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Land Law and Limits on the Right to Property: Historical, Comparative and International Analysis

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Introduction

The right to property is probably the oldest real right, much before concepts such as “right” or “real” (as opposed to “personal”¹) were outlined. It has often been regarded as a “natural” right, derived from nature.² Therefore, controversies on property are certainly as old as humanity itself. However, in the revolutionary period, the right to property was deemed a fundamental right and included as such in the charters approved at that time.³ This has continued up

1 The distinction between real and personal rights was implicit in Roman categories of “*actio in rem*” and “*actio in personam*” (Juan Iglesias, *Derecho Romano*, 8th ed., 1983, pp. 250–256), but was developed in Mediaeval times (Luis Díez-Picazo, *Fundamentos del Derecho Civil Patrimonial*, I, 4th ed., 1993, pp. 60–61).

2 Justinian’s Institutes explained: “Things are likewise obtained by us by natural law through delivery; for nothing more accords with natural justice than to confirm the desire of an owner to transfer his property to another” (II, I, 40). The quote is from the translation by S.P. Scott, available at <http://www.constitution.org/sps/sps02.htm>). John Locke affirmed that through one’s labor, a right to property in the work of his hands emerges (*Two Treatises on Government*, book II, chapter V, 27).

3 See Articles 2 and 17 of the French Declaration of the Rights of Man and of the Citizen (1789). See also Section 1 of the Virginia Declaration of Rights (1776).

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to our times,⁴ including in modern constitutions and international and regional human rights treaties. Its rationale is mostly to protect the right to property against governmental action, even though there are opposite policy preferences as to regulation of property rights at the domestic level. This is why taking property in the public interest or in the public need is frequently mentioned in those texts.⁵ However, the restrictions deriving from the protection of the public interest in regard to environmental values and livelihoods, natural resources, coasts, forest villagers or indigenous people are recognized in an overwhelming majority of the legal orders at the constitutional or statutory level or in the case law. Those limits become visible especially in regard to land law in different scenarios. Developmental challenges, new technologies and emerging economic powers or models necessitate portraying and rethinking land law restrictions from the perspective of human rights since the claims as to the right to property as a fundamental right transform and develop rapidly in domestic or regional human rights litigation and in constitutional designs. The land law disputes, which had been traditionally viewed as a quintessential local matter, are increasingly affected by supranational legal norms and procedures. Accordingly, a number of recurring themes typify the various cases, especially in seeking to strike an appropriate balance between the right to property and the authority of governments to regulate or expropriate land to promote the public interest.⁶

This collaborative paper aims at focusing on land law and the limits on the right to property from historical, comparative and international perspectives to analyze continuity, divergences, differences and similarities in approaches in seemingly independent contexts. First, the paper deals with property in land and its limits in Jewish law, canon law, Islamic law and Hindu law, while it puts specific emphasis on Roman law conceptualizations affecting current domestic and international settings. In so doing, the paper seeks to demonstrate what might be considered a counterintuitive argument: while natural law or moral-based law theories of property rights are conventionally associated with the right of an individual, the same sets of arguments also point to promoting the interests

4 Article 17 of the Universal Declaration of Human Rights (1948) and Article 17 of the Charter of Fundamental Rights of the European Union (2000).

5 See Article 17 of the French Declaration of the Rights of Man and of the Citizen and first paragraph of Article 1 of the Protocol No. 1 to the European Convention on Human Rights.

6 For a more elaborate analysis of the case law below, see: Amnon Lehavi, *The Global Law of the Land*, 81 *University of Colorado Law Review* 425 (2010); Amnon Lehavi, *Unbundling Harmonization: Public versus Private Law Strategies to Globalize Property*, 15 *Chicago Journal of International Law* 452 (2015); Amnon Lehavi, *Land Law in the Age of Globalization and Land Grabbing*, in *Comparative Property Law: Global Perspectives* 290–310 (Michele Graziadei & Lionel Smith editors, Edward Elgar Publishing, 2017).

of the community as a whole, and to the need to strike an appropriate balance between individual and community in constructing land law. Second, it portrays modern constitutional structures based on different policy preferences of two emerging economies, India and Turkey. Third, the paper analyzes international human rights disputes, ranging from claims of protection of rights of indigenous people to conflicts arising from cross-border acquisition of land, in light of the growing case law on these matters. Cutting across many periods and jurisdictions, the paper addresses what is essentially a leitmotif in property law: identifying the tension between individual and community in delineating the boundaries of ownership, control, and use of scarce resources, and the particular resolution of such tension in the case of land.

1. Historical and religious perspectives: property in land and limits on property rights

The modern conception of land law and the limits on property rights are widely modeled in the principal legal systems on individualistic and liberal ideologies, although sometimes medieval influences are still present and one cannot of course underestimate the importance of the socialist model. Moreover, religious and customary laws cannot be excluded from this picture. In fact, in many cases, these sources of law have had a deep influence on the historical development of modern state laws, and even more significantly, they are self-bearers of concepts of land ownership that can interact with the views of secular state laws. This issue is well understood in a pluralistic perspective that promotes the coexistence and interaction in the same context of multiple sets of rules, institutions, and values, which can give rise to phenomena of either conflict or assimilation.⁷ These phenomena are particularly important in post-colonial legal systems, where during the colonization period some concepts and rules on land ownership were introduced to replace the previous set of concepts and rules that had a religious or customary origin.

Therefore, some points are worth considering with reference to the jurisprudence of land ownership that has developed in the main religious and customary legal traditions. From a methodological point of view, it is necessary to be aware that the same religious laws, their theological assumptions, technical concepts and solutions, as elaborated by plural learned traditions, interacted with many customary systems in different geographical areas. As a result, the variability of

⁷ Within the huge literature on this issue, see Masaji Chiba (ed), *Asian Indigenous law in interaction with received law*, London-New York, KPI, 1986.

local religious legal systems can be very high. Nevertheless, the consideration of some fundamental conceptions can help to add further dimensions of discourse that make it possible to draw a more complete picture, which is all the more important when one considers that the interaction between different rules and concepts can raise very significant problems in the protection of property rights today by state laws and international law. In this regard particularly important are indigenous customary land rights, whose basic features do not match the concepts that are at the basis of state property laws and are prompting, particularly at the international level, the search for new instruments to assure their acknowledgment.

In religious laws, land is not seen as a mere economic asset but is naturally embedded in an entire conception of the world, its origin, the proper conduct of human beings and their salvation. Ownership rules may be understood in this context. For example, the Islamic jurisprudence on property is closely and inevitably linked to theological assumptions.⁸ From an Islamic point of view everything was created by God and ownership originally resides in God.⁹ One consequence of this is that property rights are limited and must be enjoyed in the observance of the ethical rules of Islam.¹⁰ The fact that everything belongs to God is not in conflict with the fact that private ownership of land is permitted and even encouraged for productive purposes. Property must be protected because it is recognized as fulfilling the needs of the faithful. Like in other religious traditions, limits on property rights can legitimately derive from the need to satisfy basic communal needs. Islamic jurisprudence states that some goods, for example, rivers, have a public nature. They are considered community property and are intended for public use. From a technical point of view, *waqf* has been a fundamental institution to immobilize property aiming to fulfil a charitable purpose. *Waqf* also served, particularly in the Ottoman Empire, to provide a basis for the economic independence of ulama (religious leaders) against the political power. The Islamic principles on land law have proven to be flexible enough to coexist with different land regimes in the vast Islamic world.

An interesting approach in the Islamic law tradition concerning the concept of private property can be observed within the Hanafi school of jurisprudence, which was the dominant school of the Ottoman legal thought.¹¹ Under this

⁸ See Siraj Sait and Hillary Lim, *Land, Law and Islam*, London-New York, Zed Books, 2006.

⁹ Quran, 2:29; 31:20, 11:61; 7:74; 14:32; 45:13; trans. by M.A.S. Abdel Haleem, Oxford World Classics, Oxford University Press, New York, 2008.

¹⁰ Quran 3:15; 17:100; 89:20; 100:8

¹¹ Although Quran includes general principles relating to property right, the regulation and protection of it is not dwelled upon.

approach, private property finds its source in the “agreement”¹² between God and the faithful where the faithful is burdened with some certain obligations against God deriving from divine commands but is also vested with certain rights, such as the right to property or the right to life.¹³ Rights such as property rights do not exist naturally: they come to life as a result of the acceptance of the obligations.¹⁴ Therefore, rights should be exercised in limitation with those obligations since they exist in a direct correlation with them.

On the other hand, the notion that the recognition of private property is necessary for the preservation of the fabric of the society can also be observed within the Islamic jurisprudence. According to this approach, a society without private property would fall into chaos, as history shows that communal property had been the one of the main reasons behind social conflicts.¹⁵ Therefore, private property is the demonstration of God’s grace to the faithful.¹⁶ Still, it will not be wrong to argue that the problem as regards the essential character of Islamic law’s approach to property right is far from being definitely resolved. While a considerable number of Islamic law scholars claim that the Islamic law’s approach to property rights is individualistic in nature,¹⁷ the majority view sees it as

12 Hilmi Ziya Ülken, *İslâm Düşüncesi*, İÜ Edebiyat Fakültesi Yayınları, İstanbul 1946, pp. 81–83; Fahri Demir, *İslâm Hukukunda Mülkiyet Hakkı ve Servet Dağılımı*, Diyanet İşleri Başkanlığı Yayınları, Ankara, 2012, pp.164–170.

13 In Islamic law, there is a clear distinction between the ‘rights of God’ (*huquq Allah*) and the ‘rights of the men’ (*huquq al’ibad*). For a general discussion on this dictonomy see Anver M. Emon, *Huquq Allah and Huquq al’ibad: A Legal Heuristic for Natural Rights Regime*, *Islamic Law and Society*, Vol. 13, No:3, 2006, pp. 321–395; Miriam Hoexter, *Huquq Allah and Huquq al’ibad as Reflected in the Waqf Institution*, *Jerusalem Studies in Arabic and Islam*, Vol 19, 1995, pp. 133–135; Mohammed Kamali, *Fundamental Rights of the Individual: An Analysis of Haqq in Islamic Law*, *American Journal of Islamic Social Sciences*, Vol 10, Fall 1993 and Baber Johansen, *Sacred and Religious Elements in Hanafite Law*, *Islam et Politique au Magreb*, Ed. Ernest Gellner & JC Vatın, Paris, 1981, pp. 281–303. According to some scholars ‘property right’ is the most essential, if not the only, *huquq ‘ibad*. (NJ Coulson, *The State and the Individual in Islamic Law*, *The International and Comparative Law Quarterly*, Vol. 6, No. 1 (1957), p. 50).

14 Hasan Hacak, *İslam Hukuk Düşüncesinde Özel Mülkiyet Anlayışı*, *M.Ü. İlahiyat Fakültesi Dergisi*, Vol. 29, No:2 (2005), pp. 108–109; Ebu Zeyd ed-Debusi, *Takvîmü'l-Edille*, (inq.by Halil Muhyiddin Meys), DKB, Beirut 1402/2007, p. 41.

15 id 14, p. 112; Al-Taftazani, *at-Talwih fi Kashfi Haqaiq at Tanqih*, Vol II, 1304, p. 174

16 Abu Bakr Ibn al-arabi; *Ahkam al-Quran*, 3rd ed., Vol I, DKB, Beirut, 2003, pp. 24–25.

17 It is often argued that the first section of the 1192th article of the Ottoman Civil Code Mejlle is influenced by this individualistic view. (Art 1192: Any person may deal with his property owned in absolute ownership as he wishes. But if the rights of any other person are concerned therein, the owner of such property may not deal with it as though he were the independent owner thereof). See Saba Habachy, *Property, Right and Contract in Muslim Law*, *Columbia Law Review*, Vol 62

having an overarching social function.¹⁸ One must also remember that the concept of “public interest” (*maslahah*) is a part of the Islamic jurisprudence (*fiqh*) and the five necessities (*al dururiyat al khamsan*)¹⁹ namely, life – lineage – religion – intellect and property that Sharia targets to protect equally fall into the domain of *maslahah*.²⁰ While on one hand, the right to property of the faithful was to be protected by the Sharia, on the other hand, the ultimate goal of “establishing social justice through the process of managing and allocating physical and human resources in a way that harmonizes the objective goals of distributive equity and economic efficiency”²¹ was also to be realized. Thus, the restriction of property rights in favor of the public interest is in line with the general principles (and goals) of Islamic law.²²

In Jewish law, similarly, all of creation belongs to God. Land is central to Jewish legal thought. Land rights are conceived as limited and contingent, and an extensive set of rules governs the use of land. The lordship of God over all creation implies that wealth is conceived as a gift. Property has a social dimension and

(1962) p.456–457; Ferit Hakki Saymen & Kemal Elbir, *Türk Eşya Hukuku*, Filiz Kitapevi, İstanbul, 1963, pp. 226–228.

18 See Ali el-Hafif, *el-Milkiyyetü'l-ferdiyye ve tahdîdühâ fi'l-İslâm* Mecelletü'l-Ezher, Vol. 36, Cairo, 1964, pp. 3–4; Adnan Güriz, *Teorik Olarak Mülkiyet Sorunu*, AÜHFY, Ankara, 1969, pp. 60–64; Halit Çalış, *İslam Hukukunda Özel Mülkiyete Getirilen Kısıtlamalar*, Yediveren Kitap, İstanbul, 2004, pp. 68–77.

19 Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (rev.ed.) Islamic Texts Society, Cambridge, 1991, p. 271–273.

20 The prominent Shafi scholar Al-Ghazali defined *maslahah* as the consideration which secures a benefit or prevents a harm but is also in harmony with the aim and objective of Sharia. Al-Ghazali laid out that these objectives consist of protecting the five values of ‘religion, intellect, life, lineage and property’. Any measure which secures these values falls within the scope of *maslahah*. (Al-Ghazali, *El-Mustasfa: Islam Hukukunda Deliller ve Yorum Metodoloji*, (trans.) by Yunus Apaydın, Vol.1, Rey Yayıncılık, Kayseri, 1993, pp.332–336).

21 Masudul Alam Choudhury & Uzir Abdul Malik, *The Foundations of Islamic Political Economy*, Macmillan, London, 1992, p.1; Khaled Abou El Fadl, The Place of Ethical Obligations in Islamic Law, *UCLA Journal of Islamic and Near Eastern Law*, Vol. 4, no. 1, 2004, pp.1–40; Anver M. Emon, *Islamic Natural Law Theories*, Oxford University Press, 2016, pp. 24–37. For a recent and interesting view that this moralistic purpose was both conceptually and structurally indispensable for the normative coherence of early Islamic jurisprudence see Omar Farahat, A Devotional Theory of Law: Epistemology and Moral Purpose in Early Islamic Jurisprudence, *Journal of Law and Religion*, Vol 31, no: 1, 2016, pp. 42–69.

22 The influential Islamic scholar Joseph Schacht had argued that although Islamic law was thoroughly individualistic, it also strived for a social reform and the improvement of the position of the socially weak. (Joseph Schacht, *An Introduction to Islamic Law*, Clarendon, Oxford, 1969, p. 269). This duality in characteristics would naturally pervade the whole system including the understanding of ‘property’ and ‘ownership.’

solidarity is required towards those in need. An important role is played by consecrated property (*hekdesh*), dedicated to the needs of the temple of Jerusalem, and then to various charitable purposes.²³

This social dimension of Jewish property law can be observed in the commands that stipulate one to use and enjoy his/her property right in a balanced way with community needs. It can even be argued that the property right in Jewish law is a derivation of the right holder's duty of not to interfere with another's (neighbor's) property. The individual's 'right' over a property was recognized as long as that this recognition did not harm the interests of the society and the interference with one's property right was closely linked with potential harm.²⁴

The Jewish law, in a way, sacrifices or subordinates individual property rights to the concept of "*harchakat nezikin*" (restraining of nuisances) and more broadly to prevention of actions considered as '*midat Sdom*' (roughly equivalent to the modern "abuse of rights" doctrine).²⁵ This resulting social obligation (or even a legal obligation) not only includes refraining from generating harm to neighbors or fellow citizens, but also to the public at large and the physical environment.²⁶ The result is one of various restrictions on property rights in favor of the protection of the environment or promotion of social justice.²⁷

Therefore, it follows that property considerations are thwarted by the societal (and environmental) considerations. It can also be argued that the individual was not only under the duty of not creating harm to the environment but also was given the task to tend, protect and enrich it. "God places man in the garden of

23 See Menachem Elon (ed.), *The Principles of Jewish Law*, Encyclopedia Judaica, Keter Publishing House Jerusalem, 1975, p. 701.

24 Aryeh Carmell, Judaism and the Quality of the Environment, in *Challenge: Torah Views on Science and Its Problems*, Eds. Aryeh Carmell & Cyril Domb, 2nd ed., 1978, Feldheim Publishers, Jerusalem, pp. 500–507; Meir Tamari, Social Responsibility of Jewish Individuals, in *Tikkun Olam: Social Responsibility in Jewish Thought and Law*, Eds. David Chatz & Chaim I. Waxman & Nathan J. Diament, 1997, pp. 239–240.

25 On 'abuse of rights' in Jewish Law, see Shmuel Shilo, *Kofin Al Midat S'dom: Jewish Law's Concept of Abuse of Rights*, *Israel Law Review*, Vol. 15, no.1, 1980, pp. 49–78; Aaron Kirschenbaum, *Jewish Law and the Abuse of Rights*, *Tel Aviv University Studies in Law*, Vol. 5, 1980–1982, pp. 98–114.

26 Elliot N Dorff, What is *Tikkun Olam* and Why Does it Matter? An Overview from Antiquity to Modern Times in *Tikkun Olam: Judiasm, Humanism and Transcendence*, Eds. David Birnbaum & Martin S. Cohen, New Paradigm Matrix Publishing, 2014, pp. 30–33.

27 Moti Banyan, *Real Estate & Planning and Building Laws in the Principles of the Jewish Law*, Bursi Press, 2015 pp. 53–56, 154–155 (Hebrew); George J. Webber, The Principles of the Jewish Law of Property, *Journal of Comparative Legislation and International Law*, Vol. 10, No. 1 (1928), pp. 82–93.

Eden to till it and keep it,” as said in the Book of Genesis.²⁸ Various commandments express the idea that ‘God, not Man is the rightful Lord of the Land’²⁹ and since God gave the property rights, no man could usurp them; not even kings.³⁰ Jewish law also instills respect for the earth and its cycles through intricate agricultural commandments such as the ancient commandment to let the earth lie fallow every seventh year.³¹

The Jewish legal tradition does not connect individuality and freedom with property rights. On the contrary, the values that are pronounced in this context are: solidarity, cooperation, social consideration and broader societal concerns – these are given much importance when balanced against the rights of individuals. When we also consider the fact that property rights in Jewish law were never explicitly laid out and were developed gradually in line with the societal needs, it can be argued that in ancient Jewish law, the primary beneficiary of the individual’s right over a property was “the community.” The protection of public health, the fostering of social justice and the maintenance of the urban aesthetics were amongst those targeted social benefits, as were the sustainment of natural resources. All those considerations accounted for the rationale behind the restrictions on the individual’s property rights.

Canon law shares with Islamic and Jewish law the idea that all property belongs to God. This seems to be a necessary consequence of the idea of creation. Coughlin highlights that, according to theologians such as Thomas Aquinas, everything belongs to God, material goods are meant for the benefit of all, and men are conceived as having a mere power of stewardship.³² Private property is sometimes connected to the original sin, causing inequality between men, but the anthropology underlying Canon law fully justifies private property as a means to the end of development of human potentiality. Private property then acquires the status of a natural right. Like in other religious traditions, property has a necessary social dimension. Private property cannot be exercised in an egoistic way and should always go along with social responsibility. Again, property also served from a religious point of view as an economic basis to stand against

28 Genesis 2:15 The Jerusalem Bible, Koren Publishers Jerusalem, 1992.

29 Exodus 19:5; Deuteronomy 19:1; Psalms 24:1; Psalms 97:9, The Jerusalem Bible, Koren Publishers 1992.

30 Kings 21:2, The Jerusalem Bible, Koren Publishers 1992.

31 Leviticus 25:1–6, The Jerusalem Bible, Koren Publishers 1992.

32 See for an extensive analysis, J.J Coughlin, “Church Property: the Unity of Law and Theology”, *Notre Dame Law School, Legal Studies Research Paper*, No. 07–23, 2007. <http://ssrn.com/abstract=975836>, and Drostan Maclaren, *Private Property and Natural Law*, Aquinas papers, no. 8, Oxford, Blackfriars, 1948 (quoted in Coughlin).

persecution and political interference. Berman makes reference to the fact that the Church has had enormous wealth and owned more than one-fourth of the land in Western Europe. Berman remarks that it is not surprising that ecclesiastical courts developed a substantial body of property law. However, “the canon law of property was influenced by contemporary secular law to much greater extent than was the canon law of family relations. For one thing, it was never suggested that property – even ecclesiastical property – had a sacramental character. Material resources of the church were always treated as part of its temporal power.”³³

According to the cosmological foundations of Hindu law, everything is a manifestation of the divine rather than the creation of a God. Land and more generally property are conceived as a means to accomplish ritual duties that are necessary for upholding the cosmic and social order. In this sense, property is functional to dharmic duties. Other aspects that may be highlighted with reference to Hindu jurisprudence on property are the possibility of multiple ownership, and the fact that the limits to own and use the land depend on social status – which is no surprise – but in this context more specifically on membership in a caste, and thus is theoretically part of a religious understanding based on dharma. Commenting on a seminal article by Derrett,³⁴ Davis remarks that it was “characteristic of the Hindu jurisprudential view of property to admit that there could be several owners of a thing, especially when it came to land. Within the joint family, the multiple and concurrent claims of sons to a portion of the family estate typify this idea of co-existent *svatvas* [ownerships]. Outside the joint family, the easiest example of this fractured sense of property is land tenure.” Davis also observes a striking correspondence between texts on dharma and historical evidence of medieval land tenure in India, highlighting at least a general pattern for the fact that “higher status meant greater control over the extent of property; lower status meant derivative forms of ownership without alienation rights, though with legal guarantees.”³⁵

The idea of sacredness of the land is prominent in indigenous land laws. Glenn uses the term “chthonic law” to provide an internal perspective based on a concept of harmony with the land. Thus, relationship with land is central to chthonic law and understood in different terms than in modern laws. As Glenn

33 H.J. Berman, *Law and Revolution: the Formation of the Western Legal Tradition*, Cambridge (MA), Harvard University Press, 1983, p. 237.

34 D.R. Davis Jr., *The Spirit of Hindu Law*, Cambridge, Cambridge University Press, 2013, p. 100. See also J.D.M Derrett, “The Development of the Concept of Property in India”, in *Essays in Classical and Modern Hindu Law*, Vol. 2, Leiden, Brill, 1977.

35 Donald Davis, *The Spirit of Hindu Law*, p.100.

explains: “Living close to the land and in harmony with it means limiting technology which could be destructive of natural harmony ... there is no reason to accumulate land, or map it (other than to show trails); there is nothing to be done to it or with it, except enjoy its natural fruits. Chthonic notions of property are therefore those of a chthonic life, and the human person is generally not elevated to a position of domination, or dominium, over the natural world.”³⁶ Communal property is the rule. Property law is based on a web of relationships within the group and between groups with respect to the land. This also entails that land is not fully disposable and the limits of its use depend on the needs of the group.

Of course, there is a risk of oversimplification in these brief observations about the jurisprudence of property in religious laws and customary laws. Nowadays, no law is pure and what we have is a continuous phenomenon of interaction. As an interim conclusion, if one concept such as “property” may have many faces because of religion- or place-specific values and meanings that are culturally connected to it, then this would translate in turn to different property regimes, and in particular to a different balancing between the individual and the community in the ownership, control, and use of land.

2. Roman law as a case study for conceptualizations of the right to property and the features of land law

2.1. The lasting influence of the Roman concept of property

It is often argued that property as a liberal concept finds its origins in Roman law.³⁷ The protection of private property is one characteristic of Roman law which had a lasting influence on modern legal systems. (Absolute) private property rights, among other private law institutions such as ‘*obligatio*/obligation,’ were the essential heritage of Roman law to later centuries. The ‘classical’ liberal conception of property – thought to be modelled after the Roman notion – which views the right to property as a subjective and nearly absolute right (*plena in re potestas*) dictated the way modern politics and law make sense of the institution.³⁸ Property right is an individual right that is only restricted by the rights of

³⁶ H.P. Glenn, *Legal Traditions of the World*, 5th edition, Oxford, Oxford University Press, 2015, p. 69.

³⁷ Gottfried Dietze, *In Defence of Property*, H. Rodney Co, Chicago, 1963, p. 14.

³⁸ For a comprehensive treatment of the characteristics of ‘classical property right’ see Sjeff Van Erp, From ‘classical’ to modern European property law, in *Essays in Honour of Konstantinos*

others or the public interest. Accordingly, it follows that the holder of this right can use (*usus*), reap the benefits of (*fructus*), and dispose of his/her property (*abusus*); and all these aspects of property rights stem from classical Roman law although the three fundamental powers vested in the owner of a property (*ius utendi – ius fruendi – ius abutendi*) were drawn up by jurists in the Middle Ages. However, the Roman notion of ownership did not re-appear until the eighteenth century with the rise of the commercialized society in Europe. The withering away of the monopoly of the sovereign's divine right over property opened up a new channel for the expression of liberty and individualism.³⁹

Thus, it would not be wrong to state that the Continental European codifications of the nineteenth and twentieth centuries were the manifestations of the emerging liberalism wave in the legal sphere, which espoused 'private property' and the 'freedom to use it at one's will.' It was only natural that the great codifications of that era had championed the main claims of the French Revolution,⁴⁰ namely 'freedom' and 'equality,' and had elevated the right to property to a state of being 'inviolable and sacred,' 'absolute,' 'indivisible' and 'exclusive' right. The historical and legal foundation of this approach was based on the 'Roman concept of ownership.' The drawbacks of reducing the variances of the Roman notion of property right to a single concept under a system that lasted for 25 centuries are evident and thus led to a rather incomplete conclusion on the nature of the Roman understanding of ownership.

2.2. A social aspect of the 'liberal' Roman right to property?

It did not take long before the Roman influence on the 'classical' liberal understanding of property started to be challenged by other competing understandings

D. Kerameus/Festschrift für Konstantinos D. Kerameus, Vol. I, Athens/Brussels: Ant. A. Sakkoulas/Bruylant, pp. 1517–1533.

³⁹ "Private property creates for the individual a sphere in which he is free of the state ... It is the soil in which the seeds of freedom are nurtured and in which the autonomy of the individual and ultimately all intellectual and material progress are rooted. In this sense, it has even been called the fundamental prerequisite for the development of the individual." Ludwig Von Mises, *Liberalism* (trans.) by Ralph Raico, CreateSpace Independent Publishing Platform, 2012, pp. 67–68.

⁴⁰ Declaration of the Rights of Man and of the Citizen 17: "*La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité.* (Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified).

of property rights as being unjust or imperfect.⁴¹ The beginning of the twentieth century witnessed the rise into prominence of probably the most influential of these competing understandings: the ‘social function of ownership.’ The celebrated French jurist Leon Duguit is frequently cited as the founder of the notion of the ‘social function’ of property rights and in this sense may be viewed as the antagonist of the Roman concept of ownership. His views of ‘property not being a right but a social function’⁴² can be argued to pave the way for the transpiration of the legal and intellectual basis for the justifications of modern restrictions on property rights in different cases. These limits vary from rent controls, anti-eviction regulations, urban planning and redistribution via land reform programs to the reconsideration of intellectual property rights and the expropriation by the State.⁴³ The prevalent idea was that the ‘Roman idea of ownership’ granted the owner an absolute, sacred, and nearly limitless right over his property, so that a new social function of property right was required to be taken into account in order to emphasize the interdependent connection between the collective economic needs of the community and individual property—with such a connection being arguably overlooked by the classical liberal thinkers.⁴⁴

In light of those aforementioned facts, one might come to the conclusion that the ‘Roman’ ownership lacked any social characteristics, being viewed solely from an individualistic perspective, and that the modern social approach to

41 See PJ Proudhon, *What is property? An inquiry into the principles of right and government*, (trans.) by Benjamin R. Tucker, Princeton 1876; Karl Marx, *The economic and philosophical manuscripts of 1844*, (trans.) by Martin Miligan, Dover publications, New York, 2007. See generally MC Mirow, The Social Obligation Norm of Property, Duguit, Hayem and others, 22 *Florida Journal of International Law*, 2010, pp. 191–226, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1662226; Sheila R. Foster & Daniel Bonilla, The Social Function of Property: A Comparative Law Perspective, 25 *Fordham Law Review* 1004 (2011) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960022.

42 “*On peut dire qu’en fait la conception de la propriété droit subjectif disparaît pour faire place à la conception de la propriété fonction sociale*” (One may say that in fact the concept of property as a subjective right disappears, to be replaced by the concept of property as a social function) (Léon Duguit, *Traité de droit constitutionnel*, 3rd ed., Paris, 1927, p. 618). For similar approaches of Duguit’s contemporary French jurists see Georges Renard & Louis Trotobas, *La fonction sociale de la propriété privée*, Paris, 1920; Emmanuel Lévy, *La vision socialiste du droit*, Paris, 1926.

43 For the influence of Duguit’s views on the concept of property right in South American legal systems see MC Mirow, *Latin American Law: A History of private law and institutions in Spanish America*, University of Texas Press, Austin, 2004, p. 205. For the influence of the doctrine of “property as a social function” on modern Arab codes see Guy Bechor, *The Sanhuri Code and the Emergence of Modern Arab Civil Law*, Brill, Leiden, 2007, pp. 99–143.

44 Léon Duguit, *les transformations générales du droit privé depuis le code napoléon*, 2nd ed., Paris, 1920, p. 20.

property rights – which gives way to various limitations on the use of property by its owner – was completely alien to the Romans.⁴⁵

The challenging of such an assumption should begin with the fact that there was not a single, unitary understanding of ‘ownership’ throughout all periods of the history of Roman law. Moreover, there were even times when different types of ownership had co-existed. This contrast can also be seen in the plurality of the terms that the Romans employed to indicate the power/authority one could possess over a thing: ‘*Meum esse*’ and ‘*Mancipium*’⁴⁶ were the most ancient ones amongst them, and it is nearly impossible to give their exact definition in modern terms. What is certain, though, is that both terms denoted the power of the father (*pater*) over persons and things of the family (*familia*), and the difference between them was related to their scope. ‘*Meum esse*’ was broader and included all objects of ownership as well as the free members of the family while *mancipium* was narrower in the way that it excluded *res nec Mancipi*.⁴⁷ Both terms are far from being the ancient equivalent of the modern term of ‘ownership.’ However, this lack of synonymy should not imply that the institution of ownership did not exist in ancient Roman law. Rather, it should serve as an indication for the absence of a precise corresponding notion.⁴⁸ In classical legal language, new terms came to be used to denote what we would call ‘ownership’ today: *Dominium* and *proprietas*. *Dominium* was the older of the two and first appeared in writings during the end of the Republic. *Proprietas*, on the

45 It is important to note here that the general hostility to Roman law which was based on an assumption that it encouraged commercialism, exploitation and individualism unfitting for a moral existence, was present in the European minds since the Middle Ages. See James Q. Whitman, The moral menace of Roman Law and the making of commerce: Some Dutch evidence, 105 *Yale Law journal* 1841 (1996); James Q. Whitman, Long live the hatred of Roman Law, 2 *Rechtsgeschichte*, 2003, pp. 40–57; Gerald Strauss, *Law, resistance and the state: The Opposition to Roman Law in Reformation Germany*, Princeton University Press, Princeton, 1986.

46 The original meaning of the term ‘*mancipium*’ is much discussed in literature. See Bonfante, *Scritti giuridici varii, Proprieta e Servitu, Forme primitive ed evoluzione della proprieta romano* vol II, Torino 1918, p. 88; WW Buckland, *The Main Institutions of Roman Private Law*; Cambridge University Press, 2011, p. 60, 95; Fernand De Vissher, *Mancipium et Res Mancipi SDHI* vol II 1936 pp. 292–301; Georges Cornil, Du Mancipium au dominium, *Festschrift P. Koschaker Weimar*, t.I. 1939 p. 404–444 ; Vincenzo Arango-Ruiz, *Istituzioni di dritto Romano*, 14th ed., Napoli 1984.

47 *Res Mancipi* was the type of property that was particularly important to the Romans which could only be conveyed by the methods of transfer: *mancipatio* or *in iure cessio*. All the remaining property was considered as being *res nec Mancipi*. (Alfred Berger, *Encyclopedic dictionary of Roman Law*, American Philosophical Society, Philadelphia, 1980: *Res Mancipi*).

48 Gyorgy Diosdi, *Ownership in ancient and pre-classical Roman Law*, Akadémiai Kiadó, Budapest, 1970, p. 60.

other hand, was a later creation. Although it was initially used to distinguish between different types of powers over the property,⁴⁹ with time, it became the synonym of *dominium*.⁵⁰

The discrepancy regarding the institution of ‘ownership’ in Roman law was not confined to the terms that denoted it. It also existed in regard to the degree of power that was vested in the holder of the ‘right.’ The quiriary ownership (the ownership under *ius Quiritium*⁵¹) was the type of ownership that the modern codifications had used as a model, while framing the ‘classical’ notion of the right to property. Therefore, some further explanations are needed to underline the differences between the quiriary ownership (*dominium ex iure Quiritium*) and the other – and more liberal – type of ownership under Roman law: bonitary ownership.⁵² *Dominium ex iure Quiritium* was the type of ownership that was acquired in conformity with the principles of *ius Quiritium* and was to be protected by the ‘legally recognized’ procedural action (*rei vindicatio*) of *ius Quiritium*. *Rei vindicatio* was legally recognized in the sense that any unlawful interference with the right of ownership was addressed in the courts of Rome by the means of *rei vindicatio* and if anyone was denied his power over an object that belonged to him under *ius Quiritium*, he could hold the other party accountable.⁵³ Since it was only the Roman citizens who could bring that action in a Roman court, any non-Roman who held a ‘*res Mancipi*,’ that is the category of objects⁵⁴ which the *ius Quiritium* stipulated to be transferred or acquired via the ‘modes of acquisitions recognized by *ius Quiritium*,’⁵⁵ would not enjoy any legal protection whatsoever under Roman law. This type of ownership was probably the continuance of the familial-communitarian agricultural land ownership.

49 Such as the difference between the restricted real right over an object and the right of -the naked- ownership over it (*nuda proprietas*); or the difference between possession and ownership. See Gai.I.2,30;2,92; D. 7,1,9,4.

50 See D.41,1,13 pr.

51 *Ius quiritium* was the ancient -customary- law which was very formalistic and rigid mainly owing to its religious roots. It was only valid for the citizens (*cives*) of Rome.

52 *In bonis habere*; see Gai. 2, 41.

53 The unified and absolute nature of this general vindication action (*rei vindicatio*) shall be considered to be the “paradigm of the absolute nature of Roman ownership.” Ugo Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction*, Greenwood Press, 2000, p. 183.

54 The category of the objects that were deemed to be *res Mancipi* was exhaustive. The things that were considered to be *res Mancipi* in Roman law were: slaves, beasts of burden, land and houses on Italian soil, rustic and prandial servitudes.

55 Namely *mancipatio* and *in iure cessio* (Gai. I. 16).

The system was tailored so as to exclude any foreigner from holding things which the Romans assumed to be vital for the public good.⁵⁶ It was only the Roman citizen who could have a *dominium ex iure Quiritium* in a piece of property. During the second century B.C., a new type of ownership came to life as a result of the need to address pressing socioeconomic issues. Starting from early times, as the Roman agrarian society began to rely on a market based economic system, foreigners started to be a part of the commercial and social life in Rome and accordingly, the need to integrate them into the legal system of Rome surfaced. The office of the urban praetor (*praetor urbanus*) was created in 246 B.C. and gradually assumed the title of *praetor peregrinus*, mainly dealing with the legal standing of foreigners. It was the procedural protection (*actio publicana in rem*) of the foreigners' acquisitions, provided by this new office of *praetor peregrinus*, which gave way to a new type of ownership.⁵⁷ This new form of ownership was called 'bonitary ownership' (*in bonis habere*) and unlike *dominium ex iure Quiritium*, the protection was not limited in regard to its subject-matter. *Res Mancipi* or *res nec mancipi*, all property could be the object of bonitary ownership.

Before moving on to examine restrictions on property rights in Roman law, it is important to underline the fundamental division of properties in Roman law: *Res Extra Patrimonium – Res in Patrimonium*. The property that was considered to be *res extra patrimonium* could not be in private ownership and could not be the object of any legal transaction.⁵⁸ Such property was either related to divine law (*res divini iuris*) or 'human law' (*res humani iuris*). The properties of human law (*res humani iuris*) included *res publica*, *res communes omnium* and *res universitatis*. *Res publica* was the public property that was under the ownership of the State.

56 The restrictions concerning *res mancipi* were not only confined to whom they could be owned by, but also to how they could be transferred and acquired. They could only be transferred or acquired by the 'ius civile' modes of acquisitions them being: *in iure cessio* and *mancipatio* both of which involved a great deal of publicity. *Mancipatio* was done in front of five witnesses and a 'lipripen' whereas *in iure cessio* had to be done in front of a magistrate. Both modes of transfer could only be done by Roman citizens (Gai. I. 14(a)).

57 The changing socio-economic dynamics were the driving force behind the transformation of the Roman concept of 'ownership.' However, the incorporation of new moral and religious perceptions into the Roman thought should also not be overlooked. Bülent Tahiroğlu, *Roma Hukukunda Mülkiyet Hakkında Sınırlar*, 3rd ed., Der Yayınları, İstanbul, 2001, p. 23. The influence of Greek philosophical schools such as Stoicism and Epicureanism and various Eastern belief systems contributed to the rising individualist sentiments in the society; the individual was no more an inseparable part of the State. See Clifford Herschel Moore, Individualism and Religion in the Early Roman Empire, 2.2 *The Harvard Theological Review*, 1909, pp. 221–234. Law (and property law in particular) was not immune from all of those changes as well.

58 D. 18, 1, 6, pr; D. 18, 1 34, 1.

Therefore, this type of ownership was public ownership and the rules of public law were applicable. Things such as roads, public squares, piazzas, constantly flowing water and ports were committed to the use of the people.⁵⁹ *Res Communes omnium* was the property that was considered to be the common property of all people, such as air, water, rivers, sea and the coastlines. This type of property was under the ownership of neither the State nor the people. Anyone could make use of them. As long as there was no law that prohibits it, the fish one catches in the river or the sea belonged to him. Or if one had constructed a hut on the coast of the sea, he would be considered to be the owner of it as long as that hut stood.⁶⁰ Lastly, *Res Universitatis* was the property belonging to a corporate body (*civitas* or *municipia*) such as theaters, circuses and *stadias*.⁶¹

The property that was considered to be *res in patrimonium*, on the other hand, could be the object of private property and any legal/commercial transaction. This group of property consisted of all types of properties that were not *res extra patrimonium*.

2.3. The public law limits on the right to property in Roman law

This section illustrates how Roman property law was constantly engaged in striking a balance between the individual and the community, even with respect to resources considered *res in patrimonium*. The types of limits discussed in the following subsections demonstrate, therefore, that Roman property law was far from focusing solely on empowering the individual owner.

2.3.1. Limits concerning graveyards

The first posited restrictions on ‘the right over property’ under Roman law can be observed in the Law of the Twelve Tables. This law had prohibited the inhumation or cremation of corpses within the city borders (*pomoerium*).⁶² The prohibition concerning inhumation accommodated religious concerns,⁶³ as well as health

⁵⁹ Pomponius had divided the *res publica* in to two different categories: *in publico usu* (public property all people can benefit such as roads and theaters) and *in pecunia populi* (public property which the State benefits such as mines) (D. 18, 1, 6 pr.)

⁶⁰ D. 17, 10, 13, 7.

⁶¹ D. 43, 8, 2, 9.

⁶² Tabula X 1. “*Hominem morum in urbe ne sepelito neve urrito*” (A dead person shall not be buried or burned in the city); Cicero, *De Legibus* 2, 23, 58.

⁶³ Giuliano Bonfante, *Corso di Diritto Romano*, Vol. 2, Milano 1966, p. 304.

and safety ones.⁶⁴ Since the general standard for the Romans was to bury their dead in their own land, this prohibition was a clear restriction on what a person could do with his own property, if his land was situated within the city borders.⁶⁵ The failure to comply with this prohibition would result in the land where the dead had been buried becoming a religious site (*locus religiosus*).⁶⁶ Accordingly, the land would lose its *commercium*, which meant that it could not be the subject of an ownership right or any other judicial act anymore and could not be pledged, transferred or acquired in any way.⁶⁷

Cremation, on the other hand, was prohibited for the sake of public safety. The main rule in regard to cremation was that it was forbidden to burn any corpses inside the city walls and cremation was only permitted outside the city border as long as the cremation took place at least 60 feet away from the nearest building.⁶⁸

The aforementioned limits were not the only property restrictions that dealt with inhumation or cremation. If someone had buried a corpse or its remains in another person's land without the owner's consent or knowledge, then the owner could not exhume them without a permissive decision from the priests or from an imperial enactment.⁶⁹ In such a case, the owner's freedom to use his property at his will was restricted for religious purposes. Another case of religiously motivated restrictions on land ownership was the statutory easement of the right of way to a burial site (*iter ad sepulchrum*), which could be considered as one of the first cases of a 'statutory right of the way.' If someone had to pass through another person's land in order to tend to a grave or exercise any kind of worship in the burial place then the owner of the land that is to be passed through was expected to grant a right of way to the person concerned. Otherwise, the right of way to the burial site would be provided by the magistrate in exchange for compensation.⁷⁰ The '*iter sepulchrum*' was a part of public

64 Cicero, *De Legibus* 2, 24, 61.

65 Vittoria Scialoja, *Teoria della Proprieta nel Diritto Romano*, (ed.) Pietro Bonfante, Vol. 1, Anonimia Romana Editoriale, Rome, 1928, p. 331.

66 Making the graveyard a *res religiosa*. (Gai 2, 3; D. 1,8,1). Heinrich Siber, *Römisches Recht in Grundzügen für Die Vorlesung, Römischen Privatrecht*, 2nd ed., Wissenschaftliche Buchges, Darmstadt, 1968, p. 63.

67 Gai I, 2, 6; Gai I. 2, 7.

68 Cicero, *De Legibus*, 2, 24, 61.

69 D. 11, 7, 8 pr; D. 8,1, 14 pr.

70 *Actio sepulchri violata* was a penal action granted in case of the violation of a grave (*actio sepulchri violata*).

law and later had been protected with imperial edicts. Its public characteristic was evident by the fact that the praetorian action *actio sepulchri violati* was an *actio popularis*⁷¹ and an *actio perpetua*.⁷²

2.3.2. Limits concerning buildings

The restrictions concerning buildings also date back to the times of the Law of the Twelve Tables. The law included a rule, which provided for a minimum of 2.5 feet (*sesterius pes*) gap between buildings.⁷³ The rationale behind that rule was to sustain a steady stream of air within the city and to mitigate the risk of spreading in case of a fire. This ambit of 2.5 feet was called '*ambitius*' when it separated buildings and '*confinium*' when it separated farms.⁷⁴

The limit of '*ambitius*' was a restriction that was about the construction of the buildings. Another restriction that dealt with buildings was not about their construction but their preservation: that is the case of *Tignum Iunctum*. *Tignum* was the beans and logs used in the construction of a building. However, at the time, the term also included, on a broader sense, any material used for construction purposes.⁷⁵ The Twelve Tables had explicitly stated that it was prohibited for a person to separate the logs and beans of a building or vineyard owned by another person, even if he himself was the owner of the logs or beans, as long as the building where the material was used in its construction stood firm.⁷⁶ Here, it is not the ownership of the building or the vineyard that was restricted but the

71 *Actio Popularis* was a penal action which could be brought by anyone of the people to protect the public interest.

72 *Actio Perpetua* was the type of action which could be brought without any time limit.

73 It would not be wrong to say that the rule of *ambitius* was not observed faithfully. For example, during the rebuilding of Rome following its sack by the Gauls, this rule of '*sesterius pes*' gap was not complied with at all. See Dennis Serrigny, *Droit Public at Administratif Romain*, Vol.1, Paris, 1862, p 464. Emperor Nero had reinstated the rule after the 'Great Fire of Rome' and his successors had to uphold it. During the later years of the Empire, the ambit between buildings in the city was extended to 12 and 15 feet. (D. 8,2,14). Any building in the city which had been constructed without complying with this rule was to be demolished.

74 *Actio finium regundorum* was the action that dealt with disputes relating to '*confinium*.' This action served to settle the disputes between neighbors over the boundaries of their lands. It could result in the transfer of a portion of land from one party to another into full ownership.

75 Most probably due to the developments in the construction industry and the usage of material other than logs and beans in the construction process. See Raymond Monier, *Historia de la proprieite fonciere a Rome et dans l'Empire Romain*, Paris 1953, p. 120.

76 XII Tables (6,8).

movable goods used in their constructions.⁷⁷ The motive behind such a prohibition was the ‘public need’ to preserve buildings and the desire to foster the cultivation of vineyards.

The preservation of buildings was not confined to the prohibition of separating the *Tignum Iunctum*. The temple of Jupiter Stator was the first all-marble building in Rome but it was not until the Empire that the use of marble became widespread. Still, starting from the time of Julius Caesar,⁷⁸ the use of expensive material in constructions, such as marble, had become common.⁷⁹ With the marble replacing wood and bricks in the construction of the buildings, new types of restrictions regarding the demolition of buildings had surfaced, in response to novel ways of making speculative profits out of the practice of demolishing buildings and selling their materials. Two different senate decrees (*senatus consulta*)⁸⁰ of the early Imperial period had prohibited this practice.⁸¹ The prohibition was reaffirmed by the *Senatus Consultum Acilianus*, dated 122 A.D.⁸²

Other prohibitions and proscriptions in the same vein followed:

- The owners were under the duty to repair or restore their buildings and were compelled to follow through the construction of their buildings once it commenced.⁸³
- In 245 A.D., a prior address of Emperor Marcus Aurelius concerning repairing charges had been re-established: Accordingly, co-owners of a building that is to be repaired or restored had to disburse their share of the expenses. If a co-owner refused to comply then he would lose his share over the property after a four-month period.⁸⁴
- In 321 A.D., Emperor Constantine had prohibited the dismantlement of marbles and columns of an urban building for the purpose of installing them in a

77 The owner of the material had an action ‘*actio tignum iunctum*’ which could be directed against the owner of the building for double the value of the material, provided that the material was used in bad faith. However, a claim for the separation of the material was not admitted.

78 It is generally accepted that the use of marble in Roman constructions started with Julius Cesar’s starting the *Luna (Carrara)* quarries (Carmelo G. Malacrino, *Constructing the ancient world: Architectural techniques of the Greeks and Romans* (trans) by Jay Hyams, Getty Publications, Los Angeles 2010, p. 25).

79 Suetonius referred to Emperor Augustus’s boast about his urban development efforts: “*Urbem latericium invenit, marmore reliquit*” (He found the city a city of bricks; he left it a city of marble) (Suetonius, *Divinus Augutus*, 28.3).

80 *Senatus Consultum Hosidianum* (44 AD) and *Senatus Consulium Volusianum* (50 AD).

81 Desolate buildings which were not suitable to be used as a dwelling were excluded.

82 In 398 AD, the prohibition was extended to public buildings.

83 D. 1, 18,7; C. 8, 10, 8.

84 C. 8, 10, 4. also see (D.17.2.52.10)

countryside house regardless of the possibility that both houses were owned by the same person. Moreover, the urban building and the separated material would be confiscated by the State. The rationale behind this prohibition was to sustain city beautification. Accordingly, the dismantlement of such material from a desolate building that was to be installed in an urban building in another city was permitted. In 362 A.D., the scope of the prohibition was expanded to include the dismantlement and replacement of building columns for any reason.⁸⁵

2.3.3. Limits concerning natural resources

Any citizen who owned land along the coast of the sea or the bank of a river had to bear with anyone who used the property for the purposes of fishing or transportation. These owners also had to allow the fishermen or boatmen to tie their boats to trees in their land or unload their cargo there.⁸⁶ Especially during the classical law period, all coastline and rivers were open to the use of all citizens.⁸⁷ The praetorian interdict *uti priori aestate* did forbid anything to be built in a public river or its banks as this could cause the water to flow in a reverse direction than usual.⁸⁸ Being a public law remedy, any Roman could resort to the praetor and invoke this interdict. The praetor could also compel the defendant to undo what he had done in the river or its banks with an *interdictum restitutium*.⁸⁹

The situation of mines was different in the way that during the classical law period the property right of the owner of a mine was nearly absolute. As long as the owner did not consent to it, no one could operate that mine.⁹⁰ However, during Justinian's reign, the property right of mine owners became extremely restricted. According to this new principle, it was permitted to dig and operate a mine, provided that 10 percent of what had been acquired was paid to the State treasury and another 10 percent was paid to the owner of the mine. Actually, the classical Roman law maxim: "*cuius est solum, eius est usque ad coelum et ad infernos*" (He who owns the soil owns everything above and below from heaven to hell) was no longer applicable during the post-classical period. We can see

⁸⁵ Raymond Monier, *Du Mancipium au Dominium, Essai sur l'apparition et le developpement de la notion de propriete en droit Romain*, Les Cours de droit, Paris, 1947, p. 103.

⁸⁶ D. 1, 8, 3, 5 pr.

⁸⁷ Ulpian talks about a distinction between public rivers (*fluminae publica*) and private rivers (*aquae private*). However, the essence of the distinction between them is not that clear (D. 43,13).

⁸⁸ D. 43,13,1 pr.

⁸⁹ D. 43,13,1,11-13

⁹⁰ D. 8, 4, 13, 1.

numerous imperial enactments that restrict the property rights of private persons when the object of the property right is a mine.⁹¹

2.4. Confiscation, expropriation and public utility in Roman law

In modern times, the most common State-based interferences with a person's ownership right are the practices of 'confiscation' and 'expropriation.' Both 'confiscation' and 'expropriation' refer to the seizure of private property by the State. The difference is that with 'expropriation,' the State seeks to meet a public need and in order to realize this target, it seizes (expropriates) the property of a private person in exchange for 'fair' compensation. However, the State 'confiscates' the property of a private person with the aim of penalizing that person. Therefore, the main differences between those two practices can be summed up such that in expropriation there is the element of 'public good' and it is done in exchange for a payment, whereas confiscation is penal in nature and accordingly is done without any compensation; the confiscated property becomes a part of the 'treasury.'

When we turn to Roman law, we can observe that the public act of 'confiscation' (*confiscatio*) was very much present in the Roman system. Although the Roman State resorted to the act of *confiscatio* mainly in cases concerning high treason,⁹² one can observe other cases where private property was seized by the State. For example, the *lex Julia de maritandis ordinibus*, which was Augustus's legislative answer to the social and 'moral' problems of Roman society, made the offence of adultery a crime punishable by exile and confiscation of property. On the other hand, the majority of Roman law scholars believe that the institution of 'expropriation'⁹³ did not exist in Rome as a legal instrument but rather as a practical display of State power.⁹⁴

The scope of the limits on expropriation is generally drawn within the vague borders of 'public good.' Therefore, the institutions of 'expropriation' and 'public utility' under Roman law should be also addressed when dwelling on cases of

91 See C. 11, 7 (6) 3; C. 11, 7 (6) 3.

92 *Lex iulia maiestatis*; D.48,4,1,1

93 The Latin term '*expropriate*' does not appear in classical texts.

94 See WW Buckland, *The Main Institutes of Roman Private Law*, Cambridge University Press, 1935, p.103; Özcan Karadeniz Çelebican, *Roma'da Kamulaştırma ve Kamu Yaranı*, Ankara Üniversitesi Yayınları, Ankara, 1975 p. 6–9; Pietro Bonfante, *Corso di diritto Romano: La Proprieta*, Vol 2, Giuffrè, Milano, 1963, p. 247–248 ; Max Kaser, *Roman Private Law* (trans.) by Rolf Dannenbring, 2nd ed., Butterworths, London, 1968, p. 97; Bülent Tahiroğlu, *Roma Hukukunda mülkiyet hakkının sınırları*, 3rd ed., Der Yayınları, İstanbul, 2001, pp 79–82.

property restrictions based on the authority of the State.⁹⁵ First, it must be stated that there is little controversy in regard to the assumption that there existed no legal institution of ‘expropriation’ in Roman law. However, that assumption should also not lead to the conclusion that the Romans had no notion of the State carrying the authority to seize its citizens’ property. The public order was viewed as being outside of the legal sphere and therefore expropriation existed in Rome, not in Roman law. Thus, the difference with modern law is that there was no general rule or maxim that covered such instances in Roman law; it was as practical as it could get. Still, even during the classical law period, one can observe the more or less equivalent of modern expropriation albeit in the form of a ‘forced sale’ (*emptio ab invito*)⁹⁶ only for the purposes of the construction of aqueducts and alleys.⁹⁷ And similar to modern times, it was also acknowledged that such an action on behalf of the State was an exception and should had been done only under certain circumstances and for a limited number of reasons. During the Republican period, it can be seen that various laws were enacted, including specific prohibitions of the practice of *emptio ab invito*.⁹⁸ It should also be stressed that during the ancient law and the classical law periods, the Roman State did not feel the pressing need to confiscate or expropriate land since most of the land actually belonged to the State. In the earlier times, most of the land was

95 It is important to distinguish between “necessity” and “utility” in this context. It may be debatable whether the cases where an overriding necessity (such as a fire hazard) leads, for example, to the demolition of a property, should be considered as an act of ‘expropriation’ with a legal/legislative foundation or a mere display of supreme executive authority by relevant officials.

96 This was a technical term concerning the seizure of one’s land in exchange for compensation. Out of all the public interferences on one’s property, *emptio ab invito* was the closest to the modern act of ‘expropriation’ (Özcan Karadeniz Çelebican, *Roma’da Kamulaştırma ve Kamu Yaranı*, Ankara Üniversitesi Yayınları, Ankara, 1975, p. 13 fn. 42.)

97 In that regard, it is interesting to observe the parallels between Roman law and Islamic law. Despite the fact that in Islamic law ‘expropriation for public utility’ is of recent introduction, the origins of the institute can be found in the practice where the command of the *Kadı* (judge) concerning the sale of the property that is to be expropriated, superseded the consent of the owner. (Saba Habachy, Property, Right and Contract in Muslim Law, *Columbia Law Review*, Vol 62 (1962) p.456; Hossein Askari & Zamir Iqbal & Abbas Mirakhor, *Introduction to Islamic Economics*, Wiley, 2015, p. 58 also see David Santillana *Istituzioni di Diritto Musulmano Malichta*, 2nd ed., Istituto per l’Orient, Vol I, 1938 p. 357 fn. 5). Termed “legitimate duress” (*ikrah hükmi*) by Muslim scholars, this practice is undoubtedly very similar to Roman law’s “forced sale” (*emptio ab invito*) as in both instances the consents of the sellers are tainted with the ‘legitimate’ duress by the State’s (authority) rendering this invalidity of the juristic acts as inconsequential.

98 Such as two agrarian laws; one sponsored by *tribunus Servilius Rullus* (BC 64) and one of Gaius Julius Caesar’s *Lex Iulia Agraria* (BC 59) or the imperial edict of Augustus, *Edictum Venafranum* (BC 20–30).

owned by the State, while during the classical period quiritarian ownership over provincial land was not allowed, and since the late republic such land was deemed to be owned by the State.

On the other hand, there is little doubt that the institution of ‘expropriation’ is recognized and practiced in a legal form during the Dominate period.⁹⁹ The ‘public utility’ purpose of expropriation is emphasized, and the legal framework is identified more clearly during this period as compared with the classical period.¹⁰⁰ However, public utility (*public utilitas*) was a very broad term in the Roman mind and we can observe various terms that had been used to express the ‘good of the public’ such as ‘*rei publicae utilitas*,’ ‘*decus rei publicae*,’ ‘*pulchritudo civitatis*,’ ‘*magna necessità*,’ ‘*urguens necessità*,’ ‘*communis commoditas*’ and ‘*inevitabilis*.’ This shows us that the Roman notion of the ‘good of the public’ was not limited to urgent economical necessities of the people but also included aesthetic and artistic considerations.

The organization and the functions of the Roman State were not based on a written constitution. The sovereign right (*imperium*) of the State was considered to be part of the field of politics, not part of the legal sphere. Therefore, to claim that a Roman constitutional and administrative law existed, in the modern sense of these terms, may hint to an anachronism.¹⁰¹ Throughout the political history of the Roman State, it can be observed that the functions of the State bodies that possessed *imperium* were designed as a consequence of the socio-economic and political circumstances within the society. It was the conventional perpetuity of the State bodies and their functions that provided for the stability and balance of the Roman public institutions.¹⁰² The lack of general legal principles that could provide guarantees for the basic rights of the citizens combined with the fact that all functions of the State were seen as a part of the absolute public power *imperium*, had prevented the formation of precise and definite legal rules concerning the relations between the State and the citizens.¹⁰³

⁹⁹ See C. Th. XV. 1. 39; C. Th. XV. 1. 50. ; C. Th. XV, 1, 51; C. Th. XV, 1, 53.

¹⁰⁰ Even the Emperor Augustus did hesitate to expropriate for public utility (WW Buckland & Arnold D. McNair, *Roman Law and Common Law: A Comparison Outline*, 2nd ed., Cambridge University Press, 2008, pp. 94–95).

¹⁰¹ Theodor Mommsen, *Römisches Staatsrecht*, Graz Vol I., 1953 pp. 169; Henrik Siber, *Römisches Verfassungsrecht*, Lahr, 1952, pp. 65–66; Fritz Schulz, *Prinzipien des Römischen Rechts*, München 1935, p 111.

¹⁰² F.M De Robertis, Sulla espropriazione per pubblica utilità nel Diritto Romano, *Studi Guido Zanobini*, Vol. V, Milano, 1965 p.144.

¹⁰³ Theodor Mommsen, *Römisches Staatsrecht*, p. 169; F.M. De Robertis, ‘*Emptio ab invito*’, sul problema della espropriazione nel Diritto Romano, *Estratto dagli Annali della Facoltà di Giurisprudenza della Università di Bari*, Volume VII-VIII, 1945-46–47, p. 199.

Therefore, it was only natural that according to the Roman understanding of public services which supposed that all State functions (including the carrying out of public services) were part of *imperium*, expropriation – which was one of the most vital ways to generate revenue for public services – would not be considered as a distinct legal institution. This was so because in such a case, expropriation did not need to be based on an authority specifically granted to public bodies as an exception to the absoluteness of private individual property.

2.5. Roman land law: between individual and community

The tension between the individual and the community as regards the definition, allocation, protection and exercise of property rights is not a modern phenomenon. Historically speaking, such a tension is emphasized in religious laws, but a secular system such as Roman law seems also not to have been devoid of it.

We argue that the aforementioned cases of property restrictions (and the fact that most of them could be demanded with an *actiones populares*¹⁰⁴ or a common interest interdict) are sufficient to indicate that in Roman law, the restrictions on property rights were meant not only to prevent interferences with another person's private property rights (such as reciprocal limits among neighboring landowners), but also to limit individual property rights for the sake of communal and societal considerations.¹⁰⁵ The difference between religious laws and Roman law in this regard may be that while religious laws were conceived from the beginning as having a moralistic nature based on a certain social vision, Roman law gradually acquired such characteristics because of social, political and economic necessities.¹⁰⁶ For example, the limits – or the lack thereof – of the property right over slaves became more and more problematic in the Roman society owing to the mistreatment of the slaves and the way this affected a certain part of the community.¹⁰⁷ This led to various restrictions as to what the master could do with his slaves.¹⁰⁸ It would be also fitting here to remind the fact that the concept of

104 See *supra* note 71.

105 Religious considerations are included within this scope.

106 This does not mean, of course, that religious laws were inherently static and not susceptible to any development through interpretation or other means.

107 See, e.g., Seneca, *Epistulae Morales*, Letter 47 (trans) by RM Gummera, Loeb Classical Library Harvard University Press, London, 1979, p. 300; Cicero, *De Officiis*, I.13.43.

108 See, e.g., *Lex Petronia* (61 A.D.) which prohibited masters from making their slaves fight wild animals unless a permission from the competent magistrate was granted. See also D.48,8,11,2; D.18,1,42. Justinian also stated that one should refrain from abusing his property right over his slave as this prohibition of abuse was closely related with the “public interest” (Inst. I.8.2: *expedit*

“public interest” was eventually arrived at because of pressing new needs. As the republican tendencies grew, the State had relied on fresh principles for its continuum. The sole principle of “religion” was required to be replaced with the new principle of “public interest.”¹⁰⁹

Another important fact to mention is that the “doctrine of the abuse of rights” was never fully developed under Roman law¹¹⁰ as the exercise of a legally stated right could never be construed as an abuse.¹¹¹ However, the first theoretical instance of the formulation of the doctrine can also be found in the *Institutiones of Gaius*.¹¹² Moreover, the exceptions of “*exceptio doli generalis*” and “*specialis*” with which the defendant could plead the other party’s fraud (and all his other actions in bad faith) as a procedural defense may also be considered as the historical origin for the doctrine of abuse of rights.¹¹³

Therefore, the efforts to give Roman law a strong ideological outlook and present Roman law as “the bulwark of individualist capitalism, materialist in its outlook and favoring selfishness at the expense of the public good”¹¹⁴ must be approached with caution. The gradual shift of importance from the individual to the social domain was ideological/political in nature.¹¹⁵

It is true that the certain aspects of the Roman property right had constituted a model for the ‘liberal’ concept of property right¹¹⁶ and for various contemporary

enim rei publicae, ne quis re sua male utatur). The interests of the masters were subordinated to communal interests. (Alan Watson, *Slave Law*, John Hopkins University Press, Baltimore, 1987, p. 121; See also Peter Birks, *The Roman Law Concept of Dominium and The idea of Absolute Ownership*, *Acta Juridica*, 1 (1985), p. 24; WW Buckland, *The Roman Law of Slavery*, The Lawbook Exchange Ltd., 2001, pp. 36–39).

109 N. Denis Fustel de Coulanges, *The Ancient City*, John Hopkins University Press, Baltimore, 1980, pp. 309–310.

110 Pietro Bonfante, *Corso di diritto Romano: La Proprieta*, Vol 2, Giuffrè, Milano, 1963, p. 290 ; WW Buckland & Arnold Duncan, *Roman Law and Common Law: A Comparison in Outline*, 2nd ed., Cambridge, 2008, pp. 97–100; HC Gutteridge, Abuse of Right, *Cambridge Law Journal*, Vol.5, no.1, 1933–1935, pp. 22–32.

111 D. 50,17,55 *nullus videtur dolofacere qui a quo iure utitur* (no one is considered to have committed a wrong who exercises his legal right); D.50,155.1: *non videtur vim facere qui iure suo utitur* (he is not deemed to use force who exercises his legal right).

112 Gai.Inst. I. 55 (...*male enim nostro iure uti non debemus*...) (...We should not exercise our rights wrongfully..).

113 Andreas Schwarz, *Roma Hukuku Dersleri*, (trans.) by Türkan Rado; 7th ed.; Istanbul, 1965, p. 213.

114 HF Jolowicz, The Political Implications of Roman Law, *Tulane Law Review*, Vol. 22, 1947, p. 62.

115 On the link between the decline of the individualistic concept of property and the emergence of nationalism and political unification movements during the late 19th and early 20th centuries, see Gottfried Dietze, *In Defence of Property*, H. Rodney Co, Chicago, 1963, p. 128–133.

legal concepts such as “freedom of contract” which can be regarded as giving way to the market-based economy grounded on predictability find their origins in Roman law.¹¹⁷ It is also true that the Roman private law institutions and concepts had provided for the basis of framing the language and the methodology within which the conceptualization of various modern political theories became possible.¹¹⁸ The Roman ‘*dominum*’ had become a generalized signifier of absolute proprietary power of one over another and played a central role in the royal and dynastic politics of Renaissance Europe.¹¹⁹ The French royalist jurists identified the king as a *domunus* which helped them embed all the sovereign authority and regal rights¹²⁰ into the princely property right of *dominum*, giving way to its succession by heirs.¹²¹

At the same time, however, Roman law represented the legal system of the most complex society that came out of the ancient world and managed to carry its presence on such a diverse landscape for hundreds of years following its official dissolution. Roman law owes this trait to its success in managing to stay stable while gradually developing. Throughout its life, the Roman legal system was tested many times with the inevitable forces of change only to adapt its institutions and models to the emerging new realities. Accordingly, it is perfectly plausible to envision that the principles of the same law which had developed a sophisticated legal system for the inhumane institution of slavery may also be re-issued to spearhead the modern crusades of environmental protection or animal rights. Thus, many principles of Roman law would be applicable if one wanted to rely on Roman private law institutions and concepts for the promotion of collective societal values or for the safeguarding of human dignity and freedom as such

116 There were no restrictions on the *ius quiritum* mode of ownership. The ancient law did not acknowledge any statutory easements deriving from neighbouring relations. The owner of the land was also deemed to own every natural resource that is part of the land. Land ownership was perpetual and not subject to any tax. (Pietro Bonfante, *Historia du Droit Romain*, trans. by Jean Carrère & François Fournier; Vol. I, Paris, 1928, pp. 207–208).

117 see James Gordey, *The Philosophical Origins of Modern Contract Doctrine*, Clarendon Press, Oxford, 1991, p. 30 *et seq.*

118 JN Figgis, *Political Theory from Gershon to Grotius*, Batoche Books, Kitchener, 1999, p. 121; Gerald Strauss, *Law, Resistance, and the State: The Opposition to Roman Law in Reformation Germany*, Princeton University Press, New Jersey, 1986, p. 123.

119 Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought*, Oxford University Press, 2016, pp. 91–97, 101–105.

120 Since these were considered *res incorporales*.

121 Daniel Lee, Private Law Models for Public Law Concepts: The Roman Law Theory of *Dominium* in the Monarchomach Doctrine of Popular Sovereignty, *The Review of Politics*, Vol. 70, No. 3 (Summer, 2008), pp. 370–399.

considerations gradually transfused into Roman law.¹²² Such an attitude would not be that different from the case where the French monarchomachs had relied on Roman private law institutions themselves¹²³ in order to discredit the French Royalist School's 'Dominum theory' or to lay down the mechanics of constitutional change and resistance.¹²⁴ Roman law was – and still is – utilized as a weapon in the political arena of the ideological battles.¹²⁵ Furthermore, property rights in Roman law may be considered to be epiphenomenal since the economic, social and political changes directly influenced and fragmented the Roman understanding of ownership and caused various restrictions that are not that different in nature when compared with the restrictions brought about by the emergence of the 'social function of property' doctrine. The social function of property, although not present since the beginning of Roman law, nonetheless gradually became an aspect of the Roman understanding of property as a quasi-intended consequence of the transformations that the Roman individual, society and State have undergone.

122 To cite a few examples: the quasi-contract of '*negotiorum gestio*'; the concept of just price (*iustum pretium*) and the principle of '*laesio enormis*'; the various applications of "*obligatio naturalis*" which in time came to include obligations deriving from social/moral duties. Another interesting example would be the emergence of the delict '*in iura*' which is considered to be the historical origin of the modern crime of insult. Roman law is known to be the first system that legally acknowledged the non-psychical, 'incorporeal' personality comprised of personal reputation, honor and dignity. Thus starting from about BC II. Century, any unlawful attack against individual 'personality' in the forms of insult and libel was subjected to punishment via the praetorian edicts and the action of '*actio iniurarium*'. See Ruth Walden, *Insult Laws in The Right to Tell: The Role of Mass Media in Economic Development*, Ed. Roumeen Islam, Washington, 2002, p.210; Bülent Tahiroğlu, *Roma Hukukunda Iniura*, İÜ Yayınları, İstanbul, 1969, pp.23–26; Salvatore Di Marzo, *Roma Hukuku*, (trans.) by Ziya Umur, 2nd ed., İÜ Yayınları, İstanbul, 1959, pp. 479–480; Rudolph Sohm, *The Institutes*, (trans.) by James Crawford Ledlie, 3rd ed., Clarendon Press, Oxford, 1908, pp. 422–423. See also Gai.I.3,220 and D.45.10.1.2.

123 The critics of the Royalists had reminded that Roman law never regarded the *fiscus* to be a part of the personal property of the *princeps*. The Manorchomachs, by crafting a corporatist concept of the people, did deny the royal *dominum* in favour of the people (*populus*) who were assumed to be 'a legal person' in civil law terms. Daniel Lee, *Private Law Models for Public Law Concepts, The Roman Law Theory of Dominium in the Monarchomach Doctrine of Popular Sovereignty*, *The Review of Politics*, Vol. 70, No. 3, Summer, 2008, p. 382–383.

124 *Id.*, at p. 377.

125 Walter Ullman, *Law and Politics in the Middle Ages*, Cornell University Press, Ithaca, 1973, p. 77; Peter Stein, *Roman Law in European History*, Cambridge University Press, New York, 1999, pp. 2–3.

3. Comparing current constitutional structures for the right to property and land law: Turkey and India

In this part, we select two constitutional contexts having seemingly different policy preferences as to the right to property, namely Turkey and India. Since both are emerging economies, they may provide touching stones to better understand the role of contemporary public law restrictions on the right to property and economic growth, and to observe the recent effects of those restrictions on different rights' owners as well as on sustainable development and environment.

During the years when the right to property was enshrined as a fundamental right in the constitution, India witnessed unimpressive rates of growth. But after this right ceased to be a fundamental right in 1978, India experienced remarkably rapid growth from 1991 until 2009. In contrast, Turkey has generated its economic growth under a constitutionalized right to property.

3.1. Turkey

In Turkey, the right to property is guaranteed as a fundamental right and its constitutionalization traces back to the modernization period of Ottoman legal and political structures in the nineteenth century. The economic regression and political turbulences that severely affected the Ottoman Empire as of the mid-eighteenth century led to the modernization of Ottoman legal and political structures, based on the adoption of basic constitutional documents, first in form of pacts and charters, and then through legal codifications and the enactment of the first constitution in 1876. In this period of constitutionalization, basic guarantees as to the right to property, including prohibition on excessive and arbitrary taxation, were also at the center of the debate and the various normative approaches. In the era of republican constitutionalism, Turkey kept on the approach of respecting the constitutional value of the right to property. In the 1961 constitution, the right to property and its public law restrictions and safeguards such as in matters of expropriation, preservation of forests and nationalization are regulated in the constitution under the chapter on social and economic rights. The 1982 constitution changes this constitutional design by placing the right to property under civil rights in line with liberal economic policies. However, it still stipulates public law restrictions and guarantees under the heading of social and economic rights. The rights to property and to inheritance are explicitly cited as civil rights. Principles of legality, and the public good or the public interest as a ground for restriction on the exercise of the right to property, are also stipulated in the relevant constitutional provisions (article 35 para. 2 and 3).

Under Turkish constitutional conceptualization, public property clauses, such as bans on ownership in regard to coasts and forests and State duties about property in land are prevalent. Some of them are regulated under social and economic rights and some of them are stipulated under different constitutional provisions of economic nature. These clauses include limits on State intervention in immovable properties, safeguards for the protection of the public interest, and positive obligations of the State in regard to the protection of vulnerable groups, such as farmers with insufficient land of their own or forest villagers. In the Turkish political discourse of the late 1960s and the 1970s, land law reform was perceived by some of the political parties as a tool for promoting less developed regions that exhibited strong patterns of unequal distribution of land ownership and low rates of human development. Nevertheless, a land law reform was never implemented in its broad sense, although there are countrywide and regional development projects or plans for the protection of small farmers and land-owners. Taking into account effective use of agricultural lands, protection of forests and coasts, and promotion of organic products and olive agriculture, various laws were adopted that partly met the challenges of economic growth and protection of the public interest for the sake of livelihood and the right to environment as entrenched in the Turkish constitution. Here, we put emphasis on issues regarding the impacts of two different sets of constitutional norms that became the subject of various legal disputes at both the national and regional levels mostly against the background of rapid economic growth, environmental concerns, challenges of urbanization, or lack of trustworthy records for real estate.

The first issue deals with the property rights of local and traditional agricultural farmers, who are also producers of olive and owners of olive trees. Agriculture based on olive trees refers to a historical tradition in Anatolia, especially in the Aegean region of Turkey. It is the main source of income for local inhabitants and it is also deemed as a cultural heritage for wide segments of the west Anatolian population. In a recent case known as *Yırca*, the name of the village where the legal dispute became the subject of public attention, the clash of claims between the right to property of local farmers and the economic interest of the investor in an energy project were brought into the legal scene. *Yırca* made a huge impact on the debate in Turkey in regard to the effective protection of environmental rights, property rights of small farmers, and one-sided governmental policies favoring economic interests of energy investors in Turkey.

The case is a result of an urgent expropriation procedure, which is not defined in the constitution, but is enabled by the Law on Expropriation. The Law allows for the application of an urgent expropriation procedure for purposes of national defense as prescribed in the National Defense Law, in cases of urgency determined by the Cabinet or under extraordinary circumstances de-

fined by specific laws. In the *Yirca* case, the Cabinet has approved the urgent expropriation of lands used for olive agriculture and owned by local farmers in favor of the energy company Kolin, which constructs a power plant based on coal. This decision of the Cabinet was not welcomed by the owners of the lands and olive trees, and it became a matter of concern for the local community, environmentalist groups, and opposition parties. As the objections of the owners and the local community were raised, the energy company Kolin felled a total of 6,666 olive trees in the expropriated land.¹²⁶ The locals tried to guard the olive grove for more than 52 days. As the trees were cut down by Kolin group, public officers did not take any measures to prevent the cuttings and the total destruction of the area. There were extensive clashes between private security officers and the locals during the protests and cuttings. Cries and vows of local owners for the olive trees as well as ill-treatment of protestors by private security officers and police were quite visible in the Turkish mainstream media. The urgent expropriation decision issued by the Cabinet was brought before the Council of State, the supreme administrative court in Turkey, on the ground of there is a specific legislation in Turkey on the protection of olive groves, known as Olive Law. Olive Law as a *lex specialis* prohibits constructions having detrimental effect on olive groves within a 3 km radius or on olive tree lands. Since olive tree lands are mostly located in the Aegean and Mediterranean towns of Turkey, it is well known that rent-seeking groups or individuals have a huge interest in those lands for building holiday resorts or construction projects for summer houses and villas. The Olive Law has been regarded as an obstacle for those groups for many years, even though there are also patterns of severe violations of this law and similar ones. However, in the *Yirca* case, the matter of dispute was not a direct violation by a company or an individual. Instead, the violation is in fact provided and facilitated by the Cabinet's decision under the urgent expropriation procedure, seemingly in line with the Law on Expropriation. The Council of State accepted the case of *Yirca* local farmers on the basis of the Olive Law and the lack of a public interest, and it issued an interim relief order that prevented the construction of power plant in the olive groves.¹²⁷ The

126 For critiques, a description of the course of events, and other issues see “*Yirca*’daki köylüleri dövüldü, 1 saatte 6000 zeytin ağacını kestiler” (The villagers in *Yirca* were battered and 6,000 olive trees were cut down), *Cumhuriyet*, 7 November 2014; Emre Kızılkaya, “New Turkey seizes private property like old Ottomans,” *Hürriyet Daily News*, 9 February 2015; “Bakanlıktan Büyük İtiraf (A Big Confession from Ministry),” *Evensel*, 16 July 2014; “Turkey’s Council of State cancels rapid expropriation decision for *Yirca* olive grove,” *Hürriyet Daily News*, 26 December 2014.

127 Council of State, E. 2014/7272, K. 2014/8748, 16 December 2014. For the local court’s decision see also Manisa Administrative Court (First), E. 2014/1079, 20 March 2015.

Yirca case has proven that the protection of the right to property of local farmers can go hand in hand with claims on the right to the environment, which is explicitly guaranteed in the constitution. In light of the *Yirca* case, it also becomes clear that an isolated interpretation of an expropriation case that requires compensation under the Turkish constitution is not sufficient to solve the complex issues in regard to the economic interests of local farmers, environmental friendly development models based on traditional production methods, and energy demands of a growing economy.

The second issue deals with Turkey's constitutional approach to the right to property, land law restrictions, and protection of environmental values. It is related to the ownership of forests, which became a matter of dispute before the European Court of Human Rights. The matter of dispute is based on the fact that the constitution states that forests are under the care and supervision of the State. The ownership of State forests cannot be transferred. Ownership of these forests cannot be acquired by prescription, nor shall servitude other than that in the public interest be imposed in respect to such forests (article 169 paragraph 2 of the constitution). The judgment of the Court in *Turgut and Others v. Turkey*, no. 1411/03, 8 July 2008, has relied on the interpretation of this constitutional clause in light of the right to property.

The case dealt with the registration of land, belonging to the applicants, in the name of the State's Treasury for nature conservation purposes, without the payment of compensation. The Court determined that until the annulment of their title and its re-registration in the name of the Treasury, the applicants had been the rightful owners of the property, with all the consequences arising from their title, and they had further benefitted from "legal certainty" as to the validity of the title recorded on the land register, which provided undisputable evidence of ownership. The applicants had been deprived of their property by a national judicial decision. The Court decided that the purpose of the deprivation imposed on the applicants, namely the protection of nature and forests, fell within the public interest. However, it further reiterated that where there was deprivation of property, consideration had to be given through means of compensation provided for in domestic legislation. It was observed in the case at hand that the applicants did not receive any compensation for the transfer of their property to the Treasury, in conformity with the constitution. No exceptional circumstance had been raised in order to justify the lack of compensation. Consequently, the failure to award the applicants any compensation had upset, to their detriment, the fair balance that had to be struck between the demands of the general interest of the community and the requirements of the protection of individual rights. This case triggered many similar cases before the Court in which the Court found similar violations. In the end, the Turkish Supreme Court had to change its case law and

created a new domestic remedy in which the applicants of such cases can ask for compensation at the domestic level.

3.2. India

Moving to the case of India, it should be highlighted at the outset that the right to property has been the cause of a long period of conflict (1950–78) between the parliament and the judiciary. During this conflict, judges were accused of class bias because they struck down legislation intended to expropriate land from landlords with large holdings, paying little or no compensation, and to redistribute the land to ‘tillers’ whilst protecting the tenants’ right to property.

The conflict between the two branches of government could not be on account of different ideologies. The champion of land reforms, Prime Minister Nehru, had an even more aristocratic class background compared to that of the judges who struck down legislation abolishing zamindaris (ownership of large estates). The reason for the conflict has more to do with the difference in what policy-makers believe it is possible and necessary for them to do and what judges think is permissible to do. Policy-makers think in terms of ‘more or less’ with shades of grey. Prime Minister Nehru believed that landlords who had exploited their tenants, had extravagantly pompous life-styles and were also compradors of the British Raj, deserved to have less protection for their property, whereas the tenants or tillers to whom the state redistributed the land ought to have their property protected in greater measure. The tendency to shift blame and responsibility for the failure of land policy reached its high point in 1975 when a state of internal emergency was imposed by Prime Minister Indira Gandhi. The suspension of fundamental rights was defended by the government with the claim, among others, that judicial review of agrarian legislation obstructed redistribution of surplus land and other egalitarian measures.

The Constitution’s Forty-Fourth Amendment was intended to make it difficult to suspend fundamental rights and impose emergency rule, as was done on grounds of ‘internal disturbance’ in 1975. But this Amendment also removed the right to property from the list of fundamental rights. Property is now recognized as a legal right in Article 300A of the constitution: “No person shall be deprived of his property save by authority of law.” The constitution does not lay down any principles to be followed by laws enabling the taking of property. There is no guarantee of compensation at market value or stipulations about reasonable standards.

The only provisos in the Amendment are that the removal of property from the list of fundamental rights would not affect the right of minorities to establish

and administer educational institutions of their choice, and that the right of persons holding land for personal cultivation and within the ceiling limit to receive compensation at the market value would not be affected.

Among the key economic reforms related to land was the repeal, in 1999, of the Urban Land (Ceiling & Regulation) Repeal Act, 1976. This act illustrates how professed egalitarian aims can be thwarted, and end up achieving the opposite result. No land was acquired and put to any public purpose under this law. It served the interests of government ministers because they could use the discretionary power vested in them to waive the application of provisions of this law in specific cases. The law became the basis for rent seeking, leading to a severe shortage in land for sale and a steep increase in land prices, hurting poor people the most because they could not afford the inflated costs of land for housing.

There are many laws in India under which the State may acquire private land for public purposes. The most commonly used eminent domain legislation is the Land Acquisition Act of 1894. This has been used for a variety of public purposes such as building roads, bridges, dams, public establishments, institutions, development of urban areas, public housing schemes, etc. But it has also been misused by governments. There are many reported cases where governments have acquired land, ostensibly for a public purpose, and transferred that land to private developers to build malls, commercial centers and industrial units, instead of expecting developers to purchase land needed for commercial purposes on the open market. Similarly, large scale acquisitions have been made on behalf of the companies by invoking the provisions contained in Part VII of the Act (Acquisition of Land for Companies). Farmers whose land is generally acquired by the government for such purposes have little knowledge about their constitutional and legal rights.

Recognizing that such injustices have become rampant, India's parliament, with rare consensus among the major political parties, passed the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation, and Resettlement Act (LAAR), 2013. This Act intends to safeguard the interests of indigenous people ('tribals' as they are called in India) and stipulates norms for fair compensation, resettlement and rehabilitation of persons displaced on account of land acquisition. It has new provisions for social impact analysis and recognition of non-owners as affected persons, and it prescribes some norms of free, prior informed consent of people affected by land acquisition.

From the point of view of inclusiveness, a dozen laws that affect vulnerable and marginalized people continue to be in force. Nearly 90 percent of the central government's land acquisition in mineral-rich region has been carried out under these other laws, and it may be the case that the new and more progressive land acquisition legislation will not be used very extensively.

The Government led by Prime Minister Narendra Modi amended the 2013 Act on 31 December 2014 by means of an Ordinance (executive legislation that needs to be endorsed by parliament). This Ordinance creates a special category of projects, which are exempt from many requirements for land acquisition that are part of the 2013 Act. These include consent of 80 percent of persons affected by acquisition, social impact assessment, review by an expert group, and it removes the ban on acquisition of multi-crop agricultural land for industrial or commercial use. Provisions for return of unutilized land after a period of time have been diluted. Instead of five years stipulated in the Act, the Ordinance allows retention of land by government for the period specified for the setting up of any project for which land was acquired. The definition of ‘private entity’ for whose benefit the government can compulsorily acquire land has been expanded to include proprietorships, partnerships, companies, non-profit organizations and any other entity under any law in force.

Three fundamental problems remain with respect to property rights in land in India. First, land records are poorly and not uniformly maintained. Second, price reporting is episodic and highly inaccurate. Third, titles over landed property are presumptive and never conclusive. This is a weakness that is often exploited by powerful land mafias making every land transaction open to interminable legal disputes. The executive branch has a strong interest in maximizing its power of eminent domain. In the past, the judiciary in India resisted that impulse and sought to protect the right to property as a fundamental right. Now it is no longer a fundamental right and the property of the weak and vulnerable is at risk of being taken over by the State to promote industrialization and urbanization. However, the absence of a fundamental right to property is also a matter of concern for foreign investors.¹²⁸

128 In a recent case involving the defanged right to property in Article 300A of the Constitution, the Supreme Court said, in a judgement delivered by Chief Justice S.H. Kapadia: “Rule of law as a concept finds no place in our Constitution, but has been characterized as a basic feature of our Constitution which cannot be abrogated or destroyed even by the Parliament and in fact binds the Parliament. In the *Kesavanda Bharati* case, this Court enunciated rule of law as one of the most important aspects of the doctrine of basic structure. Rule of law affirms parliament’s supremacy while at the same time denying it sovereignty over the Constitution. Rule of law as an overarching principle can be applied by the constitutional courts, in the rarest of rare cases, in situations, we have referred to earlier and can undo laws which are tyrannical, violate the basic structure of our Constitution, and our cherished norms of law and justice. One of the fundamental principles of a democratic society inherent in all the provisions of the Constitution is that any interference with the peaceful enjoyment of possession should be lawful. Let the message, therefore, be loud and clear, that rule of law exists in this country even when we interpret a statute, which has the blessings of Article 300A. Deprivation of property may also cause serious concern in the area of

4. Approaches of international human rights bodies to the right to property and land law

This section moves to study contemporary conceptions of land law and their limits in the public interest from the perspective of supranational norms. The first subsection deals with the American Convention of Human Rights and the jurisprudence on the right to property in the context of land, as developed by the Inter-American Court of Human Rights. The second subsection deals with the European Convention on Human Rights and the ways in which the general framework developed by the European Court of Human Rights has impacted national legal systems as these strike a balance between individual and community in crafting land law.

4.1. American Convention of Human Rights: respecting rights of indigenous people and property in land

The American Convention of Human Rights,¹²⁹ which currently brings together 25 Latin-American countries, includes the right to property in Article 21.¹³⁰ The work of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, entrusted with the authority to oversee the members' adherence to the Convention, has drawn particular attention in the context of land law disputes brought forward by indigenous tribes that have contested domestic legislation and regulation as allegedly infringing the right to property.

One such example is a petition filed in 2001 by the Sawhoyamaya Indigenous Community of the Enxet People to the Inter-American Commission on Human Rights, alleging that the government of Paraguay violated Article 21 of the Con-

foreign investment, especially in the context of international law and international investment agreements. Whenever, a foreign investor operates within the territory of a host country the investor and its properties are subject to the legislative control of the host country, along with the international treaties or agreements. Even, if the foreign investor has no fundamental right, let them know, that the rule of law prevails in this country." *K.T. Plantation (P) Ltd. v. State of Karnataka*, Supreme Court Cases (SCC 9, 2011) 1, 141–42.

129 Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 143.

130 Article 21 reads: "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."

vention.¹³¹ The tribe argued that the government had failed to complete its own initiative to recover part of the ancestral lands of the tribe of over 14,000 hectares in the Chaco region of Paraguay, even though Paraguayan law recognizes the right of indigenous peoples to preserve their way of life in their habitat and to protect the claimed lands. As a result, community members had to live in inhumane conditions, resulting in a number of deaths due to lack of food and medical care. The government contended that, although it was committed to solving the matter, the lands in question had been formally purchased by a German citizen, who uses the land for beef production. Consequently, the executive branch's efforts to expropriate the land had been met with staunch resistance by the legislature in view of the 1993 bilateral investment treaty between Germany and Paraguay.

In March 2006, ruling in favor of the tribe, the Inter-American Court reasoned that the enforcement of bilateral investment treaties may not allow a state to infringe its obligations under the American Convention. The Court also reasoned that although it is “not a domestic judicial authority with jurisdiction to decide disputes among private parties” (here, the German owner and the tribe members), it is nevertheless competent to “analyze whether the State ensured the human rights of the members of the Sawhoyamaxa Community.” According to the Court, the government's recognition of the tribe's rights to traditional lands remains “meaningless in practice if the lands have not been physically ... surrendered because the adequate domestic measures necessary to secure effective use and enjoyment of said right ... are lacking.” The Court ordered the State to adopt measures to return the land to the Sawhoyamaxa Community.

In June 2014, after many delays, and two other rulings by the Inter-American Court in favor of indigenous tribes in Paraguay, President Horacio Cartes signed into law a bill that orders the expropriation of the land from the German owner and its return to the tribe.¹³²

This ruling, alongside other cases in which the Inter-American Court of Human Rights held in favor of indigenous tribes by holding that customary land tenure is protected under the right to property and is thus binding on the Convention's member states,¹³³ offers intriguing insights into the construction of land law as a balancing act between individual and community interests. On the one hand,

131 Sawhoyamaxa Indigenous Community v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C.), No. 146 (Mar. 29, 2006).

132 Giles Constantine ‘Paraguay: Indigenous Community Records Rare Land Rights Victory’ (2014), available at: <https://eyeonlatinamerica.wordpress.com/2014/06/20/paraguay-indigenous-land-rights-victory/>.

133 *Id.*

the validation of the right to property seems to empower individual interests over those of the state. On the other hand, the context in which these interests are validated is one in which the collective interests of a socially- and historically-disenfranchised group eventually prevail over those of a foreign investor, who tries to shield himself behind an interstate investment treaty to protect his individual gains. The Court is clearly committed to a broader social goal of preventing historical injustice and alleviating the current distress of tribe members. As such, one may view the ruling as largely intended to promote the public interest, such that the evocation of the right to property is aimed at putting the community before the individual owner.

4.2. European Convention on Human Rights: diversity of conflicts arising from land law restrictions

This subsection surveys the effects of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”)¹³⁴ on national land laws, and the growing role of the European Court of Human Rights (ECHR) in developing case law in the matter. After drawing the general framework and applicable principles, we exemplify the restrictions on land law through country specific case-law of the ECHR regarding Spain and Turkey.

4.2.1. General Framework under the European Convention on Human Rights

According to Article 1 of Additional Protocol 1 (AP-I):¹³⁵

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.

¹³⁴ Nov. 4, 1950, 213 U.N.T.S. 221.

¹³⁵ On the right to property in ECHR jurisprudence, see Javier Barcelona Llop, *Propiedad, Privación de la Propiedad y Expropiación Forzosa en el Sistema del Convenio Europeo de Derechos Humanos*, 2013; Mar Aguilera Vaqués, “El Reconocimiento del Derecho a la Propiedad Privada y los Límites a la Regulación (art. 1 P1)”, in Javier García-Roca & Pablo Santolaya, (eds.), *La Europa de los Derechos: El Convenio Europeo de Derechos Humanos*, 3rd ed., 2014, p. 669–692; and the work of Lasagabaster Herrarte, Iñaki, in Lasagabaster Herrarte, Iñaki (ed.), *Convenio Europeo de Derechos Humanos. Comentario Sistemático*, 2nd ed., 2009, p. 763–799.

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.

Article 1 comprises, therefore, three distinct but connected rules:¹³⁶

1. The first rule is of a general nature: principle of peaceful enjoyment of possessions (first sentence, first para.);
2. The second rule concerns ‘deprivation’ of possessions and subjects it to certain conditions (second sentence, first para.);
3. The third rule entitles states to ‘control the use of property’ in accordance with the ‘general interest,’ by enforcing such laws as they deem necessary for the purpose (second para.).

The second and third rules “are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.”¹³⁷

The property jurisprudence of ECHR had initially opted for a relatively narrow review of the deprivation or regulation of property, focusing on a lawfulness or “quality of law” principle under which states had only to demonstrate that they complied with the formal requirements of their legal system and that such rules were sufficiently “accessible, precise and foreseeable.”¹³⁸

This approach changed in the 1982 *Sporrong and Lönnroth v. Sweden*¹³⁹ and 1986 *James v. United Kingdom*¹⁴⁰ cases, in which the ECHR developed self-standing criteria of “fair balance” and “proportionality” for reviewing domestic legislation or regulation. Both disputes arose in the context of land law. The *Sporrong* case dealt with the validity of an expropriation order for multiple land plots in central Stockholm. The *James* case addressed a statute in the United Kingdom that conferred on tenants residing in certain types of houses on long leases the right to purchase the freehold of the property from the owners at below market rates.

136 D.J.Harris, M. O’Boyle & Warbrick, *Law of the European Convention on Human Rights*, 2nd ed., 2009, p. 666 *et seq.*

137 *Anheuser-Busch Inc v Portugal* [GC], 2007, para. 62.

138 Tom Allen, ‘Compensation for Property under the European Convention on Human Rights,’ 28 *Michigan Journal of International Law* 287 (2007).

139 *Sporrong and Lönnroth v. Sweden*, 52 Eur. Ct. H.R. (ser. A) (1982).

140 *James v. United Kingdom*, 8 Eur. H.R. Rep. 123 (1986).

According to its now established approach in analyzing a complaint under Art. 1 of AP-I, the Court will first analyze if the applicant has an interest which can be classified as a possession. If this is the case, the Court will first consider if there has been a ‘deprivation’ (first paragraph second sentence); if not, it will then analyze if there has been a ‘control of the use’ of possessions (second para.). Only if there has been neither of them will the Court consider whether there has been some other interference with the peaceful enjoyment of possessions (first sentence, first para).¹⁴¹ However, whichever sentence/paragraph applies, the test adopted by the Court in determining whether there has been a breach of Art. 1 will be very similar, and it will come down to the issue of proportionality. In any case, the Court does not always indicate under which sentence a case is being decided.¹⁴² In general, interferences (deprivation of or controlling the use of property) must be proportional, that is to say, the interests of the individual must be weighed against the collective interest, and a fair balance must be struck. The individual must not be required to bear an excessive burden.

If a deprivation of property is to strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights, in principle, some compensation should be paid to the individual.¹⁴³ In the Court’s case law, the taking of property without payment of an amount ‘reasonably related’ to the market value of the property at the time of the deprivation is normally held to constitute a disproportionate interference.¹⁴⁴ While the absence of compensation for a measure limiting the use of property is not in itself sufficient to constitute a violation of Article 1 of Protocol No. 1, the availability of compensation is one of the factors, often an important one, in the overall assessment of proportionality of the measure.¹⁴⁵ In particular, the lack of compensation weighs heavily in a situation where the infringement of the right of property is excessive and affecting the very substance of ownership. In this type of situation, where the impugned measures are of particular severity, domestic law should provide for compensation in order to avoid placing a disproportionate burden on the individual.¹⁴⁶

141 Robin C.A.White & Clare Ovey. *The European Convention on Human Rights* (5th ed, Oxford University Press: Oxford, 2010), p. 479.

142 D.J Harris, M. O’Boyle & Warbrick, *supra* note 136, p. 667.

143 *Id.* at p. 680.

144 *See, e.g.,* *Perdigao v Portugal* [GC], 16/11/2010, para. 68.

145 *See, e.g.,* *Depalle v. France* [GC], no. 34044/02, § 91, 29 March 2010; and also *Galtieri v. Italy* (dec.), no. 72864/01, 24 January 2006; *Massa v. Italy* (dec.), no. 29247/04, 20 August 2007; *Goletto v. France* (dec.), no. 54596/00, 12 March 2002.

146 For example, in *Housing Association of War Disabled and Victims of War of Attica and Others v. Greece*, no. 35859/02, 13 July 2006, a building prohibition imposed on all of the applicants’ land

However, full compensation is not always required, e.g., in *nationalization* cases the measure of compensation does not have to be the market value.¹⁴⁷ Again, where the purpose of an *expropriation* is to pursue political or economic reform, or to achieve a change of a country's constitutional system from monarchy to democracy, lesser payment may be acceptable.¹⁴⁸ Another example where legitimate objectives in the public interest may result in less than full compensation is the purpose of protecting historical and cultural heritage. On the other hand, a total lack of compensation may only be justifiable under exceptional circumstances.¹⁴⁹

Compensation must be paid within a reasonable time. Long delays in the payment of compensation, particularly where there is high inflation or an inadequate payment of interest on the late payment will lead to a violation of the article.¹⁵⁰

There must be safeguards in place to assess the reasonableness of the compensation. Therefore, the method for determining compensation must be even-handed between the state and the individual.¹⁵¹ The Court gives importance to granting individuals an opportunity to make representations in the valuation proceedings. Individual circumstances (e.g., the applicant's attachment to the family home, the historical value of the building) are important in calculating a fair compensation. Especially in case of individual expropriations, all the relevant factors must be taken into account in determining compensation. There may be exceptional cases where consideration of such circumstances will not always be required, e.g., major nationalization programs may require a standardized approach to the calculation of the compensation to be paid.¹⁵² In general, the

following its classification as protected woodland without any compensation was not compatible with Article 1 of Protocol no.1 in which it held: "The Court is particularly struck by the fact that, although the very substance of the applicants' ownership has been affected (see *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 23, § 60), the applicants were not successful in obtaining compensation under Greek law. This, combined with the State's ultimate refusal to expropriate the applicants' property or to exchange it for new land of equal value, aggravated considerably the adverse effects on the applicants' situation and placed a disproportionate burden on them." *Id.* para 39.

147 D.J Harris, M. O'Boyle & Warbrick, *supra* note 136, p. 681; White & Ovey, *supra* note 141, p. 494.

148 For the expanded margin of appreciation granted to states under such conditions see *Broniowski v Poland* [GC], 22/06/2004, para. 149.

149 White & Ovey, *supra* note 141, p. 493. See, e.g., *Jahn and others v Germany* [GC], 30/06/2005.

150 White & Ovey, *supra* note 141, p. 494. See, e.g., *Akkuş v Turkey*, 09/07/1997.

151 White & Ovey, *supra* note 141, p. 493.

152 D.J Harris, M. O'Boyle & Warbrick, *supra* note 136, p. 682. White & Ovey, *supra* note 141, p. 494. See, e.g., *Lithgow v UK*, A 102 (1986).

national method of calculation of the compensation will only violate P1–1 if it is arbitrary or grossly unfair.

This supranational set of standards, however, is far from creating a uniform blueprint for the domestic ordering of land law. As is the case throughout the ECHR jurisprudence, the review of national law is subject to the margin of appreciation principle. That said, there seems to be a difference between the scope of the margin in cases said to implicate the “deprivation” of property under the European Convention’s first paragraph of Article 1 of the First Protocol and those dealing with regulation that works to “control the use of property” under the second paragraph. The first type of cases is usually subject to a higher level of scrutiny in applying principles of fair balance and proportionality, such as in determining due compensation for the deprivation of property. In contrast, in evaluating regulation that controls the use of lands without expropriating it, the ECHR has granted states a particularly wide margin of appreciation.

Finally, the right to property also imposes on states certain positive obligations to protect the enjoyment of possessions. This includes an obligation to protect against private interferences. Indeed, “The purpose of ECHR is primarily that of protection against direct governmental intrusion of the private sphere (...). But, founded on the effectiveness principle, the European Court has developed implied positive obligations as well. A positive obligation means that the ECHR might include a duty for the State to do something in order to protect or promote people’s rights. Those positive obligations can even extend to require public intervention in a genuinely inter-personal dispute (the so called third-party effect of the Convention).”¹⁵³

Hence, the ECHR has extended the right to property to bilateral controversies between individuals, provided any sort of governmental action or inaction, even if weak, is found.¹⁵⁴

153 Ploeger, Hendrik D., & Groetelaers, Daniëlle A., “The Importance of the Fundamental Right to Property for the Practice of Planning: An Introduction to the Case Law of the European Court of Human Rights on Article 1, Protocol 1”, *European Planning Studies*, Vol. 15, No. 10, November 2007, p. 1437. See also Monica Carss-Frisk, “The Right to Property. A Guide to the Implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights”, Human Rights Handbook No. 4, 2001, available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4a>.

154 “As with other rights and freedoms of the Convention, the Court has recognized that in principle, the State may be responsible under Article 1 for the interference with the peaceful enjoyment of possessions resulting from transactions between individuals. However, for the State’s responsibility to be engaged it is necessary that the facts complained are the result of an exercise of State authority and that they did not concern exclusively contractual relations between

In *Öneryıldız* (GC, 30/11/2004), Turkey was held responsible for the loss of life and destruction of property as a result of an explosion in a refuse tip nearby the applicants' homes. Similarly, in *Budayeva*, which concerned a natural disaster, the Court also held that the state has a positive obligation to avoid the destruction of property. At the same time, unlike the positive obligation under the right to life, where the risk is of destruction of property is at stake, the authorities enjoy a wider margin of appreciation. In contrast, the State cannot be expected to act to prevent loss of value as a result of market factors (there is no such positive obligation). In that sense, inflation does not impose an obligation on the State to maintain the purchasing power of sums deposited with financial institutions.¹⁵⁵

As a result of these developments, in addition to dealing with the quintessential public law aspects of land law, i.e. those dealing chiefly with vertical legal relations between the State and private parties, the ECHR has also addressed a number of petitions that alleged a breach of Article 1 in what was essentially a private law dispute. In such cases, plaintiffs argue for a conflict between the European Convention and the body of national land law that orders legal relations among private persons.

The most prominent example is the *J.A. Pye (Oxford) Ltd v. United Kingdom* case.¹⁵⁶ The case dealt with adverse possession of registered private land. The applicants, the land's former owners who had lost their case before the national courts, argued that the then-in-force English adverse possession law, the Land Registration Act of 1925, was in violation of Article 1. The ECHR's Section 4 Chamber ruled that the case did engage the first paragraph of Article 1, and that although English adverse possession law may be deemed as serving a genuine public interest, the interference with the registered owners' rights was disproportionate and thus in violation of Article 1. The Grand Chamber reversed that finding. It noted that "the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one" and that this approach is "particularly true in cases such as the present one where what is at stake is a long-standing and complex area of law which regulates private-law matters between individuals." Moreover, the Grand Chamber held that "it is characteristic of property that different countries regulate its use and transfer in a variety of ways. The relevant rules reflect social policies

private individuals." Pieter van Dijk, Fried van Hoof, Arjen van Rijn & Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights*, 4th ed., 2006, p. 865.

¹⁵⁵ *Ryabykh v Russia*, 24/07/2003.

¹⁵⁶ *J.A. Pye (Oxford) Ltd. v. United Kingdom*, App. No. 44302/02, Judgment of Aug. 30, 2007, 2007-III Eur. Ct. H.R. 365.

against the background of the local conception of the importance and role of property.”

A somewhat different approach has been taken by the ECHR in its 2012 *Lindheim v. Norway* decision.¹⁵⁷ The Court reviewed a 2004 amendment to Norway’s Ground Lease Act of 1975, which subjected the leasing of lands for permanent homes or holiday homes to special statutory regulation, entitling lessees to demand an unlimited extension of the contracts on the same conditions as applied previously once the agreed term of the lease has expired. The ECHR referred to its previous case law about “the margin of appreciation available to the legislature in implementing social and economic policies.” But it nevertheless held that the statutory intervention in lease contracts, even if looking to address the growing pressure on real estate prices, placed its social and financial burden solely on the applicant lessors, not striking a “fair balance between the general interest of the community and the property rights of the applicants.”

4.2.2. Spanish and Turkish practices on land law restrictions and European Court of Human Rights

One of the latest examples of the expansive jurisdiction of the ECHR, and its effect on national law and practice of placing limits on property rights in land, is the recent decision in the case *Sociedad Anónima del Ucieza v. Spain*, Application No. 38963/08, of 4 November 2014.¹⁵⁸

The plaintiff, a Spanish limited company, bought a piece of irrigated land in Spain in 1978. According to the description in the Land Register, several buildings had been built in that piece of land, including a church, a house, a windmill, a farmyard and several watermills. The land was part of the ancient monastery of “Santa Cruz de la Zarza,” founded in the twelfth century, nationalized by Spanish authorities in the nineteenth century and sold at auction by the State. Therefore, the Land Register mentioned that one of the buildings (the church) was formerly the chapel of the monastery. That church was a parish church at least from the beginning of the seventeenth century, first served by the monks and later by parish priests of the diocese of Palencia. The bishop of Palencia issued a certification on the property of the church, which was regis-

¹⁵⁷ *Lindheim v. Norway*, Apps. nos. 13321/08 and 2139/10, Final Judgment dated Oct. 22, 2012, Eur. Ct. H.R.

¹⁵⁸ The only official text is written in French. No translation to English is offered in the web page of the Council of Europe (HUDOC).

tered in the Land Register on 22 December 1994. The plaintiff addressed an out-of-court claim to the bishopric, which was answered by the bishop, asserting that the church had always been a parish church belonging to the bishopric, as the nationalization of the nineteenth century did not include parish churches according to the statutory law of that time. On reading this, the plaintiff filed a lawsuit against the bishopric claiming its right of property over the church and the annulment of the contradictory registration on the Land Register. The action was dismissed by the Judge of First Instance number 5 of Palencia, who affirmed the right of property of the bishopric. The plaintiff brought an appeal, dismissed on the same ground by the Provincial Court of Palencia (judgment of 5 February 2001). The plaintiff then asked the Spanish Supreme Court for review in cassation, but this court did not hear the case, as the controversy did not comply with the minimum economic amount required (EUR 600,000). Neither did the Spanish Constitutional Court intervene, as the case lacked “constitutional interest,” according to its decision of 26 February 2008.

The plaintiff argued violation of article 6.1 of the Convention (right to a fair trial) and of article 1 of the Protocol No. 1 (right to property), in combination with article 14 of the Convention (prohibition of discrimination). The Court unanimously found a violation of article 6.1 of the Convention and stated that no separate claim of discrimination was admissible. It also held that there had been a violation of the right to property, with a dissenting opinion of Judge Motoc.

Leaving aside the right to a fair trial, which exceeds the boundaries of this paper, the Court declared that there had been an interference with the right to private property of the plaintiff, as the registration of its land, which has important consequences in Spanish law and included the chapel, had been rendered ineffective by court decisions. This interference amounted to a breach of the peaceful enjoyment of its possession, namely by the church: although it pursued the general interest, it did not involve any compensation, imposing thus a disproportionate burden on the company.

The ECHR judgment purported to protect the peaceful enjoyment of its possession by the applicant. Nevertheless, previous national litigation discussed precisely the ownership of the church building. National courts concluded that the plaintiff did not enjoy any right on it, neither property nor possession, and had never enjoyed them: it had always been a possession of the bishopric. The ECHR judgment thus directly contradicted Spanish courts in its interpretation of the applicable law and concluded that (1) the plaintiff possessed the church; (2) this possession had been subject to interference from national authorities (namely, the courts of justice); and (3) this interference imposed a disproportionate burden on the plaintiff (as no compensation was awarded).

As it is well-known, the concept of “possessions” in article 1 of the Protocol No. 1 must not be interpreted according to national categories.¹⁵⁹ The ECHR normally explains why the national interpretation of the right is not consistent with the Convention. In the commented case, the only reason given to acknowledge a European right of property to the plaintiff was its registration of the piece of land in the Land Register, which included the church building, as did the registration of the bishopric. However, according to Spanish law, real rights, including property rights, are acquired and conveyed apart from the Land Register, even if they are later subject to registration,¹⁶⁰ which is not even compulsory.¹⁶¹ That is why previous litigation in the case did not rely on the Land Register to decide the controversy. It is at least dubious that these points of Spanish law should be deemed contradictory to the European right of property.

In sum, in this case the ECHR shows little respect for Spanish jurisdiction, in deciding on the right of property once it found a violation of the right to a fair trial, and although it has little understanding of the Spanish law of property, when interpreting the concept of “possessions” in article 1 of Protocol No. 1 to the Convention. We suggest that this sort of private law controversies, in which public authorities involvement limits the working of the courts and of the Land Register, are probably better adjudicated at the national level.

Moreover, as observed in *Sociedad Anónima del Ucieza v. Spain*, the payment of compensation appears to be an important indicator in assessing the deprivation of property. It is a well-established principle of the Court’s case law that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference.¹⁶² However, it should be clear there is no requirement to pay compensation for *any* type of interference with the right of property.¹⁶³

159 Among most recent judgments, see *Akhverdiyev v. Azerbaijan*, Application No. 76254/11, of 29 January 2015, at 73. According to Harris, O’Boyle & Warbrick, *supra* note 136, at p. 865: “the concept of possession is autonomous.”

160 See, for example, José Enrique Gomá Salcedo, *Instituciones de Derecho Civil Común y Foral*, vol. I, 2004, p. 638–641.

161 José Luis Lacruz Berdejo, & Francisco de Asís Sancho Rebullida, *Derecho Inmobiliario Registral*, 1984, p. 57.

162 See *Kozacıoğlu v. Turkey*, cited above, § 64, for a recent recapitulation of the principles.

163 In this respect, the distinction between deprivation of property and a control of use of property was highlighted already by the Commission in *Baner v. Sweden*, no. 11763/85, Commission decision of 9 March 1989), where it was held: “It follows from the case-law of the Convention organs that as regards deprivation of possessions there is normally an inherent right to compensation (Eur. Court H.R., James and Others judgment of 21 February 1986, Series A no. 98, p. 36, para. 54 and Lithgow and Others judgment of 8 July 1986, Series A no. 102, p. 51, para. 122).

As to the lack of compensation in the deprivation of property, Turkish cases have been quite exemplary. For instance, in *Börekçiogulları (Çökmez) and others v. Turkey*, no. 58650/00, 19 October 2006, the absence of compensation for *de facto* occupation and subsequent transfer of property title to the State due to 20-year statutory limitation period was considered as a violation of the right to property. In this case, the applicants inherited a plot of land which was being used by the Ministry of Defense as a military base and they brought an action for compensation claiming that the Ministry had not conducted expropriation proceedings or compensated them for the damage resulting from the illegal occupation of the land. Domestic courts held that the Ministry had been in actual possession of the land over fifty years and rejected the case as being time-barred. The applicants continued to pay the land tax every year, until the court's further decision by which their title to the land in question was transferred to the State. After this decision, the Turkish Constitutional Court annulled the law provision concerning the limitation period as being unconstitutional. The ECHR, in addition to the conclusions of the Turkish Constitutional Court, noted that the impugned law provision had not provided adequate protection to the landowners as it had required them to claim compensation for deprivation of property rather than obliging the authorities to pay it automatically. Moreover, the fact that the time-limit for claiming compensation ran from the *de facto* occupation had allowed the administration to benefit from a situation already existing when the relevant law had entered into force. The application of the relevant law provision by the domestic authorities had the consequence of depriving the applicants of the possibility of obtaining damages for the annulment of their title. In the absence of adequate compensation in exchange for their property, the interference in question, although prescribed by law, had not struck a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Thus, the ECHR found a violation and made an award for a pecuniary damage amounting to EUR 373,000.

In *Sarica and Dilaver v. Turkey*, no. 11765/05, 27 May 2010, the Court held that the widespread practice in Turkey of *de facto* expropriation by the State represented a structural problem and was contrary to the Convention. This practice enabled the Turkish authorities to occupy property without any formal declaration of transferring ownership. They could also change the prospective use of the property irreversibly. The practice forced people to start court proceedings in

However, in the Commission's view such a right to compensation is not inherent in the second paragraph. The legislation regulating the use of property sets the framework in which the property may be used and does not, as a rule, contain any right to compensation. This general distinction between expropriation and regulation of use is known in many, if not all, Convention countries."

order to have such occupation of land quashed or in order to receive compensation. Under article 46 ECHR (binding force and execution of judgments) the Court indicated that Turkey should also take general measures in order to make the process of expropriation less unforeseeable and arbitrary and to secure compensation. Turkey should also actively discourage *de facto* expropriation by measures of deterrence and by holding the people responsible to account. Reforms in this area are thus now called for in Turkey.

An important issue for Turkey was the matter of real estate pertaining to foundations established by minorities residing in Turkey. The problem was caused by the case law of the Turkish Court of Cassation, which held in 1974 that foundations belonging to minorities cannot hold real estate other than those stated by 1936. Therefore, many real properties belonging to such foundations were taken from their hands as land registries to their name were cancelled and the property transferred to the State. In *Fener Rum Erkek Lisesi Vakfı v Turkey* (judgment of 9 January 2007), this practice was found to be in violation of the Convention since these foundations had obtained possession of such properties lawfully at the time and the provisions of the Law on Foundations allowed community foundations to possess real estate. The European Court thus decided that restitution of this property through re-registration of the property to the name of the foundation in the Land Register would suffice, and that in case of failure to do so, Turkey would have to pay compensation. This judgment set an important precedent, since much real estate which once belonged to minority foundations was in the hands of the State. In February of 2008 the new Foundations Law (Law no. 5737) entered into force. It provides the legal framework for returning the real property previously transferred to the State. In August 2011, a decree supplemented the above law with provisions for compensation of communities, which could not recover their properties because these had been acquired and registered by third parties. These regulations enabled, by September 2011, the registration of 181 properties in the name of non-Muslim community foundations.

In conclusion, it is apparent from the above overview that the Court takes into account a variety of factors when assessing whether the measures taken by the states in the context of land law regional planning and development are such that they impose an excessive burden on the individual property owner. Given their wide margin of appreciation in implementing measures in this area and restricting the use of property in the general interest, the provision of compensation does not necessarily come into play in all cases. However, if compensation is available in whatever form (monetary indemnity, exchange of land, payment of rent, etc.) or amount, the balance is likely to tip in favor of the State. Conversely, the lack of possibility to claim any compensation *in combination with* other shortcomings in

law, procedure or practice has frequently been considered as offering inadequate protection of the right of property.

In the absence of any compensation, the existence of laws and procedures providing the individual with an opportunity to effectively challenge the impugned measure and to allow for the weighing of the different interests at stake becomes a matter of crucial importance. Nevertheless, it is now established that even if a procedural protection is deemed adequate, a measure which entails serious and harmful consequences for the individual requires the payment of compensation for it to be compatible with the requirements of Article 1 of Protocol No. 1.

Conclusion

Over the course of history, many recurring themes seem to have emerged in the context of land law and the limits on the right to property. These basic dilemmas cut across geographical borders, political settings, historical circumstances, and technological developments. Some of the questions raised are as old as humanity itself; others take up a new form with the change of times. The current era of globalization is therefore not entirely unique.

As this Article has shown, one such core issue concerns the balance between individual and community in constructing legal norms on the right to own, use, and alienate assets, and land in particular. Just about every legal system, with its specific backdrop of political forms of control, religious or moral convictions, and socioeconomic structure, has grappled with the need to delineate the boundaries between private and public control over land. An inherent complexity embedded in such an effort has to do with the fact that identifying “individual” and “community” for purposes of such line-drawing may change for time to time and from place to place. On the one hand, numerous societies across history have seen the family, clan, or some other cluster of persons as the core subject of law. On the other hand, the promotion of “public” or “social” goals often breaks away from a single concept of “State” or “government.” Religious, moral, or even contemporary jurisprudential concepts developed by supranational treaties and tribunals may diverge from the ways in a certain state government may identify “public,” “social,” or “community” interests. Accordingly, the challenge of delineating the boundaries between individual and community in land law could be seen as a focal point for the much broader debate, in every society throughout history, about the appropriate balance between the private and public spheres.

This insight also sheds light on the question whether the debate over land law and limits on the right to property has changed substantially in the current era of

the human rights discourse. While the situation may be certainly different for other provisions included in human rights treaties and case law, the analysis throughout the article may lead to counterintuitive results in regard to land law and the limits on the right to property. When we move away from misconceptions of Roman law as focused solely on individual rights or of religious laws as static or fixed conventions unwilling to respond to changing circumstances in land systems, then we may come to realize that the current debate about the balance between individual and community interests is not truly novel. This is definitely not to say that the focal point or the swing of the pendulum between private and public interests does not change across eras or across borders. But one claim can be stated with quite some confidence:

The current jurisprudence of international human rights tribunals employs new terminology, such as “fair balance” and “proportionality,” but at their core, these legal concepts rely on the very foundational premises that guided the lawmakers of the Twelve Tables and numerous laws, constitutions, codes, and judicial cases since then throughout human history. Land continues to be a resource that has no equal in the way it brings together dilemmas about the role of humanity, the justifications for the existence of governments, and the distinct place of the individual within society. No two cultures give the same answers. No two religions preach the exact same principles. No two courts follow the exact same jurisprudence. They all deal, however, with the same set of fundamental questions, and in particular with the inherent balance that needs to be struck, in the context of land law, between individual and community interests.