

# **PROPERTY RIGHTS AND HUMAN RIGHTS IN THE AMERICAS**

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## **Introduction**

Throughout the world, property rights and the many different issues related to them are subject to intensive debate. Whether framed around the idea of controlling natural resources or described as involving the inclusion of those presently excluded from its benefits, property rights are at the epicenter of the debate over wealth, economic development, and fairness.

The Americas are not exempt from living – suffering – the consequences of this volatile situation; if anything, the debate in the Western Hemisphere is even more boisterous and poignant. In some of the Andean countries governance is being put at stake. Populism is making a comeback and with it a new round of “agrarian reform” – even thirteen years after the closure, through the fostering of

privatization mechanisms, of the paradigm amongst such experiments, the “ejido” system forged by the Mexican Revolution. In Brazil, disputes over property rights have resulted in blood-shed more than once, and “landlessness” has lent its name to an increasingly assertive political movement. And even in the USA, where property rights are seen as the cornerstone of freedom and the central government is bent on fashioning an “owner’s society,” both a recent decision by the Supreme Court and the severe disruptions caused by nature have placed the spotlight starkly over the issue of fairness with regard to property rights.

This chapter will briefly describe the way property rights, especially over land, have been conceived in the Americas, both

at the regional and at the country level, while humbly trying to foretell the way the ongoing debate over them may evolve in this part of the world.

## I.

Even though the international efforts aimed at protecting human rights are mostly a consequence of the terrible experiences the world lived through during the first half of the 20th Century, the Americas already showed a collective interest in the topic back in 1826, when a Treaty that brought together Colombia, Central America, Mexico, and Peru committed the signatory parties to “the complete abolition and eradication of the trade in slaves from Africa” (Art. 27). The political consequences of the treaty, which called for a perpetual union, league, and confederacy between its parties (“*Tratado de Unión, Liga y Confederación Perpetuas*”), were short-lived, the first stone was cast from this part of the world.

The Eight Pan American Conference, in 1938, pointed to the need of getting the international community involved in the protection of human rights and issued a “Declaration for the Defense of Human Rights.” Then, the Inter American Conference on the Problems of War and Peace, held in Mexico in 1945, issued a resolution (Resolution 40) on the International Protection of the Rights of Man. Three years later, in 1948, the Ninth International Conference of American States, meeting in Bogotá, Colombia, approved the “American Declaration of the Rights and Duties of Man.” The avowed purpose of the Declaration and of the countries ap-

proving it was to assert the intrinsic dignity of every inhabitant of the American Continent by protecting and enhancing those rights which are essential to human nature and which are the indispensable tools for the spiritual and material progress of every human being. Amongst those essential rights of every human being the “Declaration of Bogotá” included the Right to Property: “Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home” (Art. 23).

In 1959, during a meeting of the regional Ministers of Foreign Affairs a resolution was passed asking the Inter-American Jurists Council (*Consejo Interamericano de Jurisconsultos*) to prepare a draft for a regional treaty or convention encompassing human rights and providing for the creation of an Inter American Human Rights Commission and an Inter-American Human Rights Tribunal. The Commission (*Comisión Interamericana de los Derechos Humanos – “CIDH”*) was installed in 1960 by the Consejo of the Organization of American States (“OAS”). All members of the Inter-American system were asked whether a regional system for the protection of human rights, including enforcing mechanisms, should be created. Some of the OAS members, like Argentina and Brazil, considered it unnecessary in view of the existence of a similar structure in a larger, almost universal context. The initiative was approved and pursued.

A Specialized Conference on Human Rights convened in Costa Rica, in 1969, and it approved the “American Conven-

tion on Human Rights” (also known as the “Pacto de San José de Costa Rica”), which also included, and further elaborated, the notion of the right to property as being a part of the essential rights of man:

Article 21:

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.

An addendum (protocolo) to the Convention was adopted in 1988, emphasizing democratic principles, social justice, and individual freedom as the framework within which the essential rights of man should be consolidated. This “Protocolo de San Salvador” (“Protocolo Adicional a la Convención Americana sobre Derechos Humanos en materia de Derechos Económicos, Sociales y Culturales”) compels the state parties to adopt a proactive stance towards the implementation of the human rights consecrated in the Protocol and in the Convention without any exclusion or discrimination (Art. 3). It calls for the adoption of domestic and international measures to achieve the full observance of the rights recognized in the Protocol. It should be noted that the Protocol omits any direct reference to prop-

erty rights, but in its Article 4, it brands as inadmissible the restriction or curtailment of any right recognized by virtue of the internal laws or international laws in force in any given State Party on the pretext that the Protocol does not list such a right in its text.

This “universalization” of the issue of human rights, as part and parcel of an international common good that gives priority to human dignity over and above the concept of sovereignty, has deterred some nations – the United States of America is one – from signing and/or ratifying some of these agreements. And the inclusion of property rights in the list of human rights has not been an incentive for the laggards.

## II.

The application of the principles of social justice to property rights tends to separate Anglo-North America from Latin-South America. And, to some extent, there is a religious background to this separation, due to the pervasive influence of Catholicism in Latin America, home to one half of the one billion catholics in the World. The Social doctrine of the Catholic Church has been laid out since the last decade of the nineteenth century in a series of encyclical letters. The first, *Rerum Novarum*, issued by Pope Leo XIII in 1891, is considered the Magna Charta of social Catholicism. It ratified private or individual property rights as consistent with human nature, while highlighting the moral duty to employ individual wealth to assuage poverty and misery: “It is not on account of man-made laws but on account of Nature that an in-

dividual is entitled to his private property; therefore, no public authority can abolish property rights, although it can moderate their exercise and regulate it in a way that is consistent with the common good.”

Forty years later, Pope Pius XI, issued another encyclical letter, “*Quadragesimo Anno*,” which firmly established the dual character of property (ownership) rights as individual or social rights, depending on whether the emphasis is placed on serving the individual owner’s interest or on advancing the common good (the needs of society at large). The individual owner is required to use property not only for his own benefit, but also in a way that benefits society at large.

The influence of Catholic values and traditions is also present in the development of the Civil Law system that the Spanish and the Portuguese brought to Latin America. Civil law, imbued during the Renaissance with the principles and institutions of Roman law, is perhaps the most important legal system or “group” of systems (every nation adopting it has its own, despite sharing many of the same traits). It is prevalent in most of Europe and in Latin America, as well as in areas of the world that lay outside the Western tradition.

The English, on the other hand, refused to give up English law and successfully resisted the “reception” of Roman law into their Common law system. The success in isolating England from the legal developments in continental Europe is also behind the separation between Anglo-North America and Latin-South America when it comes to property rights. The

“classical” distinction between Civil Law and Common Law brands the first as a “codified” system, while emphasizing the Common law’s reliance on case law – the decisions issued by its courts system – as the source of its basic principles of law. This distinction frequently fails to point to any significant differences when it comes to the core of essential substantive rules of law in either system, which may be explained by arguing that “good law” is mostly common sense, and, despite cultural differences, sensible rules are frequently the same in quite different environments, the joker in the deck being political instability which breeds a number of maladies that may translate into “bad law.”

But one area where the two systems are different – even substantially different – is precisely the Law of Property. The Law of Property, in societies ruled by Common law, was (is) rooted in the feudal system, which had displaced the principles of Roman law imbedded in the Civil law system. One characteristic that clearly distinguished the Common law was its ability and creativeness in designing rights to land in somewhat complicated time and space segments called “estates.” Whereas in many civil law countries that level of creativity is seldom reached because of the so called *numerus clausus* principle, under which only those rights in rem listed in the property rights (*derechos reales*) section of the Civil Code are legally valid.

An “estate in land,” because of its feudal origin, was conceived as tied to the holder’s status or office, which the Sovereign

or Lord acknowledged by allocating a piece of land (its tenure) to him in exchange for certain services. But the land continued to be under the domain of the feudal lord. The fullest expression of rights, privileges, and powers over land in the Common Law system is the fee simple absolute in possession which can last “forever” (through subsequent inheritances or conveyances), bringing it close to what in Civil Law is called *Dominio*. But even to this day, in parts of the British isles, the Crown, or, in some cases the duchies of Lancaster or Cornwall, may occasionally come to exert its domain (*demesne*) over land formerly in private hands, when the fee simple rights are extinguished and vacancies occur (for lack of heirs, or, more frequently, when the fee holder was a corporation that went bankrupt). Title in those cases reverts or escheats in favor of the feudal lord (or *mesne lord*).

*Dominio*, as defined along the lines of Roman Law in Articles 544 and 545 of the French Civil Code, is the right to enjoy and dispose of things in the most absolute manner, and it is conceived as a natural right, not as a grant from the sovereign.

The “old common law” was, first and foremost, real property law, and it did not have much to do with, or say about, the lives and concerns of those without land. A vestige of this sublime view of land ownership even found its way into the realm of political or civic rights, until the not too distant past, through rules that prevented those who had no interests in land from holding public office, or even voting.

The Code Napoleon, the “mother” of most other civil codes, on the other hand,

was aimed at undermining the power and privileges of the landed aristocracy. Despite the quasi absolute nature ascribed to *dominio* above (in classic Roman Law, one of its features was known as *abutendi*, or the right to use and abuse what you own as you chose, without any restraint, to the extent of destroying it if you so wished), its recognition as a natural right of man has facilitated its taming in some civil law countries, by subjecting it to regulations founded in the common good or the best interests of society at large.

Catholic Social Doctrine played a significant role in this mellowing process of identifying a social function in *dominio*, by recognizing property rights as licit and inherent to human dignity, while asserting that they were not inconsistent with the natural law principle that all things were originally meant to be available to all men. Pope John Paul II, in his encyclical letter “*Sollicitudo rei Socialis*,” described the situation as the coexistence of a valid and necessary private property system, with a limitation or encumbrance resulting from what he calls a “social mortgage.”

The common good began to seep into the common law of property through the development of land-use or zoning law (which evolved from the ancient “law of nuisance”), imposing limitations on what people can do with their property. And in the second half of the twentieth century, individual rights – the right to property amongst them – were reconfigured in the United States of America in a way that seemed as if the gap that separates North-Anglo America from Latin-South America could be bridged. A series of de-

cisions rendered by the post-New Deal Supreme Court tended to substitute and weaken the classical liberal concept of property rights through to the acknowledgement of an ever expanding list of economic rights, which called for governmental intervention in many ways that limited property rights.

A reaction to that development in the case law gained ground in the 1990s, supported by an argument based on a re-assessment of the takings clause of the Fifth Amendment to the US Constitution (“private property shall not be taken for public use without just compensation”). But lately there are hints of an ever more proactive use of the power of eminent domain by the State.

### III.

The US takings clause has its counterparts in the constitutions passed by most other countries in the Western hemisphere, even in places where the authorities seem eager to disregard its usual requirements (legally founded, public purpose, previous compensation). However, the constitutional framework in most Latin American countries does not leave much room for the classic liberal concept of property right, but rather confines it within the boundaries of a social function (*función social*).

Under Article 17 of the Argentine national constitution, property rights are considered inviolable, and no inhabitant of Argentina can be deprived of his or her property in the absence of a legally founded judgment from a court of law. Foreigners have the same civil rights Argentine citizens have, and there is no restriction to

foreign ownership of real estate (Art. 20). These provisions come close to the Code Napoleon’s take on property rights asserting the absolute character of ownership rights (*dominio*), but every individual’s right to use and dispose of his property is subject to the laws that regulate the exercise of all individual rights (Art. 14).

The idea of constraining the exercise of individual property rights by ascribing a social function to ownership has never been fully accepted by Argentine jurisprudence and doctrine. But the Supreme Court, through the argument that, under Article 14 of the Constitution, the exercise and modalities of all constitutional rights can be constrained, has stated that the rationale behind those laws and regulations that restrict the exercise of property rights is found in the preeminence social order and the common good have over all individual rights, expressly negating that ownership rights could ever be seen as absolute.

The second paragraph of Article 17 of the Argentine constitution sets the requirements for the most extreme of the limitations on property rights: expropriation – a legal institute similar to what, under the US takings clause, is known as the exercise of the state’s eminent domain. In Argentina, property can be taken for a public use which has been identified and asserted by law, that is, by a particular expropriation law and after payment to the private owner.

It should be noted that in 1994 Argentina reformed its national constitution, incorporating human rights and thus giving them constitutional rank. Under Ar-

ticle 22 of the reformed constitution, the “American Declaration of the Rights and Duties of Man,” the “American Convention on Human Rights,” and the “Protocolo de San Salvador” (along with the “Universal Declaration of Human Rights” and several other international conventions on the subject) were expressly assimilated into the Constitution.

And in pursuit of a more proactive approach towards the realization of human rights, Article 86 of the reformed constitution instituted The People’s Defender (el Defensor del Pueblo) as an independent and fully autonomous governmental organ, in charge of upholding human rights (and all other constitutional rights and guarantees).

In most other Latin American countries, the social function of property is more clearly established. The Nicaraguan Constitution, for instance, in Articles 5, and 44, acknowledges private property rights, while limiting them by ascribing a social function to them (Art. 5, par. 4) and permitting expropriations only when the public use or social interest involved is clearly stated by law and after payment of fair compensation (Art. 44).

In Peru, the constitution says that property is inviolable and guaranteed by the state but must be used in harmony with societal needs (Art. 70). Article 99 of the 1961 Venezuelan Constitution guaranteed property rights which were to be regulated by the law on account of their social function, through public interest based restrictions, contributions, and obligations to be born by the owner. Article 115 of the current Venezuelan

Constitution (la Constitución Bolivariana) is almost a replica of the one above, although it omits any explicit reference to social function (public usefulness and social interest remain as grounds for regulating property rights, as well as for cases of expropriation). It incorporates into this same Article 115 most of the expropriation language to be found in Article 101 of the 1961 constitution; but it calls for the timely payment (pago oportuno) of the fair compensation the expropriated owner is to receive, disallowing the use of government bonds for such purposes.

Article 109 of Paraguay’s constitution also guarantees the inviolability of private property rights, which are to be defined by the laws in accordance with such economic and social functions as would facilitate the access to private property to all. This same article contains the usual due process and takings (expropriation) clauses.

The Colombian Constitution takes a different tack when it comes to expropriations or eminent domain, allowing the legislature to pass expropriation laws that provide for no compensation to be paid to the expropriated owner, when equitable reasons so warrant (Art. 58, par. 5). Beyond that, Colombia’s is one of the most stringent constitutional texts in the hemisphere when it comes to limiting private property on common good and social interest grounds, finding an inherent ecological side (an obligation bearing on the private owner) to property rights social function (Art. 58) and calling for the state to promote widespread access to property rights (Art. 60).

In Cuba, the one “socialist” country in the Western hemisphere, the common good is exalted in the constitution to an extreme. As in the Argentine case, Cuba has practically incorporated all the rights recognized by the “Universal Declaration of Human Rights” into its constitution (Arts. 52–59), inspired by what the constitution declares is in the core of Cuban socialism: the pursuit of the common good through egalitarian values and policies (Art. 43). What this means is that in Cuba these constitutional rights, tailored to universally recognized Human Rights, are limited to the extent they may harmfully collide with the common good or collective well-being. According to Human Rights Watch, the problem is not this reference to the common good but rather fact that the common good or collective well-being has been measured and determined by the same political party for the past forty-six years.<sup>1</sup>

Article 25 of the Cuban constitution authorizes the expropriation of assets or goods (bienes) in order to satisfy public needs or social interest, if properly compensated. It defers to the laws to establish the procedure to be followed in cases of expropriation and determines their usefulness and necessity, as well as the means chosen for compensation. Article 21 of the Cuban constitution guarantees personal property rights over the proceeds and savings from an individual’s labor, over the house he or she is in possession of, founded on legal title or dominio, the tools or means whereby the individual and his family support themselves, and over such other goods and objects that help satisfy his or her

material and cultural needs. The protection afforded to these personal property rights (the name in Spanish is *propiedad personal* – which is not the same as *propiedad privada* – and it excludes all the means of production, which are in state hands) extends to any use that advances societal goals, but not to those uses that may lead to private enrichment. So the *dominio* is reduced to its minimal expression, far from its classic Roman law origin.

With regard to the *propiedad personal* over an individual’s home, it is hard to find a better statement of the extent of this constitutional limit to the exercise of property rights than the words of a prominent Cuban lawyer, Rodolfo Dávalos Fernández who once headed the Cuban National Housing Institute: “housing is to live in, not to make a living from” (“*la vivienda es para vivir en ella, no para vivir de ella*”). Therefore, even if the percentage of homeowners in Cuba may be very high when compared to almost every other country in the Western Hemisphere, the beneficial impact homeownership has on Cuba’s economy is very limited, as opposed to the one it has in other societies. On the other hand, and even if the “promise” of dignified housing to all Cubans has yet to be fulfilled, you are not as likely to see homeless persons roaming the streets of any Cuban city, as you may see in many of the great capitals of the world.

Any proactive approach aimed at addressing the “promise” of property rights available to all members of a given society is fraught with perils. The idea of distributing wealth in pursuit of “social justice,” and doing it in a democrat-



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- 01 Aerial View of Petare
- 02 Araña

Venezuela, with the third largest economy in South America, is a place of deep set contrasts. There are few places where the tension generated by the widening gap between wealth and poverty is more evident than in the beautiful and narrow Caracas Valley, where the privileged and the excluded face each other in extremely close quarters, and property rights is an elusive concept for many of the latter, who live in the squalor of shanty towns (or “ranchos”). The fact we, the privileged, seem content with living for the day, unconcerned by the predictable consequences of such a widening gap and taking the future for granted, has recently taken a toll on Caracas’ modern looking – yet time worn – infrastructure, cutting it off from its main port (La Guaira) and its international airport. And the outlook is, unfortunately, very similar in many other Latin American countries.



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03 Palo Verde, Petare and La Urbina

04 Petare La Urbina

ic / free-market setting, presumes the existence of a “distributor” which is nowhere to be found: the free-market has no tools to achieve that goal, and when it tries its hand at it, justice is rarely served.

The difficulty in implementing the dualist view of property rights – private ownership constrained by societal needs – are also many and obvious, though they tend to be lesser when political power is distributed among different government organs. But even in those environments where there is a so called balance of powers, the tension between individual property rights and the perceived interest of the collective often erupts into fierce public debate.

A recent 5 – 4 decision by the US Supreme Court in the case of *Kelo v City of New London* in the state of Connecticut asserted the authority of local governments to seize private homes and businesses for the direct benefit of another private party, as long as the taking or expropriation is deemed to have indirect public benefits (in the *Kelo* case, the creation of jobs and increased tax revenue). This approach, often described as the gentrification of blighted urban areas, amounts to substituting the “public use” required under the US Constitution for a broader “public purpose” requirement, and is seen by some as a complete subversion of what we have been calling the common good or collective well-being. In the words of one of the four dissenting justices: “Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportion-

tionate influence and power in the political process, including large corporations and development firms.”

Where political power is concentrated in the hands of a few and achieving “social justice” as one of the avowed collective goals of society is left in those few hands, the results are usually dismal. These distributors of wealth, no matter how well intentioned, easily turn into plunderers of wealth.

Even when seen as a human right – a right that is consequential to man’s nature – the right to property needs the protection and the regulatory constraints of the legal system. But a human right to property, by definition, is not a creature of those laws, nor can it be obliterated by any laws. In the United States of America, the Bill of Rights makes this clear, by preserving the fundamental rights of the individual – property rights amongst them – from the reach of political majorities, no matter how democratically conformed.

Still, the man-made laws in place to protect and regulate a human right to property are crucial to the preservation of that right. And where those laws are trampled and ignored, where there is no respect for the rule of law, the damage to society as a whole is often terminal. This damage is sometimes subtle, as when it is caused by legislative inflation, when, in the words of Montesquieu, useless laws weaken the useful ones. Sometimes it is overt, as when governments arbitrarily take property rights away from individuals. The price is always paid in the same currency: legal uncertainty and corruption, its faithful companion.

What is presently happening in Venezuela is a case in point. Despite a number of legal constraints to governmental power – some of them embedded in the Bolivarian Constitution passed by its present rulers – Venezuela seems to be embarked in a series of unsound, disorderly and indiscriminate measures aimed at undermining property rights across the board. There may seem to be reasons for this rush to redistribute land in Venezuela, although there are no signs of a swelling public opinion behind these measures. But the fact is that the persistent and increasing gap between wealth and poverty is – and has always been – starkly evident in Caracas, Venezuela’s capital, where indigence and luxury are intertwined in a very small physical space, by force of a geographical setting that meshes unparalleled natural beauty with marked socio-economic contrasts that leave their scars in the narrow valley of Caracas.

Americans, in the United States, seem only now to be awakening to the kind of tension that intimacy between wealth and pauperism has always generated in places like Venezuela. That tension was never as patent – but was obviously latent – in New Orleans, where the haves and the have-nots mingled in an apparent harmony that is now being re-assessed, after hurricane Katrina blew the lid on the intensity of the poverty problem in a city so often visited by American tourists and conventioners, but so little understood.

#### IV.

But looking ahead, the most likely battlefield where property rights issues in the

Western Hemisphere will be fought over, is that of indigenous peoples’ rights. The draft version of what is intended as an “American Declaration of the Rights of Indigenous Peoples” – the draft dates from 1997 and is reviewed by the Committee on Juridical and Political Affairs of the Organization of American States (“CJPA”) – acknowledges indigenous laws and indigenous legal systems (Art. XV), and recognizes the collective rights of indigenous peoples, including their rights to lands (Art. XVIII). Even without this Declaration in force – the CJPA is committed to have it approved before the second semester of 2006 – the Inter American Court of Human Rights has ruled that governments in the region must take proactive measures to delimit and demarcate the lands of the indigenous communities, and formally title those lands to said communities, in recognition of the fact that, as a matter of international law, indigenous peoples have collective rights to the lands and natural resources they have historically used and occupied. (See Inter American Court of Human Rights: Case of Mayagna Awas Tingi Community v Nicaragua, Judgment of August 31, 2001). The decision was based on the Court’s reading of Articles XXV (right to judicial protection) and XXI (right to private property) of the “American Convention on Human Rights.”

The increasing impact of indigenous peoples’ claims to political power in countries like Bolivia, Ecuador, and Peru has put a stop to the hemispheric trend towards the privatization of public utilities, and has compromised the outlook for foreign investment in those countries,

at least for those investments related to the exploitation of natural resources. And it has added a flammable ingredient to the old but still growing wealth gap between the elites and the impoverished masses in the Andes. This newfound political power has put ethnicity – the Quechua, the Aymara, the Guarani – in the crucible of the next elections in those countries, and the vindication of their property rights over ancestral lands is in their leaders' agendas.