LIBERAL PROPERTY AND LIVED PROPERTY: A CRITIQUE OF ABSTRACT UNIVERSALISM IN THE HUMAN RIGHT TO PROPERTY

by

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Contents

Abstract

This study argues that the liberal hold on the human rights discourse leads to a definition of the right to property disconnected with property relationships as they are experienced on the ground. Abstract universalism prevalent in international human rights law creates an erroneous conflation of liberal property rights (individual and exclusionary rights over commodified objects) and the human right to property. The latter ought to be understood within the context of the human rights mission which, this thesis proposes, is to enable people's meaningful social participation. Indeed, human rights cannot exist in a vacuum. They are responses to concrete social struggles and interactions and should reflect needs expressed by people within these circumstances. Two consequences emerge from the claim of human rights' sociality: first, the definition of a human right to property ought to draw its meaning from lived experiences in location, in particular those of marginalized and underrepresented people, not abstract reason; and second, the relative importance of property in a person's life ought to be evaluated within the complex network of relationships that make up a person's lived experience instead of assuming its centrality as liberal theory suggests. This exploration does not reject the idea of universalism in human rights law, but embraces a bottom-up version of universalism, in which shared values are drawn from a plurality of voices in a dialogical manner.

The confusion between liberal property rights and the human right to property is present in legal theory as well as international practice. Yet, closer scrutiny exposes multiple instances where property's liberal premises were set aside in favour of a definition based on the protection of a minimum standard favouring social inclusion. Regional human rights case law shows for instance how giving space to personal stories of property leads to adopting unorthodox but concrete meanings of property, whether it is by recognizing ownership of land in the absence of title based on neighbourly relationships, or by establishing hierarchies based on the importance of property for survival and social cohesion, for instance for peasants or displaced people. But exploring lived experiences in location also reveals the limits of qualifying all relationships with the material world as property, for instance for the homeless and tenants who are excluded from property's benefits or for indigenous peoples for whom claims of autonomy are only imperfectly encapsulated by the language of property. This is why human rights violation ought to be approached in an integrated manner, emphasizing concrete needs over abstract rights. Ultimately, a focus on lived experiences as source of universal standards means that human rights are best understood as procedural (asking questions) rather than substantive (proclaiming truths), and that rights language ought to remain dynamic and adaptable.

Résumé

Cette étude soutient que l'emprise libérale sur le discours des droits de la personne conduit à une définition du droit à la propriété déconnectée des relations de propriété telles qu'elles sont vécues sur le terrain. L'universalisme abstrait qui prévaut dans le droit international des droits de la personne crée une confusion entre les droits de propriété libéraux (droits individuels et d'exclusion sur des objets de nature commerciale) et le droit humain à la propriété. Ce dernier doit être entendu dans le contexte de la mission des droits de la personne qui, tel que soumis dans cette thèse, est de permettre une véritable participation sociale des personnes. En effet, les droits de la personne n'ont pas été développés en vase clos. Ils répondent à des luttes et des interactions sociales concrètes et devraient refléter les besoins exprimés par les personnes dans ces circonstances. Deux conséquences se dégagent de la socialité des droits de la personne : premièrement, la définition d'un droit humain à la propriété doit tirer son sens des expériences vécues sur le terrain, en particulier celles des personnes marginalisées et sous-représentées, et non de la raison abstraite ; et deuxièmement, l'importance relative de la propriété dans la vie d'une personne doit être évaluée au sein du réseau complexe de relations qui composent son expérience vécue au lieu d'assumer sa centralité comme le suggère la théorie libérale. Cette exploration ne rejette pas l'idée d'universalisme des droits de la personne, mais embrasse une version d'universalisme partant de la base, dans laquelle des valeurs partagées sont tirées d'une pluralité de voix de manière dialogique.

La confusion entre les droits de propriété libéraux et le droit humain à la propriété est présente dans la théorie juridique ainsi que dans la pratique internationale. Pourtant, un examen plus approfondi révèle de nombreux cas où les prémisses libérales de la propriété ont été mises de côté en faveur d'une définition basée sur la protection d'une norme minimale favorisant l'inclusion sociale. La jurisprudence régionale des droits de la personne démontre, par exemple, comment le choix d'accorder une place aux récits personnels de propriété conduit à des interprétations singulières mais concrètes du droit, que ce soit en reconnaissant la propriété terrienne basée sur des relations de voisinage en l'absence de titre, ou en établissant des hiérarchies fondées sur l'importance de la propriété pour la survie et la cohésion sociale, entre autres pour les paysans ou les personnes déplacées en temps de conflit. Mais l'examen des expériences vécues sur place révèle également les limites qu'impose la qualification de toutes les relations avec le monde matériel sous le concept de propriété, comme dans le cas des sans-abri et des locataires qui sont exclus des avantages de la propriété, ou des peuples autochtones pour lesquels les revendications d'autonomie ne sont qu'imparfaitement encapsulées dans le langage de la propriété. C'est pourquoi les violations des droits de la personne doivent être abordées de manière intégrée, en insistant sur les besoins concrets plutôt que sur les droits abstraits. En fin de compte, l'accent mis sur les expériences vécues en tant que source de normes universelles signifie que la compréhension des droits de la personne est mieux servie d'une perspective procédurale (poser des questions) que substantielle (proclamer des vérités), et que le langage des droits doit rester dynamique et adaptable.

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Introduction

> *"The right to property is a human right and, in this case, its violation is 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."*[1]

The Márquez Arguetas are among many peasant families whose lives were destroyed in massacres that occurred during internal armed conflicts in El Mozote, El Salvador. The military was conducting "counterinsurgency" operations which led to mass extrajudicial executions, including of children; but damage to civilian property in rural and remote areas of the country was also part of their strategy to instil and maintain fear in the population and to discourage uprisings. With their homes, families, and means of subsistence devastated, many survivors were forced into displacement, both within El Salvador and abroad.

Maşallah Öneryildiz lived in a slum quarter in Istanbul which had informally developed some fifty metres away from a garbage dump. Five years after he had settled there with his family, having left their village in search of better opportunities in the city, a methane explosion in the dump caused a landslide which buried the Öneryildiz home, killing several family members. The authorities were aware of the dump's health risks to surrounding inhabitants, but did not act in time.

The Endorois are a pastoralist indigenous community whose territory lies within the formal boundaries of the state of Kenya and who were displaced from their ancestral lands by the state to create a game reserve. They had lived on that land for centuries, and on it lies what they consider the birthplace and origin of all Endorois—the Monchongoi forest—as well as Lake Bogoria, home to the Endorois spirits. Their uprooting caused them great losses in terms of their cultural, social, and economic needs, and the state's promises of compensation were insufficient to repair these losses.[2]

While their circumstances differed significantly, the Márquez Argueta family, Mr. Öneryildiz, and the Endorois each alleged violations of their right to property, among others. Yet each presented a

[1] *Massacres of El Mozote and Nearby Places Case (El Salvador)* (2012), Inter-Am Ct HR (Ser C) No 252 at para 180 [*El Mozote*].

[2] See the facts in *ibid*; *Öneryildiz v Turkey* [GC], No 48939/99, [2004] XII ECHR [*Öneryildiz*]; and *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2010), Afr Comm HPR No 276/03 [*Endorois*]. All three cases are discussed further in Chapter 6.

different version of what 'property' meant to them, influenced by their history, their geographic reality, their social circumstances, and the various relationships and interactions these implied. For the families of El Mozote, their homes and land were fundamental to maintaining their physical survival in the countryside, but they were also the hub of their social life. Maşallah Öneryildiz considered his humble dwelling, and even the land on which he had built it, to be his property, even if it was not formally recognized as such by the state that considered the slum public land. For the Endorois, their land 'property' was held communally rather than individually, and provided at once for their subsistence (the land was fertile and fit for grazing) and their spiritual needs (around the Monchongoi forest and Lake Bogoria).

None of these property claims quite corresponds with what we learn about property in law school, which is that property is a private, individual, abstract, alienable, and exclusive entitlement that comes with a fixed bundle of rights (to use, alienate, exclude, destroy), allowing stable commercial exchanges within market-based economies. The stories above show ownership as being concrete, contingent on personal perceptions, rooted in continuity and permanence. Of course, not all property cases reach such levels of complexity, but the stories of Öneryildiz, the Endorois, and the Márquez Argueta family expose an important problem: whether our embedded legal conception of property limits the application of human rights to concrete instances of human suffering on the ground. What is left out when human rights are defined from above?

I suggest examining this question by looking at the human right to property—a perspective from which to offer a critical account of international human rights' current claims to universalism. The problem with property is that it is considered both a human right and an indispensable legal and political institution of Western liberal capitalist economies.[3] The characteristics of property listed above—private, individual, abstract, alienable, exclusive—all derive from a liberal political philosophy. The question is whether this specific conception runs through the human rights corpus. International human rights law distinguishes itself from the rest of classical international law by the fact that its main focus is people, not states or institutions. Still, the sources of international law and human rights law, as scholars of Third World Approaches to International Law (TWAIL) point out, are overwhelmingly liberal.[4] So if on the one hand international human rights

[3] Judy Fudge & Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (Toronto: University of Toronto Press, 2004) at 11.
[4] See discussion below at §1.2.

instruments uphold a liberal version of the right to property and, on the other, a look at practice shows that there are many other ways to describe 'proprietary' relationships with the material world, can we really talk of a *universal* human right to property? This study will investigate that question, looking into the meanings of universalism, human rights, and property.

Property (understood as property *ownership*)[5] has undeniably been treated as a human right. It is guaranteed in the *Universal Declaration of Human Rights* at Article 17.[6] It can also be found in the American Convention on Human Rights (Article 21),[7] the first Protocol to the European Convention on Human Rights (Article 1),[8] the African Charter on Human and Peoples' Rights (Article 14),[9] and various other binding international instruments on human rights.[10] Roughly one-sixth of all legal cases heard by the European Court of Human Rights have involved violations of the right to property. It is also one of the most common of codified rights in national constitutions.[11] Still, private property rights are so intuitively associated with the capitalist enterprise and past and present exploitative practices deriving from it—slavery, degrading labour conditions, resource and capital concentration leading to social inequalities—that there is still confusion as to what property as a human right entails: does it protect entitlements of the already privileged? Or is it meant to apply to the more personal relationship we have with the things we own? The meaning and reach of the right to property have led to such strong debates and divergent views that the right was

[5] Unless otherwise indicated in this study, the word "property" refers to property ownership in international human rights law.

[6] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 [UDHR].

[7] *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 143 (entered into force 18 July 1978) [American Convention].

[8] *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9 (entered into force 18 May 1954) [1st Protocol ECHR].

[9] *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) [African Charter].

[10] E.g. *Convention relating to the Status of Refugees*, 14 December 1950, 189 UNTS 137 (entered into force 22 April 1954); *Convention relating to the Status of Stateless Persons*, 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960); *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 November 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) [CEDAW]; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003).

[11] For a compilation of the various constitutional provisions on property see Theo RG van Banning, *The Human Right to Property* (Antwerpen: Intersentia, 2002) at 139–146; Christophe Golay & Ioana Cismas, "Legal Opinion: The Right to Property from a Human Rights Perspective" (2010) Rights & Democracy, online: <https://papers.ssrn.com/abstract=1635359> at 7–9; *The right of everyone to own property alone as well as in association with others – Completed final report submitted by Mr. Luis Valencia Rodríguez, independent Expert*, by Luis Valencia Rodriguez, E/CN.4/1994/19 (United Nations General Assembly, 1993).

ultimately omitted by design from the International Covenants on Human Rights,[12] the two enforceable multilateral human rights instruments.[13]

And so we are left with a right with an obscure meaning in international law, even if it is clearly defined at the domestic level, at least in Western liberal societies. I argue that human rights practitioners and scholars have struggled to define the human right to property because they too often confuse it with Western liberal property rights, which leads to a conflation of these concepts in international human rights law. This conflation, as I will demonstrate throughout this study, can be found in legal theory as well as in international practice, both in the drafting of human rights instruments and in their enforcement at the regional level. The problem with liberal property rights is that they approach property relations purely as means to ensure the most efficient and productive management of resources in a market economy, whereas everyday property relationships are much more intricate, inserting themselves in a complex network of relationships which do not necessarily limit ownership to its fungible value. Liberal private property is presented as apolitical, ahistorical, and structured, whereas everyday property relationships are fraught with messy power dynamics. Ignoring this in human rights law would thus lead to a right to property disconnected from lived experiences, silencing such power dynamics as well as alternative stories of property which may exist outside the liberal paradigm.

In order to reconcile the right to property with claims of universalism inherent to human rights discourse, as well as to improve those claims' coherence, I suggest a renewed approach to the human right to property following three general theses that shape the three parts of this dissertation. First, the (international) human right to property must be clearly distinguished from (domestic) liberal property rights. While liberal rights are abstract and often antagonistic to the community interest, the right to property is concrete and attached to social participation. Second, it is only through lived experiences that the meaning of the right to property can be revealed, following the claim that human rights are procedural (finding shared values) rather than substantive (proclaiming objective truths). Third, a focus on lived experiences asks that needs in location be assessed in an integrated manner, so that no single human right is given more importance than another.

[12] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 221 (entered into force 23 March 1976) [ICCPR]; *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [ICESCR].

[13] See Chapter 3 below on the drafting context of the right to property in the *UDHR* and the International Covenants.

Outline

In Part I, I expose the influence of liberal thought on international human rights, which influence leads to a skewed version of universalism that is overly reliant on abstract formulations of individual rights, to the detriment of concrete needs of human beings in location—understood not just as a physical place, but as encompassing all relationships with people and the environment which are built within and around that place. I argue that claims for human rights are never made in the abstract; they are made by people who, in one way or another, have been excluded and marginalized from or within societies. What these people ask for is to be able to meaningfully participate in society, and this is what I identify in **Chapter 1** as the universal objective of human rights: social participation.[14] Put another way, human rights ought to empower social beings in their interactions with the world surrounding them, which implies that they ought to recognize power dynamics that play out in society. This further means that any right that excludes—for instance, liberal property—has no place in the human rights corpus.

I further argue that, if human rights seek to enable social participation, then they must find their sources in concrete struggles on the ground. Indeed, social participation can be achieved in various different ways, depending on the person, their immediate environment, their geopolitical location, their cultural background, and so forth. Participation reflects social needs—that is, needs that are relational, depending as much on a person's preferences as on their interaction with the external world, both material and social. People may claim social participation through the satisfaction of basic biological needs to ensure their survival as living beings—food, shelter, labour, affection.[15] Others may attain social participation through greater communication with others, be it cultural and artistic expression or political engagement. On the other hand, it is possible that greater privacy may better suit a person's needs within their social interactions. Thus, social participation can be understood in many different ways depending on who expresses the claims.

I thus propose a bottom-up approach to human rights, suggesting that universal rights are *lived*, not prescribed. This approach is dynamic and dialogical; it involves constantly paying attention to

[14] I understand social life to encompass political life. See Hannah Arendt, *The Human Condition*, 2nd ed (Chicago: University of Chicago Press, 1998) at 22–38.

[15] See Griffin's comments on the 'biological' and psycho-biological needs of human beings: James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008) at 116. Arendt writes of the basic condition of human existence as being associated with birth (natality) and death (mortality), Arendt, *supra* note 14 at 7–8.

how people's needs are expressed in location in order to understand the shared values that empower people.[16] What is inherent to human beings is not some abstract concept of reason, but their sociality, which leads them to look for shared beliefs.[17] And since social relations are constantly developing and shifting, shared understandings that derive from them are necessarily dynamic. This is why a right to property that defines itself from abstract reason or as being 'inherent' to human nature—a heritage of natural rights theory—is bound to be maladapted to a wide range of circumstances. In fact, the history behind human rights makes it clear that their content is fully the product of contingent events, whether the struggles of French revolutionaries against absolutist kings in the eighteenth century or the mobilization of workers demanding decent working conditions in the nineteenth.

A bottom-up dialogical approach to human rights further requires that the needs of the most vulnerable be given precedence, not by depicting them as helpless victims, but by giving them the opportunity to voice their needs and empowering them in the process. Taking the perspective of the "marginalized other"[18] is not only congruous with the mission of human rights to provide all with equal participation, it also allows shaking the liberal grip on human rights by turning the process of their elaboration on its head: hegemonic pretences disguised as elevated abstract reason are replaced by concrete stories of struggle and hope. This study therefore applies the teachings of TWAIL literature, introduced in Chapter 1, which tells us that international law can become legitimate only by shedding its Western bias and giving a voice to the historically silenced. In the case of the right to property, these include slum dwellers, people living in remote areas, land workers, refugees, indigenous peoples, nomadic peoples, tenants, and the homeless.

Keeping in mind this theoretical framework, **Chapter 2** exposes how theory that approaches property as a human right tends to unjustifiably transfer liberal notions of property into the realm of human rights. I suggest ways to distinguish the right to property from property rights, starting with each concept's relationship with the social. Liberal property rights either view social benefits as the passive effects of a system of exclusive individual property rights or posit social good and

[16] Martha C Nussbaum, "Human Capabilities, Female Human Beings" in Martha C Nussbaum & Jonathan Glover, eds, *Women, Culture and Development: A Study of Human Capabilities* (Oxford: Oxford University Press, 1995) 61 at 63 [Nussbaum, "Female"].
[17] See Griffin, *supra* note 15 at 113–115.
[18] Expression used by William Paul Simmons, *Human Rights Law and the Marginalized Other* (Cambridge: Cambridge University Press, 2011) [Simmons, "Marginalized"].

property as antagonists. In contrast, the human right to property ought to be understood as possessing internalized social benefits, innately providing positive outcomes by increasing social participation, whether by defining identity, securing essential material needs and livelihood, or fulfilling needs for affiliation—all features that settle the person within their social space. I frame this as a social *potential*, since I assume that benefits for social life are not an automatic result of property; property ownership does not precede or define membership, it is not its *nature* to provide security, it is rather one enabling factor amongst many. Another point of distinction is the relationship of property with physical location. While liberal property rights exist in the abstract space of capitalist markets, the right to property is concrete and anchored, features which are essential in understanding if and how a person's possessions enable social participation.

But the right to property framed in international human rights law seems to abide by liberal standards in its use of abstract language disconnected with social reality, as I explore in **Chapter 3**. I argue that the final text of *UDHR* Article 17 maintains the confusion by using vague wording which primarily satisfies states' convenience, not human needs. Indeed, the *travaux préparatoires* of the *UDHR* show that the drafters had in hand a text of the right to property, submitted by Canadian scholar John Humphrey, which limited itself to a right to *personal* property, understood as a minimum standard of property necessary for a decent living. Such a text privileged a contextual approach, as what is decent for a person necessarily depends on their located circumstances. Nonetheless, Cold War tensions sidetracked the debate on the meaning of property as human right, turning the conversation into a defence of property as a political institution, whether within liberal or communist economies. I also recall in Chapter 3 the ways in which the abstract language of Article 17 derives from similar formulations of the right to property as a natural right by French and American revolutionaries at the end of the eighteenth century. I show that while the revolutionaries saw property as a means of proclaiming their independence from oppressive sovereigns—in other words, to provide them with greater participation—they nonetheless ended up framing it as an end in itself, an absolute right of divine command, thus erasing the process of its conception. And it is this absolute version, claiming universality, which ended up being enshrined in the *UDHR*. Still, the debates held around its definition showed substantial support for framing the right to property as a limited right dependent on contingent circumstances, emphasizing the social potential of property.

Part II looks at regional case law on the human right to property in order to identify how the conflation of the right to property and property rights plays out in practice. It shows that, when lived experiences in location are taken into account, this conflation breaks and the meaning of property changes, going from an abstract right attached to markets to a right attached to social purpose. The regional bodies studied are the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), and the African Commission on Human and Peoples' Rights (ACHPR). In **Chapter 4**, I offer some background to the exploration of regional case law, discussing the relevance of studying regional forums, presenting the methodological approach adopted to scrutinize case law texts, and analyzing the text of the human rights instruments applied by the three regional bodies. I suggest that each regional instrument presents a version of universalism influenced by regional specificities, which affects the formulation of the right to property. In terms of methodology, I examine the language used by adjudicators in cases of property to see whether they tend to adopt the liberal language described above or if they allow stories of property told before them to influence their own formal narrative about the right to property.

In **Chapter 5,** I argue that the extent to which a regional system upholds a liberal version of property depends on how it perceives its role as an 'international' tribunal. Indeed, the ECtHR, strong in its mission to defend European values, shows much deference to states that conform to liberal ideals and thus tends to approach cases of the right to property in a mechanical way, applying rigid criteria to its application rather than delving deeply into the potential of property for social participation. On the other hand, the IACtHR and the ACHPR view themselves as international human rights tribunals, allowing increased flexibility and greater focus on the human dimension of cases. This, in turn, changes their approach to cases of property violations, since such flexibility implies more space for lived experiences in case assessments.

Once regional adjudicative bodies allow the penetration of lived experiences, in particular that of marginalized and traditionally voiceless persons, the meaning of property is turned upside down. **Chapter 6** illustrates this, touching upon cases of serious violations of human rights, rural property, illegal property, and indigenous property. In these cases, applicants proposed nonconforming and unorthodox understandings of property, whether by introducing the cultural significance of ownership, claiming a title without a formal deed, or suggesting that property could be inalienable and fluid. Most importantly, these alternative stories of concrete circumstances on

the ground managed to influence the legal narrative, pushing the regional bodies to expand the meaning of the right to property. I conclude Chapter 6 by observing that, interestingly, the more lived experiences are allowed in human rights courtrooms, the easier it becomes to assess interactions of rights and turn human rights instruments into dynamic tools aimed at concretely meeting people's needs in location.

Part III explores the interactions of other human rights with the right to property. I suggest that people's lived experiences cannot be reduced to rigid categories and that their needs expressed as human rights ought to be constantly assessed alongside the complex network of relationships that make up their lives in location. What matters in this complex network is not necessarily a binary right to belongings, which merely links the person with a material thing, but a right to *belong*, to participate, which is multifaceted and complex. Indeed, belonging can be accomplished in many ways unrelated to ownership. Ultimately, establishing the distinction between right to property and property rights implies weakening the reach of the right to property in favour of a more integrated approach to rights. Thus, in **Chapter 7** I examine how property relates to other rights, in order to see if it is the best right to address relationships with the material world. Property has historically been portrayed in the Western liberal tradition as a cure-all, and thus moving away from the liberal premises of property also means moving away from the idea that the right to property is the guardian of all other rights, the ultimate symbol of freedom. Property as potential for social participation means that not all property accomplishes social participation and that not all needs are expressed (or met) through ownership. Lived experiences reveal what property can provide for social persons in terms of capacities to secure their needs, and also help assess how these needs can be met, with or without ownership.

To illustrate how property is an imperfect resource for addressing all claims of social participation, I explore in Chapter 7 a few myths about property's role in satisfying essential needs, showing that they tend to simplify complex relationships in an unproductive way. For instance, the myth of property as poverty alleviation ignores how poverty is not just the result of an absence of possessions, but of various unfavourable factors at play in capitalist economies, ranging from lack of employment opportunities to institutionalized racism. Another example is the myth of land and home, which presents ownership as necessary to secure virtues of permanence, security, privacy, and social existence. Not only do the liberal myths of land and home exclude non-owners (and nonconforming owners) from reaching these common aspirations, it limits the exploration of how

permanence, security, privacy, and social existence could be met otherwise, for instance by enforcing tenancy and labour protections, nurturing strong community bonds, or enabling greater political participation and autonomy. I suggest a few ways in which permanence, security, privacy, and social existence in location can be met beyond ownership—for instance, by exploring the concepts of tenure and access—ultimately arguing that social relations ought to be given precedence over property relations in the realm of human rights.

Chapter 8 concludes this study by advocating a dynamic approach to human rights—in particular, a bottom-up dialogical process in which expressed needs in location supersede rigid formulations of rights. Rather than identifying fixed, necessarily imperfect rights such as that to property, a truly universal approach to human rights ought to be understood as a process which requires us to ask the right questions directed to the right people about their experiences. And since lived experiences are as diverse as people, a bottom-up approach to human rights requires embracing the plurality of voices that make up social life. While this approach may appear to justify arbitrariness, especially for jurists who are taught to rely on neutral and abstract rules in order to maintain stable and accountable relationships, it rather seeks to enable the full potential of human rights in providing social participation, in particular for those traditionally left in the margins of law. What's more, a bottom-up dialogical approach to human rights is already applied to varying degrees in human rights practice—illustrated by regional case law, among other sources—showing the potential for international law to embrace greater empathy in its application. Ultimately, the approach I argue for does not challenge the content of human rights or rights language itself, but asks us to reconsider their sources, interpretation, and enforcement in a dynamic way, embracing change, adaptability, and movement in the expression of needs of social human beings in location.

Part I – The Theoretical and Historical Foundations of the Human Right to Property

Chapter 1 – Universal Human Rights Based on Lived Experiences

1.1 Introduction

> *"In more than thirty years of working with issues of cultural relativism, I have developed a simple challenge that I pose to skeptical audiences. Which rights in the Universal Declaration does your society or culture reject? Rarely have I had a single full right (other than the right to private property) rejected."*[19]

Within a body of law which claims to be universal and to ensure human dignity, the human right to private property seems a bit of an outcast. For one thing, it does not seem to be quite universal: across—and at times within—nation-states, Western liberal private property rights (exclusive individual rights that are abstract, neutral and alienable) are challenged by socialist property principles, or customary land tenure, of a collective or communal nature. Also, it is sometimes hard to defend property as furthering the emancipatory objective of human rights when it is the legal institution of private property that allows for the accumulation of resources and consequent social inequalities. Part I thus aims to explore the ambiguous position of property within the human rights framework, through an overview of its philosophical and historical foundations, and uses this to reformulate the meaning of universalism of human rights as deriving from shared lived experiences rather than abstract reason.

International human rights and property theory have in common a set of premises based in liberalism. By this I mean that they both rely on a conception of 'rights' as belonging to the individual, inherent to human beings, and derived from abstract reason. In this chapter, I argue that these latent liberal influences lead to a version of universalism of human rights that is disconnected with reality, and thus misrepresents the actual development of human rights in the context of specific localized social relations. Thus, while the elaboration of liberal human rights principles from the eighteenth century to the present resulted from concrete social struggles—against absolutist kings or oppressive working conditions, for example—presenting them as abstract and

[19] Jack Donnelly, *Universal Human Rights in Theory and Practice*, 3rd ed (Ithaca: Cornell University Press, 2013) at 100 [Donnelly, "Universal"].

context-independent hides power dynamics which tend to favour groups that benefit from those dynamics. In this respect, the elaboration of the human right to property that I recount in the rest of Part I is simply a flagrant and telling example of the potential exclusionary nature of a human rights discourse based on abstract reason.

Is there another way of thinking about universality? What international human rights have tended to do is 'universalize' liberal standards, asserting that they derive from every man's reason, rather than offering a vision of how rights are truly universal, that is, accepted and shared by all. Still, the quote above anecdotally suggests that many if not all of the rights enumerated in the *Universal Declaration of Human Rights* apart from that to property are broadly accepted by people from diverse cultural backgrounds, and can thus be considered truly 'universal'. I argue here that human rights are shared claims made by people across the globe in order to enable their *social participation*. More than the abstract concept of dignity—which is often taken as the core objective of human rights—, social participation recognizes human beings' sociality and the fact that rights always evolve within a concrete social context. Dignity, in turn, suggests that human rights are somehow 'inherent' to human beings, in other words detached from their environment, thus offering an incomplete image of how rights are lived and experienced on the ground.

The idea of participation is multidimensional and does not limit the expression of needs, since a person can participate or belong in many different ways, including by choosing not to partake in social life. Underlying participation is the autonomy of social human beings. The idea of participation thus allows subjective expressions of needs, yet is not individualistic nor arbitrary because it inserts itself in a social context, that is to say in a complex network of relationships in location which determine the shape of needs, including their limitations.[20] Thus, the concept of social participation encourages dialogue to determine how best to secure a person's fundamental needs. In this context, universal principles of human rights are possible, but only if they are drawn from the bottom up—that is, from lived experiences of human rights in location. I call this approach *lived universalism*, which is a contextual, concrete, inclusive, and dynamic universalism of rights. Lived universalism is inspired in part by the concept of *phronesis* (or practical wisdom) which has been famously developed in Martha C Nussbaum's capability approach to human rights,

[20] See Griffin, *supra* note 15 at 113–114.

proposing that empowering people in their daily lives can be attained by looking at concrete knowledge on the ground.[21]

Who 'lives' human rights? I further suggest that the focus of a bottom-up approach to universal human rights ought to be on those that most desperately need to be empowered in societies that oppress them, underrepresent them, or marginalize them: minorities, the poor, vulnerable populations, victims of armed conflict.[22] If human rights, as I argue, aim to provide social participation to all, they must rebalance power relationships by providing normative standards that favour a person's positive freedom to act: for example, by providing workers with the means to assert their dignity at work, by giving a voice to minorities in political debates, or by allowing small-scale farmers to make the most of their land. In that sense, understanding the human right to property from the perspective of the small farmer makes more sense than to do so from the perspective of the already-empowered landlord rentier.

How and where are human rights 'lived'? In human rights, 'power' is not a matter of domination ("power over"), but the ability to act and make choices which are relational, and thus determined by the inherent sociality of human beings. That is to say, as Hannah Arendt suggests, that the very idea of 'power' is generated by "the living together of people."[23] Arendt's definition of power helps us understand human rights as social participation, because it acknowledges how social life is inseparable from power dynamics; in fact, she adds, a person who is isolated from others automatically becomes powerless, no matter how much strength she possesses.[24] In this sense, social participation *is* power; and in the context of unequal power relationships, the purpose of human rights is to level the playing field so that everyone can accomplish their social needs equally, as this chapter suggests. To approach the notion of power as relational implies two things, underlined by Arendt: first, power is better understood as a potential in the sense that it is constantly actualized by speech and action;[25] since power dynamics are constantly changing, human rights aimed at balancing them ought to allow sufficient flexibility for their own

[21] See e.g. Martha C Nussbaum, "Capabilities and Human Rights" (1997) 66:2 Fordham L Rev 273 [Nussbaum, "Human Rights"]; Nussbaum, "Female", *supra* note 16. See also further discussion on this below at §1.3.3.
[22] See on this Simmons, "Marginalized", *supra* note 18.
[23] Arendt, *supra* note 14 at 200–201. See also Flyvbjerg, on how power is inherent to relationships, in Bent Flyvbjerg, *Making Social Science Matter: Why Social Inquiry Fails and How it Can Succeed Again* (Oxford: Cambridge University Press, 2001) at 117–124.
[24] Arendt, *supra* note 14 at 201.
[25] *Ibid* at 200.

reassessment. Second, while power is boundless, its inherent sociality makes it so that the "existence of other people" limits it, "because human power corresponds to the condition of plurality to begin with."[26] So we see that human rights as empowerment can never be assessed in isolation from each other, but must be constantly sensitive to the needs of others.

Furthermore, the ways in which universal human rights are elaborated are fully a product of human beings' location, and so will differ in time and place. While liberal human rights ignore the historicity and geography of rights, an approach based on social participation acknowledges that the formulation, interpretation, and enforcement of rights depend on a variety of factors: not only personal preferences, but also relationships with others and the environment, political context, and cultural variables. By embracing the adaptability of human rights standards—that is, their ability to adjust to changing social conditions and the complex network of relationships that make up each person's lived experience—the international human rights corpus is more likely to be accepted as universal, since it will be seen as responding to people's claims as they are articulated within a specific context.

The reformulation of universalism that this study suggests is particularly informed by the critique of international law formulated by the theoretical and methodological school known as Third World Approaches to International Law (TWAIL). As a theory, TWAIL proposes a critique of abstract universalism that focuses on so-called Third World people.[27] Third World people are not only the most in need of empowerment through the language of human rights, but, as TWAIL scholars explain, they have historically been excluded from a Westernized approach to human rights. TWAIL scholars underline the ways in which international law was founded on colonial domination and oppression, and expose the ongoing pervasiveness of western liberal thought in international law, particularly in the ways that international law regimes—including human rights—tend to spread European, Western norms across the globe while claiming their universality.[28] They do not reject international law out of hand, but rather aim to suggest reforms

[26] *Ibid* at 201.

[27] Obiora Chinedu Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2008) 10:4 Intl Community L Rev 371 at 376 [Okafor, "Theory"]; Makau Mutua, "What is TWAIL?" (2000) 94 Am Soc'y Intl L Proceedings 31 at 35–36 [Mutua, "What is TWAIL"]. Mutua notes that the expression "Third World" is more appropriate than "developing" or "the South" since it more directly conveys the unjust relationship between the West and the rest of the world, while denoting a stronger sense of resistance.

[28] Antony Anghie & BS Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2:1 Chinese J Intl L 77 at 84; Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42:1 Harv Intl LJ 201 [Mutua, "Savages"].

that would make it more responsive to a wider constituency, in particular by reaching Third World populations that have traditionally been excluded from the human rights conversation.[29] Beyond criticism, the objective of TWAIL is, as Antony Anghie and BS Chimni put it, to "transform international law from being a language of oppression to a language of emancipation."[30]

An important contribution of TWAIL scholarship in this context is its methodological focus on asking how international legal knowledge is produced, what consequences it has on historically disadvantaged groups, and how it can be reformulated in an inclusive manner.[31] Obiora Chinedu Okafor, while acknowledging that there are multiple theoretical and methodological schools of thought within TWAIL scholarship, still considers that TWAIL scholars share a body of methods with which to approach international law and institutions, notably an insistence on digging into the history of international law, the identification of continuities and discontinuities, the examination of the discourse of universalism, and the focus on the underrepresented Third World people.[32] This thesis proposes to apply these by exploring the historical process that led to the inclusion of the right to property in international human rights law, by exposing the liberal influence on this inclusion, and by suggesting that we rethink the idea of universal human rights from the bottom up.

In light of this, my objective when critiquing international human rights law in general, and the construction of the right to property in particular, is not to reject the institutions of international law altogether, but rather to reformulate the claim of universalism they propose in a way that everyone can relate to, regardless of their location. Thus, I do not challenge rights language *per se*, especially since it offers a common vocabulary to formulate moral claims, that is, to express shared values of what human emancipation requires.[33] Rather, I suggest that the language of rights ought to allow enough flexibility to adapt to varied and diverse expressions of how one can meaningfully participate in social life. Lists of rights, like the one presented in the *UDHR*, are

[29] See e.g. Anghie & Chimni, *supra* note 28 at 77–79; Mutua, "What is TWAIL", *supra* note 27 at 31. The authors outline how the focus on people is part of a second wave of TWAIL, the first focusing more on issues of Third World state sovereignty. On this, see also generally Martin Gallié, "Les théories tiers-mondistes du droit international (twail): Un renouvellement?" (2008) 39:1 Études Int 17.
[30] Anghie & Chimni, *supra* note 28 at 79.
[31] *Ibid* at 86; Mutua, "What is TWAIL", *supra* note 27 at 31.
[32] Okafor, "Theory", *supra* note 27 at 377. Continuities and discontinuities in the history of ideas are also discussed significantly in Michel Foucault, *L'archéologie du savoir* (Paris: Gallimard, 1969).
[33] Distinct from the internal morality of law which Fuller proposes around his principles of legality. See generally Lon L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969).

useful tools of empowerment—provided they are not presented as immutable, objective truths independent of context.[34]

In the following pages of this chapter, I start with a critique of the current definition of universalism as a product of Western liberal thought and its focus on individual, 'natural', pre-social rights. Criticism and debate are often lacking in human rights law and practice,[35] but are necessary. As David Kennedy notes, allowing criticism of human rights may be the best way to ensure that their function not be distorted so that they may truly accomplish what he coins their "emancipatory" function.[36] Thus, I expose how the international human rights system tends to ignore the power dynamics that have led to its creation, such as in the case of the right to property, which allows the perpetuation of excluding practices within a system that is meant to provide participation for all. I suggest that if rights language is to be maintained at all, it ought to acknowledge power dynamics as part of a person's lived experience, and provide a concrete vocabulary of empowerment for people on the ground, rather than settling for an inflexible rhetoric derived from abstract rationality.

I then elaborate on my definition of lived universalism, based on the centrality of localized experiences of social persons. It understands human rights as shared understandings of the fundamental needs for social participation which people express in location, while emphasizing the voices of those traditionally excluded from the human rights conversation. The approach I propose is dialogical as it assumes the sociality of human beings and the fact that their needs are dependent on the relations they develop with others and the material world, and as such embraces flexibility and adaptability in the elaboration of universal human rights.

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[34] On the limits of framing human rights as mere objective facts, see Griffin, *supra* note 15 at 116–123.

[35] Annalise Riles, "Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage" (2006) 108:1 Am Anthropologist 52 at 54 [Riles, "Anthropology"]; Makau Mutua, "Human Rights in Africa: The Limited Promise of Liberalism" (2008) 51:1 Afr Studies Rev 17 at 23–25 [Mutua, "Africa"]; Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2008) at 135–136; Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (Cambridge, Mass: Harvard University Press, 1997) at 114. Amartya Sen suggests that the lack of conceptual criticism amongst human rights activists stems from the requirement of responding quickly to violations, which sets aside deeper philosophical doubts. See Amartya Sen, "Elements of a Theory of Human Rights" (2004) 32:4 Phil & Pub Affairs 315 at 317.

[36] David Kennedy, "International Human Rights Movement: Part of the Problem?" (2002) 15 Harv Hum Rts J 101 at 124.

1.2 The Criticism of Abstract Universalism: the Western Liberal Influence on Human Rights

The mainstream discourse of international law and human rights tends to emphasize a version of universalism which is disconnected with reality, something inherited from the Western liberal tradition. The liberal language presents 'rights' as disincarnated categories—ethereal, pre-existing truths—thus eliding how they are contingent on specific historical, cultural, social, and geographical circumstances.[37] Indeed, while liberalism emphasizes the freedom of individuals, it underplays the importance of society in the fulfillment of this freedom.[38] For instance, a liberal version of property emphasizes the fact that ownership provides exclusive rights over a thing as an expression of individual freedom, rather than assessing how property fits within concrete social relationships.

In human rights rhetoric, a focus on the abstract individual is reflected in the idea that human rights derive from the sole fact of human existence, from the inherent dignity of human beings. This is a message propagated by the preamble of the *UDHR:*

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world [...][39]

At first reading, the 'inherent dignity' language seems to suggest that context does not matter in determining what rights humans possess, i.e. that human rights exist in the abstract. Their elaboration, however, tells a completely different story: first, because it relies heavily on the Western liberal tradition and its own definition of how claims of social participation can be met; and second, because every human right derives from concrete circumstances, as this chapter will illustrate.

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[37] Zoe Pearson, "Spaces of International Law" (2008) 17:2 Griffith L Rev 489 at 493. See also Carl Landauer, "Regionalism, Geography, and the International Legal Imagination" (2010) 11:2 Chicago J Intl L 557.
[38] Fudge & Tucker, *supra* note 3 at 8.
[39] *Supra* note 6, Preamble, first paragraph. See also Donnelly, "Universal", *supra* note 19 at 28–29 on the notion of inherent dignity in the UDHR. Donnelly further notes the shifting meaning of dignity in the West, from being worthy (*dignitas*), to the idea of inherent worth (*ibid* 121-128). This vision of human dignity is strongly influenced by Judeo-Christian thought: See Michel Villey, *Le droit et les droits de l'homme* (Paris: Presses universitaires de France, 1983) at 105.

Saying that international law, including that of human rights, is highly influenced by Western liberal thought of the Enlightenment era is not in itself a controversial statement.[40] The fact that human rights language would be born in Europe does not exclude the possibility that they would, over time, be willingly accepted by other cultures. Even if not all states were represented in 1948 when the *UDHR* was adopted, most have since pledged to abide by international human rights standards.[41] After all, the 'dignity' language—the idea that every human being is inherently worthy of respect—and the principle of freedom surely resonate well with people.

The controversy, as TWAIL scholars underline, lies in how the liberal influence has come to be, and how it is maintained. As Section 1.2.1 will show, 'natural rights' of Western origins derive from the idea that human rights can be drawn from reason alone, but this rationalization of rights was specifically Eurocentric, entitling European colonizers to export and forcefully impose their values and systems of normativity. Because the language of human rights followed in the footsteps of the natural rights tradition, TWAIL scholars argue that international law allows the reproduction of patterns of domination within its corpus; in fact, the sources of international law are overwhelmingly liberal, giving the impression that marginal voices do not have a place in determining what is 'universal' (§1.2.2). It must be specified, however, that the understanding of rights as individual, neutral, and pre-social is particularly the product of Enlightenment liberal thought, from which the 'first generation' human rights—to life, equality, freedom of speech, property, due process—are derived. Already, the 'second generation' rights—to labour protections, food and shelter, social security, health, and education—are much more anchored in their social context (namely, the rise of the capitalist economy) and much more cognizant of power inequalities. Since human rights derive from concrete circumstances, the universal rights language adopted should allow adaptability to time and place, meaning that rigid lists of isolated rights ought not to precede expressed needs in location (§1.2.3).

[40] The main sources for human rights are the French *Déclaration des droits de l'homme et du citoyen* of 1789 and the *American Declaration of Independence* (US 1776), which in turn were influenced by the work of John Locke on natural rights, these being further discussed in the next section.

[41] Wiktor Osiatynski, "On the Universality of the Universal Declaration of Human Rights" in András Sajó, ed, *Human Rights with Modesty: The Problem of Universalism* (Leiden: Martinus Nijhoff, 2004) 33 at 39.

1.2.1 Liberalism, natural rights, and the abstract definition of rights

Contemporary human rights are particularly influenced by modern natural rights as formulated in the French *Déclaration des droits de l'homme et du citoyen* of 1789 and the *United States American Declaration of Independence* (1776), from which they borrow the idea of rights being 'inherent' to human beings (and thus pre-social) even as the 'natural rights' tradition is specifically European.[42] Despite controversies on its meaning, the presence of the right to property in the French declaration contributed to its later inclusion in the *UDHR*.[43] Furthermore, according to John Humphrey, a Canadian scholar active in the United Nations at its creation, the important contribution of Americans in drafting the Charter of the United Nations made it so that "American concepts of natural law have found their way into it."[44]

What must be emphasized is that while natural/human rights are presented as "universal, nonpartisan, acultural, ahistorical, and nonideological,"[45] history tells us that all human rights that we recognize today derive from specific historical, political, and social circumstances. In fact, the Enlightenment version of the right to property is a telling example of how natural rights rhetoric gives retroactive moral justification to contingent facts, in this case the rise of a property-owning class and their perceived lack of political recognition.[46] The American declaration was a rejection of colonial rule by the American colonies, while the French declaration brought an end to the feudal tenure of the absolutist French king.[47] Both instruments thus served the specific purposes of the revolutionaries at the time—specifically white, male landowners—fighting for freedom from oppressive authorities, which led to rights of freedom, equality, and property proclaimed in

[42] See Brian Tierney, "The Idea of Natural Rights-Origins and Persistence" (2004) 2:1 Nw J Hum Rts 1 at 2, footnote 2. Tierney discusses the difference between *classical natural law* as developed in Greek philosophy and *modern natural rights* of the Enlightenment era. On this distinction see also Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart, 2000); Villey, *supra* note 39. On the roots of human rights in Western liberalism, see David Kennedy, *supra* note 36 at 114. On the influence of the revolutions, see Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 2011) at 210; Stephen P Marks, "From the 'Single Confused Page' to the 'Decalogue for Five Billion Persons': The Roots of the Universal Declaration of Human Rights in the French Revolution" (1998) 20:3 Hum Rts Q 459.
[43] For more on property in the eighteenth century declarations, see §3.2.1.
[44] McGill University Archives, MG 4127, John P Humphrey, Container 27, Teaching cards, Box 12 TNC: Adm, intl, roman, public law, "Natural Law", 1937-1946.
[45] Mutua, "Africa", *supra* note 35 at 23. See also David Kennedy, *supra* note 36 at 115 on the political nature of the legal project.
[46] Nicole Graham, *Lawscape: Property, Environment, Law* (Abingdon, Oxon: Routledge, 2011) at 123. Douzinas, *supra* note 42 at 1.
[47] Douzinas, *supra* note 42 at 87.

absolute terms.[48] In this retroactive justification, localized and concrete property entitlements which empowered the revolutionaries against despotic governments were transformed into the abstract and absolute natural right to property of the eighteenth century, and later the human right of the twentieth century. Economic and social rights are also tributary to historical circumstances, contemporary to the nineteenth-century industrial revolution. Elements of the *UDHR* such as the right to social security or the right to rest and leisure were meant to palliate the negative effects of free markets, for example, the unequal distribution of resources or the control of labour power by powerful owners, of which the institution of private property was, and still is, a key element.[49]

The 'inherent dignity' rhetoric implies that natural rights can be discovered with the sole reliance on abstract reason,[50] that is, on *Man*'s ability to think, without external influences from the material and relational world. John Locke, a leading proponent of modern natural rights and of liberal thought, suggested that God granted man the ability to sense and reason (as opposed to the animal's instinct) as a way of securing his "natural inclination" for self-preservation.[51] He noted:

> The state of Nature has a law of Nature to govern it, which obliges everyone, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions.[52]

The 'law of Nature' thus centres the human, his unique freedom to think, and his ability to act morally.[53] In this approach, the human is an 'individual', separated and independent from the external world; his own isolated human nature suffices to draw a list of essential rights, such as

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[48] *Ibid* at 97–99. See §3.2.1, below, on the excluding effect of eighteenth-century formulations of natural rights.

[49] Gudmundur Alfredsson & Asbjørn Eide, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff, 1999) at 533; Fudge & Tucker, *supra* note 3 at 11. See also the Catholic encyclicum *Rerum Novarum* as an example of a moral answer to historical circumstances, Pope Leo XIII, *Rerum Novarum: Encyclical of Pope Leo XIII on Capital and Labor*, 15 May 1891, online: The Holy See <http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html>.

[50] What William Paul Simmons coins as the deductive approach. See Simmons, "Marginalized", *supra* note 18 at 3. See also Douzinas, *supra* note 42 at 2.

[51] John Locke, *Two Treatises of Government* (London: Awnsham Churchill, 1689). See Book I, Chapter IX, 'Of Monarchy by Inheritance from Adam', § 86. John Locke, is overwhelmingly cited as the precursor of liberal theory of property. See e.g. CB Macpherson, *The Rise and Fall of Economic Justice, and Other Papers* (Oxford: Oxford University Press, 1985) at 87 [MacPherson, "Economic Justice"]; Margaret Davies, *Property: Meanings, Histories and Theories* (Abingdon, Oxon, UK: Routledge-Cavendish, 2007) at 86.

[52] Locke, *supra* note 51. See Book II, Chapter II, 'Of the State of Nature', § 6.

[53] Villey, *supra* note 39 at 123; Douzinas, *supra* note 42 at 187–191. See also Walter Mignolo, "Who Speaks for the 'Human' in Human Rights?" in José-Manuel Barreto, ed, *Human Rights from a Third World Perspective: Critique, History and International Law* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2013) 44 at 53. See e.g. Locke's theory of property influenced by this view of natural rights, Locke, *supra* note 51 Book II.

freedom and equality.[54] Peter Fitzpatrick notes in his exploration of mythology in law that the Enlightenment 'individual' is "the great mythic figure of the modern age,"[55] who replaces God and possesses the means to acquire truth. Such a mythic figure allows the separation between law and society, presenting law deriving from reason (doctrine) as autonomous and unified, even if it isn't so.[56]

The reliance on abstract reason, however, tends to overlook the historicity and political roots of rights and the complex networks of relationships within which a person evolves. The eighteenth century right to property was not fundamental because some God ordained it, but because the revolutionaries needed it in order to thrive as recognized political actors. In that sense, the right to property provided them with social participation, through the power against absolutist kings that land ownership conferred on them. Yet, while these social foundations underpin the revolutionaries' need for strong property entitlements, these foundations do not appear in the actual texts adopted, which rather present private property as an apolitical and ahistorical necessity. When the 1776 American Declaration of Independence, for instance, proclaimed natural rights as "self-evident" truths,[57] it turned them into absolute, abstract, and immutable universal principles, erasing the bottom-up process leading to their elaboration.[58]

Abstract natural rights at times contradict their immediate context. For instance, the 'universal' natural right to equality of the Enlightenment coexisted for some time with the transnational slave trade, practiced by those very people who had proclaimed natural rights of 'all' men. The prohibition of slavery in the nineteenth century was not the result of some sudden shift in the European man's reason in an abstract setting, however, but rather emerged from centuries of progressive development of the meanings of freedom and equality, through educative campaigns on the horrors of slavery by emancipists in the nineteenth century, aided by better means of communication, as well as political pressures and denunciations, not to forget the important role that slaves themselves played in framing their concrete claims of emancipation in a universal moral

[54] See Douzinas, *supra* note 42 at 190.
[55] Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992) at 34.
[56] *Ibid* at 1–9.
[57] *American Declaration of Independence* (US 1776), Preamble.
[58] See Douzinas, *supra* note 42 at 93. See also Derrida's analysis of the 'performative' function of the act of declaring rights: Jacques Derrida, "Déclarations d'Indépendance" in Jacques Derrida, *Otobiographies: L'enseignement de Nietzsche et la politique du nom propre* (Paris: Galilée, 1984) 13. The retroactive effect of turning property into an end of human life is discussed further at §3.2.1.

language.[59] In fact, Lynn Hunt notes from the French experience that the legal abolition of slavery was not so much an act of altruism—which would imply an abstract and disinterested shared sense of humanity and community—as a way to ease social tensions.[60] While freedom and equality were said to be inherent to human dignity in the Enlightenment rhetoric, it wasn't before specific pressures were experienced that it came to have a concrete meaning in favour of racial and other minorities.[61]

The example of slavery raises an important challenge to abstract reason as source of human rights, since it forces us to investigate *whose* reason is at play in the elaboration of natural rights. It goes without saying that not all people reason the same; a person's thought processes depend on the knowledge they possess, underlying cultural and social assumptions they carry, and time and place. Yet modern liberal conceptions of natural rights deny this. The European 'individual' of the Enlightenment era, as Fitzpatrick notes, is a racist subject, who posits himself in contrast and as superior to the 'savage' other.[62] The contradiction between the Enlightenment principle of equality and the commercial practice of slavery mentioned in the previous paragraph is in good part due to the fact that the 'universalism' of rights that the Revolutionaries promoted was specifically European.[63] Thus, relying on decontextualized 'reason' to define human rights, that is, relying on *one's own* particular reason to draw *general* principles, can lead to oppressive results, which goes against the conception of universalism as *shared* beliefs—that is, *many* particulars contributing to the universal.

Turning particular knowledge into general principles is also observed in the justification of colonization, in which the natural right to property played an important role. Various theories were

[59] One of the most famous examples is the activism of Frederick Douglass, former slave and abolitionist in the US. On the relationship between the abolition of slavery and international law, see generally Jenny S Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford: Oxford University Press, 2012). The author observes that the role of the abolition of the slave trade in the nineteenth century in the elaboration of international law is often underestimated in favour of Enlightenment ideas (*ibid* at 13–14). See also Davies, *supra* note 51 at 77–78. Communications definitely helped expose the horrors of slavery, notably through literature, a famous example being the American novel *Uncle Tom's Cabin* which, with its description of the life of a black slave, triggered widespread anti-slavery sentiments in the United States.

[60] Lynn Hunt, *Inventing Human Rights: A History* (New-York: WW Norton & Co, 2007) at 165.

[61] The same can be observed for women's rights, see Sally Engle Merry & Peggy Levitt, "The Vernacularization of Women's Human Rights" in Stephen Hopgood, ed, *Human Rights Futures* (Cambridge: Cambridge University Press, 2017) 213 at 216. See §3.2.1, below, for a more detailed discussion on the process of erasure of social context and history in the elaboration of 'inherent human rights'.

[62] Fitzpatrick, *supra* note 55 at 62–69.

[63] The American revolutionaries who sought independence from the English king at the end of the eighteenth century were settlers of European descent.

offered by jurists and philosophers at the time of the conquest of the Americas to validate the dispossession of land from indigenous people, whether through 'first occupation' theory, the labour theory of appropriation, 'just war,' legitimate conquest, or variations on the theme of efficient/proper/productive use of land; but all had in common the portrayal of indigenous people as unworthy of possessing land because their use of it did not conform with European liberal values transplanted into the New World—notably because of the absence of an equivalent to private property.[64]

While these visions of proper use were framed as the natural inclination of men to exploit land in a way that favours the common good, they rather showed a progressive tendency to favour private property for its commercial efficiency. In fact, the same justifications had previously served to enclose lands in England which had been held in common up to that point.[65] The only way to justify taking land away from traditional agrarian communities or indigenous people, which both used a system of communal stewardship of the land, was to frame particular rules of private property as objective truths of divine providence. Many have noted how this process was enabled by the Europeans' control over knowledge: 'truth' in this context becomes whatever interpretation of events is backed by power,[66] and the seemingly objective result of the reasoning process is no

[64] On the labour theory of appropriation and the liberal idea of proper use of land derived from Locke's work, see generally Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988). On Locke's influence in justifying colonization, see also Villey, *supra* note 39 at 151; Graham, *supra* note 46 at 46–48; Davies, *supra* note 51 at 86; Barbara Arneil, "Trade, Plantations, and Property: John Locke and the Economic Defense of Colonialism" (1994) 55:4 J Hist Ideas 591 at 592. See however contra the interpretation that Locke intended to protect owners and provided the basis for modern capitalism, James Tully, *A Discourse on Property: John Locke and his Adversaries* (Cambridge: Cambridge University Press, 1982).On the influence of other accounts of property and proper land use in the elaboration of international law, see Antony Anghie, "Francisco De Vitoria and the Colonial Origins of International Law" (2016) 5:3 Soc & Leg Stud 321 [Anghie, "Vitoria"]; Georg Cavallar, "Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?" (2008) 10:2 J Hist Intl L 181; Martti Koskenniemi, "Empire and International Law: The Real Spanish Contribution" (2011) 61:1 UTLJ 1. See finally Fitzpatrick, *supra* note 55 at 81–89 on the European scientific discourse on stages of progress of mankind, which posited roaming at the lowst point.

[65] The process of systematically fencing and privatizing land previously held in common in England is referred to as the Enclosure movement, which started in the twelfth century but gained momentum in the sixteenth and seventeenth centuries, leading to greater concentration of lands in the hands of a few wealthy landlords, shifting production from subsistence to commerce, and paving the way to capitalist economy. See generally Joan Thirsk, ed, *The Agrarian History of England and Wales* (Cambridge: Cambridge University Press, 1985). See also Graham, *supra* note 46 at 51–84.

[66] Flyvbjerg, *supra* note 23 at 125–126; Mutua, "What is TWAIL", *supra* note 27 at 38. See also Fitzpatrick, *supra* note 55 at 69–70 on the selection of knowledge by Europeans in order to secure the myth of their superior identity, notably through the idea of "progress".

more than a historical instrumentalization of the perspectives of some elite, often white, often male, which could determine who counted as 'human'.[67]

The process of colonization led by Europeans across the world not only helped develop a version of natural rights as justificatory measures for particular practices, it also favoured the globalization of these particular practices, since it expanded the geographic reach of the Western liberal way of thinking.[68] This, in turn, enabled their wider acceptance as objective truths, which eventually allowed the specifically European rhetoric of natural rights based on inherent reason of men to make its way into the twentieth-century corpus of universal human rights. But if natural/human rights have been imposed through hegemonic and oppressive means to perpetuate the colonial project—by emphasizing individual freedoms and undermining community-based values, for example—their validity as 'inherent' rights can readily be challenged.[69]

1.2.2 Universalizing liberalism in the United Nations system

Since natural rights of the Enlightenment era were presented by their authors as neutral and universal, it did not appear problematic to transpose them into the rhetoric of human rights in the twentieth century, through the language of inherent dignity. For instance, Michel Villey wrote in 1983 that human rights are born out of 'Man's' subjective reason, which allows him to "*deduct* the law, through morality, of a generic definition of Man."[70] The philosopher of religion Raimon Panikkar notes that the rights of the *UDHR* derive from an assumption that there is a common human nature that is knowable outside and separated from reality, or society, making the human being its own complete microcosm.[71] Indeed, Article 1 of the *UDHR* explicitly asserts that humans are "endowed with reason and conscience,"[72] showing already the natural rights influence; in fact, an early version of the article read "endowed *by nature* with reason and conscience."[73]

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[67] See Mignolo, *supra* note 53. The author notes how the word "human" (open to manipulation from the West) often excluded women, racial minorities, indigenous peoples, and other minority groups.
[68] Mutua, "What is TWAIL", *supra* note 27 at 33–34; Tierney, *supra* note 42 at 3; Graham, *supra* note 46 at 85. Anghie & Chimni, *supra* note 28 at 84; Anghie, "Vitoria", *supra* note 64; Mutua, "Africa", *supra* note 35 at 19.
[69] Anghie & Chimni, *supra* note 28 at 84; Raimon Panikkar, "Is the Notion of Human Rights a Western Concept?" (1982) 30:120 Diogenes 75 at 75–76. See also Baxi, *supra* note 35 at 33–34. Baxi recounts the various formulations of the hegemonic thesis, distinguishing notably between the historic claim (human rights historically originated in the West) and the evangelical clause (human rights have been propagated from the West).
[70] Villey, *supra* note 39 at 133 [translated by author; emphasis in original].
[71] Panikkar, *supra* note 69 at 80–82.
[72] *Supra* note 6, Article 1.
[73] Economic and Social Council, *Report of the third session of the Commission on Human Rights*, UNESCOR, 7th Sess, UN Doc E/800 (1948) Annex A, Article 1 [emphasis added]: "All human beings are born free and equal in

Interestingly, this direct reference to nature in the *UDHR* provoked controversy, with strong defenders of natural rights theory such as Lebanese delegate Charles Malik on one side and, on the other, those who felt that the concept of 'nature' might appear to impose a particular philosophical approach to human rights, a position notably held by Chinese delegate P.C. Chang.[74] Humphrey noted from the drafting of the *UDHR* that references to nature and God were among the most controversial topics of the drafting process.[75] It is also worth noting that the various draft models presented to the drafters in the process of elaborating the *UDHR* overwhelmingly came from English-speaking and Western countries, where natural rights theories were born in the first place.[76]

However, by following the model of natural rights as the fount of rights, the international system in some instances allowed the reproduction of colonial patterns of domination over and condescension toward people seen as less developed than 'civilized' Europeans.[77] TWAIL scholars have been vocal in denouncing the erasure of history in international law generally, and human rights law in particular, which the reliance on abstract reason tends to effect. Makau Mutua suggests that human rights as elaborated after the Second World War were ultimately a European answer to a European problem, and thus were not necessarily concerned with universal well-being.[78] Upendra Baxi adds that just like their colonial predecessor, the European human rights advocate promotes liberal ideals of freedom, setting aside non-Western ways of understanding

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dignity and rights. They are endowed by nature with reason and conscience, and should set towards one another in a spirit of brotherhood". See also commentary from René Cassin, "Twenty Years After the Universal Declaration" (1967) 8:2 J Intl Comm Jur 1, at 1–2. For discussions on the matter, see UNGAOR, 3rd Committee, 3rd Sess, 96th Mtg, UN Doc A/C.3/SR.96 (1948) and UNGAOR, 3rd Committee, 3rd Sess, 98th Mtg, UN Doc A/C.3/SR.98 (1948).

[74] Commission on Human Rights, UNESCOR, 3rd Sess, 12th Mtg, UN Doc E/CN.4/SR.12 (1947). Humphrey described Malik as a Thomist and a strong defender of natural law, see John P Humphrey, *Human Rights & the United Nations: A Great Adventure* (Dobbs Ferry, NY: Transnational Publishers, 1984) at 23. About Chang's comment, see UNGAOR, 3rd Committee, 3rd Sess, 98th Mtg, UN Doc A/C.3/SR.98. For similar concerns, see comments by Haitian delegate (UNGAOR, 3rd Committee, 3rd Sess, 105th Mtg, UN Doc A/C.3/SR.105) and Czechoslovakian delegate (UNGAOR, 3rd Committee, 3rd Sess 93th Mtg, UN Doc, A/C.3/SR.93).

[75] Humphrey, *supra* note 74, at 66–67.

[76] *Ibid* at 32. Among these were drafts presented by the American Law Institute, the American Jewish Congress, writer HG Wells, and legal scholar Hersch Lauterpacht.

[77] Anghie & Chimni, *supra* note 28 at 83–86; Gallié, *supra* note 29 at 34; Mutua, "What is TWAIL", *supra* note 27 at 34–35; Mutua, "Savages", *supra* note 28 at 237–238. See also Isabelle Duplessis, "Le droit international a-t-il une saveur coloniale? L'héritage des institutions internationales multilatérales" (2007) 2 RJT 311 at 319–320. Duplessis notes that the Mandate system of the League of Nations adopted this civilizing discourse, and that even the more contemporary language of economic development developed by international financial institutions maintains a similar condescending attitude (*ibid* at 326–336).

[78] See Mutua, "Savages", *supra* note 28 at 210 speaking more directly of the UDHR and how it was seen as a response to Nazi horrors.

relationships.[79] Yet the *UDHR* makes only a veiled reference to the circumstances of its adoption in the preamble, saying that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind," without further specifying the historical facts that led to a global call of action against these acts, incarnated in the creation of the United Nations. This ahistorical posture clashes with the experiences of people in the Global South, with their recurring and lasting history of imperialism, colonialism, and poverty.[80]

To respond to the critique of Western domination on international human rights law, many authors have argued that Western countries were not the chief proponents of human rights at the UN level, noting for instance the contribution of small powers in the elaboration of the *UDHR*, notably in the inclusion of economic and social rights, which depart significantly from liberal tradition.[81] Osiatynski notes for instance that Western states, prior to the adoption of the *UDHR*, certainly did not want other states to benefit from the same rights and freedoms as their own constituents.[82] While this may be true, the dialogue around human rights is still highly influenced and guided by Western liberal thought, as Mutua suggests:

> While I do not think that the human rights movement is a Western conspiracy to deepen its cultural stranglehold over the globe, I do believe that its abstraction and apoliticization obscure the political character of the norms that it seeks to universalize. As I see it, the purportedly universal is at its core and in many of its details, liberal and European.[83]

He points out for instance that the two 'non-Western' drafters of the *UDHR*, P.C. Chang from China and Charles Malik from Lebanon, were still educated in the West, and thus influenced by liberal standards.[84]

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[79] See Baxi, *supra* note 35 at 42–44.
[80] Mutua, "Africa", *supra* note 35 at 31.
[81] Michael Ignatieff, *Human Rights as Politics and Idolatry*, Amy Gutmann, ed. (Princeton, NJ: Princeton University Press, 2001) at 8; Susan Waltz, "Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights" in José-Manuel Barreto, ed, *Human Rights from a Third World Perspective: Critique, History and International Law* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2013) 355 at 378–381. On the role of small states in developing the human rights agenda, see also MA Glendon, "The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea" (2003) 16 Harv Hum Rts J 27; Osiatynski, *supra* note 41 at 37–38.
[82] Osiatynski, *supra* note 41 at 35.
[83] Makau Mutua, "The Complexity of Universalism in Human Rights" in András Sajó, ed, *Human Rights with Modesty: The Problem of Universalism* (Leiden: Martinus Nijhoff, 2004) 51 at 54 [Mutua, "Complexity"].
[84] *Ibid* at 61.

To be clear, hegemony in international law—the power of one state over another—does not necessarily and automatically imply overt maliciousness or violence. This being said, and as Anthea Roberts has thoroughly chronicled, the sources and resources of international law remain significantly dominated by Western liberal (often Anglo-Saxon) legal tradition, and the West's overwhelming and lasting international influence can falsely make particular liberal principles seem universal and neutral.[85] For instance, she notes how the working languages of international law (French and English) determine who will be hired, who will be read, and who will be influential: "It seems reasonable to assume that privileging certain languages results in privileging both native speakers of those languages, as well as the concepts, approaches, and sources with which they are familiar."[86] In turn, case law from the West, and particularly from the United Kingdom and the United States, is cited more often in international law textbooks than case law from non-Western countries.[87] Similarly, as noted by Mutua, NGOs that act in the name of human rights victims are often funded by Western states, agencies, or charities.[88] And as Baxi adds, these organizations often determine which "forms of suffering"—understood as human rights violations—to prioritize over others, supplanting the voices of those they are meant to represent.[89] This results in the condescending dominance of one voice at the expense of alternative ones.[90]

As Roberts explains, this dominance of Western liberal legal tradition is enabled by the power some states possess to influence others:

> Although no state has a monopoly on defining international law, some powerful Western states function as international law exporters because they can successfully transport some of their national approaches to the international sphere in the name of "international law."[91]

Thus, controlling the institutions of international law allows the West to control the message they transmits. And one aspect of these 'national' approaches that have been transmitted into the

[85] See Anthea Roberts, *Is International Law International?* (New York: Oxford University Press, 2017) at 3; 8–11 [Roberts, "International"].
[86] *Ibid* at 267. Similarly, she notes that many non-Western scholars choose to study in Western states and write in English in order to reach a wider audience (*ibid* at 261–264).
[87] *Ibid* at 165–172.
[88] Mutua, "Savages", *supra* note 28 at 241.
[89] Baxi, *supra* note 35 at 30.
[90] Mutua, "Complexity", *supra* note 83 at 59–60. See also Roberts, *supra* note 85 at 99–103, who explains that the actual language spoken by international lawyers can lead to parochialism.
[91] Roberts, *supra* note 85 at 9.

international sphere of human rights is the insistence on negative individual freedoms framed as neutral and abstract rules of law.

1.2.3 Liberalism, the categorization of rights, and 'rights' language

Another way that liberalism has influenced international human rights law is through the reliance on the idea of 'rights' as a series of fixed and identifiable entitlements which are usually attached to the individual and divided into neat categories which determine their proper enforcement.[92] Liberal property rights, conceived as a bundle of individual rights of owners, follow this structure.[93] Categorization of social needs as rights allows certainty and accountability in the enforcement of human rights; yet it can also impede concrete social participation by overemphasizing fixed rules of law to the detriment of dynamic expressions of ways to attain social participation.

These categories can also isolate rights from one another, making it difficult to frame an integrated approach to human rights violations, especially if some are viewed as enforceable and others not.[94] This was the case for a long time in international human rights law, as rights were classified as civil and political on the one hand, and economic, social, and cultural rights on the other. Civil and political rights—the 'first-generation' rights associated with liberties—were conceived as pertaining to individuals, whereas economic, social, and cultural rights (the second-generation rights) were considered collective. Their enforcement was thus viewed differently: civil and political rights were understood as negative rights, implying that states could not intervene in their exercise; while economic, social, and cultural rights were said to be 'programmatic' rights of a positive nature. In fact, while the *UDHR* contains both sets of rights, these were later separated into two different treaties, officially on the basis that they were not to be implemented in the same way.[95] Drafters of the International Covenants on Human Rights considered that civil and political rights were immediately enforceable judicially, while economic, social, and cultural rights were to be implemented progressively, through policy and active state intervention, and thus could not be submitted to judicial scrutiny.[96]

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[92] Duncan Kennedy identifies the rule of law as a leading value of liberalism, alongside a commitment to market economy and democratic values; see Duncan Kennedy, *supra* note 35 at 47.

[93] For more on the structure of liberal property rights, see Chapter 2.

[94] See Simmons' critique of rights categorization in human rights law, Simmons, "Marginalized", *supra* note 18 at 191–192.

[95] A debate which started during the drafting of the *UDHR*, see Humphrey, *supra* note 74 at 44–45. For instance, French delegate René Cassin and Lebanese delegate Charles Malik both expressed during the drafting process that social and economic rights should be distinguished from 'fundamental rights' (See their comments respectively in Commission on Human Rights, Drafting Committee, UNESCOR, 1st Sess, 5th Mtg, E/CN.4/AC.1/SR.5 and Commission on Human Rights, Drafting Committee, UNESCOR, 1st Sess, 10th Mtg, E/CN.4/AC.1/SR.10).

[96] Peter R Baehr, *Human Rights: Universality in Practice* (New York, NY: St. Martin's Press, 1999) at 33.

Needless to say, the distinction between civil and political rights on the one hand and economic, social, and cultural rights on the other is not as clear in practice. It is now generally accepted that all human rights require both negative measures (non-interference in the exercise of a right) and positive ones (adoption of protective laws and policies) to fulfill their emancipatory potential.[97] Equality rights are a common example of how mere non-intervention of the state does not lead to equal opportunities: in the United States, for instance, formal equality in access to ownership has not impeded significant racial inequalities in real estate ownership due to historical and social circumstances that disadvantage the African-American community, and so proactive anti-discrimination measures such as affirmative action were and are required to attain effective equality.[98] On the other hand, many economic, social, and cultural rights can be enforced by courts and in individual cases—for instance, labour rights. The adoption in 2008 of the *Optional Protocol to the International Covenant on Economic Social and Cultural Rights* allowing for individual complaints now shows a global consensus in favour of their justiciability.[99]

The superficial categorization that distinguishes civil and political rights from economic, social, and cultural rights is influenced by global politics, in particular the postwar tension between liberal and communist states: economic, social, and cultural rights were indeed seen as potential threats to individualized freedoms promoted through liberal discourse, a feeling particularly prevalent in the United States, where a specific rhetoric of opportunity attaches the highest value to personal hard work and breeds distrust of any type of government intervention, including social programs.[100] Because of their social nature, these rights also came to be associated with communism, which impeded their development at the international level during the Cold War. Nonetheless, the controversial nature of economic and social rights and the division between them and civil and

[97] Donnelly, *supra* note 19 at 43. The UN now proposes that each human right implies obligations to respect, protect, and fulfill, a categorization proposed by Asbjorn Eide during his work at the UN. See Baehr, *supra* note 96 at 33.
[98] See generally Cheryl I Harris, "Whiteness as Property" (1993) 106:8 Harv L Rev 1707; Ezra Rosser, "The Ambition and Transformative Potential of Progressive Property" (2013) 101:1 Cal L Rev 107. Harris in particular notes that reduced access to ownership leads to reduced access to the privileges traditionally associated with ownership (e.g. political participation). See also the discussion on racial exclusion associated with the notion of home, below, at §7.3.2.
[99] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 10 December 2008, UNGAOR, UN Doc A/RES/63/117 (entered into force 5 May 2013). The Protocol essentially brings the UN system up to date, since multiple national courts, especially in the Global South (ee.g. India, South Africa), have already been enforcing social and economic rights, as well as the African Commission. See e.g. Fons Coomans, "The Ogoni Case before the African Commission on Human and Peoples' Rights" (2003) 52:3 ICLQ 749.
[100] Barbara Stark, "Postmodern Rhetoric, Economic Rights and an International Text: 'A Miracle for Breakfast'" (1993) 33:2 Va J Intl L 433 at 439–440. Baehr, *supra* note 96 at 33. See also Donnelly, *supra* note 19 at 32, on the continuing resistance to economic and social rights in the USA.

political rights is largely a relic of the past,[101] and shows how historical context plays an important role in defining and interpreting human rights.

Aside from the division of rights mentioned above, '*rights'* language itself establishes artificial and formulaic categories, which are enshrined into definitive codes, and which may limit the expression of needs for social participation. For Judy Fudge and Eric Tucker, law as discourse in liberal tradition sets up "categories that delimit the realm of legitimate claims, organize those claims in particular ways, and privilege some claims over others."[102] In other words, law is selective of the claims that can be made by people, something which can clash with lived experiences. For instance, in the context of labour relations, they note that the institutionalization of labour relations prompted by liberal capitalist societies has allowed them to control labour conflicts through the legal and political apparatus, while at the same time protecting a capitalist vision of private property which creates significant inequalities in society.[103]

In fact, by setting in stone a set of rights determined by states to be inherent to human nature, the *UDHR* creates a 'positivisation' of human rights in which rules have priority over the facts that have led to the elaboration of those rules in the first place.[104] Meanwhile, some authors argue that rights language is only one way in which human rights objectives might be accomplished,[105] and thus it is worth questioning their very usefulness. David Kennedy, in particular, suggests that rights language fails to accomplish its objective of emancipation.[106] He notes that it tends to ignore how political and economic factors influence people's lives, and that such language puts the responsibility of human emancipation in the hands of the state rather than the community.[107] He

[101] See for instance the 1993 Vienna Declaration, which consecrates the principles of indivisibility, interdependence, and interrelatedness of all human rights; UN General Assembly, *Vienna Declaration and Programme of Action*, A/CONF.157/23 (12 July 1993), Article 5. Binding human rights instruments adopted after the two Covenants have generally included both sets of rights without creating hierarchies, as noted by Baehr, *supra* note 96 at 33. See for instance *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[102] Fudge & Tucker, *supra* note 3 at 6.
[103] *Ibid* at 6–8.
[104] On the positivisation of natural rights operated by the *UDHR*, see Douzinas, *supra* note 42 at 9. See also Taylor, on Western liberal influence on formulation of positive rules of human rights, Charles Taylor, "A World Consensus on Human Rights?" *Dissent* (Summer 1996) 15 at 16–17. On the criticism of legal positivism as denying a variety of contextual factors in its analysis, see Rémi Bachand, "La critique en droit international : Réflexions autour des livres de Koskenniemi, Anghie et Miéville" (2006) 19:2 RQDI 1 at 9–10.
[105] David Kennedy talks of a lost vocabulary outside of rights, including duty, responsibility, and commitment. See David Kennedy, *supra* note 36 at 108. See also Baxi, *supra* note 35 at 6.
[106] See generally David Kennedy, *supra* note 36.
[107] *Ibid* at 109–113.

adds that the human rights movement inserts itself in the wider context of international law's focus on legal forms, such as concepts of sovereignty and territorial jurisdiction, which isolates conflicts and violations within borders.[108]

Yet human rights language, as imperfect as it may be, possesses advantages in accomplishing social participation, since it acts as a point of reference for addressing violations and a means for constant critical renewal. As Nussbaum explains, "[t]he language of rights has a moral resonance that makes it hard to avoid in contemporary political discourse."[109] On a practical level, rights have indeed been used to address violations, allowing empowerment of disadvantaged groups in many cases.[110] Sally Engle Merry and Peggy Levitt have noticed a strategic use of human rights discourse by local NGOs in order to adapt it to local demands.[111] This is not to say that rights language is superior to other ways of attaining social participation—through policy work, for instance[112]—only that it has shown positive outcomes. The language of human rights allows advocates to address urgent claims by providing identifiable tools of representation within a legal system.[113] Their global reach also encourages transnational conversations by providing a common vocabulary understandable across jurisdictions and organizations.[114] Finally, even when the legal language has been adopted as a means of control or domination, it does not exclude the fact that this language can be contested and reappropriated in a subversive way to support claims of emancipation, which has been observed for instance with workers' organizations in their practice of social solidarity.[115]

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[108] *Ibid* at 123. For commentaries on the concepts of sovereignty and jurisdiction as imposed on indigenous peoples in Canada, see generally Shiri Pasternak, *Grounded Authority: The Algonquins of Barriere Lake against the State* (Minneapolis, MN: University of Minnesota Press, 2017).
[109] Nussbaum, "Human Rights", *supra* note 21 at 273.
[110] Ignatieff, *supra* note 81 at 4–8 and 18–19; Helen Stacy, "International Human Rights in a Fragmenting World" in András Sajó, ed, *Human Rights with Modesty: The Problem of Universalism* (Leiden: Martinus Nijhoff, 2004) at 168. Note that on this question there is no agreement since many defenders of cultural relativism or cross-cultural approaches consider that the human rights project has essentially failed in its mission. See Abdullahi Ahmed An-Na'im, "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment" in Abdullahi Ahmed An-Na'im, ed, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) 19; IJ Gassama, "A World Made of Violence and Misery: Human Rights as a Failed Project of Liberal Internationalism" (2012) 37:2 Brook J Intl L 407.
[111] Engle Merry & Levitt, *supra* note 61 at 215.
[112] Griffin, *supra* note 15 at 127–128. On tools adopted by NGOs to advance human rights, see also Engle Merry & Levitt, *supra* note 61 at 233.
[113] Nussbaum, "Human Rights", *supra* note 21 at 295–296. Donnelly, *supra* note 19 at 12–13; Ignatieff, *supra* note 81 at 4.
[114] Engle Merry & Levitt, *supra* note 61 at 234.
[115] Fudge & Tucker, *supra* note 3 at 9–10.

While rights language provides for empowerment, it must not however remain frozen in time and place, and rather allow for context and contingency to influence its shape. As TWAIL scholars argue, the problem in international law is not the existence of rights, but rather their rootedness in colonialism, their fixedness, and their resistance to change.[116] Anghie & Chimni note in fact that legal positivism, and more specifically its tendency to isolate rules from their environment, is ill-suited in international law since it "fails to locate international law and institutions in their political context."[117] Language, in turn, is usually responsive to context. As James Griffin notes, language ultimately depends on shared practices and values about how to express ourselves, and its interpretation requires accepting these shared practices.[118] Costas Douzinas adds that rights are ultimately meaningless, being flexible constructs open to any type of interpretation;[119] while Engle Merry and Levitt observe from their empirical work that human rights law provides "an open discourse, with multiple uses and appropriations."[120] What these comments tell us is that in order to be meaningful, human rights language must remain flexible, allowing for its own transformation and redefinition. The *UDHR* and other human rights instruments may appear to be immutable, fixed instruments, but the work deriving from them shows rather constant movement and a potential for transformation; this is something I observe from the case law of regional human rights systems on the right to property, particularly in cases emanating from the Global South, which I discuss in Part II.

Most importantly, the language of human rights must serve humans, not the states or institutions who proclaim them. A bottom-up approach to human rights requires, to borrow the words of TWAIL scholar Chimni, that we "make effective use of the language of human rights to defend the interests of the poor and marginal groups."[121] The critique of rights language articulated by David Kennedy amounts to deploring the lack of space given to local and personal experience. Human rights, he notes, currently privileges the general, "beyond the human experience of

[116] Anghie & Chimni, *supra* note 28 at 101.
[117] *Ibid* at 98. For a parallel debate within domestic law, particularly in the United States, between legal formalism and contextual approaches to law, see generally Ronald Dworkin, *Taking Rights Seriously* (London: Bloomsbury Academic, 2013).
[118] Griffin, *supra* note 15 at 113.
[119] Douzinas, *supra* note 42 at 252–254.
[120] Engle Merry & Levitt, *supra* note 61 at 234.
[121] B S Chimni, "Third World Approaches to International Law: A Manifesto" (2006) 8:1 Intl Community L Rev 3 at 24.

specificity and against the human capacity to hope for more."[122] In this context, what really needs to be challenged then is not necessarily rights language, but the fact that it currently imposes liberal standards as fixed and immutable rules over adapted norms deriving from lived experience.[123] Rights can be named and written down, but in the field of human rights, they ought not to be reified, substituting themselves in importance to the needs of people they are meant to accomplish.[124] Rather than seeing human rights as a "universal bundle of attributes,"[125] we must approach them as enablers of social participation, challenging their centrality while still acknowledging their utility.

1.3 Reformulating Universalism

> *"Cultivating our humanity in a complex interlocking world involves understanding the ways in which common needs and aims are differently realized in different circumstances."*[126]

Not many authors nowadays deny that the *UDHR* is in good part a product of Western thinking.[127] Nevertheless, these Western liberal origins should not lead us to reject the idea of human rights as establishing universal standards attached to human life. One must distinguish between the historical tendency of 'universalizing' Western liberal values and the idea of universal rights as moral claims accepted by all.[128] As mentioned above, universalism and diverse lived experiences are compatible if we understand universal human rights as shared values of social participation drawn from the bottom up. Nussbaum, in the introductory quote of this section, makes it clear that an acknowledgement and respect of our common humanity comes from a recognition of our differences. She accepts human rights as universal, but suggests that universal commonalities take roots in the heterogeneous daily lives of human beings.[129] Thus, contrary to the liberal version of universalism which claims to define principles applicable based solely on human reason,

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[122] David Kennedy, *supra* note 36 at 111.
[123] Baxi describes the current language as "the statist human rights discourse", Baxi, *supra* note 35 at 26.
[124] On the over-formalization of human rights, see David Kennedy, *supra* note 36 at 110. See also Douzinas, *supra* note 42 at 260–261 and 312–318, on the legalisation of desires.
[125] Which is the way Mutua describes the current state of human rights, in Mutua, "Savages", *supra* note 28 at 209.
[126] Martha C Nussbaum, "Cultivating Humanity in Legal Education" (2003) 70:1 U Chicago L Rev 265 at 270 [Nussbaum, "Humanity"].
[127] See e.g. Panikkar, *supra* note 69 at 79; Eva Brems, "Reconciling Universality and Diversity in International Human Rights Law" in András Sajó, ed, *Human Rights with Modesty: The Problem of Universalism* (Leiden: Martinus Nijhoff, 2004) 213 at 224; Douzinas, *supra* note 42 at 123. Even though some still insist on the diversity of thought reflected in the *UDHR*, see e.g. Waltz, *supra* note 81; Osiatynski, *supra* note 41.
[128] As suggested by Baxi, *supra* note 35 at 160.
[129] Nussbaum, "Female", *supra* note 16 at 69–70.

independent of context, a lived version of universalism in human rights emphasizes concrete and diverse experiences of social persons as the source of rights. Lived universalism aims to take into account a plurality of voices in the creation of normative standards, while rebalancing power dynamics so that one voice does not overwhelm the others.

Drawing from this, the bottom-up approach to universal human rights embraced in this study recognizes the basic fact that human beings are both autonomous and social, and that their free choices are determined through a variety of relationships and interactions with other people and their environment. It also emphasizes the process by which rights are identified as providing for social participation rather than the mere identification of rights within immutable lists. As Griffin notes, drawing a list of values of human rights is ultimately a matter of deliberation rather than of discovering 'truths,'[130] and this deliberation, I argue, ought to take its roots in lived experiences in location. This dialogical process reinforces a discourse of rights as universal, as it lends widespread democratic legitimacy, thus answering the critique formulated by TWAIL of human rights being currently dominated by a monolithic liberal narrative.

This chapter thus ends by establishing bases for the concept of lived universalism which will guide the subsequent inquiry on the right to property as it has been defined at the national and international levels, as it has been applied, and with regards to its potential for greater emancipation. I first provide some general comments on the compatibility of universalism with diverse experiences and on the need for a foundational theory of human rights (§1.3.1). Then, I elaborate on what it means to assess rights in location, proposing that universalism should fully embrace location in the elaboration of rights rather than ignore it (§1.3.2). I follow by presenting the human being of human rights as an autonomous social person who tends to be neglected in discussions of human rights, relegated to the role of passive victim (§1.3.3). I argue that to counter the long-lasting Western liberal influence on human rights, human rights should particularly emphasize the lived experiences of the oppressed, underrepresented, and marginalized, who have generally been silenced in the process of elaboration of international law, yet are the most likely to benefit from the increased social agency that concrete human rights can provide. Finally, I explain how a bottom-up approach to human rights implies maintaining dynamism in the meaning of rights, through a dialogical process (§1.3.4).

[130] Griffin, *supra* note 15 at 115.

1.3.1 Why care about universalism?

The critique of the liberal version of universalism presented above may lead some to ponder whether moral universalism is even desirable within the international human rights discourse. For the cultural relativist school,[131] the imposition by force of specific norms of the colonial West means that the whole corpus of human rights, and in particular its claim of universalism, is flawed and should be set aside. Cultural relativists claim that international human rights are everything but universal since they fail to take into account local culture, and are often incompatible with such culture in a non-Western context; from there, some authors challenge the idea that universal principles even exist.[132] A common example given by cultural relativists of the incompatibility of universal rights with local culture is the fact that international human rights overwhelmingly focus on individual rights, which contradicts, they say, the communal nature of many societies, for instance in African culture.[133]

But the cultural relativist argument oversimplifies the issue: first, as already mentioned, the problem with human rights is not that concrete and localized power struggles are at their source, but that these power struggles are hidden in favour of a discourse of abstract reason. As Anghie & Chimni outline, ignoring the power relations that have shaped international law can only perpetuate them: "Approaches to international law that fail to take into account its violent origins might preclude an understanding of the continuing complicity between international law and violence."[134] They argue for a "philosophy of suspicion,"[135] a skepticism toward what is said to be universal and just, especially if these universal principles are ultimately Western.[136] Skepticism in

[131] The concept of cultural relativism was initially introduced by anthropologists in the twentieth century, and then developed in philosophy, legal scholarship, and advocacy in relation to human rights. Brems, *supra* note 127 at 213–214. Alison Dundes Renteln, "Relativism and the Search for Human Rights" (1988) 90:1 Am Anthropologist 56 at 57. See Gallié generally on the differences and similarities between the first wave of Third World critiques of international law, which emphasized sovereignty and self-determination of Third World states, and TWAIL scholarship, which is more critical of the nation-state, Gallié, *supra* note 29.

[132] See Renteln, *supra* note 131 at 60–61; An-Na'im, *supra* note 110 at 21; Jack Donnelly, "Cultural Relativism and Universal Human Rights" (1984) 6:4 Hum Rts Q 400; Stacy, *supra* note 110 at 166; Fernando R Tesón, "International Human Rights and Cultural Relativism" (1984) 25 Va J Intl L 869 at 870–871, 896.

[133] Brems, *supra* note 127 at 219. On the communal nature of rights in customary communities in Africa, see the case law of the African Commission of Human and Peoples' Rights on the right to property, discussed below at §6.3.2.

[134] Anghie & Chimni, *supra* note 28 at 102.

[135] *Ibid* at 96.

[136] Mutua, "What is TWAIL", *supra* note 27 at 37.

this case does not mean rejection, but rather invites a deeper investigation into the roots of international human rights.

Second, diversity of culture does not exclude the possibility of universal principles as long as one culture is not allowed to dominate others. Universal principles drawn from the bottom up accept that there are different ways of experiencing the world, hence the need to look at concrete practices in order to observe shared values. Uncritical cultural relativism presents an oppositional logic which amounts to the same ethnocentrism as the one imposed by the Colonial West, since the 'culture' which some cultural relativists defend appears as all-encompassing and hierarchical as the liberal concept of universalism that they oppose, presenting one moral system as better than the other.[137] After all, liberalism is itself a culture that tries to present itself as superior and thus worthy of being spread out, by force if necessary—a rhetoric which lived universalism seeks to avoid. Meanwhile, the 'culture' that cultural relativists defend can easily reduce the Third World to a uniform bloc rather than reflect a heterogeneous group of shared interests.[138]

For instance, while it is true that communal property is a prevalent way of managing the relationship between a community and the material world that is not necessarily reflected in the liberal definition of property, it is equally true that private property can enable a person's social participation—for instance, a small farmer who depends on her land for her living. The important thing is to allow sustained dialogue between plural lived experiences, similar to the suggestion by Mutua of bringing about "cross-cultural legitimacy" to human rights.[139] Thus, instead of downright rejecting the idea of universalism, the criticism of the current shape of human rights, as Alison Dundes Renteln suggests, should aim to challenge our unconscious bias in favour of our own culture and our ethnocentric conceptions of universal 'truths'[140] by clarifying how multiple ways of expressing social needs exist. Just as context sensitivity does not negate the possibility of universal human rights, culture and universal principles around ideals of social participation are compatible, since they provide for a localized understanding of universals. Baxi makes the important point that insisting overly on the Western hegemonic origins of human rights can amount

[137] Renteln, *supra* note 131 at 63; Tesón, *supra* note 132 at 888; Donnelly, *supra* note 19 at 109.
[138] On the political relevance of the subjective identification as 'Third World', see Okafor, "Theory", *supra* note 27 at 376; Mutua, "What is TWAIL", *supra* note 27 at 35–36.
[139] Mutua, "Complexity", *supra* note 83 at 56; Mutua, "What is TWAIL", *supra* note 27 at 36; Mutua, "Savages", *supra* note 28 at 208.
[140] Renteln, *supra* note 131 at 57–58. See also An-Na'im, *supra* note 110 at 23–25.

to claiming that non-Western traditions are devoid of notions of human rights, thus effectively blocking any attempt at cross-cultural dialogue.[141]

On the other hand, even when the importance of universalism of rights is recognized, many scholars adopt a pragmatic stance and suggest that a foundational theory is not necessary for human rights, as long as a consensus can be reached or a choice made as to what identifies as 'human rights.' [142] Thus, as long as states widely ratify human rights treaties, their moral sources would matter less.[143] It was pointed out, for instance, that the *UDHR* did not actually have any foundational theory, despite its reference to human dignity, and rather consisted simply of a consensus amongst the drafters.[144]

But a consensus on a list of human rights can come only from a common understanding of what it is to be human, of what it means to live a decent life, which gives it its moral legitimacy.[145] The pragmatic approach ignores the importance of some form of moral support to legitimize and strengthen the claims of people against oppression and marginalization, and since human rights are conceptualized as protecting people against states and as taking precedence over other legal norms,[146] it seems as though more than state acceptance is implied. A foundational theory of human rights need not be specific on rights nor attached to a particular legal or philosophical tradition, as long as it suggests underlying values to them—a common thread which explains their necessity.[147] What this study proposes is that people's need for social participation is the universal foundation of human rights, a framing which allows for diverse expressions of these needs based on location.

Acceptance of human rights by the persons they are meant to protect is already more indicative of their moral value,[148] hence the importance of a bottom-up approach to human rights. Such an

[141] Baxi, *supra* note 35 at 38–39. See also Tesón, *supra* note 132 at 891. Renteln, *supra* note 131 at 64–66.
[142] Donnelly, *supra* note 19 at 21–22; Brems, *supra* note 127 at 216–217; C Taylor, *supra* note 104 at 15; Ignatieff, *supra* note 81 at 54–56.
[143] An argument proposed notable by Donnelly, *supra* note 19 at 94–95.
[144] Simmons, "Marginalized", *supra* note 18 at 4–5; Brems, *supra* note 127 at 216; Griffin, *supra* note 15 at 25–26; Ignatieff, *supra* note 81 at 77–78. Donnelly notes that the word 'dignity' forms a kind of quasi-foundational principle for human rights, shared by most, albeit with different meanings, Donnelly, *supra* note 19 at 131.
[145] Hunt and Maritain talk of human rights as an understanding of right and wrong, see Hunt, *supra* note 60 at 26–27; Jacques Maritain, *Les droits de l'homme et la loi naturelle* (New York: Éditions de la Maison française, 1942) at 79–81 [Maritain, "Droits"].
[146] Donnelly, *supra* note 19 at 13.
[147] Baxi, *supra* note 35 at 9. See also Griffin, *supra* note 15 at 114–115 on the values of human rights.
[148] Anghie & Chimni note how historical patterns of acceptance and resistance offered stronger evidence than anything else of the fairness of rules, see Anghie & Chimni, *supra* note 28 at 78.

approach trusts in human beings to determine their own means to attain social participation within a given location rather than simply delegate the tasks to higher levels of decision-making, such as state delegates to an international organization. Griffin's influential recent theory of human rights proposes that human rights should emphasize people's personhood, understood as the autonomy to make choices, over the more passive notion of 'dignity'.[149] More than just proclaiming right, the notion of personhood he proposes seeks to equip people with the means to attain the 'good life'—what I more concretely define as social participation. An important element of Griffin's 'personhood' is to facilitate people's agency, not in the liberal sense of negative freedom and individual empowerment,[150] but as providing both autonomy and minimum protections to ensure that people's choices are informed and can be effectively exercised.[151] The distinctive point of Griffin's definition of agency is that it implicitly acknowledges the sociality of human beings, since he rejects the idea that mere isolated freedom can lead to emancipation; personhood is thus a *social* agency which inserts a person within their location.

1.3.2 Lived universalism: Social life in location

The social character of human beings described above means that human rights are more than rights we possess simply by virtue of being human; rather they exist by virtue of people's sociality. Social life necessarily evolves within a concrete location, and this should be emphasized in the elaboration of universal human rights, rather than relegating location to a secondary role as is the case in liberal thought. Indeed, liberal legal tradition which focuses on rules of law tends to isolate them from their context: while location may play a role in enforcing rights in court, this role is subsidiary, since location serves merely to support the validity of positive rules, and does not inform how location shapes the rules themselves. Yet, as we have seen, behind the abstract reason of individuals lies concrete struggles in location.

The concept of location is underrepresented in international law, which tries to elevate law to a higher level of generality. As one author puts it:

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[149] Griffin, *supra* note 15 at 33–37. The concept of personhood has also been used by Margaret Radin to describe a personal relationship with property that goes beyond mere commodity, see generally Margaret Jane Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993).

[150] See e.g. Ignatieff, *supra* note 81 at 57. Ignatieff concludes that human rights are thus inherently individualistic, *ibid* at 74–75.

[151] Griffin, *supra* note 15 at 33, 47.

> [F]ar too often the concrete and the local are lost in a broadly international and temporally oriented purview, and when attention is purportedly focused on the local, it too often loses its local specificity in the broader disciplinary lens of the dominant categories of discourse.[152]

There is a sense in which local specificities and the universal pretenses of international law seem incompatible, but this conception is misguided. A bottom-up approach to universalism implies that location matters, since universal principles are drawn from and applied on the ground, and it advocates for a reconciliation of the local and the universal, challenging their assumed dichotomy.

Local context already determines in good part how universal human rights ought to be applied in concrete settings: Engle Merry and Levitt have observed in practice a phenomenon of "vernacularization" of human rights in which universal principles are translated into local understandings by NGOs, based on local circumstances, and these local meanings in turn influence global policy to various degrees.[153] What I propose is that this translation process ought to be taken seriously, not only in the application of human rights law, but also in its elaboration, and have its roots not only in the local work of NGOs, but in the everyday experiences of persons in location.[154] Everyday experiences of property, for instance, describing diverse relationships of security, affiliation, anchorage in community, survival, and so forth, may be better adapted to describing property as a human right than relying on abstract notions of bundles of rights associated with ownership.

Location is a site of multiple complex relationships anchored in geographic reality. Geography and physicality is an important aspect of localized rights; in fact, many rights—particularly economic, social, and cultural rights—depend on geography in their elaboration. Examples are rights of 'access': to food, housing, health, or education services.[155] At a fundamental level, rights to food or shelter mean different things in cold climates and tropical zones, in terms of both what people need and what can be provided.[156] But geography can also influence the way that civil and

[152] Landauer, *supra* note 37 at 561.
[153] Engle Merry & Levitt, *supra* note 61 at 213–214.
[154] As Engle Merry and Levitt note, the choices that NGOs make are determined not only by the needs on the grounds, but also by the social background of activists, their funding, and the preferences and interests of their partners and clients, *Ibid* at 215.
[155] Jean Connelly Carmalt, "Rights and Place: Using Geography in Human Rights Work" (2007) 29:1 Hum Rts Q 68 at 69–71.
[156] See e.g. Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food*, UNESCOR, 20th sess, UN Doc, E/C.12/1999/5, para 7: "[…] The precise meaning of 'adequacy' is to a large extent determined by prevailing social, economic, cultural, climatic, ecological, and other conditions […]".

political rights are applied; for instance, rights to an effective judicial remedy or to political participation may not be enforced the same in rural as in urban settings, since in rural areas states may need to act positively to provide effective access to services.

As a physical and concrete place, location can be multidimensional: one can be physically at once in a country, a city, a house.[157] But location is more than just a fixed geographic place; rather, it encompasses all the relationships that shape a person's lived experience at a distinct point in the physical world.[158] It is the external, material world where social, political, and cultural life occurs and defines one's identity and participation.[159] It includes both the circumstances of a person's personal life, and those of the community or communities in which they develop as a person. It is made up of the variety of experiences that a person lives, and is thus different for each person, making in turn claims for social participation differ from a person to another. For instance, the homeless person in front of a city skyscraper, the doorman of that same building, and the lawyer working in a big law firm on one of its floors each possesses a different context, knows different relationships, has different social goals. Universal human rights ought to adapt to these various experiences, but also recognize that the way a homeless person experiences location means that she is less empowered than the lawyer in that same location. What's more, human rights ought to recognize that there is an inherent movement and dynamism to location, which derives from the constantly changing nature of one's context, and which also makes the expression of needs dynamic. It is not excluded, for instance, that the doorman moves up in the skyscraper, thereby gaining increased social participation.

Thus, the 'local' here is not an abstract conceptual part of a binary opposition between local and universal. It is a concrete place that can be the site of universal, shared practices. In fact, in contemporary scholarship, few human right scholars view universality and context as antagonists.[160] This is particularly true at the level of enforcement of human rights: while there may be universal standards, their concrete application and enforcement are said to fully depend on

[157] Tom Hall, Amanda Coffey & Howard Williamson, "Self, Space and Place: Youth Identities and Citizenship" (1999) 20:4 Brit J Soc of Ed 501 at 509. See also Carmalt, *supra* note 155 at 74 on the various scales of geographic application of human rights, from the human body to the global.
[158] Andrew Herod, Al Rainnie & Susan McGrath-Champ, "Working Space: Why Incorporating the Geographical is Central to Theorizing Work and Employment Practices" (2007) 21:2 Work, Employment & Soc'y 247 at 254–255.
[159] Hall, Coffey & Williamson, *supra* note 157 at 509.
[160] See e.g. Donnelly, *supra* note 19 at 103–104.

particular circumstances.[161] This does not necessarily embrace the adaptability of universal norms themselves, but it still emphasizes the role of the local in approaching human rights. Eva Brems further suggests that a sensitivity to particular circumstances could lead to greater universalism because of its more inclusive approach; she suggests indeed that particularism is more aligned with democratic process, and is more pragmatic, as it directly relies on the way that human rights are experienced, noting that diverse views serve to "improve the connection between international human rights and the reality of human life in non-Western contexts."[162]

But one must be cautious not to reduce location to culture. As briefly mentioned in the previous pages, many have argued that a genuine notion of universalism detached from Western domination ought to draw its legitimacy from cross-cultural examination and a greater diversity of sources.[163] While this point is valid, I would argue that what is most important is not necessarily the formal sources of rights, but their rootedness in human experience, as well as the flexibility of norms. The idea of cross-cultural universals seeks to draw an 'objective' list of rights, through empirical inquiry into overlapping moral values,[164] but it does not say much about the role of human experience in determining this list since it looks at culture from above, if not from outside. Some authors have argued that the empirical approach suggested by cross-cultural examination, i.e. to identify a lowest common denominator, ultimately creates a weak version of universalism which does little service to the advancement of human rights.[165] As mentioned already, an all-encompassing notion of culture does not necessarily take into account the diverse ways in which culture is experienced, embraced, or challenged in location, and these diverse experiences should be the primary focus of human rights.[166] Culture is fundamental in defining one's identity, but a person is the ultimate guardian of her own cultural beliefs, not her community or the state. In turn, needs in location must be understood as deriving from complex circumstances beyond culture—including personal preferences, relationships with other people, relationships with the community,

[161] See generally Engle Merry & Levitt, *supra* note 61 on the translation process of human rights into local vocabulary. See also Baehr, *supra* note 96 at 11; Donnelly, *supra* note 19 at 100–103; Douzinas, *supra* note 42 at 165; András Sajó, *Human Rights with Modesty: The Problem of Universalism* (Leiden: Martinus Nijhoff, 2004) at 29.
[162] Brems, *supra* note 127 at 224.
[163] See e.g. Baxi, *supra* note 35 at 40; Mutua, "Complexity", *supra* note 83 at 56; An-Na'im, *supra* note 110 at 19; Panikkar, *supra* note 69 at 78–79; Renteln, *supra* note 131 at 64.
[164] Renteln, *supra* note 131 at 64.
[165] Brems, *supra* note 127 at 215.
[166] In a given cultural context, Brems argues for taking the "insider" perspective, and evaluating culture around persons rather than the group, *Ibid* at 229–230.

and relationships with the physical environment—and depend on the way the person experiences these circumstances. Thus, *plurality of voices* is perhaps more important than plurality of cultural sources when it comes specifically to determining universal human rights in location.

1.3.3 The social person of universal human rights

The version of localized universalism I propose is one which derives from experience, rather than reason, and in which experience is *lived* by persons rather than observed by distant, external eyes.[167] The 'individual' of liberalism operates in an ethereal space that is timeless, apolitical, ahistorical, and free of external influences. In short, this individual does not exist in context—or at all, for that matter. On the contrary, the person of human rights ought to be taken as a free, autonomous, living social agent able to express her needs for social participation in her location because she experiences them. Saying that the human being is free does not imply a negative and abstract freedom isolated from reality; rather, as Carol Gould suggests, freedom ought to take into account the place of a person within a given social context, and the potential benefits and responsibilities emanating from that position in location.[168] This makes the person of human rights concrete. Panikkar notes how the word "person" is much more appropriate for human rights than the concept of "individual," which embodies abstract, isolated rights.[169] The person, he argues, is a more complex being, a combination of multiple internal and external factors:

> An individual is an isolated knot; a person is the entire fabric around that knot, woven from the total fabric of the real. The limits to a person are not fixed, they depend utterly on his or her personality.[170]

This being said, the focus of lived human rights ought to be on the oppressed, underrepresented, marginalized person, since human rights exist to respond to instances of oppression, underrepresentation, and marginalization.[171] Baxi notes that human rights language, despite its

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[167] See William Paul Simmons, "Making the Teaching of Social Science Matter" in Bent Flyvbjerg, Todd Landman & Sanford Schram, eds, *Real Social Sciences: Applied Phronesis* (Cambridge: Cambridge University Press, 2012) 246 at 258 [Simmons, "Teaching"].
[168] Carol C Gould, "Contemporary Legal Conceptions of Property and Their Implications for Democracy" (1980) 77:11 J Phil 716 at 722.
[169] Panikkar, *supra* note 69 at 90.
[170] *Ibid*. Similarly, Leary suggests that the distinction between 'person' and 'individual' emphasizes the "intrinsic links between persons and community," see Virginia A Leary, "Postliberal Strands in Western Human Rights Theory: Personalist - Communitarian Perspectives" in Abdullahi Ahmed An-Na'im, ed, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) 105 at 106.
[171] Simmons, "Marginalized", *supra* note 18 at 2, 12.

potential to expose violations, fails to recognize those who are actually denied human rights, such as the stateless, refugees, and the poor.[172] Yet the above discussion on the contextual nature of natural rights tells us that the discourse of 'inherent' rights has roots in concrete struggles, and indeed the very idea of human rights and its corresponding concept of dignity equally derive from a social order where such 'dignity' was violated. Thus, if human rights are born of struggles for social participation, their discussion should continue to focus primarily on those who struggle the most.

The fact that *all* human beings must be served by human rights does not connote a neutral notion of equality, but rather begs for an inclusive approach cognizant of social reality that creates inequalities.[173] TWAIL scholars argue, for instance, that the lived experiences of Third World peoples should be emphasized, since the validity of universal rules is best tested by their ability to help the most disadvantaged of the world.[174] Following this logic, a meaningful human right to property should be based not on the needs of powerful owners who control the means of production, but on those of owners whose possessions provide them with an access to social life which they couldn't otherwise access.

The person of human rights also ought to be an *empowered* social agent. People whose human rights are being violated are not necessarily 'vulnerable' in the sense of being without means, but are often overtly exploited (oppressed), silenced (underrepresented), or set aside by mainstream normativity (marginalized), all of which are acts external to them. Presenting them as vulnerable can send the message that they are helpless and weak—the kind of narrative which has often served to justify interventions from the West, from colonial invasions to modern wars. Yet, in the same way that people are not born victims, vulnerability is not an inherent trait, but is rather caused by structural injustices.

Thus, to counter the colonial past of human rights, a renewed version of universalism must be one that empowers people rather than treating them as passive individuals to be saved. As Panikkar notes, freedom may be more than the ability to choose, but also "the power to create options."[175]

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[172] Baxi, *supra* note 35 at 2.
[173] Maritain speaks of equality as establishing relations of justice, Maritain, "Droits", *supra* note 145 at 54.
[174] Anghie & Chimni, *supra* note 28 at 78, 102; Mutua, "What is TWAIL", *supra* note 27 at 37.
[175] Panikkar, *supra* note 69 at 102. For Griffin, the ability to choose and deliberate is what distinguishes human beings from other species, Griffin, *supra* note 15 at 32.

According to Mutua, the problem with the place given to 'victims' in international human rights law is its condescension, which is a consequence of its colonial roots.[176] He notes that hierarchies are created in which "actors are cast into superior and subordinate positions," between the white, Western, European saviour—a descendant of the 'colonizer' and his zealous Christian missionary—on the one hand and the Third World victim or savage on the other.[177] This victim is presented as helpless, powerless, uneducated, poor, nonwhite, and in need of external intervention "to overcome the conditions of victimization."[178] This victim metaphor derives from the European 'civilizing mission' which, as many argue, is perpetuated in contemporary international agendas,[179] and persists even in human rights activism which looks for the 'perfect victim' to save.[180] In turn, David Kennedy notes that the fixed image of the victim leads to giving very little consideration for "what if means to be human, […] who is human, […] how humans might relate to one another."[181] Baxi adds that human rights create a "conceptual human," rather than truly reflecting what it is to be human.[182]

Such an external assessment of who is in need of human rights weakens the agency of the oppressed, underrepresented, and marginalized person—or the subaltern as Gayatri Chakravorty Spivak calls them[183]—by denying them the ability (or power) to identify their needs for social participation.[184] Spivak explains how the subaltern is automatically represented and defined from the point of view of the Western researcher, for the benefit of a Western audience; this Western subject is the 'Self' to which the subaltern is the 'other'—in "the Self's shadow."[185] She notes that if the subaltern can speak, it is only under specific circumstances determined by the West.[186] Human rights 'victims' are thus object of rights, rather than their active subject.

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[176] Mutua, "Savages", *supra* note 28 at 231.
[177] *Ibid* at 202–204; 233. See also Mutua, "Complexity", *supra* note 83 at 61.
[178] Mutua, "Savages", *supra* note 28 at 228–230.
[179] Anghie & Chimni, *supra* note 28 at 85–86; Mutua, "Africa", *supra* note 35 at 18; Mutua, "Savages", *supra* note 28 at 214–215.
[180] Mutua, "Savages", *supra* note 28 at 241; David Kennedy, *supra* note 36 at 120–121; Ignatieff, *supra* note 81 at 9–10; Baxi, *supra* note 35 at 36, who talks of "missionary practices".
[181] David Kennedy, *supra* note 36 at 111.
[182] Baxi, *supra* note 35 at 136.
[183] See generally Gayatri Chakravorty Spivak, "Can the Subaltern Speak?" in Patrick Williams & Laura Chrisman, eds, *Colonial Discourse and Post-Colonial Theory: A Reader* (New York: Columbia University Press, 1994) 66.
[184] Simmons, "Marginalized" *supra* note 18 at 11–12; Mignolo, *supra* note 53 at 60.
[185] Spivak, *supra* note 183 at 75.
[186] *Ibid* at 78.

In contrast with the artificial image of the helpless victim of liberal human rights language, the empowered social person is a subject of law, able to speak for herself and to determine her own needs. Of course, giving a voice to the disadvantaged implies acknowledging the heterogeneity and diversity of experiences of marginalization and of claims of emancipation, and thus they cannot be reduced to a fixed narrative.[187] This puts forward, once more, the idea of a plurality of voices, rather than a relativism of voices, determining universal truths. This approach is highly subjective, but should not be seen as lacking in certainty, since these claims are expressed in order to attain social participation.[188] Lived experiences of empowered persons tell us that the main focus of human rights should be on the human, and that human rights law should not overpower human experiences.[189]

1.3.4 Dynamic universal norms from the bottom up

Drawing universal principles from the ground up argues against the existence of immutable truths, and rather proposes that shared values are changeable and adaptable to changing circumstances. This is why lived universalism is procedural in essence, since it focuses on the acknowledgment of the plurality of voices of human rights, and on how these various voices enter into a conversation to find a consensus on how social participation can best be achieved through a universal human rights language.

Addressing human rights as adapted expressions of social needs implies that, while lists may fix 'rights', they ought to fix neither their meaning nor their ability to evolve. As Stark notes about economic and social rights:

> [The ICESR] accepts economic rights as necessarily ephemeral, fragmented, discontinuous and chaotic. The actual substance of these rights, like the ways in which they are interpreted and implemented, changes over time. Solutions are invariably partial, sporadic and as "chaotic" (or unpredictable) as the forces of nature, or vagaries of late capitalism, to which they respond.[190]

Stark thus suggests that a one-size-fits-all definition of rights is inappropriate for the realization of economic and social rights—a conclusion that should be extended to all rights. Other authors have suggested that lists of rights are imperfect in defining human rights. French Philosopher Jacques

[187] Simmons, "Marginalized", *supra* note 18 at 15; Baxi, *supra* note 35 at 149.
[188] See Stacy, *supra* note 110 at 181.
[189] Something which Douzinas says it does, through the 'legalisation of desires', Douzinas, *supra* note 42 at 261.
[190] Stark, *supra* note 100 at 458.

Maritain, for instance, regards the *UDHR* as the result of a necessary "practical agreement," albeit inherently incomplete, since human rights were always to be discovered and rediscovered, being "revealed" to our consciousness by evidence of necessity.[191] Maritain views human rights as the product of natural law, but he understands natural law as an unwritten law, the knowledge of which is imperfect and constantly developing.[192] Based on that, he criticizes the fact that French revolutionaries transformed natural law into an absolute code.[193] Similarly, Jack Donnelly sees the creation of lists of rights as a "politically driven process of social learning"[194] attempting to reflect struggles against suffering; he considers lists of rights to be a contingent response to specific historical circumstances, explaining why such lists have evolved through time.[195] These views suggest that human rights are dynamic in their shape and meaning, emphasizing the process of their elaboration rather than their final formulations.

A procedural approach to human rights is closer to the older Aristotelian understanding of natural law—*physis* or physical nature—as being general and unwritten, so that it can be observed, but never fully grasped. Despite this, practical judgment based on experience (*phronesis*) can lead to concrete norms.[196] *Phronesis* or practical wisdom, is a form of acquisition of knowledge, distinct from *episteme* (rational knowledge focused on abstract universals and theoretical principles) and *techne* (craftsmanship).[197] It proposes exactly that some form of knowledge can be drawn from the ground rather than from reason. This in turn implies that 'nature' can be interpreted in various ways, depending on who experiences it.

Applied to international human rights, *phronesis* suggests that general rights ought to derive from lived experiences, thus reconciling universalism and social reality. Drawing from this, Nussbaum proposes that common needs and capabilities of human being can lead to universal values.[198] She suggests deriving capabilities from what is shared rather than on the achievements of a dominant

[191] Jacques Maritain, *Man and the State* (Chicago: University of Chicago Press, 1951) at 76 [Maritain, "Man"].
[192] Maritain, "Droits", *supra* note 145 at 83–85.
[193] *Ibid* at 102.
[194] Donnelly, *supra* note 19 at 99.
[195] *Ibid* at 97–98.
[196] For a reading of Aristotle's natural law in the context of human rights, see notably Douzinas, *supra* note 42 at 40–42; Tierney, *supra* note 42 at 3–4; Villey, *supra* note 39 at 40–41.
[197] Flyvbjerg, *supra* note 23 at 54–56.
[198] Nussbaum, "Female", *supra* note 16 at 69. The capability approach asks what people are able to do and to be, and draws central capabilities from there, see Nussbaum, "Human Rights", *supra* note 21 at 285.

group,[199] which is what TWAIL accuses the West of having done with international law. Her approach is resolutely bottom-up: "This focus on capabilities, unlike the focus on GNP, or on aggregate utility, looks at people one by one, insisting on locating empowerment in *this* life and in *that* life, rather than in the nation as a whole."[200] She does not suggest rejecting rights language altogether, but rather reassesses the central role of rights when approaching violations.[201] Without necessarily following the theoretical conclusions drawn by Nussbaum,[202] her methodological process based on practical wisdom offers important insights for our purposes, notably the focus on experience on the ground as a way to draw broader conclusions. The exercise I suggest here does not aim, however, to draw a new list of rights (or capabilities) but simply to check existing rights against lived experiences, departing from the idea of inherent dignity and introducing social agency into the equation.

The bottom-up approach to human rights inspired by *phronesis* I propose to apply is dialogical since, rather than setting down values, it seeks to emphasize the "polyphony of voices" which *determine* values.[203] These various voices can expose the power relationships and localized barriers which people experience within social life and which impede their participation, but also propose ways in which relationships can be rebalanced to empower people. And since some voices may have tended to be silenced or marginalized in societies, a dialogical process ought to provide positive access to them to ensure effective equality.[204]

Labour rights provide a telling example of the dialogical nature of a phronetic approach to human rights, since labour-related human rights have become fundamental and universal precisely through a process which derived rights from experience-based knowledge. Exploitative work conditions during the Industrial Revolution and the spread of capitalism led worker communities to increasingly organize around the world. Workers' rights were first defended at a global level by

[199] Nussbaum, "Female", *supra* note 16 at 61; Nussbaum, "Human Rights", *supra* note 21 at 275. See also reading of Nussbaum in the context of property relationships by Gregory S Alexander & Eduardo M Peñalver, "Properties of Community" (2009) 10:1 Theor Inq L 127 at 136.
[200] Nussbaum, "Human Rights", *supra* note 21 at 285.
[201] *Ibid* at 292–296.
[202] See e.g. Nussbaum's list of capabilities in *Ibid* at 287–288. Note that, as Nussbaum explains, her and Sen's list of capabilities remain committed to the liberal focus on liberties (*ibid* at 296).
[203] Flyvbjerg, *supra* note 23 at 139; See also Simmons, "Teaching", *supra* note 167 at 248 commenting on the idea of polyphony of voices suggested by Flyvbjerg. Bent Flybjerg uses *phronesis* to push for a greater use of context-based studies within social science research.
[204] Simmons, "Teaching", *supra* note 167 at 249–255. See also Flyvbjerg, *supra* note 23 at 139.

the socialist movement,[205] but they triggered reactions from other actors as well, in good part to offer a counterbalance to the growing popularity of communism. The papal encyclical *Rerum Novarum*, for instance, which promoted minimum standards of labour, was ultimately a response to the Marxist (atheist) rhetoric. On the other hand, the working class itself took its destiny into its own hands, developing a 'class consciousness'[206] and demanding better working conditions enshrined in protective laws; these political pressures eventually forced states and the international community to react. Together, these various actors added elements to the conversation as to how to best protect workers against the pressures of capitalist markets, and offered a counterweight to the commercial interests of industries and the reluctance of states to regulate markets.[207]

Thus, labour rights in the West were not initially drawn from abstract knowledge; rather, specific historical and economic circumstances made them necessary. And workers' claims were taken seriously only when they made their voices heard, exerting greater pressure from the ground up. Only later were labour norms codified and 'positivized.' In that sense, labour rights are fully contingent on contextual factors; yet they are meant to express fundamental needs common to all workers within an industrialized labour setting, and as such are universal. Similarly, women's rights, which gained significant traction in the 1990s, made their way into the international system of universal human rights only with pressure from and mobilization of women activists, whose work led to the 'formalization' of women's rights as human rights.[208]

The conversation implied in a dialogical approach is not just between people on the ground, but also between local knowledge and general principles. In other words, drawing human rights from the ground up is not a finite process, since general rights can—and should—be constantly reinterpreted and challenged. Maritain's suggestion that human rights are to be constantly reassessed to reflect human beings' ever-increasing consciousness of the world reflects this, by rejecting absolute formulations in favor of adaptation to time and place. The 'truth' of human rights ought not to be an immutable one:

> [D]ialogical social inquiry is best practiced when we give up traditional notions of objectivity and truth and put aside the fact-value distinction. Instead, we should

[205] See e.g. Karl Marx, *Manifesto of the Communist Party* (Raleigh, NC: Alex Catalogue).
[206] See EP Thompson, *The Making of the English Working Class* (New York: Vintage Books, 1966).
[207] See generally Fudge & Tucker, *supra* note 3 for a history of the process of labour relations regulation in Canada in the twentieth century, from sporadic interventions to legal protection.
[208] Engle Merry & Levitt, *supra* note 61 at 216.

> emphasize a contextual notion of truth that is pluralistic and culture-bound, further necessitating involvement with those we study.[209]

The idea of objective truths resonates within property theory, which at times presents rules of liberal property as the only valuable way to approach relationships with the material world.[210] Yet a dialogical approach allows us to check this claim against practice on the ground, to confirm or refute it. Such a process thus implies a constant movement between particular contexts and general principles.

Rather than making human rights uncertain and chaotic, lived universalism allows us to counter the effects of the indeterminacy of language by constantly assessing the relationship between law and reality. William Paul Simmons notes that giving determinate meaning to law through concrete facts is in fact what judges constantly do, which does not make their conclusions any less universal.[211] Thus, while the meaning of human rights may be uncertain because language can never be fixed, it can gain credence through a person's lived experience. By embracing the fact that language is contingent and contextual, a bottom-up approach to universal human rights legitimizes the language chosen, while starting from the universal premise that people aspire to a meaningful participation in social life.

It must be stressed that moving from the particular to the general will always involve some distortion of the particular, if only because those who state the general will necessarily interpret others' lived experiences through their own experiences.[212] This is why 'general' rules, as important as they are as a starting point for dialogue, should never be reified or treated as immutable, sacred, and fixed, and why significant space for subjective accounts of rights should always be allowed in the legal enforcement of human rights. Taking once more the labour example, the traditional Fordist-type relationship between an employer and her employee, typical of the industrial era, must not be deemed the universal standard: changes through place (regions where smaller, more reciprocal or community-based labour exist or where informal labour is the norm), and through time (increasing labour insecurity or mobility of labour) can occur and alter the meaning of the universal rights of labour. The same applies to the right to property: while for a

[209] Sanford Schram, "Phronetic Social Science: An Idea whose Time has Come" in Bent Flyvbjerg, Todd Landman & Sanford Schram, eds, *Real Social Science: Applied Phronesis* (Cambridge: Cambridge University Press, 2012) 15 at 19.
[210] See discussion on this below, at §3.2.1.
[211] Simmons, "Marginalized", *supra* note 18 at 7–8.
[212] See Renteln, *supra* note 131 at 62–63, on enculturation.

long time property was considered central to one's autonomy and political participation, this centrality is now challenged in many ways.[213] This is why international human rights law ought to allow flexibility in its form and application. What this means for the human right to property is that the definition given to it in abstract theories, such as natural rights or liberal tradition, should not precede nor be confused with the meaning given to it by concrete social persons in location.

While the previous comments on location, social agency, and the dialogical process of human rights serve as a general basis for this study, the human right to property explored in the following chapters will give flesh to a theory of lived universalism and its potential for greater human emancipation. An examination of property as a human right thus requires us to ask whether the act of ownership provides for social participation. It means first that its definition would not come from legal codes but from lived experiences of property, and that its acceptance as a human right would depend on whether it enables a person to engage herself meaningfully in her social context. How does this differ from property rights in private law? One could think of land squatters in urban peripheries in the Global South, for instance, who in most cases do not possess formal property rights in the domestic legal sense, but who could nonetheless claim a 'right' to property over land, if the possessory act they operate over land provides them and their family with a stable domicile, allowing them to rest and better interact within their community. These location-based distinctions will preoccupy us throughout this study.

[213] See Part III, below, on the challenges to the centrality of property; see also generally Jeremy Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where All of Life is a Paid-For Experience* (New York: JP Tarcher/Putnam, 2000) on the shift from a focus on ownership of goods to a focus on access to services.

Chapter 2 – The Shortcomings and Prospects of Property Theory in Defining the Human Right to Property

2.1 Introduction: National Lawyers, International Practice, and the Conflation of Concepts

If it is true that the right to property is the single human right that raises the most opposition—as the opening quote of Chapter 1 suggests—why is that so?[214] The right to property is one of the rights that were proclaimed by the eighteenth-century revolutionaries as 'natural' and thus inherent to human beings, but it also carries with it a loaded history of exploitation, domination, and exclusion, as already hinted at in the previous chapter in the context of colonialism. More than just a 'right,' private property is a legal and political institution inseparable from the capitalist economy which it enables, maintains, and reinforces.[215] Capitalist modes of production encourage liberal states to support and protect the claims of private owners while making subsistence dependent on wages, turning labour into a commodity.[216] This results in severe inequalities, which are however hidden within the liberal legal discourse because, as Fudge and Tucker put it: "[l]aw obscures the social relations embodied in rights, treating each individual as equal before and under it, despite profound inequalities in the human condition."[217] It is well known that large agricultural land-owners often rely on servile labour to exploit their land.[218] In urban settings, unbounded property rights means rentier landlords can impose any type of strenuous housing conditions on their tenants, giving them disproportionate power.[219] In short, liberal property rights, without necessarily encouraging inequality, are not particularly conducive to providing equal opportunity of participation to all.

[214] See also Harvey M Jacobs, "Private Property and Human Rights: A Mismatch in the 21st Century?" (2013) 22 Intl J Soc Welfare S85 at s86.
[215] See Fudge & Tucker, *supra* note 3 at 11.
[216] *Ibid* at 4–7.
[217] *Ibid* at 11.
[218] See e.g. Jim Chen, "Of Agriculture's First Disobedience and its Fruit" (1995) 48:5 Vand L Rev 1261 on plantations and slavery in the US; but also Jean-Louis Halpérin, *Histoire du droit des biens* (Paris: Economica, 2008) at 264 on the persistent hacienda culture in Latin America.
[219] See e.g. in the American context Blair Cameron Stone, "Community, Home, and the Residential Tenant" (1986) 134:3 U Pa L Rev 627–656.

But this history of exploitation is in itself the history of liberal property rights. In this chapter, I argue that liberal property rights (a set of attributes to ownership developed in domestic law) and the right to property (a universal human right) are two different concepts which are nonetheless conflated in international human rights law. This conflation is a telling example of the universalizing effect of liberal rights carried by Western legal traditions, and which is denounced by TWAIL scholars, yet it does disservice to an inclusive definition of the human right to property since it carries with it not only the neutralizing effect of liberal language, but also the political and social weight of property as a capitalist institution. By upholding a singular understanding of property through this fusion of concepts, international human rights law risks silencing other visions of property, drowning out the plurality of voices necessary to understand how property might actually encourage social participation.

Why does this conflation occur? It appears that scholars who have examined the right to property from a human rights perspective[220]—very few compared to the overwhelming amount of scholarship on private property—tend to transfer notions of domestic property rights to the realm of international human rights without adjustment. Possibly, without a robust critical framework, scholars may assume that what has been said about domestic property rights can be extended to a definition of the international human right to property. After all, what international jurists know about property is drawn from their domestic legal training—in most cases, from Western liberal concepts of private property.[221] Domestic legal concepts come with their own vocabulary, which sticks with them even across legal frontiers; in this context, it is hard for lawyers to shake the assumptions they have about law, even when they leave the realm of domestic law.[222]

[220] For other authors who have addressed property as a human right, see William A Schabas, "The Omission of the Right to Property in the International Covenants" in A Kiss, ed, *Hague Yearbook of International Law* (The Hague: Martinus Nijhoff, 1992) 135; van Banning, *supra* note 11; John G Sprankling, *The International Law of Property* (New York, NY: Oxford University Press, 2014); Benjamin Davy, "Human Dignity and Property in Land - A Human Rights Approach" in Sony Pellissery, Benjamin Davy & Harvey Jacobs, eds, *Land Policies in India: Promises, Practices and Challenges* (Singapore: Springer, 2017) 2; Jacobs, *supra* note 214; Colin Crawford, "The Social Function of Property and the Human Capacity to Flourish" (2011) 80:3 Fordham L Rev 1089; Rhoda E Howard-Hassmann, "Reconsidering the Right to Own Property" (2013) 12:2 J Hum Rts 180; Golay & Cismas, *supra* note 11; José Alvarez, "The Human Right of Property" (2018) 72:3 U Miami L Rev 580.

[221] Graham, *supra* note 46; Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Milton Park: Routledge, 2015); Davy, *supra* note 220 at 7. See also Roberts, *supra* note 85 on the domination of international institutions by citizens of Western states.

[222] Roberts, *supra* note 85 at 25–26.

Many ideas that cross through international law arise from Western liberal traditions.[223] In the case of property, lawyers from these jurisdictions are encouraged in their legal training to view property as a disincarnated object. In her study of the disconnection between property law and place in English, Australian, and US legal theory, Nicole Graham suggests:

> Thinking like a lawyer requires a suspension of belief in physical reality, a denial of experience. The law facilitates a culture of property articulated in terms of symbols, certificates of title, conflicting interests rather than places, homes and belongings.[224]

This is the result, she claims, of the anthropocentrism of law; that is, its tendency to separate people from place, which makes the natural world irrelevant in its application.[225] Such a disincarnated approach to property was also observed by Annalise Riles in her first experience teaching property law. She found that students expected to be taught a set of legal rules, and so the anthropological conceptions of property she proposed in the classroom—linked with personhood and the meaning of social relations—were meaningless to them.[226] She suggests that the nineteenth-century conception of property as "pre-political" contributed to this formalism.[227] The narrative on property in this context is one of unified "accepted truths"[228] detached from its socioeconomic context.[229]

The specific shape of Western liberal property rights may be variable. While common-law scholars are familiar with the image of the bundle of rights of property, civilists generally refer to the classic *usus/fructus/abusus* division of the attributes of property.[230] But both legal traditions share a conceptual emphasis on liberal principles around the rational individual, which presume that property is neutral (everyone can own and all things can be owned), abstract (disconnected from context), and alienable (part of a market economy). These features further present property rights as apolitical and ahistorical.

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[223] See generally Roberts, *supra* note 85.
[224] Graham, *supra* note 46 at 11.
[225] *Ibid* at 15.
[226] Annelise Riles, "Property as Legal Knowledge: Means and Ends" (2004) 10:4 J Royal Anthropological 775 at 778–779 [Riles, "Property"].
[227] *Ibid* at 784.
[228] Graham, *supra* note 46 at 17.
[229] *Ibid* at 176–179. See also Bradley Bryan, "Property as Ontology: On Aboriginal and English Understandings of Ownership" (2000) 13:1 Can JL & Jur 3 at 15.
[230] See e.g. the list by Anthony Maurice Honoré, "Ownership" in Anthony G Guest, ed, *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961) 107., which includes the right to exclude, alienate, control, or destroy.

But why should the right to property as an international human right be defined differently than property rights in private law? How else could we understand the international law notion if not by relying on domestic knowledge, since, after all, property rights derive in good part from private law? I suggest here two main reasons inspired by the TWAIL critique of international law and its investigation of the ways in which international knowledge is created: first, international human rights law is a distinct field of law that should not be seen as a mere continuation of domestic law, but rather imagined as its own autonomous discipline, in order to avoid the erroneous universalization of a particular version of 'truth'.[231] Second, as discussed in the previous chapter, the presumed neutrality of liberal rights hides dynamics of power which tend to exclude marginalized or underrepresented people, which goes against the empowering and inclusive mission of international human rights.

Indeed, while some international human rights may be said to derive from domestic law concepts, such as property or criminal procedural protections, it must nonetheless be conceptualized as an autonomous body of law. International human rights are meant to protect persons against acts of the state by creating a body of standards above positive law. As such, these standards do not necessarily impose substantive content, but are often framed as a general guideline for the conduct of states, such as principles of effective access to justice. In fact, many domestic norms, at least in the West, derive from pushes at the international level, not the other way around. This is the case for minority rights protection and non-discrimination rules, but also for various labour protections. This is not to say that domestic law shouldn't ever influence international law;[232] after all, the creation of international custom is directly tributary to state practice, and Article 38(1)d) of the ICJ Statute provides that national judicial decisions can serve as a subsidiary interpretative tool. But in international human rights law, this influence should be weighed against the mission of setting moral 'standards' above ordinary law. By evaluating the appropriateness of domestic legal concepts for the protection of human rights, we can ensure that injustices such as those resulting from unbounded liberal property rights are not reproduced in international law.

[231] For Graham, English property law has been 'universalized' but is not universal *per se*; see Graham, *supra* note 46 at 204.
[232] See generally Anthea Roberts, "Comparative International Law? The Role of National Courts in International Law" (2011) 60:1 ICLQ 57.

The universalization of liberal property rights silences alternative visions of property that do not conform to the logic of individualized alienable rights and market integration. These include indigenous property and localized arrangements like slum property, which are framed as 'illegal' in that they oppose the formal requirements imposed by liberal property.[233] Yet these alternative visions, in the context of human rights, may better allow us to assess how property contributes to (or inhibits) social participation, especially if they are more reflective of the relationship between people and their immediate environment and context—that is, more connected with location. Liberal property rights focus on fixed attributes to allow stable exchanges within markets. However, as I discuss in this chapter, these rigid attributes cannot generally express the complex nature of lived experiences of property, which should guide the definition of the human right to property. Ultimately, if concepts of private law are to be transferred or transplanted into international human rights, they must be adapted or translated into the ethos of human rights—which, I contend, is to enable meaningful social participation in a flexible and reflective way.

Section 2.2 of this chapter concentrates on critically analyzing John G. Sprankling's *The International Law of Property*, as an illustration of the conflation of property rights and the right to property in international law. Sprankling's work is one of very few that study the right to property from an international perspective in a systematic way,[234] yet it fails to define that right independently from domestic legal concepts. That is, it associates property with markets, and defines it using fixed and abstract attributes. I argue that defining the international human right to property by compiling existing domestic law, as Sprankling and others do, offers an incomplete image of the right, because it elides alternative stories of property.

I then make two principal distinctions between property rights and the right to property. First, the two concepts relate differently to the social world (§2.3): while property theorists tend to assume antagonism or competition between individual entitlements and social rights due to the market integration of property rights, I claim that the right to property possesses an internal *social*

[233] See generally Davies, *supra* note 51. As Gray suggests, common law itself is subject to "divergent national themes and trends"; see Kevin Gray, "Property in Common Law Systems" in Gerrit van Maanen, A J Van der Walt & Gregory S Alexander, eds, *Property Law on the Threshold of the 21st Century* (Antwerpen: Maklu, 1996) 235 at 235 [Gray, "Common law"]. The case law on property in regional human rights system provides many examples of these alternative visions of property, as illustrated in Chapter 6. On the anthropological approach to property as a critical stance on the narrow understanding of property in law, see Riles, "Property", *supra* note 226 at 776–777.

[234] For the list of scholarly works that have covered the topic, see *supra* note 220. At the UN level, see Valencia Rodriguez, *supra* note 11.

potential; that is, that it possesses the ability to enable rather than impede a person's meaningful social participation. It is a 'potential' rather than a function, because property is neither necessary nor sufficient for social participation.[235] Second, while property rights seek to regulate formal legal relationships in the abstract, the right to property reflects concrete and complex relationships in location, which determine the extent to which ownership situates a person within her community (§2.4). Indeed, the abstraction of property implicit in liberal property rights leaves little place for lived experiences of property to inform its meaning as a human right, since it ignores the localized nature of property relationships.

Since this study explores property in international law, I shall examine neither how domestic legal systems ought to approach property cases, nor constitutional protections of the right to property, although there are rich examples of progressive rights to property found in some national constitutions, notably from the Global South.[236] What I do suggest is that the international legal order should distance itself from blind commitment to liberal standards in its definition of rights, rather focusing on lived experiences as a way to understand rights. This obviously leads me at times to look at domestic practices, if only to identify these liberal standards. In doing so, I look at a variety of sources that have directly or indirectly discussed property as a human right (a minimal subset of property literature) to identify patterns indicating a liberal bias and the use of unchallenged assumptions. The link with human rights, however thin, is the main criterion I use to circumscribe the scholarly work on property that I consult, given that the literature on property is wildly diverse. This explains, for instance, why I do not refer to law and economics literature, which generally concentrates more on property as a market-oriented institution than on its potential for social participation.[237] Ultimately, I aim to challenge what Joan Williams calls the "intuitive image" of property as absolute entitlement, encouraging in its place an approach that embraces the various visions of property that exist and coexist.[238] By arguing that the human right to property

[235] I elaborate more on these in Part III, below, notably on the interactions between property and other human rights in satisfying basic needs for social participation.
[236] See e.g. the constitution of Brazil and the constitution of South Africa, discussed in Golay & Cismas, *supra* note 11 at 8–9. In both instances, the article on property elaborates on the social function of property and presents specific cases—squatting for Brazil, land reform for South Africa—as valid reasons for limiting property rights. Note that each instance responds to concrete circumstances in that country.
[237] A leading text in the law & economics literature remains R.H. Coase's "The Problem of Social Cost," in which the author argues that legal conflicts over property should not be seen as cases of harm-reparation based an abstract notion of justice, but as questions of balancing transaction costs in favour of the most efficient (commercial) use of property (R H Coase, "The Problem of Social Cost" [1960] 3 JL & Econ 1).
[238] Joan Williams, "The Rhetoric of Property" (1998) 83:2 Iowa L Rev 277 at 279.

ought to be evaluated based on concrete location rather than abstract rationales, I want to illustrate how rights derived from a lived version of universalism can participate in making human rights more responsive to reality and targeted to those who need them the most.

2.2 The Pervasive Influence of Liberal Rights: The Case of the Right to Property

There is no fixed definition of "property". The usual approach to codifying a human right to property is thus to examine how states define property domestically, and create a patchwork definition from there. This approach is precarious, however, since, first, it may lead to favouring dominant definitions (e.g. liberal property) over marginalized ones (e.g. customary land tenures); second, it fails to ask a fundamental question about property, namely whether it impedes or enables empowerment of disadvantaged and underrepresented people within their social relations. Sprankling's *The International Law of Property* (2014), which attempts to define property as a legal concept at the international level, is one of the most recent illustration of this shorthand. In this monograph, the author argues that there is now a global right to property transcending domestic law, which he supports largely by drawing comparative examples from two fields of international law: human rights law and investment law.[239] As he indicates early on, his approach blends private law and public law concepts together.[240] However, by mixing legal categories, he fails to justify a global right to property beyond the mere fact that it exists. In fact, in emphasizing the market integration of property, focusing on individual rights, and defining property by its attributes, Sprankling essentially reproduces liberal ideas in the international realm, rather than rethinking the right to property as an autonomous concept within human rights law. While this section focuses on Sprankling's book, it also illustrates, through comparisons with other authors' work on the same subject, a general tendency in literature on the right to property to conflate notions.

[239] Sprankling, *supra* note 220 at 42. Sprankling also addresses to a lesser extent examples from intellectual property, on harmonization of domestic norms through international standards, or from the Law of the Sea.
[240] *Ibid* at 4.

2.2.1 Finding the lowest common denominator in liberal definitions of property

Property at the international level is often defined by applying a comparative survey of domestic state regulations, as Sprankling does.[241] While he suggests that there is no generally accepted definition of property in international law because of the association of property with domestic law,[242] the author nonetheless searches for a consensus at the national level as a sort of a lowest common denominator of property rights. He notes: "because virtually all states recognize a general right to property under domestic law, it may be appropriate to view the global right as a general principle of law."[243] Methodologically, Sprankling adopts the point of view of the positivist lawyer, disincarnating property as a set of legal rules detached from their context, and thus allowing him to take formal state definitions of property at face value without asking further questions on alternative narratives of property that could inform an international definition of the right. He defines property in international law broadly, as an entitlement of *a* person to *a* thing, "effective against all other persons."[244] Sprankling considers each element of this definition—'entitlement', 'person', 'thing', 'other persons'—within the abstract world of legal relations, rather than its particular context.

Drawing a consensus in this way can blur nuances and granular features of property relationships, notably their diverse expressions in location. For instance, Sprankling notes that 95% of national constitutions recognize a right to property, citing as exceptions Cuba, North Korea, Venezuela, and Zimbabwe[245]—that is, authoritarian states known for their undemocratic practices—without mentioning liberal states—such as Canada—which similarly have no constitutionally enshrined protections for property, for their own reasons.[246] His selection of the 'exceptions' to the rule appears to suggest that only pariah states exclude property from constitutional protection, which is not the case. Otherwise, the reference to domestic legal systems is done in a monolithic way, approaching domestic law as a uniform, homogeneous, and static space, absent of dissenting voices. All legal regimes of property seem to flow from the same source, something exemplified in his discussion of the right to transfer: "Municipal laws manifest widespread conceptual

[241] For other examples see e.g. Golay & Cismas, *supra* note 11; Valencia Rodriguez, *supra* note 11.
[242] Sprankling, *supra* note 220 at 21.
[243] *Ibid* at 203.
[244] *Ibid* at 23.
[245] *Ibid* at 209.
[246] For Canada, see generally Alexander Alvaro, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24:2 Can J Pol Sc 309.

agreement on the acceptable methods for transferring property rights, in part due to the legacy of Roman law."[247] While this may be true for municipal laws adopted in Western states, the legacy of Roman law is far from being universal.

It must be made clear that the philosophical, theoretical, and legal sources from which Sprankling calculates his 'common denominator' are overwhelmingly Western and traditionally liberal. Aside from Roman law, he looks regularly at Greek philosophy, as well as European authors such as Pufendorf, Grotius, Locke, Bentham, Blackstone, and Robert Joseph Pothier for the civilist perspective. The use of these latter authors of liberal tradition may explain why Sprankling's reading of property as a human right focuses on individual rights and negative freedom, as exemplified in this quote: "Article 17 [of the UDHR] was a breakthrough in that it: (a) vested the right to property in private actors; and (b) contemplated that they could assert it against their own state."[248] Personal liberty is in fact cited as one of the foundational principles for the right to exclude[249] and the right to transfer[250]—which are both dominant attributes of liberal property rights.

Sprankling refers periodically to Asian law and *sharia*, which he cites as major sources of law. But he mentions them only briefly, and often to support his assertion that there exists a generally accepted international norm of property—for instance when he notes that acquisitive prescription is a mode of ownership acquisition found in various legal traditions.[251] On the other hand, non-state traditions are ignored as sources of alternative conceptions of property. Where indigenous tradition is discussed in Sprankling's work, it is not as a source of law, but as an object of formal property law, in which indigenous communities are cast as beneficiaries of the global right to property based on Western liberal concepts.[252]

In turn, Sprankling describes customary and communal regimes of property of many African and Asian states as being opposed to "official legal systems" of private property in these states,[253] suggesting that these regimes should be excluded from a consensus-based approach. Aside from the fact that this rhetorically marks customary law as 'extralegal' and thus less valuable than

[247] Sprankling, *supra* note 220 at 323.
[248] *Ibid* at 10.
[249] *Ibid* at 307.
[250] *Ibid* at 324.
[251] *Ibid* at 237.
[252] For instance when he says that in cases of conflict of rights between private parties indigenous property has precedence, *Ibid* at 46.
[253] *Ibid* at 8.

'official' law, it fails to address how liberal property rights have in many cases been transplanted through colonial expansion and domination, an historical fact that refutes the universality of the liberal model.[254] As many authors have noted, the automatic association of property with private property is a fairly recent phenomenon,[255] and to assert the universality of a singular understanding of property—however widespread it has come to be through colonial expansion—denies the plurality of visions that exist in the world. In one case, concerning intellectual property and cultural expression, Sprankling does seem to acknowledge that alternative visions can meet and clash, saying that treaty negotiations in that field had proved complicated due to differences between western systems and "traditional cultures".[256] But generally, he seems to suggest that Western liberal property rights ought to be prioritized as the source of international law of property.

The one example in which Sprankling offers a more contextual analysis outside of liberal assumptions is his discussion of property as linked with the right to housing.[257] In this case, he does not necessarily follow conventional requirements in identifying property, such as the existence of formal titles, but rather explores how international law can provide for a broader "security of tenure," notably for squatters and informal settlements. Thus, he recognizes that international human rights law has the potential to uphold relationships with the material world beyond the liberal idea of property, without expanding on this. What might explain Sprankling's different approach in the case of housing is the fact that a person's home is anchored in a concrete reality,[258] making that person's lived experience more relevant in understanding their relationship with ownership.

Sprankling's book is by no means the only attempt at defining the international human right to property by compiling domestic practices. A 1994 report examining the right to property commissioned by the United Nations, known as the Valencia-Rodriguez Report, also offers a compilation of legislation discussing property at various jurisdictional levels rather than attempting

[254] On the global spread of common law property through colonial expansion, see Graham, *supra* note 46 at 85.
[255] MacPherson situates this in the seventeenth century; see CB Macpherson, *Property, Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) at 9 [MacPherson, "Property"]. See also Rifkin, *supra* note 213 at 188–190; Gray, "Common Law", *supra* note 233 at 250–251. As Graham notes, land practices in England, prior to enclosures, were inconsistent with private property's rules of exclusion and alienability (Graham, *supra* note 46 at 51–84).
[256] Sprankling, *supra* note 220 at 85.
[257] *Ibid* at 123–129.
[258] See §7.4, below, on the relationship between the right to property and the right to housing.

a self-contained definition of the human right.[259] The report notably falls short of its objective of studying the human right to property in all its complexity by focusing too much on Western liberal sources, such as Christian conceptions of property, the works of Locke and Grotius, and the American and French declarations of rights.[260] Similarly, a 2009 *Rights & Democracy* legal opinion on the human right to property offers a compilation of accepted uses of the right to property, emphasizing the criteria developed by the European Court of Human Rights, but does not delve into a more inquisitive exploration of how property provides for social participation in concrete circumstances.[261]

The reliance of Sprankling and others on formal state definitions of property rights delegitimizes lived experiences of property. According to property theorist Sarah Keenan:

> Theories of property that take law as either the starting point or final answer to the question of what belongs to whom fail to acknowledge the heterogeneity of networks of belonging and of people's experiences of property; they tend to reinforce rather than challenge the underlying theoretical and political frameworks that are reflected in law.[262]

What Keenan suggests is that law's formal definition of property and the assumptions it carries—property being neutral, apolitical, abstract, and alienable—does not necessarily encompass all the ways in which property is concretely experienced. *A fortiori*, if human rights ought to be drawn from lived experiences, domestic property law cannot be taken as a starting point for definition of the human right to property. When such a definition is drawn from a compilation of existing formal definitions while downplaying alternative visions of property such as those of indigenous peoples, not only are property's assumptions not challenged, but they are taken as a given.

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[259] Valencia Rodriguez, *supra* note 11. The Valencia Rodríguez report is the result of multiple initiatives at the General Assembly to offer further guidance and information on the human right to property. See for instance *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*, GA Res 41/132, UNGAOR, 41st Sess, 97th Mtg, UN Doc A/RES/41/132 (1986), asking the Commission of Human Rights to "resume consideration of the right of everyone to own property alone as well as in association with others." The Commission later nominated an independent expert to complete the study (Commission on Human Rights, UNESCOR, UN Doc Res 1991/19, 1 March 1991). On the shortcomings of the report in defining property as human right, see also Jacobs, *supra* note 214 at S92.

[260] Valencia Rodriguez, *supra* note 11 at para 10-21.

[261] See generally Golay & Cismas, *supra* note 11. On the reliance on ECtHR case law in drawing the principles of the right to property, see also van Banning, *supra* note 11.

[262] Keenan, *supra* note 221 at 79.

2.2.2 A market-based approach to property relations

Approaching property as an abstract right leads to conflating ideas not only across jurisdictions, but also across legal fields, something also observable in Sprankling's monograph.[263] Sprankling describes Article 17 of the *UDHR* as the "cornerstone of international property law,"[264] yet, as mentioned above, he draws his own definition of a global right to property not only from human rights law, but also in good part from investment law. One reason for this, he explains, is that international organs related to both fields have generated a substantial body of material, including case law, on property, from which to draw patterns, such as the fact that international law creates, protects, and sometimes restricts property rights.[265] Once again, his method of looking at the law from a wide angle and at a higher level of generality supplants a more grounded and contextual approach.

The fact that Sprankling approaches human rights and investment law simultaneously to draw his conclusions suggests that he considers the idea of property the same in both settings, built on the same foundations, namely market integration and the desirability of favouring commercial exchanges.[266] Market integration as a logical match with property rights is suggested in many different ways. For instance, he suggests that globalization, by increasing property transactions across borders, has led to the more recent development of international property law.[267] The five attributes of property he identifies—the rights to acquire, use, destroy, exclude, and transfer property[268]—also suggest that market integration is fundamental to Sprankling's global right to property. These resemble the proverbial 'bundle of sticks' associated with common law property. Sprankling tends to automatically consider these attributes of property within a capitalist market economy; for instance, he explains that the right to exclude is justified by the need to maximize efficient use of property, rhetoric that skirts a utilitarian vision of 'use'.[269] This association between

[263] But also for instance in J Alvarez, *supra* note 220; Howard-Hassmann, *supra* note 220.
[264] Sprankling, *supra* note 220 at 258.
[265] *Ibid* at 41–42.
[266] De Soto's theory of property also relies heavily on the assumption that property relationships exist solely within a given market, which makes property acquire value in the form of capital, Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000). For a more detailed discussion and analysis of de Soto's work, see below, §7.2.
[267] Sprankling, *supra* note 220 at 18.
[268] *Ibid* at 220. Sprankling elaborates on each of these attributes, and considers the right to use as the 'central' and more fundamental attribute (*ibid* at 250).
[269] *Ibid* at 306. The utilitarian justification is also repeated for the right to use (*ibid* at 251), and the right to transfer (*ibid* at 324). For a more detailed discussion on the use-value of property, see below, §7.2.

property and productivity is very similar to Locke's justification of private property, which suggests that land ought not to remain uncultivated, and which became a leading principle of liberal property rights.[270] Similarly, he identifies the right to transfer as a "cornerstone of every market economy," which supposes that property is inherently alienable.[271]

While the market integration of property seems self-evident when discussing investment law, its relevance is not as clear for human rights law. Sprankling does briefly mention that human rights law and investment law stem from completely different rationales, but he believes that they overlap enough to justify their simultaneous examination.[272] From these "similar norms […] treated in a similar manner," he draws a new category of law, the 'global' law of property, which in his opinion "safeguard[s] the legitimacy of the law."[273] Yet it is not clear how norms with completely different objectives—ensuring social participation versus securing stable investments—can be deemed similar.

Again, the fact that some concepts overlap does not mean that they should be treated the same. Take for instance the question of titling. From an investment law point of view, clear, formal titles of property are essential to ensure that a commercial investment be secured, because they help avoid conflicting claims from third parties. From a human rights perspective, a secured title may help protect a homeowner from arbitrary state interference, thus securing her need for shelter. But it can also impede the fulfillment of human needs—if a state were to grant to a third party a title over a large plot of land on which individuals have informally settled for decades, for instance.[274] Thus, understanding property as necessarily attached to markets does not help human rights lawyers in their assessment of how best to protect social needs through property.

Investment law and human rights are already legal categories in their own right, and attempting to merge them carries the danger of oversimplifying notions rather than clarifying them. In fact, domestic law already recognizes that some objects of property ought to be addressed differently

[270] Locke, *supra* note 51, Book II, at para 26-35. See also Waldron, *supra* note 64 at 140 & 177; Carol M Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder: Westview Press, 1994) at 16 on the concept of useful labour and its integration in common law [Rose, "Persuasion"].
[271] Sprankling, *supra* note 220 at 323.
[272] *Ibid* at 347.
[273] *Ibid* at 348.
[274] In fact, states where large informal housing settlements exist usually do not resort to mass expropriation considering the high social costs this would imply, see Boaventura de Sousa Santos, "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada" (1977) 12:1 Law & Soc'y Rev 5.

in law depending on what they are meant to accomplish. For instance, intellectual property is treated differently from general rules of property law because it stems from a different rationale: while general private property rights are normally exclusive, intellectual property rights generally grant limited access while still protecting the rights of the creator. Similarly, family law may protect certain forms of property against the free operation of markets, in particular the family home and attached goods of a patrimonial nature,[275] thus anchoring these specific 'things' within the concrete relationships they represent. What these examples show is, first, that the various types of property recognized in domestic law cannot simply be jumbled together as a universal right to property, and second, that even in domestic law the alienability of property is not its only defining quality.

The definition Sprankling offers for the concept of human rights may explain why he considers it plausible to treat all property related matters similarly. Of the human right to property, he writes:

> Classifying the right as a "human right" suggests that it is fundamental in nature, and thus entitled to enhanced protection. As a general matter, "human rights" refer to "freedoms, immunities, and benefits which, according to widely accepted contemporary values, every human being should enjoy in the society in which he or she lives." Human rights hold a superior position among international law norms.[276]

What is striking in this definition is its omission of any reference to the familiar notions of morality, dignity, or self-realization, relying rather on a definition of human rights suggested by the American Law Institute that emphasizes notions of "freedoms, immunities, and benefits," which could arguably be deemed necessary for efficient investment transactions. The moral foundations of human rights, for Sprankling, seem secondary.[277]

Again, Sprankling is not the only one examining the right to property across legal fields. José Alvarez, who recently wrote an extensive article on the human right to property, discusses more directly the justification of property as a human right, addressing how property can be associated with notions of dignity and how it is instrumental to many other human rights.[278] Yet he still tends

[275] In Quebec private law, for instance, certain spousal property is automatically included in the family patrimony, such as the main residence and its furniture, regardless of who owns it, in which case restrictions to their alienation enter in force without the possibility of renunciation (Article 414-426 Civil Code of Quebec, CCQ 1991).
[276] Sprankling, *supra* note 220 at 205., citing a text from the American Law Institute, *Restatement of the Foreign Relations Law of the United States*, 3rd ed (American Law Institute, 1987) at 701.
[277] On the necessity of a foundational theory of human rights, see discussion above, at §1.3.
[278] See J Alvarez, *supra* note 220 at 669–675. On the instrumentalism of the right to property, see also generally Howard-Hassmann, *supra* note 220.

to blend legal categories when approaching the right to property from an international perspective. Indeed, while he extensively reviews the case law of the Inter-American Court of Human Rights in relation to the right to property, he also relies significantly on the examples of bilateral investment treaties, international investment agreements, and free trade agreements.[279] His conclusion that there are multiple rights to property at the international level and that this should be seen as a strength[280] is interesting in the sense that it recognizes various relationships of property, but, just like Sprankling, he fails to establish a clear distance between property as human right and property as commercial asset.

2.2.3 The limits of defining the right to property through 'attributes'

One feature of liberal property rights is their focus on fixed attributes: property as a domestic legal concept is more accurately described as a series of rights which derive from the act of ownership, such as the rights to acquire, to exclude, or to transfer property. As mentioned above, Sprankling follows this logical structure in his definition of a global right to property by assigning it five static attributes. In private law, these qualities are said to be necessary to maintain certainty, stability, and legitimacy in commercial exchanges,[281] a reasoning which Sprankling seems to take as a given in the international arena. Formal titles, for instance, are essential for efficient property transactions: they establish clear entitlements and consolidate markets, allowing for free commerce and the movement of capital, and are thus embraced in Western liberal legal traditions for the equality of treatment, security of transactions, and unity of language they provide.[282] In property law, this certainty, stability, and legitimacy is guaranteed in part by granting a certain number of immutable attributes to ownership, one of which is the right to exclude others, whether as part of common law's bundle of rights or civil law's principle of absolute *dominium*.[283] While there are

[279] See e.g. J Alvarez, *supra* note 220 at 651–652. Golay & Cismas also suggest that the standard for compensation should draw from all subject matter, including investment law and human rights, see Golay & Cismas, *supra* note 11 at 28.
[280] Alvarez, *supra* note 220 at 653–655.
[281] Kevin Gray & Susan Francis Gray, "The Idea of Property in Land" in Susan Bright & John K Dewar, eds, *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998) 15 at 32.
[282] See e.g. Adam Smith, *The Wealth of Nations* (London: W. Strahan and T. Cadell, 1776); Coase, *supra* note 237. See also Daniel Bonilla Maldonado, "Extralegal Property, Legal Monism, and Pluralism" (2009) 40:2 U Miami Inter-Am L Rev 213 at 216–220. Bonilla Maldonado contrasts formal titles to the informal property relationships which develop in illegal settlements around Colombian urban centers.
[283] Ugo Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (Westport, Conn: Greenwood Press, 2000) at 3 [Mattei, "Basic principles"]; Gray, "Common Law", *supra* note 233 at 264; Waldron, *supra* note 64 at 49. The conceptualization of property as absolute exclusion of others, although often contested or

various interpretations of 'exclusivity,'[284] the classical liberal understanding is that it provides protection against undue interference by the State and third parties.

What fixed and neutral attributes do is limit the extent to which the conceptual boundaries of property can be moved, challenged, and redesigned. The problem with focusing on these attributes and transferring them to the realm of human rights is that their rigidity does not adapt well to the plurality of voices on property. For instance, customary indigenous understandings of property often view land as inalienable[285] and thus fixed rules for transfer of property as irrelevant. Fixed attributes are problematic not only from the point of view of customary property. Olivier De Schutter, former UN Special Rapporteur on the right to food, notes in a study on the right to land that limiting transfers of property actually protects small landowners, since it relieves them from market pressures,[286] making alienability a secondary concern for them. Rather than viewing property relationships as neutral commercial transactions, human rights lawyers should approach them as social interactions that are contextual and diverse, focusing less on attributes and more on determining why and how ownership contributes to social participation, and within what context. Sprankling does not ask these questions, let alone answer them. As Williams suggests, "Labeling something as property does not predetermine what rights an owner does or does not have in it."[287] Only by approaching the meaning of property in a dialogical manner, and letting the empowered social person answer the 'whether, how, what, and when' questions of their relationships with property can we make sense of it as a human right.

As is emphasized by TWAIL literature, fixed neutral attributes can hide historical power dynamics. The liberal notion of productive 'use,' for instance—which suggests first that privately held resources are more productive and thus more valuable, and second that agriculture is the most productive activity—automatically condemns communal/collective tenures of land and nomadic

diluted, is generally associated with eighteenth-century English jurist William Blackstone's definition of private property as exclusive dominion in *Commentaries on the Laws of England*, as emphasized notably by Carol M Rose, "Canons of Property Talk, or, Blackstone's Anxiety" (1998) 108:3 Yale LJ 601 [Rose, "Canons"].

[284] Katz for instance rather views exclusion as an owner's exclusive ability to set an agenda on the owned thing, Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58:3 UTLJ 275.

[285] van Banning, *supra* note 11 at 61; Ugo Mattei, "Socialist and Non-Socialist Approaches To Land Law: Continuity and Change in Somalia and Other African States" (1990) 16:1–4 Rev Socialist L 17 at 21–25 [Mattei, "Socialist"]; Valencia Rodriguez, *supra* note 11 at para 151; Olivier De Schutter, "The Emerging Human Right to Land" (2010) 12:3 Intl Community L Rev 303 at 317.

[286] De Schutter, *supra* note 285 at 322.

[287] J Williams, *supra* note 238 at 297.

relationships with it as inferior, in the name of rationality.[288] Since some indigenous peoples the Europeans encountered in North America relied predominantly on hunting and gathering to live, and ranged across their territories for seasonal harvesting rather than enclosing it, the Europeans justified taking it from them by arguing that it ought to be put to 'better'—agricultural—use. In this instance, it is precisely the fact that property and its attributes are presented as rational and logical consequences of the need for stability and certainty in property relations that enables the domination of vulnerable and disempowered people, since the Europeans' ethnocentric sense of superiority is hidden behind the rational language of efficient use.

Ultimately, Sprankling offers a commendable compilation of the current treatment of property-related matters in international law, touching upon a wide variety of themes, but offers little analytical insight on the meaning of property as a human right. His monograph offers an example of the ways in which underlying assumptions about property, carried through legal training, are hard to shake when it comes to addressing the human right to property. He admits, however, that the current state of the global right to property "reflects the liberal Western tradition of individualized ownership," something which he says undermines the protection of vulnerable groups such as de facto owners and communal property owners.[289] And while this Western liberal influence on the understanding of the human right to property significantly weakens its strength as a human right, I would suggest that this weakness can be overcome if its definition distances itself from dominant discourses of property at domestic level, and reorients itself with lived experiences of property in location. One way of avoiding the confusion is to treat the human right to property as its own distinct subject, rather than blending it with 'false friends' such as domestic property rights. More specifically, by establishing a boundary with liberal property rights, one can begin to appreciate the diversity of stories of property that can inform the definition of the human right to property. And what these concrete stories can reveal is how property contributes to social participation. The next section discusses the relationship between property and the social world.

[288] The idea of productive and maximized use through private property goes back to Locke and has been defended since then by various authors, for instance, in the twentieth century, Garrett Hardin, "The Tragedy of the Commons" (1968) 162:3859 Science 1243. On the liberal notion of use and its link with agriculture, see Fitzpatrick, *supra* note 55 at 84–90; William W Bassett, "The Myth of the Nomad in Property Law" (1986) 4:1 JL & Religion 133 at 144–149.

[289] Sprankling, *supra* note 220 at 357.

2.3 The Social Function vs. the Social Potential of Property

If the right to property as a human right ought to be distinguished from domestic liberal property rights, I suggest that one point of distinction is the way each concept relates to social life. In a 2009 legal opinion on the human right to property commissioned by the International Centre for Human Rights and Democratic Development (Rights & Democracy), authors Christophe Golay and Ioana Cismas stated that property is both an intrinsic means of survival and an impediment to the realization of human rights.[290] This apparent contradiction is possible only because of a conflation of domestic property rights with the human right to property, yet it gives a hint as to what distinguishes them: while property rights are in tension with the community in that they can limit access to resources necessary for meaningful participation, the human right to property rather seeks to integrate people *within* their communities by enabling their basic needs. This implies that the human right to property is not limited to protecting powerful owners, but aims particularly to empower marginalized people—for example, those who lack access to formal ownership or are left behind in a capitalist economy.

It must be made clear that property, even in its liberal iteration of an individual(istic) private right isolated from its context, is always social. It is social first because its 'attributes,' such as exclusivity and alienability, imply interactions with others. In fact, as soon as property rights isolate a thing from the common pool of resources, that affects other people's claims to that thing.[291] Thus, property implies social relations, often characterized by power dynamics which oppose owners to owners, owners to non-owners, and owners to states.[292] Fudge and Tucker explain another way in which liberal property is social: while it is framed as an individual right of the private sphere, the set of claims property rights defend necessarily depends on state recognition and enforcement.[293] In that sense, the operation of property depends on the community, and has an

[290] Golay & Cismas, *supra* note 11 at 2. This tension within property is also underlined by Davies, *supra* note 51 at 7.
[291] See Alexander & Peñalver, *supra* note 199 at 128; Richard Schlatter, *Private Property, the History of an Idea* (London: Allen & Unwin, 1951) at 168–169. This association of property and the social dates back to early natural law theories, for instance in the works of Aristotle, see on this Waldron, *supra* note 64 at 6–7; Schlatter, *supra* note at 11. The social function of property is also emphasized in the Catholic Church's social doctrine, see for instance the Papal encyclical *Rerum Novarum*, *supra* note 49, at para 22.
[292] Ivana Isailovic, "Indigenous Peoples' Claims and Challenges over Control of Property" in Ugo Mattei & John D Haskell, eds, *Research Handbook on Political Economy and Law* (Cheltenham: Edward Elgar Publishing, 2015) 436 at 439.
[293] Fudge & Tucker, *supra* note 3 at 11.

impact on it. This is why many property scholars have emphasized what is generally called the 'social function' of property, in an attempt to make property rights more inclusive.

The idea of social function is very broad, and relates generally to the interactions between property and social life. I suggest there are three ways in which these interactions can be understood. They can be approached as a passive relationship, in which the mere existence of property creates social outcomes in favour of the community; they can represent an external relationship, in which property is in tension with the social world and must be restricted to provide social benefits; or they can be understood as internal relationships, in which property innately provides social benefits. I contend that this last relationship—the 'internal' one—is best suited to support the definition of a human right to property as providing meaningful social participation. To make the distinction clear, I will call this perspective the social *potential* of property—as opposed to its social *function*. Just like Arendt's "power," the potential of property depends on context, meaning that it can be actualized or realized only through concrete relationships in location, and that it will differ from one person to another.[294] The following sections elaborate on these various relationships and on the social potential of property.

2.3.1 The social functions of property: Passive property and external relations

The idea of property in Western liberal thought does not ignore the needs of the community. Indeed, many versions of it, including that of John Locke, convey the message that resources of the Earth ought to benefit as many people as possible. While Locke ultimately focused his right on individual self-preservation, he nonetheless stressed that the natural right to property did not justify one individual exerting power over another by virtue of having accumulated more resources:

> But we know God hath not left one Man so to the Mercy of another, that he may starve him if he please: God [...] has given no one of his Children such a Property, in his peculiar Portion of the things of this World, but that he has given his needy Brother a Right to the Surplussage of his Goods; so that it cannot justly be denyed him, when his pressing Wants call for it. And therefore no Man could ever have a just Power over the Life of another, by Right of Property in Land or Possessions.[295]

[294] Arendt, *supra* note 14 at 200.
[295] Locke, *supra* note 51, Book I at para 42. Idea reiterated in *ibid*, Book II at para 31.

He adds to this that the principle of charity should grant to the needy some right over "another's Plenty."[296] The natural law of property, according to Locke, thus provides that everyone should have a private share of the resources of the world because no single person has a moral claim on the accumulation of property beyond what is necessary for themself.[297] But Locke also says that these moral restraints associated with natural law do not automatically transfer to the *conventional* right to property.[298] While God gave Earth to mankind so that all could reap its benefits, Locke says that God also gave men freedom: freedom to acquire property through their labour without express consent from others,[299] and freedom to make laws to govern themselves as they see fit. Consequently, individuals are able to exercise their free will over property, which includes entering into conventional agreements that facilitate the accumulation of property. The State, created by convention, cannot supplant the will of free persons; it can only formalize these agreements and protect them.[300]

And so we see that liberal property has an ambivalent place in social life, in which property's social function is either passive or based on its restraint. The passive social function of property derives from its utilitarian justification, often defended through the 'tragedy of the commons,'[301] a theory which suggests that private property is ultimately justified by the necessity to maximize the production of scarce resources for the greater good of the general public.[302] As populations grow, and with them resource use, private property is said to be more efficient, based on the assumption that people are self-interested and thus have more incentive to maximize privately held resources than common ones.[303] Through clear entitlements, guaranteed notably by the right to exclude, private property further creates benefits for society as a whole by establishing stable expectations, securing peaceful exchanges, and maximizing utility or value. And since social benefits are supposed to flow naturally from a clear allocation of resources, private property ought not to be

[296] *Ibid*, Book I, at para 42.
[297] Reiterated in *ibid*, Book II at para 30: "As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in. Whatever is beyond this is more than his share, and belongs to others."
[298] *Ibid*, Book II at para 45–50.
[299] *Ibid*, Book II at para 27.
[300] According to Fudge and Tucker, the role of the liberal state in recent history has precisely been to protect private property in order to secure the capitalist economy, Fudge & Tucker, *supra* note 3 at 6–7.
[301] Expression first coined by Hardin, *supra* note 288.
[302] A thesis central to Adam Smith's *laissez-faire* theory, see A Smith, *supra* note 282. See also Waldron, *supra* note 64 at 31–32; Mattei, "Basic principles", *supra* note 283 at 2.
[303] Hardin, *supra* note 288.

otherwise bounded by positive rules which would distort this natural course—for instance, the regulatory reallocation of resources to those in need. The passive social function of property is thus foundational to the rhetoric of liberal property rights and capitalist economics, since it insists on unrestrained individual freedom.

And yet, the passive social function of property is not reflected in practice, seeing as states generally regulate property to avoid accumulation of resources in the hands of a few, making it a relative right, in the sense of a right subordinated to other social interests. In this second scenario about the interaction between property and social life, it is the external limitations on property which achieves its social function, not property itself. Indeed, liberal states often put *external* restraints on property—precisely to avoid the accumulation of resources in the hands of a few to the detriment of the community. Property can be limited by direct regulation (the most evident example being taxation) but the full implications of property can also be limited by tenancy rights, environmental regulation, and labour regulation, among countless other means.[304] The social function of property, in this perspective, can even result in confiscation of property—for instance, land expropriation in the public interest. The external perspective thus reveals antagonism and tension between social protection and individual property.

Yet placing external constraints on property to improve social participation does not explain how property in itself is a human right, since in this account it is not the 'act' of ownership that provides for social participation, but rather the limitations or constraints on exclusive dominion which create social benefits for the person of human rights.[305] This tension is endemic to the way liberal thought pits individuals against each other within societies, which in turn translates into the notion that property's 'social function' is a limitation. Liberal private property and the common good are opposed to each other as they compete for the same resources; external constraints serve to balance the distribution of resources in favour of the common good.

What I want to emphasize here is that many authors who have attempted to recast property as a more progressive and inclusive legal and political institution by emphasizing its social function in

[304] Singer and Gray discuss the numerous obligations and limits put upon private ownership, see Joseph William Singer, "The Reliance Interest in Property" (1988) 40:3 Stan L Rev 611–751 [Singer, "Reliance"]; Gray, "Common Law", *supra* note 233. See also Fudge & Tucker, *supra* note 3 at 11 on how labour regulations limit the full application of private property in capitalist societies.
[305] As noted by Alexander & Peñalver, *supra* note 199 at 129.

its above two guises leave the liberal antagonism between social welfare and individual property unchallenged. As A J Van der Walt notes, talking of social obligations attached to property tends to make property the normality, thus making the propertyless the exception to the norm.[306] Generally, those who elaborate on the social function of property start by saying that property is never fully exclusive nor fully absolute, and that it is associated with social or public obligations.[307] The 'rhetoric' of absolutism—famously illustrated by Blackstone's description of property as "sole and despotic dominion"[308]—has been said by many to be the expression of a liberal ideal rather than an accurate reflection of reality, seeing as property has always been constrained in various ways, whether owned individually or communally.[309] Carol Rose notes that, at the time Blackstone was writing, family and community obligations mitigated property rights—something which he himself acknowledged, says Rose—making his exclusivity talk a "rhetorical figure describing an extreme or ideal type rather than reality."[310]

The contingent nature of liberal property is observed for instance by the self-proclaimed American progressive property school, led by scholars Gregory S. Alexander, Eduardo Peñalver, Joseph Singer, and Laura Underkuffler.[311] In their joint "Statement of Progressive Property,"[312] written as a manifesto, these authors emphasize the duality of property as promoting both individual and social interests, from which derive moral obligations. Rather than focus on notions of exclusion, they use the language of values to illustrate the complex nature of property, associating it with "life, human flourishing, the protection of physical security, the ability to acquire knowledge and make choices, and the freedom to live one's life on one's own terms."[313] They also recognize that the resources of property are necessary for human life and development, and that property is a part of community life.[314] Progressive property is pragmatic in the sense that the school aims to work

[306] A J Van der Walt, "Property and Marginality" in Gregory S Alexander & Eduardo M Penalver, eds, *Property and Community* (Oxford: Oxford University Press, 2010) 81 at 93–97.
[307] See e.g. Singer, "Reliance", *supra* note 304 at 622. Rosser suggests that the fact that the right to property is not absolute is non-controversial, being accepted even by libertarians, Rosser, *supra* note 98 at 145.
[308] William Blackstone, *Commentaries on the Laws of England* (London: Cavendish, 2001). See Book II, Chapter 1, "Of Property in General".
[309] On restrictions on absolute property in Feudal Europe, see J Williams, *supra* note 238 at 281–282. See also Kevin Gray, "Property in Thin Air" (1991) 50:2 Cambridge LJ 252 at 260–277, on various constraints imposed throughout history on common law estate property [Gray, "Thin Air"].
[310] Rose, "Canons", *supra* note 283 at 603–604.
[311] For a detailed description of the progressive property school, see the critical account by Rosser, *supra* note 98.
[312] Greogry S Alexander et al, "A Statement of Progressive Property" (2008) 94 Cornell L Rev 743.
[313] *Ibid* at para 2.3.
[314] *Ibid* at para 4-5.

within the current paradigm to render more inclusive results, notably in favour of the community. As Ezra Rosser notes, "Progressive property is an example of leading scholars attempting to make the best out of property law's available material."[315]

However, the premise of progressive property is that benefits to the community derive from diluting property's effects rather than from these effects. Singer, for instance, presents many legislative examples to illustrate how legal rules, in practice, do not protect the owner's absolute and exclusive dominion, but rather provide non-owners with rights over property, whether through the law of adverse possession, tenancy protection laws, or welfare rights.[316] Using as an example the ownership of an industrial plant, Singer explains that the single-owner approach is misleading, since many actors—shareholders, management, workers, suppliers, communities—make up a "network of ongoing relationships" around property, and that the relevant question shouldn't be who owns, but "who has a right to say something about the use or disposition of the property."[317] Singer concludes that legal systems, through limitations on owners' rights, operate a "sharing or shifting of property interests" in favour of non-owners.[318]

Despite the conceptually redistributive feature of this argument, Singer's approach to the social function of property does not address how property provides for social participation for the owner, but rather conceives of owners' rights being constrained by the obligations that third parties' reliance interests impose on them. This is because he approaches property mainly as a political and economic institution within capitalist societies, where third parties (like workers) can be overwhelmed by its unbounded application. He extends the reach of the bundle of rights, adding to it a bundle of duties, without necessarily explaining why 'progressive' property rights help workers more than, say, labour legislation. In the end, Singer does not challenge the liberal premises of property; rather, he embraces these premises as necessary for market exchange, but adds that this "core" is completed with "altruistic" rules meant to make benefits and losses shared.[319] And while Singer applies his theory to the ownership of large industries, it is not clear how it applies in more modest cases, such as home ownership.

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[315] Rosser, *supra* note 98 at 114.
[316] Singer, "Reliance", *supra* note 304.
[317] *Ibid* at 641. In a similar line of thought, Katz has argued that the notion of exclusivity should be seen as an exclusive right to make choices over property, Katz, *supra* note 284.
[318] Singer, "Reliance", *supra* note 304 at 623.
[319] *Ibid* at 634–635.

The presence of unchallenged liberal premises within progressive property has been criticized for underplaying how liberal property has historically led to social inequalities that persist to this day.[320] Keenan for instance notes that progressive property proponents:

> [end] up arguing for property to be more attentive to liberal ideals of equality and civic virtue, but not seeking to question the concept of property on any deeper level—for example the relation between property and belonging, or between property and structural injustice.[321]

More specifically, Rosser argues that the forward-looking approach of progressive property tends to ignore important historical facts in the elaboration of the United States' property regime,[322] notably that it was built around the dispossession of indigenous lands and the oppression of African Americans.[323] He adds that this omission makes it easy to miss how social inequalities historically associated with private ownership persist, notably through inheritance rules. This is also underlined by Cheryl Harris, who argues that the denial of the historical past of dispossession and oppression and the rhetoric of neutrality in law perpetuates racial inequalities in current rule-making.[324]

To counter the neutralizing effect of liberal rhetoric, Rosser urges us to instead confront the historical facts of property directly and challenge assumptions, while using the lessons from the past to foster transformative change based on acquisition and distribution.[325] Taken together, these critiques outline how the focus on liberal ideals can obscure the reality of power dynamics on the ground, impeding any contextualization of rights. Conversely, localized property relationships can expose how liberal property rights may maintain inequalities by concentrating power in the hands of those who own resources, but it may also show how the act of owning can empower social agents in their quest to attain meaningful social participation.

2.3.2 The social potential of property

In contrast to the passive and external relationships between property and social good, it is possible to think of social integration as an internalized feature of the human right to property. In other

[320] Williams notes the tendency of liberal individualism as rhetoric to erase history in favour of arguments of scientific objectivity, J Williams, *supra* note 238 at 293.
[321] Keenan, *supra* note 221 at 61.
[322] Rosser, *supra* note 98 at 109.
[323] *Ibid* at 131–134.
[324] Harris, *supra* note 98.
[325] Rosser, *supra* note 98 at 111–112.

words, from the internal perspective, the social benefits of property derive from the act of ownership rather than from its limitations. For instance, ownership of a residential house provides shelter, and allows the owner to physically be in their neighbourhood and interact with others in a meaningful way. In this case, property empowers the owner without allowing them to overpower others. To avoid confusion with the often-used expression 'social function of property', I suggest we call these internalized benefits the social *potential* of property. The idea of potential suggests that ownership can foster a person's autonomous capacity to develop into a full social being, in harmony with the community. It also implies a possibility, a choice, an option: it is not meant to frame property as an absolute entitlement or as something 'natural'; it does not precede or define membership in society; it is, rather, one enabling right among many. The social potential of property thus implies that that right to property interacts with other rights to accomplish social participation, something I will discuss further in Part III. Finally, implicit in the idea of 'potential' is that its realization depends on concrete circumstances unique to each person.

Implied in the internalized social potential of property is that the person of human rights is a social being, a member of a community (usually many communities), which means that the determination of her needs is always bound up with the relationships she has with others in society. Thus, property and the interests of the group are not always opposed. This approach obviously clashes with the liberal individual, as many authors have pointed out. Gould, for instance, discussing the nature of property rights, sees the individual of liberal theory as being external to social relations and purely self-interested, always interacting in an adversarial manner with others.[326] Similarly, Alexander & Peñalver note that both utilitarian and liberal justifications of the relationship between property and society presuppose that individuals preceded communities, entering them with their "own pre-existing goals and desires"; in these appreciations, the community, they say, is purely instrumental to securing individual freedom.[327]

To provide an alternative to the liberal assumptions about the individual, both Gould and Alexander & Peñalver emphasize the sociality of human beings. Gould suggests we talk instead of "individuals-in-relation,"[328] whose fundamental needs should be assessed based on their

[326] Gould, *supra* note 168 at 720.
[327] Alexander & Peñalver, *supra* note 199 at 134. For a similar discussion on the relationship of the individual with the community, see Stone, *supra* note 219 at 628–631.
[328] Gould, *supra* note 168 at 723. She opposes the individual-in-relation both to the liberal individual and the socialist individual, whose interests are simply absorbed by those of the group, *ibid* at 721.

interaction with the social environment, which would lead to an understanding of property as means to attain agency and positive freedom.[329] For their part, Alexander & Peñalver suggest that humans are both autonomous and dependent on the community.[330] They add that, within their social context, humans strive to attain "human flourishing,"[331] and that communities are "the mediating vehicles through which we come to acquire the resources we need to flourish and to become fully socialized through the exercise of our capabilities."[332] Communities both satisfy and shape individual preferences, and because members of the community recognize others as also having rights, they are morally obliged to honour those rights.[333] All in all, these authors directly assess how social life influences the determination of human needs, rather than viewing society as impeding them, as classical liberalism suggests.

The question left to be answered is how property is innately social, in other words, how it provides the conditions for social participation. There are various ways in which the social potential of property has been described. Alexander & Peñalver, drawing notably on the works of Amartya Sen and Nussbaum, suggest a capabilities-based approach to property, linking "human flourishing" with the capabilities of life, freedom, practical reason and affiliation understood within their social context.[334] Harvey Jacobs suggests that people "yearn for property" because "it almost always reflect[s] the deep desire for the security and stability that property […] traditionally conveys."[335] More specifically, Theo van Banning lists the various ways in which property is a "human" right, namely that it provides security, autonomy, protection against arbitrary state interference, and political participation, as well as satisfying social needs for subsistence.[336]

These few examples show that there are many ways in which property can enable people to participate fully in social life, whether by maintaining their physical health, fostering interpersonal bonds, or allowing their political participation. These various views suggest that it is not necessary to limit the ways in which property can provide for social participation. Instead, following a

[329] *Ibid* at 722.
[330] Alexander & Peñalver, *supra* note 199 at 134–135. On this double nature, see also Davies, *supra* note 51 at 2.
[331] Alexander & Peñalver, *supra* note 199 at 135.
[332] *Ibid* at 139.
[333] *Ibid* at 140–143. See also Crawford, *supra* note 220 at 1094, on a reading and interpretation of Alexander & Penalver.
[334] Alexander & Peñalver, *supra* note 199 at 138.
[335] Jacobs, *supra* note 214 at S96.
[336] van Banning, *supra* note 11 at 181–184.

dialogical approach to human rights, I suggest that what matters is asking the right questions about a person's relationship with property in order to determine if it merits the status of a human right. For example, does a person relate to property through the concrete relationships it enables, or rather emphasize its fungible value in the abstract? Does a person's property provide for their basic needs as a social person (food, shelter, affiliation, freedom of expression, political participation, etc.) or is it used merely for its commercial value? Does a person's use of property enrich her social life or does it tend to isolate her while excluding and undermining other people's social needs? Asking these and similar questions can help reveal the social potential of property.

To say that property as human right is anchored in social reality also implies that it is a right in location, since social life evolves in location. The next section will examine how setting the human right to property in location distinguishes it from liberal property rights, which often ignore the locality of ownership in favour of the abstract space of capitalist markets.

2.4 Property as a Human Right: A Concrete Right in Location

Property as a human right implies that property reflects a relationship with the physical world, since it is precisely this concrete relationship that allows social participation. But this relationship is not an isolated one; rather, it is integrated into a complex network of social, cultural, interpersonal, environmental, and ecological relationships, set within a specific place, all of which mutually influence each other. Thus, the way that property acts as a human right—its potential for social participation—can never be predetermined, as it is contingent on this network of relationships, which can be revealed only through a person's lived experience. Still, the locality of the human right to property offers a basis for distinguishing it from neutral and abstract property rights, since property's ability to fulfill needs is determined by concrete, observable, and identifiable social relationships. In turn, lived experiences of property in location can lead to universal principles of human rights through a dialogical process in which shared values are drawn from the bottom up, while maintaining the necessary flexibility for them to be challenged and reinforced by the social person.

2.4.1 What place for possessions in property relationships?

For the human right to property to be concrete, the object of ownership must be taken into account within the complex network of relationships that surrounds property. In common law, property is

often described as more a relationship between persons (the Hohfeldian definition) than a relationship with a thing.[337] The focus on persons rather than things derives once more from the principle of exclusivity, which implies that ownership provides rights to the owners and imposes constraints on others; in other words, it provides power to the owners over others through their power over the thing.[338] Distancing property law from the actual thing owned (and its 'use') pushes the commodification of property in capitalist markets even further, since it does not matter what an object is intrinsically worth as long as it can be exchanged with another of equivalent value, progressively erasing the relevance of its inherent traits.[339] The person-to-person relationship and its corresponding bundle of rights thus remove the object from the property equation, allowing the abstract application of property rights: regardless of the object or thing owned, the same rights—or attributes—apply to it indiscriminately, whether it is an industrial company or a toothbrush.[340] And while the civilian tradition maintains a greater focus on the concrete thing,[341] property in civil law remains a right of use and exchange which emphasizes market value.[342]

The question is whether the common person-to-person approach translates well into the mission of human rights to provide for social participation. For instance, if we take property relationships out of the commodity market, does it still stand? Do squatters of public lands in developing countries' urban peripheries see their squatted land as means of exerting power over the state, or as a place to live and develop? It is interesting to note that the common law definition of property

[337] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1964). MacPherson suggests that this is the generally accepted approach to property in legal theory and philosophy, MacPherson, "Property", *supra* note 255 at 3. See contra, Gray, "Common Law", *supra* note 233 at 245–247 who specifies that the person-to-person approach is specific to common law.

[338] MacPherson, "Property", *supra* note 255 at 1. Gray & Gray, *supra* note 281 at 15. Joseph William Singer, "Property and Social Relations: From Title to Entitlement" in Gerrit van Maanen, A J Van der Walt & Gregory S Alexander, eds, *Property Law on the Threshold of the 21st century* (Antwerpen: Maklu, 1996) 69 at 69, 78 [Singer, "Title"].

[339] See generally Gray, "Thin Air", *supra* note 309. Gray contends that as long as someone can claim exclusive use of something, for instance air, than that person would have property rights to it, making exclusivity more important than the actual object (*ibid* at 259). On the shift from use-value to exchange-value of property operated by capitalism, see Bryan, *supra* note 229 at 13.

[340] See Kenneth J Vandevelde, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" (1980) 29 Buff L Rev 325 at 328–330. Vandevelde discusses how the concept of property in American law went through a dephysicalization process, passing in the nineteenth century from the Blackstonian concept of absolute dominion over things to the Hohfeldian definition of a set of legal relations between persons at the beginning of the twentieth century (on the dephysicalization of property, see *ibid* at 333–339). See also Rose, "Canons", *supra* note 283 at 610–612, on how the doctrinal rules of bundle of sticks have a neutralizing effect.

[341] Gray explains that civil law property more directly approaches property as "an absolute jural relationship between a person and a things," Gray, "Common Law", *supra* note 233 at 245–247.

[342] Yaëll Emerich, *Conceptualising Property Law: Integrating Common Law and Civil Law Traditions* (Cheltenham: Edward Elgar Publishing, 2018) at 175.

as a person-to-person relationship is often opposed to the lay understanding of property as a relationship with an object.[343] In this regard, Graham commented that law students were taught to unlearn their own ideas about property to adopt a view of property as relational.[344] But how a person views the role of property in their life should matter in considering the way that property acts as a human right, since it is their lived experience that determines their needs, and this often corresponds to a concrete relationship with a particular object. By assessing the value of an object to its owner, not just in financial terms, but in terms of its concrete significance for attaining social participation, it is easier to assess the extent to which property should be protected as a human right.

A few scholars have attempted to reinstate the connection between person and object in property law in order to account for the importance of tangible resources. David Lametti, for instance, has suggested that the object matters in order to better grasp the duties associated with appropriation of certain resources which would hold a more important societal value.[345] He argues that the lay perception of property as a relation with an object should bring us to question the bundle-of-rights model.[346] While he agrees that property is necessarily relational, he explains how property relationships with others can exist only through a relationship with a thing, whether tangible or intangible.[347] An important consequence of focusing on the object, as Lametti explains, is that "the nature of ownership varies according to the object owned."[348]

The idea of a varying nature of property dependent on the object is also central to Margaret Radin's theory of property for personhood, although she rather derives it from the proposition that property is an extension of a person's identity. In fact, while Lametti's argument relates to the societal value of property, he is much more interested in the economic relationships regulated by property rights, and says little on the more personal, intimate relationships one can hold with property. Radin addresses this more directly, saying that objects lie on a spectrum ranging from 'personal' to

[343] See e.g. MacPherson, "Property", *supra* note 255 at 7. A distinction which Rosser says is a recurring theme in property scholarship, Rosser, *supra* note 98 at 158.
[344] Graham, *supra* note 46 at 177. Riles also notes that law students go to class expecting to learn neutral rules of property rather than to delve into more 'theoretical' inquiries, Riles, "Property", *supra* note 226 at 779.
[345] David Lametti, "The Concept of Property: Relations through Objects of Social Wealth" (2003) 53:4 UTLJ 325.
[346] *Ibid* at 328.
[347] *Ibid* at 339. See also Nicholas Blomley, "The Territory of Property" (2016) 40:5 Progress in Hum Geog 593 at 1 [Blomley, "Territory"].
[348] Lametti, *supra* note 345 at 341.

'fungible' property. She suggests that objects of 'personal' property—attached with one's personhood—are constitutive of identity, and thus should be afforded higher protection than fungible property, held merely for its monetary value.[349] This is not to be confused with the category of personal property in common law, a category alongside real property: in Radin's account, the home of a person could be considered 'personal' if it contributed to her identity.[350] Property associated with personhood in Radin's account refers to objects that are necessary for an individual's self-development and autonomy, making them inseparable from one's identity.[351] This distinction based on personhood could imply for instance the decommodification of property on the 'personal' end of the spectrum, to protect the person from market forces.[352] Radin's context-sensitive definition of personal property allows for a subjective classification of property in which an object can be fungible for one person and personal for another, and that this can change over time.[353] For Radin, the moral value of property does not depend merely on the act of possession, but also on the importance of the object to one's self-realization, inserting the person-object relationship within its broader context.

What Lametti and Radin argue is that objects of property matter because they can determine one's place within societies. The idea of a spectrum or continuum of property interests between personal and fungible property illustrates this well, and offers important insights for the definition of a human right to property. The same kind of hierarchy can help distinguish between property as a human right and property as a political or economic institution. Hierarchies of property are not novel; they can be found in domestic law, for instance, in the varying timeframes applying to the acquisition of adverse possession of immoveable and moveable property.[354] The difference from a dialogical human rights perspective is that the distinction between property that provides social participation and property as a mere commercial asset is not predetermined by fixed and static rules, but rather depends on the dynamic expression of a person's needs.

[349] Radin, *supra* note 149 at 48.
[350] *Ibid* at 20–21.
[351] *Ibid* at 36–37.
[352] See her example of residential rent control. *Ibid* at 79.
[353] *Ibid* at 37–38. Yet she moves on to say that there is a need for objective criteria to distinguish 'good' and 'bad' identifications to avoid arbitrary decisions, which can be done by referring to the concept of a person being a reasonable right-holder, possessing a human body and able to project a continuing life plan (*ibid* at 38–39).
[354] See e.g. Articles 2917-2919 Civil Code of Quebec, CCQ 1991.

2.4.2 Property in location

To say that the human right to property addresses a relationship between a person and a thing is not sufficient to understand how it enables social participation unless the relationship is considered in context. The fact that persons are inherently social means that they are part of a complex network of relationships anchored in a particular *location*, which helps establish a person's needs for participation. These relationships can be with one's family or community, but also with public or private organizations; they can denote a particular relationship with a geographic place or nature, inserting a person in their ecological environment. And they vary from person to person. For instance, ownership of a car does not mean the same for a city dweller as for a person living in a remote region; neither does it mean the same in countries with differing levels of public transit infrastructure. This makes the human right to property contingent and concrete, dependent on the multiple relationships involved in the act of owning and the power dynamics that these relationships imply.

As a concrete right in location, the human right to property obviously conflicts with the rhetoric of abstraction typical of liberal property rights. In fact, the lack of contextualization in liberal property rights is perhaps its most criticized feature. Singer notes that the importance of context is obscured from the classical theory of absolute property focusing on fixed and certain rights, whereas property is fully contingent and dependent on context.[355] Similarly, Keenan observes that law's misleading narrative of universality and neutrality tends to dominate and silence other narratives of property.[356] Both authors suggest that property relationships are part of a complex and concrete set of relationships, "a complicated network of relations with others,"[357] which shapes the meaning of property in an adapted and contingent manner.[358] Approaching property in that way reveals power relations within the network of relationships, and ultimately allows us to disrupt them in favour of vulnerable parties, or 'subversive' understandings of property.[359]

The idea of property evolving in location further calls for a geographic approach to property, assessing relationships as they exist in the material world. Graham suggests that, more than an

[355] Singer, "Title", *supra* note 338 at 80.
[356] Keenan, *supra* note 221 at 21–22, 47.
[357] Singer, "Reliance", *supra* note 304 at 653.
[358] Keenan talks of property as a spatially contingent relationship of belonging, understood as 'fitting-in,' see Keenan, *supra* note 221 at 6, 12.
[359] Singer, "Reliance", *supra* note 304 at 662–663; Keenan, *supra* note 221 at 7.

abstract space, the location of property is a physical *place*.[360] Graham directly connects the contingent nature of property with the external world by arguing for a reconnection to local place and physical environment when determining legal rules of appropriation.[361] This reconnection with place is more complex than the reconnection with the object, as it implies that both the material world and the relationships evolving around and within the object must be taken into consideration.[362] She focuses on place as concrete location, as the materiality of nature.[363] She argues that the division of culture and nature, for which the English 'enclosure movement'[364] was an important milestone, has turned land into a conceptual 'thing' which is abstract and devoid of inherent qualities, rather than localized and responsive.[365] The person-to-person relationship described above in relation to liberal property rights reinforces this separation with nature, by eliminating it completely from the evaluation of the value of property.

Location as connection with physical reality shapes the meaning of property as a human right. For instance, the social participation provided by farm ownership depends on its rural environment (more land, food production, greater interpersonal distances, and so forth). The farm in location is not just an asset that can be exchanged for money in a given market; it is a source of income, a site of relationships, and a marker of continuity in time, since land is permanent and outlives its owners.[366] Yet location does not mean immobility or fixity; within location, the notions of change, adaptability, and movement are important: relationships are inherently dynamic. The farm does not hold the same meaning for the owner and for the worker, or for the woman and the man—and it does not mean the same in Canada and in Lebanon.

There are many examples showing how focusing on concrete experiences of property in location challenges the abstract rules of property rights, thus warning against their mere transfer within the human right discourse on property. In an American context, Robert Ellickson conducted ethnographic studies in the 1970s of ranchers in relation to their fencing practices and how they

[360] Graham, *supra* note 46 at 66. See also notes on the concept of place in Keenan, *supra* note 221 at 40–42. Keenan describes place as a point in space which is performative of identity and produces social memory.
[361] Graham, *supra* note 46 at 7–10.
[362] *Ibid* at 18–19.
[363] *Ibid* at 67.
[364] See comments in footnote 65, above, on the English Enclosure movement.
[365] Graham, *supra* note 46 at 19–20. Graham notes how the divide between culture and nature is supported by the notion of civilization as a scientific concept, *ibid* at 28–29.
[366] See generally Eduardo Peñalver, "Land Virtues" (2009) 94 Cornell L Rev 821 [Penalver, "Virtues"].

dealt with cattle trespass conflicts, showing how local practices tended to supplant formal property rules since they generally made more sense for those affected by the application of norms.[367] In the same way, Daniel Bonilla Maldonado notes how informal rules of property in the Global South developed locally in slums to manage housing relationships to which the formal legal system did not sensible apply.[368] Similarly, Ugo Mattei's case study of land law in Somalia reveals that nomadic pastoral small-scale farming adopted by indigenous peoples proved to be more efficient than large-scale agriculture given the particular geography of the country, characterized by scarcity of water and suitable soil.[369] What these three examples show is that lived experiences of property expressed in location, whether in rural America, the urban peripheries of Colombia, or rural Somalia, offer a better sense than abstract rules of how property can be adaptive to social and geographic reality.

For human rights generally, what needs to be emphasized is how property enables social participation within a complex network of relationships. Ultimately, the difference between the human right to property and liberal property rights is identifiable by a difference in objectives: while property rights exist to ensure stable commercial exchanges within market economies (thus their abstract, neutral framing), the human right to property aims to provide meaningful social participation, for which it needs to be assessed as concrete and localized. Thus, characteristics of property rights (e.g. titling requirements, exclusive boundaries, market-value compensation) may or may not be protected as a human right, depending on whether they contribute to securing social participation. To make that determination, we must give space to lived experiences of property in location, which may depart from the mainstream liberal story. Unfortunately, the international human rights system enshrined in the *UDHR* has struggled in freeing the normative standards of human rights from their liberal influence, as the next chapter will illustrate.

[367] See e.g. Robert C Ellickson, "Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County" (1986) 38:3 Stan L Rev 623 [Ellickson, "Coase"].
[368] See Bonilla Maldonado, *supra* note 282.
[369] Mattei, "Socialist", *supra* note 285 at 51.

Chapter 3 – Drafting a Human Right to Property: Conflated Notions, Deflated Hopes[370]

3.1 Introduction: Looking Back at the *UDHR*

In their review of the development of the right to property in the United Nations system, scholars Catherine Krause and Gudmundur Alfredsson suggested that Article 17 of the *UDHR* essentially protects private property as an institution rather than a right to property *per se*, the drafters thus being guilty of the shortcut between property rights and right to property mentioned in the previous chapter.[371] Because of this, they add, "[t]his traditionally Western conception of property rights has heavily influenced the ways in which the right has been formulated and interpreted in international human rights law".[372] In order to understand how the right to property has been conflated with property rights within the *UDHR*, I look back in this chapter at the *travaux préparatoires* of Article 17. The main conclusion to be drawn is the following: while it is true, as Krause and Alfredsson suggest, that the article on property ultimately reproduces assumptions related to liberal property rights, the philosophical discussions related to the right to property that took place during the drafting process offer illuminating insights on how to approach property as providing a path to meaningful social participation.

Looking at the history behind the international human right to property is a way of demystifying the right, and exposing the power dynamics at play in its elaboration. As TWAIL scholars suggest, a focus on history allows us to expose instances of domination of Western liberal ideals, and also to imagine how to turn the tide in favour of traditionally marginalized groups.[373] What the story of Article 17 reveals is that the drafters chose to support an abstract version of the right to property rather than to shape its meaning through concrete experiences. Indeed, the concept of 'personal property' introduced by Humphrey in the original draft of the *UDHR* would have favoured a contextual approach to the right to property, limiting its reach to such property which provided for

[370] A preliminary version of this chapter was published in Laura Dehaibi, "The Case for an Inclusive Human Right to Property: Social Importance and Individual Self-Realization" (2015) 6:1 West J Leg Stud, online: <http://ir.lib.uwo.ca/uwojls/vol6/iss1/5>.
[371] Catherine Krause & Gudmundur Alfredsson, "Article 17" in Gudmundur Alfredsson & Asbjørn Eide, eds, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff Publishers, 1999) 359 at 359.
[372] *Ibid*.
[373] Anghie & Chimni, *supra* note 28 at 84; Mutua, "Savages", *supra* note 28; Okafor, "Theory", *supra* note 27 at 377. See also Flyvbjerg, *supra* note 23 at 137 on the importance of historical inquiries in social science.

a person's decent living, a formulation which supposed adaptability to a person's circumstances. Smaller states at the United Nations supported this proposition, as the following sections will show, but ultimately lost the battle in front of powerful nations, such as the United States and the USSR. Despite this outcome, the story of Article 17 still tells us that a needs-based and contextual approach to universal human rights is possible and enjoys widespread support.

Going back to the formulation of the right to property in 1948—the year the *UDHR* was adopted—is justified by the fact that it is the first and only general formulation of the right to property that exists at the UN level. Indeed, after the adoption of Article 17, the right to property was not properly defined within the United Nations framework of human rights, and has generally received little attention. Article 17 is particularly succinct:

> Article 17:
>
> (1) Everyone has the right to own property alone as well as in association with others.
> (2) No one shall be arbitrarily deprived of his property.[374]

This short article presents a statement of principles, but does not elaborate on the scope of the right to own property, its conditions of exercise, or its potential limitations. In its current form, it is not clear whether Article 17 guarantees the protection of conventional market-integrated property rights or a right to property geared towards social participation.

Since the adoption of Article 17 of the *UDHR*, the UN system of human rights has failed to offer a more detailed interpretation of the human right to property. Most rights proclaimed in the *UDHR* have made their way into one or the other of the International Covenants on Human Rights, but not the right to property.[375] Commenting on this omission, Humphrey mentioned in one of his speeches: "John Locke must have turned in his grave."[376] The only meaningful development related to Article 17 is the elaboration of the Valencia-Rodríguez report discussed in Chapter 2, which does not really advance a definition of the right, rather presenting a compilation of accepted domestic legal norms on property.

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[374] *UDHR*, *supra* note 6, Article 17.

[375] Most rights have been included in the ICCPR and ICESCR, *supra* note 12, except the right to property, the right to asylum, and the right to a nationality. However, the last two are covered by other binding instruments, such as the *Convention relating to the Status of Refugees* (1951), *supra* note 10, and the *Convention relating to the Status of Stateless Persons* (1954), *supra* note 10. The right to property has been mentioned indirectly however in a few treaties; for a list of these see, J Alvarez, *supra* note 220, Appendix.

[376] Commented in French: "*John Locke doit se retourner dans sa tombe*," see McGill University Archives, MG 4127, John P Humphrey, Container 27, File 363, "Les Pactes internationaux des droits de l'homme" (speeches).

Although the right to property has since received attention at the regional level, both in conventions and through case law, the *UDHR* remains particularly influential. Even if not a binding instrument, it is considered to form part of international customary law due to its widespread acceptance by the global human rights community,[377] and is cited as a leading source of inspiration in a variety of human rights instruments, including regional ones such as the *European Convention on Human Rights*, the *American Convention on Human Rights*, and the *African Charter on Human and Peoples' Rights*.[378] Humphrey expressed the idea that the *UDHR* was likely to be more universal than the Covenants because it had a superior moral force.[379] For all these reasons, it is seen by many as a valid tool of interpretation for human rights provisions generally.[380]

Ultimately, the drafting process of Article 17 of the *UDHR* serves as an example of how property rights and the right to property have been conflated in international legal practice. Yet the discussions held during the drafting can also support a more inclusive interpretation of Article 17 in future elaborations since, in international law, principles of interpretation allow lawyers to look back at a treaty's preparatory work, "and the circumstances of its conclusion"[381] when the ordinary meaning of a treaty provision is obscure or "leads to a result which is manifestly absurd or unreasonable."[382] Since Article 17 has not been further elaborated in the International Covenants, the drafting process helps illustrate the right to property as understood by the drafters. Although the *UDHR* is not a treaty, this rule of interpretation can be extended to offer a clearer understanding of the human right to property. In its current shape, Article 17 can lead to absurd results if, as a human right, it offers a protective shield to accumulation of property leading to significant inequalities and violations of other fundamental human rights. In fact, Villey cites the right to

[377] See generally Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law" (1995-1996) 25 Ga J Intl & Comp L 287; see also Valencia Rodriguez, *supra* note 11 at para 179-180. Humphrey, *supra* note 74 at 64–65, 75–76. Schabas notes that the customary nature of the *UDHR* has been contested on the basis that the General Assembly was not representative in 1948, William Schabas, United Nations & General Assembly, *The Universal Declaration of Human Rights: The Travaux Préparatoires* (2013) at cxx.
[378] All three instruments include a right to property, which are discussed in Part II, below.
[379] See McGill University Archives, MG 4127, John P Humphrey, Container 18, File 372, Speech to the Society of Ethical Culture, 10 December 1952. See also Humphrey, *supra* note 74 at 64. Schabas agrees with Humphrey on this point, see Schabas, United Nations & General Assembly, *supra* note 377 at cxviii–cxix.
[380] See Schabas, United Nations & General Assembly, *supra* note 377 at cxix. See also Louis B Sohn, "The Universal Declaration of Human Rights: A Common Standard of Achievement? The Status of the Universal Declaration in International Law" (1967) 8:2 Journal of the ICJ 17 at 23–25.
[381] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Article 32.
[382] *Ibid.*

property as an example of the many contradictions within the human rights edifice, as it has created, alongside freedom of contract, "monstrous and colossal inequalities".[383] To counter this, the discussions around the concept of 'personal property' during the drafting process provide tracks to follow in order to allow a plurality of voices to inform a lived universal definition of property as human right.

As the previous chapters have shown, Western liberal thought has had a heavy and lasting influence on the formulation of human rights *and* the particular concept of property, within both private law and human rights law. In Section 3.2, I present the drafting of the *UDHR* and Article 17 in their historical context, assessing on the one hand how natural rights and liberal thought influenced their final shape, and on the other, how Cold War tensions ultimately obstructed attempts by non-aligned States (for instance the Latin American group) to break the European hold on rights language. Ultimately these factors contributed to maintaining the conflation between right to property and property rights.

Next, in Section 3.3, I will look more closely at the relationship between property and social life as discussed during the *travaux préparatoires*, keeping in mind the distinction elaborated in the previous chapter between social function and social potential. While 'natural rights' and liberal theories of property discuss the social benefits of the right to property as something external or incidental to its exercise, inherent in market economies, the right to property suggested by Humphrey in his first draft sought to internalize the social potential of property. The discussions related to this first version of the right strongly support the idea of a human right to property associated with positive freedom and social insertion.

An important contribution from the *travaux préparatoires* of Article 17 is the idea of a minimum standard of personal property—understood as property ownership that meets basic and essential needs—introduced by Humphrey's initial draft. And what emerges from the discussions is that this idea was never formally contested. Many drafters were conscious of the potential negative consequences of property rights and did not want to support them through an article on property. The progressive deletion of the minimum standard criteria from the text of Article 17 is the result not of substantive disagreement, but of a variety of factors foreign to moral discussions on the right to property, an important one being the Cold War context and the polarized political ideologies at

[383] Villey, *supra* note 39 at 13 [translated by author].

its origin. Ultimately, Article 17 reflects the only agreement that could be reached in this context, but this agreement preserves the ambiguity between property rights and right to property.

A significant part of this chapter is based on archival material accessed through two main sources. The actual *travaux préparatoires* of the *UDHR* can be found in their entirety on the online Dag Hammarskjöld Library of the United Nations, organized by different stages of the drafting process (the Drafting Committee, the Commission of Human Rights, and the General Assembly).[384] William Schabas has also compiled the drafting material of the *UDHR* in a two-volume collection.[385] In addition, I accessed John Humphrey's archival material housed at the McLennan Library of McGill University. These archives contain Humphrey's personal drafts of the *UDHR* preceding the version he submitted to the Drafting Committee, which include one handwritten and six typed drafts. They also contain his teaching cards and various speeches, which offer some additional information relating to our inquiry. Finally, I have consulted published memoirs and compilation of speeches by members of the drafting Committee, including Humphrey, Eleanor Roosevelt, and Charles Malik.[386]

3.2 "Alone as Well as in Association with Others": A Compromise on Property in the Context of Ideological Conflict

As I have argued above, one effect of the language of liberal rights applied to human rights is that it tends to universalize conventional norms associated with Western legal tradition, such as those around property rights. This 'universalization'—which has led to conflating the concepts of property rights and right to property—is reflected in Article 17 of the *UDHR*. The right to property had been famously proclaimed as a fundamental right in the eighteenth-century declarations of rights, which used the language of natural rights to portray ownership as an end in itself (as described in §3.2.1). Attempts to transplant this liberal version of property to the *UDHR* were met with resistance from the Communist bloc, a conflict which ended up overwhelming the discussions

[384] Dag Hammarskjöld Library, *Drafting the Universal Declaration of Human Rights*, online: United Nations <research.un.org/en/undhr>.
[385] Schabas, United Nations & General Assembly, *supra* note 377.
[386] See Humphrey, *supra* note 74; A J Hobbins, *On the Edge of Greatness: The Diaries of John Humphrey, First Director of the United Nations Division of Human Rights* (Montreal: McGill University Libraries, 1994); Charles Habib Malik, Centre for Lebanese Studies (Great Britain) & Charles Malik Foundation, *The Challenge of Human Rights: Charles Malik and the Universal Declaration* (Oxford: Charles Malik Foundation, 2000); Eleanor Roosevelt, Rochelle Chadakoff & David Emblidge, *Eleanor Roosevelt's My day* (New York: Pharos Books, 1989). See also René Cassin, "Twenty Years After the Universal Declaration" (1967) 8:2 J Intl Comm Jur 1.

on property: the concept of property was approached by many drafters as a political and economic institution rather than as a human right with the potential for social emancipation, and Article 17 ended up reproducing the abstract and neutral language of its liberal iteration (§3.2.2).

3.2.1 The origins of *UDHR* Article 17: How the eighteenth-century revolutions perceived property as an end of human life

Article 17 of the *UDHR* was not born in a vacuum, and shows the continuing influence of the natural-rights tradition inherited from the French and American declarations of the late eighteenth century. While the meaning of property has been discussed since time immemorial and across cultures, the fact that the *UDHR* holds it to be a human right is in large part the result of its defence by the French and American revolutionaries,[387] who relied heavily on natural rights rhetoric in their respective claims. One author suggests that Article 17 in fact does little to expand the notion of a right to property beyond its eighteenth century counterparts.[388] Yet the concrete power of ownership—the word possession, after all, comes from the Latin *posessio*, derived from *potis*, meaning power[389]—is key to understanding the political struggles of the Enlightenment era in Europe as well as the later spread of capitalist economy across the world.

The American declaration identifies only life, liberty, and the pursuit of happiness as inalienable and natural rights of men.[390] However, the Fifth Amendment, adopted in 1791 as part of the Bill of Rights of the United States Constitution, classifies property with life and liberty as rights protected in criminal proceedings.[391] In fact, during the drafting of the *UDHR*, the United States

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[387] See e.g. Valencia Rodriguez, *supra* note 11 at 10–21.

[388] Jacobs, *supra* note 214 at S97.

[389] Halpérin, *supra* note 218 at 37.

[390] It has been noted by some that 'pursuit of happiness' was particularly attached to property in the minds of the Founding Fathers; see Douzinas, *supra* note 42 at 81–82. See also Leonard W Levy, "Property as a Human Right" (1988) 5 Const Comment 169 at 175. Yet, according to Richard Schlatter, it is not so clear that the Founding Fathers unanimously shared a Lockean conception of property. He suggests that Jefferson, as an agrarian, was uneasy with presenting private property as a fundamental right, as he believed in common and equal use of land (Schlatter, *supra* note 291 at 195–196. In turn, Madison would have objected to the removal of property alongside life and liberty, Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (Chicago: University of Chicago Press, 1990) at 17.

[391] Fifth Amendment (US Const amend V):

> "No person shall […] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Reiterated in the Fourteenth Amendment (US Const amend XIV §1-1868):

> "[…] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws."

suggested at one point that the right to property be included in the article on the right to life, proposing a text similar to the Fifth Amendment.[392] Furthermore, many American states adopted constitutions guaranteeing the natural, inherent, and inalienable right to property.[393] In France, Article 2 of the *Déclaration des droits de l'homme et du citoyen* (1789) includes property as one of four natural and inalienable rights of man along with liberty, security, and resistance to oppression. Article 17 of the French declaration further states that property is "*un droit inviolable et sacré*" ("an inviolable and sacred right") of which no-one can be deprived under any circumstances, excepting "public necessity." Ownership consequently became associated with individual freedom in post-revolutionary France, and as Mattei observes, this "equation […] became commonplace in legal, economic, and social theory."[394]

By entrenching the right to property as a natural right of men in their founding declarations and legal instruments, the revolutionaries confirmed the 'universalization' of private property as a fundamental end in human life. What this universalization process concealed, however, was the fact that property served largely as materiel for the revolutionaries' respective battles against hegemonic powers. Private property was associated with political power and independence, weapons the revolutionaries needed to fight monarchic claims on their lands.[395] To this end, it appeared necessary to proclaim the right to property as absolute and inalienable. In that context, Locke's theory of property—which presents property as a natural right preceding civil society—gave political ammunition to a disenchanted bourgeois class in France and the American colonies by stating that states could not violate their right to property, meaning that they could not violate the exercise of their free will over their possessions. As George Cabot Lodge observes, Locke "was speaking for a clientele who owned property and was anxious to keep it from the king. For them, property was the means to political and economic independence, the guarantor of

[392] See Commission on Human Rights, Drafting Committee, *Draft International Covenant on Human Rights (Document E/600) with United States Recommendations*, UNESCOR, 1st Sess, UN Doc E/CN.4/AC.1/19 (1947), and commentary by Schabas, "Omission" *supra* note 2 at 148–149).
[393] Francis S Philbrick, "Changing Conceptions of Property in Law" (1938) 86:7 U Pa L Rev 691 at 714. Schlatter, *supra* note 291 at 188–189.
[394] Mattei, "Basic principles", *supra* note 283 at 123.
[395] Rose, "Persuasion", *supra* note 270 at 61–62; Philbrick, *supra* note 393 at 713. As Hunt argues, declarations of rights in the eighteenth century were particularly linked with the idea of sovereignty against despotic governments, Hunt, *supra* note 60 at 114–124. See also Douzinas, *supra* note 42 at 89.

freedom."[396] Yet natural rights theories, in this respect, served only as a moral validation of the political claims of a specific class of owners. As the legal historian Jean-Louis Halpérin suggests, the French revolutionaries did not seek to advance modern natural rights, but simply to break free from the feudal regime.[397]

But while the French and American revolutionaries articulated the idea that owning property was a necessary condition for freedom, the language of absolute rights they used in their respective declarations—property as "inalienable", "inviolable", "sacred"; no person shall be deprived of "life, liberty, or property"—made it appear as though property and freedom were coterminous. The revolutionaries were certainly not the first to associate property and political freedom,[398] but they downplayed the reasoning that led from one to the other. As noted in the previous chapter, various accounts of the justification of private property (including Locke's) suggest that private property is morally good since it provides social benefits, such as the more efficient distribution of limited resources. These social benefits, in turn, provide autonomy and freedom to people who are no longer at the whim of nature. Yet, since these social benefits are underlying and passive, they tend to be omitted from the justificatory process. Thus, when the revolutionaries proclaimed the natural right to property, they did not frame it as necessary for social participation but as a prerequisite for individual freedom. What the revolutionary discourse did was to take a shortcut:

Private Property → Social Benefits → Freedom

Private property → Freedom

Property = Freedom

By eliminating the social middle link, the declarations took property to incarnate freedom, making property an end in itself. This shortcut contributes to the conflation of the human right to property and property rights, since it protects all property relationships as natural and absolute rights, including those that may lead to exploitation and subordination of others. As such, any function of private property is justified, whether it is to benefit the collective, impose political domination, or maximise preferences and capital. And since the final version of Article 17 of the *UDHR* equally

[396] George Cabot Lodge, "The New Property" in Patricia H Werhane & al, ed, *Philosophical Issues in Human Rights: Theories & Applications* (New York: Random House, 1986) 235 at 235; see also Lauren, *supra* note 42 at 15 on the influence of Locke's work in the revolutionary movements.
[397] Halpérin, *supra* note 218 at 176.
[398] See e.g. Arendt, *supra* note 14 at 58–68 on the political aspects of property in antiquity and beyond.

omits the social foundation of the right in favour of an abstract vocabulary typical of the natural rights tradition, it perpetuates the ends/means confusion established by the French and American declarations.

Emphasizing the social nature of property is necessary to avoid instances where the ownership rights of one person undermine the rights of another. Yet this was a secondary concern for the revolutionaries. Indeed, while the French and American Revolutions are often cited as milestones in the advancement of human rights, they also set the stage for their abuse, in particular by means of an unbounded application of the liberal right to property. These revolutions were led by male bourgeois owners advocating for more commercially efficient land uses,[399] and the right to property they defended was not a right of all *men*, but rather a right of all *proprietors*.[400] In fact, local communities in Europe were often wary of enclosed lands and private property, which clashed with their traditional land practices, but their concerns remained silenced or marginalized.[401] And while there were some efforts made during the First Republic of France to redistribute 'national goods', peasants were generally left out of the process, and available lands ended up being purchased by those who were already landowners.[402] Thus, from the very first days of the new republics, feudal lords were replaced by another elite: proprietors. This is evident in both France and the US, where "We, the People" and "*le citoyen*" referred to owners rather than the general public.[403] The revolutions created a distinction between passive citizens (the landless, women, children) and active taxpaying citizens (proprietors), the latter being viewed as the "true shareholders in the great social enterprise."[404] As a result, voting rights were soon denied across the US to individuals without property, as well as women, slaves, and indigenous peoples.[405] Property was therefore a qualifying condition for exercising civil rights.[406]

[399] Pushed notably by the pre-capitalist physiocratic school, see Halpérin, *supra* note 218 at 173–174.
[400] Waldron, *supra* note 64 at 20. See also Douzinas, *supra* note 42 at 95–97.
[401] See Graham, *supra* note 46, Chapter 3, for resistance in the UK; Halpérin, *supra* note 218 at 173–176, for the French context.
[402] Halpérin, *supra* note 218 at 189–190.
[403] Hunt, *supra* note 60 at 18 & 148; Schlatter, *supra* note 291 at 192; Rose, *supra* note 270 at 61; Philbrick, *supra* note 393 at 723.
[404] Hunt, *supra* note 60 at 148. See also Douzinas, *supra* note 42 at 97–99. The same views were shared in Canada; see Alvaro, *supra* note 246 at 313.
[405] Lauren, *supra* note 42 at 31. For instance, Delaware restricted voting to men owning a minimum of fifty acres of land (Hunt, *supra* note 80 at 149).
[406] See Arendt on how property in Greek political life provided for civil participation, Arendt, *supra* note 14 at 29–30.

The absolute and unbound right to property as framed by the eighteenth-century revolutionaries also allowed for mass slavery for commercial purposes. It is tragically ironic that the assertion of property as a natural right of all men was immediately used to support the already well-entrenched practice of slavery—that is, human beings being treated as property.[407] The legal approval of treating humans as property wasn't new, and dates back to antiquity; but the nineteenth century witnessed an explosion of slave exploitation caused by colonial expansion, capitalist economy, and the sanctification of private property.[408] The liberal right to private property endorsed the accumulation of property beyond what is necessary for individual survival and well-being, inserting this in a capitalist economic system which required the subjugation of the landless masses. The power of property used against despotic rulers and lords was transformed into power over people in the economic realm. In the US, the accumulation of property in the nineteenth century was exemplified by large agricultural plantations, requiring a huge workforce. As a result, many American farmers succumbed to the convenience and profitability of slavery in order to maximize land resources.[409] Natural rights theories allowed for slavery not only by justifying the accumulation of property, but also by providing slave holders with stronger moral arguments against the State, which could not unduly interfere with the exercise of such a right.[410]

Even as slavery was progressively abolished in the nineteenth century, powerful owners continued to subjugate the landless. In the United Kingdom, the effect of the accumulation of property was felt more directly in the urban centres to which displaced victims of rural enclosures flocked, feeding the capitalist ambitions of the Industrial Revolution.[411] In Marxist analysis, those who owned the industrial means of production also effectively owned the workers themselves, since the latter were dependent on industry to sustain themselves and their families, and the 'natural rights' theory of property sanctioned this servitude.[412] Again, the distrust of regulation over a right

[407] Davies, *supra* note 51 at 77–78. The author notes that the history of slavery is not one of progressive improvement, since the integration of slavery within capitalist economy led to the worst abuses of slaves.
[408] Marks, *supra* note 42 at 474; Davies, *supra* note 51 at 78.
[409] Chen, *supra* note 218 at 1277; Lauren, *supra* note 42 at 29.
[410] In particular that of Locke, see Hunt, *supra* note 60 at 119.
[411] Graham, *supra* note 46 at 45.
[412] Marx, *supra* note 205. Part I — Bourgeois and Proletarians, Footnote A:

> "By bourgeoisie is meant the class of modern Capitalists, owners of the means of social production and employers of wage-labor. By proletariat, the class of modern wage-laborers who, having no means of production of their own, are reduced to selling their labor-power in order to live."
> (note by Engels to the 1888 English Edition)

See also Fudge & Tucker, *supra* note 3 at 4–5.

framed as natural and sacred made it so that the victims of the nascent capitalist economy were left without resources; Rose notes for instance how in the nineteenth century social programs were frowned upon for their "wealth-dissipating" effects.[413] In fact, workers' struggles were often framed as attacks against property rights,[414] while social and economic rights developed at the turn of the century to protect the poorer segments of society, such as minimum labour standards or social security rights, have been described as "correctives to abuses of property rights,"[415] although ironically the human right to property would later be added to this category.

3.2.2 Tensions re-enacted: The Cold War and the drafting of the *UDHR*

The drafters of the *UDHR* thus had to make sense of a *human* right to property in a historical context in which the natural right to property served to justify marginalization and exploitation. They had the occasion to imagine a right to property different from the Western liberal conception of an absolute individual right understood in the abstract, but Cold War tensions diverted the discussions towards debates on the economic institution of property. The US and the USSR, in particular, were not interested in how property could provide for social participation, but rather saw discussions around Article 17 of the *UDHR* as a fine battlefield for Eastern (socialist) and Western (liberal) visions of political society.

The *UDHR* is often regarded as a remarkable achievement at a time of political turmoil. John Humphrey, a Canadian professor at the Faculty of Law of McGill University who was appointed Director of the United Nations Division of Human Rights in 1946, asserted that delegates at the commission perceived their role as being autonomous experts,[416] and many authors view the drafting process as a genuine work of philosophical inquiry, as opposed to an instrumentalist, partisan exercise.[417] Nevertheless, the Cold War was already in motion, as Humphrey noted in a later speech:

> It should be remembered that this considerable body of international human rights law was built up at a time when the great powers were engaged in a cold war and the world was divided on strictly ideological grounds into two camps, one concerned primarily, indeed almost exclusively, with collective rights and the other with the rights of

[413] Rose, "Persuasion", *supra* note 270 at 62.
[414] See Lauren, *supra* note 42 at 56 on the English Chartist movement in the mid nineteenth century.
[415] Marks, *supra* note 42 at 477. Still, conversations on what we now call economic, social, and cultural rights were had as early as during the French Revolution, (*ibid* at 503–505).
[416] Humphrey, *supra* note 74 at 17–18.
[417] See Glendon, *supra* note 81; Lauren, *supra* note 42 at 212; Humphrey, *supra* note 74 at 10.

> individuals. It is somewhat of a miracle in the circumstances that the result has been as good as it is.[418]

While he suggests the Cold War played a "secondary role" in the early years of the UN, it nonetheless left its mark.[419] A series of incidents in the years leading up to the adoption of the *UDHR* show how both the US and the USSR were setting the stage for their later confrontations,[420] and the *travaux préparatoires* of Article 17 was an early manifestation of these.

The *UDHR* is the result of roughly two years of intense discussions and negotiations. The newly created Commission on Human Rights at the United Nations was mandated to elaborate the draft,[421] which went through several different versions and passed through many hands.[422] But the version prepared by Humphrey—officially referred to as the Secretariat Outline—essentially constitutes the basis for the discussions of the eight-member Drafting Committee (or 'temporary sub-commission').[423] In this process, the article on property started with a detailed text which was

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[418] McGill University Archives, MG 4127, John P Humphrey, Container 18, File 370, "The Individual in the Eighties (speech), 26 May 1979

[419] Humphrey, *supra* note 74 at 24. Humphrey's position might be better understood when put against the later works of the UN, which have been much more affected by political battles, in particular when it came to discuss the right to self-determination after 1949 (*ibid* at 66). He nonetheless admits in another document that as soon as the UN was created, the Cold War started dividing "the world into ideological camps" (see McGill University Archives, MG 4127, John P Humphrey, Container 18, File 371, Human Rights Day Speech, 10 December 1973).

[420] For instance, the US and the USSR each defended their own hierarchy of human rights, with the US defending the creation of a sub-commission on the freedom of press and information, and the USSR retorting by pressing the agenda of minority protection and the prevention of discrimination, which they reminded was lacking in the US; see Humphrey, *supra* note 74 at 20. In another instance, the discussions on the *UDHR* at the Commission were interrupted by a diplomatic incident where issuance of visas for two delegates from Soviet countries was delayed, which the USSR blamed on the Americans' intentional action; see Commission on Human Rights, UNESCOR, 3rd Sess, 46th Mtg, UN Doc E/CN.4/SR.46 (1948).

[421] Humphrey, *supra* note 74, at 17. The Commission on Human Rights was created by the Economic and Social Council, in accordance with Article 68 of the UN Charter. For an extended account of the various steps leading to the formal drafting of the *UDHR*, see generally Schabas, United Nations & General Assembly, *supra* note 377, Introductory essay.

[422] Once the Drafting Committee had agreed on a draft (see Commission on Human Rights, *Report of the Drafting Committee to the Commission on Human Rights*, UNESCOR, 1st Sess, UN Doc E/CN.4/21, Annex F), it was sent to the Commission on Human Rights, who created a working group to address it (Commission on Human Rights, UNESCOR, 2nd Sess, 30th Mtg, UN Doc E/CN.4/SR.30 (1947)). The working group sent its result to the Commission which once more submitted a new version of the draft to the eight-member Drafting Committee for its second session. Eventually the draft was transmitted to the Economic and Social Council, which then sent it for examination to the third Committee of the General Assembly. From there, it was finally submitted to a vote in the plenary of the General Assembly.

[423] Composed of Australia, Chile, China, France, Lebanon, the USSR, the UK, and the US. Chairman of the Commission Eleanor Roosevelt asked Humphrey to draft a bill through the Secretariat, a decision which was confirmed by the Economic and Social Council; Humphrey, *supra* note 74 at 29. Secretariat outline and drafting committee approved in Social Committee, *Draft Resolutions on Human Rights and on International Conference on the Freedom of the Press*, UNESCOR, 7th Sess, UN Doc E/AC.7/12 (23 March 1947).

progressively stripped down to two short sentences that present a vague statement of principle, silent on the content of a right to property.

While a self-proclaimed liberal and critical of communism,[424] Humphrey focused his attention beyond ideological claims when drafting his vision of human rights. His initial draft of Article 17 sought to depart from the existing modern conflation of property rights and right to property. His 'right to property' (Article 22 in the Secretariat outline) clearly distinguished between conventional rules of property and the human right to property:

> Article 22
>
> Every one has a right to own personal property.
>
> His right to share in the ownership of industrial, commercial and other profit-making enterprises is governed by the law of the State within which such enterprises are situated.
>
> The State may regulate the acquisition and use of private property and determine those things that are susceptible of private appropriation.
>
> No one shall be deprived of his property without just compensation.[425]

The human right to property was thus limited to personal property; that is, property owned by individuals for their own personal use, as opposed to market-oriented property. Other forms of property (industrial, commercial, profit-making) were subject to state regulation, and thus understood as less fundamental and absolute than personal property.[426] Humphrey noted that the only way to have the sensitive right to property apply across economic and social systems was by recognizing "only an unqualified right to own personal property."[427] Before submitting this version to the drafting committee, Humphrey wrote for himself seven different versions of the draft, and it is interesting to note that the last two paragraphs of his Article 22 were added only in the fifth

[424] In one of his speeches, Humphrey referred to himself in these terms: "Perhaps I should begin by confessing that I am a liberal (with a small "l") which isn't to say that I do not believe in social justice." (see McGill University Archives, MG 4127, John P Humphrey, Container 18, File 370, "The Individual in the Eighties" (speech), 26 May 1979)). He is responsible for inserting social and economic rights in the *UDHR*, but firmly believed that all human rights were individual in nature; see McGill University Archives, MG 4127, John P Humphrey, Container 18, File 370, "Another Road to Serfdom" (convocation address), 1980.

[425] Commission on Human Rights, Drafting Committee, *Draft outline of International Bill of Rights (prepared by the Division of Human Rights)*, UNESCOR, 1st Sess, UN Doc E/CN.4/AC.1/3 (1947).

[426] Morsink suggests that the structure of Article 17 presents a moral hierarchy between different forms of property ownership, see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999) at 141.

[427] Humphrey, *supra* note 74 at 44. See comments on the concept of 'personal property' as discussed in Radin's theory of property for personhood, above, §2.4.1.

typed draft.[428] I speculate that this addition was meant to remove as much uncertainty as possible from the meaning of the right to property by explicitly contrasting it with state-based property rights. It also indicates that the two paragraphs were offered as clarifications, since the actual human right is essentially circumscribed in the first paragraph.

The debates around Humphrey's initial article on property[429] were heated and revealed a rich philosophical understanding of the controversial right to property.[430] Dr. Jiménez de Aréchaga, the delegate of Uruguay at the General Assembly in those years, summarized the task of the drafters as being the elaboration of a text which "without being too wide, could be accepted by all the cultural streams, political ideologies and economic systems represented at the Assembly,"[431] a proposition reminiscent of the cross-cultural approach to human rights later advocated by some TWAIL scholars.[432] Hernán Santa Cruz, the Chilean delegate during the *travaux préparatoires*, insisted that the article should specifically define a 'human right':

> The question to be decided was whether ownership or property was an essential and fundamental right. The idea of ownership or property was regarded from different angles in different countries; it was necessary to find a minimum common denominator or, if that proved impossible, to abandon the question altogether.[433]

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[428] McGill University Archives, MG 4127, John P Humphrey, Drafts to the UDHR, 5th typed draft, March 6, 1947. The archives contain one undated handwritten draft, five typed drafts, and one mimeographed draft dated March 15, 1947. The draft was completed within a week, *Ibid* at 31.

[429] The draft officially discussed during the first session of the drafting committee was the one presented by René Cassin, delegate from France (see Commission on Human Rights, Drafting Committee, *International Bill of Rights*, UNESCOR, 1st Sess, UN Doc E/CN.4/AC.1/W.2/Rev 1 (1947)). His draft, however, essentially recreates Humphrey's draft, notably the article on property. Only the order of the paragraphs was changed, along with minor stylistic modifications:

> Article 18:
> Every one has a right to own personal property.
> No one shall be deprived of his property except for public welfare and with just compensation.
> The State may determine those things that are susceptible of private appropriation and regulate the acquisition and use of such property.
> The right to ownership, in whole or in part, of industrial, commercial and other profit-making private or collective enterprises, is governed by the law of the State within which such enterprises are situated.

To this day, Cassin is still mistakenly attributed the "fatherhood" of the first draft of the *UDHR*, for which he even won a Nobel Prize. Humphrey rather humbly argued that the *UDHR* had no father: "It is indeed this very anonymity which gives the Declaration some of its great prestige and authority," Humphrey, *supra* note 74, at 43.

[430] Morsink, *supra* note 426 at 140.

[431] Justino Jiménez de Aréchaga, "The Background to Article 17 of the Universal Declaration" (1967) 8:2 J Intl Commission Jurists 34 at 34.

[432] See discussion above, at §1.3.1.

[433] Commission on Human Rights, Drafting Committee, UNESCOR, 2nd Sess, 38th Mtg, UN Doc E/CN.4/AC.1/SR.38 (1948). He further added that property was not a human right if it was left to states to determine how it is exercised. Chile reiterated this position before the General Assembly, see UNGAOR, 3rd Committee, 3rd Sess, 126th Mtg, UN Doc A/C.3/SR.126 (1948).

The fear that an article on property would be meaningless actually brought delegates of both the United Kingdom and Australia to suggest at some point that the article be completely deleted from the text.[434] But in Santa Cruz's view, a "common equation" could be found in an absolute right to personal property, as suggested by Humphrey in his draft, while "general" property would be subject to the "interest of the community."[435] Professor René Cassin, the delegate from France, similarly thought that the conceptual differences about property were an issue, and pushed particularly for the protection of the proprietor against the State, reflecting the ideals of the French Revolution.[436] He felt that it was impossible to avoid the protection of private property, but that in doing so it was necessary to stress that it could be limited.[437] Schabas concludes from his analysis of the debates that the need to impose limitations on the right to property was unanimously shared.[438]

Avoiding the conflation of property rights and right to property required a departure from the liberal assumptions attached to property. The participation of non-Western countries gave significant hope for avoiding this conflation, since those nations were able to offer novel perspectives on human rights that challenged the conventional wisdom of liberal states. In particular, the presence of Latin-American countries was a novelty in this kind of high-level decision-making. Santa Cruz, who became an informal leader of the 'small' powers,[439] even stressed that the presence of Soviet countries in the Commission on Human Rights was "of fundamental importance in view of the special contribution that might be made by States with new

[434] Commission on Human Rights, *Report of the Drafting Committee to the Commission on Human Rights*, UNESCOR, 1st Sess, UN Doc E/CN.4/21, Annex F, footnote to Article 17; discussions on the matter in Commission on Human Rights, Drafting Committee, UNESCOR, 1st Sess, 8th Mtg, UN Doc E/CN.4/AC.1/SR.8 (1947). In fact, the right to property was not included in the UK draft submitted to the Commission; see Commission on Human Rights, Drafting Committee, *Text of Letter from Lod Dukeston, the United Kingdom representative on the Human Rights Commission, to the Secretary-General of the United Nations*, UNESCOR, 1st Sess, UN Doc ESC/CN.4/AC.1/4 (1947).
[435] Commission on Human Rights, Drafting Committee, UNESCOR, 1st Sess, 8th Mtg, UN Doc E/CN.4/AC.1/SR.8 (1947).
[436] *Ibid.*
[437] *Ibid.*
[438] Schabas, *supra* note 220 at 158. He notes this from the *travaux préparatoires* of both the *UDHR* and the Covenants. Yet, some delegates opposed placing explicit limits on the right to property in Article 17 since, according to them, Article 29 of the *UDHR* (duty of individuals towards the community) offered sufficient and appropriate external limits, Morsink, *supra* note 426 at 155.
[439] Humphrey, *supra* note 74 at 37.

forms of law."[440] Thus, Communism was not seen as a threat by all non-communist countries, at least not during the first years of the UN's existence.

However, contrary to Santa Cruz's hopes, meaningful discussions of a human right to property were constantly overwhelmed by the ideological debates of the nascent Cold War. This is particularly apparent in the defensive interventions by the USSR, which refused to accept any texts that would, in their view, sanction liberal rights. In one such intervention, the USSR noted that the draft declaration submitted by the United Kingdom seemed to be "an attempt to transfer certain principles of law accepted in the United Kingdom to other countries."[441] In another, Soviet delegate Professor Koretsky, who would later become a judge at the International Court of Justice, pushed for the removal of the word 'civilized' in the drafts as he felt it artificially divided the world.[442] While these two examples seem to suggest that the USSR sought to position itself as a defender of the voiceless and traditionally dominated states, the country's interventions focused particularly on protecting their own political interests, specifically against the United States. Notably, they did so notably by undermining the United States' reputation as a defender of individual rights, when outlining the United States' poor results in preventing discrimination, a theme which the Soviet country defended during the drafting process of the *UDHR*.[443]

Soviet political motivations are also apparent in their interventions in relation to the future Article 17. The USSR considered an eventual right to property as a potential encroachment on its political sovereignty; in their view, it seemed to defend the institution of private property to which they were opposed. During the drafting process, the Soviet delegate, Mr. Pavlov, "recalled that in the USSR private property was not the essential basis of 'decent living' for individuals."[444] In another intervention, the USSR opposed private property, which "acted as a brake on progress and ensured

[440] Commission on Human Rights, Drafting Committee, UNESCOR, 1st Sess, 6th Mtg, UN Doc E/CN.4/AC.1/SR.6 (1947). The USSR itself insisted that the text of the Declaration "should be acceptable to Members of the United Nations with different economic systems" (See Commission on Human Rights, UNESCOR, 3rd Sess, 49th Mtg, UN Doc E/CN.4/SR.49 (1948)).
[441] Commission on Human Rights, Drafting Committee, UNESCOR, 1st Sess, 5th Mtg, UN Doc E/CN.4/AC.1/SR.5 (1947).
[442] Commission on Human Rights, Drafting Committee, UNESCOR, 1st Sess, 2nd Mtg, UN Doc E/CN.4/AC.1/SR.2 (1947). This reference to civilization is another demonstration of the Western European influence on the *UDHR*, recalling its colonial past and distinct notion of progress, see Graham, *supra* note 46 at 95.
[443] See notably Commission on Human Rights, Drafting Committee, UNESCOR, 1st Sess, 5th Mtg, UN Doc E/CN.4/AC.1/SR.5 (1947).
[444] Commission on Human Rights, Drafting Committee, UNESCOR, 2nd Sess, 38th Mtg, UN Doc E/CN.4/AC.1/SR.38 (1948).

the continuance of extremes of poverty and wealth," talked of the "superiority" of common ownership, and continued by arguing for a statement of principle that recognized "the equality of the two systems."[445] They further insisted that any article on property should allow the State to regulate ownership.[446]

Facing resistance from Soviet delegates, the Chilean delegate felt it necessary at one point to remind them that the declaration sought to put the interests of the individuals before those of the State,[447] as such trying to break the Soviet conflation of property as political institution and property as human right—but to no avail. Indeed, the Soviets did not necessarily allow space for positive social outcomes to derive from property, but rather suggested a regime based on collective property, seen as more respectful of the social needs of the masses. But this alternative to liberal private property rights remains just another set of conventional legal rules adopted by an authoritative entity in order to regulate exchanges. It is not (or is only incidentally) concerned with the ways in which property ownership can promote one's social participation. Of course, the communist states did not reject private property of personal belongings, but they did not consider it a human right *per se*.

On the other side of the ideological spectrum, the United States pushed for an unrestrained right to property, protected through a broad statement of principle, and opposed the adjective "personal".[448] And since both the USSR and the US were assigned to the drafting sub-committee created by the Commission on Human Rights to settle the debates on the article on property,[449] the outcome of the sub-committee's work—that is, essentially the final text of Article 17[450]—largely

[445] Commission on Human Rights, UNESCOR, 3rd Sess, 49th Mtg, UN Doc E/CN.4/SR.49 (1948).
[446] This point was reiterated many times, for instance within the Drafting Committee (Commission on Human Rights, Drafting Committee, UNESCOR, 2nd Sess, 38th Mtg, UN Doc E/CN.4/AC.1/SR.38 (1948)), the Commission on human rights (Commission on Human Rights, UNESCOR, 3rd Sess, 49th Mtg, UN Doc E/CN.4/SR.49 (1948)), and during a General Assembly Third Committee meeting (UNGAOR, 3rd Committee, 3rd Sess, 126th Mtg, UN Doc A/C.3/SR.126 (1948)).
[447] UNGAOR, 3rd Committee, 3rd Sess, 91st Sess, UN Doc A/C.3/SR.91 (1948).
[448] UNESCOR, 3rd Sess, UN Doc E/CN.4/AC.2/SR.8 (1948). See also footnote 1 of the draft submitted to the Commission in Commission on Human Rights, *Report of the Drafting Committee to the Commission on Human Rights*, UNESCOR, 1st Sess, UN Doc E/CN.4/21, Annex F (1947).
[449] The other two members of this sub-committee were the United Kingdom and France. See Commission on Human Rights, UNESCOR, 3rd Sess, 59 Mtg, UN Doc E/CN.4/SR.59 (1948).
[450] With the exception of a suggestion by the USSR to add "in accordance with the laws of the country where the property is located", which was rejected by vote, see Commission on Human Rights, UNESCOR, 3rd Sess, 61st Mtg, UN Doc E/CN.4/SR.61 (1948). A slightly different formulation of the article—only stylistically—was submitted to the Economic and Social Council, see Economic and Social Council, *Report of the third session of the Commission on Human Rights*, UNESCOR, 7th Sess, UN Doc E/800 (1948) Annex A, article 15 (Also found in UN Doc A/632).

reflects their respective concerns: "everyone one has the right to own property" reflects the US's desire for a broad principle, while "alone as well as in association with others" satisfies the USSR's demands for a recognition of 'alternative' property ownership regimes. Yet this formulation, completely devoid of context, omits the initial suggestion by Humphrey to clearly distinguish between property as a human right and conventional property rights.

The USSR's general reticence is even more surprising considering the fact that the Humphrey text sought precisely to depart from liberal property, notably by submitting most forms of property to state regulation. This leads us to think that the opposition to the right to property was only an opportunistic facade to advance the Soviet political agenda. As mentioned above, the communist position essentially presents an alternative to liberalism as a political justification for a given economic institution of property, not a theory of human rights. As such, the interventions by the USSR regarding the right to property during the *travaux préparatoires* were not necessarily aimed at defending their own version of the human right to property, but rather served to defend their own political choices. As de Aréchaga stressed, the USSR's insistence on the assignment of the right to property to national legislation "merely amounted to ratifying by means of an international instrument the relevant provisions of national law,"[451] a position which also conflates property rights and right to property, and which stems from a disconnection with reality—or rather an inability to go beyond economic reality. By limiting private property to an instrument of capitalist markets, the Soviet position failed to account for instances where property operates beyond the market of commodities.

Humphrey seems to disagree that political tensions led to the brevity of Article 17:

> The discussions leading up to the adoption of this text were, as was to be expected, controversial; but, contrary to my expectations, there was relatively little apparent division on ideological grounds. Indeed, the General Assembly text was unanimously adopted—perhaps because it says so little.[452]

This version of the draft was sent to the Third committee of the General Assembly on 24 September 1948, which, despite spending some 81 meetings discussing the overall draft—including active debates on the meaning of property—maintained the same formulation. At the Third committee, 168 formal draft resolutions were submitted by governments for consideration, see *Draft Report of Sub-Committee 4 of the Third Committee*, UNGAOR, 3rd Sess, 3rd Committee, UN Doc A/C.3/400, Annex A (1948).

[451] de Aréchaga, *supra* note 431 at 38.

[452] Humphrey, *supra* note 74 at 44.

Humphrey suggests that the adoption of the text of Article 17 is evidence that ideological tensions did not overwhelm the discussions. But the important question is not whether a text was adopted, but whether it offers a meaningful definition of the right to property, which at face value it does not. Other suggestions, such as narrowing the definition down to commonalities of various national meanings or underscoring the social function of property, were not implemented, despite their broad support from states not aligned with either side of the liberal-communist debate.[453] And while unanimity is an oft-celebrated accomplishment of the *UDHR*, it hides the fact that eight countries abstained from the final vote, six of which were communist countries.[454] Consensus was necessary to move forward, but it did not indicate universal agreement.

With its abstention on a previous vote of the text of the *UDHR* at the General Assembly Third committee,[455] even Canada contributed to the confusion between conventional rules and human rights by claiming that various articles of the Declaration affected the division of powers between the federal and provincial governments specific to Canada's political regime, in which civil law is a provincial jurisdiction.[456] Canada had argued that the fact that property and civil rights were provincial jurisdictions would limit Canada's ability to respect these rights.[457] Again, this hints at a short-sighted view of human rights as encroachments on domestic jurisdictional domains, rather than as normative standards.

While it may be said that the succinctness of Article 17 is due to the declarative nature of the *UDHR*,[458] this seems a weak argument when confronted with the shared agreement on the complex

[453] See §3.3.2 below for discussions on the social function of property. Humphrey himself admits that his text on property was probably better than the final one adopted, since it provided a common denominator, *Ibid*.
[454] UNGAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/PV.183 (1948); the abstainers were the Byelorussian Soviet Socialist Republic, Czechoslovakia, Poland, Saudi Arabia, the Ukrainian Soviet Socialist Republic, South Africa, the USSR and Yugoslavia.
[455] UNGAOR, 3rd Committee, 3rd Sess, 178th Mtg, UN Doc A/C.3/SR.178 (1948). Humphrey assumes that Canada ended up voting in favour of the *UDHR* because they were "embarrassed" to abstain along communist countries, Humphrey, *supra* note 74 at 8. He adds that Canada had little interest in human rights at the time (*ibid* at 71).
[456] UNGAOR, 3rd Committee, 3rd Sess, 178th Mtg, UN Doc A/C.3/SR.178 (1948)
[457] UNGAOR, 3rd Committee, 3rd Sess, 90th Mtg, UN Doc A/C.3/SR.90 (1948). Canada expressed at the General Assembly that the Declaration was vague and imprecise, and had abstained every time a matter fell on provincial jurisdiction; see UNGAOR, 3rd Sess, 182nd Plen Mtg, UN Doc A/PV.182 (1948). The same issue of division of powers prevented the right to property to be included in the Canadian charter of rights and freedoms, see generally Alvaro, *supra* note 246. Yet, Humphrey expressed doubt that the encroachment on jurisdiction was a compelling reason, since the *UDHR* was not meant to be binding, suggesting that this abstention was the result of influence from the American Bar Association, which was opposed to the adoption of the *UDHR*, Humphrey, *supra* note 74 at 72, 79.
[458] It was often suggested that a Declaration of principles should maintain a simple style while a binding convention, which was to follow, would offer more details on the nature of each right (see e.g. Commission on Human Rights, Drafting Committee, UNESCOR, 1st Sess, 7th Mtg, UN Doc E/CN.4/AC.1/SR.7 (1947) and Commission on Human

and controversial nature of the right to property. As mentioned earlier, the length of Humphrey's initial article on property was justified by the need to clarify what actually constituted a human right to property, in contrast to other forms of ownership. Furthermore, other articles of the *UDHR* are more detailed (such as Article 2 on the prevention of discrimination and Article 26 on the right to education), leading us to think that clarity was also an important criterion, and certainly one that should have prevailed in the case of the right to property.

While Humphrey's draft attempted to depart from a liberal formulation of the right to property by inserting ownership in its context, the Cold War debate between the respective moral values of private and communal property perpetuated the confusion between property rights and the right to property, resulting in an abstract formulation of the right. Instead of focusing on defending their respective political institutions, the US and the USSR should have concentrated exclusively on how property could ensure the satisfaction of needs for social participation, whether held privately or collectively. These latter preoccupations were however addressed by other delegates concerned with a genuine definition of property as a human right, and the next section will explore these discussions around the social nature of property.

3.3 "Everyone has the Right to Own Property": the Social within Property

The social aspect of property was an important part of the discussions during the drafting of Article 17 of the *UDHR*. As mentioned in Chapter 2, even liberal property, with its emphasis on individual exclusionary rights, acknowledges the way in which ownership affects social life, at least in the sense that exclusion implies relationships with others. But the discussions of the social function of property in the *UDHR* do not neatly follow the liberal line creating an antagonism between property and the community. Indeed, Humphrey's concept of 'personal property' fostered a debate on how property could be protected as a human right in its capacity to facilitate social participation for the owner without its deleterious effects as an economic institution. The idea of personal property as a sort of minimum standard for decent living both establishes a distinction between property as a human right and conventional property rights, and allows flexibility in the

Rights, *Comments from Governments on the draft International Declaration on Human Rights, draft International covenant on human rights and the question of implementation*, UNESCOR, 3rd Sess, UN Doc E/CN.4/82 (1948)). This has in part contributed to a shortened version of Humphrey's right to own property, see e.g. discussions on length of the article in Commission on Human Rights, Drafting Committee, UNESCOR, 1st Sess, 8th Mtg, UN Doc E/CN.4/AC.1/SR.8 (1947).

determination of what counts as human right based on lived experiences, since what is 'personal' depends on a person's own distinct circumstances. This section thus looks generally at how the right to property was and is positioned *vis-à-vis* social rights in the United Nations system (§3.3.1), and pushes the historical investigation beyond the ideological debates to assess how the proposition to emphasize the social potential of property, far from being a fringe idea, was welcomed by many state delegates (§3.3.2).

3.3.1 Categorizing property: Negative freedom or social right?

The drafters of Article 17 of the *UDHR* were preoccupied by the question of whether the right to property should be classified as a negative freedom or a social right, and early on it was clear that the United Nations system of human rights considers it a social, economic, and cultural rights. The exercise of categorizing the right to property started as soon as discussions on the topic were initiated at the United Nations. During the *travaux préparatoires* of the *UDHR*, in one proposed division of the 48 articles of the Secretariat outline presented by Humphrey, the article on property was included in the category of "liberties".[459] Professor Cassin believed instead that it should be grouped with civil rights,[460] while Cuba categorized it as a "legal and political right".[461] On the other hand, the Indian representative suggested that property was part of a general right to security, along with the rights to work, education, and health.[462] Charles Malik, although a convinced natural lawyer, also considered the right to property to be of a social and economic nature.[463]

In subsequent developments, the UN has clearly tended to view the right to property as an economic and social right. The right to property was considered for inclusion in the International Covenants, and once the decision was taken to adopt two Covenants rather than one it was generally agreed that it would be inserted in the covenant on economic, social, and cultural rights,

[459] Commission on Human Rights, Drafting Committee, *Plan of the Draft Outline of an International Bill of Rights*, UNESCOR, 1st Sess, UN Doc E/CN.4/AC.1/3/Add.2 (1947). The other proposed chapters were social rights, equality, and general dispositions.
[460] Commission on Human Rights, Drafting Committee, UNESCOR, 1st Sess, 4th Mtg, UN Doc E/CN.4/AC.1/SR.4 (1947).
[461] The other categories being fundamental rights and social rights, *Draft Declaration of Human Rights: Draft Plan of the Declaration of Human Rights – Cuba*, UNGAOR, 3rd Committee, 3rd Sess, UN Doc A/C.3/SC.4/8 (1948).
[462] Security being associated here with economic and social rights, see Commission on Human Rights, *Draft of a Resolution for the General Assembly – Submitted by the Representative of India*, UNESCOR, 1st Sess, UN Doc E/CN.4/11 (1947).
[463] Commission on Human Rights, Drafting Committee, UNESCOR, 1st Sess, 10th Mtg, UN Doc E/CN.4/AC.1/SR.10 (1947). Malik believed property to be a fundamental right, but did not believe in the "unlimited character" of the right to property.

even though, as already mentioned, it was not included in the end.[464] In a 1986 resolution, the General Assembly associated the right to own property with higher standards of living, full employment, and economic and social development.[465] The Valencia-Rodriguez report was also mandated under the agenda item of the enjoyment of economic and social rights; according to the report, the Commission on Human Rights has generally considered the right to property to be of an economic, social, and/or cultural nature.[466]

But what does that mean? As I mentioned above, the artificial categorization of rights proposed at the United Nations sought mostly to distinguish rights based on their supposed importance and means of enforcement, an approach which has since been contested and rejected. In this context, the question of whether property fits in one category or another is not the most important in evaluating it as a human right. The important question is how—and if—property can enable social participation by involving a person in their location. And Humphrey's initial article on property sought to answer just that question by distinguishing between different types of property based on what they provided for the human being and her community.

3.3.2 Attempts to reinstate the social potential of property: Humphrey's concept of personal property

During the drafting process of Article 17 of the *UDHR*, the social dimension of property was constantly recalled by national delegates.[467] For instance, during the General Assembly Third Committee meetings, the Haitian delegate stressed that since "many countries no longer admitted the absolute right to property, the draft declaration would be running counter to the trend of historical evolution if it laid down such a right."[468] This social dimension was often approached by delegates as an antagonism: indeed, it was often proposed that the right to property ought to be restrained in order to take into account the needs of society as a whole, thus assuming that the full

[464] Schabas, *supra* note 220 at 150–151.
[465] *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*, GA Res 41/132, UNGAOR, 41st Sess, 97th Mtg, UN Doc A/RES/41/132 (1986); the resolution then moves on to recognize the various forms of legal property ownership.
[466] Valencia Rodriguez, *supra* note 11 para 98.
[467] See e.g. commentaries on public interest by French delegate René Cassin in Commission on Human Rights, Drafting Committee, UNESCOR, 1st Sess, 8th Mtg, UN Doc E/CN.4/AC.1/SR.8 (1947) and UNGAOR, 3rd Committee, 3rd Sess, 126th Sess, UN Doc A/C.3/SR.126 (1948).
[468] UNGAOR, 3rd Committee, 3rd Sess, 126th Sess, UN Doc A/C.3/SR.126 (1948). A joint amendment to the article on property was submitted by Belgium and Haiti; it recommended adding, "Within the limits of public interests" at the beginning of the article.See UNGAOR, 3rd Sess, 3rd Committee, UN Doc A/C.3/325 (1948).

effect of property rights opposed the interests of the group. These interventions denote what I called earlier the external perspective on the social function of property, which associates property with its Western liberal definition.

By contrast, Humphrey's right to personal property offers a vision of how social benefits can be internalized; that is, it emphasizes the social potential of property for the concrete person of human rights. The notion of personal property, although not explicitly defined in Humphrey's article on property, refers to some form of minimum standard of property necessary for decent living. This qualification as minimum standard is evident in the gradation, presented in Humphrey's draft Article 22, between different levels of property ownership, as explained above. Humphrey did not comment on the significance of Article 17 after the *UDHR* was adopted, but he did refer in one of his teaching cards from the late '60s to a scholarly article which argued that Article 17 should be clarified to recognize the right to a minimum standard and explicitly refer to the social function of property.[469]

Humphrey's draft, to a large extent, was an attempt (voluntary or not) to 'deliberalize' the human right to property. Indeed, it distinguished between property as human right and property as economic institution, resolutely retaining a right to property that is reflective of both the exploitative past of unbound private property and the potential of ownership for promoting a decent life and social well-being. As noted by Santa Cruz, a draft that protected personal property "did not limit the right to own property; it merely established to what extent it was to become an essential right, and each country would be free to determine reasonable limits in that connexion."[470] Thus, it encouraged asking questions about the relationship people had with their property rather than approaching ownership as an abstract and absolute right.

Generally speaking, Humphrey's draft of the *UDHR* was sensitive to social and economic rights, and he described it himself as an attempt "to combine humanitarian liberalism with social democracy".[471] He was well aware that human rights had meaning only within social life, and held

[469] Article written by de Aréchaga, *supra* note 431. See McGill University Archives, MG 4127, John P Humphrey, Container 30, Teaching cards, Box 15, TNC: Intl Law, 1967–1971.
[470] Commission on Human Rights, Drafting Committee, UNESCOR, 2nd Sess, 38th Mtg, UN Doc E/CN.4/AC.1/SR.38 (1948).
[471] Humphrey, *supra* note 74 at 40.

that civil and political rights are generally meaningless "on empty bellies".[472] The fact that the first article of his draft refers to a "duty of loyalty"[473] to the State and the international community is telling, as it is in stark contrast with the liberal mistrust of the State.[474] Similarly, Humphrey suggested that the preamble refer to duties to society, an idea that was not retained in the final draft.[475] Humphrey's draft included many social and economic rights, and this was particularly novel—even radical[476]—at a time when their acceptance was controversial, especially since economic and social rights were associated with communism, as Humphrey recalls.[477] But since they were included in the draft at an early stage, delegates had no choice but to at least discuss them.[478] Humphrey's initiative was supported by many delegates even outside the Communist bloc: the representative of New Zealand argued at the fourth session of the Economic and Social Council that "individual rights could not be enjoyed unless the requisite materials and facilities were provided by collective organization and work."[479] Santa Cruz insisted that social and

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[472] *Ibid* at 2. In one teaching card, Humphrey noted that "Apart from socially, an individual can have no rights," see McGill University Archives, MG 4127, John P Humphrey, Container 30, Teaching cards, Box 15, TNC: Intl Law, "Human Rights & Society", 1967-1971.

[473] Commission on Human Rights, Drafting Committee, *Draft outline of International Bill of Rights (prepared by the Division of Human Rights)*, UNESCOR, 1st Sess, UN Doc E/CN.4/AC.1/3 (1947), Article 1:

> "Everyone owes a duty of loyalty to his State and to the [international society] United Nations. He must accept his just share of such common sacrifices as may contribute to the common good."

See also Article 2:

> "In the exercise of his rights every one is limited by the rights of others and by the just requirements of the State and of the United Nations."

[474] Ultimately, a different version of this article would be included in the *UDHR*, but at the very end of the document (*UDHR* Article 29).

[475] Humphrey, *supra* note 74 at 32.

[476] In Humphrey's own words: "I was myself responsible for putting the references to economic and social rights into the first draft of the Universal Declaration of Human Rights—something which in 1948 was considered to be a very radical thing to do indeed" (McGill University Archives, MG 4127, John P Humphrey, Container 18, File 370, "Another Road to Serfdom" (convocation address), 1980).

[477] McGill University Archives, MG 4127, John P Humphrey, Container 27, File 363, "Les Pactes internationaux des droits de l'homme" (speeches). The work of the UN human rights program around the *UDHR* was qualified as "an attempt to establish State socialism" by the President of the American Bar Association in September 1948, as reported by Humphrey in his diaries, entry of Sept 21 1948, in Hobbins, *supra* note 386 at 45.

[478] As Humphrey was told by the UK delegate, Geoffrey Wilson, during the drafting process, Humphrey, *supra* note 74 at 32. Humphrey himself expressed surprise that the whole of his draft was accepted as is: "[Henri] Laugier [then Assistant-Secretary-General for Social Affairs at the UN] approved my draft without a change. I often wondered what would have happened had this operation taken place some years later after the secretariat had centralized and more conservative forces were in power." (McGill University Archives, MG 4127, John P Humphrey, Container 30, Teaching cards, Box 15, TNC: Intl Law, "UDHR, History of", 1967-1971). While he does not mention social and economic rights explicitly, his reference to the growing conservative forces leads us to think that he may have referred to such rights.

[479] As reported in UNGAOR, 3rd Sess, 69th Plen Mtg, UN Doc E/PV.69 (1947).

economic rights were fundamental in stopping fascism.[480] Argentinian and Cuban representatives expressed similar support for social rights.[481]

In fact, Humphrey's right to property appears to be a direct product of the Latin American influence in the human rights arena in the early history of the United Nations.[482] At the San Francisco Conference, Cuba, Mexico, and Panama were at the front line demanding the inclusion of a Bill of Human Rights in the UN Charter.[483] At the time of the drafting, many Latin American national constitutions—influenced by the social doctrine of the Vatican[484]—already contained significant protections for social rights, departing from the Western tradition of prioritizing negative individual rights.[485] According to Johannes Morsink, the fact that Humphrey had maintained regular relations with his Latin American counterparts throughout the war and ultimately drew from Latin American sources to write his initial draft favoured the inclusion of social rights in the *UDHR.*[486] Humphrey does not address these connections directly in his memoirs, but his personal and professional archives show that he had always been particularly interested in the political and legal situation in Latin America.[487]

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[480] Commission on Human Rights, Drafting Committee, UNESCOR, 1st Sess, 7th Mtg, UN Doc E/CN.4/AC.1/SR.7 (1947).

[481] UNGAOR, 3rd Comm, 3rd Sess, 90th Mtg, UN Doc A/C.3/SR.90 (1948); prior to the Cuban revolution.

[482] Glendon, *supra* note 81 at 27. With some twenty nations represented at the UN, Latin American countries formed the largest bloc (*ibid* at 28). Malik recognized the important role of Latin American countries in the drafting of the *UDHR* in his speech at the Third Assembly on December 9 1948 (see Malik, Centre for Lebanese Studies (Great Britain) & Charles Malik Foundation., *supra* note 386 at 117.). Ironically, Humphrey criticized the overzealousness of Latin-American countries which insisted that the *UDHR* be compared with the recently adopted Bogotá Declaration; see Hobbins, *supra* note 386 at 51–52, 55, 87.

[483] Humphrey, *supra* note 74 at 13; Glendon, *supra* note 81 at 27.

[484] With the work of Bartolomé de las Casas and the encyclical *Rerum Novarum*, *supra* note 49, as its centrepiece. See Glendon, *supra* note 81 at 35–36. Humphrey, commenting on the intervention of Guy Perez Cisnero (Cuban delegate at the third Committee of the General Assembly in 1948), said: "His speeches were laced with Roman Catholic social philosophy, and it seemed at times that the chief protagonists in the conference room were the Roman Catholics and the communists, with the latter a poor second," Humphrey, *supra* note 74 at 66.

[485] Glendon, *supra* note 81 at 32–34.

[486] Morsink, *supra* note 426 at 131–133.

[487] Humphrey showed significant interest in the Pan-Americanism movement and the Pan-American Union (ancestor of the Organization of American States), the work of which he addressed in a few speeches and papers. It seems that the fact that Humphrey was evolving in the civil tradition of the Quebec legal system might have influenced his interest in Latin American countries, which also follow a civil law tradition. See notably McGill University Archives, MG 4127, John P Humphrey, Container 23, No. 491, Correspondence 1945, Draft reference paper: Canada and the Inter-American System, 18 January 1945; McGill University Archives, MG 4127, John P Humphrey, Container 23, No. 493, Speech addressing an audience on the occasion of the Anniversary of the Pan-American Union, 14 April 1944: in this speech, he notes the importance of tightening cultural relations with Latin American countries, especially with French Canada and its civil law tradition; similarly, his teaching cards contained many notes on pan-Americanism and South American countries; see McGill University Archives, MG 4127, John P Humphrey, Containers 26, 27, 29, and

When preparing his own draft, Humphrey noted that the best text he had in hand was the one prepared by the American Law Institute, a text sponsored by the Panamanian delegation.[488] But it seems that his right to property in particular was influenced rather by the one formulated by the Inter-American Juridical Committee and submitted by the Chilean delegation in January 1947 (the "Chilean draft")[489] at the Economic and Social Council, given the similarities in style and substance. The Chilean draft reads:

> Article VIII – Right to own property
>
> Every person has the right to own property.
>
> The state has the duty to cooperate in assisting the individual to attain in minimum standard of private ownership of property based upon the essential material needs of a decent life, looking to the maintenance of the dignity of the human person and the sanctity of home life.
>
> The state may determine by general laws the limitations which may be place upon ownership of property, looking to the maintenance of social justice and to the promotion of the common interest of the community.
>
> The right of private property includes the right to the free disposal of property, subject, however, to limitations imposed by the state in the interest of maintaining the family patrimony.
>
> The right of private property is subject to the right of the state to expropriate property in pursuance of public policy, just compensation being made to the owner.[490]

The similarities between this text and the one proposed by Humphrey are numerous. Also lengthy, the Chilean draft offers a similar differentiation between 'fundamental' property and property subjected to state law. Humphrey's second paragraph[491] mirrors the third paragraph of the Chilean draft, and both drafts refer to just compensation (as does the final version of Article 17). While the

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30, Teaching cards. Finally, he was also a good friend of Santa Cruz, Chilean delegate to the United Nations during the drafting of the *UDHR*, Humphrey, *supra* note 74 at 37.

[488] *Ibid* at 32. The representative of Panama at the UN in 1945, former president Ricardo Alfaro, was part of the drafting group of the American Law Institute text, which included experts from diverse cultural backgrounds; see Glendon, *supra* note 81 at 31–32.

[489] The document submitted by Santa Cruz also served as a draft for the soon-to-be adopted *American Declaration of the Rights and Duties of Man* (1948), Glendon, *supra* note 81 at 31.

[490] *Draft Declaration of the International Rights and Duties of Man Formulated by the Inter-American Juridical Committee*, UNESCOR, Commission on Human Rights, 2nd Sess, UN Doc E/CN.4/2 (1947). A text also pushed for by Santa Cruz in Commission on Human Rights, *Report of the Drafting Committee to the Commission on Human Rights*, UNESCOR, 1st Sess, UN Doc E/CN.4/21, Annex F, footnote 3 of Article 17 (1947).

[491] Article 22:

> "[...] The State may regulate the acquisition and use of private property and determine those things that are susceptible of private appropriation."

(Commission on Human Rights, Drafting Committee, *Draft outline of International Bill of Rights (prepared by the Division of Human Rights)*, UNESCOR, 1st Sess, UN Doc E/CN.4/AC.1/3 (1947)).

Chilean draft does not use the expression 'personal property', it actually substantiates the concept, giving more absolute protection to property aimed at ensuring "the essential material needs of a decent life, looking to the maintenance of the dignity of the human person and the sanctity of home life". It also imposes a duty on the State to ensure that this minimum standard is met. Humphrey instead defines personal property negatively by contrasting it with other forms of property, such as industrial or commercial property.

Nonetheless, the distinction between property rights as an economic institution and the right to property is made clear in both drafts. The right to property, here, is a "minimum standard," which seems to suggest that accumulation of property over this minimum standard would not be protected as a human right. It is also interesting to note that the first paragraph introduces a right *to* own property in absolute terms, while the other paragraphs of the article use the terminology of the right *of* private property, which is subject to state scrutiny. Right(s) *of* property in the Chilean draft seems to refer to conventional rules of property adopted in domestic law, which are left open to State regulation, whereas the right *to* property indicates a normative standard of a moral nature that bounds States.

The other version of the text on property pushed by Santa Cruz (the "Bogotá text") also made it clear that not all property relationships were protected as a human right:

> Everyone has the right to own such property as meets the essential needs of decent living, that helps to maintain the dignity of the individual and of the home, and shall not be arbitrarily deprived of it.[492]

This text, drawn almost verbatim from the *American Declaration of the Rights and Duties of Man*,[493] also presents the right to property as a minimum standard for decent living, but in more concise language. The Bogotá text was actually retained during the second session of the drafting committee,[494] which indicates clearly that there was some form of agreement with its normative

[492] See Commission on Human Rights, *Report of the Drafting Committee to the Commission on Human Rights*, UNESCOR, 2nd Sess, UN Doc E/CN.4/95, Annex A, Article 14 (1948). For discussion on the matter see Commission on Human Rights, Drafting Committee, UNESCOR, 2nd Sess, 38th Mtg, UN Doc E/CN.4/AC.1/SR.38 (1948).

[493] OAS, *American Declaration of the Rights and Duties of Man*, Adopted at the Ninth International Conference of American States, 2 May 1948, OEA/Ser.L/V/I.4 Rev. 9 (2003). The article on property reads as follows:

> "Article XXIII: 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."

[494] Commission on Human Rights, *Report of the Drafting Committee to the Commission on Human Rights*, UNESCOR, 2nd Sess, UN Doc E/CN.4/95, Annex A, Article 14 (1948). For discussion on the matter see Commission on Human Rights, Drafting Committee, UNESCOR, 2nd Sess, 38th Mtg, UN Doc E/CN.4/AC.1/SR.38 (1948). It was ultimately modified during the work of the Commission, but Santa Cruz still tried to restore the exact same text during

claim. Much shorter than the previous Chilean suggestion, this version focuses primarily on personal property as a human right. Santa Cruz claimed that this formulation would "define how much property should be considered an inherent right of the individual," adding that "ownership of anything more than that might be legal and just, but could not be considered a basic right."[495] Santa Cruz insisted that it did not limit property, simply that whatever exceeded this standard was not to be considered a human right. As Schabas notes, while the final version of Article 17 refers back to national laws, the Bogotá text rather "provided an objective standard for definition of the right to property,"[496] although the "decent living" criterion added a "subjective component" to the right.[497] In other words, 'decent living' allowed lived experience to influence the meaning of property, since what is decent for a person depends on their located social circumstances.

Many countries voiced their support for a right to personal property, starting with members of the Latin American contingent. De Aréchaga considered that this minimum standard of personal property was an essential feature of a meaningful right to property—as essential explicitly assessing its social function.[498] The Colombian delegate pushed the logic of the social function beyond the realm of property ownership, suggesting a clear mention of the relationship between capital and labour when discussing the right to own property, stating that the article on property

> should deal with the whole problem of the grinding and humiliating poverty which permitted man to survive but broke his spirit. It should state the right of the worker to share in profits. If it could thus come to grips with the problem of economic insecurity, it would indeed constitute a great achievement on the part of the United Nations.[499]

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the meetings at the Third Committee of the General Assembly; see *Draft International Declaration of Human Rights: Amendment to Article 15 of the Draft Declaration (E/800)/Chile*, UNAGOR, 3rd Committee, 3rd Sess, UN Doc A/C.3/249. The Cuban delegation also pushed for the adoption of the Bogotá text during the Third Committee drafting meetings; Humphrey, *supra* note 74 at 65.

[495] UNGAOR, 3rd Comm, 3rd Sess, 126th Mtg, UN Doc A/C.3/SR.126 (1948).

[496] Schabas, *supra* note 220 at 141. This position, held by Chile during the *UDHR* debates, was also reiterated by its delegate in the drafting of an eventual article on property in the Covenants; see Commission on Human Rights, UNESCOR, 10th Sess, 417th Mtg, UN Doc E/CN.4/SR.417 (1954).

[497] *Ibid* at 142.

[498] de Aréchaga, *supra* note 431 at 39.

[499] UNGAOR, 3rd Comm, 3rd Sess, 91st Mtg, UN Doc A/C.3/SR.91 (1948).

Cuba[500] and Ecuador[501] suggested more concrete alternative versions to the Bogotá right to property in the hopes of creating consensus, while still stressing its social essence.

Outside the Latin American contingent, the idea of a minimum standard of property being a human right did not meet any substantial objection.[502] Lebanese delegate Charles Malik stated that the right to personal property was self-evident and essential.[503] Even the UK, which ultimately favoured the removal of the article on property, nonetheless suggested at one point a similar text based on a minimum standard of property: "Everyone has the right to own such property as is necessary to enable him to maintain the average standard of life in the country in which he lives."[504] In another intervention, the UK delegate stressed that "everyone has the right to own property" should be interpreted to mean that "some right of ownership of private property is regarded as an essential human right. It is not intended to mean that every sort of property must be susceptible of private ownership."[505] Generally speaking, the UK supported the Chilean proposal for the right to property.[506] And while the USSR was skeptical that property could be the basis for "decent living",[507] it still recognized personal property as property that "enabled [individuals] to participate […] in the life of the community".[508]

Either the disagreements were based on the vagueness of the vocabulary used, or they related to the scope of the right to property. For the US delegation, the choice to include the term "personal" was inadequate because of the confusion it created with the common law concept of personal

[500] One modified version submitted by Cuba introduced changes meant to mirror the mainstream article, for instance by adding "alone as well as in association with others" and "Every person has the right to legal protection against arbitrary confiscation of his property" to the Bogotá version, see *Draft Declaration of Human Rights: Amendments to Articles 10–22 of the Draft Declaration/Cuba*, UNGAOR, 3rd Comm, 3rd Sess, UN Doc A/C.3/232 (1948).
[501] "The Right of Private Property is guaranteed by the State in so far as this is compatible with the needs of society" (Article 7 of *Draft Charter of International Human Rights and Duties Proposed by the Delegation of Ecuador* Commission on Human Rights, UNESCOR, 2nd Sess, UN Doc E/CN.4/32 (1947)).
[502] Morsink, *supra* note 426 at 144.
[503] Commission on Human Rights, Drafting Committee, UNESCOR, 1st Sess, 8th Mtg, UN Doc E/CN.4/AC.1/SR.8 (1947).
[504] *Ibid*.
[505] Commission on Human Rights, *Comments from Governments on the draft International Declaration on Human Rights, draft International covenant on human rights and the question of implementation*, UNESCOR, 3rd Sess, UN Doc E/CN.4/82/Add.9 (1948).
[506] Commission on Human Rights, Drafting Committee, UNESCOR, 2nd Sess, 38th Mtg, UN Doc E/CN.4/AC.1/SR.38 (1948). However, since the UK favoured short declarative articles, it ultimately supported the short version of the article when Chile tried to reinstate its proposal during the Third Committee (see UNGAOR, 3rd Committee, 3rd Sess, 126th Mtg, UN Doc A/C.3/SR.126 (1948).
[507] Commission on Human Rights, Drafting Committee, UNESCOR, 2nd Sess, 38th Mtg, UN Doc E/CN.4/AC.1/SR.38 (1948).
[508] UNGAOR, 3rd Committee, 3rd Sess, 126th Mtg, UN Doc A/C.3/SR.126 (1948).

property.[509] Conversely, the delegate from the USSR stated that leaving "property" without a corresponding adjective might open the way to the protection of the ownership of the means of production.[510] The US concern about the vocabulary used was not a rejection of the social function of property. In fact, the US delegation's initial revision of Humphrey's Article 22 remained detailed, and included restrictions to the right to property:

> Everyone has the right to own and transfer property, subject to reasonable regulation, under general laws, governing the acquisition and use thereof, and determining, in the interest of national welfare and security, those things not susceptible of private ownership. No one shall be deprived of property except in accordance with due process of law, nor suffer his property to be taken other than for public use with just compensation to him.[511]

This article clearly establishes that property can be limited by the interest of the community, although it reads more as a framework of private property law than as a description of a human right. Mrs. Roosevelt also found vagueness in the terms "essential needs"[512] used in the Bogotá text, a position echoed by the Lebanese delegate at the Third Committee, who stated that he would have supported the Chilean proposal if the minimum standard had been defined.[513] He and Roosevelt seem to have ignored the fact that the final text adopted for Article 25 *UDHR*, which provides for a "right to a standard of living adequate for the health and well-being," also used open-ended language allowing for a flexible and contextual approach to rights.

Other concerns were expressed with the scope to be assigned to a human right to property. As Morsink commented, "the great majority of the drafters did not believe in unlimited property rights. They only disagreed on where to place those limits."[514] Probably in an attempt to diffuse the Cold War tensions, Malik stressed at one point that "the unlimited character of the ownership

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[509] See Commission on Human Rights, *Report of the Drafting Committee to the Commission on Human Rights*, UNESCOR, 1st Sess, UN Doc E/CN.4/21, Annex F, footnote to Article 17 (1947). This sentiment was shared by the UK delegation; see Morsink, *supra* note 426 at 143. During the discussions of the Drafting Committee, Mrs Roosevelt suggested keeping only the first paragraph of the Humphrey draft, but adding real property, so as to broaden the reach of the protection (see Commission on Human Rights, Drafting Committee, UNESCOR, 1st Sess, 8th Mtg, UN Doc E/CN.4/AC.1/SR.8 (1947)).

[510] Morsink, *supra* note 426 at 143.

[511] Commission on Human Rights, Drafting Committee, *United States Revised Suggestions for Redrafts of Certain Articles in the Draft Outline (E/CN.4/AC.1/3)*, UNESCOR, 1st Sess, UN Doc E/CN.4/AC.1/8/Rev. 1 (1947).

[512] Commission on Human Rights, Drafting Committee, UNESCOR, 2nd Sess, 38th Mtg, UN Doc E/CN.4/AC.1/SR.38 (1948). Position reiterated by the US in UNGAOR, 3rd Committee, 3rd Sess, 126th Mtg, UN Doc A/C.3/SR.126 (1948).

[513] UNGAOR, 3rd Committee, 3rd Sess, 126th Mtg, UN Doc A/C.3/SR.126 (1948). Haiti and Belgium agreed that "decent living" was vague, and thus argued for a reference to "public interest."

[514] Morsink, *supra* note 426 at 146.

of private property could not be considered a fundamental right, but […] even the socialistic constitutions refer to the fact that a man must have something which is his own".[515] But many states considered that the protection of property should go beyond personal property.[516] Cassin felt that the Chilean draft did not do enough to recognize various conceptions of property.[517] Similarly, the USSR opposed an article that limited itself to personal property, since such wording did not recognize the collective nature of communist property ownership.[518]

Again, this kind of intervention from the USSR aimed less at defining a human right to property than at legitimizing its specific vision of property rights. To be clear, Humphrey's text did not favour one economic system over another, but rather set a common standard on what the human right to property meant. An important feature of the formulations suggested by Humphrey and Santa Cruz is that they drew a line between human right and conventional rules of property, an endeavour that seemed to draw consensus at least in principle, if not in practice. This line established how property in itself could provide for a meaningful life, internalizing its social potential, but also made it clear that not all forms of property accomplished this objective. While the distinction did not make its way to the final version of the *UDHR*, the principle should nonetheless be further explored, notably when looking at the application of the right to property in concrete cases.

3.4 Lessons from Article 17 of the *UDHR*

As TWAIL scholars note, the history of international law reveals the pervasive influence of liberal thought in its institutions, and the drafting of Article 17 *UDHR* is no exception. The universalizing discourse of natural rights brought with it the right to property as framed by the Enlightenment revolutionaries, but in a form that has done nothing to include marginalized populations. Asking how knowledge is produced in the international arena, as Anghie & Chimni encourage,[519] one observes from the *travaux préparatoires* that the voices of powerful states ended up dominating those of historically underrepresented ones. What stands out in the discussions on Article 17 are

[515] Commission on Human Rights, Drafting Committee, UNESCOR, 1st Sess, 8th Mtg, UN Doc E/CN.4/AC.1/SR.8 (1947).
[516] Morsink, *supra* note 426 at 144–146.
[517] UNGAOR, 3rd Committee, 3rd Sess, 126th Mtg, UN Doc A/C.3/SR.126 (1948).
[518] UNESCOR, 3rd Sess, UN Doc E/CN.4/AC.2/SR.8 (1948); UNGAOR, 3rd Committee, 3rd Sess, 126th Mtg, UN Doc A/C.3/SR.126 (1948).
[519] Anghie & Chimni, *supra* note 28 at 86.

attempts to impose particular visions of property defended at the national level, rather than deeper inquiries into what property means as human right. As a consequence, Article 17 fails to capture the ways in which property can provide for meaningful social participation, despite attempts to bring forward the links between property and social participation through the concept of personal property. A right to property that maintains the confusion with property rights, and in particular one that upholds a particular version of property as an objective truth, such as the one framed in the *UDHR*, undermines the mission of international human rights to express shared values: it excludes alternative voices on the concept of property.

TWAIL still encourages us to look for a transformative language through the complicated edifice of international law. As the previous section showed, the discussions surrounding Article 17 contain the seeds for such a transformative language, revealing the emancipatory and inclusive potential of property beyond its oppressive version. Morsink, in compiling the drafting history of the *UDHR*, wrote that

> the deep impulse behind property right in the Universal Declaration is not the one so often associated with Western "possessive individualism", but one that has far deeper communitarian roots than is normally thought.[520]

The balance between individualism and communitarian values transpires indeed from the multiple conversations taking place around the right to property, and is represented to some extent in the broad formulation "alone as well as in association with others." But even more important is that the proposition to approach the right to property in a subversive way was strongly defended by states which had previously been silenced in the process of elaboration of international law, showing that, if transformation was to happen, it would have come not from the old guard but from the perennial outsiders.

The adoption of *UDHR* Article 17 certainly did not put an end to the controversy surrounding the right to property. The unenforceable nature of the instrument may have facilitated consensus, but once it came to developing the right into a legally binding claim at the international level, the debates led to an impasse. The drafting discussions of an article on property in the International Covenants reproduced concerns similar to those raised during the drafting of Article 17.[521] The

[520] Morsink, *supra* note 426 at 139.
[521] See generally Schabas, *supra* note 220.

drafting of the Covenants began before the adoption of the *UDHR* and, for the article on property specifically, ended in 1954, when it was decided to adjourn discussions *sine die*.[522]

The United States proposed at one point during the drafting of the Covenants to use the text of Article 17, but it was suggested that a more detailed text should be adopted in order to more specifically address cases where the right could be subject to state legislation or expropriation,[523] again reflecting the discomfort of many national delegates with a vague and absolute right to property.[524] As emphasized by Schabas, Santa Cruz and others expressed frustration with the process of drafting the right to property in the Covenants:

> Mr. Santa Cruz of Chile reminded [Commission members] that the Commission had opted for a "quite inoffensive wording" in Article 17 of the Universal Declaration, and he said it was now "wasting its time" trying to do any more.[525]

The Chilean delegate succeeding Santa Cruz, Mr. Orteaga, actually tried once more to push the Bogotá text, reiterating that the article on property should set a standard rather than reproduce domestic legislation.[526]

Many authors agree that the reason for the absence of an article on property in this case is not ideological, but rather derives from the inability to agree on the specific content of the right, in particular the issue of compensation.[527] Schabas suggests that "The real conclusion to be drawn from the *travaux préparatoires* is that the right to property was left out because it simply was not

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[522] Commission on Human Rights, UNESCOR, 10th Sess, 418th Mtg, UN Doc E/CN.4/SR.418 (1954). Schabas notes how each parts of the article were approved, but that the article as a whole was rejected, at *Ibid* at 156–157. The text read:

> "The State Parties to this Covenant undertake to respect the right of everyone to own property alone as well as in association with others. This right shall be subject to such limitations and restrictions as are imposed by law in the public interest and in the interest of social progress in the country concerned.
> No one shall be deprived of his property without due process of law. Expropriation may take place only for considerations of public necessity or utility as defined by law and subject to such compensation as may be prescribed."

[523] See Commission on Human Rights, *Report on the Tenth Session*, UNESCOR, 18th Sess, Supp No 7, UN Doc E/2573, at 7. See also Schabas, *supra* note 220 at 152–153.

[524] *Ibid* at 158.

[525] *Ibid* at 150. Schabas refers to comments reproduced in Commission on Human Rights, UNESCOR, 7th Sess, 230th Mtg, UN Doc E/CN.4/SR.230 (1951). Schabas notes that the Danish delegate expressed similar opinions, saying that adopting the same text would have no value, while trying to adopt something more specific would fail.

[526] Commission on Human Rights, *Report on the Tenth Session*, UNESCOR, 18th Sess, Supp No 7, UN Doc E/2573, at 8. Commission on Human Rights, UNESCOR, 10th Sess, 417th Mtg, UN Doc E/CN.4/SR.417 (1954). See also Schabas, *supra* note 220 at 155–156.

[527] Humphrey, *supra* note 74 at 144; Schabas, *supra* note 220 at 158; Golay & Cismas, *supra* note 11 at 4. See also Commission on Human Rights, *Report on the Tenth Session*, UNESCOR, 18th Sess, Supp No 7, UN Doc E/2573, at 7.

important or fundamental enough."[528] I would suggest however that the confusion of property rights and right to property, reflected in Orteaga's comment, may not have helped to resolve this question.

Indeed, what mostly needs to be retained from the discussions surrounding *UDHR* Article 17 is that the difference between property rights (associated with liberal capitalist economy) and right to property as a basic human right was readily accepted by many of the drafters. Within a vision of property that recognizes a minimum standard for decent living, property is understood to provide access to otherwise unattainable social life. Property, in this positive formulation, holds social potential. As Schabas notes, the notion of 'decent living' found in the Bogotá text offers a "subjective component" to the right,[529] which should be particularly emphasized, since it allows lived experiences of property to concretely define the extent of property as human right. While many delegates during the drafting of the *UDHR* argued that 'decent living' and 'essential needs' were vague concepts, it is important to stress that only expressed needs in location can clearly define what is necessary for decent living. This is something the Chilean delegate stressed in one of his interventions: "The declaration […] was a statement of general principles which would be interpreted by the peoples of the world according to their varying concepts."[530]

Ultimately, the question of whether Article 17 of the *UDHR* is a product of the Cold War should not matter if, as suggested in Chapter 1, we approach human rights as dynamic and dialogical norms. Again, one should refrain from approaching the words of the *UDHR* as an immutable and untouchable statement of truths. The specific rhetoric of rights it presents should not overwhelm the meaning of human rights as they are thought, taught, lived, and experienced. The *UDHR* merely entrenches a particular conception of human rights based on a consensus adopted between the drafters at a specific time, in a specific place. The *UDHR* may be universal, but in a very particular way: a universalism informed by the atrocities of the Second World War, the ideological debates of the Cold War, the emergence of third-world countries, but also a global social order that had yet to be swept away by decolonization and claims of self-determination. These are of course

[528] Schabas, *supra* note 220 at 159. The only country that seemed to push for the right to property in the Covenants is the United States (*ibid* at 152). Ironically, by resisting a more detailed article, the US contributed in good part to its absence.
[529] *Ibid* at 142.
[530] UNGAOR, 3rd Committee, 3rd Sess, 126th Mtg, UN Doc A/C.3/SR.126 (1948).

only a few of the many historical and political factors determining the 'truth' of the *UDHR* in 1948, but they serve to show that it is impossible to assess human rights outside of their context.

In order to maintain this adaptability, a focus on localized experiences is fundamental. Needs, after all, cannot become 'rights' until they enter a social and political setting where they may not be appropriately satisfied otherwise. If a narrative of natural law can be used to render this logic of human rights, it would be that of classical natural law, which understands nature not as a set of fixed rules but as a process, a "methodological principle" which seeks the attainment of an ideal of well-being through *phronesis*.[531] Again, this does not make the 'list' of rights of the *UDHR* irrelevant, or even less universal. It does however make a difference at the level of enforcement, since assessing one's social needs comes before assessing the specific rights to be applied.

Saying that a person's needs can be expressed only within concrete social life is addressed to some extent within the *UDHR*. Indeed, Article 29, which provides a general limitation on human rights based on social duties, says in its first paragraph: "Everyone has duties to the community in which alone the free and full development of his personality is possible." This article thus recognizes that one's "free and full development"—what I suggest derives from social participation—is dependent on social life. And since all rights of the *UDHR*, including Article 17, are to be read in conjunction with Article 29, it could be argued that property ownership would be considered a human right to the extent that it inserts itself within that social mission. In fact, it was explicitly said during the *travaux préparatoires* that any restriction to the right to property would be covered by Article 29, and thus did not need to be included in Article 17.[532] To understand what these limitations are, it seems that the distinction made between property rights and right to property based on the concepts of personal property and decent living is particularly relevant, creating a shift in vocabulary from exclusivity and alienability to positive social participation.

In fact, the reference to the right to property in Article 6 of the 1996 Declaration on Social Progress and Development insists on the fact that property should be approached as an inclusive social force:

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[531] Douzinas, *supra* note 42 at 68. Tierney similarly prefers Aristotelian classical natural law for its focus on virtues rather than assertion of rights; Tierney, *supra* note 42 at 3.

[532] Morsink, *supra* note 426 at 155. Among the reasons invoked to shorten the article on property was the fact that Article 29 of the *UDHR* was meant to apply as a 'chapeau' clause providing for limitations on rights found in the Declaration. See intervention by P.C. Chang, the delegate from China, in UNGAOR, 3rd Committee, 3rd Sess, 126th Mtg, UN Doc A/C.3/SR.126 (1948).

> Social progress and development require the participation of all members of society in productive and socially useful labour and the establishment, in conformity with human rights and fundamental freedoms and with the principles of justice and the social function of property, of forms of ownerships 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.[533]

The social function of property presented here suggests that ownership in itself can foster conditions for equality and social participation, making it more a 'human right' than a right concerned with market efficiency. This inclusive vocabulary ought to be the one adopted when enforcing the human right to property, in particular when assessing the rights of underrepresented and marginalized populations, and this is what I will be looking for in the regional case law examined in Part II.

[533] *Declaration on Social Progress and Development*, GA Res 2542(XXIV), UNGAOR, 24th Sess, UN Doc A/RES/2542 (1969), Article 6.

Part II – Stories of Property in Regional Case Law: From Property Rights to a Right to Property?

"I want to suggest that all truths are local—they are contextual, cultural, historical, and time-bound."[534]

Chapter 4 – Methodology, Text, and Context: The Language of Location

4.1 Introduction: Why Look at Regional Case Law?

Sorting out the conflation of right to property and property rights requires shaking up liberal assumptions embedded in the concept of property. These assumptions can be reinforced in the judicial process, but they can also be exposed and challenged therein. Part II looks more closely at how human rights adjudicators[535] in regional systems talk about property, examining their judicial and quasi-judicial discourse in case law to establish, first, the influence that the liberal notion of property has on the definition and interpretation of the human right to property in legal practice; and second, the extent to which these regional systems manage to depart from such assumptions, more specifically by upholding lived experiences of property in their assessment.

Lived universalism, in the specific case of the right to property, involves looking for the meaning of property as a human right not in books or theories, but in the everyday proprietary relationships and experiences that occur in location. If, as I argued in Chapter 1, human rights ultimately exist to enable people's participation by empowering them within their social relationships in location, I want to assess the space adjudicators allow for stories of location in their decision-making—that is, for direct recollections of experiences by those who actually lived them. These observations can reveal if, when, and how ownership contributes to inserting a person into her social life. This means that the facts ought to take significant space in the cases—at least as much as the legal rules themselves. Attention to location may encompass geographical aspects of the cases (specificities of the regions, countries, cities where they occur), temporal factors (passage of time, historical events), political circumstances (internal conflicts, refugee crises), or interpersonal ones (membership in a particular community, family life). An important question is whether such

[534] Mutua, "Complexity", *supra* note 83 at 51.
[535] For the purpose of the analysis here, I take "adjudicative" to mean a mechanism by which a competent regional authority issues a decision in the context of a legal dispute brought by a claimant against a state, regardless of whether or not this decision is legally binding.

located context is just used as passive background, or rather considered a key factor in determining the extent to which property is a human right.

Furthermore, in order to truly create a departure from dominant liberal narratives in property cases, it is relevant to focus on the experiences of marginalized and underrepresented 'owners,' such as displaced people and refugees who have lost their belongings in conflict; indigenous peoples whose relationships with land are incompatible with settler law; people in informal settlements who, despite not possessing formal titles, still consider that they 'own' their homes; and people in rural areas whose land use is essential for survival. This exercise allows various voices of property to inform a universal definition of the right to property in a dialogical and reflexive way—a constant reassessment of the meaning of property. Following this, legal 'precedent' ought not to overwhelm personal stories of property, but enter in conversation with them. Thus, in Part II I ask who introduces stories of location, whose narrative is taken into account when presenting facts, and how lived experiences of property are presented.

The analysis of case law in the next few chapters is conducted bearing in mind the critique of the current discourse of human rights based on abstract reason, articulated in Chapter 1, while assessing the potential of international human rights for emancipatory renewal. Specifically, I look at how judges' conceptions of property may perpetuate the confusion between property rights and right to property, by borrowing the liberal rhetoric of exclusive individual rights, of commodification and market-alienability, and of definition through attributes. In other words, I identify what TWAIL scholar Okafor has called 'continuities' (of Western domination) in international law.[536] Adjudicators who follow the structure of liberal property rights tend to ignore location and specificities pertaining to located property, in favour of a neutral and universalizing vocabulary. As a consequence, they leave less room for lived experiences to influence legal outcomes, especially if such experiences challenge the monistic definition of liberal property they assume should apply, as illustrated in cases of illegal property discussed in Chapter 6.

But case law also reveals discontinuities, in particular when adjudicators focus on the concrete stories of property presented to them rather than resorting to abstract jargon. In some cases, for instance with indigenous property, adjudicators can be said to apply a phronetic approach, in which lived experiences in location are the direct source of knowledge on the meaning of the human right

[536] Okafor, "Theory", *supra* note 27 at 377.

to property. As Tim Ingold notes, knowledge—such as one's personal knowledge about property relations—in practice, "occurs" rather than "exists": it is told through stories rather than put in categories.[537] And cases which pay attention to location as spaces of 'lived property' tend to assess more directly the role of property in enabling social participation—that is, empowering persons to make choices that favour their insertion in their communities. Furthermore, attention to stories of and in location lends itself to a vocabulary of purposiveness, inserting property within its larger social and cultural environment.

The regional mechanisms explored here are the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), and the African Commission on Human and Peoples' Rights (ACHPR), each of which receives individual complaints and communications alleging violations of their constitutive human rights treaty. This choice is guided by the fact that these three are the most developed regional mechanisms devoted to protecting human rights. They each enforce a binding supranational instrument on human rights that includes the protection of the right to property. In comparison, the United Nations system does not have an enforceable right to property. The latter could be covered indirectly through other rights found in the International Covenants, such as the right to housing (ICESCR Article 11),[538] the protection against discrimination (ICCPR Art 26),[539] the right to self-determination and sovereignty over natural resources (ICESCR/ICCPR Joint Art 1),[540] the protection against unlawful or arbitrary interference with the home (ICCPR Art 7),[541] the protection of intellectual property (ICESCR Art 15), or the right to social security (ICESCR Art 9). Yet, apart from a few exceptions, the Human Rights Committee has generally abstained from direct statements on the right to property.[542] Consequently the bulk of case law on the right to property at the international level issues from these regional systems.

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[537] Tim Ingold, "Against Space: Place, Movement, knowledge" in Peter Wynn Kirby, ed, *Boundless Worlds: An Anthropological Approach to Movement* (New York: Berghahn Books, 2009) 29 at 41–42.
[538] See e.g. *IDG v Spain* (2015), Communication No 2/2014, UNESCOR, 55th Sess, Annex, UN Doc E/C.12/55/D/2/2014.
[539] See e.g. in *Simunel, Hastings, Tuzilova and Prochazka v The Czech Republic* (1995), Communication No 516/1992, UNHRCOR, 54th Sess, Annex, UN Doc CCPR/C/54/D/516/1992.
[540] See e.g. in *Gilbert Martinez and others v Algeria* (2013), Communication No 1922/2009, UNHRCOR, 109th Sess, Annex, UN Doc CCPR/C/109/D/1922/2009.
[541] *Ibid*.
[542] van Banning, *supra* note 11 at 81. It will be interesting, however, to see how the new powers of the Committee on Economic, Social, and Cultural Rights in regard to the hearing of individual complaints might change this, in particular in relation to the right to housing.

It should be noted that there is an African *Court* on Human and Peoples' Rights which issues binding decisions, but the volume of cases it has heard to date remains marginal.[543] The decision to look into the work of the Commission rather than the Court therefore responds to the desire to have access to a greater number of sources to be examined. Since the analysis of the case law presented in the following chapters does not aim to identify rules of precedent but rather discursive patterns, the decisions of the Commission, although not binding, are a rich source to offer an alternative to the dominant liberal perspective. Indeed, while the ECtHR has produced by far the most expansive case law on property (over 3000 cases compared to less than a hundred for the IACtHR and ACHPR combined), it is not automatically representative of a universal understanding of the human right to property, hence the need to look at the three systems. The dominance of Western liberal sources, thinkers, and concepts within liberal institutions[544] may lead some to consider the latter as sufficient when elaborating, defining, and interpreting international law. But as Roberts notes, "One of the problems about looking primarily to, or failing to look significantly past, domestic or Western case law and practice is that it can result in an inaccurate understanding of state practice and a false sense of universality."[545] To counter this, she suggests a comparative approach to international law, one which she claims is rare since it challenges "the field's universalist assumptions and aspirations."[546] Yet, as I suggested earlier, the local is not necessarily opposed to the universal, and should be approached rather as a potential concrete affirmation of universal principles.

In fact, moving away from Western liberal patterns of law focused on abstract principles may offer greater opportunities to reconcile universality and location. Looking beyond European standards in human rights law forces us to challenge the homogeneity and apparent neutrality of international law exposed by TWAIL scholars and others, and the resultant suppression of alternative voices.[547] Every region carries its own history, assumptions, and categories, every location its own network of complex relationships, which inform the located meaning of property. The European political

[543] For instance, there is only one decision related to the right to property; see *African Commission on Human and Peoples' Rights v Republic of Kenya* (2017), Afr Ct HPR No 006/2012 at para 197–198 [*Ogiek*].
[544] Observed notably by Roberts, *supra* note 85 at 9–10; but also by TWAIL scholars, see generally Mutua, "What is TWAIL", *supra* note 27.
[545] Roberts, *supra* note 85 at 177.
[546] *Ibid* at 2–3.
[547] See e.g. Mutua, "Complexity", *supra* note 83; Pearson, *supra* note 37 at 495–496. On the effect of homogenization of rules on the acceptance of alternative narratives by judicial bodies in international law, see Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002) at 1–3.

and social realities differ significantly from the American and the African ones, and these different 'truths' are revealed within the regional human rights instruments, as discussed in the rest of this chapter. When Mutua, in this Part's epigraph, suggests that all truths are local in human rights, he does not object to the idea of universal standards, but rather encourages us to ask "how local truths are legitimately transformed into universal creeds—what value judgments are made, who makes those judgments, how they are made, and for what purpose."[548] He does not believe that regional specificities counter the idea of a universal human right to property, but rather endorses the phronetic view that universal principles can find their roots only in commonalities drawn from the ground up.

In this chapter, I first introduce the methodological approach adopted in Part II, which is to scrutinize the discourse of regional adjudicators on property presented in regional case law (§4.2). I then elaborate further on the concept of lived property in location introduced in Chapter 2. This chapter also briefly introduces the foundational texts of each regional body to identify similarities and differences among the texts, in both their general content and structure and their consideration of the right to property (§4.3). I further provide some historical background for the elaboration of each text, outlining regional particularities which are part of a person's location and can thus have an influence on the enforcement of human rights.

4.2 The Language of Property in Human Rights Courts

In order to establish whether adjudicators make a clear distinction between property rights and the right to property, and whether they allow lived experiences of property to influence their definition of the human right to property, I suggest we look more closely at how the ECtHR, the IACtHR and the ACHPR treat property cases. As James Boyd White suggests, law is ultimately the product of ongoing conversations embedded within a particular culture and social environment; thus, while a court may issue a particular view of the truth, no such absolute truth exists prior to the judicial process—or even after, for that matter.[549] Expanding on the absence of absolute truth in law, Williams has suggested that rather than there being a single absolute right to property, there are

[548] Mutua, "Complexity", *supra* note 83 at 52.
[549] James Boyd White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life" (1985) 52:3 U Chicago L Rev 684 at 687.

multiple "truths" about property that act as "expressions of personal and political identity."[550] According to her, a version of property as absolute right has been maintained by courts only because it had been repeatedly associated with political liberty.[551] From a human rights perspective, upholding a single version of property obviously goes against a phronetic conception of universalism based on shared values drawn from the ground, which would instead require taking seriously all versions of property.[552] Case law examined in the subsequent chapters displays the multiple truths about property that can enter the human rights courtroom; and, in response, the regional bodies have either tended to narrow property down to a single, neutral truth or have accepted this multiplicity of voices.

4.2.1 Analyzing the discourse of human rights judges

The texts of the cases analyzed here are approached not as formal, positivistic, legal sources but as a legal and social discourse on the meaning of property, as part of discursive "formations" or "practices".[553] Certainly adjudicators have a voice in the human rights conversation generally, and in determining the meaning of a human right to property in particular. On the other hand, words do not have predetermined or static meanings, neither does the idea of property.[554] In the legal arena, a discourse-analysis approach offers the possibility of departing from conventional definitions of property. Thus, by scrutinizing the discourse of judges on the right to property, I investigate whether they tend to fix a meaning to the concept of property, particularly one associated with the dominant liberal discourse, or whether they are willing to consider alternative viewpoints and enter into a dialogue with them in order to draw normative conclusions from the ground up.

Legal cases involve multiple stories, from formal legalistic ones to more personal accounts. Ultimately, however, these stories are told indirectly through judges, who sign the official texts of cases to be publicly distributed. As Professor Henry Smith explains, "Courts are producers as well

[550] J Williams, *supra* note 238 at 280.
[551] *Ibid* at 282.
[552] See discussion above, at §1.3, around Nussbaum's conception of *phronesis*.
[553] Nick Hartland, "System and Repetition in Legal Discourse: A Critical Account of Discourse Analysis of the Law" (1993) 9 Austl JL & Soc'y 89 at 91; Greg Marston, "Metaphor, Morality and Myth: A Critical Discourse Analysis of Public Housing Policy in Queensland" (2000) 20:3 Crit Soc Pol'y 349 at 351. See also on discursive formations, Foucault, *supra* note 32, wherein he talks about the presence of continuities and discontinuities in the history of ideas.
[554] See e.g. J Williams, *supra* note 238; Henry E Smith, "The Language of Property: Form, Context, and Audience" (2003) 55:4 Stan L Rev 1105–1191.

as processors of messages."[555] When different meanings of property conflict in the courtroom, the judge has the authority to determine which meaning is upheld; legal cases make authoritative pronouncements about law. But these pronouncements may not always match the concrete needs expressed by the victims of human rights violations, especially when these needs are not communicated in a formal legal jargon understandable to the judge. For instance, if a judge retains a meaning of property as fungible asset exchangeable in abstract capitalist markets, it limits people's capacity to present property in other ways, such as cultural artifacts or essentials for family life.

A judge's ability to uphold a plurality of voices of property is not only hindered by abstract legal language, but by the social environment in which this legal language is assimilated. Social patterns can be reproduced or modified within the courtroom,[556] such as the endorsement of liberal values. And, as part I of this study took pains to point out, the liberal language of property derives from a particular social structure in which capitalist markets dominate. Additionally, before being international practitioners, adjudicators of the ECtHR, IACtHR and ACHPR are domestically-trained jurists who carry with them assumptions about property inherited from their own legal training, background, professional practice, and even unconscious bias and ideology.[557] In ignoring the complex social structures at play in and around the courtroom, judges only reinforce their bias or ideological predispositions. Interestingly, Duncan Kennedy defines ideology as a universalization project within a context of conflicting group interests.[558] He notes that the creation of settled rules deriving from ideology may "empower some groups at the expense of others, and in general function [...] reproduce the systems of hierarchy that characterize the society in question."[559] This unusual definition of ideology as a universalization project seems to refer particularly to *liberal* ideology, which, as we have seen, has tended to transpose itself in all spheres of political life and across the world by a process of erasure of its hegemonic roots through the language of abstract reason. In the case of the right to property, the fact that judges implicitly

[555] H Smith, *supra* note 554 at 1159.
[556] Hartland, *supra* note 553 at 93–94. See also Marie-Claire Belleau & Rebecca Johnson, "I Beg to Differ: Interdisciplinary Questions about Law, Language, and Dissent" in Logan Atkinson & Diana Majury, eds, *Law, Mystery, and the Humanities: Collected Essays* (Toronto: University of Toronto Press, 2008) 145 at 147.
[557] Duncan Kennedy notes in the US context that judges systematically deny carrying bias, and that the public often views judges as objective and neutral than 'passionate' lawmakers, see Duncan Kennedy, *supra* note 35 at 24–29.
[558] *Ibid* at 39.
[559] *Ibid* at 14.

favour liberal property rights may lead to reinforcing their system of exclusion. But this association of ideology and legal discourse is occulted in the judge's technical and formal language that can act to convince them of their own neutrality.[560]

Looking into stories of property does not require an exhaustive inquiry into all that has been said in regional courts on the right to property, but rather searching for particular discursive patterns in judges' language.[561] In this study, examining discursive patterns may help identify the perpetuation of liberal assumptions about property, when property is associated for example with its commercial value rather than its personal importance, or the individual rather than the community. On the other hand, the presence of discursive "disruptions",[562] of "moments"[563] which present departures from the general and abstract principles of property rights, may serve to reveal alternative 'truths' about property. For instance, narratives of indigenous peoples' attachment to location tend to disrupt the liberal notion of title as a way of providing stability and certainty in commercial exchanges.[564] Thus, analyzing the language of adjudicators on the right to property allows us to both identify patterns of commitment to liberal standards and reveal instances of disruption of those patterns.[565]

Disruptions to mainstream normativity can also be found in judicial dissents, which often derogate from the upheld truth proclaimed by judgments. Dissents can let other voices be heard,[566] thus challenging the homogenizing effect of legal discourse. Marie-Claire Belleau and Rebecca Johnson also observe that the tone of dissents often conveys more "passion" and persuasion.[567] Indeed, while majority rulings generally maintain a formal and technical tone, the language of dissenting judges is often much more personal, expressing discomfort or disagreement with the court's conclusions. In my investigation, I found that dissents often express greater sympathy with the applicant's experience of property.

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[560] See *ibid* at 1–4 on rhetorical effects suggesting that judges "rise above" ideology. Duncan Kennedy suggests further that there is some level of bad faith in a judge's professing to be non-ideological, especially in so-called 'hard cases' which have no clear answer (*ibid* at 19–20).
[561] Henry Smith identifies patterns in law as a way to standardize law and reduce the processing cost of communicating legal information; see H Smith, *supra* note 554 at 1161.
[562] Marston, *supra* note 553 at 354.
[563] Term used by Knop in her selection of case studies on the interpretation of self-determination. Knop, *supra* note 547 at 21.
[564] See case law on indigenous property at §6.3, below.
[565] Marston, *supra* note 553 at 350; Roberts, *supra* note 85 at 3.
[566] Belleau & Johnson, *supra* note 556 at 148–149.
[567] *Ibid* at 151.

4.2.2 The importance of lived experiences in human rights cases

In the Western liberal tradition, lawyers and judges are trained to adopt neutral language, referring to broad principles of law and abstract rules rather than "particular justices"[568] in the name of commitment to the rule of law and principles of stability and equality.[569] Henry Smith has suggested that such formalism in American property law in particular is the result of a cost/benefit compromise made in a system of communication—law—which depends on the audience, and the need to adapt to it.[570] Thus, in order to reach a broad and anonymous audience, judges applying property law tend to simplify and standardize concepts and information.[571] Similarly, while the human rights judge is usually asked to show empathy towards personal stories of struggle, they may still tend toward broader principles which they believe have a greater reach than specific and personal assessments of lived experiences.[572] The problem is that such a formal discourse based on legalities often tends to ignore what Greg Marston calls "non-structural dimensions" of property cases, since it favours a discourse of scientific objectivity, underplaying "behaviour, culture and the meanings people give to their lives."[573]

The tendency of courts to generalize norms has been particularly observed and critiqued in cases of protection of cultural diversity and minorities. In her exploration of the interpretation given to the international legal concept of self-determination, Karen Knop notes that the quest for general principles leads international tribunals to approach each case of secession as "the validation of one simple definition over another,"[574] rendering details of the case secondary. But as Knop notes, this "neatly logical and linear" process, which derives from the assumed equality of states in international law, actually negates the practice of self-determination as experienced by groups that are by definition diverse and particular.[575] The same can be said for any human right: because

[568] *Ibid* at 145. This is typical of the deductive mode of legal reasoning, starting from abstract principles and narrowing to the concrete; in this case, the narrow rule is only a way of validating the more general one. See Duncan Kennedy, *supra* note 35 at 98; Simmons, *supra* note 18 at 3.
[569] Duncan Kennedy, *supra* note 35 at 13–14.
[570] H Smith, *supra* note 554 at 1107–1108.
[571] *Ibid* at 1115, 1160.
[572] Henry Smith suggests that the larger the audience, the less intensive judges will be in communicating information; see *ibid* at 1125. On the tendency in international law to set aside local context in support of abstract universal norms, see Pearson, *supra* note 37 at 503; Landauer, *supra* note 37 at 561; Knop, *supra* note 547 at 1–2.
[573] Marston, *supra* note 553 at 350.
[574] Knop, *supra* note 547 at 2.
[575] *Ibid* at 1, 6.

relationships in life are diverse, universal principles mean very little if they are applied uniformly, without attention to the ways in which needs for social participation express themselves in location.

Thus, the quest for broad abstract principles in human rights law can silence voices of, and offer maladapted responses to the needs of, social persons. And this is where the distinction between property rights and the right to property becomes important: while it may be that stable commercial exchanges benefit from standardization, when it comes to human rights abuses, the complex stories of those suffering the abuse cannot be reduced to generalities. This is particularly true for poor and marginalized segments of society. For instance, the recognition of a right to property solely through the existence of formal titles limits the opportunities for inhabitants of informal settlements in urban peripheries of the South to make claims through a human rights forum on the land on which they live and develop. If audiences indeed matter, as Smith suggests, then the audience of human rights should lead to a different reading of property. Indeed, the primary aim of a human rights court, before creating jurisprudence for a large and anonymous audience, should be to provide relief to the concrete person of human rights, by enabling their social participation in concrete terms, which in turn implies a context-sensitive language.

In fact, scholarship that has approached property relationships through field-based empirical research, that is, through localized inquiry, tends to contradict the neutrality and uniformity of property rights. For instance, Ellickson's investigation of dispute resolution of livestock trespass between neighbours in a rural Californian county showed that informal social norms took precedence over formal legal rules, suggesting that those living the conflicts were most fit to determine how they should be resolved.[576] Similarly, Bonilla Maldonado's investigation on informal property within a peripheral urban neighborhood of Bogotá showed that inhabitants of the neighborhood developed adapted rules of property based on trust in order to compensate for the inapplicability of formal law.[577] These examples highlight how multiple sites of normativity can meet in a given location, but also support the argument that location matters in determining how persons relate to and deal with property relationships in order to promote, not impede, social participation.

[576] Ellickson, "Coase", *supra* note 367.
[577] Bonilla Maldonado, *supra* note 282. See also Ting Xu & Wei Gong, "The Legitimacy of Extralegal Property: Global Perspectives and China's Experience" (2016) 67:2 N Ir Leg Q 189; David Guillet, "Ground Water Irrigation and Property Rights in Northwestern Spain" (2008) 20:2 PoLAR 144.

Consequently, one way that liberal bias can be challenged before the human rights court is by inserting property relationships in their social context. Thus, the exploration of disruptive moments in the legal discourse on property in the following chapters will look for stories of location, where the right to property is approached not semantically—from the perspective of a neutral and objective language—but contextually.[578] 'Location' is a place in which meanings of property are constructed in a particular way, influenced by relationships with persons and with place, with legal norms and historical circumstances. The passage of time in the cases studied below is particularly important from both a procedural point of view—dates and linear timelines establish the admissibility of complaints—and a substantive one. 'Ancestrality' matters, and stories of location in property cases often present experiences that, for example, establish the duration of physical presence or assess how ownership has been passed down through generations. Temporal aspects of location solidify the relationship between the social person and her property. Another important aspect is to assess the actual space given to location, and how stories of location are told. Do personal stories come before or after formal rules in the cases? Are they summarized by the judges or told through transcribed testimonies? Answering these questions will allow us to draw broader conclusions as to the importance of lived property in drawing normative content, creating legal knowledge, and reshaping the very notion of a right to property.

It may be argued that in a courtroom, law automatically and necessarily takes into account context and location in determining outcomes. After all, courts do precisely the work of applying abstract rules to concrete cases. US Circuit Judge Wilkinson suggests that each right possesses a double meaning: its absolute meaning in rhetoric and its 'compromised' meaning in practice.[579] He argues that this dual nature allows both for certainty and sensibility. But the question in the context of this research is not *whether* context is taken into account, but *how* it is used to determine outcomes. Douzinas has suggested that "[l]egal rules do not address themselves to real people, but to the juridical personality created by the law to represent the human person."[580] What this means is that the extent of a legal subject's voice depends on the space allowed by the legal system, such that

[578] Beaulac discusses the difference between semantic and everyday meaning of language, in Stéphane Beaulac, *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden ; Martinus Nijhoff Publishers, 2004) at 13.
[579] J Harvie Wilkinson, "The Dual Lives of Rights: The Rhetoric and Practice of Rights in America" (2010) 98:2 Cal L Rev 277 at 278–279.
[580] Douzinas, *supra* note 42 at 234–235.

the experiences they bring to the courtroom are controlled. Yet, as Jean Connelly Carmalt notes, narratives of location are particularly primordial when it comes to human rights, since they illustrate when, where, and how violations occur.[581] Beyond allowing the application of rules, lived experiences directly shape the meaning of human rights, since they indicate exactly how a right can enable social participation within complex networks of relationships.

4.2.3 Selection of cases

Considering the fact that property case analyses presented here seek patterns and their disruptions rather than rules of precedent, I did not limit myself to the 'core' or leading cases for each system. In fact, the majority of cases I cite from the ECtHR are unreported; that is to say, they were not considered 'important' case law by the Court. Indeed, from a bottom-up perspective emphasizing stories in location, minor cases are often more telling than those that introduce general dogmas. In order to observe patterns in language used by adjudicators to describe the right to property and assess the place given to lived property in these cases, I prioritized a broad search, looking for discursive clues to liberal traits on the one hand and openness to alternative stories on the other.[582] Using fixed research criteria, I screened each regional system's cases from their respective inceptions through to December 2018.

The screening process was relatively simple for the IACtHR and the ACHPR, since those systems have heard few cases on the right to property. For the IACtHR, as of December 2018, there were 61 cases that concerned in part the article on property and were heard on merits (I excluded decisions on compliance and provisional measures). I also set aside decisions in which property arguments were not addressed, or were considered inadmissible based on procedural requirements. In the end, I considered 30 cases, of varying importance.[583] For the ACHPR, there were 29 cases concerning in part the article on property as of December 2018. Thirteen of these cases were deemed inadmissible, and I set most of these aside. I also omitted cases which were only incidentally about property and cases that did not provide legal reasoning other than finding a

[581] Carmalt, *supra* note 155 at 80.
[582] See Flyvbjerg on atypical cases as revealing sites of investigation in social science case studies, Flyvbjerg, *supra* note 23 at 77–80.
[583] I have also selected two reports from the Inter-American Commission which stand out for their interpretation of the article on property within the American Declaration by opposition to the American Convention: *Dann v United States* (2002), Inter-Am Comm HR, No 75/02 [*Dann*] and *Maya Indigenous Communities v Belize* (2004), Inter-Am Comm HR, No 40/04 [*Maya*].

violation. In the end I retained 11 cases for consideration. I also considered the unique case of the African Court of Human and Peoples' Right that addressed the article on property. Cases on property before the IACtHR and the ACHPR ranged from simple property disputes to more serious cases of mass violations, and also represent a significant case law on indigenous relationship with land.

For the ECtHR, the screening was more complex due to the high volume of cases on property. As of December 2018, the ECtHR had heard close to 3500 cases relating to the right to property [584]— roughly a sixth of all its decisions. In fact, of all the articles of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[585] (ECHR), the one relating to property is overall the fourth most used before the Court, and second most among substantial articles (behind Article 6, relating to the right to a fair trial).[586] It is relevant to note that while the jurisprudence of the Court reaches back to 1976, fewer than one hundred cases were decided on merits prior to 2000. The reason for this is essentially one of membership: prior to 1990, only 22 countries had ratified the Convention, but the fall of the Iron Curtain brought a significant increase in the number of signatories, many of which had experienced transitions from communism to capitalism, with concomitant shifts from communal property and government housing to private ownership and real estate markets, inevitably causing significant property-rights conflicts.

Going through the ECtHR case law on property, I generally set aside cases that were primarily related to violation of due process requirements (ECHR Article 6), since they touched only indirectly upon property matters.[587] For the same reason, I set aside cases which were primarily about discrimination. I decided to reject all cases that were introduced by legal persons, concerned purely commercial property, or implied transfers of property into multiple hands, since I was chiefly concerned with the personal relationship between human beings and their property. I also set aside cases on intellectual property, focusing on cases of immoveable property, with the exception of a few cases on social security as property. This process reduced the number of cases

[584] Many of which however were struck from the list after friendly agreements, especially in the 1990s.
[585] 4 November 1950, 213 UNTS 221, ETS 5 (entered into force 3 September 1953) [*ECHR*].
[586] P1-1 and Article 6 are often invoked at the same time. The other most invoked articles are of a procedural nature: admissibility criteria (Article 35) and just satisfaction (Article 41).
[587] Ee.g. delays in accessing courts, delays in enforcement, difficulty/inability to access legal remedies.

considered to roughly eighty of various importance. Considering the number of cases, I used simplified coding to distinguish them by theme[588] and interest level.[589]

4.3 Regional Instruments: A First Glimpse at Differences in Location

Before proceeding to the analysis of discourse in the case law of the ECtHR, IACtHR, and ACHPR, it is worth having a look at the instruments they apply in order to understand their content as well as the context within which they have been elaborated. The following sections look at the shape of the right to property as framed in the three regional treaties on human rights, and outline the similarities and differences among the texts. It also puts these regional rights to property in context within both the texts themselves and their history. The European convention sought to rebuild the foundations for a unified continent after a devastating war, while the African Charter sought to underline the uniqueness of a region recently freed from colonial rule. The American instruments, for their part, show a struggle between a long-standing commitment to enlightenment ideals and a desire for differentiation from European standards. In these contexts, the choice of what counts as 'human rights'—from classical political and civil rights to third-generation 'rights of development'—is revealing, as that choice reflects the ideological predispositions of the drafters, even as each of the three systems considers its list of rights to be universal.

Analyzing the similarities and differences among these texts entails a comparative approach to international law which allows the identification of patterns of both dominance and disruption.[590] Roberts identifies some of the disruptive historical moments which challenged the traditional Western domination of international law. Examples include the decentralization of geopolitical power, changing domestic political preferences, and the increasing accessibility of non-Western legal sources through technological innovations.[591] These signalled the end of the "ascendancy of a particularly Western, liberal vision of international law."[592] Roberts suggests that the increasing use of regional fora to address various themes of international relevance further illustrated the

[588] Themes: Illegal constructions; serious violation; particularities of agricultural activity; property and the environment; property and the social; "home" cases; restitution cases post-1990.
[589] Levels of interest: discursive interest; decisions of principle; as example only; issues of compensation; dissent interest; definition of "possession".
[590] Roberts, *supra* note 85 at 5.
[591] *Ibid* at 277–284.
[592] *Ibid* at 14.

changing times.[593] The same comments apply to international human rights law: regional bodies, which can hear individual complaints, play an ever-increasing role in the interpretation and elaboration of human rights, and their constitutive regional treaties offer rich starting points for understanding the subtle nuances of lived universalism of rights.

4.3.1 European Convention: Human rights or European unity?

The 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms*[594] does not include a right to property. As was the case at the UN level, debates on the inclusion of the right within a binding instrument were controversial to the point that drafters of the Convention came to a dead end.[595] One point of disagreement was whether the right to property should be considered an economic and social right—a category of rights that the drafters decided to exclude from the Convention, focusing rather on civil and political rights.[596] The right to property was nonetheless added to the list of Convention rights through the adoption of the first Protocol to the Convention on Human Rights in 1952.[597]

The right to property in the European context is thus provided for in Article 1 of the first Protocol (P1-1), which reads as follows:

> Article 1 – Protection of property:
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

This text has been subject to significant jurisprudential development, but what I want to focus on is its linguistic elements, particularly the following three details: use of the word 'possession', protection for legal persons, and direct reference to the right of states to regulate in favour of the

[593] *Ibid* at 284.
[594] *ECHR*, *supra* note 585.
[595] See generally Yves Haeck, "The Genesis of the Property Clause under Article 1 of the First Protocol to the European Convention on Human Rights" in Hugo Vandenberghe et al, eds, *Propriété et droits de l'homme* (Brugge: Bruylant, 2006) 163. The right to property was present in the first list of rights to be included in the Convention, but was eventually left aside for further discussions (*ibid* at 169). See also van Banning, *supra* note 11 at 65–77.
[596] van Banning, *supra* note 11 at 66,77; Schabas, *supra* note 220 at 165–167; Haeck, *supra* note 595 at 170.
[597] *Supra* note 8.

general interest. These three points illustrate the tension between human right to property and property rights.

First, P1-1 does not provide for a general entitlement to 'property', but rather protects the 'peaceful enjoyment' of 'possessions'. Usually, the word possession can refer to both the act of possessing and the object that is possessed, the latter being the meaning retained in P1-1. The French version of text uses the word "*biens*," clearly referring to the object rather than the act.[598] The word possession used as object would seem to refer to a broader reach than ownership. A 'possession' can be owned, but it can also be leased, possessed, or subject to any other real rights.[599] At least one ECtHR judge has expressed in a dissent how the choice of words and ambiguities among translated versions of P1-1 was confusing and weakened the provision.[600]

Despite the linguistic ambiguity, the majority of the Court clarified in *Marckx v Belgium* (1979), one of the first cases heard on P1-1, that the article essentially protected the right to property, something they said was confirmed by the *travaux préparatoires.*[601] Yet what the *travaux préparatoires* and the final (ambiguous) choice of words illustrate is the drafters' discomfort with an absolute and unfettered right to private property. Some drafters had suggested limiting the article to property for personal use, thus excluding commercial property.[602] As during the drafting of the *UDHR*, the British delegation expressed the opinion that the article should be removed

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[598] "Article 1 – Protection de la propriété

> Toute personne physique ou morale a droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international. […]"

There is also a problem of translation between the French and the English versions (both official) of P1-1. While the English text refers to "possessions" in both the first and second sentence, the French text rather uses the word "propriété" in the second sentence.

[599] This is the case for instance in Quebec civil law where a "*bien*" (translated in English as "property") can be subject to various rights other than ownership. See Article 911, Civil Code of Quebec, CCQ 1991:

> "On peut, à l'égard d'un bien, être titulaire, seul ou avec d'autres, d'un droit de propriété ou d'un autre droit réel, ou encore être possesseur du bien./ A person, alone or with others, may hold a right of ownership or other real right in property, or have possession of the property."

[600] See Judge Fitzmaurice, dissenting in *Marckx v Belgium* (1979), ECHR (Ser A) No 31, para 18. In a footnote he added:

> "The apparent interchangeability of the terms 'possessions', 'property', 'biens' and 'propriété' in different contexts and without evident reason is confusing. The French 'biens' is best translated into English by 'assets' not 'possessions'. But the best French rendering of the English 'assets' is 'avoirs'. In addition, there is no really satisfactory French equivalent of 'possessions' as such, and in the plural. These anomalies of translation add to the difficulties. But they also thereby reduce the value of the Court's interpretation." (*ibid*, footnote 8).

[601] *Ibid* at para 63.

[602] Haeck, *supra* note 595 at 170; van Banning, *supra* note 11 at 66.

altogether, as ownership was subject to many differences across jurisdictions.[603] In this context of conceptual disagreements, the expression 'peaceful enjoyment of possessions' seems less absolute than 'private property,' and allows for a broader interpretation. In fact, while the majority in *Marckx* clearly associated P1-1 with a right to property, the decision crucially extended the meaning of possessions to include patrimonial rights or 'proprietary interests', such as inheritance rights. This decision opened the way to a fruitful jurisprudence progressively expanding the meaning of the word 'possessions' to pensions, welfare benefits, and leases.[604]

The second element that draws our attention is that the article on property in the European human rights framework applies to both natural and legal persons, which appears to contradict the fact that the Convention is meant to protect *human* rights while at the same time illustrating the influence of the liberal definition of property rights as market-based. The application of 'fundamental' rights to corporations is not unusual in itself; while it has been subject to harsh criticism, it is nonetheless widely observed, notably in the Canadian constitutional context.[605] But 'fundamental' or constitutional rights are not the same as international human rights, first because the latter are not concerned with the political organization of a state per se, and second because international human rights law is not a 'law above law' or a supra-legislative bill adopted by governments, it is rather a law *across* law, a set of normative standards that should transcend the legal corpus of individual states.[606] States may take the political decision to extend constitutional protections to corporations, but this does not change the fact that *human* rights apply to humans. This being said, insofar as P1-1 applies to legal persons as well as natural persons, it seems more like a regional constitutional protection aimed at maintaining the liberal institution of property

[603] Haeck, *supra* note 595 at 171–172.

[604] See ee.g. *Béláné Nagy v Hungary* [GC], No 53080/13 (13 December 2016) ECHR [*Béláné Nagy*] (pensions); *Akhverdiyev v Azerbaijan*, No 76254/11 (29 January 2015) ECHR (lawfully used land); *Mago and others v Bosnia and Herzegovina*, No 12959/05 (3 May 2012) ECHR (occupancy rights); *Vrountou v Cyprus*, No 33631/06 (13 October 2015) ECHR (refugee related social benefits); *Hovhannisyan and Shiroyan v Armenia*, No 5065/06 (20 July 2010) ECHR [*Hovhannisyan*] (rights of use of residential flats); *Brezovec v Croatia*, No 13488/07 (29 March 2011) ECHR [*Brezovec*] (claim over a flat); *Šidlauskas v Lithuania*, No 51755/10 (11 July 2017) ECHR (established entitlement to compensation). Tulkens suggests this broad interpretation made P1-1 less of a "selfish" right, see Françoise Tulkens, "La réglementation de l'usage des biens dans l'intérêt général. La troisième norme de l'article 1er du Premier protocole de la Convention européenne des droits de l'Homme" in Hugo Vandenberghe et al, eds, *Propriété et droits de l'homme* (Brugge: Bruylant, 2006) 61 at 95–96.

[605] See Elizabeth Foster, "Corporations and Constitutional Guarantees" (1990) 31:4 C de D 1125.

[606] This is reflected in international instruments in the obligation of states to guarantee within their national legislation the protection of rights; see *ECHR*, supra note 585, Art 1; *American Convention*, *supra* note 7, Art 1; *African Charter*, *supra* note 9, Art 1; *ICCPR*, *supra* note 12, Art 2. See also Louis Henkins's comparison of American constitutional rights and human rights in Louis Henkins, "Rights: American and Human" (1979) 79:3 Colom L Rev 405 at 412.

rights than a definition of a moral human right. To be clear, human rights do not necessary apply only individually; many labour protections, as well as minority rights, are collective in nature. Still, rights should serve social participation, not corporate interests.[607]

In fact, the ECHR has an ambiguous position in relation to human rights protection. While no other rights in the Convention refers explicitly to legal persons, all rights set out in the Convention apply to corporations as well as individuals.[608] The Convention's very name officially refers to both human rights and fundamental freedoms, but in common usage (and in its usual acronym) "Fundamental Freedoms" is elided, colouring the perceived scope of the document. Yet the fact that human rights and fundamental freedoms are enumerated and attached by an "and" suggests that the drafters did not view the two concepts as identical. "Fundamental freedoms," in the text of the Convention, is independent of any particular subject, whereas 'rights' are attached to the 'human,' implying a distinction between constitutional protections (applied to all legal subjects of rights) and human rights. The short version of the ECHR's name misrepresents its constitutional purpose.

On the other hand, the preamble of the ECHR focuses more on the common interests of European countries—"greater unity between its members"; European governments being "like-minded" and sharing a "common heritage of political traditions, ideals, freedom and the rule of law"—than on the importance of ensuring the universal human rights of their citizens, despite a reference to the *UDHR*. Thus, and as Emberland has advanced,[609] the Court's extension of the ECHR to commercial corporations is an interpretation consistent with the essence of the Convention, which is to favour European standards of liberalism. And this liberal commitment is noticeable in ECtHR jurisprudence, as the following chapters will demonstrate.

It is worth noting that the ECHR was drafted just after World War II and the devastation it bequeathed to the European continent. This meant two things: first, that the Convention should express unity to help recover from the war's profound divisions; and second, that unity was best expressed through liberal values.[610] As such, the drafters expressed the opinion that property

[607] See Anna Grear, "Human Rights - Human Bodies? Some Reflections on Corporate Human Rights Distortion, the Legal Subject, Embodiment and Human Rights Theory" (2006) 17:2 Law and Critique 171.
[608] See generally Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: Oxford University Press, 2006).
[609] *Ibid*, see generally Chapter 2.
[610] Duncan Kennedy, *supra* note 35 at 73.

protection was symbolic of antifascism,[611] justifying its presence as not only a human right, but also a symbol of liberalism. Yves Haeck suggests that the inclusion of P1-1 was based not so much on its 'human rights' value as its utility as a political compromise among states to "safeguard their respective interests and economic policies at home."[612] Another author, commenting on the lack of extended protection for minority groups in the Convention, expressed that "[t]he human rights thinking of the time saw ideal human societies as composed of formally and substantively equal citizens,"[613] another characteristic of liberal values.

One feature of the compromise on P1-1 is the provision (in the second paragraph) of a significant limitation to the right to property through the regulation of its use, marking a departure from the vague formulation of Article 17 of the *UDHR*. This limitation is slightly more permissive than the one in the first paragraph (no deprivation except for public interest), allowing a broad range of regulatory restrictions on the right to property—a hard-fought battle during the drafting of the article.[614] These limitations clearly affirm that there is no such thing as an absolute right to property, but also underline the tense relationship between property and social rights. In cases of both deprivation from and regulation of property, the community serves to limit the European 'human' right to property. This framing presupposes that individual and community are necessarily in competition, and that the rights of one are incompatible with the rights of the other.

In fact, other than the broad statement of principle in its first sentence, P1-1 says little about exactly how property is an inherent human right. The court's interpretation of the second paragraph has been said to promote the social function of property, understood as balancing rights of individuals and general interests of the community.[615] Yet, as discussed in chapter 2, this social function is external and works through regulation of property, rather than enabling its positive force for social participation. In this sense, the text of P1-1, just like *UDHR* Article 17, misses its goal of expressing how property can act as a human right, the drafters focusing rather on ways to protect the domestic legal and political institutions of property rights.

[611] van Banning, *supra* note 11 at 67.
[612] Haeck, *supra* note 595 at 193.
[613] Timo Koivurova, "Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects" (2011) 18:1 Intl J Minority & Group Rts 1 at 29.
[614] See generally Haeck, *supra* note 595.
[615] Tulkens, *supra* note 604 at 64. The author is a former judge at the ECtHR.

Just the same, it is worth noting that the interpretation of P1-1—through both the word 'possession' and the limitations based on general interest—has served to some extent to fill the Convention's gaps regarding social and economic rights—for example, by offering some protection to tenants and guaranteeing social benefits. During the drafting process, it was decided that the ECHR would not include economic and social rights, reflecting the global opposition at the time—both regionally and internationally—to judicial enforcement of that category of rights. The European regional system has later come to include economic and social rights, as laid out in the *European Social Charter*.[616] The Charter, being a treaty opened for ratification, is a binding instrument, but one that does not allow for individual complaints to be heard before a judiciary mechanism. In this context, the broad meaning given to the word 'possession' has allowed some leeway in adjudicating economic and social rights. Yet, as I will explain below, this interpretative twist has led to confusing situations in which P1-1 has served both to protect social entitlements and to undermine them.

4.3.2 Americas: Dissent and conformity

Close analysis of the drafting history of the *UDHR* conducted in the previous chapter reveals the fundamental yet neglected role played by Latin American countries in the elaboration of an international corpus of human rights. Humphrey's draft, after all, was heavily inspired by drafts submitted by the American Law Institute and the Inter-American Juridical Committee. This early commitment to human rights illustrates the crucial role played by Latin American countries in the development of international law.[617] Long before the League of Nations, American countries have attempted to systematize international law through a succession of regional congresses and conferences covering topics as varied as the creation of a confederation of states, codification of international law, commercial trade, maritime law, and private international law, and more.[618] Few of these attempts led to ratified multinational treaties in the nineteenth century, but they showed a continued desire to advance the international agenda, and apparently "kept alive the [American] feeling of solidarity."[619] Alejandro Alvarez concluded that 'New World' countries had succeeded

[616] 18 October 1961, 529 UNTS 89, ETS 35 (entered into force 26 February 1965).
[617] See generally Alejandro Alvarez, "Latin America and International Law" (1909) 3:2 AJIL 269.
[618] See *ibid* on the various conferences.
[619] *Ibid* at 288.

in developing a genuine "American consciousness" of international law.[620] And since neither Canada nor the US has yet recognized the jurisdiction of the IACtHR,[621] their influence on its work is limited, and thus its case law offers a uniquely Latin American view of human rights that does not fully align with Western liberal tradition—although it does not drastically depart from it either.

Latin American regionalism has been a historical battleground of conformity and dissent. On one side, Latin American countries sought to assert their autonomy from the European continent in order to protect their newly acquired and thus fragile independence.[622] From their independence, countries in Central and South America, in particular Spanish-speaking countries, have presented a regional front united by language, shared culture, geographic proximity, and the battle against a common enemy.[623] Alvarez noted that "they inaugurated a policy of fraternity which presented a remarkable contrast to that of rivalry and passion then characteristic of the international life of Europe,"[624] thus setting themselves apart from the 'old' continent. On the other hand, they quickly adopted liberal principles and institutions in their own legal and political structures, and even reproduced European codes of private law.[625]

This paradox—the desire to innovate juxtaposed with conformity to European conceptions of rights—is illustrated in American instruments of human rights in relation to the right to property, in particular in the significant differences between the American Declaration of Rights and Duties of Man,[626] adopted in 1948, and the American Convention on Human Rights,[627] adopted in 1969. While the Declaration protects a minimum standard of property necessary for decent life, the

[620] *Ibid* at 336–338.
[621] Their participation to the various regional initiatives in the Americas has been uneven throughout history, although the United States did host the First International Conference of American States in 1890.
[622] A Alvarez, *supra* note 617 at 269–270, 276.
[623] This comes out from the preamble of a draft *Treaty of Confederation* signed in 1848, which described Spanish-speaking American states as

> "bound together by origin, language, religion and customs, by geographical position, by the common cause they have defended, and by the analogy of their institutions, and, above all, by common necessity and reciprocal interests" (cited in *Ibid* at 281).

[624] *Ibid* at 276. Alejandro Alvarez also noted that the relative community of interest between American countries in the nineteenth century has encouraged them to resort more frequently to international arbitration than war to resolve conflicts, something that the constant political tensions and divergences in Europe would not have allowed at the time (*ibid* at 303–304).
[625] *Ibid* at 273. This is the case particularly for the French civil code.
[626] Adopted at the Ninth International Conference of American States, Res XXX, 2 May 1948, OEA/Ser.L/V/I.4 Rev. 9 (2003).
[627] *Supra* note 7.

Convention rather appears to protect the liberal institution of property rights, similarly to the *UDHR* and the European text.

The article on property in the American Declaration shows a desire to depart from European standards. Essentially reproducing the text pushed by delegate Santa Cruz during the drafting of the *UDHR*,[628] Article 23 of the Declaration provides 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.

This text contains many interesting features, the first being the limited reach of the right to property. The language used—"such private property as"—clearly tells the reader that not all property ownership should be understood as a human right, but rather only that property which meets "essential needs". Thus, the article sets a minimum standard, similar in essence to Humphrey's concept of 'personal property'. This minimum standard was meant to accommodate the diversity of views on the character of property, notably the need to limit it.[629]

What's more, property as a human right is directly given a purpose: that of securing decent living and dignity. On that front, the various official translations of the text offer different meanings. While the English and Portuguese texts say that both decent living *and* dignity are provided by property, the French and Spanish text rather suggest that the word "dignity" is used to define "decent living": " […] *une vie décente, qui contribue à maintenir sa dignité et celle de son foyer*."[630] In fact, the version of this text submitted for the *UDHR* text also preferred that definitional structure—"essential needs of decent living, that helps to maintain…"[631]—which leads us to think that decent living and dignity should be interpreted as equivalent for the drafters of the American Declaration. The comments on the first draft of the article on property in the Declaration also illustrate the fact that the inherent dignity of the human being was the basis of the whole Declaration and should be understood as enabling "the most complete opportunity for his full

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[628] See discussion on this matter in §3.3.2, above.

[629] Álvaro Paúl Diaz, *Los trabajos preparatorios de la Declaración Americana de los Derechos y Deberes del Hombre y el origen remoto de la Corte Interamericana* (Ciudad de México: Instituto de Investigaciones Jurídicas, 2017) at 123 Annex: Informe anexo al Anteproyecto de Declaracion de los Derechos y Deberes Internacionales del Hombre, Analisis detallado de derechos y deberes, Articulo VIII : Derecho de propiedad.

[630] The Spanish version reads:

> "Toda persona tiene derecho a la propiedad privada correspondiente a las necesidades esenciales de una vida decorosa, que contribuya a mantener la dignidad de la persona y del hogar."

[631] See Commission on Human Rights, *Report of the Drafting Committee to the Commission on Human Rights*, UNESCOR, 2nd Sess, UN Doc E/CN.4/95, Annex A, Article 14 (1948).

development."[632] The fact that inherent dignity is linked to both individuals and the home somehow pins property to community and social life, making it less of an absolute right, and more anchored in its social context. This version of the right to property thus aligns with a conception of human rights as allowing meaningful participation of persons in social life. However, the IACtHR has never invoked the American Declaration in cases of property, despite the fact that it has recognized its interpretative value,[633] seemingly taking the position that the text of the Convention alone is sufficient to decide cases.

Still, the reference to 'private' property in the Declaration illustrates the lasting influence of liberal assumptions about property. Interestingly, while the text on property in the American Convention abides more explicitly by liberal principles with its absolute formulation, it does not mention private property at all. Article 21 reads as follows:

> Right to Property:
>
> 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
>
> 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
>
> 3. Usury and any other form of exploitation of man by man shall be prohibited by law.

Despite some nuances, the Convention text is similar to its European counterpart, notably by the fact that it protects the "use and enjoyment of property", a more vague formulation than the protection of *ownership* of property, yet it differs from it by expressly providing for a right to compensation—something that European drafters failed to include.[634] The interpretations of the article by their respective adjudicative bodies have also take different directions.

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[632] As reproduced in Paúl Diaz, *supra* note 629 at 123 (translation by author).

[633] *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of article 64 of the American Convention of Human Rights (Colombia)* (1989), Advisory Opinion OC-10/89, Inter-Am Ct HR (ser A), No 10, at para 36, 42, 47. The Court has stated that the Declaration has interpretative value, but that the Court cannot pronounce itself on violation of rights found in it, see *Moiwana Community Case (Suriname)* (2005), Inter-Am Ct HR (Ser C) No 124 at para 63 [*Moiwana*]. The Declaration can however be invoked before the Commission, for instance for complaints against states that have not ratified the Convention. This has been the case notably in *Dann*, *supra* note 583, where the Commission declared that the American Declaration constituted a source of legal obligations for member states, and in particular for those that had not ratified the Convention, since they had generally agreed to commit to human rights through their membership of the Organization of American States, further adding that many rights found in the Declaration possessed a customary legal status (*ibid* at para 163). This position was reiterated in *Maya*, *supra* note 583 at para 87–88.

[634] Although the ECtHR corrected this in *James and others v United Kingdom* (1986), ECHR (Ser A) No 98 [*James*], see at para 54 in which the majority found that the right to compensation was implicit in P1-1. Just compensation is

Once again, debates about the right to property during the *travaux préparatoires* of the American Convention were among the most heated, between proponents of a complete removal of the article and those who would have emphasized the social function of property.[635] It was also advanced that the right should be considered an economic and social right.[636] The themes of social justice and land reform, of particular relevance in Latin America, pervaded the discussions,[637] which eventually led to the general restriction in Article 21(1) based on "the interest of society."[638] The recognition of the continent's colonial past is also asserted through the prohibition of all forms of exploitation of human beings, yet perhaps opens the way for the protection of labour rights through property.[639] The particular colonial heritage of the Americas is also reflected in the proposition of the Colombian delegation to replace the right to property by a right to self-determination, with a text similar to Article 1 of the International Covenants,[640] showing the fineness of the line between abstract property and political territory.

Article 21 of the American Convention does not however retain the limitation of the protection to 'personal property' provided for in the American Declaration. Some countries, in particular Uruguay, Chile, and Ecuador, had pushed for a formulation that followed the purposeful spirit of the Declaration.[641] To Brazil's objection that the protection of only a minimum standard of property would amount to an ideological statement, they replied that their proposition would not prevent states from expanding the constitutional protection afforded to the right to property. Echoing Santa Cruz's insistence during the drafting of the *UDHR*, they sought to make a clear distinction between

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mentioned in the reiteration of rights found in the Charter of Fundamental Rights of the European Union. The absence of just compensation in P1-1 is attributable to British reticence, and was meant to accommodate different visions of property, something which the Court notes in its analysis of the *travaux préparatoires* in *James* (see *ibid* at para 64). See also Haeck, *supra* note 595 at 194.

635 As reported in *Mayagna (Sumo) Awas Tingni Community Case (Nicaragua)* (2001), Inter-Am Ct HR (Ser C) No 79, footnote 57 of para 145 [*Mayagna*]. The Chilean delegate noted for instance that the right to property led to a divergence of principles, which justified removing it from the Convention; see OAS, *Conferencia Especializada Interamericana sobre Derechos Humanos – Actas y Documentos*, OR OEA/Ser.K/XVI/1.2 (1969), at 41 (Doc 7: "Observaciones del gobierno de Chile al Proyecto de convencion sobre derechos humanos").

636 See the Chilean observation in *ibid* at 233 (Doc 49: "Acta de la Décima Sesión de la Comisión I"). On the other hand, the Brazilian delegation considered the right to property a civil right open to adjudication, *ibid* at 238 (Doc 52: "Acta de la Undécima Sesión de la Comisión I").

637 van Banning, *supra* note 11 at 59. See e.g. the Brazilian delegate proposing solutions so that the right to property would not "impede the agrarian reform" (translation by author of *impedir la reforma agraria*) in OAS, *supra* note 635 at 239 (Doc 52: "Acta de la Undécima Sesión de la Comisión I").

638 See debates on this in *ibid*.

639 No cases to date.

640 OAS, *supra* note 635 at 237 (Doc 52, "Acta de la Undécima Sesión de la Comisión I"). This proposition did not however receive any support.

641 *Ibid* at 240–241 (Doc 52: "Acta de la Undécima Sesión de la Comisión I").

human right to property and property rights. Instead, the final text encompasses all forms of property, and opposes them to principles of social justice.

Still, as mentioned already, the word "private" is absent from the text of the article. An initial version of this text explicitly protected the right to private property, but the expression "use and enjoyment" of property was preferred, a reflection of the *travaux préparatoires* on the Spanish text, in which "*propiedad privada*" was replaced at the last minute by "*uso y goce de sus bienes*", following a joint proposition by Brazil, Chile, Ecuador, Guatemala, Uruguay, and Venezuela.[642] However, there seems to be a contradiction in the translation of the titles: while the English title simply has "Right to Property," the Spanish, French, and Portuguese titles all include the word "private," seemingly contradicting the intention of the drafters. Nonetheless, and as the IACtHR would later note,[643] the fact that the expression "private property" was taken out of the body of the text shows that the drafters did not wish to limit the reach of the article to private property.

The Convention and the Declaration also differ in their approaches to economic and social rights. The American Declaration includes economic and social rights: health, education, work, and social security. It also directly describes individual duties toward society, or children, and parents. By contrast, the American Convention does not list any substantive economic and social rights, but provides a general commitment to their progressive realization (Article 26). Similar to the ECHR's adoption of its Social Charter, the American system subsequently adopted the Protocol of San Salvador, a binding instrument listing substantive economic and social rights which must be guaranteed by states, but which are not open for individual complaints.[644] While the Court has

[642] *Ibid* at 446–447 (Doc 86: "Acta de la Segunda Sesión Plenaria").
[643] See *Mayagna*, *supra* note 635 at para 145–146.
[644] *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador")*, Doc A-52, 17 November 1988, OASTS No 69; 28 ILM 156 (1989) (entered into force 16 November 1999). Still, the Protocol of San Salvador has been used as an interpretative tool by the Court, notably to establish a consensus towards the importance of social protections (see e.g. *Five Pensioners Case (Peru)* (2003), Inter-Am Ct HR (Ser C) No 98 at 116 [*Five Pensioners*]; *Yakye Axa Indigenous Community Case (Paraguay)* (2005), Inter-Am Ct HR (Ser C) No 125 at para 163 [*Yakye Axa*]; *Xákmok Kásek Indigenous Community Case (Paraguay)* (2010), Inter-Am Ct HR (Ser C) No 214 at para 211 [*Xákmok*]).

shown willingness to discuss the progressive realization of economic and social rights,[645] it has not, to this day, ruled on any alleged violation of Article 26.[646]

This marginalization of economic and social rights once more shows the tension within the American system between conformity to a particular liberal standard and the desire to set itself apart. The Cold War surely influenced the text of the Convention; in 1969, dissenting from liberal views could be seen as an implicit approval of communist values, as reflected in the Brazilian view that protecting a mere right to personal property was ideological.[647] Even during the drafting of the Declaration, the Nicaraguan delegate expressed the view that protecting the right to property was a way to fight ideologies that abjured private ownership.[648] Yet, as I will show later, the IACtHR moved beyond these polarized views, notably by recognizing communal rights to property for indigenous peoples.

4.3.3 Banjul Charter: Balancing rights

The main distinguishing feature of the 1981 *African Charter on Human and Peoples' Rights*[649] is its wide-ranging formulation of rights. Making a clean break from its European and American counterparts, the Charter includes substantive economic and social rights, such as the rights to work (Article 15), health (Article 16), and education (Article 17). It also includes rights of people, and thus rights that can be exercised collectively, such as rights to existence (Article 19), economic, social, and cultural development (Article 22), and a satisfactory environment (Article 24). These rights are unequivocally placed on an equal footing with civil and political rights—the classical classification of human rights at the UN level is absent. The list of rights, for

[645] The Court in *Acevedo Buendía et al Case (Peru)* (2009), Inter-Am Ct HR (Ser C) No 198 [*Acevedo Buendía*], rejected the objection *rationae materiae* raised by the state against the application of Article 26, saying that "the Court is competent to decide whether the state has failed to comply with or violated any of the rights enshrined in the Convention, even the aspect concerning Article 26 thereof" (para 17). It further elaborated on the drafting history of Article 26, reproducing minutes of the preparatory works that showed an intention of including the materialization of economic, social, and cultural rights within the work of the Court (para 99).

[646] Although the article has been raised in a few cases, see ee.g. in property-related cases *Five Pensioners*, *supra* note 644; *Acevedo Buendía*, *supra* note 645; *Kichwa Indigenous People of Sarayaku Case (Ecuador)* (2012), Inter-Am Ct HR (Ser C) No 245 [*Kichwa*]. In *Five Pensioners*, the Court concluded that it could not rule on the issue of progressive realization in a case that concerned a limited amount of persons being granted pension rights, and which were not representative of the situation of pension rights more generally in Peru (at para 147–148).

[647] OAS, *supra* note 635 at 240 (Doc 52: "Acta de la Undécima Sesión de la Comisión I").

[648] Álvaro Paúl Diaz, "La génesis de la Declaracion Americana de los Derechos y Deberes del Hombres y la relevancia actual de sus trabajos preparatorios" (2016) 47 Rev Der PUCV.

[649] *Supra* note 9.

instance, has no qualifying and dividing subheadings.[650] What this means, most significantly, is that economic and social rights are considered as justiciable as civil and political rights.[651] The only subheadings serve to distinguish between rights and duties, making the African Charter the only one of the three binding regional instruments to enumerate duties alongside rights.[652] Fons Coomans believes that the focus on obligations accentuates the fact that all rights are on the same footing.[653]

Within the African human rights edifice, the right to property is also formulated differently. Article 14 states that:

> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

The interesting feature of this text, the shortest of the three, is its inverse formulations relative to the European and American texts. The African Charter does not provide that "everyone" has a right to property, but rather that the right to property "shall be guaranteed". In doing so, the African Charter avoids the language of entitlement, which seems consistent with its intention to balance rights and duties. The passive formulation of the first sentence seems to shift focus from the individual ("everyone") and thus from a liberal tradition of natural rights in which absolute entitlements of individuals precede and take precedence over the state. Similarly, the Charter does not specify that "no one shall be deprived" of property, but rather that it "may […] be encroached upon" in certain cases. The negative formulation in the European and American texts somehow imposes a high level of scrutiny on state action: for a state to encroach on property, it must have good reason, because the principle is that such encroachment is not allowed. By opposition, the African Charter tells states that they may encroach on the right to property, since it is not absolute. Formally, it can be said that all three articles provide the same protection; after all, each provides for a general protection of property and establishes the conditions on which it may be limited, namely that it is necessary for public interest. Yet the message transmitted by the language of Article 14 is that property is not necessarily the 'sacred' right of Western legal tradition. It is clearly considered a human right, since it made it into the Charter, but it is not formulated in a way

[650] Something noted also by Coomans, *supra* note 99 at 750.
[651] *Ibid* at 751.
[652] Although the American Declaration does include duties.
[653] Coomans, *supra* note 99 at 753.

that elevates it above other rights. It is important to note that the passive formulation chosen for the right to property is not common to all human rights in the African Charter; most other rights actually employ more absolute phrasing, with "Every individual" as the direct subject of the right.[654]

It may seem dangerous to formulate such a weak right to property,[655] since it might send the message that states can do whatever they want with people's property—even property which aims to secure social participation. Indeed, nothing in the article establishes a difference between property for commercial purposes and property for self-realization. But the intentions of the drafters, as far as they can be understood by analysing the Charter as a whole, was certainly not to promote socialist ideologies, but rather to be sensitive to the continent's postcolonial struggles, characterized notably by a desire to reclaim despoiled lands from foreign interests.[656] After all, the committee of experts responsible for preparing an initial draft were strongly encouraged to "draw inspiration from African values and tradition and also to focus on the real needs of Africans, the right to development and the duties of individuals."[657]

The historical struggle against colonial rule is something that the African continent shares with the Americas, and which has influenced both regional systems. Yet the process of independence has progressed differently on the two continents. In the Americas, political emancipation goes back as far as the eighteenth century, with the majority of countries gaining independence in the early nineteenth century. In Africa, decolonization was much more recent, with the majority of countries becoming independent in the 1960s, after the adoption of the *UDHR*. In this context, being able to manage national resources was an important factor in the political emancipation of recently independent African states.[658] Many new countries, for instance, sought to nationalize land after their independence, something which created tension with large owners and foreign investors, who

[654] See e.g. Article 3 of the African Charter, *supra* note 9: "Every individual shall be equal before law."
[655] Something which has been said about Article 14 of the African Charter, as commented in Golay & Cismas, *supra* note 11 at 6.
[656] *Ibid*. There are no formal *travaux préparatoires* left behind for the African charter, hence the appeal to context, both textual and external. Note however that certain personal accounts of participants have been recorded, see e.g. Nathaniel Rubner, *An Historical Investigation of the Origins of the African Charter on Human and Peoples' Rights* (Master's Thesis, University of Cambridge, 2008) [unpublished] at 7.
[657] ACHPR, "History of the African Charter", online: <www.achpr.org/hotac>. See also Rubner, *supra* note 656. The author provides a comprehensive historiography of the origins of the Charter, and concludes that the Organization of African Unity consistently sought to put forwards "needs and aspirations of Africans" inscribed in post-colonial politics and identity (*ibid* at 6).
[658] van Banning, *supra* note 11 at 47.

obviously saw these decisions as violating their property rights.[659] In fact, the principle of permanent sovereignty over natural resources does not necessarily comply with the economic foundation of liberal property rights—that resources should be exploited for maximum commercial benefit in private hands.

In this sense, the African Charter abides less by principles of liberalism than the ECHR or even the American instruments. The preamble, for instance, reminds the reader that Africans still struggle "for their dignity and genuine independence", noting twice that all forms of colonialism ought to be eliminated.[660] One feature of achieving "genuine" independence relates to citizens' control over natural resources, which is addressed directly at Article 21:

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. State Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity.
5. State Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

This article establishes the relationship between territorial sovereignty and property, which is often occulted from any discussion on property taken as an abstract and neutral right. The dispossession of wealth and natural resources is considered a violation of property (paragraph 2), and allows for recovery or compensation. Control of natural resources is viewed as necessary in order to reinforce unity and solidarity on the continent (paragraph 4), in particular against the undue interference of

[659] *Ibid* at 154–155. In two cases heard by the ACHPR, non-native or foreigner applicants contested state initiatives to expropriate or confiscate their land for redistribution to third parties (*Dino Noca v Democratic Republic of the Congo* (2013), Afr Comm HPR No 286/04 [*Dino Noca*]) or agricultural land reforms (*Crawford Lindsay von Abo v Republic of Zimbabwe* (2016), Afr Comm HPR No 477/14 [*von Abo*]), claiming these acts were illegal.
[660] *African Charter*, *supra* note 9, Preamble.

foreign interests (paragraph 5), which have historically seized natural resources on the African continent.

All these, taken in conjunction with Article 14 of the African Charter, show that the objective of the Charter with regards to the right to property is to make sure that it is used in a way that favours both the individual and the collective, without abuses. The African system of human rights seems to depart from implicit liberal premises when it comes to the right to property and the principles guiding the management of resources. But this text should not necessarily be seen as the reflection of the mentality or reality of all African states. For instance, the International Conference on the Great Lakes region, another African intergovernmental organization, adopted the "Protocol on the Property Rights of Returning Persons"[661] which defined property as "autonomous possessions of economic value" (Article 1), thus conveying a very narrow understanding of the concept, focused on marketability of all things owned. Furthermore, the strong statement of principle in favour of protection of natural resources has certainly not kept African countries from granting control of their land to foreign monopolies, which has opened the way to one of the leading cases on property before the ACHPR, opposing oil industry interests and indigenous land rights.[662] This being said, the case law of the ACHPR, as will be shown in the following chapters, displays a sensitivity to visions of property that go beyond the fungible value of the object owned.

This brief overview of the regional instruments demonstrates how even the formal, seemingly neutral, texts of universal rights reveal ideological preferences and sensitivity to location. And these contextual features are intensified as soon at the texts are used in concrete cases, as the next chapter illustrates.

[661] Adopted on 30 November 2006.

[662] *Malawi Africa Association and Others v Mauritania* (2000), Afr Comm HPR No 54/91 [*Malawi Africa Association*]; *SERAC & CESR (Ogoni) v Nigeria* (2002), Afr Comm HPR No 155/96 [*Ogoni*].

Chapter 5 – The Role of Regional Systems in Defining the Human Right to Property

5.1 Introduction

José Alvarez, comparing the ECtHR and IACtHR, has argued that their interpretations of the right to property differ because the latter deals with much more serious violations than the ECtHR, and that American States have generally showed a greater commitment to positive obligations imposed on states.[663] While this may be true, I further argue here that the perception each of these regional systems—as well as the ACHPR—has of its role as an international tribunal and human rights organ determines the extent to which it is willing to depart from domestic understandings of property rights in its assessment of the human right to property. In this chapter, I observe that when a regional body hews close to the legal systems of its member states, it tends to uphold the legal principles of those states, for instance a liberal, market-bound notion of property, whereas a proximity to international principles lends itself to a more flexible approach to legal standards and facts. This spectrum from national to international law influences the place given to lived experiences in cases of right-to-property violations: a liberal right to property focuses more on the abstract, detached, neutral principles of property rights in order to satisfy the criteria of certainty, stability, and accountability; whereas a location-sensitive right to property allows more space for a plurality of voices to influence the outcome. While each regional body attempts to draw universal principles applicable to the right to property—notably by defining property in international law 'autonomously', independent of its domestic definition—not all succeed in doing so from the bottom up.

The regional systems investigated here derive their authority from human rights instruments and are meant to assess property not as a matter of private law, but as a human right. My guiding question is whether they make the distinction between property rights and right to property clear, and if they do not, whether the rhetoric of liberal property rights—exclusive and absolute individual right necessary for a market economy—unjustifiably influences their decisions. As Knop explains: "The choice of an interpretive theory determines how to speak: it sets the limits

[663] J Alvarez, *supra* note 220 at 648–649.

and terms of the conversation about meaning that may be had in international law."[664] If, for instance, the ECtHR upholds a theory of property as being market-bound, this will colour the interpretative tools used by the court to decide cases of violation of the right to property. And considering the high standing of the European court, this interpretation could be mistakenly universalized.[665]

In this chapter, analyzing the language used by regional judges and commissioners, I first assess how each system posits itself within the global international legal order and within the human rights project (§5.2). I observe that in its case assessments, the ECtHR tends to hew close to the domestic law of the state involved, while the two other systems consider themselves to be international organs meant to scrutinize state practice. Then I move to see how this self-positioning influences the 'autonomous meaning' property holds in international law, contrasting the European system (§5.3) with the Inter-American and African systems (§5.4). Finally, I examine the place given to personal experiences of property in each system, drawing inferences from each system's perception of its human rights mandate (§5.5).

5.2 Defining a Corpus of International Law

When seeking the meaning of the international human right to property, a fundamental aspect of the inquiry, already touched upon in Chapter 1, is what 'international human rights' means, and the initial instinct should be to distinguish international human rights from domestic law, whether private or public. Regional human-rights adjudicative bodies, as part of an international organization, should seek to set themselves apart from domestic judicial bodies. In fact, the way that courts posit themselves has an influence on how they interpret rights: the closer they stay to domestic jurisdiction, the more they tend to adopt the language of that jurisdiction. This is particularly relevant when discussing the right to property, which, as we have seen, tends to be highly (but wrongfully) influenced by domestic property rights.

Of course, international regional systems must constantly work toward maintaining their credibility and legitimacy in regard to their member states, and one way of doing this is by adopting

[664] Knop, *supra* note 547 at 4.
[665] And it already has, at least in scholarship on the right to property; see ee.g. van Banning, *supra* note 11; Sprankling, *supra* note 220. Both authors rely heavily on the jurisprudence of the ECtHR in their analysis and conclusions. It is relevant to note that at the time of publication of van Banning's book (2000) the case law emanating from the IACtHR and the ACHPR remained marginal.

neutral, technical language, to encourage certainty, accountability, and stability in decision-making. The risk associated with this in the context of human rights enforcement, however, is to suggest that all rights should be applied in the same way, regardless of location. In the case of property, a singular definition can easily be reduced to liberal property, which is what the judges and commissioners know best—what they have absorbed during their legal training. In turn, this can lead to neglect of lived property in the assessment of cases.

What characterizes the jurisprudence from the ECtHR and influences its discourse on the right to property is in good part its ambiguous location at the nexus of international law and national law, and its uncertain status as both international human rights court and European institution. In the EU system, boundaries between international and national are often blurred, leading to mixed messages about the right to property. The ECtHR's name marks it as an international human rights tribunal, and as such, its mandate would appear to be to apply international law, and to make sure that domestic law acts in accordance with universal human rights.[666] And yet the language of deference to states widely adopted by European judges in their decisions—manifested by a broad 'margin of appreciation' for states—portrays the ECtHR as an administrative tribunal providing judicial review at the European level. This deference is often expressed in a formulaic manner: "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to decide what is 'in the public interest.'"[667]

In a comprehensive study on the reception of international law within the case law of the ECtHR, Magdalena Forowicz concludes that the European system of human rights usually views itself as self-contained which has led to limited use of extra-European international law.[668] While the ECtHR does not reject the penetration of "external sources", neither does it embrace it.[669] She notes that the Court used "constitutional terms" when it was not willing to apply international law and a "more expansive vocabulary" when it was.[670]

[666] The regional nature of the ECtHR does not separate it from the body of international law institutions, see on this Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford: Oxford University Press, 2010) at 16–17.
[667] See e.g. in *James*, *supra* note 634 at para 46; or in *Béláné Nagy*, *supra* note 604 at para 113. This formulation is repeated in around one hundred decisions.
[668] Forowicz, *supra* note 666 at 388–390.
[669] *Ibid* at 5–6.
[670] *Ibid* at 6.

But the Court offers little justification why it is more open to act as an international human rights tribunal in certain cases. In fact, while international instruments other than the Convention are sometimes invoked by applicants before the ECtHR, they are very rarely addressed by the Court, which prefers to remain within the confines of the Convention. For instance, in *Bélané Nagy v Hungaria* (2016), while the applicant invoked the European Social Charter, one UN convention, and two conventions from the International Labour Organization (ILO) in their claim, the Court never engaged with these instruments, explicitly stating that once the case has been decided with the Convention, "it is not warranted to address the parties' further arguments intended to elucidate the nature of the disputed entitlement as it is described by various international texts."[671] While contributing to the creation of a European constitutionalism, this position of the Court isolates it from other international bodies and international law in general.[672]

By contrast, The IACtHR explicitly presents itself as an international tribunal, saying its cases address "international responsibility of the State"[673] whose actions are being examined. This sort of statement qualifying all decisions makes it clear that the IACtHR does not see itself as an extension of its member states, but rather as a guardian of the rights guaranteed in the American Convention. In fact, it has been noted that the case law on property of the IACtHR has contributed in distinguishing the international right to property from domestic conceptions of property, allowing the right to "evolve" from its Western roots.[674]

In the early *Ivcher Bronstein v Peru* (2001), the IACtHR, discussing the assessment of evidence, clarified its role as an international tribunal:

> In an international tribunal such as the Court, the purpose of which is the protection of human rights, the procedure has special characteristics that distinguish it from proceedings under domestic law. The former is less formal and more flexible than the latter, although this does not mean that it fails to ensure legal certainty and procedural fairness between the parties.[675]

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[671] See e.g. *Béláné Nagy*, *supra* note 604 at para 111.
[672] Forowicz believes that the European human rights system is a hybrid between a constitutional regime and an international special regime, see Forowicz, *supra* note 666 at 390. The ECtHR's reticence to interact with international law has also been observed in cases concerning armed conflict and the application of international humanitarian law, see generally Andrea Gioia, "The role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict" in Orna Ben-Naftali, ed, *International Humanitarian Law and International Human Rights Law* (Oxford: Oxford University Press, 2011) 201.
[673] See e.g. *Xákmok*, *supra* note 644 at para 2. This formulation is repeated in all decisions.
[674] J Alvarez, *supra* note 220 at 606.
[675] *Ivcher-Bronstein Case (Peru)* (2001), Inter-Am Ct HR (Ser C) No 74, at para 65 [*Ivcher-Bronstein*].

In this passage, the IACtHR first describes itself as an international tribunal rather than as a 'regional' tribunal, then clarifies that its role is to protect human rights. In this context, it assesses that procedures should be more flexible, suggesting that it does not abide by strict legal formalism and is open to adaptation of law to people's circumstances. What's more, the IACtHR makes it clear that flexibility and certainty—the latter being perceived as an essential feature of the rule of law—are not incompatible, adding that the former is especially important in cases involving human rights violations.[676] In a later case, the Court expressed how such flexibility involved paying attention "to the circumstances of the concrete case."[677] It is this flexibility in the establishment of facts and evidence which contributed to the establishment of indigenous property as a legal principle, further explored in the next chapter.[678]

As a consequence, deference to states is generally secondary to the Court's human rights mandate, as illustrated by the decision on competence (1999) in the *Ivcher Bronstein* case. Against the argument that the State of Peru had withdrawn its recognition of the jurisdiction of the Court, the IACtHR replied that human rights treaties put in place a "set of higher common values"[679] which trumped states' interests.[680] Similarly, in *Xákmok Kásek Indigenous Community v Paraguay* (2010), the Court stressed that, in the case of human rights, international public order transcended the will of the parties.[681] Also revealing is the fact that the IACtHR usually hears all cases on merits even when a state has acknowledged responsibility, meaning that it assesses its own jurisdiction as independent from that of states. For instance, in *Kichwa Indigenous People of Sarayaku v Ecuador* (2012), the Court noted that while the state acknowledged its full responsibility, it had done so in broad terms,[682] justifying the Court's intervention:

> [A]lthough there is no longer a dispute, the Court will proceed to make a specific determination of the events that occurred, because this contributes to making

[676] *Ibid* at para 66.
[677] *Tibi Case (Ecuador)* (2004), Inter-Am Ct HR (Ser C) No 114 at para 67 [*Tibi*].
[678] See e.g. *Mayagna*, *supra* note 635 at para 89.
[679] *Ivcher-Bronstein Case (Competence) (Peru)* (1999) Inter-Am Ct HR (Ser C) No 54 at para 42 [*Ivcher-Bronstein*, Competence]
[680] *Ibid* at para 44.
[681] *Xákmok*, *supra* note 644 at para 30; this was in response to a state objection that the Community refused an offer of friendly settlement. A similar statement was made in *Abrill Alosilla y otros Case (Peru)* (2011), Inter-Am Ct HR (Sec C) No 223 at para 22 [*Abrill Alosilla*].
[682] *Kichwa*, *supra* note 646 at para 27.

> reparation to the victims, to preventing a recurrence of similar acts and, in general, to the satisfaction of the purposes of the inter-American jurisdiction over human rights.[683]

This passage supports the separation between the mandate of the IACtHR and domestic jurisdictions; indeed, the IACtHR makes it clear that its responsibility is to the defence of human rights, both in favour of the direct victims in the case and in prevention of future ones. It appears also that the Court distinguishes between human rights and fundamental rights, at least in this passage from *Perozo et al v Venezuela* (2009), regarding the non-application of Article 21 to legal persons:

> [The absence of express recognition of legal entities] does not mean that, in specific circumstances, an individual may not resort to the Inter-American system for the protection of human rights to enforce his fundamental rights, even when they are encompassed in a legal figure or fiction created by the same system of law.[684]

While this passage opens the way for an extension of the Convention's reach, it also distinguishes between international human rights and domestic 'systems of law'. Finally, in another case, the Court mentioned expressly that its jurisdiction was of a "contributing and complementary nature," and thus could not be viewed as "a court of 'fourth instance'."[685]

With its international jurisdiction, the Court does not shy away from invoking international instruments and sources external to its regional setting.[686] In *Santo Domingo Massacre v Colombia* (2012), concerning violations of the rights of villagers caught in battles between Colombian soldiers and the FARC, the Court decided that Article 21 should be read in light of international treaties, notably on international humanitarian law.[687] In cases concerning indigenous property, the Court has made reference to ILO Convention No 169 on Indigenous and Tribal Peoples,[688] and has supported their findings by following international developments on the protection of indigenous

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[683] *Ibid* at para 28. In *El Mozote*, *supra* note 1, the Court similarly decided to examine the case despite acknowledgement of responsibility, noting that a dispute remained as to the legal consequences of the facts acknowledged (see para 26).

[684] *Perozo et al Case (Venezuela) (2009), Inter-Am Ct HR (Ser C) No 195* at para 399 [*Perozo*]. This case concerns property rights violation allegation by shareholders in a media company; in this case however the Court noted that the property lost was the company's, not the shareholders'.

[685] *Mémoli Case (Argentina)* (2013) Inter-Am Ct HR (Ser C) No 265, at para 140.

[686] See Carlos Iván Fuentes, *Normative Plurality in International Law: A Theory of the Determination of Applicable Rules* (Switzerland: Springer, 2016) at 144–146.

[687] *Santo Domingo Massacre Case (Colombia)* (2012), Inter-Am Ct HR (Ser C) No. 259, at para 270 [*Santo Domingo Massacre*].

[688] Ee.g. *Yakye Axa*, *supra* note 644 at para 127; *Kichwa*, *supra* note 646 at para 70; *Xákmok*, *supra* note 644 at para 211.

peoples.[689] In cases concerning economic and social rights, the Court has also made reference to general comments developed by the United Nations Committee on Economic, Social, and Cultural Rights,[690] as well as the Protocol of San Salvador.[691] It must be made clear, however, that while the Court readily allows other international instruments to be used for interpretation, it will not formally *apply* them, something emphasized in the decision on preliminary objections in *Las Palmeras v Colombia* (2000), in relation to international humanitarian law.[692] Interestingly, in this case the Court and the Commission did not agree, since the Commission considered that both organs were competent to apply customary humanitarian law, from a broad interpretation of the article on the duties of states to judicial protection.[693]

Finally, the IACtHR refers to case law outside of its jurisdiction, notably from the ECtHR.[694] Of course, it could be argued that it only makes sense for the IACtHR to look to its elder counterpart for guidance. But this also means that the Court views itself as part of an international community of interest, whereas the EU family seems reduced to the community of its member states. What's more, the Inter-American Court has also looked to the work of the younger African Commission to support its findings on the protection of indigenous cultural identity.[695]

The ACHPR is perhaps the most willing of the three regional systems to allow the penetration of international law and use cross-referencing, all the while insisting on the importance of a context-sensitive approach to human rights. This demonstrates that the local and the international, the universal and the contingent, are not only compatible, but logically connected. Just like the IACtHR, the Commission explicitly presents itself as an international body meant to ensure the protection of human rights. For instance, against the argument that the adoption of domestic

[689] *Saramaka People Case (Suriname)* (2007) Inter-Am Ct HR (Ser C) No 172, at para 130–131 [*Saramaka*]. See also *Kichwa*, *supra* note 646 at para 164, where the Court makes a survey of international norms and their domestic acceptance to determine that the obligation to consult has become a general principle of international law.
[690] Ee.g. in *Yakye Axa*, *supra* note 644 at para 166; *Xákmok*, *supra* note 644 at para 211.
[691] *Xákmok*, *supra* note 644 at para 211; *Yakye Axa*, *supra* note 644 at para 163; *Five Pensioners*, *supra* note 644 at para 116.
[692] *Las Palmeras Case (Colombia)* (Preliminary Objections) (2000), Inter-Am Ct HR (Ser C) No 67, at para 28–34 [*Las Palmeras*]. See also Fuentes, *supra* note 686 at 155, noting how the IACtHR has never applied an instrument external to the Inter-American System.
[693] *Las Palmeras*, *supra* note 692 at para 29.
[694] See e.g. *Ituango Massacres Case (Colombia)* (2006), Inter-Am Ct HR (Ser C) No 148, at para 196 [*Ituango*] or *Ivcher-Bronstein*, Competence, *supra* note 679 para 45–47, both citing multiple cases from the ECtHR.
[695] See *Kichwa*, *supra* note 646 at para 216, referring to *Endorois*, *supra* note 2, alongside cases of the UN Economic and Social Council and the European Court. The Inter-American Commission has itself made reference to *Ogoni*, *supra* note 662 in *Maya*, *supra* note 583 at para 149.

amnesty laws rendered a claim no longer valid, the Commission replied that domestic decisions "cannot shield that country from fulfilling its international obligations under the Charter."[696] Yet this international 'conscience' does not deny regional specificities, as the Commission has expressed in *SERAC and CESR (Ogoni) v Nigeria* (2001):

> The uniqueness of the African situation and the special qualities of the African Charter imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.[697]

In this passage, the Commission fully embraces the universality of human rights, saying that all human rights can be applied in the African context—an apparent reply to the criticism of cultural relativism—yet it simultaneously claims that such universal rights must be cognizant of the African reality.

The ACHPR relies significantly on international law, which is in fact part of its explicit mandate as provided for by Article 60 of the African Charter:

> The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the Parties to the present Charter are members.

Thus the Commission has an obligation, agreed upon by its constituent states, to insert its work within the larger framework of international human rights law. While the European and American Conventions do make some references to international law, it is only generally, referring for example to "obligations under international law," "general principles of international law," and the "recognized rules of international law."

One way that the Commission has integrated itself with the global human rights framework is by directly adopting the language developed by the United Nations Human Rights Committee on the

[696] *Malawi Africa Association, supra* note 662 at para 83.
[697] *Ogoni*, *supra* note 662 at para 68.

obligations of states to respect, protect, promote, and fulfill human rights.[698] Another way is by citing international case law. In *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (2009), the Commission refers to multiple decisions from the IACtHR on the matter of indigenous property in order to infer an international consensus on the protection of land rights.[699] Similarly, the Commission extensively refers to cases of the ECtHR in *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2009).[700] This reliance on the global corpus of international law lends credibility to the Commission's work, although it fails at times to elaborate on these international sources as they apply in specific cases.[701]

It is true that the findings of the Commission are technically non-binding, which might explain why it is more open to the use of external sources. Forowicz did note that the European Commission was also more willing to refer to international law than the ECtHR, suggesting this was due to the non-binding nature of its conclusions.[702] Similarly, the Inter-American Commission has explicitly stated that both regional and global rules of international law should be taken into account when interpreting the American Declaration.[703] In fact, the African Court, in its only decision concerning the right to property, also in relation to indigenous land rights, did not refer to any cases from the two other regional systems, nor even from the ACHPR, although it did refer to international principles in defining indigenous property.[704]

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[698] E.g. *ibid* at para 44. From there, and drawing from case law of the IACtHR and the ECHR, the Commission derived an obligation of states to protect individuals and groups against interference from private parties (at para 57). In this case, the Commission condemned the state for having allowed oil companies to damage the environment of Ogoniland (at para 58).

[699] See *Endorois*, *supra* note 2 at para 190–195, citing *Mayagna*, *supra* note 635 and *Saramaka*, *supra* note 689. These cases and others emanating from domestic courts had been cited by the complainants.

[700] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2009), Afr Comm HPR No 279/03 at para 195–202 [*Sudan*], citing *Doğan and others v Turkey,* No 8803/02, [2004] VI ECHR [*Doğan*] and *Akdivar and others v Turkey* [GC], No 21893/93, [1997] IV ECHR [*Akdivar*]. Those two decisions are also cited in *Endorois*, *supra* note 2 at para 188–189, 202.

[701] This is the case notably in *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea* (2004), Afr Comm HPR No 249/02, where the Commission simply concludes that there is a violation of Article 14, without offering reasoning for this conclusion [*Sierra Leonan refugees*].

[702] Forowicz, *supra* note 666 at 370–371.

[703] See *Dann*, *supra* note 583 at para 96–97. The Inter-American Commission then proceeds to an analysis of the evolution of international law on the matter of indigenous rights (*ibid* at para 124–131).

[704] See *Endorois*, *supra* note 2 at para 123–124, citing notably the *United Nations Declaration on the Rights of Indigenous Peoples*.

Yet the ACHPR seems to view its role as closer to that of an adjudicative body: all cases submitted to the Commission must comply with a series of admissibility tests, including the exhaustion of domestic remedies, and the rule of *res judicata*. To that effect, the Commission has stated that the fact that a particular case had been addressed by UN organs and agencies did not mean that the Commission could not also hear the case, since UN mechanisms led to "political resolutions and declarations," and were not "capable of granting declaratory or compensatory relief to victims,"[705] which is what the rule of *res judicata* envisaged. What this means is that the Commission considers that it has the power to make pronouncement on the law which, while not necessarily binding, would still count as jurisprudence.

5.3 The Autonomous Meaning of Property in the ECHR: Market-Integrated Property Rights

The ECtHR is conscious that the human right to property is not the same as property rights in private law. For instance, it repeatedly affirms that the meaning of "possession" in the Convention differs from its meaning in domestic law. It does so in a repeated, formulaic way:

> The concept of "possession" within the meaning of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of material goods and is independent from the formal classification of domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision.[706]

The main trait that would distinguish 'European' property from national property would thus be the fact that it extends to any 'asset' possessed which, as I have already mentioned, has allowed the protection of certain economic and social rights such as pension entitlements.

Yet, while the reach of property is broad in European law, the liberal premises of property rights remain unshaken. The ECtHR judges do not explicitly voice their "ideological preferences"[707] towards a liberal notion of property, but the vocabulary they use to assess cases on the right to property is typical of liberalism, notably in its association of property with market economy,

[705] *Sudan*, *supra* note 700 at para 105. The IACtHR has also suggested that United Nations Human Rights Committee was more a reporting mechanism than an adjudicatory one (see *Saramaka*, *supra* note 689 at para 51–54).
[706] See e.g. *Béláné Nagy*, *supra* note 604 at para 74.
[707] Duncan Kennedy notes in the American judicial context that judges, while never admitting to ideological motives in their decision-making, still tend to use a language that shows their preferences; see Duncan Kennedy, *supra* note 35 at 55–56.

democratic values, and the primacy of the rule of law.[708] Most telling is how the European judges consistently assert that objects of property are exchangeable commodities with specific monetary values. Thus, when the ECtHR added a right to compensation to P1-1 in *Sporrong and Lönnroth v Sweden* (1982)[709] (the original text is silent on the matter) it decided that such compensation ought to be evaluated based on commercial considerations. In that case, which dealt with land subjected to lengthy expropriation permits restricting its use, the Court's remedy was based on market value decline of real estate.[710]

Yet these commercial assumptions about property were immediately challenged. Judge Walsh, in his *Sporrong* dissent, commented that:

> Article 1 of the First Protocol (P1-1) does not constitute a guarantee against all State activities which may affect the market value of property. Article 1 (P1-1) acknowledges the right to own private property and the right not to be deprived of it. It is clear from the provisions of Article 1 (P1-1) that it does not guarantee the right of private property to be an absolute one.[711]

Judge Walsh suggests that the liberal definition of property is not universal. He adds that "Justice does not require that compensation must be paid for profits which might have been gained if there was no development of the area,"[712] thus implicitly distinguishing between (international) justice and (national) law. Judge Thor Vilhjalmsson, in his concurring opinion to *James and others v United Kingdom* (1986), also felt that both the regular meaning of the text—the silence of the article on compensation—and the *travaux préparatoires* indicated that P1-1 did not provide for a right to compensation.[713]

Nonetheless, the ECtHR normally follows the majority ruling in *Sporrong*, leading to multiple cases in which judges simply evaluate the appropriateness of financial compensation in cases of property rights violations. In a series of similar cases, the Court addressed only whether the

[708] See e.g. *Ibid* at 47 on the values of liberalism.
[709] In *Sporrong and Lönnroth v Sweden* (1982), ECHR (Ser A) No 52 [*Sporrong*]. This decision was divided, 9 out of 19 judges disagreeing with the majority ruling on the question of compensation. The conclusion that the right to compensation was implicit in P1-1 was however later confirmed in *James*, *supra* note 634.
[710] *Sporrong*, *supra* note 709.
[711] *Ibid*, dissent of Judge Walsh at para 1.
[712] *Ibid* at para 2.
[713] See concurring opinion in *James*, *supra* note 634.

indemnity[714] or the payment arrangements[715] were adequate in cases of land expropriation. Of course, monetary compensation cannot in itself be said to be at odds with a human rights court. After all, human rights tribunals do not only assess violations, but are also expected to provide some form of reparation; yet, when the Court acts as a mere calculator of market value of property, this reinforces the idea that property is quantitative, which omits crucial qualities of the right: for instance, how a person's property may anchor them within a community, enabling their personal development. In the latter case, the attachment of a person to their property cannot be evaluated in 'market' terms, and in fact financial compensation may not be the best form of reparation.

The marketable nature of property is omnipresent in ECtHR jurisprudence, but nowhere is it more salient than in cases concerning economic and social rights. Property and economic and social rights interact through P1-1 in two ways. First, as I have mentioned before, social entitlements may be covered by the broad meaning of "possession". Second, economic and social rights can justify limitations on property based on public or general interest. What is striking is that both paths are contradictory: while the first is inclusive, in that it extends the protection of property beyond simple 'ownership' to include 'effective possession', the second is exclusionary, opposing owners' absolute entitlement with the encroachment of social legislation. This being said, ECtHR case law recognized early on that social measures warranted limitations on property rights. In *James,* the Court determined that some compulsory transfers of property to long-term residential leaseholders served the public interest—even if they favoured particular individuals—if they pursued a legitimate social goal.[716] The Court expressed that "modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces."[717] It further added that when a taking was made in the public interest, compensation did not necessarily need to match the market value in order to meet the standard of

[714] In 2001 for instance, the majority of P1-1 cases—over 100 cases—concerned indemnity readjustment for Turkish rice cultivators whose property had been expropriated (see e.g. *Mustafa Şahin v Turkey*, No 19689/92 (18 September 2001) ECHR). The same recurring cases on compensation amounts for expropriation appear in the 2000s, against Turkey and other countries; see e.g. *Preite v Italy*, No 28976/05 (17 November 2015) ECHR.

[715] In *Almeida Garrett, Mascarenhas Falcão and others v Portugal*, No 29813/96 [2000] I ECHR and a large number of similar cases against Portugal following it, the Court was brought to evaluate the delays in paying full compensation for expropriated land in the context of an agrarian reform. The agrarian reform itself was not contested.

[716] *James*, *supra* note 634 at para 45–46, 51.

[717] *Ibid* at para 47. The Court further gives significant space to the history and context behind the adoption of the compulsory transfer legislation, even delving into the bill's parliamentary debates.This formulation was reprised in *Edwards v Malta*, No 17647/04 (24 October 2006) ECHR [*Edwards*], *Hutten-Czapska v Poland* [GC], No 35014/97, [2006] VIII ECHR [*Hutten-Czapska*], and *Anthony Aquilina v Malta*, No 3851/12 (11 December 2014) ECHR [*Anthony Aquilina*].

P1-1.[718] *James* paved the way for many decisions in favour of social legislation, particularly in housing cases.[719] Yet the decision reinforced the idea that ownership is inseparable from the free market, viewing the case as exceptional and thus implicitly reinforcing liberal orthodoxy. Once more, social justice and property rights are opposed, not reconciled.

What's more, it seems that the legitimate aims of social housing outlined in *James* are set aside when these protections are provided in an undemocratic, anti-liberal setting. An overwhelming number of property cases before the ECtHR are from former Soviet countries and deal with transition from collective property regimes to private ones,[720] such transition being viewed as a necessary condition for transition to liberal democracy.[721] In *Schirmer v Poland* (2004), speaking in the context of Poland's transition and its effects on tenancy protection, the Court framed the question as dealing with the difficulties of "the process of transition from a socialist legal order and its property regime to one compatible with the rule of law and the market economy […]"[722] This passage, beyond its legal implications, supports the European commitment to liberal values, as expressed in the rule of law. What is troubling is that the rule of law seems inextricable from the market economy, any other economic system being construed as contrary to European interests. This ideological stand is taken in the name of European unification, but the Court's insistence on a neutral, uniform meaning for property, regardless of geography and history,[723] overshadows lived experiences of property.

[718] *James*, *supra* note 634 at para 54–55.
[719] See e.g. *Almeida Ferreira and Melo Ferreira v Portugal*, No 41696/07 (21 December 2010) ECHR, on tenancy protection as proportionate interference; *Hovhannisyan*, *supra* note 604, on rights of use of residential flats counting as a possession; *Brezovec*, *supra* note 604, on established claims over a flat counting as a possession.
[720] For instance, the Court has heard over 1000 cases from Romania and Russia respectively. Many of these cases implicate property restitution in the context of de-nationalization of land property and are still heard to this day; see e.g. *Valančienė v Lithuania*, No 2657/10 (18 April 2017) ECHR.
[721] See on this notes from Valencia Rodriguez, *supra* note 11 at para 203-210. The UN-mandated report notes that this transition needed to be done by assessing the importance of private property for the realization of economic and social development and the promotion of other human rights (*ibid* at para 210).
[722] *Schirmer v Poland*, No 68880/01, (21 September 2004) ECHR at para 38.
[723] As noted by ECtHR judge Leszek Garlicki, "L'application de l'article 1er du protocole No 1 de la Convention européenne des droits de l'Homme dans l'Europe centrale et orientale: problèmes de transition" in Hugo Vandenberghe et al, eds, *Propriété et droits de l'homme* (Brugge: Bruylant, 2006) 128. He adds however that the Court has tended to recognize the economic and social specificity of property in certain cases, in particular in transition states, *ibid* at 132–134.

Following this preference for liberal democracy, the ECtHR often looks negatively at Communist countries' property regimes, with their abusive nationalization of real estate.[724] For instance, in *Jahn and others v Germany* (2005), the Court determined that distribution of agricultural parcels of land through a state-owned pool of land could not be considered a property-rights regime "such as existed at the time under democratic, market economy regimes,"[725] thus implying that property rights should be understood as clearly defined, private property rights. The sequence of words—'democratic' followed by 'market economy'—seems to suggest further that private property is more 'democratic' than collective property. In this case, the word 'democracy' is implicitly and automatically associated with liberal ideology. Partly dissenting in *Jahn*, Judge Pavloschi would have rather taken into account the practical implications of voiding the communist system of land distribution in place in Germany before the fall of the Iron Curtain, since it would affect more than 50,000 Germans. He noted: "I really fail to see any "public interest" in depriving such a large number of German citizens of their property rights."[726] Another important point that Pavloschi makes in his dissent is how little the applicants' voices are taken into account; disagreeing with the majority finding that the absence of compensation is legitimate, he notes: "In my view the word "balance" implies taking into consideration the particular interests of both the parties involved—in this case the interests of the German State and the interests of the legal landowners."[727] Thus, according to that judge, concrete circumstances in this case should have served to challenge liberal premises of property rights.

Support for liberal property rights can also be found in multiple rent-control cases. In *Hutten-Czapska v Poland* (2006), the Court struck down the Polish system of imposed tenancy and rent control on the basis that they significantly infringed on owners' rights, notably their "right to derive profit from leases."[728] The majority in *Hutten-Czapska* thus interpreted P1-1 as protecting owners' economic interests. Judge Zupančič, partly dissenting in *Hutten-Czapska*, noted the absurdity of

[724] It is interesting to note that P1-1 has been used to protect both previous owners stripped of their property through nationalizations (see ee.g. *Gherghiceanu and others v Romania*, No 21227/03 (8 December 2009) ECHR) and the good faith possessors of nationalized property (see e.g. *Vladimirova and others v Bulgari*a, No 42617/02 (26 February 2009) ECHR; *Manolov and Racheva-Manolova v Bulgaria*, No 54252/00 (11 December 2008) ECHR).
[725] *Jahn and Others v Germany* [GC], No 46720/99 [2005] VI ECHR, at para 101. The newly democratic government of Germany had adopted a law to expropriate all such small 'landowners' that inherited the land and no longer used it for agricultural purposes, which had been the communist-era intent behind land distribution.
[726] *Ibid*, partly dissenting opinion by Judge Pavlovschi.
[727] *Ibid*.
[728] *Hutten-Czapska*, *supra* note 717 at para 197.

protecting commercial interests through a human rights instrument. Referring to the hesitations during the *travaux préparatoires* to even include the right to property as a human right, he wrote that "*A fortiori*, the right to derive profit by merely owning an apartment building cannot be seen as a human right,"[729] suggesting that this was supported by the text of the article. In fact, in the older *Mellacher and others v Austria* (1989), the fact that rents were legislatively reduced by as much as 80%, bringing them far below market value, did not appear disproportionate to the Court, based on states' wide margin of appreciation in crafting social justice policy.[730] The applicants' argument regarding their inability to make a profit did not seem to move the majority in *Mellacher*.[731]

In *Hutten-Czapska* (2006), the fact that the owners could not enter freely into lease agreements played a big part in finding a violation, and served as a way of distinguishing the cases from *James* (1986) and *Mellacher* (1989). Yet these rent-control schemes, while 'undemocratically' adopted, still aimed at protecting vulnerable tenants.[732] This was considered a legitimate aim in *James*, in which case the owners were also obliged to forfeit their property rights. The point distinguishing the older *James* and *Mellacher* on one hand and *Hutten-Czapska* on the other (other than the passage of time) seems to be the commitment of the respondent states in the former cases—United Kingdom and Austria—to the liberal principles of the Convention's preamble, by contrast with Poland's communist past in the latter.

Where tension between property and social programs is concerned, the voices of potentially interested parties (tenants, for example) have a secondary role, if any. In *Anthony Aquilina v Malta* (2014), concerning rent-control measures on the applicant's property, the government submission briefly mentions the lack of proof that the aged tenants in question could not find alternative accommodations.[733] The Court does elaborate to some extent on the tenants' situation, but in a way that seems to necessarily favour the applicant's claim against them. For instance, the background

[729] *Ibid*, see part III of Judge Zupančič's partly concurring, partly dissenting opinion. He did not dispute that a violation of P1-1 had occured, only the extent to which it was violated.
[730] *Mellacher and others v Austria* (1989), ECHR (Ser A) No 169 at para 56.
[731] In part because the owners were able to apply for recovery of maintenance costs. *Hutten-Czapska* distinguished itself from *Mellacher* by the fact that Austrian owners had some leeway to maintain the dwellings, while in the Polish scheme the flats were deteriorating; see *Hutten-Czapska*, *supra* note 717 at para 224.
[732] The facts in *Hutten-Czapska* outline how, in 2002, 58% of the population of Poland lived below the poverty line, *ibid* at para 17.
[733] *Anthony Aquilina*, *supra* note 717 at para 50.

notes for the case state that the couple does not "have any children formally residing with them,"[734] and that the amount paid in rent represented less than 5% of the couple's annual income, making an eventual rent increase less dire for them.[735] In deciding which facts to include in the official text of the case, the Court is merely imposing its own views on the legitimacy of the couple's favourable tenancy conditions, without giving an opportunity for the tenants to explain why they insist on staying put. Similarly, in *Immobiliare Saffi v Italy* (1999), concerning the applicants' inability to evict tenants, the Court makes room for the applicants' nakedly commercial argument that "sitting" tenants bring rent prices down[736] while ignoring the tenants themselves. Their needs are not considered, they are mere objects in a battle between virtuous liberal market forces and the state's apparently clumsy attempts to provide social housing.

Finally, the Court's perception of property as a neutral, liberal right is further confirmed by the contrast between the applications of P1-1 and Article 8, the latter providing protection for the 'home'.[737] The Court agreed to hear *Ivanova and Cherkezov v Bulgaria* (2016), involving the demolition of an illegal construction, under Article 8, noting that while the applicant's residence could not be considered 'property' under P1-1 because of the construction's illegality,[738] it could be considered a 'home' which "touches upon issues of central importance to the individual's physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community."[739] Similarly, in *Zehentner v Austria* (2009), while the applicant primarily invoked P1-1, the Court decided to examine the case first from the perspective of Article 8. In doing so, the Court emphasized that the violation—the forced judicial sale of her apartment to pay a private debt—was particularly abusive given that the apartment was her home, saying that "the Court has already held that the loss of one's home is a most extreme form of interference with the

[734] *Ibid* at para 16.
[735] *Ibid* at para 65.
[736] *Immobiliare Saffi v Italy* [GC], No 22774/93, [1999] V ECHR at para 45. This case was the basis of numerous, similar others against Italy.
[737] Article 8 ECHR reads as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[738] *Ivanova and Cherkezov v Bulgaria*, No 46577/15 (21 April 2016) ECHR at para 75 [*Ivanova*].
[739] *Ibid* at para 54.

right to respect for the home."[740] Yet when the Court moved to look at the violation of P1-1, it stated that

> under Article 1 of Protocol No. 1 the Court is examining the judicial sale of the applicant's apartment not from the point of view that it was the applicant's "home" but from the point of view of property rights.[741]

These different "points of view" for the same act—judicial sale of an apartment—show that the Court establishes a distinction between the personal attachment to property, described as 'home,' and the marketable nature of property, the latter being covered by P1-1. For instance, actual occupation of landed property is irrelevant in P1-1,[742] whereas it is essential in 'home' cases. The Court thus creates a partition between the various functions of property, from providing social participation to enabling market access: while P1-1 cases adopt neutral language associated with the fungibility of property, Article 8 cases allow judges to consider personal attachment to and involvement with property, opening up space for the applicant's experience.

The personal nature of the 'home' has influenced at least one P1-1 case, by contrast with the *Ivanova* and *Zehentner* cases. In *Pincova and Pinc v The Czech Republic* (2002), the applicants, deprived of their home purchased in good faith, invoked P1-1. They had acquired the home from the state, which had illegally confiscated it from its previous owner. While the deprivation was clearly lawful as it sought to restore the rightful owner's property, the Court concluded that the compensation paid—reimbursement of the purchase price—was insufficient, based on the fact that the applicants had lived in the house for 42 years and that the restitution had left them homeless and in a difficult social situation.[743] Contrary to other decisions on property restitution, which emphasized the illegality of the confiscations by the communist state, this decision delved more deeply into the applicants' reality of personal attachment to the property in question. But regardless of the apparent inconsistencies in outcomes these illegal home cases reveal, what they tell is that

[740] *Zehentner v Austria*, No 20082/02 (16 July 2009) ECHR at para 59 [*Zehentner*].
[741] *Ibid* at para 77.
[742] See e.g. *Barcza and others v Hungary*, No 50811/10 (11 October 2016) ECHR, in which the Court determined that the establishment of a water protection zone by the state reduced the effective use of the applicant's property, despite the fact that the applicant had never actually used the land in question (at para 144). See contra *Malfatto and Mielle v France*, No 40886/06 (6 October 216) ECHR, where the Court did not find a violation of P1-1 in the state's decision to ban new constructions along a coastline, based in part on the fact that the land in question had been left unexploited for a long time (at para 69). Note however that the latter case did not concern an expropriation, but rather regulation on the use of property, a matter in which states have more discretion.
[743] *Pincová and Pinc v The Czech Republic*, No 36548/97, [2002] VIII ECHR at para 61–62 [*Pincová*].

the liberal version of property that the European judge favours is fragile against alternative stories of property, such as those emanating from former communist countries.

5.4 Autonomous Meaning in the American and African Systems: An International Right to Property

Like the ECtHR, the IACtHR applies a broad definition of the right to property, again presented repeatedly in a formulaic way. In the IACtHR's own words:

> The Court's case law has developed a broad concept of property that includes, among other matters, the use and enjoyment of property, defined as material goods that can be possessed, as well as any right that may form part of a person's patrimony. This concept includes all movables and immovables, corporeal and incorporeal elements, and any other immaterial object which may have a value.[744]

This approach to property is close to the liberal one in that it presents property as a neutral right with commercial value. The ruling in *Chaparro Alvarez and Lapo Íñiguez v Ecuador* (2007) also presented property as a commodity, deciding that "the failure to return property belonging to the company had an impact on its value and productivity, which, in turn, prejudiced its shareholders,"[745] who were deprived of the ability to make profit.[746] Still, in this case, the Court made it clear that only a person's shares in a company could be protected under the Convention—the company itself could not invoke a violation to its property.[747]

The broad concept of property adopted by the IACtHR also allows it to expand property's reach to 'proprietary interests' through the concept of "*patrimonio*"—"personal wealth."[748] In *Five Pensioners v Peru* (2003), the Court determined that granted pension rights were acquired rights, part of the pensioners' patrimony, and thus could not be arbitrarily reduced.[749] Similarly, the IACtHR has ruled that "vested rights to remuneration" (earned salaries, benefits, and raises) were

[744] *Chaparro Álvarez and Lapo Íñiguez Case (Ecuador)* (2007), Inter-Am Ct HR (Ser C) No 170 at para 174 [*Chaparro Álvarez*]. See also *Ivcher-Bronstein*, *supra* note 675 at para 122. In both cases Article 21 was said to cover shares in a company.
[745] *Chaparro Álvarez*, *supra* note 744 at para 209. In this case, the two complainants had been detained on account that they had participated in drug trade and their company was seized during the proceedings.
[746] *Ibid* at para 214.
[747] *Ibid* at para 181–182. See also *Perozo*, *supra* note 684, in which the court rejected the argument on property on the basis that the alleged losses were that of a company, not the victims (at para 400–402).
[748] See e.g. *Five Pensioners*, *supra* note 644.
[749] *Ibid* at para 102, 121. A similar finding was held in *Acevedo Buendía*, *supra* note 645.

part of one's personal wealth,[750] and that compensations due should be considered property.[751] The IACtHR also briefly addressed the social function of property in *Salvador Chiriboga v Ecuador* (2008), saying that individual rights to property had to be balanced with public welfare and collective rights, thus manifesting the liberal duality of property and social considerations.[752] In these matters it diverges little from its European counterpart.

The difference between the European "autonomous meaning" of property and the American one is that in the first case, it is self-contained—a specifically European meaning—whereas in the American case it is more firmly anchored in international law, as illustrated by this passage in *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001):

> The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.[753]

Thus, while the European autonomous notion of property remains close to its commitment to European liberal values, the American version is attached to the fact that property is deemed an international human right. The IACtHR thus frames the question as a determination of whether the deprivation was done "in accordance with the American Convention,"[754] whereas the European Court rather uses the expression "in accordance with the law"—that is, domestic law.

Consequently, the IACtHR readily accepted in *Mayagna* that Article 21 of the Convention was not limited to private property, but extended to communal property held by indigenous communities.[755] In a concurring opinion in *Mayagna*, Judge Salgado Pesantes noted that indigenous peoples' right to land "transcends the right to property in the traditional sense, which mainly concerns the rights to private property," adding that communal property more directly enabled the social function of ownership.[756] Similarly, Judges Cançado Trindade, Pacheco Gómez, and Abreu Burelli, in a separate opinion in the same case, emphasized the fact that traditional ownership—what they

[750] *Abrill Alosilla*, *supra* note 681 at para 83–84. In this case, the state had eliminated a salary scale system, which had retroactive effect through deductions on salaries. The retroactive effect was considered to violate the right to property.
[751] *Furlan and Family Case (Argentina)* (2012), Inter-Am Ct HR (Ser C) 246 at para 220–223.
[752] *Salvador Chiriboga Case (Ecuador)* (2008), Inter-Am Ct HR (Ser C) No. 179 at para 60 [*Salvador Chiriboga*].
[753] *Mayagna*, *supra* note 635 at para 146.
[754] *Ivcher-Bronstein*, *supra* note 675 at para 128.
[755] *Mayagna*, *supra* note 635 at para 148.
[756] *Ibid*, concurring opinion of Judge Salgado Pesantes at para 2.

called "habitat"[757]—clashed with the privatization and commercialization of natural resources.[758] This differentiation between indigenous property and private property was later adopted by the majority in *Kichwa*: "These notions of land ownership and possession do not necessarily conform to the classic concept of property, but deserve equal protection under Article 21 of the American Convention."[759] Generally, what these positions emphasize is how liberal property offers only a glimpse of how the human right to property can express itself, domestically and internationally. Thus, the Court acknowledges that location forms part of the definition of property, whereas the European court prefers an ostensibly neutral, abstract definition.

Another difference is the determination of appropriate reparations. The variety of remedies available to the IACtHR shows that it is not bound by market principles. Of course, fair compensation in cases of expropriation or deprivation of property remains the rule: it is explicit in Article 21, and the IACtHR considers it a general principle of international law.[760] Still, the IACtHR regularly looks beyond mere financial compensation in its discussions on reparations, taking into account the needs of the victims rather than the abstract requirements of liberal property. In many cases in which land has been taken away from indigenous communities and the Court recognizes a violation of their right to property, the remedy has been land restitution rather than 'equivalent' monetary compensation.[761] When restitution of the specific land in dispute was not possible, the Court required that the state provide equivalent land[762] on which the same communal property rights would apply.[763] The idea of equivalence here is calculated not in price

[757] A word also used in another case by a member of an indigenous community and an expert witness to describe indigenous lands; see *Yakye Axa*, *supra* note 644 at para 38a)–38b).
[758] *Mayagna*, *supra* note 635, separate opinion by Judges Cançado Trindade, Pacheco Gómez and Abreu Burelli at para 6.
[759] *Kichwa*, *supra* note 646 at para 145.
[760] *Salvador Chiriboga*, *supra* note 752 at para 96. In its conclusion, the Court refers to EU case law, as well as to *UN Resolution 1803: Permanent Sovereignty over Natural Resources*, GA Res 1803(XVII), UNGAOR. The Court later determined in the decision on reparation and costs in the same case that market value was not the only valid criteria to determine what counted as 'fair,' yet it mainly uses it to establish that, the property in question being of "rustic" and "rural" character, its price should reflect this fact, thus essentially reproducing market-based criteria; see *Salvador Chiriboga Case (Ecuador)* (Reparations and Costs (2011) Inter-Am Ct HR (Ser C) No 222 at para 67, 74–82 [*Salvador Chiriboga*, Reparations].
[761] See e.g. *Yakye Axa*, *supra* note 644 at para 211. The Court has stated that the rule of restitution emanates from the international nature of the violation, see *Comunidad Garifuna Triunfo de la Cruz y sus Miembros Case (Honduras)* (2015), Inter-Am Ct HR (Ser C) No 305 at para 255 [*Triunfo de la Cruz*].
[762] *Sawhoyamaxa Indigenous Community Case (Paraguay)* (2006), Inter-Am Ct HR (Ser C) No 146 at para 135 [*Sawhoyamaxa*]. This was also the case in *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members Case (Panama)* (2014), Inter-Am Ct HR (Ser C) No 284 [*Kuna*], in which the inundation of the Kuna and Embera's lands made the return impossible (see para 120).
[763] *Kuna*, *supra* note 762 at para 122.

per square metre, but in terms of adequacy or 'suitability' of the land for the accomplishment of community needs and aspirations.[764] The state must then grant formal titles after delimitating and demarcating property in consultation with the people.[765] Furthermore, in evaluating fair compensation in cases of indigenous property, the Court established that when the "regular use and enjoyment" had been encroached upon, compensation could include a right to a share in benefits.[766]

The idea is to assess property not commercially, but in terms of its cultural significance to the community. The Court clarified its rationale behind reparation in cases of violation of indigenous property in *Kaliña and Lokono Peoples v Suriname* (2015):

> The Court considers that, in cases such as this one, the reparation should help strengthen the cultural identity of the indigenous and tribal peoples, guaranteeing the control of their own institutions, cultures, traditions and territories in order to contribute to their development in keeping with their life projects, and present and future needs. The Court also recognizes that the situation of the indigenous peoples varies according to national and regional characteristics, as well as to their different historical and cultural traditions. Consequently, the Court finds that the measures of reparation granted should provide effective mechanisms, in keeping with their specific ethnic perspective, that permit them to define their priorities as regards their development and evolution as a people.[767]

Basing reparations on impacts on cultural identity display a sensitivity to lived property: it adapts the language of property and reparation to the expressed needs of victims in location. The court also suggests allowing indigenous peoples to determine "their priorities" rather than dictating them. Aside from this, in cases in which property has been associated with other basic needs, the court has sought to address these in reparations. For instance, in *Yakye Axa Indigenous Community v Paraguay* (2005), seeing that land deprivation had led to significant social vulnerability, the court decided that the state had to provide the victims with basic social services as long as they were landless.[768] In other instances, the Court ordered the state to finance community development

[764] *Xákmok*, *supra* note 644 at para 118–119.
[765] See e.g. *Moiwana*, *supra* note 633 at para 209.
[766] *Saramaka*, *supra* note 689 at para 138–139. A conclusion also drawn by the ACHPR in *Endorois*, *supra* note 2 at para 295–296.
[767] *Kaliña and Lokono Peoples Case (Suriname)* (2015), Inter-Am Ct HR (Ser C) No 309 at para 272 [*Kaliña*].
[768] *Yakye Axa*, *supra* note 644 at para 221.

funds, looking beyond one-time payments for lost property and toward more sustainable remedies.[769]

These context-sensitive approaches to reparation are not limited to cases of indigenous property. In other instances, the IACtHR has granted non-pecuniary damages even in the absence of evidence, stating that "it is a fact of human nature that every individual who suffers a human rights violation experiences suffering."[770] While this reasoning may seem simplistic, it underlines once more how the IACtHR sees itself as a defender of human rights. The same line of thought was adopted in *Ituango Massacres v Colombia* (2006): while no documentation was available to assess the financial loss associated with the destruction of houses, the Court decided that it could still be covered through non-pecuniary damages to account for the victims' personal attachment to their homes.[771] The Court also decided in that case that the state should create a housing program to compensate for the losses and displacement created by paramilitary attacks,[772] again looking beyond reparations for immediate losses to the villagers' long-term well-being.

Finally, some judges of the Court have even suggested that attention to context in evaluating right-to-property reparations should include the evaluation of a state's capacity to pay. Indeed, in the decision on reparation and costs in *Salvador Chiriboga* (2011), a case concerning a prolonged, unlawful occupation of private land by the municipality of Quito, three dissenting judges felt that the amount of compensation granted by the majority—unprecedented in IACtHR case law—placed an unreasonable financial burden on the municipality.[773] These judges rejected an abstract calculation of restitution, showing sensitivity to local reality.

The ACHPR does not explicitly elaborate on the autonomous meaning of property. In some cases, it applies neutral criteria to cases of deprivation—"general interest", "in accordance with the law", "fair balance", "adequate compensation"[774]— while in others, mainly those concerning indigenous

[769] See ee.g. *Sawhoyamaxa*, *supra* note 762 at para 224; *Saramaka*, *supra* note 689 at para 201; *Kaliña*, *supra* note 767 at para 298.
[770] *Abrill Alosilla*, *supra* note 681 at para 131.
[771] *Ituango*, *supra* note 694 at para 375.
[772] *Ibid* at para 407.
[773] *Salvador Chiriboga*, Reparations, *supra* note 760: Judge García Ramírez, dissenting opinion at para 19–20; Judge Diego Garcia-Sayán, partially dissenting opinion at para 17–19; Judge Leornardo A. Franco, partially dissenting opinion at para 7.
[774] See e.g. *Institute for Human Rights and Development in Africa v Angola* (2008), Afr Comm HPR No 292/03 at para 71–73. This case touches upon the expulsion of Gambian nationals from the Angolese territory who lived there as legal resident. See also *Dino Noca*, *supra* note 659 at para 144.

property, it fully engages with location in defining the concept at the regional level. The Commission is generally flexible in its definition of property and possession. For instance, in the *Sudan* case, the Commission began by stating that the right to property is "a traditional fundamental right in democratic and liberal societies"[775] consisting of a general principle of ownership and rules on how it can be restricted,[776] in echo of the language of the European Court. Yet, it concluded that clear legal titles to property—which are usually required in liberal economies to allow stable commercial exchanges—were not necessary for the recognition of a violation of the right to property, especially when land had been possessed for generations.[777] In the *Endorois* case, the Commission sought to establish, in its own words, "a determination of what is a 'property right' (within the context of indigenous populations) that accords with African and international law."[778] Two points stand out in this statement: first, the Commission puts 'property right' in quotation marks, indicating that those words may only imperfectly describe indigenous peoples' rights to their land; second, the Commission explicitly states that it interprets 'property rights' not as its domestic meaning, but rather internationally—that is, as a human right. These examples demonstrate the Commission's desire to distinguish the human right to property from property rights.

5.5 The Place for Lived Experiences in Regional Case Law

International adjudicative systems superseding domestic jurisdictions can encroach on a state's sovereign power to prescribe, interpret, and apply the law on its territory. Thus, these systems constantly work at maintaining their credibility and legitimacy vis-à-vis those states, often manifested in a certain formality in the structure of their decisions.[779] For instance, because international human rights tribunals are subsidiary bodies approachable only when domestic remedies have been exhausted, or because their jurisdiction extends back only to a state's ratification of the relevant human rights treaty, supranational systems often present a lengthy procedural history of a case and spend some time discussing admissibility questions (exhaustion of domestic remedies, *rationae materia*, *rationae temporis*), sometimes in a separate decision. The

[775] *Sudan*, *supra* note 700 at para 192.
[776] *Ibid* at para 193.
[777] *Ibid* at para 205.
[778] *Endorois*, *supra* note 2 at para 185.
[779] See Forowicz, *supra* note 666 at 4.

three regional systems observed here do not escape this formality, although they differ in emphasis. In assessing the place given to context in the case law of regional systems, the structure of a legal decision can itself be revealing, since it ultimately reflects a court's choice to present facts in a certain way, emphasizing some aspects of a case and ignoring others.[780]

5.5.1 European case law: Certainty before context

Generally, the ECtHR pays more attention to procedural matters, legal jargon, and references to national laws than to the applicant's personal story. All decisions of the ECtHR follow the same formal structure: they start with a brief account of the facts, followed by the history of procedures within the domestic legal system, the presentation of domestic law (and in rare cases the relevant international law), a discussion on admissibility, a brief presentation of the parties' arguments, and finally a discussion of the merits and the Court's conclusions. Adhering to this formal structure generally limits the space available for context and personal accounts of facts. Belleau and Johnson note that "flatness" in tone in legal reasoning can be revealing, since it is a way of denying personality and agency to the protagonist.[781] More attentive to law than circumstances, the ECtHR relegates applicants' lived experiences to a subsidiary and passive role.

As suggested earlier, the ECtHR's choice to emphasize abstract rules of law over concrete facts is explained by its desire to present a uniformity of political and economic ideals around liberalism, and thus a homogenization of norms and their application. The Court thus relies more on precedents than on case-specific facts in its decisions, in order to maintain stability and certainty:

> The Court considers that, while it is not formally bound to follow any of its previous judgments, *it is in the interests of legal certainty, foreseeability and equality* before the law that it should not depart, without good reason, from precedents laid down in previous cases. Since the Convention is first and foremost a system for the protection of human rights, the Court must, however, have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved.[782]

In this passage, while the Court acknowledges its role as a human rights defender and its responsibility to adapt to this mission, it does so by referring back to "changing conditions" in

[780] Belleau & Johnson, *supra* note 556 at 152. For a discussion on the use of silence in dispute resolution processes, see also de Sousa Santos, *supra* note 274 at 33 describing silence as a "positive expression of meaning."
[781] Belleau & Johnson, *supra* note 556 at 154.
[782] *Chapman v the United Kingdom* [GC], No 27238/95, [2001] I ECHR at para 70 [emphasis added] [*Chapman*].

states' legal narratives rather than shifts in concrete individual circumstances. The call for certainty recurs in a few decisions. In *Edwards v Malta* (2006), concerning the contested requisitioning of tenements for housing purposes, the Court criticized the Maltese housing program for creating uncertainty in contractual relations.[783] In *Béláné Nagy v Hungaria* (2016), a case of pension approached as property, a concurring judge wrote:

> The first and foremost condition for the legitimacy of a court is the precision, clarity and methodological correctness of its reasoning. Only well-argued judgments can win the respect of citizens. The European Court of Human Rights should consolidate the rule of law by setting the highest possible standards in this respect. *It is true that the Convention sets out the minimum European standard for substantive human-rights protection, but this ought not to prevent the Court from seeking and promoting excellence in the art of legal argument.*[784]

For this particular judge, abstract legal requirements trump other considerations. In the same case, dissenting judges even expressed that the "long-standing and well-entrenched approach to the interpretation of 'possessions' and 'legitimate expectations'" carry more weight than "the applicant's difficult situation,"[785] completely negating the applicant's agency in expressing her needs. While the concurring and dissenting judges in *Béláné Nagy* would have settled the case differently, both sides prioritize stability and certainty over human considerations—at least when it comes to property.

This desire for uniformity is further illustrated by the repetition of fixed formulations to describe the right to property. The Court "reiterates that Articles 1 of Protocol No. 1 […] comprises three different rules,"[786] it "has previously addressed the issue of legitimate expectation,"[787] it "recalls," "has already examined," "has consistently held." This repetition is also found in the fixed criteria examined in all cases of property: is there a possession? If so, was there interference? Was the interference lawful? Did it serve a legitimate aim? Did it strike a fair balance? These criteria establish categories or tests to be applied in the case law and they are seen as more important than the applicants' context. Facts are obviously important in deciding cases, but they are effectively

[783] *Edwards*, *supra* note 717 at para 71: "Uncertainty—be it legislative, administrative or arising from practices applied by the authorities—is a factor to be taken into account in assessing the State's conduct." A finding repeated word for word in *Anthony Aquilina*, *supra* note 717 at para 60.
[784] *Béláné Nagy*, *supra* note 604, concurring opinion of Judge Wojtyczek at para 12 [emphasis added].
[785] *Ibid*, joint dissenting opinion of Judges Nussberger, Hirvelä, Bianku, Yudkivska, Møse, Lemmens, and O'Leary at para 45.
[786] See e.g. in *ibid* at para 72.
[787] See e.g. in *ibid* at para 80.

used after the law has been laid down, and to support legal reasoning and its formal categories. Thus, while the facts may change, the Court's understanding of property does not.

In using repetitive formulas, the ECtHR creates a sense of stability by ensuring that similar-sounding cases have similar-sounding outcomes. Redundancy is not unusual in judicial decision-making, says Henry Smith, since it helps diminish the processing cost of communicating legal information, allowing easier coordination among legal fora.[788] But in the context of a human rights court, the use of redundancy limits the extent to which alternative versions of property can be argued and responded to,[789] especially if the formal legal categories and tests focus on technicalities specific to a particular regime—liberalism—rather than assessing the importance of a person's claim for their social participation. For instance, if a human rights judge begins with the premise that the right to property on land requires a formal title, then any claim of possession based on a deep attachment to land is automatically discarded, regardless of whether other, located, ways of determining ownership exist, such as ancestrality on the land or recognition of tenure by the surrounding community. Relying on predictable rules of precedent and taking all cases as taxonomic exercises leaves the Court with a purely technical role, removed from concrete circumstances.[790]

Applicants to the ECtHR do have a voice in the story that the Court tells about them insofar as the facts are based on what the parties present,[791] but the selection of the relevant facts and their presentation and ordering is ultimately decided by the European judge. As mentioned in *Zehentner v Austria* (2009), the Court can pick and choose the facts of record based on its greater knowledge of the Convention:

> The Court reiterates that, since it is master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by

[788] H Smith, *supra* note 554 at 1161.
[789] See Knop, *supra* note 547 at 4 who argues that the choice of an interpretative theory fixes meanings. See also Nigel Bankes, "The Protection of the Rights of Indigenous Peoples to Territory through the Property Rights Provisions of International Regional Human Rights Instruments" (2011) 3:1 YB Polar L 57 generally, on how the interpretation of the right to property can favour or impede indigenous land claims.
[790] See J B Baron, "Winding Toward the Heart of the Takings Muddle: Kelo, Lingle, and Public Discourse About Private Property" (2007) 34:2 Fordham Urb LJ 613 at 636. The author examines the contrast in discourse between strict application of the law by courts and public opinion.
[791] Most decisions begin with a general statement on the source of evidence examined by the court: "The facts of the case, as submitted by the parties, may be summarised as follows [...]"

> the applicant. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on.[792]

The Court used this argument in the *Zehentner* case to examine the facts under Article 8 (protection of home), rather than treating it as primarily a P1-1 case. While the objective was ultimately to provide greater protection for the applicant, the message it sent is that the applicant's determination of her own needs and their status as 'property' is secondary to the judge's assessment, since the applicant is generally ignorant of the law. The same message was communicated by the Court in *Saghinadze and others v Georgia* (2010), in which it was decided that the "applicants' unsolicited and lengthy pleadings submitted after the communication of the application" were not to be included in the case file.[793] What the Court says here is that it can decide when and how an applicant can tell their story.

Still, as noted above, when the ECtHR approaches property as a 'home,' more space is given to lived experiences in location. The Court distinguishes the psychological aspect of the home from the commercial aspect of property, and so the interpretation of facts within a single case may depend on whether the argument is based on P1-1 or Article 8. For instance, in *Volchkova and Mirnov v Russia* (2017), the applicant, citing P1-1, called the expropriation order disproportionate based on the compensation offered, thus relying on a purely pecuniary argument. But citing Article 8, she argued that the expropriation "had adversely affected her comfort and, in a way, her quality of life. She and her husband had enjoyed living in the house since 1969, where she had had a garden, and had made many technical improvements."[794] The language is completely different, although the facts are the same. In *Ivanova*, the Court determined that 'home' cases "can normally only be examined case by case,"[795] while at the same time saying that context was irrelevant (or less important) in P1-1 cases:

> It is not contrary to the latter for the legislature to lay down broad and general categories rather than provide for a scheme whereby the proportionality of a measure of implementation is to be examined in each individual case.[796]

The Court thus isolates P1-1 and Article 8 from each other, but this seems artificial in cases where a person's property coincides with their home. In fact, in an earlier case, the Court had examined

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[792] *Zehentner*, *supra* note 740 at para 34.
[793] *Saghinadze and Others v Georgia*, No 18768/05 (27 May 2010) ECHR at para 71 [*Saghinadze*].
[794] *Volchkova and Mironov v Russia*, No 45668/05 (28 March 2017) ECHR at para 141.
[795] *Ivanova*, *supra* note 738 at para at 54.
[796] *Ibid* at para 74.

Article 8 and P1-1 simultaneously, applying the same criteria in relation to the existence of an interference and its lawfulness.[797] The partition of the functions of property actually appears to be more recent in ECtHR case law, perhaps once more to consolidate liberal, democratic Western European principles in the face of a growing and increasingly diverse membership. Ultimately, the contrast between the ECtHR's treatments of Article 8 and P1-1 shows that its insistence on certainty over context is not necessarily generalized to all cases heard before the ECtHR, but is definitely present in P1-1 cases, which supports the idea that when it comes to property, the Court aligns with state definitions rather than formulating its own.

5.5.2 Inter-American case law: Emphasizing stories

While the ECtHR maintains a certain distance from facts and proximity to domestic law in order to maintain its credibility, the IACtHR rather seems to secure its legitimacy by giving space to facts, evidence, and testimonies in a rigorous, methodical, and detailed manner. The IACtHR maintains a formal and ordered structure in its decisions: it presents an introduction of the case, a section on competence, and the timeline of proceedings before the Court.[798] When relevant, it then proceeds to examine provisional measures, preliminary objections, or previous considerations; then it presents the facts, the evidence, and the assessment of evidence, before delving into the discussion on merits, usually article by article (or by combinations of articles), finishing with a chapter on reparation measures.

The weight the IACtHR gives to certain sections reveals its desire to emphasize the human aspects of each case. For instance, it devotes less space (if any) to domestic legal frameworks and procedural histories, rather emphasizing the arguments, the facts, and the evidence. The procedural history, for its part, is there only to verify that the criterion of exhaustion of domestic remedies has been met by the alleged victim—not to seek some guiding national precedent. The discussions on reparations are also given significantly more weight than in European cases, with detailed accounts of the parties' arguments and thorough discussions. Inter-American judges allow significant space for testimony, not only from victims, but also from experts, such as anthropologists, philosophers, lawyers, or interested NGOs, through amicus briefs.[799] In the end, the importance of context in

[797] *Khamidov v Russia*, No 72118/01 (15 November 2007) ECHR. See also *Pincová*, *supra* note 743, where the Court accepted that personal facts could influence the finding under P1-1.
[798] Prior to 2007, the Court also presented a detailed account of the proceedings before the Commission.
[799] See e.g. *Mayagna*, *supra* note 635 at para 83; *Kichwa*, *supra* note 646 at para 13.

IACtHR case law derives from its mandate as an international human rights tribunal: as mentioned above, the Court considers that such a role demands greater flexibility in the assessment of evidence[800]—that is to say, it allows more space for concrete experiences of property.

The IACtHR refers to persons raising violations as "alleged victims." And while, as TWAIL scholars have noted, the word 'victim' can make a person appear passive and helpless,[801] the IACtHR displays a genuine desire to provide an active voice to those whose human rights have been violated. In its earlier case law, the Court left an impressive amount of space for almost unedited testimonies, which made the "evidence" segment quite long. For instance, in *Mayagna*, the Court introduced over 25 pages of testimony from members of the Mayagna community, with detailed accounts of their relationships with land and natural resources, and how these relationships shaped their cultural and spiritual life.[802] The Court did not necessarily start with a summary of facts, which left the audience trying to understand the 'story' as they read, yet leaving a deeper sense of empathy, of connection with the claimants' circumstances. The Court's actual summaries of fact in the discussions on merits were usually more dry and impersonal, focusing on procedural matters,[803] and so the testimonies' precedence served to draw attention to claimants' stories.

In 2007, however, the IACtHR changed its case-presentation format at the request of various stakeholders to reduce the length of cases, claiming this would make its work more accessible to the public.[804] Indeed, giving so much space to testimonies made the cases extremely long [805] and did not necessarily lead to clear texts. Yet it did emphasize the Court's mission to protect human beings. The Court's language was no less legal; just more empathetic. After these changes, the section on evidence was reduced to a list of evidence and witnesses, and this sense of empathy was lost. Since then, personal experiences have been related indirectly through the Court's selective summaries. They are introduced later in the text, either in the merits or in the discussion on

[800] See ee.g. *Tibi*, *supra* note 677 at para 67; *Perozo*, *supra* note 684 at para 112; *Salvador Chiriboga*, *supra* note 752 at para 23.
[801] See discussion above at §1.3.2.
[802] *Mayagna*, *supra* note 635 at para 83. The same length can be observed in *Yakye Axa*, *supra* note 644, and *Sawhoyamaxa*, *supra* note 762.
[803] See e.g. in *Five Pensioners*, *supra* note 644, the contrast in tone between testimonies (para 83) and the summary of facts (para 89).
[804] *Nuevo Formato de Sentencias*, Court Agreement 1/07, online: Inter-American Court of Human Rights <http://www.corteidh.or.cr/cf/jurisprudencia2/acuerdo_de_corte.cfm?acuerdo=3&lang=en&lang_ac=es>. The agreement mentions that this change responds to demands by states, academics, and NGOs, among others.
[805] Ee.g. *Sawhoyamaxa*, *supra* note 762 (157 pages); *Yakye Axa*, *supra* note 644 (144 pages); *Moiwana*, *supra* note 633 (122 pages); *Tibi*, *supra* note 677 (146 pages).

reparations, in which case the tone of the facts tends to become much more personal and empathetic.[806] Still, after just a few cases following the new rules of presentation, the IACtHR resumed the presentation of more detailed facts in the 'evidence' section, reverting to its previous habits.[807] In the end, many decisions remain long,[808] chiefly because the facts are often complex and the violations many. In those cases, the Court usually establishes the context of cases before introducing the specific facts, to set up legal discussions.[809] But ultimately, the change affects who tells the story; by reproducing testimonies, the Court gave the victims a voice, whereas fact summaries mean that judges take over the narration, and what is emphasized therein. While lived experiences exist in every case, the Court gets to choose how they are expressed.

In more recent cases related to indigenous property, the IACtHR has occasionally conducted field visits to experience the stories directly from complainants, such as in *Kichwa*:

> There, the Court's delegation heard numerous statements from members of the Sarayaku, including young people, women, men, the elderly and children from the community, who shared their experiences, views and expectations about their way of life, their worldview and their experience in relation to the facts of the case. The President of the Court also gave the members of the delegations an opportunity to express their views.[810]

The Court walked in and flew over the territory of the Sarayaku to get a sense of its members' lived experiences. This allowed the inclusion of novel details about the territory, such as the fact that it was hard to access,[811] a geographic fact distinguishing it from urban or suburban land. The remoteness of the territory is rarely mentioned in other cases, yet this geographical characteristic is a strong influence on the Sarayaku's way of life. Literally *going to* the facts demonstrates a

[806] See e.g. *Chaparro Álvarez*, *supra* note 744 at para 248–249, on the evaluation of non-pecuniary damages. In fact, personal stories are often used more in the evaluation of damage (particularly non-pecuniary damage) than in the assessment of the violation itself.
[807] See e.g. *Salvador Chiriboga*, *supra* note 752 at para 19, where the testimonies are listed as well as summarized in some detail, whereas in the previous case on property, the witnesses were simply listed (see *Saramaka*, *supra* note 689 at para 64–65).
[808] E.g. *Afro-Descendant Communities Displaced from the Cacarica River basin (Operation Genesis) Case (Colombia)* (2013), Inter-Am Ct HR (Ser C), No 270 (171 pages) [*Afro-Descendant Communities*]; *Kaliña*, *supra* note 767 (104 pages); *Comunidad Garifuna de Punta Piedra y sus Miembros Case (Honduras)* (2015), Inter-Am Ct HR (Ser C) No 304 (115 pages) [*Punta Piedra*].
[809] See e.g. in *Expelled Dominicans and Haitians Case (Dominican Republic)* (2014) Inter-Am Ct HR (Ser C) No 282 [*Expelled Dominicans*].
[810] *Kichwa*, *supra* note 646 at para 19. Field investigations were also conducted in *Punta Piedra*, *supra* note 808; *Triunfo de la Cruz*, *supra* note 761; and *Kaliña*, *supra* note 767.
[811] *Kichwa*, *supra* note 646 at para 53.

conscious effort by the Court to establish evidence in a way that advances its human rights mandate from the ground up.

As mentioned above, the IACtHR does not shy away from citing jurisprudence, whether from its own case law or from other international tribunals or commissions; but interestingly, it usually puts citations in footnotes to preserve textual flow. This allows the main text to tell the story of the case more directly, with fewer interruptions and intrusions. In contrast, the European Court intersperses the main text with cited case law, muddying the flow. Still, the IACtHR often restates its previous case law, either to establish the basic principles to be applied[812] or to introduce further development of a previously applied principle.[813] Repetitions are not used to avoid interactions with facts, but rather to set them in motion.

A final point about the content of Inter-American case law: the Court has in some cases used *obiter dicta* as a way to pronounce itself on issues that are otherwise excluded on preliminary grounds. Take for instance *Norín Catrimán et al v Chile* (2014), concerning conflicts between the state and an indigenous community regarding the exploitation of natural resources on and occupation of traditional land. The Court, while noting that Article 21 was not invoked, still recalled various criteria concerning the protection of the right to communal property.[814] In *Comunidad Garifuna Triunfo de la Cruz y sus miembros v Honduras* (2015), while the Court determined it did not have jurisdiction to determine whether the Community's territory included parts of the beach and the sea, it nonetheless commented on the importance of water sources for indigenous peoples, even referring to international materials, and suggested that guaranteeing the use and enjoyment of indigenous property should extend to beaches and seas if such resources are traditionally used by the community.[815] The use of *obiter dicta* in these examples interrupts the formal and structured discussions, but it also reinforces the idea that human rights considerations supersede national sovereignty.

[812] See e.g. *Sawhoyamaxa*, *supra* note 762 at para 220, in the section on reparations: "Pursuant to repeated international precedents, judgments constitute in and of themselves a form of reparation."
[813] See e.g. *Saramaka*, *supra* note 689 at para 85: "This Court has previously held […] that members of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regards to their enjoyment of property rights, in order to safeguard their physical and cultural survival."
[814] *Norín Catrimán et al (Leaders, Members and Activist of the Mapuche Indigenous People) Case (Chile)* (2014), Inter-Am Ct HR (Ser C) No 279 at para 155.
[815] *Triunfo de la Cruz*, *supra* note 761 at para 134–137.

5.5.3 African case law: Taking into account regional location

Like the two other systems, the African Commission's decisions have a uniform structure,[816] starting with a summary of facts followed by the procedural history, continuing with a discussion of the admissibility of the case and the merits, in both instances introducing the arguments of the parties before its own analysis. Finally, it offers brief recommendations to the state in case of violation, although in more recent cases it has started using the word 'decision' rather than 'recommendation' in a seeming attempt to reinforce its authority.

The Commission does not necessarily leave much space for personal stories in its decisions. These decisions are often short, some under ten pages, leaving little room for long recollection of evidence and testimonies.[817] Still, the Commission allows vulnerable or alternative voices to be heard by allowing third parties such as NGOs to present communications to the Commission. The Commission explained the rationale behind this in *Malawi Africa Association and others v Malawi* (2000):

> This characteristic of the African Charter reflects sensitivity to the practical difficulties that individuals can face in countries where human rights are violated. The national or international channels of remedy may not be accessible to the victims themselves or may be dangerous to pursue.[818]

Thus, the ACHPR acknowledges the reality of victims who may not have the opportunity to bring their own claims forward. The "practical difficulties" may include limited physical access to judicial systems for people living in remote regions who rarely travel to urban centres, institutional obstacles presented by weak state bodies, or other social and political circumstances like forced displacement. In those cases, allowing communications by NGOs enables the African Commission to 'go to' these people in location thanks to their representative organizations.

In the same spirit, the Commission has been more flexible regarding the rule of exhaustion of domestic remedies, especially in cases of mass violations concerning large groups and cases of forced displacement and expulsions, saying that these concrete situations rendered local remedies

[816] This being said, the decisions and their presentation are rather uneven. Some earlier cases are poorly organized or exhibit a blatantly activist tone.
[817] This is the case for instance in *Ogoni*, *supra* note 662, one of the most cited cases of the African Commission. This decision is relatively short, and offers little detail on the Ogonis themselves, such as on their way of life or modes of organization.
[818] *Malawi Africa Association*, *supra* note 662 at para 78.

unavailable, ineffective, and insufficient.[819] In some cases, NGOs are the main providers of evidence, especially since a significant part of their work is to investigate and report on human rights violations.[820] The Commission also conducts fact-finding missions and collects testimonies, which have served in some cases as evidence.[821]

Furthermore, the ACHPR elaborates significantly on local, national, and regional contexts. In fact, of all the regional systems, the African Commission may take regional specificities most seriously in its assessments of human rights violations; in many decisions, the Commission stresses the particular historical, geographical, and demographic circumstances, such as the diversity of African people, the colonial past and its impact on management of natural resources, and the presence of multiple armed conflicts leading to population displacement. This sensitivity to context reflects the spirit of the African Charter, which explicitly takes into account the African reality in its elaboration of rights.

These references to regional context are not used to diminish the universality of human rights. Quite the contrary: they emphasize the importance of applying human rights *locally*, in an integrated way. In *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea* (2004), concerning the forced detention and expulsion of refugees from Guinea, the Court noted how refugee movement was a recurring issue in Africa: "The African Commission is aware that African countries generally and the Republic of Guinea in particular, face a lot of challenges when it comes to hosting refugees from neighbouring war-torn countries."[822] By discussing this fact beyond the frontiers of Guinea, the Commission acknowledged the specific regional geography of the violation. Similarly, in the *Ogoni* case, the Commission took the time to explain the rationale behind the adoption of Article 21 of the African Charter, on the right to management of natural resources:

> The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers,

[819] See e.g. *Sudan*, *supra* note 700 at para 100; *Sierra Leonean refugees*, *supra* note 701 at para 36; *Malawi Africa Association*, *supra* note 662 at para 85. This argument has been adopted by the ECtHR in *Akdivar*, *supra* note 700, in which the Court determined that the exceptional circumstances in the Southeastern part of the country led the court to believe that no effective domestic remedy existed for the applicants (at para 70–77). See also similar conclusions in *Khamzayev and others v Russia*, No 1503/12 (3 May 2011) ECHR, concerning ongoing conflicts in Chechnya.
[820] For instance, in *Sierra Leonean refugees*, *supra* note 701, the Commission recalled that Human Rights Watch and Amnesty International collected many statements from Sierra Leonean refugees (at para 40).
[821] See e.g. *Sudan*, *supra* note 700 at para 151.
[822] *Sierra Leonean refugees*, *supra* note 701 at para 67.

> creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the [African] Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.[823]

The African continent's history of dealing with colonialism is also reiterated in the *Sudan* case, this time in relation to the definition of a 'people':

> It is unfortunate that Africa tends to deny the existence of the concept of a "people" because of its tragic history of racial and ethnic bigotry by the dominant racial groups during the colonial and apartheid rule. The Commission believes that racial and ethnic diversity on the continent contributes to the rich cultural diversity which is a cause for celebration. Diversity should not be seen as a source of conflict. It is in that regard that the Commission was able to articulate the rights of indigenous people and communities in Africa.[824]

As a result, the Commission determined that Darfurians fit the flexible African definition of a people and thus had a right to their economic, social and cultural development.[825] This position was also upheld by the African Court in its only case on the right to property. In *African Commission on Human and Peoples Rights v Republic of Kenya (26 May 2017)* (hereinafter "*Ogiek*"), the Court noted that the silence on a definition of 'peoples' in the African Charter was probably meant to allow flexibility in its interpretation and application. It recognized the colonial influence on the inclusion of rights of people, saying that the first targets of the Charter were populations struggling for independence, yet it accepted that the notion extended beyond these populations to include indigenous peoples and ethnic communities.[826]

Finally, in *Endorois*, the Commission explained how the African Charter's list of rights is a product of its own history:

> The African Commission also notes that normatively, the African Charter is an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of "peoples." It substantially departs from the narrow formulations of other regional and universal human rights instruments by weaving a tapestry which includes the three "generations" of rights: civil and political rights; economic, social, and cultural rights; and group and peoples' rights. In that regard, the African Commission notes its own observation that

[823] *Ogoni*, *supra* note 662 at para 56.
[824] *Sudan*, *supra* note 700 at para 221.
[825] *Ibid* at para 220–223.
[826] As long as such groups did not challenge national sovereignty and territorial integrity without the state's consent, they add, see Ogiek, *supra* note 543 at para 197–198.

> the term "indigenous" is also not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities.[827]

In this statement, the Commission distinguishes itself from its counterparts by acknowledging the recent history of colonial struggles. In a footnote to this passage, the Commission further insists on how African human rights are born from a context of colonialism:

> The African Charter is not an accident of history. Its creation by the OAU came at a time of increased scrutiny of States for their human rights practices, and the ascendancy of human rights as a legitimate subject of international discourse. For African states, the rhetoric of human rights had a special resonance for several reasons, including the fact that post-colonial African states were born out of the anti-colonial human rights struggle, a fight for political and economic self-determination and the need to reclaim international legitimacy and salvage its image.[828]

Following this localized understanding of the importance of universal human rights, the African system is clearly the most amenable to acknowledging history within the elaboration of human rights, thus responding to the TWAIL critique of lack of contextualization in international law. This African history is one of continuing power struggles with external intrusions, particularly focused around control of resources, but also of calls to and actions toward emancipation, initially for states, but more broadly for all people. As I mentioned, direct testimonies are not as prevalent in ACHPR case law as in the Inter-American Court, but the historical consciousness displayed by the African Commission shows a willingness to consider African peoples' collective stories.

Ultimately, the comparative analysis of case law structures shows that the ECtHR, the least 'international' of the three regional systems, is also the least likely to allow space for lived experiences of property in location to pierce through the legal language, using a very liberal notion of 'certainty' around the democratic rule of law as a pretext. It is also less inclined to depart from domestic understandings of property rights in its interpretation of the international human right to property, whether determining its existence or determining how to respond to violations. The main problem with the ECtHR's tendency for "parochialism" in regard to international law, according to Forowicz, is that it prevents it from acting as a model for international human rights standards.[829] She claims that the type of regionalism the European system applies "can be viewed as a potential obstacle to the universal and unified character of international human rights."[830] If this is true, the

[827] *Endorois*, *supra* note 2 at para 149.
[828] *Ibid*, footnote 49 at para 149.
[829] Forowicz, *supra* note 666 at 20, 390.
[830] *Ibid* at 390.

European interpretation of the right to property is certainly not universal. Yet one must refrain from assuming that regionalism is automatically a challenge to universal human rights: as noted above, the ACHPR, which insists on the importance of the African reality, remains the most willing to rely on cross-referencing and to position itself within the international legal order.[831] What regionalism truly challenges is a bland, uniform application of universal human rights.

As the next chapter will show, the closed position of the ECtHR creates a space of exclusion in cases of property, where non-conforming views of property are rejected, leading to a weakened protection of human rights overall. By contrast, the willingness of the IACtHR and ACHPR to accept 'unorthodox' definitions of property presented by traditionally marginalized or underrepresented persons and communities opens the way to more inclusive and interactive responses to violations, showing how a bottom-up approach to human rights can lead to greater social participation.

[831] Isailovic, *supra* note 292 at 437.

Chapter 6 – Challenging Liberal Orthodoxies through Lived Experiences of Property

6.1 Introduction

As international human rights adjudicative bodies, the ECtHR, IACtHR, and ACHPR examine cases which at times challenge liberal property rights. Such challenges are filed by applicants whose claims tell stories that do not necessarily rely on formal legal rules, but are based rather on their relationships with their surroundings and their resulting sense of belonging. For a court to recognize these nonconforming and marginalized visions, it must allow the lived experiences to inform normative standards, and also allow the penetration of 'un-orthodox' stories—that is, stories that challenge judges' own assumptions, biases, and ideologies. Lourdes Peroni addresses the tension in law between orthodox and nonconforming views in her study of cases on religious freedom heard before the ECtHR. She notes that in certain cases the Court conveyed implicit assumptions about 'mainstream' religion, reducing religion to a set of dogmas or prescriptions rather than a "way of living." In those cases, she says judges

> tend to favor those who conform to what is authoritatively prescribed while disempowering those who may disagree, those who may engage in practices prescribed by only a minority within the group or those who may engage in practices authoritatively encouraged (or accepted).[832]

For Peroni, a "dense," dogmatic approach ignores the inherent adaptability and dynamism of religion. But she notes that in other cases, the judges made place for "lived experiences of religion,"[833] and their diverse narratives.[834] Peroni's exhortation to challenge orthodoxies resonates in cases related to the right to property, which can easily fall into the trap of reproducing domestic legal dogmas of property rights rather than acknowledge the adaptability of property relationships in location.

Generally speaking, the ECtHR, relying heavily as it does on liberal standards, seems the least open to the penetration of alternative visions of property into its case law, as the following discussion will illustrate. While the Court has allowed for a broad interpretation of the word

[832] Lourdes Peroni, "The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review" (2014) 89:2 Chicago-Kent L Rev 663 at 675.
[833] *Ibid* at 665–666. See also Ingold, *supra* note 537 on lived experience as source of knowledge.
[834] Peroni, *supra* note 832 at 686–687.

'possession,' the possession must be *formally* possessed, that is, recognized by law.[835] By contrast, when European judges are confronted with cases of illegal or extralegal[836] property, they struggle to stretch legal categories beyond formal law. What this means is that some persons or groups may be effectively excluded from the application of an instrument which is meant to protect their rights. Thus, the ECtHR is more hermetic in cases of illegal constructions, Romani property, and indigenous property, which directly call into question the liberal orthodoxies presenting property as a market-bound individual right of exclusion. Still, in cases of serious human rights violations and cases of rural property, the ECtHR departs from its neutral stance towards property matters and allows more penetration of lived experiences of property.

The two other regional systems have shown much more openness to the penetration of 'unorthodox' stories of property, particularly in cases of indigenous property. It must be noted that the states in the Global South face specific realities that are not as salient in the European context. On one hand, the colonization of the African and American continents by European invaders means that Western liberal notions of property entered into contact and conflict with diverse forms of land tenure, some of which persist to this day in tribal and indigenous communities. On the other, agriculture is the main economic sector in many countries in the Global South. These two elements of regional context are important in understanding how people relate to their property, in particular to landed property, and the African and American adjudicators seem to be conscious of that.

While the previous chapter focused on legal language, how judges assess their role within regional systems, and how they address property matters, this chapter will look more closely at the lived experiences in location which the three systems have taken into consideration, and how these have influenced legal outcomes. In some cases these experiences are told directly through testimony or pleas, and in others they are admitted indirectly via the judge's summaries of facts. Ultimately, what the penetration of stories in location reveals is that when property enables social participation, it deserves greater protection, thus creating a hierarchy between different forms of property relationships. In these cases, adjudicative bodies are more likely to allow space for lived experiences and assess the interaction between property and other human rights. And it is precisely

[835] See *Béláné Nagy*, *supra* note 604 at para 74 (for instance when a person has contributed to a pension scheme).
[836] See e.g. Xu & Gong, *supra* note 577 on the idea of extralegal property. The authors argue that the legitimacy of extralegal property derives from long-term use and social consensus.

the voices of marginalized people which allow property to be inserted in its social context, and to reveal its potential for positive empowerment.

6.2 When Stories Matter: Serious Violations and Rural Property

While the application of formal neutral rules seems to be the standard in cases concerning property, especially before the ECtHR, certain cases are exceptional. In this section, I first address cases of serious violations of human rights—usually implying multiple rights violation, including to the right to property—which show how a rigid application of liberal norms is set aside when the adjudicative bodies hear personal stories of suffering (§6.2.1). It is interesting to note how in most of these cases, serious violations occur in a rural setting, where populations are more vulnerable due to their isolation. I address the specificities of rural ownership in the second part, through cases that illustrate how linking property, economic subsistence, and social affiliation leads to a greater sensitivity to location (§6.2.2). Both instances address unconventional property relationships: in the case of serious violations, applicants are rendered vulnerable by conflict and displacement, and the loss of material possessions becomes a symbol of the loss of their way of living. In the case of rural property, land represents physical survival and permanence, a reality that may not be understood as immediately in the urban centres where most political decisions are made.

6.2.1 Lived experiences of serious violations

A look at the case law on property from all three regional systems shows that when human rights violations are serious and complex—when armed conflict and mass displacement are involved, for instance—the human narrative is commensurately important, giving it a normative force. The ECtHR recognizes this, noting in *Chiragov and others v Armenia* (2015) that it "has developed a flexible approach regarding the evidence to be provided by applicants who claim to have lost their property and home in situations of international or internal armed conflict."[837] And this flexible approach in cases of conflict extends to lived experiences of property, as is exemplified in a series of ECtHR cases concerning villagers caught in the middle of a violent and long-standing conflict between the Turkish authorities and the PKK, a Kurdish militia operating in southeastern Turkey,

[837] *Chiragov and others v Armenia* [GC], No 13216/05, [2015] III ECHR at para 136 [*Chiragov*]. In this case the ECtHR even referred to UN instruments and documentation on the topic of housing of displaced people; see para 96–98, 198–199.

cases which are in fact often cited in IACtHR and ACHPR property case law when they make reference to external jurisprudence.[838]

The Turkish cases generally involve multiple violations of ECHR rights. In many of these cases, villagers have been forcibly evacuated, sometimes arrested, before their houses are destroyed or burnt down by security forces;[839] most of the applicants are small farmers. While the findings in relation to a violation of P1-1 are uncontroversial once the facts are verified,[840] what is interesting is the extent to which both the personal situation of applicants and their general location as villagers in remote regions becomes important. In *Doğan and others v Turkey* (2004), for instance, the facts first offer a detailed description of the applicants' village:

> Boydaş village may be described as an area of dispersed hamlets and houses spread over mountainous terrain, where there is insufficient land suitable for agriculture. […] An extended patriarchal family system prevailed in the region, where there were no large landowners but generally small family farms. These usually took the form of livestock farms (sheep, goats and bee-keeping) revolving around the grandfather or father and run by their married children. The applicants earned their living by farming, in particular stockbreeding, land cultivation, tree felling and the sale of timber, as did their fellow villagers.[841]

Beyond the simple description of property, emphasis is placed on the applicants' way of life as a rural family living off the land, a tradition passed through generations. In a similar case, the facts detail the various trees that the applicant used to grow in the village and that security forces burnt down:

> The applicant owned vineyards, almond, cherry, fig and oak trees which were located to the west of Kaynak hamlet. He also owned plum, peach and apricot trees which were located in the valley between his hamlet and the village of Yardere, located to the south-east of the hamlet. These trees were irrigated by a river which had its source in the village of Aytepe and flowed to Syria. The applicant owned land in the valley where he used to grow cotton and tobacco. He also kept sheep and goats.[842]

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[838] See ee.g. *Ituango*, *supra* note 694 at para 196; *Endorois*, *supra* note 2; *Sudan*, *supra* note 700.

[839] The government argued in all cases that the displacements of the applicants were either caused by PKK wrongdoing or necessary evacuations for security reasons. The applicants have not always been able to prove the contrary.

[840] The question of evidence is particularly tricky in these cases; while in certain earlier cases the Commission was able to send fact-finding missions to establish responsibility of the Turkish State (ee.g. *Akdivar*, *supra* note 700; *Dulaş v Turkey*, No 25801/94 (30 January 2001) ECHR), in others this was not possible, for instance in *Doğan*, *supra* note 700. In the latter case, though, the Court was satisfied with the proof provided by the applicants to determine violation (*ibid* at para 143).

[841] *Doğan*, *supra* note 700 at para 11.

[842] *Hasan İlhan v Turkey*, No 22494/93 (9 November 2004) ECHR at para 13 [*Hasan Ilhan*].

These personal details are technically irrelevant in that they don't inform the finding of a violation in absolute terms; indeed, according to ECtHR case law, whatever deprivation occurs is a violation, regardless of whether the property is small or large, or what particular purpose it serves. If it were to simply evaluate damage, the Court could have mentioned that the applicant was deprived of a given number of fruit trees or a given number of livestock, without giving details or entering into a geographic description of the land. What these details do, however, is emphasize the importance of the land to the applicant, qualifying it as an integral part of their life rather than just a financial asset. They serve to anchor the applicant's claim concretely and geographically, giving deeper meaning to property in this context. The reference to the trees[843] and the river further gives the setting of the case a sense of continuity, longevity, and permanence, suggesting that the applicant's attachment to that specific property is not momentary and frivolous, but long-lasting.

In fact, contrary to typical property decisions by the ECtHR, small details are often provided in cases of serious violations. For instance, in *Abdulkhadzhiyeva and Abdulkhadzhiyev v Russia* (2016), concerning physical attacks by military forces against Chechen peasants, the Court insisted on the fact that, as well as being shot at and wounded, the applicants were deprived of their cattle. The case primarily examines whether a violation of the right to life (Article 2) was committed, and the discussion of P1-1 is very brief, limiting itself to finding a violation, but cattle are mentioned repeatedly in various parts of the judgment.[844] The judges never explicitly mention that the victims are peasants, nor do they explain the importance of cattle to their livelihood, yet it is made clear that the specific circumstances of this property violation are significant: the violation attacks their means of subsistence, and thus their dignity.

In another case that concludes a violation of P1-1 due to the killing of livestock, among various other serious violations of human rights, the ECtHR adopts a storytelling tone when describing the fact, referring to the applicants by their first names:

> The women returned to their own villages. On the next day Rabia went to Kurşunlu village to see if anyone would accompany her to look for her son. However, nobody would accompany her. The villagers had already tried in the morning to approach the area of the plain to look for Mehmet Akan and Mehmet Akkum, who had failed to

[843] For an illustration of the significance of trees in legal geography, see generally Irus Braverman, *Planted Flags: Trees, Land, and Law in Israel/Palestine* (Cambridge: Cambridge University Press, 2009).
[844] See in the facts section, *Abdulkhadzhiyeva and Abdulkhadzhiyev v Russia*, No 40001/08 (4 October 2016) ECHR at para 8 ("permission to evacuate their cattle"), 9, 11 ("The applicants' cattle remained under the control of the servicemen and were never returned") 14, 16, 17, 18, 20, 24, 38, and 45.

> return to the village the previous evening, but had only seen a multitude of animal corpses and had returned to the village before completing their searches for the two Mehmets.[845]

Such a style is never used in decisions that deal exclusively with P1-1, focusing on legal rules and market stability. Yet when it comes to narratives involving multiple human rights violations, including property violations, the Court changes its approach completely, emphasizing personal stories of struggle in an empathic way.

Presenting lived experiences of property in cases of serious violations serves not only to create empathy, but can also lead to reinterpreting or reshaping normative standards applied by the Court. In *Doğan*, for instance, it was determined that registered titles were not necessary in that case, "since they either had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivated the land belonging to the latter."[846] In other words, their physical presence on the land, paired with the 'ancestrality' of that presence, sufficed to establish possession, whereas the Court usually relies on more neutral and formal criteria to do so. The Court further determined in *Doğan* that their economic activity as cultivators itself implied possession:

> The Court further notes that the applicants had unchallenged rights over the common lands in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling. Accordingly, in the Court's opinion, all these economic resources and the revenue that the applicants derived from them may qualify as "possessions" for the purposes of Article 1.[847]

This conclusion follows ECtHR case law which extends 'possessions' to rights of a patrimonial nature, but in this case it is the specific location, and not only the formal legal recognition of proprietary interests, which shapes the definition of possession, in an effort to accurately reflect the losses suffered by the applicants.

It is worth noting that in the absence of formal titles, much of the evidence presented by the applicants derive from testimonies, either their own or that of neighbours. These testimonies are usually filled with accounts of location, describing in detail the property, its surroundings, and the applicants' relationship with it, as well as the temporal continuity of ownership. In *Doğan*, the mayor of the applicants' village presented a statement describing the applicants' property, with

[845] *Akkum and others v Turkey*, No 21894/93, [2005] II ECHR at para 23 [*Akkum*].
[846] *Doğan*, *supra* note 700 at para 139.
[847] *Ibid*.

details of land, buildings, and quantity of livestock. In *Chiragov*, concerning the loss of the homes of displaced Azerbaijani Kurds in the context of post-independence conflict between Armenia and Azerbaijan, the applicants also provided statements by their neighbours in order to support their ownership claims[848] as well as a "technical passport" describing their property.[849] The Court accepted both the statements and the technical passport as *prima facie* proof of possession.[850] The Azerbaijani Kurds also described their homeland as the place "where their ancestors had lived for hundreds of years,"[851] thus anchoring their claim in the passage of time. While the Court did not explicitly engage with this temporal element, the continuity of possession might have influenced the conclusion that it was covered under P1-1 despite the absence of a formal right or title to the land during the Soviet era.[852]

However, the testimony of an applicant as to the existence of a property deed is not sufficient to determine title if it is not given within the framework of a European Commission fact-finding investigation.[853] Indeed, in two cases similar to *Doğan* and *Chiragov*, the court found that there was insufficient proof supporting the applicant's claims to a property that had been destroyed by state forces, despite the applicants having submitted oral testimonies from neighbours; in these cases, the Commission was not able to conduct interviews and fact-finding missions.[854] Thus, although multiple stories in location can lead to an ECtHR legal conclusion on the existence of a right to property, they nevertheless require some kind of formality—here, official missions conducted by the regional system.

The ACHPR also provides for flexibility and attention for location in cases of mass violations during conflicts. In fact, the Turkish cases were particularly influential in the African

[848] See e.g. *Chiragov*, *supra* note 837 at para 33–36.
[849] *Ibid* at para 140: "The most significant pieces of evidence supplied by the applicants are the technical passports. Being official documents, they all contain drawings of houses and state, among other things, their sizes, measurements and number of rooms. The sizes of the plots of land in question are also indicated. The passports are dated between July 1985 and August 1990 and contain the applicants' names. Moreover, it appears that the passports include references to the respective land allocation decisions."
[850] *Ibid* at para 141. The Court further added that "regard must be had to the circumstances in which they were compelled to leave the district, abandoning it when it came under military attack" (at para 143).
[851] *Ibid* at para 32.
[852] *Ibid* at para 149. The Court also addressed the losses under Article 8 (protection of the home).
[853] For instance, in *Altun v Turkey*, No 24561/94 (1 June 2004) ECHR, the Commission collected oral testimonies from different villagers to recreate the events that had led to the applicants' complaint, all of which are summarized in the decision. In this case, the Court found that the evidence supported the applicants' version of events. The same happened in *Hasan İlhan*, *supra* note 842 and in *Akkum*, *supra* note 845.
[854] See ee.g. *Aksakal v Turkey*, No 37850/97 (15 February 2007) ECHR; *Keser and others v Turkey*, No 33238/96 (2 February 2006) ECHR.

Commission's findings in the *Sudan* case concerning the humanitarian crisis in the Darfur. The complainants claimed, amongst other violations, that Darfurians had been forcibly evicted from their homes and villages, acts which had been accompanied with destruction of houses, wells, food crops, and livestock.[855] While the Commission never presents direct testimonies, it does suggest that the specific circumstances of claimants should be evaluated in order to determine whether Article 14 can be invoked: "the fact that the victims cannot derive their livelihood from what they possessed for generations means they have been deprived of the use of their property under conditions which are not permitted by Article 14."[856] Among these personal circumstances, once more, is the importance of the passage of time in establishing ownership. Description of location can be brief, almost secondary, yet still significant. For instance, in *Malawi Africa Association and others v Malawi* (2000), the Commission addressed multiple violations against Black Mauritanians,[857] including confiscation of land and livestock and forced expulsions from homes. In one passage, the Commission described how one community victim lived in a valley "where the land is fertile."[858] While the Commission does not elaborate on this, the description seems to suggest that the loss of agricultural land is of particular importance.

Personal circumstances also had a significant influence in *Uzcátegui et al v Venezuela* (2012), a case heard by the IACtHR concerning harassment by police against members of the Uzcátegui family. Among other violations, the Court addressed damage to the applicants' home, and considered that:

> given the circumstances in which the action took place and, in particular, the socioeconomic status and vulnerability of the Uzcátegui family, the damage to their property during the raid had a far greater impact than it would have had for other family groups with other means. In this regard, the Court considers that States must take into account that groups of people living in adverse circumstances and with fewer resources, such as those living in poverty, experience an increase in the extent to which their rights are affected, precisely because of their more vulnerable situation.[859]

This brief passage carries within it the essence of the human right to property and human rights in general: first, it explicitly describes a hierarchy in which violations of property that target

[855] *Sudan*, *supra* note 700 at para 157.
[856] *Ibid* at para 205.
[857] *Malawi Africa Association*, *supra* note 662. This case emerged in a context of systematic racial discrimination carried or supported by the Mauritanian government, which had led to detention of opposition, extrajudiciary executions, torture, instances of slavery, and also displacement and property confiscation, mostly from villagers.
[858] *Ibid* at para 14.
[859] *Uzcátegui et al Case (Venezuela)* (2012), Inter-Am Ct HR (Ser C) No 249 at para 204.

socioeconomically vulnerable people are seen as more serious than violations of property of wealthy people. The court notes further that the family was known to be regularly subjected to intimidation and harassment.[860] Second, it provides a general guide suggesting that human rights should particularly support underrepresented and marginalized populations, notably people "living in poverty." This second part of the Court's finding was made as an *obiter dictum* comment, yet it serves to clearly establish that human rights ought to empower people in order for them to fully participate in social life.

6.2.2 The special nature of rural land

The cases of mass rights violations described above seem to suggest that property relationships located in rural settings require that judges pay greater attention to context. The role of location in these cases is fundamental: the specific geography of rural areas brings a different perspective on the meaning of property and how it ought to be protected. First, agriculture is of particular importance in Latin American and African countries, where in many cases it is the largest economic sector and thus the principal source of livelihood.[861] Small farming remains predominant,[862] although colonial rule has also left behind a culture of *hacendias* (large plots of agricultural land controlled by a small number of people).[863] This situation creates a tension between market-oriented agribusiness and traditional land management, each with its own notion of ownership: while market-oriented agriculture implies clear individual titles which are alienable in nature, customary tenures are often communal, and generally considered inalienable.[864] Second, in many decisions involving indigenous property, the agricultural component is associated with both subsistence and sociocultural life. This is the case for instance in *Mayagna*, in which members of the Awas Tingni indigenous community described their mode of living as relying on communal

[860] *Ibid* at para 205.
[861] The latest numbers for 2019 show for example that employment in agriculture occupied 14% of all employment in Latin America & the Caribbean and 54% in Sub-Saharan Africa, compared to 4% in the European Union and 1% in North America. The percentage is 57% for the least-developed countries (based on UN classification). Data analyzed by the World Bank, see "Employment in agriculture", online: World Bank Data <https://data.worldbank.org/indicator/SL.AGR.EMPL.ZS>. See also De Schutter, *supra* note 285 at 304.
[862] A majority of agricultural plots on the two continents are less than two hectares; see *ibid*. See also Mattei, "Socialist", *supra* note 285 on the importance of small farming in Somalia.
[863] Something which land reform programs have tried to correct all sorts of circumstances, with various results; see Valencia Rodriguez, *supra* note 11 at para 141; van Banning, *supra* note 11 at 58; De Schutter, *supra* note 285 at 332. For an example of ill-conducted land reform policy, condemned by the ACHPR, see *von Abo*, *supra* note 659.
[864] van Banning, *supra* note 11 at 61; Valencia Rodriguez, *supra* note 11 at para 151; Mattei, "Socialist", *supra* note 285 at 21–25; De Schutter, *supra* note 285 at 317–318.

agriculture and family farming, as well as hunting, fishing, and gathering.[865] Finally, agriculture in rural regions often features in cases about civil conflict, because it is a strategic target. In *Massacres of El Mozote and nearby places v El Salvador* (2012), the IACtHR noted that in times of conflict, destroying and burning homes, belongings, crops, and animals was a calculated strategy to permanently remove the means of subsistence.[866]

The IACtHR has insisted on the link between rural activity, subsistence, and way of living in a few decisions concerning the right to property. In *Ituango*, concerning multiple gross violations following armed raids on villages by Colombian paramilitary groups, the Court allowed significant space in the presentation of facts to descriptions of victims' property losses, demonstrating a clear concern for agricultural losses. The conflict described in *Ituango* resulted in multiple extrajudicial killings, which were addressed first by the Court, but for the surviving victims, loss and destruction of property also implied forced displacement and loss of basic means of subsistence.[867] For instance, Bernardo Maria Jimenez Lopez alleged that he had lost 36 head of cattle and his farm, which was set on fire; Libardo Mendoza lost 51 head of cattle, 20 cows, 18 feeder steers, a mule, and his farm, also by arson.[868] These losses are important when knowing that, as is stated in the opinion, "the economy of Ituango is pre-eminently agricultural."[869] Furthermore, the Court noted that rural persons are more vulnerable than others when displaced.[870]

In *Ituango*, the IACtHR simultaneously examined Article 21 (on property) and Article 11 (on the right to honour and dignity of the family, home, and correspondence) of the American Convention as they apply to the destruction of homes and the theft of livestock.[871] The Court emphasizes the rural location in its assessment:

> The Court finds it opportune to underscore the particular gravity of the theft of the livestock of the inhabitants of El Aro and the surrounding areas. As the Commission and the representatives have emphasized, *from the characteristics of the district and the daily activities of the inhabitants*, it is clear that there was a close relationship

[865] *Mayagna*, *supra* note 635 at para 103; *Sawhoyamaxa*, *supra* note 762 at para 73(2); *Kichwa*, *supra* note 646 at para 54. See also *Yakye Axa*, *supra* note 644 at para 50.3; the community is described as relying on hunting, gathering, fishing, and some farming.
[866] *El Mozote*, *supra* note 1 at para 208.
[867] See contra *Expelled Dominicans*, *supra* note 809 at para 443, where the IACtHR decided that the violation of the right to property was already addressed through other findings of violation and did not need to be further discussed.
[868] *Ituango*, *supra* note 694 at para 125(81).
[869] *Ibid* at para 125(27).
[870] *Ibid* at para 125(106).
[871] *Ibid* at para 191. Article 11 was raised directly by the Court itself, though the complainants had not invoked it.

> between the latter and their livestock, because their main means of subsistence was cultivating the land and raising livestock. Indeed, the damage suffered by those who lost their livestock, from which they earned their living, is especially severe. Over and above the loss of their main source of income and food, the way in which the livestock was stolen, with the explicit and implicit collaboration of members of the Army, increased the villagers' feelings of impotence and vulnerability.[872]

In this passage, the IACtHR, focusing on context, emphasizes both the location—close relationship between individuals and their mean of subsistence—and the purpose of property. These details underline the human rights aspect of property, linking ownership with decent living, and its deprivation with "impotence and vulnerability." The Court expressly stated in that case that the violation of the right to property was "particularly serious,"[873] suggesting that there are different degrees of gravity in right-to-property violations. Aside from the rural aspect, the Court emphasized the 'home' aspect of the case:

> [T]he effect of the destruction of the homes was the loss, not only of material possessions, but also of the social frame of reference of the inhabitants, some of whom had lived in the village all their lives. In addition to constituting an important financial loss, the destruction of their homes caused the inhabitants to lose their most basic living conditions; this means that the violation of the right to property in this case is particularly grave.[874]

Again, a hierarchy is established here, based on both the loss of basic living conditions and the destruction of social attachment to a community, anchored in place and time, and provided for by property. What's more, they merge the affective aspect of ownership—the notion of 'home'—with its material expression as property, contrary to the ECtHR which, as seen above, has tended to treat property and home cases separately. Finally, the Court notes that the destruction of the homes and the accompanying terror[875] spread by the paramilitary led to forced displacements, exacerbating the material losses and their consequences:

> Other major negative effects of internal forced displacement includes the loss of land and housing, marginalization, serious psychological repercussions, unemployment, increased poverty and the deterioration of living conditions, and increase in illnesses

[872] *Ibid* at para 178 [emphasis added].
[873] *Ibid* at para 181.
[874] *Ibid* at para 182.
[875] This has also led to a finding of violation of the right to humane treatment associated with the loss of property, see *ibid* at para 274: "the events in El Aro signified for these people not only the loss of their homes, but also the loss of their entire patrimony, and the possibility of returning home."

> and mortality, loss of access to communal property, lack of food security, and social disintegration.[876]

The Court thus insisted on the interrelation between forced displacement and multiple violations, anchoring the assessment of rights in a concrete context of violence and uprootedness, rather than assessing them in the abstract.[877] In fact, the property damage in *Ituango* violated more than just the right to property, according to the Court, because "the events in El Aro signified for these people not only the loss of their homes, but also the loss of their entire patrimony, and the possibility of returning home."[878] Thus, the Court also concluded that the material losses constituted a violation of the right to humane treatment (American Convention Article 5).

Similar conclusions were drawn in *El Mozote*, also addressing gross violations of human rights against peasants. Because of the nature of this case, the IACtHR decided to examine all allegations of Convention violations together, instead of article by article as it usually does.[879] In relation to their possessions, the surviving victims explained how their houses and crops were burned and their animals killed,[880] emphasizing how these were crucial to their livelihood. The IACtHR reiterated the hierarchy implicit in rural property:

> The right to property is a human right and, in this case, its violation is 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.*[881]

Again, rural possessions are presented as more than just material goods, possessing a strong symbolism in terms of affiliation and survival. The Court added that livestock possesses "both material and affective significance in the peasant universe."[882] Again, what counts most in the human rights language in this case is the purpose of property and how it empowers peasants in their specific location. In *Santo Domingo Massacre*, the Court reprised the argument that loss of

[876] *Ibid* at para 213.
[877] *Ibid* at para 224.
[878] *Ibid* at para 274.
[879] *El Mozote*, *supra* note 1 at para 141. These rights were the right to life, personal integrity, personal liberty, privacy, protection of the child, property, freedom of movement, and freedom of residence.
[880] *Ibid* at para 176–178.
[881] *Ibid* at para 180 [emphasis added].
[882] *Ibid* at para 180.

property is of greater importance in rural regions, adding that rural victims are more vulnerable to poverty.[883]

The sensitivity to rural location is present even outside cases of serious human rights violations. For instance, in *Lallement v France* (2002), the ECtHR departed from its usual position favouring stable abstract rules of property in P1-1 cases, arguing rather for a contextual approach to cases of agricultural property. The applicant in this case was a dairy farmer opposing an expropriation order to build a road that would have reduced his farmland by 60%. The applicant argued that the expropriation would take away his main professional activity and source of income and that he would no longer be able to "decently" ensure his "subsistence" and that of his family.[884] The applicant thus presented his property in context rather than using legal jargon. Sensitive to the condition of the applicant, the Court stated that each case ought to be evaluated individually, assessing the specifically agricultural vocation of the property in question:

> *Il y a lieu cependant d'examiner chaque situation individuelle* in concreto *et, en particulier, de tenir compte de la spécificité de l'expropriation lorsqu'elle concerne un immeuble utilisé à des fins agricoles. Dans un tel cas, la privation de propriété se double d'une atteinte aux moyens de production de l'agriculteur concerné, ce qui peut mettre en cause sa capacité à continuer son activité professionnelle.*[885]

This passage indicates that property in rural areas often constitutes the means of subsistence for the owner, distinguishing it from other types of property. Similarly, in *Osmanyan and Amiraghyan v Armenia* (2018), the ECtHR concluded that the rural setting demanded a departure from liberal property rights assumptions:

> [T]he Court considers that there may be situations where compensation representing the market price of the real estate in question even with the addition of the statutory surplus, would not constitute adequate compensation for deprivation of property. In the Court's opinion, such a situation may arise in particular if the property the person was deprived of constituted his main, if not only source of income and the offered compensation did not reflect that loss.[886]

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[883] *Santo Domingo Massacre*, *supra* note 687 at para 273. In this case, air raids by the Colombian air force had led to damage to homes, possession, crops, and animals, described by some as their "sustainable and stable living standards" (at para 253). The Court ruled however that proof was insufficient in attributing the subsequent looting to the state (at para 276–277).

[884] *Lallement v France*, No 46044/99 (11 April 2002) ECHR at para 19 [*Lallement*]: "son exploitation ne lui permet plus d'assurer décemment sa subsistence et celle de sa famille."

[885] *Ibid* at para 23. Note that dissenting judges in *Lallement* opposed the "in concreto" approach of the majority, considering that, while the applicant's personal circumstances were "respectable," the compensation received was appropriate; see *ibid*, dissenting opinion of Judges Cabral Barreto and Traja.

[886] *Osmanyan and Amiraghyan v Armenia*, No 71306/11 (11 October 2018) ECHR at para 69.

The family of five affected by the expropriation in this case had argued that they depended on the land for their living, and thus the Court determined that compensation should reflect this fact. The Court did not explain in *Lallement* and *Osmanyan* why the agricultural setting made a difference, but did hint that the specificities of agricultural work, its geographic isolation, and the corresponding lack of labour alternatives were relevant factors. The evaluation of the loss of means of living obviously relies on the commercial nature of agricultural activities, but what is relevant here is that the value of the "possession" was assessed not in the abstract, but in the context of its rural location and of its significance for the applicants' livelihood, as they themselves described it.

Applicants' descriptions of rural property are thus important in assessing their particular relationship with the land. In *Bistrović v Croatia* (2007), the applicants underlined the integrated nature of rural life:

> The applicants argued that with only partial expropriation they, as farmers, would have no further use for the house and the small area around it, since the house and the agricultural land on which it was built represented an inseparable unity.[887]

What the applicants express here is that agricultural land is not important merely for its exchange value, but for the use they can make of it: a commercial use which allows their participation in rural life. They thus asked that either their whole estate be expropriated, as they had no use for the house alone; or that compensation be commensurate with their actual loss. The Court concluded that domestic authorities failed to take into account the applicants' broader loss.[888]

Temporal aspects may have also made a difference in *Lallement*, as the farm in question was first exploited by the applicant's father, showing rootedness and permanence in land.[889] In *Gauchin v France* (2008), the importance of agricultural tenure paired with the passage of time actually played against the formal owner of agricultural land. In this case, the applicants complained about their inability to terminate a lease on their land and regain control of it; both the applicant and the lessee were cultivators, and the lessee's family had possessed a lease on the conflicted land for over 15 years before the applicants sought to end it. The Court rejected the applicants' claim and sided with the state's social policy, agreeing that there was a need to protect the investments of

[887] *Bistrović v Croatia*, No 25774/05 (31 May 2007) ECHR at para 5.
[888] The Court concluded that the loss of land suitable for agricultural activities should have been taken into account in compensating the applicants, *ibid* at para 42.
[889] *Lallement*, *supra* note 884 at para 8.

mid-sized farms.[890] The Court ruled that part of this protection reasonably stemmed from the stability and continuity of farm exploitations, maintained by fixed and renewable long-term leases, as well as the ability to transfer them within a family.[891] Seeing as such continuity is not usually a factor in deciding cases on rent control in urban areas, where the tenant's interests are occulted, the Court clearly establishes a distinction between the two geographic locations.

Continuity is also relevant in *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v the United Kingdom* (2007), in which case the majority of the Court rejected the applicants' attempt to rescind the effect of adverse possession on their registered agricultural land.[892] The third party, local farmers, had been using the land for grazing for 15 years and had successfully defended attempts to eject them before the UK Courts, based on possession over the 12 years required by local legislation. In *J.A. Pye*, the majority approved the context-sensitivity of UK legislation, which favoured "lengthy, unchallenged possession" over registered titles.[893] While the Court's position here appears to show no more than deference to state law, it still contradicts much of its own case law on neutrality and certainty of property rules, and in fact there was an important dissent in this case that lent greater importance to registered titles.[894] The *Pye* case thus follows the ECtHR's tendency to apply a more contextual approach to rural property cases. An important aspect to note, however, is that all these cases regarding rural property in Europe are decided within formally recognized legal relationships with land. But when lived experiences of property presented to the ECtHR depart from that familiar ground, its ability to uphold them is significantly diminished, as the next section shows.

6.3 Illegal Property in Europe: A Challenge to Formal Liberal Entitlements

The liberal orthodoxy of property, which I have identified as market-bound individual property rules applied in the abstract, is particularly expressed through the notion of legality and abidance by the rule of law, which allow certainty and accountability in commercial exchanges in a market-

[890] *Gauchin v France*, No 7801/03 (19 June 2008) ECHR at para 61.
[891] *Ibid* at para 63.
[892] Especially since the UK legislation provided the applicants with multiple mechanisms to avoid the effect of adverse possession, which they had not taken advantage of; see *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v the United Kingdom* [GC], No 44302/02, [2007] III ECHR at para 75–84.
[893] *Ibid* at para 74.
[894] *Ibid*, joint dissenting opinion of Judges Rozakis, Bratza, Tsatsa-Nikolovska, Gyulumyan, and Sikuta.

oriented economy, for instance through formal titles and permits.[895] While the ECtHR has shown some flexibility in relation to titles in cases of serious violations and rural property, it has struggled to allow the penetration of non-conforming visions of property in cases where the applicants technically broke the law. These include cases involving construction without formal administrative approval (§6.3.1) and Romani ownership claims to settle down on unauthorized sites (§6.3.2). These examples concern property which, while extralegal, is fundamental for its 'owner,' attached as it is to their family life, cultural identity, or livelihood. And while these cases are rare in Europe, they still reveal the limitations of the European standard of property.

6.3.1 Unauthorized buildings

Following the line of predictability and certainty, constructions built without administrative approval are generally frowned upon by the ECtHR, despite the fact that the Court holds as a basic principle that the notion of "possession" has an autonomous meaning "independent from the formal classification of domestic law".[896] In *Depalle v France* (2010), the Court found no violation of P1-1 in the state's order to demolish a house irregularly constructed on the grounds that it encroached on the public maritime domain, despite the fact that the building was tolerated for over 100 years before demolition proceedings were brought. The passage of time was relevant to the determination of the existence of a possession,[897] but lengthy possession was not enough in the Court's view to create an exception to the necessary legislative protection of coastal areas.[898] A similar conclusion was drawn in *Hamer v Belgium* (2007), in which the Court refused to find a P1-1 violation in the demolition of a vacation home built without a permit in 1967, despite the fact that since then, the applicant had paid taxes on it and had made various renovations without official objection.[899] What's more, the Court refused in both cases to rule under Article 8 (protection of the home), saying that such examination would not raise distinct questions,[900] thus contradicting cases where the Court determined that P1-1 cases and Article 8 cases addressed different points.

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[895] See discussion on this, above, at §2.2.3.
[896] *Béláné Nagy*, *supra* note 604 at para 74.
[897] *Depalle v France* [GC], No 34044/02, [2010] III ECHR at para 68 [*Depalle*].
[898] *Ibid* at para 87–89.
[899] *Hamer v Belgium*, No 21861/03, [2007] V ECHR at para 9–11. Again, protection of the environment was considered more important (*ibid* at para 76–79).
[900] *Ibid* at para 93; *Depalle*, *supra* note 897 at para 96. At least one judge opposed this finding in *Depalle*; see partly dissenting opinion of Judge Kovler. Yet the Court later stated (though not unanimously) that examination of illegal property should not be viewed the same under P1-1 and Article 8; see *Ivanova*, *supra* note 738.

By contrast, the dissenting judges in *Depalle* expressed in their summary of facts that the passage of time and the applicant's personal involvement should have been taken into account. While the majority's summary of facts insists that the applicants should have known about the irregularities related to their house, the dissenting judges present them much more empathetically:

> *L'exécution des mesures critiquées aurait des* conséquences exceptionnellement graves *pour le requérant en ce qu'elle le contraindrait à quitter et à faire démolir, sans indemnisation, une maison acquise de bonne foi qu'il habite depuis cinquante ans en toute légalité et à laquelle il consacre depuis des années du temps et de l'argent, s'acquittant des taxes et redevances y afférentes.*[901]

The judges here underline the gravity of the prospective demolition of the house, based on the applicant's personal efforts in maintaining it. The applicant was not in an illegal position, they say, because their authorization to stay had been systematically renewed (although this did not amount to a property title). The dissenting judges thus recognized the passage of time as a determining factor.

Generally, then, legality (or at least the perception of legality) is a prerequisite for recognition of a property right, and this assumption pervades ECtHR case law. In *Zhidov and others v Russia* (2018), the applicants' homes were formally illegal constructions because of their proximity to pipelines, but since they had obtained valid titles of property on these homes, the Court determined that the applicants were in good faith and that the state acted with neglect, stating that "*les requérants pouvaient légitimement se croire en situation de sécurité juridique quant à la licéité de la construction de leurs immeubles.*"[902] Still, this conclusion did not extend to *all* applicants, one of whom had been ordered to demolish his home, making him aware of its illegality and thus no longer possessing in good faith.[903]

In *Saghinadze and others v Georgia* (2010), a case about good-faith occupancy of a cottage which the applicants did not actually own, but used for residential purposes, the Court, while favourable to the applicants' plea, makes a clear judgment on what counts as legitimate occupation: "The Court observes that the first applicant settled, together with his family, in the cottage in January 1994. He was not squatting there: the dwelling had been offered to him by his employer, the

[901] *Depalle*, *supra* note 897, partly dissenting opinion of judges Bratza, Vajić, Davíd Thór Björgvinsson, and Kalaydjieva at para 5 [emphasis added].
[902] *Zhidov and Others v Russia*, No 54490/10 (16 October 2018) ECHR at para 110.
[903] See *ibid* at para 106

Ministry of the Interior."[904] The Court further notes how the applicants had "installed and planted various fixtures, fruit trees and vegetables, and started keeping poultry and small livestock,"[905] implying that they had made good use of the land rather than just occupying it illegally.[906] In presenting the facts this way, the Court suggests that, by opposition, squatting is necessarily illegitimate. In other circumstances, the Court distinguished based on the type of building whose protection was sought, in contradiction with its line of neutrality; in *Tashev v Bulgaria* (2012), the applicant contested the demolition of his garage, built without permit, which housed his mechanical workshop. But the Court clearly considered this garage to be of little value, describing the applicant's work as "artisanal" and the garage as being merely a "metal shack,"[907] implicitly expressing the opinion that the object in question was not worth the same protection as a formal, well-maintained property. Ultimately, the Court found no violation, considering that the state objective of maintaining public security was more important.

The Court's unease with illegality is also demonstrated by the harshness of the majority's ruling in *Saliba v Malta* (2005). The Court described the illegal construction of a storage building for agricultural products as being "in blatant violation of the domestic building regulations," as "totally unlawful," making the applicant an "offender."[908] These categorical judgments appear even odder given that the applicant legally owned the land on which the illegal construction was built, and that the building was already standing when he acquired the land, a fact that the two dissenting judges present more clearly than the majority.[909] The dissenting judges were equally harsh in criticizing the majority's ruling, insisting on the Court's mission to protect human rights:

> There is no doubt that the rooms in question were in a state of objective illegality (due to the wrongdoing of a third party, not of the applicant). There is equally no doubt that the authorities were in a state of human-rights illegality by instituting the second criminal action against the applicant. When it came to choosing which of the two illegalities to penalize, a court of human rights found more heinous the guilt of the stones than the illegality of a very deliberate human rights violation by the prosecution. […]

[904] *Saghinadze*, *supra* note 793 at para 104.
[905] *Ibid* at para 106.
[906] The Court concluded that the cottage in question could be considered the applicant's home in regard to Article 8, see *ibid* at para 122.
[907] *Tashev v Bulgaria*, No 41816/04 (3 July 2012) ECHR at para 40–41 (*artisanal*/*baraque en metal* in the original French).
[908] *Saliba v Malta*, No 4251/02, (8 November 2005) ECHR at para 46.
[909] *Ibid*, dissenting opinion of Judge Bonnello joined by Judge Borrego Borrego; see section "Sequence of relevant facts."

> Many will argue that the objective illegality of the rooms could not be tolerated. That it should never be approved. I, too, detest building contraventions with considerable passion. And I detest murder still more. My aversions, however, hardly lead me to reckon that the rule of law can be bent, so long as the crime does not remain unpunished. I believed that, today, human rights thinking somehow went beyond that. But I stand to be disabused. The end seems to justify the meanness.[910]

This passage underlines the absurdity of approaching a human rights case abstractly, based on 'objective' criteria of legality. Indeed, the condemnation of the storage facility was based not on protection of the environment or third parties, but simply on the need to "re-establis[h] the rule of law by removing an abusive and illegal building."[911] The dissent insists on the fact that, not only was the construction important to the applicant, it did not harm others in any way. But in this case, the criteria of lawfulness preceded the protection of human rights. In both *Depalle* and *Saliba*, the various judges' selection of facts is striking: the majority, focusing on the facts brought by states as to what is legal and what is not, found no violation of P1-1. The dissenters, however, focused on the more personal facts, describing the applicants' relationships and struggles with their property, an approach which led in both cases to opinions of right-to-property violations.

In certain circumstances, the court has found removal orders to be violations despite the formal illegality of the constructions, noting how the state had tolerated the situation.[912] These decisions, however, confirm the commitment of the ECtHR to the rule of law, since the court ultimately sought to condemn arbitrariness in state decision-making. The authorities' tolerance was determining in *Öneryildiz v Turkey* (2004). Among other violations, that case concerned the destruction of slum dwellings following a methane explosion in a nearby rubbish tip. In regard to P1-1, while the Court did not recognize the applicant's right to property on the land on which his dwelling was built, since it was public land not assigned for slum rehabilitation, it did recognize the dwelling itself as a possession, based primarily on the authorities' tolerance.[913] Indeed, the inhabitants of the slum paid taxes and public utilities.[914] Thus, *Öneryildiz* showed some sensitivity to context, consistent with other cases of serious violations, although only scratching the surface of the slum problem in Turkey and how it affected property relationships. The Court avoids delving

[910] *Ibid*, dissenting opinion of Judge Bonnello joined by Judge Borrego Borrego.
[911] *Ibid* at para 44.
[912] See e.g. *Keriman Tekin and other v Turkey*, No 22035/10 (15 November 2016) ECHR at para 66; *Öneryildiz supra* note 2.
[913] *Öneryildiz supra* note 2 at para 127.
[914] *Ibid* at para 105.

into the examination of the slum reality, rather leaving it to the Turkish state to deal "with the social, economic and urban problems in this part of Istanbul."[915]

Slum property (understood as urban living arrangements characterized by substandard buildings and insecurity of tenure) or public land squatting is not an endemic problem in Europe as it is in other parts of the world. In fact, while recent numbers note that one-eighth of the world's population lives in slums, they are virtually nonexistent in the developed world; the only EU member with significant slums is Turkey, with 12% of its urban population living in such informal arrangements.[916] Nonetheless, the ECtHR's obsession with legality makes it harder for slum dwellers to have their need for social participation be heard and met in the European context.

6.3.2 Romani homes

The lack of sensitivity towards people that do not conform to a certain standard of property ownership is strikingly illustrated in ECtHR cases related to Romani homes. These cases demonstrate how judges' bias towards liberal principles and stereotypical perception of Romani can have a direct impact on adjudication of human rights cases.[917] Discrimination against the Romani is pervasive in Europe, as noted by a dissenting judge in the first Romani property case: "There has been a refusal to recognise Gypsy culture and the Gypsy way of life."[918] There is no single Romani lifestyle,[919] but many Romani still lead a semi-nomadic life, installing their 'caravan' on various sites, often unauthorized. Since legality and formality, as we have seen, are necessary for an examination of P1-1, most of these cases were examined under Article 8; when P1-1 was also invoked, the Court often simply referred back to their conclusions in relation to Article 8. The Court's choices of which right to examine in these cases is telling: while Romani possessions can be viewed as their 'home', they cannot be accepted as 'property' in the European sense. Yet, even under Article 8 examinations, the Court has struggled to uphold Romani narratives, showing that the discomfort with nonconforming voices extends even to cases in which

[915] *Ibid* at para 107.
[916] Numbers for 2014, data analyzed by the World Bank; see "Population living in slums", online: World Bank Data <https://data.worldbank.org/indicator/EN.POP.SLUM.UR.ZS>.
[917] See generally Doris Farget, "Defining Roma Identity in the European Court of Human Rights" (2012) 19:3 Intl J Minority & Group Rts 291.
[918] See *Buckley v the United Kingdom*, 20348/92, [1996] IV ECHR, dissenting opinion of Judge Pettiti [*Buckley*]. See also Farget, *supra* note 917 at 292.
[919] *Ibid* at 301–304.

the Court usually shows more empathy. Nonetheless, the dissents in many of these cases have strongly suggested that the specific circumstances and lived experiences of the Romani should have been given more weight than blind commitment to legal requirements.

In *Chapman v The United Kingdom* (2001), the applicant, Romani by birth, had bought land in order to settle her family's mobile home after years of travelling.[920] The land in question was in a district that did not provide official Romani sites, and so the applicant was denied planning permission and asked to remove her mobile home.[921] The Court, examining Article 8, did recognize the specificity of Romani culture, stating that it

> considers that the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or by their own choice, many Gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children.[922]

While the applicant was acting on a desire to settle down, she further argued that protecting her home was also a matter of protecting her traditional lifestyle.[923] It is interesting to note how the Court, while allowing some space for lived experiences by engaging with the cultural specificities of the Romani lifestyle, describes the applicant's situation as the 'occupation' of the caravan, as if trying to create a distance from both her personal engagement—the caravan as home—and her formal property rights to both the caravan and the land under it.

While the Court in *Chapman* recognized the Romani as a minority group, whose vulnerability demands positive obligations from the state in relation to Article 8,[924] the reasoning of the majority always subtly comes back to the illegality of the situation, making it closer to a P1-1 inquiry:

> [T]o accord to a Gypsy who *has unlawfully stationed a caravan site* at a particular place different treatment from that accorded to non-Gypsies who have established a caravan site at that place or from that accorded to any individual who has established a house in that particular place would raise substantial problems under Article 14 of the Convention [protection against discrimination].[925]

[920] *Chapman*, *supra* note 782 at para 71.
[921] *Ibid* at para 14.
[922] *Ibid* at para 73.
[923] *Ibid* at para 83.
[924] *Ibid* at para 96.
[925] *Ibid* at para 95 [emphasis added].

In another passage, they add: "The Court will be slow to grant protection to those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site."[926] Both these excerpts posit the applicant as being in contravention of the law, which undermines her legitimacy. In fact, it has been noted in relation to this case how the Romani are often stereotypically perceived as seeking exemptions from the law.[927] What's more, while it acknowledges the minority status of Romani, the Court still compares them with non-Romani in its assessment, saying that law requires equal treatment. The dissent in *Chapman* criticized this position, saying that equality may imply differential treatment in some cases.[928]

The denial of Romani property and identity in this case and others is prejudicial to their way of living.[929] For one thing, the geography of the 'official' Romani sites provided by the state is incompatible with the traditional Romani nomadic lifestyle, as it fixes their community geographically.[930] In this vein, a group of dissenting judges in *Chapman* noted that fixed sites were inadequate solutions:

> The reference by the majority to the alleged liberty of Gypsies to camp on any caravan site with planning permission […] ignores the reality that Gypsies are not welcome on private residential sites which are, in any event, often prohibitively expensive.[931]

These judges felt that Article 8 had been violated, taking into account both the broad context of Romani communities and the applicant's particular situation. Indeed, they insisted on the growing European consensus that Romani communities are vulnerable groups in need of increased protection, something which the government was well aware of.[932] They also gave particular weight to the fact that the applicant had moved multiple times with her family in search for a permanent location, without success, and took into account her desire to settle in order to take care

[926] *Ibid* at para 102. Ultimately, environmental protection was considered more important than the applicant's personal circumstances, especially considering that there were, according to the Court, housing alternatives available; see *ibid* at para 110–113.
[927] Farget, *supra* note 917 at 299–300.
[928] *Chapman*, *supra* note 782, joint dissenting opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach, and Casadevall at para 8. This opinion had been voiced previously in Judge Lohmus's and Judge Pettiti's dissents in *Buckley*, *supra* note 918. The IACtHR has also held the position that unequal treatment for marginalized people did not necessarily result in unlawful discrimination; see *Saramaka*, *supra* note 689 at para 103.
[929] See Farget, *supra* note 917 generally.
[930] Although Farget warns against approaching the Romani as a homogeneous group with the same nomadic lifestyle, *Ibid* at 301–304.
[931] *Chapman*, *supra* note 782, joint dissenting opinion at para 6.
[932] *Ibid*, joint dissenting opinion at para 3–5.

of ill family members and provide a stable education for her children.[933] The dissenting judges felt that the story of the applicant should have been taken into account. Judge Bonello went even further in a separate dissenting opinion, saying that in failing to provide adequate accommodation to Romani families, the authorities could not be considered to be acting 'legally', and that in this case the state was "on the wrong side of the rule of law."[934]

In an earlier decision concerning similar facts, the dissenting judges, in three separate opinions, also insisted on the importance of the specific circumstances of the case in determining whether a fair balance had been struck between the Romani's needs and the interests of the broader community.[935] The focus of the dissenting judges in *Buckley v The United Kingdom* (1996) was the human aspect of the case, and the impact that a finding of non-violation would have on the applicant's livelihood and that of her family, given her cultural identity. For instance, judge Lohmus noted that

> [l]iving in a caravan and travelling are vital parts of Gypsies' cultural heritage and traditional lifestyle. This fact is important to my mind in deciding whether the correct balance has been struck between the rights of a Gypsy family and the general interest of the community.[936]

Here he acknowledges the normative importance of the applicant's personal story in determining the legal outcome of the case. This story is told indirectly through the dissenting voices, but is presented in a way that displays empathy and openness to diverse truths.

Connors v The United Kingdom (2004) showed the first glimpse of a change in attitude toward greater openness to nonconforming voices. The opening sentence in the presentation of facts announces this new empathy:

> The applicant and his family are gypsies. They led a traditional travelling lifestyle until they suffered so much from being moved on with ever increasing frequency and harassment that they settled on the gypsy site run by the local authority at Cottingley Springs.[937]

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[933] *Ibid*, joint dissenting opinion at para 4. On the environmental arguments, they concluded that "[w]hile the latter are not of negligible importance, they are not, in our view, of either such a nature or degree as to disclose a "pressing social need" when compared with what was at stake for the applicant." (*ibid*).
[934] *Ibid*, separate opinion of Judge Bonello at para 8.
[935] See dissenting opinions in *Buckley*, *supra* note 918.
[936] *Ibid*, partly dissenting opinion of Judge Lohmus.
[937] *Connors v the United Kingdom*, No. 66746/01 (27 May 2004) ECHR at para 9.

In this way, the personal circumstances of the applicant are put forward with sensitivity to their effects ("they suffered so much"), underlining their priority over dry legal rules. In this case, the applicant and his family were forcibly evicted from a site otherwise open for license grants, on allegations of nuisance. The applicant, citing Article 8, contested the eviction on the grounds that it affected the security of his tenure.[938] While the facts in *Connors* did not concern illegal occupation, what is striking in this decision by contrast to *Chapman* is the greater place given to the applicant's story in the Court's unanimous finding.[939] This decision aligns directly with the Court's position that in 'home' cases, more sensitivity must show to the applicant's personal circumstances, as they relate to such an important part of their life. And yet, none of these cases has been addressed by the Court under P1-1. Indeed, the nomadic nature of the Romani can be easily used by the ECtHR to dismiss claims of property, since movement and adaptability of titles are foreign to liberal property rights protected in the European framework.[940]

6.4 Indigenous Property: Adapted Locations

Like 'illegal' and 'extralegal' property, indigenous property challenges the orthodoxy of liberal property in many ways. For one thing, many land tenures rely on customary rule which favours communal ownership of land rather than separate private plots.[941] As Mattei suggests, "this conception gives land a state of inalienability,"[942] something that clashes fundamentally with Western law, which sees the alienability of private entitlements to be key to allowing property to efficiently distribute resources through exchange and commerce. So the idea of 'productivity' or the 'utility' of land is understood far differently. The very idea of 'boundaries' may be different for indigenous people and tribal communities, since land is rarely fixed by delimitative line; and nomadic peoples' boundaries literally move with the group.[943] So actual practices of property, emphasizing relationships with place over abstract exchanges, can differ significantly from

[938] *Ibid* at para 71–76.
[939] Similar decisions were taken in *Kay and Others v the United Kingdom,* No 37341/06 (21 September 2010) ECHR and *Buckland v the United Kingdom,* No 40060/08 (18 September 2012) ECHR.
[940] Farget adds that the ECtHR has only a partial knowledge of Roma identity, which influences the way the Court treats Roma cases; see Farget, *supra* note 917 at 292.
[941] Mattei, "Socialist", *supra* note 285 at 22.
[942] *Ibid*. See also Valencia Rodriguez, *supra* note 11 at para 151 on the sanctity of land in traditional African land tenure.
[943] Mattei, "Socialist", *supra* note 285 at 43; Paul Nadasdy, "Boundaries among Kin: Sovereignty, the Modern Treaty Process, and the Rise of Ethno-Territorial Nationalism among Yukon First Nations" (2012) 54:3 Comp Stud Soc'y & Hist 499; Brian Thom, "The Paradox of Boundaries in Coast Salish Territories" (2009) 16:2 Cultural Geog 179.

"enacted law."[944] Examining regional indigenous property cases helps us understand the varied regional assumptions carried with the notion of property, and also helps us reformulate the definition of the human right to property from the perspective of traditionally marginalized people, as a way of broadening its reach.

When it comes to addressing indigenous peoples' relationships with land, the European regional system's liberal principles limit its imagination. The ECtHR tends to approach indigenous property as it does illegal property: neither are compatible with the strict categories of formal domestic law, so neither are entitled to protection under P1-1 (§6.4.1). On the other hand, the IACtHR and ACHPR have both accepted that the human right to property can apply beyond the familiar liberal conception of property when facing claims to that effect, creating both a distance from domestic property rights and a reconciliation with lived experiences (§ 6.4.2).

6.4.1 Indigenous property in Europe

What the few ECtHR cases on indigenous property reveal is, once more, an inability to adapt to views of property that cannot be categorized according to a traditional western orthodoxy. Like slum property, indigenous land conflicts are comparatively rare in Europe, which helps explain the Court's lack of enthusiasm for extending the Convention's scope to address indigenous land claims. Many indigenous groups in Europe have sought Court guarantees for their rights, whether through the due process clause (Article 6), Article 8, P1-1, or a combination of these.[945] Interestingly, most cases have been rejected as inadmissible, either because collective complaints cannot be filed with the ECtHR (and indigenous communities are collective victims),[946] or because the Court denied its own *rationae tempori* jurisdiction.[947] However you look at it, the European system of human rights leaves very little room for the indigenous perspective on property.[948]

For instance, the Commission very briefly decided not to admit a case involving a hydroelectric project that would inundate traditional Sami land in Norway. In its decision, it set aside the applicant's own understanding of property, claiming that it did not fit the European definition of

[944] Mattei, "Socialist", *supra* note 285 at 44.
[945] Koivurova, *supra* note 613 at 3–6.
[946] According to ECHR Article 34 and the ruling of the ECtHR on the matter, each member of the community would have to file an individual complaint; see on this *ibid* at 7–8. See also *Johtti Sapmelaccat Ry and Others v Finland* (dec), No 42969/98 (18 January 2005) ECHR.
[947] See on this Bankes, *supra* note 789 at 74–77.
[948] Koivurova, *supra* note 613 at 8.

property.[949] From the start, the Commission considered that the claim ought to be examined under Article 8 rather than P1-1, the article invoked by the Sami community, thus implicitly denying the notion of indigenous nomadic property. In relation to the community's land claim, the Commission noted that they "do not appear to have any 'property rights' to this area in the traditional sense of that concept."[950] With this one statement, the Commission not only denies the qualification by the Sami of their relationship with land as a property relationship, thus denying their lived experience—it associates 'tradition' with European liberal property rights, which was transplanted in that region. The word 'traditional' here essentially refers to the dominant, mainstream understanding of property, not indigenous tradition.

Furthermore, whether the land claimed by the Sami as property holds an important significance for their well-being and freedom is not even considered by the Commission. The facts show that the Sami had been present in the region for hundreds of years,[951] but the Commission never interacts with this temporal aspect in its analysis. The Commission also obviously considers land and property purely fungible, finding it baffling that the Sami's complaint sought no compensation.[952] Furthermore, the Commission ultimately rejects as ill-founded the claim under Article 8 since "only a comparatively small area […] will be lost for the applicants."[953] This comment, based simply on arithmetic, shows once more how the Commission, bound by liberal understandings of property rights, fails to assess the cultural significance of the land to the Sami. Most importantly, it imposes its own narrative, silencing the Sami's story.

Timo Koivurova notes some evolution in the Court's jurisprudence since this 1983 case, especially the progressive inclusion of cultural elements in the Court's assessment of indigenous claims and the gradual recognition that immemorial usage might lead to a finding of property rights.[954] Yet the broadness of the notion of 'possession' remains within the confines of formal state law, which is confirmed by the Court's decision of inadmissibility in the 2009 *Handölsdalen Sami Village and others v Sweden* case. In this case, the court opined that, since the Sami land rights were not recognized by the state, they were "claims" to property rather than "existing possessions" protected

[949] *G and E v Norway* (dec) (1983), 35 Eur Comm'n HR DR 30.
[950] *Ibid* at para 2 of analysis.
[951] *Ibid*, see fact pattern.
[952] *Ibid* at para 2 of analysis.
[953] *Ibid*.
[954] Koivurova, *supra* note 613 at 26–28.

by P1-1.[955] The court, once more, hides behind the language of repetition as a marker of certainty and thus legitimacy:

> The Court reiterates that an applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his "possessions" within the meaning of this provision. […] By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a possession within the meaning of Article 1 of Protocol No. 1.[956]

While stating general principles, the Court implies here that the land claims of Sami peoples are mere hopes and not rightful legal claims, thus rejecting the historical and temporal presence of the Sami on the territory as a potential element in the establishment of a claim.

The long-standing physical presence of indigenous people in a region is also ignored in *Hingitaq v Denmark* (2006). In this case concerning the construction of a US airbase in Greenland which led to the eviction of an Inuit tribe from their traditional territory, the Court rejected the claim during the admissibility hearings on the grounds that the base had been built before the Convention's entry into force.[957] The Court refused the applicants' claim that there had been a continuous violation in this case, despite this argument's frequent acceptance in other cases. For instance, multiple cases against Turkey's occupation of Northern Cyprus, such as *Loizidou v Turkey* (1996), contended that there had been a continuous violation of various rights, including the right to property or the protection of the home, since the occupation began in 1974.[958] In *Chiragov*, the Court also determined that there was a continuous violation as the applicants were displaced and could not return to their homes.[959] In these examples, the theme of legality comes into play once more, but this time from the perspective of state action. Indeed, in *Loizidou*, all acts posed by Northern Cypriot authorities were considered illegal by the majority, and Turkey was generally condemned politically for the occupation.[960] Similarly, in *Chiragov*, Armenia was

[955] *Handölsdalen Sami Village and others v Sweden* (dec), No 39013/04 (17 February 2009) ECHR at para 51.
[956] *Ibid* at para 48.
[957] *Hingitaq 53 and others v Denmark* (dec), No 18584/04, [2006] I ECHR. The court still goes on to find that the payment of compensation and relocation of the tribe in alternative housing struck a fair balance, ignoring once more the cultural, economic, and social importance of territory for the Thule tribe, notably for hunting purposes.
[958] See e.g. leading cases *Loizidou v Turkey* [GC], No 15318/89, [1996] VI ECHR [*Loizidou*]; see also *Cyprus v Turkey* [GC], No 25781/94, [2001] IV ECHR.
[959] *Chiragov*, *supra* note 837 at para 200–201.
[960] Many dissenting judges criticized the conclusion that the Northern Cyprus government was 'illegal.' See e.g. *Loizidou*, *supra* note 958, dissenting opinion by Judge Jambrek and by Judge Pettiti, who both underline that, while the European community did not recognize the government of North Cyprus at the international level, they still considered their acts valid in domestic law.

scolded for its establishment of a *de facto* State within contested territory containing the applicants' property. By contrast, Denmark's occupation of indigenous land never raised any significant political or legal opposition, and thus could not be considered a *prima facie* violation. The refusal of the ECtHR to see continuous violation in cases of indigenous dispossession has been criticized, notably based on the facts that case law was unevenly applied and that the Court is unduly bound to domestic law in its definition of expropriation.[961]

These admissibility claims demonstrate the inability of European definitions of property and possession to adapt to the lived experiences of indigenous property in Europe, despite the assertion of their ancestral presence on the land. Yet the Court did show openness in cases outside indigenous property to arguments of continued presence overriding formal property titles. For instance, in *Bruncrona v Finland* (2004), the Court concluded that the applicants had a "proprietary interest"[962] over a large area of land—and thus a possession in the sense of P1-1—including water and islands, since they had been continuously allowed to use the property for over 300 years,[963] and despite the fact that they had never had formal ownership or even usufruct. The passage of time is fundamental in this case, as the Court notes:

> A unique feature of the present case is that it is impossible to separate the situation of the applicants from complex historical developments. It is common ground that the property in question had been in the possession of the Karsby mansion from the 1720s at the latest.[964]

Based on this long and uninterrupted possession, the Court considered that the proprietary interest was wrongfully terminated.[965] Similarly, in *Kosmas and others v Greece* (2017), the fact that an island dweller had been tolerated for a long period of time led the Court to recognize 'patrimonial rights' despite the fact that Greek law explicitly excluded the possibility of adverse possession on that land.[966] In these two examples, long periods of occupation challenged otherwise valid legal requirements for assessing title over land. The 'historical' element was determinant in these cases, allowing abstract property-rights rules to be bypassed, although it was not considered enough in

[961] As recalled by Bankes, *supra* note 789 at 75.
[962] *Bruncrona v Finland*, No 41673/98 (16 November 2004) ECHR at para 79.
[963] *Ibid* at para 52.
[964] *Ibid* at para 71.
[965] *Ibid* at para 86.
[966] *Kosmas and others v Greece*, No 20086/13 (29 June 2017) ECHR. The controversy here is that the Court expanded 'patrimonial rights' to *de facto* rights (at para 67–71), something criticized by the dissent. Still, *de facto* possession of patrimonial interests has been recognized before in cases of tolerance by the state, see *Osman v Bulgaria*, No 43233/98 (16 February 2006) ECHR at para 96–97.

indigenous claims. The difference is that in *Bruncrona* and *Kosmas*, the applicants' claims could be considered using a 'traditional', liberal understanding of property—a private 'possessor' claiming ownership over a fixed and bounded piece of land—whereas indigenous property, with its communal and flexible nature, apparently cannot.

These examples of indigenous land claims in Europe support the argument that the ECtHR is uneasy with unorthodox property claims, which it views as incompatible with Western liberal approaches to the rule of law that are based on stability, certainty, and compatibility with capitalist economy.[967] As a result, the lived experiences of persons which fall outside of official markets tend to be disregarded, in good part because property rights are approached by the ECtHR as a homogeneous and abstract 'bundle of sticks.' By contrast, indigenous property is what inspired the American and African regional systems to push the boundaries of their conception of property and treat it as a right with innate social significance. Where the ECtHR has hit a wall, the southern systems have allowed space for alternative stories of property to shape normativity, as the next section will explore.

6.4.2 Indigenous property in the Americas and in Africa

The treatment of indigenous property by the IACtHR and the ACHPR proposes definitions of property which depart from liberal property paradigms, in the process illustrating the shortcomings of the European case law when it comes to addressing unorthodox visions of property. According to Ivana Isailovic, the Inter-American and African systems share a willingness to put people's needs above legal definitions, both to identify indigeneity and to substantively determine indigenous rights.[968] The right to property in particular—and its quality of being legally enforceable—has played an important role in defending indigenous rights and interests in the international arena.[969] And in these cases, narratives of place and location are given much more space than in the typical, orthodox property cases.

This is not to say that the African and American regional systems have dealt with these issues in the same way. Their respective interpretations of the right to property flow from their unique

[967] Bonilla Maldonado, *supra* note 282 at 216–217.
[968] Isailovic, *supra* note 292 at 438, 442.
[969] Bankes, *supra* note 789 at 58–59. See also generally Mauricio Iván Del Toro Huerta, "El derecho de propiedad colectiva de los miembros de comunidades y pueblos indígenas en la jurisprudencia de la Corte Interamericana de Derechos Humanos" (2010) 10 Ann Mex Der Intl 49.

circumstances and constitutional instruments. Chafing against its own instrument, the IACtHR has used broad interpretations to formulate a more inclusive right to property. By contrast, the African Charter's economic and social rights, as well as its collective rights, have allowed the Commission to address issues of indigenous property with more depth and perspective, placing these cases within the larger social context of each country, and fostering a discussion of how property connects with other rights in order to accomplish social participation.

Still, both systems have provided space for indigenous peoples' concrete circumstances to shape the human right to property, creatively upholding indigenous understandings of property against state law while acknowledging the local aspects of property. State law does not always deny alternative understandings of property. As noted in a few decisions before the IACtHR, many Latin American states have constitutional provisions recognizing communal property and indigenous land tenure,[970] at times taking concrete steps to enforce it.[971] However, the Court notes that these states often fail to give full legal weight to this recognition.[972] Mexican scholar Del Toro Huerta notes that for a long time, Western concepts of territory and sovereignty were tacitly accepted in America, in part because concepts such as 'nation-state' and 'territorial sovereignty' historically aided their struggles for decolonization and political independence.[973] He adds that "[o]nly the fragmentation of the world at the end of the Cold War and the rise of new regionalism permitted cultural walls to weaken and the smoke screen of the homogeneity of nations to dissolve."[974] Indeed, the depolarization of political conversations allowed diverse views to be expressed—and heard. This in turn motivated the IACtHR to adopt a new vocabulary for the right to property, one directly influenced by indigenous narratives.

Indigenous property cases at the IACtHR are brought by communities who have either been evicted from their traditional land or fallen victim to third-party encroachment on their territory.

[970] Noted in Judge Hernán Salgado Pesantes's concurring opinion in *Mayagna*, *supra* note 635 at para 1. This is the case in Nicaragua but also in Paraguay (see *Yakye Axa*, *supra* note 644 at para 38b); Ecuador (see *Kichwa*, *supra* note 646 at para 70); and Panama (see *Kuna*, *supra* note 762 at para 114).

[971] See e.g. *Kichwa*, *supra* note 646, where the state had already conducted an environmental impact assessment before granting a contract to an oil company on indigenous territory, although the Court concluded that the consultation was not adequately conducted. See also *Kuna*, *supra* note 762, where the state had started the process of delimitating, demarcating, and titling, albeit with unreasonable delays (see discussion at para 146–157).

[972] E.g. *Yakye Axa*, *supra* note 644 at para 155; *Kichwa*, *supra* note 646 at para 105–106.

[973] Del Toro Huerta, *supra* note 969 at 53–54.

[974] *Ibid* at 54. Original text in Spanish: "Sólo la fragmentación del mundo al término de la Guerra Fría y el surgimiento de nuevos regionalismos permitieron que los muros culturales empezaran a debilitarse y las cortinas de humo respecto de la homogeneización de las poblaciones estatales a disolverse."

These communities often lack formal title over their land. The words "property," "land," and "territory" are used interchangeably in these cases, although they do not have exactly the same meaning or carry the same weight. The case law of the IACtHR applies to both indigenous and tribal communities,[975] the latter being understood as sharing "similar characteristics with indigenous peoples,"[976] notably when it comes to their social organization and relationship with ancestral territories.

Indigenous groups in Africa have diverse systems of economic, social, and cultural organization: some are hunter-gatherers, some pastoralists, some small-scale farmers.[977] While one ACHPR report acknowledged that a fixed definition of indigenous peoples was neither possible nor desirable, it also identified their relationship with traditional lands and natural resources as a "key characteristic."[978] The Commission also emphasized that the question of 'who came first' is not necessary in determining indigeneity, noting that dominant and oppressive groups may be aboriginal too.[979] This point once more demonstrates the ACHPR's sensitivity to Africa's historical and political uniqueness.

Among the various characteristics of indigenous land relationships, IACtHR and ACHPR case law presents non-conforming stories on the communal nature of indigenous possessions (§6.4.2.1), on an understanding of 'proper use' different from that of European colonists (§6.4.2.2), on geography's role in describing property (§6.4.2.3), on indigenous boundaries' adaptable character (§6.4.2.4), and on time's role in establishing title (§6.4.2.5).

6.4.2.1 Communal possession as property

One feature of indigenous property that challenges liberal orthodoxy relates to the communal nature of land ownership. In *Mayagna*, an indigenous community sought title to land on which commercial concessions had been granted to private companies. One witness noted that

[975] Following the decision in *Moiwana*, *supra* note 633, which was further clarified in *Saramaka*, *supra* note 689.
[976] *Saramaka*, *supra* note 689 at para 79.
[977] ACHPR & International Work Group for Indigenous Affairs, *Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission's Work on Indigenous Peoples in Africa* (Copenhagen: Eks/Skolens Trykkeri, 2006) at 9–10.
[978] *Ibid* at 10.
[979] *Ibid* at 10, 12.

> [t]he lands are occupied and utilized by the entire Community. Nobody owns the land individually; the land's resources are collective. If a person does not belong to the community, that person cannot utilize the land.[980]

Similarly, in *Yakye Axa*, the indigenous community insisted on the fact that their conception of land entailed "adopting criteria to assess land use that are different from those applied in private law and in agrarian law itself."[981] The Court accepted these narratives, and further recognized that the communal nature of indigenous property was associated with cultural identity,[982] thus giving property a sense of purpose. Furthermore, the Court recognized that communal property was a right of not only indigenous *individuals*, but the *people*, collectively.[983]

Similarly, the ACHPR recognized in *Endorois* that communal ownership was covered by the African Charter. The community itself invoked this collective aspect in its claim: "Land, they claim, belongs to the community and not the individual and is essential to the preservation and survival as a traditional people."[984] In this context, the Commission noted that the Charter explicitly recognized the rights of peoples, including indigenous peoples,[985] and that protecting indigenous property was fundamental to their rights.[986] The Commission explained that in this specific case, ownership was more than a matter of mere access: it was a way of empowering the indigenous community, making them "active stakeholders rather than […] passive beneficiaries."[987] The special relationship with communal land is so important that both the IACtHR and the ACHPR have recognized a right to that land even in the absence of physical occupation, if the claimant community was prevented against their will from returning to it.[988]

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[980] *Mayagna*, *supra* note 635 at para 83a).
[981] *Yakye Axa*, *supra* note 644 at para 121b). In *Yakye Axa*, the community sought to obtain restitution of their ancestral land, which had been granted as private land to a third party.
[982] *Ibid* at para 124.
[983] *Kichwa*, *supra* note 646 at para 231. See also *Kuna*, *supra* note 762 at para 111.
[984] *Endorois*, *supra* note 2 at para 16.
[985] *Ibid* at para 155–156.
[986] *Ibid* at para 187.
[987] *Ibid* at para 204.
[988] See *ibid* at para 209. See also on the American side *Moiwana*, *supra* note 633, on the recognition of forced eviction as a continuous violation (at para 43). While technically the Moiwana community could return, their cultural relationship with the land implied that only when justice was obtained and security guaranteed could they return to their land, showing how their lived experience shaped the enforcement of their right (at para 112–119). Similarly, the Court has held in *Sawhoyamaxa* that as long as the special relationship with the land was sustained, the claim over that land was enforceable; see *Sawhoyamaxa*, *supra* note 762 at para 131–133.

One characteristic of communal property is that it is inalienable, something which also challenges the liberal premises of property rights.[989] In *Ogiek*, the African Court emphasized that the 'classical' elements of property rights (*usus*, *fructus*, *abusus*) did not apply in the same way to ancestral lands, which are characterized rather by possession and occupation.[990] One anthropologist testifying as expert witness in *Mayagna* noted that the imposition of liberal property notions on indigenous land missed an essential point:

> There are pressures for those having usufruct or occupation rights within the communities to obtain a deed title to those plots in one way or another, but when the State recognizes it as private property, it can be sold or rented, and this breaks with the tradition of the community.[991]

Indeed, notions of alienability and transferability are not necessarily applicable to communal property, since the possession in question serves as a communal resource, not a commercial asset. In some communities, for instance, individual inheritance of communal land is unheard of.[992]

6.4.2.2 The notion of use

The notion of useful occupation—in particular, 'productive' occupation—differs significantly in indigenous and 'mainstream' narratives, and this contrast is clearly illustrated in many IACtHR cases. One anthropologist testifying in *Mayagna* noted that most of Nicaragua was considered national or 'waste' land despite its occupation by indigenous peoples.[993] According to another expert witness in this case, indigenous occupation had been established by "substantive actions" such as hunting, fishing, and gathering.[994] Thus, while indigenous occupation might not resemble proprietorship to European colonizers, it still had tangible manifestations.

Indigenous communities have been harshly confronted with the liberal notion of land productivity in cases against Paraguay. In both *Yakye Axa* and *Xákmok*, the state argued that it was impossible to expropriate land from its current owner and return it to the indigenous community because the

[989] See e.g. *Moiwana*, *supra* note 633, expert opinion at para 80(e).
[990] *Ogiek*, *supra* note 543 at para 124–127.
[991] *Mayagna*, *supra* note 635 at para 83(d)
[992] *Ibid* at para 83(a) Testimony of Jaime Castillo Felipe, member of the Awas Tingni Community.
[993] *Ibid* at para 83(d).
[994] *Ibid* at para 83(k).

land in question was being productively used by current owner—based on the principle of rational use.[995] In *Xákmok*, the representatives argued that

> the mercantilist perspective of the value of the land, which is understood merely as a means of production to generate 'wealth,' is inadmissible and inapplicable when addressing the indigenous question, because it supposes a limited vision of the reality, by failing to consider the possibility of a different concept from our 'western' way of looking at matters that relate to indigenous rights. Arguing that there is only one way to use and dispose of property would render the definition of Paraguay as a multicultural and multi-ethnic State illusory, eliminating the rights of thousands of individuals who inhabit Paraguay and enrich the country with their diversity.[996]

This statement distinguishes between indigenous land relationships and the capitalist assumption that property should be managed to maximize profit. It also underlines the plurality of property relationships denied by the liberal narrative. In deciding in favour of the indigenous community, the Court noted that the state had failed to give appropriate weight to indigenous property, by

> consider[ing] the issue of indigenous territory exclusively from the perspective of the productivity of the land, disregarding the inherent particularities of the Xákmok Kásek community and the special relationship of its members with the land claimed.[997]

The court added that "the merely 'productive' conception of the land when considering the conflicting rights of the indigenous peoples and the private owners of the lands claimed"[998] adversely affected the cultural identity of the Xákmok Kásek Community, thus emphasizing the importance of a contextual approach to conflicts.[999] In doing so, it suggests that liberal property rights do not hold a higher position than indigenous conceptions of property.

6.4.2.3 The geography of location

Another particularity of indigenous property is its inseparability from stories of location. Narratives of indigenous groups are imbued with geographical meanings of both physical boundaries, and deep ideas of how space is occupied. These stories *of* location serve to establish relationships with land, and demonstrate that it is 'used' by indigenous peoples, albeit not in ways

[995] *Yakye Axa*, *supra* note 644 at para 142. *Xákmok*, *supra* note 644 at para 150.
[996] Reproduced in *ibid* at para 148.
[997] *Ibid* at para 170.
[998] *Ibid* at para 182.
[999] In *Sawhoyamaxa*, the Court had already noted that in cases of conflict between a private owner and an indigenous community over the same land, the former's 'productivity' should not prevail in the balance; see *Sawhoyamaxa*, *supra* note 762 at para 139.

that state law recognizes.[1000] In *Mayagna*, for instance, references are made to the hills within Mayagna territory, emphasizing their religious significance.[1001] In *Sawhoyamaxa*, a member of the community emphasizes the location of the forest:

> The witness stated that the indigenous people live off the forest, so they cannot go for food anywhere else; for instance, she pointed out that this is the honey season, so the women of the Community have to gather as much honey as they can, even hiding.[1002]

In *Kichwa*, the Court actually travelled to witness this traditional relationship with land; the Sarayaku is described as a "living land"[1003] where the physical destruction of the jungle entails spiritual destruction of the people.[1004] The forest is equally present in the Saramaka narrative, with a leader of the indigenous community describing it as their "market place".[1005] In fact, the Court used Saramaka stories related to their use of the forest extensively, concluding that issuing logging concessions without consultation violated the Saramaka's right to property.[1006] Here, lived experiences of property are used not only to influence discussions on reparations, but to directly affect legal outcomes.[1007]

In other instances, special relationships with water sources, rivers, and seas are described,[1008] each involving different environmental interactions. In *Triunfo de la Cruz*, both the Commission and the representatives asked the Court to recognize part of the sea and the beach as traditional territory of the community, since the sea was essential to the community's subsistence (through fishing) and culture, and the beach played an important role in their religious ceremonies.[1009] And while it could not formally pronounce itself on the matter (having already ruled that they would only examine Article 21 as it related to the traditional territory recognized by the state), the Court suggested in an *obiter* that such personal accounts of location could be taken into consideration when assessing indigenous property.[1010] In this case, the challenge to state law is direct, since

[1000] See e.g. *Kaliña*, *supra* note 767 at para 151–153.
[1001] *Mayagna*, *supra* note 635 at para 83(b).
[1002] *Sawhoyamaxa*, *supra* note 762 at para 34(c) (Statement of Ms. Gladys Benitex).
[1003] *Kichwa*, *supra* note 646 at para 150.
[1004] *Ibid* at para 151 (Statement of Mr. Sabino Gualinga).
[1005] As reported in *Saramaka*, *supra* note 689 at para 82.
[1006] *Ibid* at para 144–154.
[1007] The Court used both testimonies of community members and testimonies of expert witnesses to draw its conclusion.
[1008] *Punta Piedra*, *supra* note 808 at para 86.
[1009] *Triunfo de la Cruz*, *supra* note 761 at para 131–133.
[1010] *Ibid* at para 134–137.

ownership of waterfronts is often prohibited; yet in the case of indigenous peoples it could be allowed, considering its cultural importance.

The geography of indigenous lands is also important in ACHPR cases. The *Endorois* case, which concerned the displacement of the Endorois community from their ancestral land after the creation of a game reserve,[1011] insisted on the land's importance to the Endorois community, whose cultural identity and means of subsistence revolved around Lake Bogoria. In terms of culture, the Lake was seen as the home of Endorois spirits, and thus it is deeply linked with spiritual practices.[1012] In terms of subsistence, the Endorois depend largely on pastoralism, and thus the facts insist on the importance of cattle for their survival: "The Complainants state that the area surrounding Lake Bogoria is fertile land, providing green pasture and medicinal salt licks, which help raise healthy cattle."[1013] The Lake is central to the Endorois community, both physically and conceptually, "as grazing lands, sacred religious sites and plants used for traditional medicine are all situated around the shores of Lake Bogoria."[1014]

Geographic location is also essential to the Ogiek people in Kenya, who describe the Mau Forest as their home since time immemorial, noting that they use the resources of the forest to satisfy many of their needs sustainably.[1015] This account of location frames the relationship with land as not a matter of legal ownership, but a determination of cultural identity, as the African Court concluded. This conclusion relied in part on the testimony of expert witness Dr. Liz Alden Wily, who stated that "the livelihoods of hunter-gatherer communities are dependent on a social ecology whereby their spiritual life and whole existence depends on the forest."[1016] In other words, the Ogiek's conceptions of location and property lie outside the scope of liberal orthodoxy.

6.4.2.4 Boundaries

Accounts of location also often show that indigenous territorial boundaries are not fixed. Movement, for instance, is an intrinsic part of life as a hunter-gatherer.[1017] Testimony from an

[1011] *Endorois*, *supra* note 2 at para 1. The state also sold some of the land to third parties while granting mining concessions on other parts of the territory (see para 13–15).
[1012] *Ibid* at para 6. The surrounding forest also holds spiritual importance for the Endorois, see arguments at para 76–85.
[1013] *Ibid* at para 6.
[1014] *Ibid* at para 16.
[1015] *Ogiek*, *supra* note 543 at para 43.
[1016] *Ibid* at para 160.
[1017] See e.g. *Yakye Axa*, *supra* note 644 at para 50.3.

anthropologist in *Mayagna* describes how a map of their territory was created by walking around it, using reference points, and drawing evidence from oral tradition, further adding that "[t]he Community's perception of its boundaries has been strengthened through interactions with their neighbors"[1018]—that is, that these boundaries were 'lived.' The Commission also suggested in *Mayagna* that indigenous land tenure, while "linked to a historical continuity," was "not necessarily [linked] to a single place and to a single social conformation through the centuries."[1019] Here the Commission says that 'land' property can imply movement, directly challenging liberal conceptions of property lying in static bounded space. In *Yakye Axa*, the representatives emphasized the physicality and spirituality of their presence through the notion of "habitat," which indigenous communities have "humanized and in which they have shifted around, and with regard to which they have ties of belonging."[1020]

Notions of adaptable boundaries are also present in the case of the Endorois people, whose pastoralist way of life challenges liberal property ideas.[1021] Pastoralism as a relationship with land does not require the identification of a fixed territory, but rather the existence of a fluid space allowing movement, mobility, and change. Interestingly, the state's response to the Endorois' arguments seems to deny that mobility and ownership can coincide; indeed, the state suggests that most tribes in Kenya no longer resided on their ancestral lands,

> owing to movements made due to a number of factors, including search for pastures for their livestock; search for arable land to carry out agriculture; relocation by government to facilitate development; creation of irrigation schemes, national parks, game reserves, forests and extraction of natural resources, such as minerals.[1022]

In this passage, not only does the Kenyan state deny the compatibility of movement and property, it also uses 'productivity' as a guiding principle for the determination of ownership. The ACHPR did not abide by this position, noting that moving the pastoral Endorois to semi-arid land did not make sense.[1023] To its credit, the Commission fully engaged in the specificities of the Endorois way of life, recognizing their existential need for grazing lands. In that context, taking away

[1018] *Mayagna*, *supra* note 635 at para 83(c).
[1019] *Ibid* at para 140(a).
[1020] *Yakye Axa*, *supra* note 644 at para 121(a).
[1021] *Endorois*, *supra* note 2 at para 72.
[1022] *Ibid* at para 138.
[1023] *Ibid* at para 286.

grazing land represents far more than a financial loss, or even a denial of subsistence: it is the loss of a whole way of living, a loss which the liberal concept of property rights cannot quantify.

A flexible approach to boundaries can clash with the notion of titles. Titling is an important part of liberal property, providing certainty and stability in commercial exchanges. And while the IACtHR has ruled occupation sufficient to establish a right in cases of indigenous property, based on customary practices,[1024] it still pushes for the establishment of fixed titles for indigenous land.[1025] The rationale of the Court is legitimate: the main argument in favour of granting clear title is that a mere recognition of indigenous property is useless without a practical enforcement of the right.[1026] This is why most IACtHR decisions on the matter require the state to delimit and demarcate indigenous territory.[1027] Yet, titling bears the risk of misrepresenting the complex nature of indigenous property. This became an issue in *Xákmok*, in which the conflict involved not the recognition of a right to communal property, but the delimitation of the community's territory to which it was to receive title. The representatives of the indigenous people noted that their community was traditionally nomadic and that their traditional territory was broader than the one claimed.[1028] Reacting to this, the Court noted: "It is worth underlining that, for the purpose of the protection of the right to communal property of the members of the Community, the relevant traditional territory is not that of their ancestors but that of the Community itself."[1029] While the Court acknowledged the importance of assessing territory based on the needs of the community, it did not directly address the nomadic aspect.

The notion of indigenous boundaries and titles has also led to conflicts with non-indigenous persons in their territory. This was the case in *Comunidad Garifuna de Punta Piedra v Honduras* (2015), in which one of the issues was the lack of state intervention in conflicts between indigenous and non-indigenous communities within the Punta Piedra territory. In this case, the state had granted territory to the indigenous community, but non-indigenous people already inhabited that

[1024] *Mayagna*, *supra* note 635 at para 151. Reiterated in *Moiwana*, *supra* note 633 at para 131. The ACHPR also determined that formal titles were not necessary to establish possession; see *Endorois*, *supra* note 2 at para 207.
[1025] *Mayagna*, *supra* note 635 at para 153. The Court reinforced this idea in *Kaliña*, *supra* note 767, saying that formal titles ensured legal certainty against third parties and the state (at para 133).
[1026] See *Yakye Axa*, *supra* note 644 at para 143. See also *Saramaka*, *supra* note 689 at para 115, where the court says that granting mere use of land is not enough.
[1027] See e.g. *Saramaka*, *supra* note 689.
[1028] *Xákmok*, *supra* note 644 at para 94.
[1029] *Ibid* at para 95.

territory, restricting its full use and enjoyment by the indigenous population.[1030] The non-indigenous parties had been living there since at least 1993, building a school and a football field and providing a variety of services, although it was unclear whether they had secured the required formal titles and authorizations to do so.[1031] The representatives' argument was essentially that the state failed to guarantee peaceful possession ("*posesión pacifica*") of the territory,[1032] an argument recalling the liberal lexicon of property rights. The Court decided in this case that the community's right to property may require the state to implement a "*saneamiento*" of the territory, "remov[ing] any type of interference on the territory in question," including third-party residents, with due relocation and compensation.[1033] Thus, the titling requirement leads not only to the adoption of a liberal property rights vocabulary, but also its legal consequences—that is, exclusion. To be clear, the problem here is not the preservation of indigenous rights, but rather its justification through abstract notions of exclusion attached to liberal property, rather than through more concrete expressions of social needs—preservation of natural resources and way of life; social and cultural aspects—which had been advanced in previous decisions. While these may be inferred from previous case law, the decision in *Punta Piedra* still offers a double standard in its approach to indigenous property, hinting that the concept of property might not suffice to fully enable indigenous social participation in an inclusive way.

6.4.2.5 Time and property

Temporal factors also challenge the neutrality and abstraction of property rights in the case of indigenous claims through a discourse of ancestrality. In *Mayagna*, one community member noted that

> [t]hey are the owners of the land which they inhabit because they have lived in the territory for over 300 years, and this can be proven because they have historical places and because their work takes place in that territory.[1034]

[1030] *Punta Piedra*, *supra* note 808 at para 1. The delimited territory was confirmed by a title which mentioned only two private lots as excluded areas (see at para 99).
[1031] *Ibid* at para 102–105.
[1032] *Ibid* at para 159–160.
[1033] *Ibid* at para 181 (translation by author).
[1034] *Mayagna*, *supra* note 635 at para 83(a) (testimony of Jaime Castillo Felipe).

Another community member stated that their presence dated "300 centuries,"[1035] while an expert witness talked of a "millenarian occupation."[1036] Despite this wide variation, the point is not to establish a strict timeline, but to stress the longevity and continuity of indigenous occupation, evidenced by oral history, genealogy, and evidence of presence in place.[1037] In *Kichwa*, a member of the Sarayaku community also emphasized the ancestral aspect of their occupation: "[W]e were born, we have grown up, our ancestors have lived on these lands and also our parents; in other words, we are natives of this land and we subsist from this ecosystem, from this environment."[1038] Time is marked by moments which anchor the individual in location. A group of judges in *Mayagna* emphasized the temporal dimension, noting that the relationship between land and time was mutual, and thus that the protection of their property implied a "right to preserve their past and current cultural manifestations, and the power to develop them in the future."[1039]

The temporal aspect is also noted in *Endorois*:

> The Complainants state that the Endorois are a community of approximately 60,000 people who, for centuries, have lived in the Lake Bogoria area. They claim that prior to the dispossession of Endorois land through the creation of the Lake Hannington Game Reserve in 1973, and a subsequent re-gazetting of the Lake Bogoria Game Reserve in 1978 by the Government of Kenya, the Endorois had established, and, for centuries, practised a sustainable way of life which was inextricably linked to their ancestral land. The Complainants allege that since 1978 the Endorois have been denied access to their land.[1040]

The ancestrality of possession is further supported by the allegation that the Endorois had always been recognized as the owners of the land, apart from a confrontation with a neighbouring group "approximately three hundred years ago."[1041]

The temporal aspect of occupation shapes the notion of indigeneity itself, as shown in *Moiwana*, which extended Article 21 protection to tribal lands. In determining that the Moiwana, a N'djuka tribe composed of former African slaves brought to America, were entitled to the same protections as indigenous peoples, the Court relied notably on the fact—sustained by expert evidence—that

[1035] *Ibid* at para 83(b).
[1036] *Ibid* at para 83(k).
[1037] See e.g. *Yakye Axa*, *supra* note 644 at para 39(a) (testimony of Esteban Lopez), para 39b) (testimony of Tomas Galeano).
[1038] *Kichwa*, *supra* note 646 at para 152 (statement by José Gualinga).
[1039] *Mayagna*, *supra* note 635, separate opinion of Judges Cancado Trindade, Pacheco Gomez, and Abreu Burelli at para 8.
[1040] *Endorois*, *supra* note 2 at para 3.
[1041] *Ibid* at para 4.

they existed as an autonomous community since at least the nineteenth century.[1042] Similarly, in *Saramaka*, the Court recognized that the tribe's attachment to their ancestral territory was "inextricably linked to their historical fight for freedom from slavery, called the sacred 'first time'."[1043] The court's conception of indigeneity embraces adaptability, rather than limiting it to objective and abstract determination, since the fact that the Saramaka were not 'native' to the land did not change the fact that their way of life was distinct from the national community and governed by their own rules. This was confirmed by the court's statement in *Xákmok* that "[t]he identification of the Community, from its name to its membership, is a social and historical fact that is part of its autonomy."[1044] In this way, the Court avoids imposing its own views upon communities. Similarly, the African court has recognized the Ogieks as an indigenous people using both objective ("priority in time with respect to the occupation and use of a specific territory"[1045]) and subjective (experience of marginalization and dispossession[1046]) criteria.

Each of these examples demonstrates a departure from liberal property rights; the Court assesses the importance of ownership through temporal arguments rather than abstractly. In general, IACtHR and ACHPR case law shows a willingness to take stories of indigenous location into account in the courts' definitions of the right to property; the ECtHR has shown little such willingness. While some neutral criteria remain—fixed boundaries, for instance— these systems' narratives are still guided by an acute contextual sensitivity. Nigel Bankes has suggested that the different treatments of indigenous property by the ECtHR on the one hand and the IACtHR and the ACHPR on the other are largely procedural—notably, their treatments of preliminary objections and their levels of deference to domestic courts.[1047] While this analysis fits a close doctrinal reading of the principal indigenous property cases on both sides, it omits some broader contextual aspects of these regional systems. Indeed, the ECtHR's ideological commitment to liberalism and its resulting lack of space accorded to lived experiences in its case law affects its

[1042] *Moiwana*, *supra* note 633 at para 132.
[1043] *Saramaka*, *supra* note 689 para 82. A similar observation was made in *Punta Piedra*, *supra* note 808 at para 83, in which the community members are descendants of African slaves and indigenous populations which had been moved from the Island of San Vincente to their current territory in Honduras.
[1044] *Xákmok*, *supra* note 644 at para 37.
[1045] *Ogiek*, *supra* note 543 at para 107.
[1046] *Ibid*.
[1047] Bankes, *supra* note 789 at 62. Bankes notes that the ECtHR rejected most cases based on non-exhaustion of local remedies and granted more deference to domestic courts (*ibid* at 71, 80). On the other hand, the IACtHR has made little case of preliminary objections and did not show the same deference, rather accepting diverse accounts (*ibid* at 91, 96, 100).

interactions with unorthodox or alternative property narratives, and, ultimately, its ability to uphold those narratives as would befit its human rights mandate.

6.5 Property in Relation to Other Rights

The most striking feature of indigenous property case law is how 'unorthodox' conceptions of property presented in it refer to a sense of purpose: property serves to maintain cultural identity, to ensure physical survival or economic subsistence, to anchor religious affiliation, to sustain social development. By recognizing the potential of property for indigenous people, the IACtHR and ACHPR understand how property can empower marginalized people in their social relationships with others and allow meaningful participation in location. And when these regional systems recognize property's power to enable social participation, they can shed light on property's interactions with other human rights to this end.

In indigenous property cases, the IACtHR has emphasized the interactions among property, culture, and identity as they relate to the sanctity of land in indigenous culture.[1048] A common thread in expert testimony in these cases is the indigenous notion of land transcending physical space: land is a complicated web of relationships. For instance, an expert anthropologist in *Mayagna* noted that "the land is not a mere instrument in agricultural production, but part of a geographic and social, symbolic and religious space, with which the history and current dynamics of those peoples are linked."[1049] Similarly, from an expert anthropologist's opinion in *Moiwana*: "Land is for the N'djuka people an embodiment of their collective identity; it also serves as a repository of their cultural history, as well as the primary source of their subsistence." Further:

> In order for a N'djuka community to function normally, the members must have a homeland. Even if they travel elsewhere, there are life rites that must be performed at their home village, which permits them to continue to express their continuity as a community. Without a traditional home to return to, the society will disintegrate, because it will be difficult to maintain its cultural integrity and social obligations.[1050]

[1048] For a comprehensive overview of the interactions between the right to property and other rights, see *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter American Human Rights System*, by IACHR, OEA/Ser L/V/II, Doc 56/09 (Organization of American States, 2009).
[1049] *Mayagna*, *supra* note 635 at para 83(d).
[1050] *Moiwana*, *supra* note 633 at para 80(e).

Thus, the land represents a concrete geographic point which incarnates the community's history, its identity, its beliefs, and its survival. It is inseparable from and identical with the community's continuity and its very existence.

The IACtHR notably embraced this cultural argument in *Yakye Axa*. Its judgement in that case noted that ancestral territory and its resources were "part of their worldview, their religiosity, and therefore, of their cultural identity."[1051] Interestingly, indigenous testimony in *Yakye Axa* focused on the dearth of basic social necessities: education, food, health services.[1052] The association of land and cultural identity is primarily emphasized in the statements of expert witnesses[1053] and this is what the IACtHR retained in its examination of the right to property, linking material property (land) with non-material cultural heritage (oral tradition, customs and language, arts and rituals).[1054] In *Yakye Axa*, the court did not underplay the community's severe living conditions due to lack of access to their ancestral land; indeed, it considered this privation a violation of their right to life. One of *Yakye Axa*'s most progressive legal points was its conclusion that the right to life constituted a right to a *decent* life—and that the infringement of that right was a direct consequence of the loss of their land. The IACtHR determined that the lack of guarantee for communal property

> had a negative effect on the right of the members of the Community to a decent life, because it has deprived them of the possibility of access to their traditional means of subsistence, as well as to the use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses.[1055]

With this conclusion, the court clearly established the interrelated nature of rights, supported by the fact that indigenous peoples' expressed needs for social participation (through the use and enjoyment of their resources, for subsistence and other purposes) superseded rigid norms.

For all its symbolic significance, land still possesses the basic function of ensuring physical survival, as extensively documented in case law. In *Sawhoyamaxa*, the community leader's testimony stressed land's importance in securing basic needs: "The lands have been the main

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[1051] *Yakye Axa*, *supra* note 644 at para 135.
[1052] *Ibid* at para 39(c) (testimony of Inocencia Gomez); see also in proven facts, summary of the extreme living conditions (para 50.92–50.99).
[1053] *Ibid* at para 38(c), 39(f).
[1054] *Ibid* at para 154. Such cultural heritage includes "their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values."
[1055] *Ibid* at para 168.

subject of the Community's claim, and once their claim is addressed they will be able to solve the other problems, i.e., health, education and food."[1056] While this statement may appear idealistic at first glance, it is important to note that according to an expert witness in this case, the Enxet community had always relied on their traditional territory and their profound knowledge thereof for their subsistence.[1057] The expert argued that the indigenous community understood best how to satisfy its own needs through land:

> Land should be seen as an element enabling indigenous families to enhance and develop their current subsistence strategies according to their own priorities. This requires a detailed understanding of their landholding practices and subsistence methods, and any imposition concerning the use of lands by external authorities will constitute a violation of the indigenous people's sovereignty and self-determination.[1058]

This statement presents the rights-holder as autonomous and able, given the appropriate means, to ensure their own social emancipation. While the Court did not engage with this testimony in *Sawhoyamaxa*, it did state in a later case that Article 21 protected the community's special relationship with land "in a way that guarantees their social, cultural and economic survival."[1059] Land's potential in securing basic needs was also noted in *Kichwa*; the Court reported that the Sarayaku's land provided 90% of their nutritional needs.[1060] Similarly, ownership of natural resources on indigenous property was linked with their physical and cultural survival.[1061] In this way, the right to property is understood to include a potential for positive social empowerment. What's more, understanding the importance of property to indigenous people has also shaped the normative content of the American human right to property. For instance, to encourage the effective enjoyment of indigenous property, the IACtHR has extended the reach of Article 21 to

[1056] *Sawhoyamaxa*, *supra* note 762 at para 34(a) (statement by Mr. Carlos Marecos-Aponte).
[1057] *Ibid* at para 34(j).
[1058] *Ibid* at para 34(j).
[1059] *Saramaka People Case (Suriname)* (Interpretation) (2008), Inter-Am Ct HR (Ser C) No 185 at para 32.
[1060] *Kichwa*, *supra* note 646 at para 53.
[1061] *Saramaka*, *supra* note 689 at para 121–122. While the state claimed that the Saramaka did not actually use the forest and minerals, the Court noted that exploitation of these resources by third parties could affect other resources, such as clean water, thus the need to protect all resources on the territory (*ibid* at para 126).

the rights to consultation,[1062] a share in the benefits from land, and protection and management of natural resources.[1063]

On the African side, land is also described as an important cultural factor, notably in the *Endorois* case:

> The Complainants claim that land for the Endorois is held in very high esteem, since tribal land, in addition to securing subsistence and livelihood, is seen as sacred, being inextricably linked to the cultural integrity of the community and its traditional way of life.[1064]

Again, the dual nature of land, spiritual and material, is emphasized in this story. The ACHPR accepted in that case that land, religion, and culture were intertwined,[1065] saying the restricted access to Lake Bogoria had "denied the community access to an integrated system of beliefs, values, norms, mores, traditions and artifacts closely linked to access to the Lake."[1066] Similarly, the African Court in *Ogiek* noted that for indigenous communities, spirituality was not necessarily dependent on 'formal' religious institutions, but was rather associated with territory, in this case the Mau forest.[1067]

Natural resources are themselves associated with subsistence; in fact, natural resources are invoked in *Endorois* chiefly for their role in cattle health:

> They argue that for the Endorois, the natural resources include traditional medicines made from herbs found around the lake and the resources, such as salt licks and fertile soil, which provided support for their cattle and therefore their pastoralist way of life.[1068]

Similarly, in asserting that their right to development had been violated, the complainants attested that their eviction has led to significant losses in cattle, negatively affecting their subsistence.[1069] The Commission revisited this fact in its decision on merits: "Elders commonly cite having lost more than half of their cattle since the displacement."[1070] The reference to cattle suggests that

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[1062] This was developed into a series of criteria derived from international law: prior and informed consultation, conducted in good faith, culturally appropriate and accessible, obligation of conducting an environmental impact assessment (see *Kichwa*, *supra* note 646 at para 178).
[1063] See ee.g. *Saramaka*, *supra* note 689; *Kichwa*, *supra* note 646. See also generally IACHR, *supra* note 1048.
[1064] *Endorois*, *supra* note 2 at para 16.
[1065] *Ibid* at para 166, 244.
[1066] *Ibid* at para 250.
[1067] *Ogiek*, *supra* note 543 at para 164–165.
[1068] *Endorois*, *supra* note 2 at para 124.
[1069] *Ibid* at para 126
[1070] *Ibid* at para 286.

property as subsistence is more associated with the moveable resources (cattle) than the land itself, which is a fluid space for pastoralists. In a 2006 report on indigenous peoples in Africa, the African Commission noted the importance of land and natural resources:

> [T]hey are so closely related to the capability of these groups to survive as peoples, and to be able to exercise other fundamental collective rights such as the right to determine their own future, to continue and develop their mode of production and way of life on their own terms and to exercise their own culture.[1071]

The Commission suggests here that protecting property is justified if it aids indigenous people's economic, social, and cultural development.

What distinguishes the ACHPR from the Inter-American system is perhaps its ability to assess indigenous rights holistically, not focusing exclusively on property. As noted in Chapter 4, the African Charter includes substantive economic and social rights equal with civil and political rights. It also includes rights of peoples, notably rights to development and resource management. In this context, the location stories introduced by the Commission are not necessarily filtered through the right to property, but rather examined in light of the overarching goal of human rights, identified by the Commission as securing dignity. While the *Ogoni* case, for instance, addresses violations of land rights of the Ogoni indigenous community, it is fundamentally a case about economic and social rights.[1072] In this case, the community claimed that foreign oil exploration on their land, of which they had no prior knowledge, affected their health and environment.[1073] These commercial activities led to the destruction of Ogoni food sources in two ways: the oil extraction had poisoned the soil and water sources necessary for the community's farming and fishing activities, and Nigerian forces had responded to protests by destroying crops and killing animals.[1074]

While the IACtHR would likely have addressed these violations of economic and social rights indirectly through the rights to property and life,[1075] the ACHPR in *Ogoni* was able to address the issues directly, for instance through the rights to health (Article 16), a clean environment

[1071] ACHPR & International Work Group for Indigenous Affairs, *supra* note 977 at 14.
[1072] Coomans, *supra* note 99 at 749.
[1073] *Ogoni*, *supra* note 662 at para 2–4.
[1074] *Ibid* at para 9.
[1075] In fact, in another case, the African Court hesitated to arguments on the right to life in relation to the protection of the Ogiek indigenous community, finding a lack of causal link; see its reasoning in *Ogiek*, *supra* note 543 at para 147–155.

(Article 24), and control over their natural resources (Article 21). Furthermore, the Commission derived a right to housing from a combination of Charter rights, namely the rights to property (Article 14), health (Article 16), and the protection of the family as a social unit (Article 18). Its decision emphasized that when shelter was destroyed, all three of these rights were affected.[1076] And the Commission believed that the right to housing extended beyond homeowners to tenants, saying that it would also extend housing protection against "landlords, property developers, and land owners […]"[1077] Furthermore, it stressed that the 'home' was more than a material thing: "The right to shelter even goes further than a roof over one's head. It extends to embody the individual's right to be let alone and to live in peace, whether under a roof or not."[1078] Many important insights can be drawn from this statement on the right to shelter: first, it embraces the inherent sociality of human beings (a desire to be alone implies others' presence). Second, it emphasizes that individuals have a right to decide what shelter means to them, and to choose their own means of social participation. Consequently, the need for 'shelter' can arguably be met in many ways, but to do so requires *listening* to people's articulations of their particular needs. Finally, the idea of a right 'embodying' a need suggests that rights are vehicles for social participation and emancipation, not the other way around.

As it expands the scope of the human right to property, the ACHPR also signals that ownership is not the only means to achieve social participation through one's 'home', since it can also be seen as a public health issue (among other possibilities).[1079] In *Sudan*, the Commission elaborated on that theme, agreeing that the destruction of homes, livestock, food, and farms constituted a violation of not only the right to property, but also the right to health.[1080] Taken as a whole, these considerations challenge the centrality of abstract property rights. In a 2006 report on Indigenous peoples in Africa, the Commission noted that the existence of both individual and collective rights favoured the protection of indigenous peoples, yet its list of the most relevant articles did not include the one addressing property.[1081]

[1076] *Ogoni*, *supra* note 662 at para 60. The Commission also derived a right to food from a combination of Charter rights (*ibid* at para 65).
[1077] *Ibid* at para 61.
[1078] *Ibid*.
[1079] *Ibid* at para 63, citing CESCR, *General Comment No 7: The right to adequate housing (Art 11.1): forced evictions*, UNESCOR, 16th Sess, UN Doc E/1998/22 (1997).
[1080] *Sudan*, *supra* note 700 at para 207–212.
[1081] ACHPR & International Work Group for Indigenous Affairs, *supra* note 977 at 20.

In this same vein, note that in the African system, the right to consultation relies not on the right to property (as is the case for the IACtHR[1082]) but rather the right to economic, social, and cultural development, guaranteed by Article 22, a conclusion reached by both the Commission and the Court.[1083] Against the state's argument that it had acted to favour the development of the indigenous community,[1084] the ACHPR replied in *Endorois* that development implied the ability to make choices:

> Had the respondent state allowed conditions to facilitate the right to development as in the African Charter, the development of the game reserve would have increased the capabilities of the Endorois, as they would have had a possibility to benefit from the game reserve. However, the forced evictions eliminated any choice as to where they would live.[1085]

Here the Commission emphasized the importance of the Endorois's capabilities; that is, their ability to determine their own needs and how to satisfy them. It added that community members did not seem to have been given an occasion to influence the outcomes,[1086] and if they had, were clearly in an unequal bargaining position, "being both illiterate and having a far different understanding of property use and ownership than that of the Kenyan Authorities."[1087] The Commission concluded that the right to development required participation, consultation, and prior and informed consent.[1088] While land is of course an important part of the consultation process, it is not the main focus of the discussion.

What the ACHPR expresses here is that a meaningful and informed right to consultation exists primarily not to establish clear property entitlements, but to allow indigenous peoples to take control of their destinies, whether through the management of resources or otherwise. To reduce consultation to property expresses needs only imperfectly, whereas the notion of development more adequately encompasses communities' collective desires. In fact, the argument that the right to development implies choice had been brought up by the complainants themselves,[1089] demonstrating the Commission's willingness to heed claimants' suggestions in its interpretations.

[1082] See e.g. *Saramaka*, *supra* note 689 at para 129; *Kichwa*, *supra* note 646 at para 159–211.
[1083] For the Court, see *Ogiek*, *supra* note 543 at para 202–211.
[1084] See Respondent state argument in *Endorois*, *supra* note 2 at para 139.
[1085] *Ibid* at para 279.
[1086] *Ibid* at para 281.
[1087] *Ibid* at para 282.
[1088] *Ibid* at para 289–291.
[1089] *Ibid* at para 127–129.

Even resource management, understood collectively, transcends the right to property. In *Endorois*, the ACHPR opined that the indigenous community had a right under Article 21 to benefit from state exploitation of resources on their territory.[1090] The Commission notes that while the Inter-American Court had to "read in" the right to free use of natural resources through the article on property,[1091] it was able itself to separate this use from the notion of property and treat it as a distinct right.

Property's potential for social participation has been addressed in many cases, not just those involving indigenous property. As we have seen, all three systems have been sensitive to location and lived experiences therein in cases of serious violation or those concerning rural property. In *Ituango*, the IACtHR insisted repeatedly that the loss of the victims' home was more than the simple loss of a physical object, because it affected their social and communal life and their means of subsistence, causing vulnerability through displacement. The conclusion drawn in *Ituango* was reiterated in *Case of the Afro-Descendant Communities Displaced from the Cacarica River basin (Operation Genesis) v Colombia* (2013):

> [T]he destruction of the homes of the inhabitants of the communities of the Cacarica River basin, in addition to constituting a major financial loss, resulted in the inhabitants losing their basic means of subsistence, which means that the violation of the right to property in this case was particularly serious.[1092]

What should be retained from these approaches assigning purpose to property is that the IACtHR and the ACHPR (and even the ECtHR, through its case law on rural property) implicitly create a hierarchy in which property providing meaningful social participation is more important than purely commercial property in assessing human rights violations. In *Sawhoyamaxa*, the IACtHR noted that, although international tribunals could simply not apportion property between private owners and indigenous communities in times of conflict, they still had the responsibility to determine whether the community's human rights were adequately protected, and that indigenous property could take precedence based on its role in the community's well-being.[1093] The ACHPR arrived at the same conclusion, saying in *Endorois* that the standard of encroachment control was

[1090] *Ibid* at para 255, 268, 295–296. The same conclusion was drawn by the African Court in *Ogiek*, *supra* note 543 at para 191–201.
[1091] *Endorois*, *supra* note 2 at para 256.
[1092] *Afro-Descendant Communities*, *supra* note 808 at para 352.
[1093] *Sawhoyamaxa*, *supra* note 762 at para 136.

higher for indigenous property "than individual private property."[1094] But what is of central importance in this hierarchical distinction is not the material value of the land, but its concrete role in preserving the indigenous way of life. Indeed, the ACHPR made sure to recall in *Endorois* that the protection of indigenous communities was particularly important considering the dangers they faced, naming exclusion, discrimination, exploitation, extreme poverty, displacement, lack of participation, and forced assimilation, among others.[1095] Similarly, what distinguished property in a rural setting, entitling it to a higher degree of human rights protection, is that it was attached to subsistence and continuity in place. These qualities do not apply to all owned things, particularly not things that are viewed as exchangeable commodities; furthermore, the particular geography of rural land tended to make its owners more vulnerable, a contextual element that supported different treatment in those cases.

To conclude, none of the three adjudicative bodies studied in this part have formally associated property rights with liberal ideology. Judge Sergio García Ramírez of the IACtHR did however make the connection in a separate opinion in *Sawhoyamaxa*:

> The property rights of the indigenous people are different—and so it must be recognized and protected—from *this other form of ownership created by the European law rooted in liberal ideology*. Moreover, the forced introduction of the notions of property rights stemming from Roman law and received, albeit with variation, by the nineteenth-century law that took root in America involved an extensive process that plundered and dispersed the communities, the consequences of which can still be seen."[1096]

Judge García Ramírez underscores in this passage how the imposition of Western liberal ideology through colonization has led to the annihilation of other understandings of property in the Americas, and that this should not be seen as a 'natural' choice. He further notes how this imposition transcends many property relationships:

> At the heart of the cases filed before the Inter-American Court lies this phenomenon excluding the old forms of landholding and replacing them with new types of ownership, under the aegis of the Western concept of private property.[1097]

TWAIL scholars have noted how ignoring the pervasiveness of liberal ideology in human rights can lead to exclusion, and the case law of the ECtHR confirms this, in particular in cases

[1094] *Endorois*, *supra* note 2 at para 212.
[1095] *Ibid* at para 248, under the examination of the right to culture.
[1096] *Sawhoyamaxa*, *supra* note 762, separate opinion of Judge Sergio García Ramírez at para 13 [emphasis added].
[1097] *Ibid*, separate opinion of Judge Sergio García Ramírez at para 15.

concerning nonconforming stories of property. The IACtHR and the ACHPR have been confronted more directly to diverse and unorthodox visions of property; this may have influenced their more open interpretation of the right to property, but their perception of their role as international human right bodies also plays an important part, in contrast with the ECtHR's strong commitment to European liberal values. This is not to say that the IACtHR or the ACHPR do not have 'ideological' motivations in their case law, as the ECtHR certainly seems to. For instance, the rhetoric of the Inter-American system clearly shows a commitment to the advancement of indigenous peoples' human rights,[1098] while that of the ACHPR insists on promoting African development through adapted universal human rights. The difference lies perhaps in the fact that the IACtHR and the ACHPR are more transparent in acknowledging their allegiance, whereas the ECtHR strikes an awkward balance between human rights court and defender of European values. Duncan Kennedy seems to suggest that denying that courts harbour ideologies, or even pretending that they can be surmounted, is a waste of time better spent analyzing "how [judges] can be ideological" and pressing for more transparency.[1099] In other words, power dynamics cannot be eliminated, but they can be acknowledged and embraced in a transformative way.

While the space given to lived experiences of property differs from one regional system to another, the above analysis illustrates that, when adjudicative bodies allow space for lived experiences in location to be upheld, they are able to transcend liberal property assumptions and assess property as a human right whose purpose is to enable social participation. This common purpose provides a universal standard of evaluation, which however does not preclude regional, local, and personal nuances in the nature of needs for social participation and how they can be met.

At least one ECtHR judge has expressed the opinion that this attention to location should guide all P1-1 cases heard by the Court. In his concurring opinion in *Lallement*, Judge Costa suggests that the '*in concreto* approach' to P1-1 violations in cases of rural property should be the rule in all property cases, saying that "*je ne trouve pas souhaitable la sacralisation du droit de propriété, et je crois que l'intérêt général ne se trouve pas exclu par principe de la prééminence du droit*".[1100] Judge Costa, rejecting the centrality of property rights, expresses here that certainty and context

[1098] The Inter-American Commission has made this clear in *Maya*, *supra* note 583 at para 96: "In the context of the inter-American human rights system, this Commission has long recognized and promoted respect for the rights of indigenous peoples of this Hemisphere."
[1099] Duncan Kennedy, *supra* note 35 at 130.
[1100] *Lallement*, *supra* note 884, concurring opinion of Judge Costa.

sensitivity are not opposed, but rather complementary. Furthermore, in agreeing with the majority that the specific facts of the case led to a P1-1 violation, he comments ironically on the Court's transposition of abstract rules of law:

> *Prenant en compte l'aspect humain de cette affaire*—et après tout cela ne me choque nullement qu'une Cour des droits de l'homme ne fasse pas que du droit « pur » –, *il m'a semblé finalement que la charge imposée à M. Lallement et à sa famille, en dépit du caractère non négligeable des indemnités perçues, pouvait en l'espèce être qualifiée de spéciale et exorbitante.*[1101]

Here, Judge Costa opposes "pure" (or positive) law to human rights law, implicitly saying that if the former can content itself with abstract and neutral rules, the latter cannot. He further warns that the applicant's situation was unique—perhaps suggesting that many other P1-1 cases decided abstractly contained flawed findings of right-to-property violations.[1102] Judge Costa's comments challenge not the universality of human rights, but rather the idea of *abstract* human rights.

Finally, lived experiences in location show how land relationships are not just matters of ownership or property, but also cultural identity and social development, thus suggesting that needs for social participation expressed through the material world can be met in a variety of ways, beyond the right to property. Thus, shaking liberal assumptions about property also requires challenging the centrality of property when it comes to assessing social relationships in location. What the IACtHR and the ACHPR have done with property is significant, particularly in cases of indigenous land tenure: they have turned a right traditionally associated with exclusion into one that involves participation. But there is always a risk that social and economic protections can clash with 'classical' property rights (tenancy protection laws or labour regulations, for example), restoring the latter's exclusionary nature. What's more, the boundaries of property may be extended, stretched, or made permeable, but there are limits to property's reach. Boundaries necessarily exclude at one point or another. What about cases of public land used for informal housing, endemic in Latin America? Given the illegality of the situation, are these homes still 'possessions'? The ECtHR has already ruled that in states that have policies against illegal dwellings, the demolition of properties constructed without permission does not violate of P1-1.[1103] How would

[1101] *Ibid* [emphasis added].
[1102] *Ibid* : "Je réaffirme cependant qu'il s'agit ici d'une situation très particulière, qui ne devrait pas selon moi avoir une portée jurisprudentielle trop extensive. L'arrêt relève justement, d'ailleurs, que la requête doit être, et a été, appréciée *in concreto*."
[1103] See *Ivanova*, *supra* note 738. While there was no violation of the article on property, the Court concluded there had been a violation of article 8 on the protection of the home.

the IACtHR deal with these cases? They do not relate to collective cultural rights, but clearly and directly affect 'decent livelihood;' could there be a return to the basic idea that the legitimacy of ownership is based on use?[1104] What about people who lie outside any standard category of 'possession'? One can think of people experiencing homelessness or displacement, who are invisible to a social human rights system centred on property and its boundaries. In challenging the centrality of property in assessing human relationships with the material world, we also challenge the reductive vision of how social participation can be achieved. This is the focus of the third and final part of this study.

[1104] See examples in practice in Bonilla Maldonado, *supra* note 282; Xu & Gong, *supra* note 577.

Part III – The Potential of Property as Universal Human Right: Needs before Rights

Chapter 7 – The Myths of Property: Challenging the Centrality of Property in Rights Discourse

"[T]urning all rights into property does not help, because most contemporary types of property divide and atomise people. On the contrary, property should be weakened and become one aspect only of rights associated with the equality the universalism of rights introduces."[1105]

"Property may have once been important as the guardian of other rights, but if those other rights have come to have more direct constitutional protections, do we really need property rights so much?"[1106]

"A limited right to property can make an important contribution to a life of dignity. This single economic right alone, however, simply cannot provide economic security and autonomy for all. In fact, for many people—in the Western world, most people, whose principal "property" is their labor power or skills—other economic and social rights would seem to be a better mechanism to realize economic security and autonomy."[1107]

7.1 Introduction: Property as Guardian of Social Participation?

All three quotes in the epigraph express the same ideas. First, that property has tended to be viewed as a fundamental right above others; and second, that this misconception needs to change. These interrelated propositions do not necessarily reject the idea of a human right to property, but encourage a deeper examination of its relative importance. In this chapter, I consider the place of the human right to property within the greater body of universal human rights.

So far I have argued that to be truly universal, human rights must shed Western liberal assumptions, and to do so, they ought to be based on the lived experiences of marginalized and underrepresented people. Thus, a universal right to property should draw not on the canon of liberal rights (Locke, the American and French declarations), but on the experiences of displaced people, indigenous communities, rural populations, and slum dwellers. But if property ownership has the potential to enable social participation for them, as regional case law shows, this potential is imperfect:

[1105] Douzinas, *supra* note 42 at 283.
[1106] Carol M Rose, "Property as 'The Guardian of Every Other Right'" in Gerrit van Maanen, A J Van der Walt & Gregory S Alexander, eds, *Property Law on the Threshold of the 21st Century* (Antwerpen: Maklu, 1996) 487 at 492 [Rose, "Guardian"].
[1107] Donnelly, *supra* note 19 at 44.

ownership is often neither sufficient nor necessary to accomplish the mission of human rights, since it cannot encompass every aspect of a person's lived experience. After all, it is only through 'generous' readings—that is, by stretching out the meaning of "property"—that the IACtHR and ECtHR have managed to extend the scope of this right. Assuming that property can meet all needs prevents us from exploring other ways in which they can be met. The emerging case law of the African system of human rights, notably in regard to indigenous and tribal relationships to land, is interesting in that regard in that it emphasizes the ability of rights-holders to make choices based on their needs instead of imposing a particular right's narrative, recalling Panikkar's definition of freedom as "the power to create options."[1108] The ACHPR and the African court further recognize that such needs are dependent on location, and that universal rights are best understood when they are applied in historical, political, social, and cultural context.

I certainly do not claim that the international system of human rights considers the right to property to supersede other rights; the fact that the right to property barely made it into the human rights corpus clearly indicates states' reluctance even to qualify it as human right. Still, when it comes to assessing people's relationships with the material world, there is a tendency, in everyday discourse as well as legal practice, to consider ownership the most effective way to address that relationship, making other rights—labour, tenancy protection, social security—appear weaker or less effective in enabling social participation in that context.[1109] One author has called it the "logic of centrality," making ownership central to social life and the human condition itself.[1110] As a consequence, we are forced to look for solutions to social problems through the right to property, preventing a more integrated assessment of these problems.[1111]

The idea of property as guardian of other rights expressed in Rose's quote comes from the liberal conflation of property and freedom.[1112] Once a person owns land, in particular, they are sheltered from nature, from others, and from government; they are allowed to participate politically; they are able to participate in their communities; they exist in record; their privacy and family life are

[1108] Panikkar, *supra* note 69 at 102.
[1109] See generally Rose, "Guardian", *supra* note 1106. See also MacPherson, "Economic Justice", *supra* note 51 at 84; Graham, *supra* note 46 at 173.
[1110] Van der Walt, *supra* note 306 at 82–83.
[1111] See e.g. Howard-Hassmann, *supra* note 220.
[1112] Rose, "Guardian", *supra* note 1106 at 488–492. See also Fitzpatrick, *supra* note 55 at 50.

protected. These ideas are commonly accepted worldwide. But do they accurately reflect human beings' needs or do they avoid addressing them head on?

Liberal property as an institution is so strong that it is indeed tempting to use its language beyond the classical liberal property relationship of a private owner possessing exclusive rights to a clearly identifiable thing. Expanding the reach of property seems warranted by the fact that property ownership provides power—a power protected by law in Western liberal states. So instead of demonizing property, several scholars have adopted its language in an inclusive manner. There are many such pragmatic "if you can't beat 'em, join 'em" expansions of the meaning of property. In legal practice, we have seen the language of property deployed to protect indigenous rights. In legal theory, we have the 'progressive' property school discussed in Chapter 2 (Singer, for instance, who recommends that American property law include worker protection[1113]); also Radin's work on 'property for personhood' (property as an extension of one's identity), which proposes extending property protections to tenants.[1114] Finally, there is a trend to extend the idea of property to personal attributes—race, gender, cultural preferences, religious beliefs—making property a 'right to have rights'.[1115]

All these examples involve expanding the power of property to less privileged persons while curtailing the negative effects of unbound property rights. But they tend to overemphasize the role of property in securing social participation, thus reinforcing the liberal assumption that property is necessary to exist socially, politically, and economically. In doing so, they neglect the complex network of relationships that forges a person's identity and discourage creative assessments of how social participation can be attained through and in the material world beyond simple ownership.

[1113] See discussion above at §2.3.1.

[1114] Radin, *supra* note 149 at 79–88. See also discussion on Radin above at §2.4.1. For a critical discussion of Radin's 'pragmatic approach' see J Williams, *supra* note 238 at 295, 360–361; Stephen J Schnably, "Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood" (1993) 45:2 Stan L Rev 347 at 352–353 [Schnably, "Pragmatism"].

[1115] For a detailed discussion on the etymological roots of the meaning of property, see Davies, *supra* note 51 at 24–44. For examples of extensions of property's reach, see Levy, *supra* note 390 at 174–177 borrowing from Locke's idea of people having property in themselves. Radin also suggests that property and properties cannot be perfectly separated, Radin, *supra* note 149 at 10. This assimilation allows for deeper critique of property institutions, see e.g. Harris observing that law tends to protect whiteness as property, i.e. as a space of exclusion which provides access to various privileges from which non-owners/non-whites (indigenous peoples or African Americans) were excluded (Harris, *supra* note 98 at 1714 and 1744–1745.) On how the assimilation of property and properties allows for a subversive use of property law, see generally Keenan, *supra* note 221.

Property cannot and should not be able to cure all ills. It is one right among others leading to social participation, and only a person's lived experience can determine property's place in this context.

This chapter thus seeks to expose the tendency to automatically divert efforts to address the relationship with the material world towards the vocabulary of property, and to suggest how in some cases this is not the best approach to satisfying human needs. I do so by digging at the roots of common pronouncements about the virtues of property ownership which, through the use of repetition and fictionalized imagery, take up a *mythical form*. These myths of property become almost irrefutable, creating a cultural subconsciousness in legal practice which makes it harder for marginalized and underrepresented people to frame their needs for social participation outside the familiar, but limited, language of property. Dangling the promise of ownership and its riches often misses the target, notably for non-owners (tenants, the homeless) or non-conforming possessors (slum dwellers, indigenous people, nomadic people). The promise of a home won't by itself change patterns of systemic discrimination which have long affected African Americans in the United States; title over land won't by itself address all issues of cultural survival and political autonomy of indigenous peoples; and formalizing slum dwellings is not enough to lift the peri-urban poor of the Global South out of poverty.

By 'myth,' I mean a widely shared belief transmitted by a repeated and shared societal narrative. Myths are not literal, but offer relatable stories and narratives that help us transmit cultural information and collectively understand our world.[1116] Fitzpatrick calls myths "operative reality."[1117] Stories of Origins, for instance, are common myths that describe the birth of humanity and society, and so myths are often associated with the sacred.[1118] Myths serve to transmit knowledge; thus, their lack of literal accuracy does not affect their cultural significance.[1119] Repetition plays an important role in the creation of myths: the more a particular myth is repeated—for instance, that property and freedom are coterminous—the harder it becomes to break

[1116] Susan H Williams, "The Uses of Myth: A Response to Professor Bassett" (1986) 4 JL & Religion 153 at 153–156; Fitzpatrick, *supra* note 55 at 20–22.
[1117] Fitzpatrick, *supra* note 55 at 42.
[1118] See e.g. *Ibid* at 15–19.
[1119] S Williams, *supra* note 1116 at 154.

it down.[1120] Not only are myths irrefutable, but they become internalized, turning them into social and cultural beliefs embedded in our psyche.[1121]

Myths are omnipresent in all societies and are also well rooted in legal theory and practice. The reasonable man, for instance, is a common mythical figure in Western legal tradition, a fictional being who nonetheless regularly helps solve legal cases. Despite their inaccuracy, Susan Williams argues that myths humanize law and enrich its cultural content, adding that their presence is so ingrained that it would be impossible to get rid of them.[1122] Yet they can promulgate misconceptions, perpetuating particular ideologies and power dynamics. In his exploration of the myth of the Westphalian state, Stéphane Beaulac notes that the power of a myth is to fix a meaning that supersedes all other meanings, but in a way that ignores historical roots and stifles alternative interpretations.[1123] For instance, legal theory's myth of the 'State of Nature' has often been condemned for justifying the colonial despoliation of land from indigenous peoples. The idea of 'State of Nature' indeed creates a differentiation between 'cultured' man—with his productive use of land through agriculture[1124]—and the 'savage' other[1125] or nomad,[1126] as simplistic, easily dominated figures. Blacks, migrants, women, and Jews have been similarly mischaracterized.[1127] Even human rights law, as we have seen in Chapter 1, has perpetuated a mythical image of the helpless victim of the South, undermining the agency of the corresponding (but real) people.[1128] In these instances, myths are used to rewrite the story in favour of dominant groups, and thus are dehumanizing for the have-nots.

Liberal property law has its own myths and they generally uphold the idea that ownership is essential to human life.[1129] The strength of this rhetoric lies in its omnipresence, going back to the writings of Locke, the French and American declarations, and nineteenth- and twentieth-century

[1120] Marston, *supra* note 553 at 351, 363, 366–367; Beaulac, *supra* note 578 at 4, 29.
[1121] Marston, *supra* note 553 at 369.
[1122] S Williams, *supra* note 1116 at 153. The author argues that myths humanize law and are therefore desirable.
[1123] Beaulac, *supra* note 578 at 38–39.
[1124] Fitzpatrick, *supra* note 55 at 84–90; Bassett, *supra* note 288 at 144–149. Both authors go through various liberal accounts of the idea of stages of progress, from the primitive hunter to the more civilized cultivator and commercial man. On the liberal discourse of progress and reason as applied to international law, see Duplessis, *supra* note 77 at 323–324.
[1125] Fitzpatrick, *supra* note 55 at 62–63.
[1126] Bassett, *supra* note 288 at 140.
[1127] *Ibid* at 150–151; Fitzpatrick, *supra* note 55 at 132.
[1128] See above §1.3.2.
[1129] Fitzpatrick describes property as an 'Eternal Object' of modern myths; see Fitzpatrick, *supra* note 55 at 48–50.

liberal economic theory.[1130] One classic story of property is that of the home as castle, which conveys the idea of an "impenetrable fortress," a space in which the owner has absolute control.[1131] Often cited along the castle metaphor is Blackstone's famous quote, repeated like an adage, of property being a "sole and despotic dominion." Yet, as already mentioned above, even Blackstone realized that such absolute exclusivity was impossible in practice, making the exclusivity axiom a "rhetorical figure"[1132] part of property's mythology. An another classical figure in property rhetoric is that of the land as a mother, this nurturing and protective being at the origin of life itself who never fails to provide for her offspring. One interpretation of this foundational metaphor in liberal societies is a responsibility for earth's (God's) sons and daughters to make the most of land, for instance by enclosing it into private parcels to maximise production.[1133]

Mythical forms of property have found their way into human rights law, specifically through the pervasive association of ownership and personhood. Discussing the human right to property, one author writes: "Although human dignity is not limited to owning things, owning nothing at all—having no access to land at all—is a humiliating experience to everybody who has not taken the vows of humility."[1134] Another states: "Without personal property, it may be asserted, an individual is not fully human."[1135] Again, here, we see the creation of a mythical figure where property, a supernatural object that grants privileges to their holder, ends up becoming one with the human body. Discussing property ownership as embodying selfhood is not rare, as the following quote exemplifies: "Property's function as an embodiment and symbol of the self can be normatively and practically quite desirable, providing a rootedness and sense of control that can anchor everyday life."[1136] Whether property does indeed provide rootedness and control does not really matter from a mythological point of view, as long as the narrative is ingrained in people's minds.

The problem with ownership myths is that they often favour wealthy and established owners. As the following sections will show, systems that idealize private property ownership tend to gloss

[1130] See e.g. Charles A Reich, "The New Property" (1964) 73:5 Yale LJ 733 linking individual freedom and property.
[1131] Eduardo M Peñalver, "Property Metaphors and Kelo v. New London: Two Views of the Castle Essay" (2005) 74:6 Fordham L Rev 2971 at 2973 [Penalver, "Metaphors"].
[1132] Rose, "Canons", *supra* note 283 at 604.
[1133] See generally Chen, *supra* note 218.
[1134] Davy, *supra* note 220 at 20.
[1135] Howard-Hassmann, *supra* note 220 at 189.
[1136] Nestor M Davidson, "Property and Identity: Vulnerability and Insecurity in the Housing Crisis" (2012) 47 Harvard Civil Rights-Civil Liberties Law Review (Harv CR-CLL Rev) 119 at 120.

over power dynamics at their roots and fail to recognize how this ideal entrenches at times the marginalization of important segments of society, thus perpetuating social inequality. As Peñalver notes about the castle image, "[a]ll too often, metaphor develops a force of its own, making it easy to slip from an initial application that is perfectly reasonable to one that does not make much sense."[1137] He refers particularly to the contrast between using the castle metaphor to protect the strong attachment people have with their homes and extending it to corporate interests in property, which end up accounting for over 90% of land in the US (through agricultural and mining ventures). In other words, it is one thing to use metaphor or myth to convey meaning; it is quite another to use them to sanction excluding practices. Another example is the myth of the 'nomad'—described by William Basset as the property-law myth justifying land dispossession through the portrayal of indigenous populations as incapable of 'productive' land use—which is rooted in European racism and blatant contempt for Indigenous peoples' agricultural practices.[1138] This myth, Basset suggests, had the effect of silencing people, framing them as inferior and unworthy of making valid ownership claims.[1139] Myths also avoid reality when they deny their own mythical roots or present themselves as 'scientific', something which Fitzpatrick has observed in modernity's creation of the mythical 'Individual' as an idealized rational being.[1140]

In a bottom-up approach to human rights, we must deconstruct myths in order to empower people to fulfill their need for social participation. If a myth impedes social participation, then it ought to be set aside. The rest of this chapter will explore where property myths come from, what they show, and what they hide.[1141] One myth is that property—a symbol of wealth—provides economic stability. Drawing on this myth (although not recognizing it as such), Hernando de Soto argues that formalizing slum dwellers' property rights is the most efficient path to sustained poverty alleviation in the Global South (§7.2). A Peruvian economist renowned for his work on formal property's role in empowering the marginalized, de Soto still only presents one 'truth' about property: its liberal, fungible manifestation in a capitalist world. In doing so, he misses out not

[1137] Peñalver, "Metaphors", *supra* note 1131 at 2976.
[1138] Bassett, *supra* note 288 at 134; see also Fitzpatrick, *supra* note 55 at 65, 81–82.
[1139] Bassett, *supra* note 288 at 135. The same myth was used by the English in the sixteenth century to describe the Irish—who were herders—preparing them for their colonization of the New World, *ibid* at 139–143.
[1140] Fitzpatrick, *supra* note 55 at 27–36. Fitzpatrick notes that history and anthropology in the nineteenth century helped consolidate the mythical image of modern law based on a European understanding of reason and order, *ibid* at 101.
[1141] S Williams, *supra* note 1116 at 154.

only on other ways to approach property outside of its commodified form (tenure protection, for instance), but also on alternative ways to tackle poverty, such as regulating capitalist markets, eliminating systemic racial and class divisions, or providing stronger social protections.

Another important myth conflates the virtues of land and home—permanence, security, privacy, social existence—with ownership (§7.3). As regional case law has shown, the assessment of property relationships can be different with respect to land or 'home,' as a more personal attachment is involved. But this attachment is often expressed simply as ownership, an association which not only conceals the unequal distribution of ownership, but also transmits the idea that permanence, security, privacy, and social existence can be attained only through owning land. This myth excludes non-owners or nonconforming owners and it also discourages looking for other means to enable their social participation. Of course, not all property relationships that enable social participation can be encompassed within the notions of land and home: a craftsman's tools can be equally important for their emancipation even if they are not fixed in place, since they provide for their subsistence through labour. But the mythical importance of home and land makes them important case studies in deconstructing the idea of centrality of property.

Accounting for lived experiences of social human beings allows us to debunk these myths and assess how social participation can be met in a holistic way (§7.4). While ownership may be more significant in rural settings, tenants in urban settings do not necessarily need to own to be recognized as members of their neighbourhood and have equal access to services. Other rights or concepts may better address the need for permanence, security, privacy, and social permanence, such as the right to self-determination for indigenous peoples, the right to land[1142] for rural populations, or the protection of tenure for tenants and slum dwellers. These are better understood as rights providing *access* to the social world—the ultimate purpose of human rights. This is not to say that property ownership cannot genuinely provide for social participation, but it cannot be approached in isolation. The very idea of property's social potential requires that the role of ownership in a person's life be assessed within the complex network of relationships that make up their lived experience in location, which in turn allows for a better assessment of how rights interact. The universality of human rights rests not on a taxonomy of abstract rights, but rather a

[1142] A social, economic, and cultural approach to land matters, see further discussion below, at §7.4.1.

recognition of humans' inherent sociality, along with mechanisms to facilitate their participation in society.

7.2 Property as Poverty Alleviation: The Economic Power of Ownership

One dominant myth of property is that it provides economic power, and from there, freedom. This particular myth is problematic because it denies its mythical form, rather presenting itself as a fact. Yet, it is fictitious because owning a thing does not hold any economic consequences in itself, it is the functioning of capitalist economy (enabled by liberal legal systems) that instills power to property when it is held in private and exclusive form, and it does so only for the ones at the top of the capitalist ladder.

Adam Smith's theory in the *Wealth of Nations* encouraging private property and free commerce to maximize the production and circulation of scarce resources is one of the earlier iteration of this myth. It relies on the familiar origin story of the State of Nature. Indeed, although the privatization of land was a long and uneven process in history, private ownership of land and productive farming seem to be presented as ground zero moments in history opposing an era of higher civilization to the previous State of Nature where all was held in common in a disorderly and 'brutish' manner.[1143] The 'tragedy of the commons,' which suggests that land is best exploited through clear individual entitlements, is allegorical and disconnected with actual land management practices, yet it is so deep-seated in liberal thought that it becomes truth.

Liberal property enables economic power because it is a fungible commodity, with a value determined by capitalist markets. Commodities are exchangeable and thus provide leverage in social relationships: the more one possesses commodities, the more leverage they acquire. Marxist theory makes a distinction between use value and exchange value of commodified property. *Use value* refers to the ability of a commodity to satisfy a need (a house as shelter, e.g.), while *exchange value* is the commercial value of a commodity in a given market (a house is worth *x*).[1144] Exchange value 'fetishizes' the commodified property, representing its value as intrinsic to the object, even if its evaluation is independent from the object, relying purely on market forces and social

[1143] A reference to Hobbes's classic quote of man in the State of nature as being "solitary, poore, nasty, brutish, and short," Thomas Hobbes, *Leviathan* (Minneapolis: Lerner Publishing Group, 2018).
[1144] Tim Dant, "Fetishism and the Social Value of Objects" (1996) 44:3 Sociological Rev 495 at 500, 509.

interactions and hierarchies.[1145] In this sense, the idea that property inherently provides economic power is a fantasy. It is this exchange value that determines the power a person derives from property, since it is inherently relational. Arendt suggests that, while use value is a matter of the private realm, exchange value (or social value) is the manifestation of property entering the public realm, considering all things fungible, blurring the line between property and wealth.[1146]

But approaching property as mere commodity is problematic from a human rights point of view as it does not always match lived experiences of property (for instance, stories of land being inalienable), and this mismatch impedes greater social inclusion. To further illustrate the limits of approaching all property as commodity in human rights law, this section discusses Hernando de Soto's influential work, *The Mystery of Capital*, which suggests that poverty alleviation in the Third World (a human rights objective) can benefit from formalizing property titles. Informal property is a widespread and growing phenomenon in the Global South, influenced notably by constant and rapid influx of internal migrants fleeing poverty and conflict in rural areas and converging towards urban centres.[1147] The situation is further exacerbated by the lack of state mechanisms (or political will) to implement lasting solutions.[1148] Thus, the problem de Soto addresses is rooted in the concrete struggles of underrepresented people and he specifically suggests paying attention to the reality on the ground to offer solutions. Still, by considering property central to his theory of human emancipation, de Soto ends up perpetuating the idea that, to be a complete social human being, one must own. Such discourses, as Van der Walt explains, "inhibit much-needed social and legal transformation in that they condemn certain persons to the margins of society and of the law, either by design or by default,"[1149] and as such, they avoid directly addressing the manifest needs of social human beings.

The Mystery of Capital fully embraces the myth that property (or *commodity*) provides wealth. Taking the economic power of property as an axiomatic fact, de Soto advocates for strong, formal

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[1145] *Ibid* at 500; Brett Christophers, "On Voodoo Economics: Theorising Relations of Property, Value and Contemporary Capitalism" (2010) 35:1 Transactions Inst Brit Geog 94 at 106. Davidson particularly associates this to consumerist society; see Davidson, *supra* note 1136 at 124.
[1146] Arendt, *supra* note 14 at 69–70.
[1147] de Soto, *supra* note 266 at 75–82, 86–87. See also Working Group on Property Rights, "Empowering the Poor through Property Rights" in Commission on Legal Empowerment of the Poor & UNDP, eds, *Making the Law Work for Everyone* (UNDP, 2008) at 65. For an illustration of the legal effects of this migration phenomenon in Colombia's Bogotá, see Bonilla Maldonado, *supra* note 282.
[1148] de Soto, *supra* note 266 at 18–23, 71–73; Crawford, *supra* note 220 at 1099.
[1149] Van der Walt, *supra* note 306 at 81.

property rights in developing countries as the best means to eradicate poverty (§7.2.1). The objective of de Soto is clear: to allow the poor to enjoy the benefits of modern capitalism. Yet in doing so he tends to ignore the complex and multifaceted nature of poverty within capitalist societies (§7.2.2). De Soto's approach focuses on formalizing property arrangements, tacitly absolving states from reinforcing their social and economic institutions to provide for their citizens' needs. What's more, de Soto's insistence that the poor be granted formal titles of ownership so that their 'dead' assets can be converted into useful capital wrongly assumes that property is best approached as a commodity, once more oversimplifying the concrete relationships with the material world that people experience in location (§7.2.3).

7.2.1 Property as capital: Capitalism in favour of the poor

De Soto's most cited work, *The Mystery of Capital*, asks why capitalism has failed in the Third World and former communist countries, assuming that this failure is responsible for the persistence of poverty and informality in these regions.[1150] Following the postulate that capitalism provides wealth and reduces poverty, de Soto suggests that what the poor need is formal property titles for real estate that will transform their possessions into wealth-creating capital and allow them to access formal markets. De Soto makes a distinction between the object of property and formal rights of ownership; a core premise of his theory, backed by statistical research, is that the poor have a considerable amount of assets which are subject to a variety of local "extralegal arrangements," but they do not have access to the legal institutions that could more broadly secure their title.[1151] According to de Soto, extralegal assets are 'dead capital,' whereas formal titles of property confer representation—legal existence—and thus the ability to transmute that capital into wealth, for instance by allowing to serve as security for business loans.[1152] He identifies six ways in which formal property rights allow assets to be productive: fixing their economic potential through title; integrating dispersed information into a single system; fostering accountability; rendering assets fungible; creating networks among people; and securing transactions.[1153] These functions of legal formalism recall the virtues of neutrality and stability attached to market-integrated liberal property rights. De Soto's theory has been described as "a 21st century update

[1150] de Soto, *supra* note 266 at 2–5.
[1151] *Ibid* at 6–7.
[1152] *Ibid* at 7–9.
[1153] *Ibid* at 47–60.

of Adam Smith's arguments" with a focus on urban poverty.[1154] After all, de Soto claims that "[c]apital is the force that raises the productivity of labour and creates the wealth of nations. It is the lifeblood of the capitalist system, the foundation of progress [...]"[1155]

De Soto says the poor in the Global South fail to access formal markets because national laws are not adapted to their needs; states hinder their participation by creating administrative obstacles to accessing and maintaining formal property titles.[1156] He likens limited access to formal property to a "bell jar," trapping capitalism's benefits for the elite.[1157] This leads to what de Soto calls "extralegality" (literally, "outside the official law") and the use of informal arrangements to manage these 'outsider' lives.[1158] However, such arrangements are legal rules in themselves:

> These arrangements result from a combination of rules selectively borrowed from the official legal system, *ad hoc* improvisations and customs brought from their place of origin or locally devised. They are held together by a social contract that is upheld by a community as a whole and enforced by authorities the community has selected.[1159]

These systems satisfy concrete needs and are applied consistently, but they are not formally recognized. The 'bell jar' creates a remove between law and reality: the more legal systems maintain this distance, the more people are moved to adopt extralegal arrangements which better suit their located needs.[1160] The creation of adapted informal rules of law has been observed in various case studies of informal settlements in Latin America.[1161]

In order to insert the poor into formal legal markets, de Soto suggests direct interaction with extralegal arrangements, listening to the needs of the people on the ground, and integrating the various 'social contracts' managing property relations into a single all-encompassing set of comprehensive (and positivistic) rules.[1162] He notes that such a process of adaptation and integration is precisely what has led to economic prosperity in Europe and the United States.[1163]

[1154] Jacobs, *supra* note 214 at s94.
[1155] de Soto, *supra* note 266 at 5.
[1156] *Ibid* at 16–23.
[1157] *Ibid* at 67.
[1158] *Ibid* at 23.
[1159] *Ibid*.
[1160] *Ibid* at 83–84.
[1161] See e.g. de Sousa Santos, *supra* note 274; Bonilla Maldonado, *supra* note 282.
[1162] de Soto, *supra* note 266 at 166–171.
[1163] See *ibid* at 96–110, 156–159 respectively for Europe and USA.

Ultimately, he observes that rules of property are often similar, making the adaptation of informal norms into formal law relatively easy.[1164]

De Soto's work is clearly directed towards poverty alleviation, and as such proposes a vision of capitalist society in which all can benefit from its fruits, not just the privileged elite. An important contribution of his work is to present the poor as active agents, rather than victims: he favours giving them a voice over forcing unfamiliar solutions upon them. He insists that the poor possess assets that only need to be recognized by formal law to be given full potential. Thus, he promotes empowerment, taking into account lived experiences and adaptation to location. But de Soto's 'progressive' position is based on an overarching assumption: that formal property rights, and the corresponding creation of capital, can singlehandedly lift people out of poverty. In other words, he relies on a mythical form of property—a commodity's embodiment of power—while taking that myth as a scientific fact. Yet, as formalized property takes a legally recognizable form in the shape of capital, it actually loses its material character, since the object itself does not matter, as long as it can be exchanged. Indeed, Brett Christophers suggests that de Soto's work advocates the 'financialization' of property, considering it not as something intrinsically useful, but rather as something to be exploited for financial gain; in doing so, he splits the 'body' of property, its use value and exchange value playing at different levels.[1165]

From a human-rights perspective, the distinction between use value and exchange value of property in a capitalist economy is not decisive: property treated as exchangeable capital can still enable social participation. Take small-scale farmers, for instance: they depend exclusively on their land to make a living, and so that land has obvious use value to them; but their ability to sell crops (food as fungible commodity) is just as essential. It is when crops are viewed as financial assets for profit-maximization that their ownership stops being a matter of human rights. We could also think of cases where neither use nor exchange of property enables social participation, for instance a person's fifth motor vehicle. The idea here is that 'use versus exchange' does not fully capture how people relate to the material world around them, and how these relationships can allow a person to fully realize themselves, In fact, the concept of 'productive' use, in capitalist societies, can be excluding since it imposes a concept of productivity which is not unanimously

[1164] *Ibid* at 191–198.
[1165] Christophers, *supra* note 1145 at 98, 103.

accepted. As Bradley Bryan notes, most liberal theories of 'use' centre on the domination of the property in question.[1166] All these nuances are lacking in de Soto's work because he relies on a mythical function of property which he takes as factual.

7.2.2 Formal property rights: Cure or affliction for the poor?

By overemphasizing the role of property ownership in the alleviation of poverty, de Soto ignores poverty's complex nature, its myriad causes, and the factors in its persistence. One way that myths distort reality is by simplifying events to make them memorable,[1167] but in this case the simplification leads to loss of nuance. As Van der Walt notes, focusing on property suggests that the absence of formal property renders the poor weak; it opposes the "normality of property" to the "abnormality of need, poverty, and marginality."[1168] De Soto mentions some obvious obstacles to formality such as onerous legal requirements and the absence of strong institutions, but ignores other contextual aspects such as culture, institutionalized social and racial discrimination, war, and so on. Poverty can also be perpetuated by failures in institutions not directly related to property: poor access to education or health services, lack of basic labour standards, or physical obstacles to employment. De Soto's unchallenged assumption that formal property is the best way to help the poor may explain why he ignores these other dimensions of poverty. He does briefly mention that the elite's desire to maintain their privileges may also slow down the poor's integration into formality,[1169] but does not offer solutions that directly address classism, instead suggesting ways to convince the wealthy that formalizing extralegal property would also benefit them, through increased respect for the law and investment opportunities.[1170]

One could argue that informality is the result of systemic maintenance of certain segments of the population in a state of poverty, whether through the functioning of capitalism or through the perpetuation of social discrimination. And liberal property rights integrated in capitalist economies have played a fundamental role in the creation of a disenfranchised class.[1171] Private owners are necessary for capitalism to thrive, but there need be only a few; the majority of people are workers,

[1166] On use value and exchange value, see Bryan, *supra* note 229 at 10–14; Christophers, *supra* note 1145 at 97–98, 103–104. See also Waldron, *supra* note 64 at 207–220 on the various uses of property.
[1167] S Williams, *supra* note 1116 at 153.
[1168] Van der Walt, *supra* note 306 at 82, 96–97.
[1169] de Soto, *supra* note 266 at 200.
[1170] *Ibid* at 207–209.
[1171] Fudge & Tucker, *supra* note 3 at 4–7.

dependent on the owners of the means of production. Colin Crawford notes that in many instances poverty is the result not of lack of property, but of the "functions of its abundance" in the hands of a few.[1172] Similarly, Bonilla Maldonado notes that the existence of informality is a consequence of power relations and historical marginalization, and that the resulting inequalities are maintained by the denial of informal property—subversive to capitalist institutions—by states.[1173] Poverty is often maintained by the monopolization of resources, notably in rural settings, indicating that informality is an effect rather than a cause of poverty. De Soto presents statistics showing that the total assets of the poor are substantial,[1174] yet these assets remain divided among many people; whereas 'formal' capital is highly concentrated. In this context, formalizing property would not prevent social inequalities. For instance, in the US context, cited as a model of success by de Soto, African Americans have been systematically excluded from ownership despite the existence of strong, formal property institutions.[1175]

De Soto's theory underestimates culture's role in property relations, notably what one author has called the "culture of hierarchy" that maintains class divisions by inhibiting the emergence of a strong middle class.[1176] De Soto argues that the current situations in the Third World and former communist countries are no different from those in Europe and the United States in the past, and that the same kind of industrial revolution is taking place.[1177] So, while he suggests listening to the people on the ground, he adds that regional or national location is irrelevant because all countries go through the same phases of economic development. It is interesting to note that de Soto unconsciously adopts the 'ground zero' narrative described above when he proposes that the adoption of formal property rights in Europe and the US created a turning point in history, an original moment indicating the passage from desolation to prosperity for Western countries. He presents Western economic development as a historical point in time, making it appear more like a legend than an accurate reflection of facts.

[1172] Crawford, *supra* note 220 at 1091.
[1173] Bonilla Maldonado, *supra* note 282 at 224–225.
[1174] de Soto, *supra* note 266 at 31–32. The author notes that the total value of untitled real estate in the Third World and former communist countries amounted to at least 9.3 trillion US dollars, almost as much as the value of all publicly-listed companies worldwide.
[1175] See Harris, *supra* note 98; Priya S Gupta, "The American Dream Deferred: Contextualizing Property after the Foreclosure Crisis" (2013) 73:2 Md L Rev 523. See also discussion below at §7.3.2.
[1176] Gregory S Alexander, "Culture and Capitalism: A Comment on de Soto" in D Benjamin Barros, ed, *Hernando de Soto and Property in a Market Economy* (London: Routledge, 2010) 41 at 41.
[1177] de Soto, *supra* note 266 at 16–17.

Indeed, economic development and its benefits are influenced by a multiplicity of factors in location. De Soto suggests that in the Global South, class distinctions divide those with formal property rights from those who live informally,[1178] but this ignores the highly racialized nature of wealth disparity. In Peru, his country of origin, indigenous people are overwhelmingly poorer than European descendants and even immigrants. Colonial rule and practices in the Global South have established class and racial inequalities, something which de Soto downplays. Similarly, when discussing the United States, de Soto ignores how private property was granted on land forcefully taken from indigenous peoples. Indeed, the Homestead Act of 1862, which he cites as an example of successful consolidation of existing land squatting practices,[1179] also served as "a cheaper alternative to direct military force against the native Americans whom [the US] wished to supplant."[1180]

The difficult transition to formal legal systems is also informed in many places by the fact that 'formal' law was often foreign to traditional ways of regulating social relationships. Liberal property rights were imposed through colonial invasion in the Americas, and while the majority may have adopted this foreign law, this did not preclude conflicts of rights, as land management professor Robert Home notes:

> Colonialism created and maintained boundaries through dualistic or pluralistic legal structures, especially boundaries in physical space which were defined and managed by land laws and regulations. Customary or communal land tenure was territorially distinguished, systematically misinterpreted and undermined by the judiciary, manipulated by administrators and overlooked in legislation.[1181]

Thus, colonialism established lasting power relations between those who abided by these foreign property rules and those who didn't. Those at the bottom of the former colonial hierarchy are denied not only property, but practically everything else: rights, agency, and political influence. Focusing on property rights while ignoring the colonial past and its consequent dispossession and inequality fails to address this systematic regime of exclusion.

[1178] *Ibid* at 225.
[1179] *Ibid* at 111.
[1180] Robert Home, "Outside de Soto's Bell Jar: Colonial/Postcolonial Land Law and the Exclusion of the Peri-Urban Poor" in Hilary Lim & Robert Home, eds, *Demystifying the Mystery of Capital: Land Tenure and Poverty in Africa and the Carribean* (London: Routledge-Cavendish, 2004) 11 at 13.
[1181] *Ibid* at 15.

Ultimately, de Soto's focus on a mythical version of property as economic power absolves states from accountability. Were states to abide by de Soto's recommendations (but only those), the underlying causes of poverty would not be addressed. This is something that Judge Ramón Fogel Pedrozo of the IACtHR has expressed in his partly dissenting opinion in *Yakye Axa*, noting that "land is a necessary condition, but not sufficient, to create the conditions that ensure a decent life."[1182] He goes on to insist that the root causes of poverty in Paraguay—his country of origin—and Latin America be addressed more broadly. His brother, Judge Augusto Fogel Pedrozo, actually pursued the same line of argument in his partly dissenting opinion in *Xákmok*, adding that property should be viewed in context, notably the fact that many landless peasants in the region lived in extreme poverty.[1183] A generous interpretation of the right to property, no matter how creative, could never extend social protection to these groups.

States have more than a legal obligation to adapt their laws to the lived experiences of property, as de Soto suggests; under international human rights law, they have a positive obligation to ensure that everyone's social needs are met. Addressing the myth that economic, social, and cultural rights "flow naturally" from democracy and economic growth, the Office of the United Nations High Commissioner for Human Rights replied that "unless specific action is taken towards the full realization of economic, social and cultural rights, these rights can rarely, if ever, be realized, even in the long term."[1184] This does not seem accepted by de Soto. As Christophers notes, de Soto credits property with a power that it does not inherently possess, namely the alleviation of poverty: in capitalist economy, property's worth depends wholly on human action since it is parasitic to wage labour,[1185] including (I would add) reserving the benefits of ownership for the elite. De Soto's version of property seems almighty by nature, but formal titles are meaningless for the poor if political societies maintain social disparities that affect them. Now, if economic development is at stake, improved access to formal employment and labour protections may do more to benefit

[1182] *Yakye Axa*, *supra* note 644, partly concurring, partly dissenting opinion by Judge Ramón Fogel Pedrozo at para 31.
[1183] *Xákmok*, *supra* note 644, partly concurring, partly dissenting opinion by Judge Augusto Fogel Pedrozo at para 3, 8. He also suggested that poverty was in part due to financial and economic decisions favouring private actors (*ibid* at para 26).
[1184] Office of the United Nations High Commissioner for Human Rights, "Frequently Asked Questions on Economic, Social and Cultural Rights" (2008) OHCHR Fact Sheet No 33.
[1185] Christophers, *supra* note 1145 at 103–106. Christophers calls this voodoo economics, as it creates a mystification whereby property is isolated as a financial asset which in itself creates value (*ibid* at 95).

underrepresented segments of the population.[1186] If housing is the issue, subsidized housing or financial aid for building[1187] may be more appropriate than formalizing properties that are often precarious and dangerous. To fight institutionalized inequality, states can adopt strong anti-discrimination laws and policies. None of these measures is considered by de Soto despite his stated objective of fighting poverty in the Global South. This abdication of accountability is characteristic of Western liberalism's equation of property with liberty and autonomy, considering other interventions unnecessary. But this equation belongs to the realm of myth, and harms the poor.

7.2.3 The problem with formality

Formality is a key concept in de Soto's work: formal rights lead to stable and secure exchanges, recognizable by others. It is thus implicitly required in the axiom of property as economic power, since such power derives from capital's ability to be exchanged in capitalist markets. But this insistence on formality creates a distance with lived experiences of property, especially in the Global South, which display diverse ways in which people interact with property and land, even if they don't fit neatly within a capitalist economy. States cannot reject an interpretation of human rights only because it protects a relationship with land not recognized by their laws. Thus, the qualification by a state that a given property arrangement is informal or extralegal does not preclude that property to be protected as a human right. In fact, if human rights law is a law *across* laws, it seems that state legislation ought to recognize unorthodox property arrangement as 'formal,' granted such qualification leads to greater social inclusion.

To be clear, 'extralegal' settlements are not really 'without law,' something which de Soto recognizes,[1188] and which Bonilla Maldonado further illustrates in his empirical exploration of informal dwellings at the peripheries of Colombia's urban centers. Bonilla Maldonado observes that in the Global South, legal pluralism in property is the rule rather than the exception, as populations apply various normative schemes in their day-to-day exchanges.[1189] States generally recognize only liberal property in a formal way, yet he observes in Bogotá that the city provides

[1186] See Jacobs, *supra* note 214 at s95. Informality is also very much present in labour markets in the Global South.
[1187] See e.g. Sumila Gulyani & Ellen M Bassett, "Retrieving the Baby from the Bathwater: Slum Upgrading in Sub-Saharan Africa" (2007) 25:4 Environ Plann C Gov Pol'y 486 on the contribution of infrastructure investments as an effective way to secure better living conditions.
[1188] de Soto, *supra* note 266 at 23. Yet he says earlier that these rules are messy and unenforceable (*ibid* at 14).
[1189] Bonilla Maldonado, *supra* note 282 at 221–223.

services and collects taxes in the slums, and the residents of informal neighbourhoods regularly use formal state institutions to assert their titles.[1190] He notes that there is constant exchange and recognition in practice, yet formal legal channels fail to fully address this reality, not allowing "an accurate description of how property rights are actually imagined and practiced in a good part of the global South."[1191]

The stubborn insistence on formality is problematic: there are over one billion slum dwellers around the world, most in the Global South.[1192] In Latin America, around 80% of property is informal.[1193] Yet de Soto, while recognizing the plurality of legal mechanisms to regulate property,[1194] still argues for their convergence into a single, state-based legal structure, to facilitate standardized communications.[1195] De Soto and Bonilla Maldonado observe the same things—the existence of plural legal norms, the strength of extralegal arrangements—but suggest different solutions. Bonilla Maldonado favours a legal recognition of pluralism rather than the integration of informal normative schemes with mainstream law.

Of course, informality—to be 'outside of the law'—is not something people necessarily wish for, and many informal owners would ultimately prefer formal legal recognition, if only to protect their possessions.[1196] Informality leaves people vulnerable to arbitrary evictions and can lead to social exclusion and environmental degradation.[1197] Yet denying the reality of extralegal arrangements can only lead to further marginalization; in some cases, formalization may not be an option, whereas in others (such as indigenous land tenure) the choice to reject state property law may be a conscious one based on cultural and social values.[1198] For some, non-state law may be more

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[1190] *Ibid* at 236.
[1191] *Ibid* at 214. De Schutter equally notes that Western property rights can be problematic in the rural south, De Schutter, *supra* note 285 at 316.
[1192] See Participatory Slum Upgrading Programme, *Slum Almanac 2015/2016 – Tracking Improvement in the Lives of Slum Dwellers*, online: World Urban Campaign <https://www.worldurbancampaign.org/sites/default/files/subsites/resources/Slum%20Almanac%202015-2016%20EN_16.02_web_0.pdf>.
[1193] Bonilla Maldonado, *supra* note 282 at 221.
[1194] de Soto, *supra* note 266 at 27.
[1195] *Ibid* at 51–52; See also H Smith, *supra* note 554 at 1171.
[1196] As Bonilla Maldonado notes from his empirical work in informal settlements of Bogotá; see Bonilla Maldonado, *supra* note 282 at 237.
[1197] Working Group on Property Rights, *supra* note 1147 at 76.
[1198] See e.g. Pasternak, *supra* note 108 on resistance by the Algonquins to Canadian land policies. For Pasternak, the insistence by the Canadian government to impose its sovereignty through land policies shows a continuation of colonial practices (*ibid* at 116).

appealing since it allows for more local participation and consensus-based decision-making.[1199] On the other hand, formalizing property titles means capitalizing them and entering hierarchical legal and financial systems (for instance loans) that can lead to seizures or foreclosures, without consideration for social concerns such as securing shelter. But, for many, the idea that their house could be subject to market forces is not a comforting thought.[1200] In fact, many national legal regimes restrict commerce involving certain types of property based on its function. For instance, in Quebec civil law, family residences and some related assets are considered 'family patrimony,' in which case restrictions to their alienation apply.[1201] People may desire formality simply because they want their possessions to be secured against external threats, not necessarily because they want their homes to become a source of financial investment.

Yet, de Soto's focus on market-integrated property through formalization leads to a very narrow understanding of the 'value' of property. For instance, he writes: "[Formal property] invites you to go beyond viewing the house as mere shelter—and thus a dead asset—and to see it as live capital."[1202] Describing the house as capital seems inconsistent with his stated objective of poverty alleviation, considering that most people usually work and accumulate capital *in order to* provide shelter (and security generally) for themselves and their families. Interestingly, while he disincarnates the home by downplaying its idealized protection role, he gives "life" to capital, that supernatural force which moves societies from a state of dependency to economic and social prosperity.

An important feature of formal liberal property rights, at least for real property, is titling and registration. De Soto advocates listening to the poor in drawing up new rules of formal property rights, yet assumes that lived property will lead to fixed boundaries defined clearly in registries—in his view, the best way to encourage communication and exchanges.[1203] But this kind of standardization can only lead to further marginalization, since any nonconforming approach to land is automatically excluded. Clear titles are supposed to bring security, but empirical evidence shows that they are not the only means thereto, nor do they guarantee it.[1204] Research in sub-

[1199] Home, *supra* note 1180 at 21.
[1200] *Ibid* at 22.
[1201] Article 414-426 Civil Code of Quebec, CCQ 1991.
[1202] de Soto, *supra* note 266 at 48.
[1203] On how standardized language through land records facilitate communication, see H Smith, *supra* note 554 at 1171.
[1204] De Schutter, *supra* note 285 at 319–322.

Saharan Africa showed that legal recognition of titles did little to improve slum dwellers' lives, whereas concrete infrastructure investment was effective.[1205] Other studies noted that formal titles can actually impede the livelihoods of pastoralists and fishers by "fencing them off from the resources on which they depend,"[1206] and restrict women's access to land in countries where formal property rules favour male owners.[1207] Visibility through formalization can also expose small land and home owners to the pressures of financial markets and speculation, threatening the security of their tenure.[1208] And formal titles cannot necessarily encompass indigenous peoples' dynamic relationships with land.[1209]

These examples do not argue against formalization *per se*, which is, after all, a form of legal recognition. They argue against the application of neutral legal rules without sensitivity to context, needs, and unequal bargaining powers. They also serve to show that de Soto's attempt to address all problems of poverty and marginalization through the single solution of formal property rights is misguided. In human rights terms, the legal recognition of informal settlements (or any type of entitlement over a possession) should not be merely about recognizing a deed, but should also recognize the many investments people make in their homes—financial, temporal, and emotional. This broad assessment of the value of land has been applied in certain ECtHR agricultural property cases. For these investments to be recognized, lived experiences in location are more important than titles, something that was acknowledged in the findings of the *Sudan* case: the ACHPR opined that legal titles were not indispensable for the recognition of a violation of the right to property, especially when land had been effectively possessed for generations.[1210]

If human rights are about empowering those in need, overemphasizing mainstream normativity in property relationships is misguided. Van der Walt believes that property law should draw its sources from the margins, and be about those who have historically been without rights: the homeless, the poor, immigrants, women; as he puts it, those who experience law "from a position

[1205] Gulyani & Bassett, *supra* note 1187.
[1206] De Schutter, *supra* note 285 at 318.
[1207] See Carol M Rose, "Invasions, Innovation, Environment" in D Benjamin Barros, ed, *Hernando de Soto and Property in a Market Economy* (London: Routledge, 2010) 21 at 32. The Food and Agricultural Organization of the UN (FAO) observed that Nigerian women had greater access to land when the formal legal registration requirements were disregarded: see Gender and Land Rights Database – Nigeria, online: FAO <www.fao.org/gender-landrights-database/country-profiles/countries-list/land-tenure-and-related-institutions/en/?country_iso3=NGA>.
[1208] De Schutter, *supra* note 285 at 322; Crawford, *supra* note 220 at 1107.
[1209] See Nadasdy, *supra* note 943.
[1210] *Sudan*, *supra* note 700 at para 205.

of exclusion, poverty, weakness, vulnerability, and suffering."[1211] De Soto does not ignore the margins, but his approach requires that 'marginal' people conform to 'normalcy,' and does not seriously consider a fundamental reconstruction of property law. He views the margins through a classical lens, and although he creditably recognizes that the 'poor' have greater resources than commonly thought, his view of these assets is frustratingly focused on their value as capital.

An important contribution of de Soto's theory is his suggestion that property law ought to adapt to *in situ* practice, to the way people live, and to their social and economic needs. But he simplistically lumps all informal, poverty-stricken societies together in a homogenous 'site,' a mirror image of the equally homogenous, abstract space governed by 'formal' law. However, to take into account lived experiences is precisely to shun generalization, to delve into the particular—a quality lacking in the *Mystery of Capital*. De Soto's use of statistics fails to account for particular human experiences of property, rather painting a broad portrait of informal property in the Global South. An alternative to de Soto's monolithic solution is to involve people in democratic decision-making, as suggested by Crawford.[1212] The latter describes the Cantagalo project in Rio de Janeiro, where various actors of civil society, including residents of informal settlements, worked together to formalize titles—but also to improve infrastructure, social services, and other systems, in a coordinated way.[1213] Similarly, authors Hilary Lim and Robert Home observe that participatory approaches to land issues are better suited to the African reality:

> Community-based participatory processes in poverty assessment and reduction draw upon the experiences of the poor themselves, seeing social policy as filtered through networks of relationships, and shared assumptions and meanings, which vary greatly between societies.[1214]

De Soto's approach attempts to translate human experiences into market-friendly property rules, whereas participatory democratic processes aim to craft policies that respond directly to lived experiences in location, by enhanced property protection and otherwise. Ultimately, any attempt to impose fixed categories is potentially dogmatic and denies people's ability to express their needs in location outside that framework, even more so when property ownership is attributed powers which it does not inherently possess.

[1211] Van der Walt, *supra* note 306 at 89–90.
[1212] Crawford, *supra* note 220 at 1099.
[1213] *Ibid* at 1105.
[1214] Hilary Lim & Robert Home, eds, *Demystifying the Mystery of Capital: Land Tenure & Poverty in Africa and the Caribbean* (London: Routledge-Cavendish, 2004) at 4.

7.3 Myths of Land and Home: Permanence, Security, Privacy, and Social Existence

In 2008, the United States experienced a severe financial crisis which had repercussions across the world. The crisis was initiated by a burst housing bubble that left many financial institutions insolvent. Predatory home loans were issued with scant guarantees, leading to a rash of foreclosures.[1215] Beyond the resulting financial meltdown, this crisis revealed the downside of the American obsession with home ownership, which stems in part from the longstanding legal discourse insisting on the centrality of property to human life.[1216] The longing for home ownership was so strong that people were willing to make significant personal sacrifices and take on high and risky debts to satisfy it.[1217] In other words, in seeking a *feeling* of security through the home, people were willing to put themselves in an *actual* state of insecurity.

The US example illustrates the liberal maxim that owning property is the best way to attain social participation through the material world. But the rhetoric of individual ownership as tenure of choice is not exclusive to the US; many other Western countries have high rates of homeownership.[1218] This rhetoric takes the form of an endlessly repeated discourse: property provides autonomy, permanence, existence, security, control, shelter, stability, privacy, intimacy. These supposed benefits are particularly associated with immoveable property such as land or a home. As our analysis of regional case law showed, cases concerning agricultural or indigenous land, or people's homes, have over time demonstrated a more context-based approach to the right to property, where stories of lived property in location (including unorthodox ones) are treated with more respect. Remember that the ECtHR decided that the treatment of real estate changed whether it was considered 'property' or 'home,' stating that the home

> touches upon issues of central importance to the individual's physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community.[1219]

[1215] Gupta, *supra* note 1175 at 540.
[1216] Van der Walt, *supra* note 306 at 82.
[1217] See study reported in J Williams, *supra* note 238 at 326 (Fannie Mae National Housing Survey).
[1218] Kim McKee, "Young People, Homeownership and Future Welfare" (2012) 27:6 Housing Studies 853 at 853; Robert C Ellickson, *The Household: Informal Order Around the Hearth* (Princeton, NJ: Princeton University Press, 2008) at 326 [Ellickson, "Household"]; See also generally Lorna Fox, "The Meaning of Home: A Chimerical Concept or a Legal Challenge?" (2002) 29:4 JL Soc'y 580 writing in the English context [Fox, "Meaning"].
[1219] *Ivanova*, *supra* note 738 at para 54.

But these cases reveal many assumptions about the functions of real property which ought to be further explored, both to understand the power dynamics at play behind them, and to assess whether ownership appropriately responds to the needs of social human beings in a context of human rights enforcement. The prevailing discourse around land, home, and private property is so pervasive that it seems indisputable, like a myth, even to those that are excluded from its reach. The mythical form of land and home makes it so that disadvantaged members of contemporary capitalist societies—tenants, low-wage workers, migrants—aspire to the privileges of ownership, instead of envisioning better ways to attain social participation—for instance, better labour conditions, tenancy protection, and access to basic social services. After all, risky mortgage products that led to the US subprime crisis did no more than dangle the legendary benefits of real estate ownership before the eyes of a vulnerable population eager to pass the sacred gates of their own castle. Autonomy and safety are essential in a person's life, but are they really met by ownership? Could the alleged virtues of property not be met otherwise?

Contrary to the myth of property as economic power which is misleadingly approached as a rational truth, the myths of land and home are more readily accepted as fables (mother nature, home as castle), as romanticized accounts of people's relationships with the material world which, while not necessarily accurate, aim to convey shared feelings about their fundamental importance. But when these myths take on the liberal message that private, individual ownership is the best form of tenure, they lose their humanizing effect and promote exclusion. In the following sections, I will elaborate on the mythical virtues of land and home (§7.3.1) and explain how such idealized functions, when associated with private property, tend to create spaces of exclusion (§7.3.2).

7.3.1 The virtues of land and home

The ideas of home and land have been qualified in various ways,[1220] but I suggest we look at these myths along four axes, or 'broad virtues,' which are often cited in relation to home and land: *permanence*, *material security*, *privacy*, and *social existence*. Each of these can be said to enable

[1220] See e.g. Lorna Fox's division of the values of the home in Fox, "Meaning", *supra* note 1218 at 590: the home as a physical structure (material shelter); the home as territory (security and control); the home as a means of identity and self-identity (values and personal status); and the home as social and cultural phenomenon (locus for relationship with family and friends).

social participation—the question is whether property actually incarnates them, and if so, how well.

Permanence

While property law is often associated with abstract rights, land is concrete, immoveable, and stable. Of course, its stability implies more than just being physically in one place. Mattei describes land as "a psychological entity that enshrines the ideals of immobility, perpetuity, and absence of risk."[1221] The psychological element of land's permanence is increased by the passage of time: the more a given land is passed down through generations, the more anchored to that land the possessor is. Furthermore, land allows a person to settle down in a fixed place: home. It has been said that in the United States, the concept of home is an extension of land ideology, as it "replaced land as the dominant form of American property."[1222] Peñalver further argues that the importance of the home derives from its presence in land.[1223] As many authors have noted, the home represents control, continuity, stability, and rootedness.[1224]

Material security

Land is also fundamental for the resources it provides, which feed, shelter, and clothe ourselves.[1225] People build homes to shelter themselves from the raw forces of nature, but the security provided by land is particularly linked in liberal societies with the rise of agriculture as a way of exploiting land's resources (as opposed to hunting and gathering). Agriculture is the process of settling down and focusing labour on transforming and cultivating the surrounding land so that it provides them with economic stability. As a result, rural life has come to be associated with virtue, for instance in the discourse of the Catholic Church: after all, Adam, the first man, was a peasant who made his living from the land.[1226] Rural land was also associated early on with wealth and power, for instance by physiocracy, an agrarian economic school of thought prevalent in eighteenth century

[1221] Mattei, "Basic principles", *supra* note 283 at 84.
[1222] D Benjamin Barros, "Home as a Legal Concept" (2006) 46:2 Santa Clara L Rev 255 at 255.
[1223] Peñalver, "Virtues", *supra* note 366 at 834.
[1224] Fox, "Meaning", *supra* note 1218 at 593; Rifkin, *supra* note 213 at 132; Barros, *supra* note 1222 at 278–279; Davidson, *supra* note 1136 at 119–120; Peter Somerville, "Homelessness and the Meaning of Home: Rooflessness or Rootlessness?" (1992) 16:4 Intl J Urb & Regional Res 529 at 533.
[1225] Waldron uses the expression "material resources," by opposition to immaterial resources, to describe objects capable of satisfying human needs and wants; see Waldron, *supra* note 64 at 31.
[1226] On the relationship of men and environment in biblical writings and religious metaphor, see Chen, *supra* note 218 at 1266–1268; Gilbert Larguier & Bernard Bodinier, *La terre et les paysans en France et en Grande-Bretagne de 1600 à 1800* (Paris: Ellipses, 1999) at 78.

France which insisted on the importance of agriculture and private ownership as necessary conditions for national wealth.[1227] On the other side of the Atlantic, American agrarianism mirrored the physiocratic ideals. Thomas Jefferson, a prominent agrarian, said:

> Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, & they are tied to their country & wedded to its liberty & interests by the most lasting bonds.[1228]

In all these accounts, the cultivator or farmer is presented as this idealized virtuous figure who can do no wrong, an obvious fiction since mass agriculture in the nineteenth century depended on slavery, as already discussed. Still, American agrarianism remained strong even after the Great Depression, defending rural and agrarian interests against the threats of massive industrialization and (ironically) servile wage labour, with a strong nostalgic attachment to the mythical 'Old South.'[1229]

Privacy

A home provides shelter not only against nature, but also against the invasive reach of others: neighbours, foreigners, the state. The home protects one's privacy against external threats, power dynamics, and politics; it is a place for intimacy where one can be genuine and free.[1230] The home is thus presented as a private realm, a "haven" that allows the exclusion of unwanted others.[1231] This protective quality of the home, illustrated by the 'castle' metaphor and its impenetrable fortress, has been equated to the safety provided by the notions of sovereignty and inviolability of territory in international law.[1232] The myth of home further presents it as "the exclusive arena of

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[1227] Gérard Aubin & Jacques Bouveresse, *Introduction historique au droit du travail* (Paris: Presses universitaires de France, 1995) at 17.

[1228] Thomas Jefferson, *Letter to John Jay*, Paris, August 23 1785, online: Yale Law School, Lillian Goldman Law Library – The Avalon Project <avalon.law.yale.edu/18th_century/let32.asp>. Note that, according to Schlatter, Jefferson's agrarianism did not mean he favoured private property, since he believed that common lands were also necessary for farming; see Schlatter, *supra* note 291 at 195–196.

[1229] Chen, *supra* note 218 at 1276–1289. The author discusses the effects of agrarianism on US politics, notably by establishing a strong agricultural lobby to influence law-making. For an illustration of the agrarian 'Old South' nostalgia reproduced in popular culture, see Margaret Mitchell's classic novel *Gone with the Wind* (1936).

[1230] Fox, "Meaning", *supra* note 1218 at 591–592; Stephen J Schnably, "Rights of Access and the Right to Exclude: The Case of Homelessness" in GE van Maanen, A J Van der Walt & Gregory S Alexander, eds, *Property Law on the Threshold of the 21st Century* (Antwerpen: Maklu, 1996) 553 at 554 [Schnably, "Homelessness"]; Arendt, *supra* note 14 at 58–61.

[1231] Fox, "Meaning", *supra* note 1218 at 594; Somerville, *supra* note 1224 at 532; Barros, *supra* note 1222 at 265–270.

[1232] Blomley, "Territory", *supra* note 347 at 10.

personal growth and development."[1233] Finally, home and family are concepts which often go hand in hand since, as a private space, the home is the perfect space to develop family life.[1234]

Social existence

Land and home are also often viewed as central to social organization.[1235] Gray explains that the relationship with land property in particular can reveal "a deeply instinctive self-affirming sense of belonging and control."[1236] In turn, the home provides social status by projecting a certain image of oneself onto the external world: what we own, in particular in a consumerist society, determines our place in social hierarchies.[1237] The home is said to accomplish needs for affiliation and recognition, in that it establishes a person as a member of her community.[1238] Consequently, the home is idealized as the only true way to become a fully developed, responsible, valuable, and fulfilled citizen.[1239] And as a citizen one can participate in democratic decision making: the association of land ownership with political power is strong.[1240] Of course, this is not merely a fictionalized account of ownership: as the next section uncovers, real estate owners are more socially visible than non-owners, but this is not so much the effect of the inherent features of land and home as much as it is a result of policies and laws which privilege participation by proprietors.

7.3.2 Behind the myths: Land and home as spaces of exclusion

Both 'land' and 'home' are complex concepts that involve much more than mere ownership, but liberal rhetoric has made the association of the virtues of land and home with private property

[1233] Schnably, "Homelessness", *supra* note 1230 at 565.
[1234] Barros, *supra* note 1222 at 271–272; Fox, "Meaning", *supra* note 1218 at 600–601; Schnably, "Pragmatism", *supra* note 1114 at 365. Although Ellickson would suggest that the household and the family are two different concepts, see generally Ellickson, "Household", *supra* note 1218.
[1235] van Banning, *supra* note 11 at 324.
[1236] Gray & Gray, *supra* note 281 at 19.
[1237] Gupta, *supra* note 1175 at 538; Davidson, *supra* note 1136 at 126; Somerville, *supra* note 1224 at 534; Peñalver, "Virtues", *supra* note 366 at 835.
[1238] Davidson, *supra* note 1136 at 120–124; Crawford, *supra* note 220 at 1098; Peñalver, "Virtues", *supra* note 366 at 836–838; Stone, *supra* note 219 at 635.
[1239] Something expressed by Barros, *supra* note 1222 at 301. For a similar association in Europe, see McKee, *supra* note 1218 at 854.
[1240] Halpérin, *supra* note 218 at 89; Graham, *supra* note 46 at 40–42. According to Jeremy Webber, it is fairly recent that property and government are distinguished; see Jeremy Webber, "The Public-Law Dimension of Indigenous Property Rights" in Nigel Bankes and Timo Koivurova, eds, *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Oxford: Hart Publishing, 2013) 79 at 93.

pervasive.[1241] After all, modern liberal property rights emanated from concrete relationships with land, even if it ended up abstracting these.[1242] Part I discussed the liberal right to property's roots in the justification of despoliation of land and exploitation of others—indigenous peoples, women and men forced into slavery, industrial workers. These instances of exclusion are no less present in the mythical forms of property presented above.[1243] For instance, while American agrarianism paints a romantic image of the rural US, it was largely a bourgeois movement that ignored small proprietors and waged cultivators.[1244] To say, like Jefferson in the quote above, that cultivators are society's most valuable citizens implies a hierarchy with non-cultivators in a lower stratum.

In urban or suburban areas, valued owners are similarly distinguished from lowly non-owners. This exclusionary effect of the association of home and ownership, though common around the world, is particularly strong in the US.[1245] The American home is a carefully constructed image combining lived experiences and an idealized vision of what a home ought to be—a distinct version of normalcy.[1246] This social construct has historically been encouraged by a series of public policies favouring ownership as well as the repetition of the message that homeownership is among the noblest of American enterprises, a symbol of opportunity.[1247] In this rhetoric, the castle/home, most importantly, is *owned*, the logic being that only ownership can adequately provide stability, security, and autonomy, due to owners' financial and personal investments.[1248] Because of that, property law is prioritized in public decision making. For instance, in countries where the liberal myth of home is strong, the protection of other forms of tenure, like tenancy or affordable housing, is often neglected.[1249]

[1241] Fox, "Meaning", *supra* note 1218 at 604–605; Stephanie M Stern, "Residential Protectionism and the Legal Mythology of Home" (2009) 107:7 Mich L Rev 1093–1144 at 1095.
[1242] Mattei, "Basic principles", *supra* note 283 at 83; Gray, "Common Law", *supra* note 233 at 236.
[1243] J Williams, *supra* note 238 at 303; Rosser, *supra* note 98 at 127.
[1244] Chen, *supra* note 218 at 1589.
[1245] See McKee, *supra* note 1218 at 853; Michael Voigtländer, "Why is the German Homeownership Rate so Low?" (2009) 24:3 Housing Studies 355 at 359.
[1246] Somerville, *supra* note 1224 at 530; Schnably, "Homelessness", *supra* note 1230 at 563–564.
[1247] Schnably, "Pragmatism", *supra* note 1114 at 373; Stern, *supra* note 1241 at 1094–1096; Davidson, *supra* note 1136 at 125; Gupta, *supra* note 1175 at 534–535. On the rhetoric of opportunity in American law, see generally Stark, *supra* note 100.
[1248] Gupta, *supra* note 1175 at 530–531, 555; Stern, *supra* note 1241 at 1105; Ellickson, "Household", *supra* note 1218 at 44; Davidson, *supra* note 1136 at 125; Barros, *supra* note 1222 at 301–302; J Williams, *supra* note 238 at 326; McKee, *supra* note 1218 at 854.
[1249] See Stone, *supra* note 219 generally on how the American notion of home excludes tenants. See also Davidson, *supra* note 1136 at 125; Barros, *supra* note 1222 at 255; Thomas J Sugrue, "Introduction: The Housing Revolution we Need" *Dissent* (Fall 2018) 18 at 18–20; Stern, *supra* note 1241 at 1103, 1131; Gupta, *supra* note 1175 at 534;

The idealized home as geographic place creates a concrete boundary determining political and social existence. We have seen how voting was historically restricted to landowners in new democracies in the Western world, but even today "good citizenship" is associated with (home) ownership.[1250] Once more, this is said to derive from the fact that people owning houses have greater incentive to participate in decision-making, to protect their investment.[1251] This point of view not only treats non-owners as second-class citizens, it also ignores other factors that influence political participation, such as wealth or education, which unsurprisingly correlate with home ownership.

As for the homeless, excluded from the private sphere of the home, the liberal rhetoric of property condemns them to nonexistence.[1252] When the home—owned or not—is presented as the extension of a person's identity, as a "sanctuary" for personhood,[1253] homeless people have no identity.[1254] Peter Somerville notes that the notion of homelessness goes beyond simple 'rooflessness,' but is rather constructed by contrast to the home's virtues: if the home protects, homelessness leads to exposure; if the home provides for privacy, homelessness opens the way to surveillance; if the home provides roots, homelessness is transience; if the home provides a social status, homelessness is social invisibility.[1255] Similarly, Nicholas Blomley suggests that homelessness does not lie outside the realm of property ownership, but is in fact produced in part by its mechanisms, namely the housing market: the more real estate increases in financial value (allowed by a legal system emphasizing the sovereignty of property), the less affordable and accessible houses and rents become, leading to social exclusion.[1256] Thus, the constructed notion of the home as ownership creates a space in which one is either include or excluded from its benefits.

The idealized home is often a *white* household. For instance, the stereotypical US homeowner is a single-family suburban household, homogeneously white and middle-class.[1257] Racial minorities

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Schnably, "Pragmatism", *supra* note 1114 at 380; McKee, *supra* note 1218 at 853; Voigtländer, *supra* note 1245 at 359.

[1250] See e.g. commentary by Barros, *supra* note 1222 at 301.

[1251] *Ibid*.

[1252] Schnably, "Homelessness", *supra* note 1230 at 553–554.

[1253] See e.g. Radin, *supra* note 149 at 56–60.

[1254] Schnably, "Pragmatism", *supra* note 1114 at 375–379.

[1255] Somerville, *supra* note 1224 at 531–534.

[1256] Nicholas Blomley, "Homelessness, Rights, and the Delusions of Property" (2009) 30:6 Urb Geog 577 at 581.

[1257] J Williams, *supra* note 238 at 325; Davidson, *supra* note 1136 at 124–125; Gupta, *supra* note 1175 at 534; Rosser, *supra* note 98 at 139; Schnably, "Pragmatism", *supra* note 1114 at 366.

were historically considered to devalue properties, and thus "[t]hrough the late 1960s, federal housing agencies backed mortgages and loans only to residents of racially homogeneous neighborhoods."[1258] This created segregated neighbourhoods, leading to further discrimination in terms of access to various geographical areas, public services, and political participation.[1259] African Americans, historically excluded from homeownership programs, are still less likely to get mortgage loan applications accepted; meanwhile, resistance to greater integration of neighbourhoods persists.[1260]

The ideals of privacy and security can further exclude from within by presenting a uniform image of a household. The privacy of the home means in part that whatever happens behind closed doors stays behind closed door, so instances of violence can be hidden from public scrutiny.[1261] For victims of domestic violence (almost all of them women), the home is anything but a symbol of security.[1262] What's more, as a social construction, the home has different meanings for men and women.[1263] The idealized image of the home is a place where men come to rest and women stay to work. In this rhetoric of the home, women are often confined within the house and removed from public life.[1264] Yet, as Stephen Schnably notes, women may not have chosen to become housewives and thus define their identity.[1265]

Finally, even for owners, the 'status' conferred by homeownership is problematic. Nestor Davidson notes that overemphasizing the link between property and identity, as American rhetoric does, puts people in a state of vulnerability—a "status anxiety"—since it conveys the message that losing one's home amounts to losing one's sense of self-worth.[1266] Davidson adds that this anxiety is felt more strongly in times of economic instability, something illustrated by the 2008 housing crisis and the strong emotional reactions that foreclosures triggered.[1267] Priya Gupta notes that the

[1258] Sugrue, *supra* note 1249 at 18.
[1259] J Williams, *supra* note 238 at 328.
[1260] Rosser, *supra* note 98 at 136; Keeanga-Yamahtta Taylor, "How Real Estate Segregated America" *Dissent* (Fall 2018) 23 at 23–25; Gupta, *supra* note 1175 at 573–575.
[1261] See generally Elizabeth M Schneider, "The Violence of Privacy" (1990) 23:4 Conn L Rev 973; Sally F Goldfarb, "Violence against Women and the Persistence of Privacy" (2000) 61:1 Ohio St LJ 1.
[1262] Fox, "Meaning", *supra* note 1218 at 594.
[1263] Somerville, *supra* note 1224 at 535.
[1264] Schnably, "Homelessness", *supra* note 1230 at 563.
[1265] Schnably, "Pragmatism", *supra* note 1114 at 372–373.
[1266] Davidson, *supra* note 1136 at 122.
[1267] *Ibid* at 129–132.

crisis was "emotionally traumatic because people felt like they were losing parts of themselves."[1268] Indeed, in trying to attain the elusive 'American dream,' people made tremendous sacrifices: Davidson observes that American savings were particularly low just before the crash, showing how "status anxiety" led people to put their future at risk.[1269] Public policy and discourse in favour of homeownership encouraged risky ventures and overinvestment, and they particularly targeted lower-income households. African Americans were 50% more likely than their White counterparts to receive subprime mortgage loans from banks.[1270] Ultimately, fuelled by the liberal myth of home, the subprime crisis widened the wealth gap between rich and poor.[1271] The idealized version of home, while selling the prospect of a better life—in accordance with the discourse of human rights—acted in practice to delay it and create greater insecurity.

7.4 Land and Home Beyond Ownership: Turning the Myths Around

The idealized images of land and home tend to ignore real social problems, but as Davidson notes about homeownership, property should not be a "default solution to complex problems."[1272] Indeed, many people in a state of insecurity face situations that cannot be solved simply by owning a plot of land or a home. Still, the virtues of land and home are often expressed by 'lay' people. Joan Williams recalls a 1992 survey of Americans' relationship with homeownership, in which many people, answering an open-ended question, reported that home gave them a "sense" of security and permanence, the report concluding it acted as a "metaphor" associated with family life, empowerment and control.[1273] What is striking is these words do not describe actuality: property gives a "sense," it is a "metaphor." It does not say that property *provides* security and control, or that it *supports* the family—it only *seems* to do so. This language shows the power of repeated narratives to concretize myth. But relationship with the material world is by no means limited to private property, or even any possessory privileges: it can be for instance about protecting a person's respectful use or occupation of a given place. Furthermore, the virtues of

[1268] Gupta, *supra* note 1175 at 556.
[1269] Davidson, *supra* note 1136 at 127.
[1270] KY Taylor, *supra* note 1260 at 24; Stern, *supra* note 1241 at 1103; Gupta, *supra* note 1175 at 537, 575–576.
[1271] Sugrue, *supra* note 1249 at 19; KY Taylor, *supra* note 1260 at 24; see generally Gupta, *supra* note 1175 on the consequences of the subprime crisis on low-income households.
[1272] Davidson, *supra* note 1136 at 137.
[1273] J Williams, *supra* note 238 at 327. National Housing Survey, conducted monthly by the US Federal National Mortgage Association (Fannie Mae).

permanence, security, privacy, and social existence, all of which can lead to social participation, are by no means limited to fixity in a particular place: they can just as well be attained through social relationships, cultural expressions, and community building, which are located, yet dynamic.

It must be remembered that the language of human rights is much richer than the limited vocabulary of ownership, and it is worth developing the former rather than focusing our efforts on broadening the latter. I thus propose to examine how the virtues associated with land and home can be thought of outside the language of property, capitalist enterprise, and wealth maximization. For instance, permanence on land for indigenous peoples can be attained through reinforced rights of political participation (be it within existing Westphalian states or through independence), or through action for sustained economic and social development (§7.4.1). Secure shelter can be ensured by protecting 'tenure' more broadly to include tenants and informal dwellers (§7.4.2). And social existence can be encouraged by protecting social relationships rather than property relationships, emphasizing *access* to the social world rather than trying to fix it materially via property (§7.4.3). The examples that follow are not mutually exclusive: claims of social participation can intersect, interact, and sometimes mutually contradict; some show the lasting importance of land, while others illustrate that it is secondary to expressed needs in location. But these examples are meant to illustrate how understanding universal rights is more a matter of process than substance: it means asking the right questions (What do people need to be empowered in their social relationships?) to the right people (the marginalized, the underrepresented), instead of using fixed rules of law or distorted myths as our starting point.

7.4.1 Permanence through recognition

Land's special place in people's imagination is instinctive and justified. Peñalver notes that land possesses features that distinguishes it from other forms of property. First, it is complex, having many different physical forms and relationships with human beings: "a crucial feature of land's complexity is its role as a template for—and a practically necessary ingredient in—the full spectrum of human aspiration and activity."[1274] Also, land is memory, since humans use it in ways that persist and grow over time, for example by building on it or cultivating it.[1275] From these facts,

[1274] Peñalver, "Virtues", *supra* note 366 at 829.
[1275] *Ibid* at 830.

he argues that considering land purely from the viewpoint of wealth maximization—as de Soto does—prevents us from appreciating its varied functions.[1276]

But approaching every land matter as a matter of property is equally problematic. Land does not need to be *owned* in the liberal sense to incarnate permanence, rootedness, and connection with the physical world. It is only recently, even in the West, that most land was considered subject to private property.[1277] For instance, before the enclosure movement in England, rural lands were largely held communally, with multiple households using them at once.[1278] And while Locke's and Adam Smith's theories have dramatically changed that culture in Western liberal nations, communal property remains the norm in many places, especially within indigenous communities.

Indigenous land claims examined in regional case law confirm that land is indeed fundamental for them: land is embedded in social life, it is a cultural symbol, and it embodies spiritual life through the natural world which outlives people. What indigenous land claims do *not* show is that the right to property is the only legal mechanism to assess their attachment to land: greater political recognition through the right of self-determination (granting the jurisdiction to manage land and resources as indigenous peoples see fit) or reinforced conditions for economic and social development (providing basic services adapted to indigenous cultural needs in a view of strengthening their autonomy) can equally do so. As Bryan explains, English (liberal) conceptions of 'property' are ontologically different from indigenous ones, making it hard to transfer notions from one to the other.[1279] Indeed, the use of the language of property, a seemingly innocent and apolitical convention, can occult legitimate claims for autonomy, emancipation, and self-determination, as well as claims for the reparation of past colonial violence. Usually, territory in international law is associated with political sovereignty.[1280] As Robert Home notes:

> Not only is the modern nation-State partly defined through its territorial claims to sovereignty, but the construction and exercise of State power takes place within this territory, giving spatial geography a heightened significance in most of the State's activities.[1281]

[1276] *Ibid* at 822–823.
[1277] Bryan, *supra* note 229 at 8.
[1278] Graham, *supra* note 46 at 51–55; Thirsk, *supra* note 65.
[1279] Bryan, *supra* note 229 at 4–7.
[1280] Blomley, "Territory", *supra* note 347 at 2; Nadasdy, *supra* note 943 at 503–505.
[1281] Home, *supra* note 1180 at 11.

Yet this territory-based power is potentially denied to indigenous peoples when their claims of sovereignty are presented as claims of property in the international legal system.[1282] Of course, property does provide power, but not the kind that territorial sovereignty does—namely, exclusive jurisdiction.[1283] Indeed, sovereignty over territory granted by ownership is always subject to the control of the nation-state's overarching jurisdiction, for instance property laws incompatible with indigenous conceptions of land.

Still, as already mentioned in Part II, the notions of boundary and title associated with sovereign territory do not accurately reflect many indigenous peoples' kinship-based relationship with land,[1284] nor do they apply well to nomadic, semi-nomadic, pastoralist, or hunter-gather communities. Judge Sergio García Ramírez, in his separate opinion to *Sawhoyamaxa*, noted the limits of using the word 'property' to describe indigenous tenure:

> I am forced not to object to the use of the term 'property' to describe the rights of the indigenous peoples [...] over the lands they have owned and over those they currently own, provided it be understood that, in the instant case, the property rights are "qualified", that is to say it has unique characteristics, which correspond in some aspects to ordinary ownership, but differ radically from it in others. The idea of putting the indigenous form of ownership —i.e., the indigenous landholding under their particular customary law— on the same footing as that of the civil law also preserved under Article 21 of the Convention may prove extremely disadvantageous to the legitimate interests and lawful rights of the indigenous people.[1285]

Judge García Ramírez outlines in this passage that liberal semantics do not appropriately reflect indigenous relationships with land, and thus can never perfectly protect them. This has been observed in many instances in Canada. Relating the experience of resistance of the Algonquins of Barrier Lake in their relations with Canada, Shiri Pasternak illustrates how the Western rules of sovereignty and property can undermine the claims of land jurisdiction made by indigenous peoples, noting that

[1282] See notably Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40:1 Harv Int'l LJ 1 at 76–77 on inadequacy of international law in translating needs of indigenous peoples.
[1283] Pasternak, *supra* note 108 at 9–10.
[1284] Nadasdy, *supra* note 943 at 501, 507; Thom, *supra* note 943 at 179–181; Bryan, *supra* note 229 at 27; Pasternak, *supra* note 108 at 27.
[1285] *Sawhoyamaxa*, *supra* note 762, separate opinion by Judge Sergio García Ramírez at para 16.

> liberal theorists conflate *imperium* and *dominion* in social contract theory, which assumes that Indigenous people make demands on society in the register of property rights and ownership, rather than in the register of governance and jurisdiction.[1286]

In other words, Western liberal mythical categories deny indigenous peoples the possibility of self-determination, of organizing their society as they see fit through a vision of jurisdiction that is not necessarily based on territorial sovereignty.[1287] Sovereignty does not (or rather should not) require exclusive control over territory in order to be asserted.[1288] By circumscribing the language available to indigenous peoples in this way, it limits their options for collective emancipation.

Of course, the language of property, widely recognized and accepted, offers a strong basis for defending indigenous claims through legally enforceable mechanisms. It has been noted that the IACtHR's generous reading of the right to property has led to broader political recognition for indigenous peoples, as it provides a tangible base for their claims of autonomy.[1289] However, this repeats the perverse adage that only owners have political visibility. In this view, indigenous groups must change their traditional cultural and legal practices in order to resist colonial annihilation of their lands, adopting the language of the invader even if that language cannot describe their relationship to land. Paul Nadasdy observed this with Yukon indigenous communities, who were asked to draw maps of their respective territories even if such a process was foreign to their kinship-based interactions.[1290] A dramatic effect of the imposed mapping exercise was ultimately to create a rise in ethno-territorial nationalism between Yukon peoples which did not exist traditionally.[1291] One author has noted that international law obsessively relies on maps, but in a way that limits diversity and fluidity.[1292] The premise of such a process is thus flawed, since, as Bryan notes, it imposes a Western ontology onto Indigenous knowledge and experience while representing that ontology as the only possible one.[1293] Using the language of property to address indigenous land issues falls short of full political autonomy.

[1286] Pasternak, *supra* note 108 at 116.
[1287] *Ibid* at 8–16.
[1288] Nadasdy, *supra* note 943 at 504–505. As an example of an alternative to property to manage indigenous land, see generally Pasternak, *supra* note 108.
[1289] Isailovic, *supra* note 292 at 437.
[1290] Nadasdy, *supra* note 943 at 514. Even the notion of 'bands' was foreign to Yukon peoples, but was nonetheless adopted to allow negotiation with the Canadian state (*ibid* at 508). See also Thom, *supra* note 943 at 179–182 on the inadequacy of the mapping process of indigenous lands of Coast Salish.
[1291] Nadasdy, *supra* note 943 at 528–529.
[1292] Pearson, *supra* note 37 at 505.
[1293] Bryan, *supra* note 229 at 5.

Indigenous claims for recognition can be answered in other ways. Cultural rights, for instance, may better answer the needs of indigenous peoples when it comes to their relationship with land. Unfortunately, the IACtHR has refused to take that road, notably in the *Kichwa* case, in which the community tried to make an argument about the right to culture through Article 26 (progressive realization of economic, social, and cultural rights) but was told that the matter had already been settled through Article 21.[1294] In his dissenting opinion in *Yakye Axa*, Judge Abreu Burelli nonetheless mentioned how culture is transcendent in many articles of the Convention,[1295] not just the one on property. By contrast, the United Nations Human Rights Committee agreed to refer to ICCPR Article 27, which protects minority cultural rights, in its consideration of indigenous land rights in *Ominayak and Lubicon Lake Band v Canada*.[1296]

Perhaps the *Ogoni* case of the ACHPR best illustrates how indigenous needs can be assessed outside the limited framework of property, the Commission having chosen in that case to approach the violations of indigenous lands as a violation of the right to economic and social development. What the *Ogoni* case shows is that ensuring the survival of indigenous peoples is not just a matter of protecting their land, but also of cultivating an environment that allows indigenous peoples to fully develop themselves according to their needs. Once more, the formulation of rights in the African Charter enabled the ACHPR to address people's needs in a more straightforward way, protecting indigenous self-determination through a general obligation to protect culture, security, and dignity, of which property is but one component. The ECtHR and IACtHR, constrained by their instruments, must use interpretative twists in order to provide positive meaning to the right to property, with all the restrictions this entails.

The right to self-determination is important in addressing indigenous peoples' needs, but the concept of the *right to land* can also play a part, particularly in their economic and social development. This right is not explicitly recognized in international law, but is viewed by scholars and practitioners as implicit in existing rights to property, housing, and food.[1297] It frames land within its role in people's economic, social, and cultural lives, based on expressed needs in

[1294] See *Kichwa*, *supra* note 646 at para 137 (representatives' argument) and para 230 (response of the court).
[1295] *Yakye Axa*, *supra* note 644, partially dissenting opinion of Judge A. Abreu Burelli.
[1296] *Ominayak and Lubicon Lake Band v Canada* (1990), Communication No 167/1984, UNHRCOR, 38th Sess, UN Doc CCPR/C/38/D/167/1984. The authors of the complaint did clarify in this case that their claim was not related to territorial rights, but to the management of resources within that territory (at para 12).
[1297] See generally De Schutter, *supra* note 285.

location, and is viewed as crucial in poverty alleviation. De Schutter has proposed that for the rural poor who depend on agriculture for their subsistence, the right to land is a better paradigm than private ownership.[1298] This can mean supporting efficient, redistributive, government-led agrarian reform,[1299] or providing greater labour protections for rural workers to recognize land's sustaining function in rural settings.[1300] Indeed, the right to land is about more than just tenure: it also addresses the means whereby people benefit from land, such as the availability and accessibility of services, credit, and markets.[1301] Thus, rights of *use* and *access* are emphasized over formal ownership, for instance for women who are often underrepresented as owners in poor countries, even when they are the principal tenders of land.[1302] The right to land seeks to prevent exclusion and isolation.

To be clear, indigenous land claims are not devoid of mythical formation, in the sense of repeated narrative conveying shared beliefs—quite the contrary. Knowledge of indigenous territories is often transmitted orally from generation to generation, something illustrated notably in the 1996 Canadian Supreme Court case *Delgamuukw v British Columbia*.[1303] In this decision, the Gitksan and Wet'suwet'en had respectively submitted as evidence their *adaawk* ("a collection of sacred oral tradition about their ancestors, histories and territories") and *kungax* ("a spiritual song or dance or performance which ties them to their land"),[1304] which the trial judge had described as being "repeated, performed and authenticated at important feasts."[1305] For the Supreme Court, the form of this evidence did not affect its validity, especially "in light of the difficulties inherent in

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[1298] *Ibid* at 303–304. See also FAO, *The State of Food Insecurity in the World 2013 - The Multiple Dimensions of Food Security* (Rome, 2013).

[1299] De Schutter, *supra* note 285 at 305. Note that agrarian reforms are controversial; see van Banning, *supra* note 11 at 325–331.

[1300] See e.g. *Declaration on Social Progress and Development*, GA Res 2542(XXIV), UNGAOR, 24th Sess, UN Doc A/RES/2542 (1969) Article 6, recognizing the importance of forms of ownership of land respectful of workers' needs.

[1301] Valencia Rodriguez, *supra* note 11 at 311. See also FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, fisheries and Forests in the Context of National Food Security* (Rome, 2012).

[1302] Working Group on Property Rights, *supra* note 1147 at 78. See e.g. *Transforming our World – The 2030 Agenda for Sustainable Development*, GA Res 70/1, UNGAOR, 70th Sess, A/RES/70/1 (2015), Goal 5.a asking states to:

> "Undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws."

See also *CEDAW*, *supra* note 10, which explicitly mentions property as a domain in which equal rights ought to be granted to women. For a detailed discussion on property dispositions in CEDAW, see J Alvarez, *supra* note 220 at 658–662.

[1303] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [*Delgamuukw*].

[1304] *Ibid* at para 13.

[1305] Cited in *ibid* at para 93.

adjudicating aboriginal claims."[1306] In this example, what distinguishes the use of myth in indigenous legal traditions from the liberal myths presented above is that the former myths are rooted in a shared sense of community, whereas the liberal myths of land and home, asserting themselves as self-evident, tend to antagonize and divide.[1307] Unlike liberal property myths, indigenous myths like those described in *Delgamuukw* do not try to impose a particular structure to order the world, but are framed in terms of relationships, continuity, and community—a 'procedural' framework arguably more connected with the mission of human rights than the idea of fixed lists of rigid rights.

7.4.2 Security through the protection of tenure

While the liberal myth of home tends to exclude, it is no less true that our living spaces are of fundamental symbolic importance to us as social beings: they are places where we can rest, out of public view, while developing social relations with family and friends.[1308] But a person's house is not always owned (or owned formally), something which the liberal myth downplays. Thus, debunking the myth of the home requires expanding the idea of home—as shelter, privacy, continuity, centre of family life—beyond ownership. By creating in law an image of the home as an exclusively owned house, one excludes other ways of addressing the needs that a home satisfies, for instance through tenancy. The African Commission, in the *Ogoni* case, understood how home is a more complex concept than property, drawing a right to housing from a combination of the right to property, the right to health, and the protection of the family as a social unit, and by extending such a right to tenants as well.[1309]

A bottom-up approach to 'home' asks what the home aims to accomplish. It does not reject the symbolism of home, but looks for these symbols in concrete lived experiences. Gupta suggests that, when putting homeownership in context (asking why people want to buy a house, what the incentives are, who benefits from it) and assessing its interconnectedness within societies (how one's property affects others and the environment), what seems to matter most is the "agency and dignity that comes from having secure tenure in a home," something that is not necessarily attained

[1306] *Ibid* at para 98.
[1307] Fitzpatrick, *supra* note 55 at 62–65.
[1308] See Fox, "Meaning", *supra* note 1218. See contra Stern, *supra* note 1241, who believes the psychological importance of home is overstated, at least in the US context.
[1309] *Ogoni*, *supra* note 662 at para 60–61.

through traditional private ownership.[1310] The idea of *tenure*—also central to the right to land—offers a comprehensive and flexible alternative to ownership, since it encompasses various concrete relationships with the material world, guided by the principle of access rather than exclusion.[1311] The notion of tenure can also imply shielding a person's property (their family home, for instance) from market forces, if this is necessary to ensure a person's social participation—something that de Soto's property rights do not address.

Once such form of tenure is residential tenancy.[1312] While in some countries tenancy protection is lacking, in many places tenancy rights are uncontroversial and do not require the 'prestige' of property to be applied efficiently. Germany is an interesting example: only 43% of Germans own their house, one of the lowest homeownership rates in the world.[1313] Residential rental units there are of good quality and are an attractive option for different social classes, aided by a series of regulations and policies encouraging (though not forcing) landlords to maintain supply.[1314] Thus, where renting is made available and advantageous for both tenants and landlords, the romanticized image of the owned home loses its shine, since the needs for shelter, security, and community anchorage can be met otherwise.

Even in Western countries with high rates of homeownership, the breakdown of these numbers in location presents a different picture. In Canada, while the most recent data (from 2016) show a total homeownership rate of 67.8%, these numbers are much lower in the large centres: Montreal has an ownership rate of 37%, Vancouver 47%, and Toronto 53%.[1315] Meanwhile, the places with the highest rates of homeownership are suburbs and small towns. There are many reasons for these differences: owning land can be seen as more advantageous in rural regions where many people live off agriculture; city dwellers may have more limited purchasing power due to their economic

[1310] Gupta, *supra* note 1175 at 579.
[1311] De Schutter, *supra* note 285 at 314–316; FAO, *supra* note 1301 at points 4.4-4.7.
[1312] Gupta, *supra* note 1175 at 581.
[1313] Voigtländer, *supra* note 1245 at 355.
[1314] *Ibid* at 358–362. The particular post-war circumstances of Germany and the need to replenish the housing stock explain in part the situation in that country. For more context on the German housing market, see Stefan Kofner, "The German Housing System: Fundamentally Resilient?" (2014) 29:2 J Housing & Built Envt 255–275; Sebastian Kohl, "Urban History Matters: Explaining the German–American Homeownership Gap" (2016) 31:6 Housing Studies 694. See also the case of Sweden where homeownership rates are also very low due to the construction of over 1 million state-subsidized rental units between 1965 and 1974, described in Ellickson, "Household", *supra* note 1218 at 91.
[1315] Andra Hopulele, "Homeownership Rates Drop in 88 of Canada's 100 Largest Cities", (13 September 2018), online: *Point2Homes (blog)* <https://www.point2homes.com/news/canada-real-estate/homeownership-rates-drop-88-canadas-100-biggest-cities.html>.

circumstances. There may even be cultural factors that explain lesser or greater importance assigned to ownership.[1316] Whatever the reasons, focusing on ownership as a way of enabling people's security through their possessions offers only a partial solution, whereas an approach emphasizing the protection of tenure allows greater reach, especially when each person's located circumstances are taken into account.

The idea of tenure is also better adapted to many Third World cities with a preponderance of informal housing arrangements. Flexibility and adaptability are essential in establishing tenure, something that even the ECtHR has recognized in some cases of mass violations of human rights (for instance where forced displacement limits the accessibility or even existence of administrative registries), allowing for lived experiences to determine the existence of a possession over landed property in the absence of a formal title.[1317] Many recent initiatives at the international level have thus prioritized the language of tenure to address matters related to the interactions of land and poverty, for example the Global Campaign for Secure Tenure, launched by UN Habitat (the United Nations Human Settlements Programme) to improve the lives of people living in slums and informal settlements with a focus on residential tenure and housing,[1318] and the Food and Agricultural Organization's 2012 Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, developed to address poverty and hunger alleviation through access to land.[1319] Both initiatives are focused on the marginalized and underrepresented, and prioritize the development of horizontal governance and participation over legal reforms, encouraging substantive empowerment of slum dwellers, the rural poor, and their partners on the ground.[1320]

The concept of tenure is also central to the right to housing, which is often a better option than the right to property to address relationships with home in the Global South, for example in the *Ogoni* case, but also in the oft-cited *Grootboom v South Africa*.[1321] In that case, a group of persons looking

[1316] See *ibid* showing that out of 20 cities with the lowest homeownership rates, nine are in Québec. The Quebec Federation of Real Estate Boards commented in this post that homeownership was less culturally important in Quebec than in the rest of Canada.
[1317] See discussion above at §6.2.1.
[1318] See Global Campaign for Secure Tenure, online: UN-Habitat <https://mirror.unhabitat.org/categories.asp?catid=24>
[1319] FAO, *supra* note 1301.
[1320] See e.g. *Ibid* at 1, objective 1.1.
[1321] See e.g. *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZAAC 19 (S Af CC) [*Grootboom*].

for a place to live had illegally settled on private land destined to receive low-cost housing, but soon found that the owner of the land had violently destroyed the homes they had built and evicted them. The South African Constitutional Court, applying the constitutional right to access to housing, condemned the failure of the state to quickly provide these people with decent accommodations, clearly stating how this case directly touched upon the dignity, freedom, and equality of the dwellers.[1322] Most importantly, the Court examined the case in broad context—widespread informal settlements as a result of apartheid—and the specific circumstances of the dwellers—extreme poverty and precariousness of previous living arrangements[1323]—arguing that what constituted adequate housing depended on these contextual factors:

> The state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.[1324]

This located and integrated approach allowed them to view the land invasions as not merely illegal, but rather a national problem requiring diligent and prompt attention, especially for those in the most desperate living conditions.[1325]

The approach taken by the South African Constitutional Court accords with developments in international law on the right to housing, on which it relied significantly in *Grootboom*.[1326] Contrary to the right to land, the right to housing is formally protected at the global level through ICESCR Article 11 which guarantees the right to an adequate standard of living, including adequate housing. It extends to any form of tenure that provides for the virtues associated with the home, such as tenancies, cooperatives, public accommodations, and informal settlements.[1327] And contrary to the abstract liberal right to property, the right to housing has been interpreted by the Committee on Economic, Social, and Cultural Rights (CESCR) as a located right aimed at

[1322] *Ibid* at para 23–24.
[1323] *Ibid* at para 6–8.
[1324] *Ibid* at para 37.
[1325] *Ibid* at para 56–66.
[1326] *Ibid* at para 26–33.
[1327] CESCR, *General Comment No 4: The Right to Adequate Housing (Art 11(1) of the Covenant)*, UNESCOR, 6th Sess, UN Doc E/1992/23 (1991) at para 8(a).

empowering social persons. The CESCR has shared the view that the right to housing was more than "a roof over one's head" or a "commodity," framing it as the "right to live somewhere in security, peace and dignity."[1328] Thus, the CESCR emphasizes the objective of the right over its rigid formulation. It has further interpreted the right to housing as depending directly on context and localized factors (social, climatic, or cultural,)[1329] and as being specifically attached with the participation of "social groups living in unfavourable conditions" rather than "benefit[ing] already advantaged social groups at the expense of others."[1330] In another General Comment concerning forced evictions, the CESCR suggested a list of these vulnerable groups that included women, children, youth, the elderly, indigenous people, and ethnic and other minorities.[1331] What's more, the CESCR seems to expand the protection against eviction to extralegal dwellers, noting that evictions should not lead to homelessness or increase people's vulnerability to violations of their human rights.[1332]

The case of homelessness is interesting in addressing social participation through the concept of home. While it may be said that the home and its association with privacy are by no means constrained within four immovable walls—as the Romani example illustrates well—the homeless still seem excluded from its protective reach. Schnably notes that two of the main causes of homelessness in the United States are job loss and housing costs.[1333] Evictions of tenants or illegal settlers can result in homelessness, as in *Grootboom*. Some people are driven to the streets because of financial problems or mental health issues. Some have been ostracized from their conservative communities. The reasons for this particular human rights problem are many, and so are its possible solutions. Using the right to property—or even a narrow focus on the right to housing—as a starting point in these cases fails to address the needs of the homeless, offering a roof but not necessarily relief. Framing their situation as a simple lack of material anchorage clouds the bigger picture: economic instability which can lead to job losses; deficient access to health services; tolerance of marginalizing cultural practices. These are but a few examples to show that a better approach is to understand the needs of people within their location based on their circumstances

[1328] *Ibid* at para 7.
[1329] *Ibid* at para 8.
[1330] *Ibid* at para 11.
[1331] CESCR, *General Comment No 7: The right to adequate housing (Art 11.1): forced evictions*, UNESCOR, 16th Sess, UN Doc E/1998/22 (1997) at para 10.
[1332] *Ibid* at para 16. This position is also reprised in FAO, *supra* note 1301 at point 16.9.
[1333] Schnably, "Homelessness", *supra* note 1230 at 556.

and complex relationships, and to use this bottom-up knowledge to evaluate the appropriateness of human rights in an integrated and responsive manner. This is why a person's lived experiences should always be given precedence to rights, however inclusive they seek to be.

7.4.3 Social existence through social relationships

The rights to land and housing discussed above protect more than a title, they protect *access* to the physical world and its utility for social participation. As opposed to liberal property rights, which exist regardless of use, the home is occupied for the specific function of providing shelter, and through that, a person is able to interact with their communities, voice their needs, and contribute to society. Furthermore, what the discussion of homelessness above hints at is that access takes many forms: to better services, to infrastructure, to employment, to people who share our beliefs and cultural preferences. That access—not the means to it—is what provides social participation, since it means solidifying relationships with others and making the marginalized visible.[1334] Access empowers the social human being.

It may be true that, historically, property was the best means to accessing social life. As Arendt notes when discussing the difference between property and wealth:

> Originally, property meant no more or less than to have one's location in a particular part of the world and therefore to belong to the body politic, that is, to be the head of one of the families which together constituted the public realm.[1335]

Thus, one could be an owner but still be poor—what mattered was that property provided citizenship and legal protection.[1336] Wealth in turn was more associated with livelihood than participation.[1337] Following this, she argues that private ownership understood "in the sense of a tangible, worldly place of one's own" should be protected, since it provides for a private sphere in which one can satisfy one's basic needs and enable access to the public realm.[1338] Yet her definition of property hints at the fact that recognition of a person's existence in location matters more than formal title. 'My home' can mean many things, depending on my personal experience: it can refer as much to real estate as to a town, a province or a country. As Schnably puts it,

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[1334] *Ibid* at 557–558.
[1335] Arendt, *supra* note 14 at 61.
[1336] *Ibid* at 62.
[1337] *Ibid* at 64.
[1338] *Ibid* at 70–71.

> the home represents a whole set of assumptions and lived experiences. It is impossible to think about the meaning of the home and its connection to personhood without thinking about its larger context.[1339]

The home in its symbolic meaning is not simply a point in space; it implies the relationships and connections built within and around that place. A home, in French, is often translated as "*chez-soi*," which literally means *at one's self*, implying that selfhood is more important than physical place in understanding a person's social participation. And since the self can move, shift, and change, so does the conception of home. Equally, family and community life do not need physical immobility, but require above all protection of the bonds and relationships formed within these social circles.[1340]

In fact, contemporary circumstances may well have irreversibly changed our vision of relationships with place. In western societies, homeownership is less and less accessible to a younger generation facing underemployment, high levels of debt, and spiralling real estate prices.[1341] On the other hand, current labour markets demand greater mobility, encouraging renting.[1342] In fact, Stephanie Stern notes that the ideal of rootedness associated with the home is contradicted by the fact that the average American moves about fourteen times in their lifetime, illustrating how mobility is a truer "American tradition" than the quest for stability.[1343] Moreover, recent numbers show a decrease of homeownership rates in many different parts of the Western world, including the United States and Canada, a tendency which is expected to continue.[1344] To be able to protect the home in this new reality would mean better legislation protecting renters, as well as policy that favours affordable housing whether rental units, cooperatives, or other arrangements.

[1339] Schnably, "Pragmatism", *supra* note 1114 at 365.
[1340] Barros, *supra* note 1222 at 280–281; Keenan, *supra* note 221 at 150–152 where the author talks of diaspora as an example of "taking space with you."
[1341] Sugrue, *supra* note 1249 at 21; McKee, *supra* note 1218 at 854–857. Statistics in the UK show that rates of homeownership for people under thirty went from 18% in 1980 to 9% in 2007.
[1342] Ellickson, "Household", *supra* note 1218 at 87; Stern, *supra* note 1241 at 1126.
[1343] Stern, *supra* note 1241 at 1124–1125.
[1344] See Hopulele, *supra* note 1315; Derick Moore, "Homeownership Remains Below 2006 Levels for All Age Groups", (13 August 2018), online: *United States Census Bureau* <https://www.census.gov/library/stories/2018/08/homeownership-by-age.html>; Emily Badger, "Why the Homeownership Rate will Keep Falling – and Falling, and Falling", *Washington Post* (15 June 2015), online: <https://www.washingtonpost.com/news/wonk/wp/2015/06/16/why-the-homeownership-rate-will-keep-falling-and-falling-and-falling/>.

Rapacious economic practices have undoubtedly led to the loss of purchasing power, but at the same time they have altered people's idealized notion of the home, as Jeremy Rifkin notes:

> On a deeper level, people's sense of home, which always has been grounded in geography and spatial identification, is giving way to a new sense of living arrangement as a short-term temporal affair.[1345]

People still long to call a place home, but are also increasingly realizing that their self-worth is not attached to material goods alone. Not all needs can be satisfied through possessions, and not everyone will choose to try to satisfy themselves thus. Davidson observes that since the 2008 financial crisis, the prevailing American perception of the home is associated less with security and stability and more with risk, loss, and danger.[1346] He notes that 'home' will never lose its symbolic value, but that it is time to re-examine the idea, notably by outlining the home's link with consumerism, and understanding how well-being can be accomplished more broadly beyond ownership, around the uniting factors of "sense of purpose and the centrality of social connection."[1347]

We can even challenge the premise that possessions are still essential in today's capitalist society. According to Rifkin, capitalist markets are giving way to networks, and access to these networks more important than owning fungible property.[1348] This shift implies an increased reliance on services, which are by nature immaterial and primarily involve relationships with other human beings rather than with things.[1349] Even if it leaves the capitalist venture intact, a shift to a service economy suggests that 'experiences' and social interactions are becoming more central to people's lives than ownership.[1350] This is true in Latin America, one of de Soto's laboratories, where the sharing economy, focused on *access* to things through collaborative systems rather than traditional ownership, employs an ever increasing amount of people, the majority in informal labour.[1351]

[1345] Rifkin, *supra* note 213 at 126–127.
[1346] Davidson, *supra* note 1136 at 130.
[1347] *Ibid* at 133–135. Stern similarly rejects the idea that homeownership is a "prerequisite to psychological flourishing"; see Stern, *supra* note 1241 at 1096.
[1348] Rifkin, *supra* note 213 at 4.
[1349] *Ibid* at 84–95.
[1350] Although Rifkin warns about the commodification of experience as a consequence of this shift away from property and classical markets, see *ibid* at 97.
[1351] *Retos y posibilidades de la economía colaborativa en América Latina y el Caribe*, Working Paper, by César Buenadicha, Albert Canigueral Bago & Ignacio L De Leon, Working Paper No IDB-DP-518 (Banco Interamericano de Desarrollo, 2017). See also Alejandra Dinegro Martínez, "App Capitalism" (2019) 51:3 NACLA Report on the Americas 236 on the labour impacts of the sharing economy in Latin America.

In urban settings, social existence is no longer dependent on ownership, if indeed it ever was. Rather, recognition is a matter of belonging to a community, which can be attained in many ways. Stern notes that, contrary to the myth that ownership provides community membership, evidence shows that "people depend on nonterritorial networks to provide the majority of their strong ties as well as sense of community."[1352] These networks are obviously easier to build in urban settings where proximity to others increases social interactions and enhances community building. Statistics also show that the difference in political participation between owners and renters is not strong, and that this difference tends to decrease the longer the tenure, regardless of whether one owns or rents.[1353] All these factors may explain why city dwellers are less likely to own than rural people.

Circumstances differ in rural regions where agriculture is prevalent—and labour alternatives few—making the material world highly relevant for people's subsistence, security, and social existence.[1354] This explains why regional systems of human rights consider that property violations in rural settings require comprehensive responses, sensible to concrete local circumstances, rather than simple market value calculations.[1355] But again, *access* to land and services seems more important than ownership in the countryside. The right to property cannot increase the visibility of waged agricultural workers, who form almost half of the total agricultural workforce, but a broad right to land access could favour their social insertion. Increased labour protection directly tailored to their needs would be even more beneficial in that regard.[1356] Furthermore, the line between rural and urban is not so clear-cut. Slum dwellers of the Global South are often found in 'peri-urban' areas (the "intermediate space between urban and rural"[1357]) which constantly shift as cities expand.[1358] The infrastructures and dynamics in these areas are closer to those of a city, but their residents often come from the rural side, having migrated internally in search of better labour

[1352] Stern, *supra* note 1241 at 1122.
[1353] *Ibid* at 1125.
[1354] van Banning, *supra* note 11 at 323; Rifkin, *supra* note 213 at 229.
[1355] See discussion above at §6.2.2.
[1356] See Peter Hurst et al, *Agricultural Workers and Their Contribution to Sustainable Agriculture and Rural Development* (Geneva: ILO, 2007) at 32; Laura Dehaibi, *L'évolution de la protection de la liberté d'association des travailleurs agricoles salariés en droit international et en droit canadien* (LLM thesis, Université de Montréal. Faculté de droit, 2011) [unpublished]. Source: ILOSTAT, online: <ilostat.ilo.org>.
[1357] Home, *supra* note 1180 at 12.
[1358] *Ibid* at 23.

opportunities. These are unique locations presenting their own set of relationships with people, land, and communities, in which people's needs are diverse.

Ultimately, challenging the centrality of property does not mean rejecting it, but rather emphasizing social relations over property relations. Universal human rights must enable people to meaningfully participate within their communities, whether through ownership or otherwise. As Bryan suggests about indigenous 'property,' the question to ask is not whether indigenous peoples have a concept of property that fits Western standards, but how to describe a system of social relations which regulates how people relate with each other and with the world that surrounds them.[1359] Inverting the thought process in that way may reveal the limits of the concept of property in addressing social relations, and more importantly, lead to new ways of concretely securing social needs. The case law analysis in Part II clearly established that in some cases the right to property truly accomplishes social participation, but also suggests that sometimes it is used in the absence of a better alternative. Ultimately, to make sure that property is not just used to evade deeper inquiries into how human needs can be met, it is important never to consider the right to property in isolation, but rather to assess interactions of rights horizontally, as the IACtHR and ACHPR have done in their recent cases.

Place is fundamental to human rights: if rights find meaning through their necessity for social life, and given that social encounters occur in location, then rights are always attached to some extent to the material world.[1360] This said, and as the indigenous example shows, property is but one way to reflect the relationship persons or communities have with the material world.[1361] In fact, if we start seeing places like home or land as sites for relationships and interactions, we can see beyond the object and start looking at needs in location, with their own unique hierarchies.[1362] Location, in the sense of a place where complex relationships occur to determine one's needs, requires adaptability and movement. As Ingold suggests, "lives are led not inside places but through, around, to and from them, from and to places everywhere."[1363] Every person's experience is thus

[1359] Bryan, *supra* note 229 at 4–5. Thom similarly observes that the Coast Salish people relate to territory through relationships rather than formal notions of boundaries as mutually exclusive spaces, Thom, *supra* note 943 at 179.
[1360] See Douzinas Douzinas, *supra* note 42 at 270–271 on the materiality of relationships.
[1361] Recall Nadasdy, *supra* note 943 at 507; Thom, *supra* note 943 at 185 who both observed that indigenous social interactions were better described through kinship than boundaries.
[1362] See generally Ellickson, "Household", *supra* note 1218 in which the author discusses the household as a particular space and autonomous entity where various relationships exist and develop.
[1363] Ingold, *supra* note 537 at 33.

composed by paths, he claims, which necessarily cross other people's paths, creating knots, through constant movement. And if location is movement, then lived experiences cannot be enclosed.[1364] Liberal property rights, in turn, seek to fix such pathways and knots, making them incompatible with a bottom-up approach to human rights. If stories of location are allowed to penetrate the meaning of property, the result might well be that property is no longer considered necessary. The next and final chapter of this study comments on how human rights voices can be—and have already been—upheld in practice, disrupting preconceived notions of rights.

[1364] *Ibid* at 31–34.

Chapter 8 – Empowerment before Entitlement: Concluding Notes on Lived Universalism in Practice

"[U]niversality is not something given as a fact or law, but is continuously made, in the act of choosing oneself and understanding others."[1365]

8.1 Summing Up: Is Property a Universal Human Right?

Is property a universal human right? Yes, insofar as it enables social participation; whether it does depends on lived experience in location. Thus, the question of whether property can genuinely enable social participation does not have a fixed answer. What is myth in one setting can be reality in another. If the right to housing in the US would be better served by greater tenancy protection, these measures are less relevant in Peru, where housing problems are more associated with informality, lack of space in rapidly growing urban centres, and deficient building safety. *A contrario,* looking for the answer to the question above in a single legal tradition like liberalism—which emphasizes abstract and exclusive individual rights to favour stable exchange within a capitalist market economy—does not advance the mission of human rights. Property as human right is concrete, purposeful, and reflective of a person's circumstances and social interactions within their environment.

Part I sought to expose the liberal influence on the idea of a right to property, and how that influence threatens human rights' claim to universality. I have argued that for human rights to be truly universal, they must be rooted in lived experiences of those who most need their rights recognized, as suggested by TWAIL literature. When it comes to the right to property, we can think of slum dwellers, displaced people, women in rural areas, and indigenous communities. Still, many legal writers tend to assume that property rights and right to property are interchangeable concepts, preventing a thorough conversation on the ways in which property empowers rather than enslaves. This conversation must start from the ground up, looking at practices of property rather than its abstract functions in capitalist markets.

Part II examined regional case law on the right to property, first to identify instances of conflation of the human right to property with liberal property rights, and second to see how stories of lived

[1365] Douzinas, *supra* note 42 at 200. In this quote, Douzinas makes a parallel with Sartre's existentialist theory, which suggests that one's existence can be determined only through interaction with the social world.

property in location influenced human rights adjudicators' decision-making. I found that the different self-perceptions of regional systems' human rights missions, based on geographic specificities, predisposed them either to stick to a liberal version of property (ECtHR) or to recognize unorthodox and nonconforming narratives on its meaning (IACtHR and ACHPR). For the latter bodies, property stories spoke of purpose: property as subsistence, emancipation, rootedness, or cultural or spiritual token, for example. When these were addressed, adjudicators more readily accepted a hierarchy of property relationships, distinguishing between 'legal' property rights and human property rights, as Chilean delegate Santa Cruz had pleaded for during the drafting of *UDHR* Article 17.[1366]

But the exploration of regional case law also revealed that in many instances, relationships with land and natural resources were not always best represented by the language of property. Chapter 7 sought to uncover this, deconstructing myths of the importance of ownership in providing social participation by exposing how they offer an incomplete and at times inappropriate response to the human rights problem they purportedly address. The objective of this deconstruction is not to strip property of its human rights label, but to place it within the complex network of relationships that make up a person's lived experience in an integrated manner. The right to property does not solve all human rights problems—but the good news is that it does not have to, since the human rights corpus contains a rich vocabulary which can empower social human beings.

In fact, recent human rights initiatives at the international level increasingly rely on policy instruments and strategies that adopt an integrated approach to rights, applying the proclaimed principle that human rights are interrelated, interdependent, and indivisible.[1367] Instruments, declarations, and resolutions adopted at the UN after the *UDHR* have increasingly made references to the interconnections among property, land use, and development, even if the UN has not adopted a standalone, enforceable human right to property.[1368] The UN development agenda—although

[1366] UNGAOR, 3rd Comm, 3rd Sess, 126th Mtg, UN Doc A/C.3/SR.126 (1948). See also commentary by Schabas, *supra* note 220 at 141–142.
[1367] See UN General Assembly, *Vienna Declaration and Programme of Action*, A/CONF.157/23 (12 July 1993).
[1368] Some of these do not even mention the word property, rather referring to land and natural resources. For treaties, see: *Convention relating to the Status of Refugees*, *supra* note 10 Art 13; *Convention relating to the Status of Stateless Persons*, *supra* note 10 Art 13; *International Convention on the Elimination of All Forms of Racial Discrimination*, *supra* note 10 Art 5; CEDAW, supra note 10 Arts 15-16; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, *supra* note 10 Art 15. For resolutions, see: *Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII), UNGAOR, 17th Sess, UN Doc A/RES/3171 (1962) Art 3; *Declaration on Social Progress and Development*, GA Res 2542(XXIV), UNGAOR, 24th Sess, UN Doc

critiqued by some TWAIL scholars for its condescension towards the poor[1369]—also adopts a more dynamic and responsive stance on land matters, for instance in this item of the 2030 Agenda for Sustainable Development:

> Goal 1.4:
>
> By 2030, ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance.[1370]

This goal can be seen as an attempt to redirect the use of human rights instruments towards those who need them the most based on what they need concretely. It does not reduce social participation in land to property, but recognizes a variety of rights of access, implying sensitivity to the reality on the ground.

And so, what is universal about property? What we have found is that property truly possesses the potential to satisfy basic needs of social participation, in various contexts. The importance of one's possessions for subsistence, of saying 'this is my land,' of calling a place 'home' is not limited to those living in liberal democracies. But these various relationships are not valued by everyone in the same way, and this ought to be the starting point of a human rights inquiry. I have insisted throughout this study that expressed needs in location, through stories of lived experience, are the best indicators of how human rights can accomplish their universal mission. To avoid liberal assumptions, we should not require that these lived experiences conform to a particular vocabulary or system of knowledge, whether that of property or any other, but rather ask people how they relate to the material world around them and how these relationships can be translated into legal language. This is what I call a bottom-up, dialogical approach to human rights.

To conclude this study, I will offer some thoughts on how a bottom-up, dialogical approach to human rights can lead to dynamic universal truths, insisting on the process of finding these truths rather than on their substantive form. I will also try to address some objections or difficulties that

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A/RES/2542 (1969) Art 6; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) Art 26. See finally, FAO, The World Bank & UN Habitat, *Measuring Individuals' Rights to Land: An Integrated Approach to Data Collection for SDG Indicators 1.4.2 and 5.a.1* (Washington DC: World Bank, 2019).

[1369] See Duplessis, *supra* note 77 at 322–323; Anghie & Chimni, *supra* note 28 at 83–86.

[1370] *Transforming our World – The 2030 Agenda for Sustainable Development*, GA Res 70/1, UNGAOR, 70th Sess, A/RES/70/1 (2015).

such an approach could raise—particularly against the idea of putting 'lay' narrative ahead of rules—by arguing that in many ways, a bottom-up approach is already in place and only needs to be enhanced to ensure that needs of social participation are effectively and efficiently met. It may seem that lived universalism is at best an optimistic theory, but in fact, it is at the root of the practice of human rights.

8.2 Universal Human Rights as Process

If human rights are meant to enable people's social participation, it is better to see them as tools of empowerment rather than entitlements. Entitlements are rigid (my ownership rights exclude all others), whereas the very idea of empowerment implies social relationships and thus dynamism and flexibility (my ownership rights allow me to belong in my community). Instead of ignoring power dynamics that play out constantly in society, it is better to embrace them with a view to rebalancing unequal relationships, and this is what human rights can provide when people's circumstances are taken into account. Thus, universal human rights ought to be thought of more as a process of finding universal truths than one of fixing them. This process allows us to transform concrete needs into legal claims. And the only way to know what these needs are—and to eventually draw a list of 'shared values' which can be qualified as universal rights—is to let people express them, and take into account these lived experiences in location.

Bottom-up universal human rights are thus more procedural than substantive**.** Such a procedure requires asking questions rather than imposing answers. As Griffin suggests, drawing a list of 'values' is ultimately a matter of deliberation about human interests,[1371] or what I call 'needs' for social participation. Taking once more the indigenous example, it is not sufficient to introduce a new category—'indigenous property'—which would vaguely define itself in comparison to Western property, oversimplifying the complex and diverse ways that people relate to their environment across the world. As Bryan notes, "one must be continually aware of the way that concepts and terms are being used to describe Aboriginal reality and custom so as not to misrepresent and subsequently change it."[1372] And the best way to avoid misrepresentation is to maintain an open dialogue with the 'person' of human rights.

[1371] Griffin, *supra* note 15 at 115.
[1372] See on this Bryan, *supra* note 229 at 6. Bryan later notes that Aboriginal reality is often simplified as having a collective nature (*ibid* at 17).

The questions to ask are numerous, and require sensitivity to circumstances in location, responding to the rights-holder's immediate needs, and establishing the broader context (regional, national) in which they are framed. For example: what are the expressed needs of the social person? What are the social relationships—family, community, and networks—which shape these needs? What are their beliefs? What is available (or should be available) to them in location? (That is, what are the existing material and financial resources, infrastructures, institutions, and organizations?) How sustainable are these resources? How accessible are they given the person's geographic location? How adapted are they to a person's cultural background and beliefs? Who else benefits from this, or is someone else's social participation impeded by their needs? What measures, legal or otherwise, has the state taken to respond to this need for social participation? Is the state limited in its ability to provide social programs, alternative work opportunities by conflict, or other political factors? Addressing questions to experiences rather than using a list of rights as a starting point avoids limiting the ways in which relationships are described and named—for instance, limiting a relationship with the material world through the language of property—which in turn allows a more integrated approach to recognizing human rights violations. Only after all the questions about a person's location have been asked should the inquiry move to assessing how existing human rights legal instruments can respond to needs of social participation, through open-ended interpretation if necessary.

A bottom-up, dialogical approach to human rights is not only about asking questions, but about addressing them to the right persons. As mentioned in Chapter 1, *phronesis* requires trusting people's abilities to identify their needs in location, which means allowing them to tell their stories, rather than having their stories observed and told by outsiders.[1373] From a TWAIL perspective, such an approach asks us to take "a commitment to centre the *rest* rather than merely the *west*, thereby taking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case."[1374] Spivak, in her critique of Western research and its treatment of the 'subaltern,' particularly targets Western intellectuals who speak for the subaltern instead of giving them a voice, pointing out that they represent the poor, the vulnerable, and the marginalized from the point of view of Western eyes.[1375] They are presented as 'victims,'

[1373] Simmons, "Teaching", *supra* note 167 at 258.
[1374] Obiora Chinedu Okafor, "Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective" (2005) 43:1 Osgoode Hall LJ 171 at 177.
[1375] Spivak, *supra* note 183 at 75–76. See e.g. her critique of the works of Foucault and Deleuze, *ibid* at 84–87.

which reduces the human being to "a status of weakness and dependency."[1376] But while 'victims' are talked *about*, empowered social beings—rights-holders—speak for themselves: they have a voice in the conversation. If property is power, then 'possessing' rights is empowerment. And since lived experiences are as diverse as locations and people, *phronesis* is also a call to take into account the "polyphony of voices" that make up our daily interactions in a complex social world. Thus, universal human rights are drawn not from a single person's expression of needs, but from an ongoing conversation among various expressions, making sure that in the dialogic process no voice is being drowned out by others.

But how can shared values be drawn from such a diverse range of lived experiences? What is certain is that, despite our differences, we are all concrete beings whose existence depends on social relationships. Even a hermit's condition is dependent on the existence of a society, from which they consciously decide to withdraw. The expression of our needs relies on the fact that we are social beings who constantly interact and exchange with others and our environment. As Douzinas notes, human survival is always linked with the external world, and thus to talk of the 'individual' as some self-sufficient abstract being, as liberal theory does, denies this reality.[1377] For Douzinas, rights are thus necessarily political since they arise in community.[1378] The right to food, which Douzinas discusses,[1379] offers a good illustration of this, since it does not rely purely on our body feeling hunger, but also on food's accessibility, availability, and quality, all of which in turn depend on a variety of factors such as geographical location, preferences, and cultural practices. Thus, the best way to understand the meaning of the right to food is to look at practice on the ground. Yet this does not make the right to food less universal, only more dynamic and responsive.

The importance of social life responds to many doubts about the universality of human rights. For one thing, since a person's expression of needs in location is meant to enable their social participation and thus depends on their social interactions, it prevents abusive rights claims. Going back to the example that has occupied us throughout this thesis, property understood in the abstract as a tool of capitalism could easily lead to outrageous accumulation of resources, but this contradicts the inherent sociality of human rights. In turn, the human right to property is

[1376] Van der Walt, *supra* note 306 at 99.
[1377] See Douzinas, *supra* note 42 at 269–271 where he draws from Hegel's theory of personhood as self-recognition through objects as well as other theories of recognition, for instance Alex Honneth's "The Struggle for Recognition".
[1378] *Ibid* at 274.
[1379] He actually talks of the 'desire for food,' see *ibid* at 270.

automatically limited by the concrete existence of others, since it is meant to enable social participation, not self-interest. As Alexander and Peñalver wrote, in their commentary of Sen and Nussbaum's capability approach as applied to property and community:

> Social structures, including distribution of property rights and the definition of the rights that go along with the ownership of property, are to be judged, at least in part, by the degree to which they foster the participation by human beings in these objectively valuable patterns of existence and interaction.[1380]

The authors share the view that all human beings long for existence and interactions, and thus seek to be able to participate: this 'objective' criterion serves as a way to circumscribe how needs are expressed and practiced.

For another, the criterion of social participation makes the interactions among rights-holders not a matter of conflict or competition, but one of conciliation and balance. As Griffin suggests, some conflicts of rights are not actual conflicts when considering the content of each right, including their inherent constraints,[1381] and the inherent sociality of human rights creates these logical constraints. For instance, when evaluating a person's right to security of tenure for a house informally built on another person's vacant property, a dynamic human-rights process would ask which tenure is the most essential for social participation and afford that tenure higher protection. Griffin suggests a similar approach, saying that the degree of a violation of human rights could be evaluated based on how central to personhood the right infringed is.[1382] By the same logic, if a person's tenure actually tends to impede their own or others' social participation, then it ought not to receive protection as a human right. Finally, embracing the dynamism of social relationships and their role in the understanding of human rights in a dialogical process prevents (or at least minimizes) the loss of nuance and flexibility which often follows the codification of general rules.[1383]

It must be made clear that asking questions directed to the human being means leaving aside a highly technical legal language, and can even mean leaving our conceptions of what is 'legal' at the door of the human rights court. Legal language is a fundamental tool of empowerment, but

[1380] Alexander & Peñalver, *supra* note 199 at 137.
[1381] Griffin, *supra* note 15 at at 58. The author gives the example of the right to liberty, which is constrained by the liberty of others.
[1382] *Ibid* at 66–68.
[1383] See on this Ingold, *supra* note 537 at 34–38, 41; Mattei, "Socialist", *supra* note 285 at 22–23.

actual relationships in everyday life do not necessarily abide by such formalism. As Judge Sergio García Ramírez noted in his separate opinion in *Mayagna*, to ignore the fact that there are a variety of ways to use and enjoy property "is tantamount to denying protection of that right to millions of people, thereby withdrawing from them the recognition and protection of essential rights afforded to other people."[1384] This quote was actually later reprised in the majority ruling of the *Kichwa* case,[1385] demonstrating the growing consensus within the Inter-American system around recognition of lived experiences as a source of law. Relationships in slums are another example of law operating outside the formalism of state legality. As Bonilla Maldonado and Boaventura de Sousa Santos have noted in their respective observations of law in informal settlements in Latin America, rules of law that apply in location are not necessarily culturally different from formal law, and often borrow a lot from it, but the difference is that they are more flexible, accessible, participatory, and consensual.[1386]

History has also taught us that the language of legality can be used to oppress or control. In their exploration of the historical development of the legal mediation of labour conflicts, Fudge and Tucker note that legality is automatically associated with legitimacy.[1387] Thus, when the state progressively institutionalizes labour conflicts to have them cohere in a capitalist economy, it restricts the range of legitimate workers' actions. The same scenario played out before the ECtHR in certain property cases in which the determination of what was legal cast out any nonconforming stories of property, such as those of indigenous peoples: this approach emphasizing rights before experiences not only took away the protection of human rights instruments, but made alternative relationships with the material world illegal.

It is important to remember that human rights usually come from the ground up: they derive from concrete experiences and are part of a never-ending historical process which has progressively brought their necessity; examples include voting and labour rights. As Maritain suggested, human rights are never complete, since their meanings are progressively revealed to our consciousness as history unfolds.[1388] E.P. Thompson, commenting on labour rights, described this historical process as a "multitude of individuals with a multitude of experiences," which observed over a period of

[1384] *Mayagna*, *supra* note 635, separate opinion by Judge Sergio García Ramírez at para 13.
[1385] *Kichwa*, *supra* note 646 at para 145.
[1386] Bonilla Maldonado, *supra* note 282 at 236; de Sousa Santos, *supra* note 274 at 89.
[1387] Fudge & Tucker, *supra* note 3 at 1.
[1388] Maritain, "Man", *supra* note 191 at 76.

time create patterns of relations, idea, and institutions.[1389] These patterns could be qualified as 'universals,' but the important thing is never to cast them as immutable, since they are constantly and actively "made" by people,[1390] just like, as Douzinas suggests in this chapter's opening quote, universality is made rather than given as a fact.

8.3 How to Apply a Bottom-Up Approach to Human Rights in Practice?

The main objective of this study is to make sense of the human right to property within the overall international human rights framework. Thus, the practical implementation of a renewed version of the right to property and of a bottom-up approach to human rights by human rights institutions is outside the scope of the present study. Still, I am aware that a dynamic approach to human rights could be accused of being impracticable, as it would lead to uncertainty and instability in the application of the law. Without wanting to involve myself in the debate among legal positivism, rule of law, and their critics, the approach I am advocating may appear to threaten stable legal outcomes by deemphasizing clear legal rules in favour of contingent expressions of needs. In answer, I point out that this study has given multiple examples of how a dialogical approach to human rights based on lived experiences is compatible with rule of law. In conclusion, I shall revisit these illustrations.

Embracing a plurality of voices in human rights law can be destabilizing in modern legal systems that rely on fixed and neutral rules (like those of liberal property rights) to approach social relationships. In turn, lawyers are trained to view contingency as equivalent to arbitrariness, especially in property cases. Lorna Fox gives as an example a 'home' case before the House of Lords, in which case the Court essentially avoided delving into the personal aspects of the tenant's 'home' argument. As she summarizes: "While the landlord's claim was rooted in the conceptually solid terrain of contractual and proprietary rights, the tenant's home argument appeared insubstantial and incoherent by comparison."[1391] She notes that the Court's bias in favour of hard property rules is typical of law which "tends to favor the rational, the objective, and the tangible," and which makes it harder for intangible and personal arguments to be given credence.[1392] Pierre

[1389] See e.g. Thompson, *supra* note 206, preface at 11.
[1390] See *ibid*, preface at 9 where Thompson discusses the meaning of the word "making" in the title of his book.
[1391] Lorna Fox, "The Idea of Home in Law" (2005) 2:1 Home Cultures 25 at 32. The case is *London Borough of Harrow v Qazi*, [2003] UKHL 43.
[1392] *Ibid* at 34. She sees this as the inability to quantify the "use value" of a home in legal terms, *ibid* at 35.

Schlag goes further, suggesting that the "aesthetic values" of legal formalism, such as neutrality, universality, and objectivity, all suppress the individual subject, who is subsumed in the transcendental, immutable subject that is Law.[1393] This creates in turn a "fetishism of rules, doctrines, and principles" which denies the subject's role in "creating and maintaining" law.[1394] These rules, doctrines, and principles become both the subject and the object of law; the legal thinker is a mere spectator.[1395] Anyone that challenges this 'objective' system of law is automatically positioned outside of it, in the margins.[1396]

But in human rights law, no human voice should be left in the margins. Alternative narratives of human experience should not be seen as challenges to normativity or to legal monism, but rather as a means of reinforcing the validity of human rights law by turning abstract individuals into active subjects of rights, able to both express their needs and suggest ways to satisfy them. If we view social relations as homogeneous, constant, and equal, one might think that engaging lived experiences would be irrelevant. But relationships in location cannot be reduced in that way. A bottom-up, dialogical approach is thus a call to engage pluralism in the understanding of universal human rights.

What we find is that the regional systems studied in Part II all engage in a dialogic approach to human rights, to various degrees and at various stages of the adjudicative process. They support legal rules, but also interpret them, shape them, and even at times shift their meaning completely. For instance, in the absence of a formal title, stories of property have helped establish possession in *Chiragov* and *Doğan*, in which testimonies of the applicants' neighbours were taken into account by the ECtHR.[1397] They also generally help evaluate the extent of a person's loss by establishing the importance of a person's property in their life, for instance in cases of rural property in which the loss of means of living was added to the market value of property. Similarly, lived experiences of indigenous peoples led the IACtHR to require the adoption of social programs

[1393] Pierre Schlag, "The Problem of the Subject" (1991) 69 Tex L Rev 1627 at 1634–1636. Schlag particularly addresses legal thinkers as the supressed subject and thus not necessarily the public in general, but his notes can be used *mutatis mutandis*.
[1394] *Ibid* at 1640. Schlag identifies this tendency in Langdellian formalism (*ibid* at 1733–1738), but adds that this process of fetishism is perpetuated in other leading legal theories, such as rule of law, critical legal studies, neopragmatism, or cultural conservatism, which all fetishize various "artifacts" such as theory, methodology, extra-legal disciplines, and so forth.
[1395] *Ibid* at 1652.
[1396] *Ibid* at 1635–1636.
[1397] See discussion at §6.2.1

and development funds in reparation of the extended harms stemming from land deprivation.[1398] Thus, personal stories of property have led to a departure from orthodox approaches to compensation in property cases.

Lived experiences have also led to flexibility in procedural rules: for instance, the ACHPR determined that the rule of exhaustion of domestic remedies had to be evaluated against the political situation of a country which could impede accessibility to the court system in practice.[1399] Even the ECtHR's rules allow judges to change the legal narrative of a case, for instance when it decided that a certain case on property, based on the facts, ought to be heard as a case of the right to home—although with uneven results in terms of upholding nonconforming lived experiences.[1400] But regardless of the results, these examples show once more how adaptability is already part of the human rights courtroom, and need not lead to uncertainty. This flexibility conveys the message that a sensible response to the case at hand is more important than following rigid rules.

Another example of the place already given to lived experiences in regional case law is through the conduct of fact-finding missions and field interviews, allowing the adjudicative mechanisms to directly reach the rights-holders, to get a physical sense of location, and to enter their lived experiences. This not only opens the way to greater empathy among people, it allows holders of human rights to have an active role in the process. Similarly, the significant place once given in IACtHR decisions to facts and almost unedited testimonies—always placed before legal rules—sent the message that the circumstances and stories of rights-holders mattered. Other forums like truth and reconciliation commissions rely specifically on extensive personal narratives in order to accomplish their legal mandate,[1401] and there is no reason why this could not be used more systematically in human rights courts. The polyphony of voices argued for above is acknowledged in the IACtHR and ACHPR's willingness to allow the participation of NGOs and representative organizations in their forum. This is all the more important in light of their objective of

[1398] See e.g. in *Yakye Axa*, *supra* note 644 and *Saramaka*, *supra* note 689.
[1399] See e.g. in *Sudan*, *supra* note 700.
[1400] See e.g. *G and E v Norway*, *supra* note 949.
[1401] See Landman's study of truth and reconciliation commissions in South Africa and Peru, Todd Landman, "Phronesis and Narrative Analysis" in Bent Flyvbjerg, Todd Landman & Sanford Schram, eds, *Real Social Science: Applied Phronesis* (Cambridge: Cambridge University Press, 2012) 27 at 35.

empowering the most vulnerable, since lack of representation is often a serious problem in seeking justice.

Lived experiences in case law do not serve only to apply or interpret already existing rights. Indeed, the ACHPR illustrated in *Ogoni* how the specific circumstances of a case can lead to uncovering new rights (in that case, to housing and to food) which were not explicit in the text of the African Charter, but could still be implied by various provisions.[1402] It is important to note that it is not only the circumstances of the Ogoni people that naturally led to the recognition of these new rights in the African context: these rights were actually proposed by the applicants themselves, showing the significance of having space to express needs in a human rights forum.[1403] Such an approach by the ACHPR is resolutely bottom up, by contrast to the IACtHR approach to indigenous land which, while progressive, still uses a specific language—that of property—to translate indigenous needs in location, with the limits this entails, as previously discussed. Still, the IACtHR has clearly established that dynamism and movement in the meaning of rights is not only possible, but desirable. This is what allowed the expanded definition of property and the expansion of the right to life to include the right to a *decent* life.

These few examples show how human rights courts can let concrete circumstances of cases precede rigid assessment of laws and guide their work without it leading to legal chaos. And there are many ways to enhance participation of rights-holders in the human rights process, with the objective of empowering them in their respective location and precluding hegemonic voices from taking over the message.

First, what the African example illustrates is that a dialogical approach to human rights is aided by human rights instruments which cover a wider range of rights without limiting them in terms of their justiciability or reach. As demonstrated in Chapter 7, framing one right (e.g. property) as strong while positioning others (e.g. tenancy rights) as weak ultimately hampers genuine conversations about how social participation can be attained. The presence of strong economic, social, and cultural rights in the African Charter, more readily accepted as dynamic rights, made it

[1402] Ogoni, *supra* note 662 at para 60, 65.
[1403] See Coomans, *supra* note 99 at 756–760. The author adds that the fact that the Nigerian government—a dictatorship at the time of the alleged events—did not participate in the procedures allowed the Commission to uphold the plaintiffs' narrative.

easier for the ACHPR to address new rights better suited to address claimants' reality, and thus should be taken as a lesson of lived universalism.

Second, procedural rules of human rights adjudicative bodies can explicitly mention that flexibility and adaptability is the rule rather than the exception, in order to ensure that vulnerable people's needs precede technicalities. As van Banning explains, arguing for greater interactions of rights, rather than focusing on a single right such as that to property, amounts to focusing on the rights-holder; and thus it is important to increase their participation in the determination of their own outcomes—for instance in the judicial process.[1404] To have the voices of traditionally marginalized groups heard, fact-finding missions could be enhanced, which would probably require increased funding. A dialogical process could also be formalized in the human rights courtroom by setting aside an adversarial mode and favouring horizontal adjudication, for instance by adopting principles of equity.[1405] Human rights courts could also develop mechanisms of alternative dispute resolution such as arbitration, where rules are more flexible and allow more space for dialogue,[1406] always keeping in mind of course that these alternative mechanisms must empower vulnerable parties rather than disengage responsibility from the state. If international law is currently made up of hierarchies creating unequal bargaining forces between states and rights-holders, the objective would be to reverse this tendency at all levels.

Horizontality is also desirable outside the courtroom. Participatory mechanisms can be implemented to reach directly the most vulnerable, for instance through local and representative NGOs.[1407] To that effect, whereas states and international organizations' staff remain the main producers of general comments, recommendations or reports—which are common at the international level to understand the concrete application of human rights instruments—the

[1404] van Banning, *supra* note 11 at 200–212.
[1405] See Michael Akehurst, "Equity and General Principles of Law" (1976) 25 Intl & Comp LQ 801, discussing the role of equity in international tribunals.
[1406] Note that regional systems of human rights already possess friendly settlement mechanisms, see Helen Keller, Magdalena Forowicz & Lorenz Engi, *Friendly Settlements before the European Court of Human Rights: Theory and Practice* (Oxford University Press, 2010); Patricia E Standaert, "The Friendly Settlement of Human Rights Abuses in the Americas" (1998) 9:2 Duke J Comp & Int'l L 519–542. For Africa, see *Free Legal Assistance Group et al v Zaire* (1996) Afr Comm HPR No 47/90 and African Court on Human and Peoples' Rights, "Rules of Court," Rule 26, 56-57, online: <https://www.african-court.org/en/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf >.
[1407] See generally Sally Engle Merry, "Transnational Human Rights and Local Activism: Mapping the Middle" (2006) 108:1 Am Anthropologist 38 on the opportunities and challenges of greater local representation.

redaction of these documents could benefit from greater participation from members of civil society.[1408]

Finally, increased participation is not purely a matter of legal empowerment, but of concrete actions on the ground. As Okafor suggests, reforming international law requires reaching and engaging people in various sites, not just internationally and not just legally.[1409] An important point raised by Simmons is that, to derive human rights from the expressed will of the 'marginalized other', states must provide the means for participation, notably by eliminating structural barriers such as illiteracy, discrimination, hunger, or disease.[1410] This is also part of the dynamism of lived human rights: satisfying basic needs such as education and health fosters conditions for greater social participation, which enables people to voice their needs more efficiently, ensuring their enduring membership. Furthermore, to raise awareness about the importance of taking into account lived experiences in the practice of human rights, training of international practitioners should engage a diversity of sources beyond the liberal canons[1411] and potentially rely on increased case-based learning to bring stories of and in location closer to school benches to engage deeply in *phronesis*—practical knowledge.[1412]

A bottom-up, dialogical approach to human rights does not mean the rejection of rules, but rather a sensitivity to what human rights norms are meant to accomplish in the first place: setting moral standards that enable everyone to participate meaningfully in their communities. After all, law exists to organize and mediate social relationships and lived experiences in complex societies; and these concrete circumstances do not cease to exist once a rule is proclaimed to govern them. As Ingold argues in his critique of the abstract concept of space used in science, the "pathway" to knowledge is as important as knowledge itself,[1413] something which applies nicely to human rights law, emanating as it does from concrete instances of oppression and marginalization. These

[1408] See e.g. description of the process of elaboration of general comments at the United Nations in *Report of the Human Rights Committee*, UNGAOR, 39th Sess UN Doc A/39/40 Supp No 40, 1984, at para 541-557. General comments have as their starting point periodical reports sent by states regarding their application of human rights instruments, reports which are required by these instruments; see e.g. ICCPR Art 40, *supra* note 12. See also Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, 2nd ed (Leiden: Martinus Nijhoff, 2010) envisioning an international law more centered on people.
[1409] Obiora Chinedu Okafor, "Praxis and the International (Human Rights) Law Scholar: Toward the Intensification of TWAILian Dramaturgy" (2016) 33:3 Windsor YB Access Just 1 at 10–11 [Okafor, "Praxis"].
[1410] Simmons, "Marginalized", *supra* note 18 at 190.
[1411] Okafor, "Praxis", *supra* note 1409 at 7.
[1412] See Nussbaum, "Humanity", *supra* note 126; see also Flyvbjerg, *supra* note 23 at 255–257 on case-based learning.
[1413] Ingold, *supra* note 537 at 29, 40–41.

pathways are people's personal stories of struggle and aspiration, which have shaped the definition of human rights and should continue to do so. Lived universalism is neither chaotic nor exceptional; it is dynamic, adaptable, sensitive, and open to change. Perhaps most importantly, it is empathetic.

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