RETHINKING PROPERTY TOWARDS EQUITY AND RESILIENCE. AN ECOFEMINIST PROPOSAL FOR THE COMMONS

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Rethinking property towards equity and resilience. An ecofeminist proposal for the commons

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Doctoral Thesis

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I STATE that the present study, entitled “Rethinking property towards equity and resilience. An ecofeminist proposal for the commons”, presented by Clara Esteve-Jordà for the award of the degree of Doctor, has been carried out under my supervision at the Public Law Department of this university.

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It matters what matters we use to think other matters with;
it matters what stories we tell to tell other stories with;
it matters what knots knot knots, what thoughts think thoughts,
what descriptions describe descriptions, what ties tie ties.
It matters what stories make worlds, what worlds make stories.

DONNA HARAWAY, 2016[1]

Property will cost us the Earth.

ANDREAS MALM, 2021[2]

En un planeta saturado hasta la congestión, y golpeados por el macroefecto 'boomerang' del ecocidio, el dilema secular entre igualdad y desigualdad se magnifica. Y a la vez se convierte en un dilema mucho más simple:

o matar o compartir.

HÉCTOR TEJERO & EMILIO SANTIAGO, 2021[3]

* Cover photo: Institut Municipal de l'Habitatge i Rehabilitació de Barcelona (IMHAB).

[1] Donna Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Duke University Press 2016) 12.

[2] Andreas Malm, *How to Blow Up a Pipeline* (Verso Books 2021) 69.

[3] Héctor Tejero and Emilio Santiago, *¿Qué hacer en caso de incendio? Manifiesto por el Green New Deal* (Capitán Swing 2019) 131. (transl): "In a planet saturated to the point of congestion, and hit by the macro 'boomerang' effect of ecocide, the age-old dilemma between equality and inequality is magnified. And at the same time it becomes a much simpler dilemma: kill or share".

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Palma, juny de 2023

Acronyms and abbreviations

AWG	Anthropocene Working Group
BGB	*Bürgerliches Gesetzbuch* (German Civil Code)
BVerfG	*Bundesverfassungsgericht* (German Federal Constitutional Court)
BVerfGE	*Bundesverfassungsgerichtsentscheidu*ng (decision by the BVerfG)
CC	Civil Code
CE	*Constitución Española* (Spanish Constitution)
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRE	*Constitución de la República del Ecuador* (Constitution of the Republic of Ecuador)
DDHC	*Déclaration des Droits de l'Homme et le Citoyen* (Declaration of the Rights of Man and of the Citizen)
ECHR	European Convention on Human Rights
ECLAC	Economic Commission for Latin America and the Caribbean
EU	European Union
GDR	German Democratic Republic
GG	*Grundgesetz* (Basic Law for the Federal Republic of Germany)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICS	International Commission on Stratigraphy
SA	*Statuto Albertino* (Albertine Statute)
UBI	Universal Basic Income
UDHR	Universal Declaration of Human Rights
UN	United Nations

Abstract

This thesis highlights the inequity and unsustainability generated by the modern conception of property, as the cornerstone of the world-capitalist economy that has led to the Anthropocene. Through a comparative constitutional analysis of the right to property in various modern and contemporary Western constitutions, I examine its evolution as capitalism has also moved into its late neoliberal phase. The results of this research force a rethinking of property with a focus on the commons as a defining element of the eco-social function of property. Commons offer a potential pathway to more equitable and resilient societies by emphasising the use rather than the ownership of resources. Particularly, an ecofeminist approach to the commons emphasises interdependence and eco-dependence, prioritises the needs of communities, and puts life and care at the centre. It recognises the importance of including diverse perspectives in resource management decision-making processes, while building resilience to future environmental challenges. Communities *communalise* and *constitutionalise* resources while democratising spaces and society, building law from below. This perspective can offer a promising alternative to the individualism and inequality associated with private property and become a step towards more just and resilient societies.

Keywords: property — eco-social function of property — commons — constitutional law — equity — resilience — ecofeminism(s).

Resumen

Esta tesis subraya la inequidad e insostenibilidad que la concepción moderna de la propiedad ha generado, como piedra angular de la economía mundo-capitalista que ha conducido hasta el Antropoceno. A través de un análisis constitucional comparado del derecho de propiedad en distintas constituciones occidentales modernas y contemporáneas, examino su evolución a medida que el capitalismo también iba avanzando, hasta llegar a su fase tardía-neoliberal. Los resultados de este examen obligan a repensar la propiedad poniendo el foco en los bienes comunes, en tanto que elemento definidor de la función eco-social de la propiedad. Los bienes comunes ofrecen una vía potencial hacia sociedades más equitativas y resilientes, al subrayar el uso y no la titularidad de los recursos. En particular, un enfoque ecofeminista de los bienes comunes pone de manifiesto la interdependencia y la ecodependencia, da prioridad a las necesidades de las comunidades y pone la vida y los cuidados en el centro. Así, se reconoce la importancia de la inclusión de diversas perspectivas en los procesos de toma de decisiones sobre la gestión de los recursos, al tiempo que se fomenta la resiliencia frente a los próximos retos ecológicos. Las comunidades *comunalizan* y *constitucionalizan* los recursos y a la vez, democratizan los espacios y la sociedad, construyendo el derecho desde abajo. Esta perspectiva puede ofrecer una alternativa prometedora al individualismo y la desigualdad asociados a la propiedad privada, y representa un paso hacia sociedades más justas y resilientes.

Palabras clave: propiedad - función ecosocial de la propiedad - bienes comunes - derecho constitucional - equidad - resiliencia - ecofeminismo(s).

Contents

Introduction

"This is mine and no one else's, so no one can interfere with what is mine. I can do with it whatever I want. Wherever I want. Whenever I want." We spend our lives, consciously or unconsciously, determining what is ours. Our house, our smartphone, our pet. Our household appliances. Our money, our job, our clothes. This is supposed to make us feel free, comfortable, carefree, unburdened. Indeed, the demarcation of what belongs to whom may seem harmless, neutral, peaceful. However, the institution of property has come to determine the order of our lives and that of the rest of the world, and has had a serious impact on planet Earth.

Although property is an evolving and contextual institution, its current hegemonic conception conceives of nature as a source of resources[4] at the eternal disposal of humanity. It does not understand humans as part of the same biodiversity, nor that the relationship with other living beings who also need nature ought to be one of coexistence, not of hierarchy. Admittedly, in the current system, resources are scarce compared to human demands, so the question of the control and distribution of resources is a crucial issue in every society. The main concern is to define the basic principles of this distribution. Property law is responsible for determining which of the many competing demands for the resources available for use in society are to be met, when, by whom and under what conditions.

Property is a relationship between individuals that arises from the existence of these limited resources and its legal definition establishes the rules of behaviour with respect to the requirements that all individuals must observe in their interactions with each other or suffer the punitive costs of non-compliance. However, property has also been configured as the legal encapsulation of the hierarchical relationship between this incorporeal individual (the human being), substantiated in a consciousness that defines needs and aspirations, and a formless and passive material (nature), destined to satisfy these needs and aspirations. The unconscious association between "property" and "private property" is not random. We think of "private property" because it has become the predominant way of organising property.[5] The Anthropocene challenges propertarianism, i.e., the dominance of private property.

[4] I must warn the reader right away that, throughout this thesis, I use terms such as 'resources', 'goods' and 'assets' to denote the original wealth that human beings use as livelihoods. I am aware that such terms can be considered anthropocentric. Indeed, they presuppose that the elements of nature are *for* human beings, at *their* disposal. They refer to anything, tangible or intangible, that is useful to humans and satisfies, directly or indirectly, some individual or collective desire or need, or that contributes to the well-being of individuals. The Cambridge Dictionary defines 'resource' as: "a useful or valuable possession, such as oil or gas that a country has and that can be sold"; "resources are natural substances such as water and wood which are valuable in supporting life". Thus, it already predisposes a relationship of ownership with such items. For the term 'good', the definition does not change much: "things for sale, or the things that you own". Finally, the term 'asset' seems even more humancentric and linked to ownership: "an item of property owned by a person or company, regarded as having value and available to meet debts, commitments, or legacies". Despite this drawback, I have had to use all these terms, aware of this anthropocentric bias, and waiting for academia to find more appropriate terms, more biocentric but at the same time understandable to all scholars.

[5] Timothée Parrique, 'Chapter 9. Transforming property' in 'The political economy of degrowth' (PhD Thesis, Economics and Finance. Université Clermont Auvergne - Stockholms Universitet 2020) 510 <https://shorturl.at/ioxEQ> accessed 2 June 2023.

Throughout history, property has led to thousands of disputes and even wars, but above all to the destruction of ways of relating to each other and to the Earth that sustains humanity, which some rightly call Pacha Mama. Indeed, as historical events show, the privative use of natural resources as a sign of freedom and ostension of power has at its best led to the exploitation of the resources necessary for human existence beyond its means, while at the same time undermining the freedom of others. The enormous destructive capacity that modern societies have acquired through their increasing consumption or reckless waste of natural resources has raised unprecedented questions about the conservation, rational management and equitable distribution of these resources and the benefits they generate.[6] A world based on possessive individualism and the subject of rights as an abstract, disembodied person, detached from their environment, never seemed to take its toll. For in the short term, this could be harmless. But that is exactly what is currently happening on planet Earth.

As the pace of exploitation accelerates, the symptoms of social inequality and a finite nature begin to become apparent. A small number of people own many resources while large masses of people own nothing. Meanwhile, climate change is already oozing over our heads and crushing our skin: it is announcing something that we could probably have avoided a long time ago. Whether we are prepared for the most important phenomenon of the 21st century is anyone's guess. But the evidence so far is that those who have the least will have the least to defend themselves against the climate emergency. As a legal researcher, I would like to think that this can be changed, among other things, through legal tools. There is hope if we accept that property is an economic, social, legal and moral relationship between people, functional to the reproduction of a certain historical accumulation model.[7] In other words, property is a social construct and therefore susceptible to being shaped. This makes it possible to break out of the status quo and articulate change.

At the dawn of the Anthropocene era, human activities are already changing the climate, geology and ecosystems of planet Earth. The rate at which human impact on our planet has accelerated is unprecedented, especially since the mid-20th century. Anthropogenic emissions of toxic substances have polluted large regions beyond recovery. Greenhouse gases are causing sea level rise, deforestation and desertification. Resource extraction has transformed the surface of the planet, with negative impacts on biodiversity. In this whole system, however, human beings cannot be considered as a whole, as a single, uniform and homogeneous agent, with the capacity to transform and fight against transformations in an organised way. As I will point out, human existence in the Anthropocene has been based on the unequal and unjust exploitation of resources, and the benefit of some at the expense of others. In its most sophisticated, specifically capitalist and neoliberal formula, the old patriarchy found a way to privilege a particular

[6] Judith Rochfeld, 'Quel(s) modèle(s) juridiques pour les "communs" ?' (Séminaire international : Entre élargissement du cercle des propriétaires et dépassement de la propriété. Propriété et Communs. Les nouveaux enjeux de l'accès et de l'innovation partagée - Paris 25-26 avril 2013) 2-3 <t.ly/bxzX> accessed 20 April 2023.

[7] Albert Noguera Fernández (coord), in *Regular los alquileres. La lucha por el derecho a una vivienda digna en España* (Tirant lo Blanch 2022) 18.

male pattern (white, Western, heterosexual, affluent), excluding large masses from the distribution of goods and perpetuating a myriad of inequalities.

One of the hierarchies with the greatest impact is that based on gender. Its most notorious form of discrimination has for centuries been based on the devaluation of the reproductive work, mostly carried out by women, and its exclusion from the economic indicators of the state of health of the capitalist system. The violence, sexualisation and commodification of women have also made it possible to control and repress their bodies in order to consolidate the capitalist economy and the processes of structuring power. Of course, property has also been formulated in what I will call environmental patriarchy, based on the exclusion of women from decision-making over natural resources.

In parallel, the supposed "wealth" of the capitalist centre has been achieved through the invasion and plunder of natural resources in less industrialised countries. Despite struggles to defend the land and nature, transnational corporations have been displacing many communities from their territories, upsetting the balance of local economies and activities, to the point of annihilating their models of self-sufficiency. The impoverishment of rural life forces thousands of peasant communities to migrate daily from the countryside to the city. However, the rupture caused by displacement has such a strong economic and psychological impact that a metropolis often becomes the first stop in the final migration of many women, this time transnational, to Europe or North America. Indeed, the arrival of migrant women has been incredibly cheap for Western countries; they are both the raw material and the labour force that fills the care gap created by the entry of middle-class Western women into the workforce.

In any case, the following analysis cannot be merely approached from a reductionist "men versus women" perspective. Indeed, patriarchy is not the only regime that conditions human beings' existence. Roles, responsibilities and rights are not only shaped by gender fluidity, but also by race, ethnicity, caste, age, class or sexual orientation, as well as by educational level or access to land. The intersection of these axes of identity and experience provides different opportunities for individuals and societies to adapt to environmental change. Moreover, categories change and are renegotiated under climate variability.

As a kind of confirmation of the Anthropocene and all these inequalities, in early 2020, just as this thesis was being born, a lethal virus had just hatched on the other side of the world, spreading across the globe and colonising every last corner of the planet. Indeed, this work is contemporary with the Covid-19 pandemic; it has experienced the coronavirus and all its consequences first-hand: isolation, fear, longing, uncertainty, loneliness, anguish. Long lockdowns, countless restrictions, faces covered with masks, antigen tests, vaccines. Even the coronavirus itself. But it has also witnessed the streets being cleared of CO_2 emissions, emptied of people and cars, and repopulated with fearless birds. Nature seeking to rescue and rewild old spaces. People applauding human courage and generosity from their windows. Community and neighbourhood networks of support and solidarity. And later, the recovery of some public-communal spaces.

The pandemic can only be seen as the latest symptom of the enormous systemic imbalances that promote unlimited growth on a finite planet; the result of the attempted colonisation of the last wild resources, which unpredictably harboured viruses to which

humans were not immune. The coronavirus revealed the fragility of the bodies and aggravated pre-existing vulnerabilities in several dimensions, but it also taught important lessons. The situation generated by Covid-19 was a further invitation to confront the inequalities legitimised by the prevailing structures, while it hastened humanity's response to the climate emergency.

The predictability of the state of the planet and the existence of a homogeneous, fully emancipated and equitable society seems unlikely in the age of the Anthropocene. Likewise, this unstable scenario does not seem to be conducive to maintaining the utopia of private property as a basic element for the use of resources. This type of ownership does not appear as the most appropriate to regulate future societies, and the fact that this paradigm has been dominant for the last two centuries is clearly a challenge to the hegemonic legal culture. The most important challenge facing property law today is how to adapt to the coming decades of the Anthropocene, regardless of whether it is considered a geological epoch or a boundary event.

Surely it would be less tedious to see climate change as an approaching wave, or as humanity's hara-kiri, irretrievably doomed to extinction. Just sitting and waiting for the inevitable shipwreck. But this is no more encouraging than trying to imagine other horizons, far removed from the hegemonic concept of property, which do not culturally structure the accelerated processes of aggressive adaptation within the framework of technocapitalism, but from a holistic perspective of human existence as part of something much bigger. In this context, constitutional law has a great responsibility to assume. The link between property and constitutional law as a discipline goes back right to the emergence of constitutional states and it is no coincidence that, at the same time, industrial capitalism was accelerating at an unprecedented rate.

If it is accepted that constitutional law modulates the behaviour of human beings, their relations with nature and with each other, then it may be accepted that constitutional law has played a key role in the development of property law. But also, as a human artefact, it can be rethought, reconstructed and adapted to modern times. It is this same transformative capacity of constitutional law that must illuminate a new path to make societies more resilient and equitable, not only for reasons of justice, but also for reasons of survival. Either that, or accept that there may be no tomorrow. I believe that we environmental law researchers from all areas of law have a moral obligation to choose the latter. It is precisely for this reason that I decided to embark on this research.

My aim in this research is to shed some light on the concept of property that a just eco-social transition requires us to work with. My research questions are: 1) Whether the hegemonic conception of property rights is adequate to generate a just transition towards equity and resilience; and 2) If this conception is not adequate, how should property be reconceptualised, and in particular, how should a constitutional proposal be articulated that allows for the redistribution of resources. My thesis is that an ecofeminist perspective on the commons can provide a framework for equity and resilience in the current context, through a conceptual framework that renovates hegemonic conceptions of property in a cooperative horizon according to the current needs of understanding and responding to the global environmental crisis. The main hypothesis is that the eco-social

function of property is the essential link in the search for legal legitimacy of commons claims.

My research is based on the need to rethink law and, in particular, constitutional law in the current context of eco-social crisis. For this reason, it is approached from the perspective of critical legal studies, and specifically, it understands law as a social practical activity in constant evolution, and not merely as a set of rules or a legal order in the classical sense. This vision is present throughout the work, but especially, in the fourth chapter, where I make *lege ferenda* proposals in relation to constitutional law, property and the commons. *Lege ferenda* should be understood here in the broad sense of how the discipline of law should be reformed as an evolutionary process of normative construction. Understanding law in a narrative form, as a bearer of cultural stories, allows me to observe how its aims and axiological content can be relevant when moving towards new ecological and social scenarios.

It is likely that such stories have not been all-encompassing. For this reason, this dissertation conceives of the constitution as an open order, always a becoming, in which everything is in fact reformable by a militant democracy with some essential values. Law and the cultural forms and expressions that inform it (values, beliefs, practices, customs) are never static, and therefore such an investigation is necessarily incomplete. The uncertainty and indeterminacy of this work make it easily replaceable with more rigid and robust methodologies. But for now, I think it is important to take nothing for granted and to make critical approaches to and from law, as a tool for dismantling the structure of capitalist patriarchy. As a pencil to outline the structure of a planet we can all call home, where all living beings can live better and more dignified lives.

The focus on constitutional law is justified because it is the axiological core of the system in which these pretensions are first materialised. Constitutional law is the device that distributes power and the body in which the claims of society are (or should be) reflected. I see it as a fundamental pillar for the normative deployment of states, reflecting their idiosyncrasies —even if geographical boundaries do not always coincide with the socio-cultural reality and desires of a nation. Constitutional law is a complex apparatus and can certainly be abstract. For this reason, I have not only studied the constitutions positivised in texts, but I have also made use of constitutional jurisprudence and doctrine from the past and the present.

Nonetheless, a thesis of these characteristics would not have been possible without a methodological eclecticism and a transdisciplinary perspective. Of course, law is not pure, one cannot just pull a drawer and pretend to understand everything, which is why I have drawn on the branches of Roman law, civil law and legal history to narrate this thesis in the way that seemed most comprehensible. Starting from the antecedents of property led me to know the Roman concept of property, through the feudal land institutions of the Middle Ages, to the property enshrined in the 19th-century codes, since it made no sense to understand the constitutions without their context in private law. The use of legal history seemed to me to be the natural technique for understanding why each constitution configured property in each way. I should also emphasise the comparative perspective used, which is justified by the attempt to address global problems. While international law does an enormous task in this regard, I think it is

equally important not to lose sight of the fact that people live within territories, has been and continues to be ordered under constitutions, which means that ownership has been dealt with in different ways. These are lessons and inspiration for the present.

Moreover, in a work whose aim was to analyse a legal institution and seek ways of transforming it, I naturally turned to the philosophy, theory and sociology of law, because in fact there are as many ways of understanding property as there are people who set out to understand it. I have been inspired by the philosophers and jurists who began this theoretical-philosophical journey on the concept of property some centuries ago, such as Locke and Rousseau, but also by others who, although less well known, continue to question its existence today. Likewise, I have tried to understand, from a sociological perspective, the reasons for the constitutional configuration of property at each moment in time. In any case, my strategy has not been simply to combine different disciplines of analysis according to my intellectual preferences, but to carry out the methodological integration of the different disciplines necessary to approach the subject.

Another transversal method used, which I believe gives certain originality to the content of this research, is the application of the gender perspective. Of course, property has been questioned for centuries, but women's writings on this institution from other historical periods do not exist —probably because they never had a room of their own, as Virginia Woolf claimed— or have not been preserved. And the great (male) philosophers and constitutionalists never considered what impact the configuration of property had on women. Or how property would have been configured if human vulnerability, care or life had been placed at the centre. Thus, by questioning the gendered distribution of resources, I have tried to show that patriarchy, in its capitalist morphology, as a form of subjugation of women and vulnerable groups on the basis of gender, orientation and sexual identity, has largely determined the way resources are (unequally) distributed.

In case there was still any doubt, despite my efforts and determination to maintain rigour and objectivity, there is nothing to hide in stating that my work is feminist. In particular, it is framed on feminist legal scholarship and materialist ecofeminism, which understands socio-environmental degradation as a product of capitalism as the modern materiality of patriarchy, especially in the West. It is based on the sexual division of labour and the unequal social structure that places women in the sphere of reproduction and men in the sphere of production and the consequent exploitation of nature. This school of thought defends that neither men nor women are a natural or biological group, but are defined by a social, material, concrete and historical relationship. A relationship of inequality linked to the hierarchy of production over reproduction. A system that seeks to discipline bodies through sexual classification and to subjugate women through the construction of gender, as strategies of domination.

Thus, in this thesis, I place myself within the structural understanding that rejects the pre-existence of sexual difference under naturalistic or essentialist conceptions. I understand it as a network of political, economic and socio-cultural relations, generated by the domination of the white, heterosexual male hegemonic class over all other classes. In my view, the lonely, competitive, dominant individual is mere fiction. It serves to generate inequalities and the accumulation of private property. Patriarchal capitalism portrays a world without heart, when in fact it is the relationship of sustenance and

dependence, the relationship of life, that makes sense. Everyone's survival depends on their qualitative relationship with others, with the community, with the land, with the environment. In short, we live in a relationship of ecological and community dependency because the body is just another part of the environment.

Of course, this dissertation is inevitably influenced by situated knowledge, and therefore perceptions on the issue have been strongly conditioned by my gender, sexual identity and orientation, age, race, social status and economic class. Likewise, my knowledge is strongly dependent on my historical, cultural, linguistic and value contexts. I am aware that most of these are privileges that have flowed through me in doing this work. Other aspects have certainly implied some limitations. In short, my experience within these characteristics has made this thesis what it is and no other. I believe that this can somehow contribute to the field of research, as in reality, academic research is based on the use of the scientific method based on the experience of each individual. Within this implicit subjectivity, I try to reasonably defend the adequacy of my hypotheses. In this sense, and without contradicting the above, I would like to highlight that the inclusion of the full names of the authors —although the Oscola citation method I used does not state this— responds to the desire to make visible the women who have made important proposals and theories in my field of research, which are many.

I must also warn the reader, whether they come from an Anglo-Saxon linguistic culture or not, that this is a thesis written in English by a non-native English speaker. This is due to the predominance of this language in the academia and especially in my field of law, comparative constitutional law. Despite my efforts to express myself with the utmost rigour in English, there are fundamental linguistic differences between civil law systems —the law school in which I was educated and trained— that have not found a symmetrical translation into the language of the common law. It is therefore possible that the constructions may sometimes be complicated for a native English speaker. I apologise in advance for any difficulty in understanding if this is the case. Be that as it may, to maintain the literal legal and doctrinal tenor, and to avoid possible confusion, I have reproduced the original quotations of the precepts when they were not in English, in order to facilitate their understanding, and I have provided the English translation, either below or in footnotes, depending on the length.

I must conclude with a final methodological question, which has to do with the branch of law I have used for my research. If the reader is an expert in public international law or global constitutional law, a more thorough exploration of property through the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR) may be missed. Of course, a more in-depth exploration of this area would have been extremely interesting, but my main interest here has been to see how the right to property has evolved in the constitutional tradition. This is a historical-comparative study, so I do not intend to exhaust the nuances of to the legal status of property, as will be seen. The purpose of the research is propaedeutic, not to go into the details of the property regime. That is, to see how this right is treated in different constitutionalisms.

Due to the complexity and scope of the issues I address, it may be useful to explain the logic behind the structure of this research. To make this work comprehensible, I have divided it into four chapters, besides this introduction and the conclusions. Chapter 1 is

mainly descriptive. It contains an introductory presentation and critique of the prevailing legal-theoretical conception of property. First, I contextualise the geological era we have entered, the Anthropocene, to question whether it is all humans who are modifying the conditions of the planet, or whether the conception of property has had something to do with social inequalities and environmental degradation. Thus, I argue that the questioning of property as a legal institution may be a prerequisite for approaches to solving both social and environmental problems. This leads me to a preliminary analysis of the background of property according to classical thinkers throughout history, in Rome, during the Middle Ages and up to the modern thinking of Locke and Rousseau and the impact of the French Revolution. I then analyse the nuclear family as the insurer of private property from a historical and gender perspective. Subsequently, I suggest that violence against women and nature derives from the view of both as property, and finally, I try to unpack the patriarchal configuration of property.

Chapter 2 is more analytical. It is an analysis of property in the modern constitutionalisms that emerged during the liberal era (late 18th and 19th centuries). I argue that it is no coincidence that formal constitutions were born with the emergence of capitalism, which presumably needed to be ordered and organised. To this end, I try to show how the right to property was shaped in the liberal constitutions of a selection of Western states: France, Germany, Italy, Spain and the United States, because of their interest, their pioneering spirit, their position and responsibility in the imperialist-colonialist era and their relevance to this day. A more detailed justification for the choice of each state can be found within this chapter. Through this historical-constitutional analysis, I aim to highlight that, although rights appear in modern constitutional culture as an instrument of liberation, this legal structure served to dismantle the commons. It led to the suppression of the collective elements of pre-modern societies and thus of traditional forms of community life.

Chapter 3, which is also analytical, follows a similar methodology and structure to the previous chapter, although in this case I incorporate the jurisprudence of the constitutional courts of the respective states, which provides more nuance in the interpretation of the articles. In it, I turn to some constitutionalisms of the 20th century, to see how the social function of property has been recognised in virtually all constitutions up to the current 21st century, even the most liberal ones. To this end, I analyse in detail the configuration of the right to property in the socialist constitutions of Mexico, Germany and Spain in the first third of the 20th century. I then analyse the constitutions of France, Italy, Germany and Spain after the Second World War. Finally, to provide a quite different view of property rights, I analyse the constitution of Ecuador, already adopted in the current century, which not only broadly recognises the social-common function of property, but also its ecological function. This allows me to explore whether the 'pooling' or collectivisation of property, i.e., the commons, have a place in these constitutions. Furthermore, this analysis should show how the constitutionalisation of the social function of property is one of the fundamental manifestations of the constitutionalisation of private law, which was previously only contained in autonomous civil codes.

Chapter 4 is propositional: it defines an operational concept of property rights, highlighting their limits and constraints. It is an exploration of the concept of the

commons as a defining element of the eco-social function of property, as an alternative to the hegemonic concept of property. In doing so, I attempt to explain how the commons, as a counter-narrative to the dominance of the private property paradigm, can be a transformative tool for equity and resilience in the future climate regime. In this way, property is described not as a natural right, but as an intersubjectively conceived legal position. In the Anthropocene, it makes no sense to think in terms of rigid property rights. In a changing world, the respective rights of private owners and society at large will increasingly collide. Property rights —understood as a bundle of rights— need to be restructured to accommodate and manage the conflicts that will arise in a constantly and rapidly changing world, always taking into account the vulnerability of human beings. I will therefore argue that property rights are perhaps best understood as a tool for the protection of other rights rather than as a fundamental right. I will also stress the need to focus on the use rather than the ownership of resources, and the importance of putting life and care at the heart of community life.

There is no denying that the postulates of this debate are indeed problematic. I must warn at the outset that my proposal is not to change the law out of hand, but to articulate some general principles that can guide the future development of property law. Like any dissertation, this work is partial and incomplete. I am sure that more time, more opportunities and more voices will be needed to further complete and nuance what has been written here. I would like to reiterate, then, that this is the beginning of a journey, not an end. It is a tentative exploration of how the distribution of resources has been shaped in law and in constitutions. It is, therefore, the product of an early research career, a heuristic exercise aimed at constructing a starting point for the research that I intend to project in the future.

I want to anticipate that this initial process has raised many questions and concerns that I aim to address in the near future. Before finishing this introduction, I would like to briefly unveil some of the specific questions that I intend to develop further, as for reasons of time and space I have not been able to elaborate on them here. Firstly, I consider it important to further explore the existing alternative realities —historical and contemporary— in relation to resource management and, in particular, successful cases of communal regimes. I am absolutely convinced of the need to study the legal and political strategies that were implemented behind such achievements, but also the informal practices that take place in the city streets, in the squares, in the countryside, and in the houses, huts, civic centres, communal houses, halls, courtyards, ‘patios’, verandas, kitchens... All those micro-politics where the most immediate decisions are made. Such alternative practices can inspire, illustrate and shape the paradigm shift proposed in this thesis. I also believe that much can be learned from existing social movements, such as mobilisations, organisations, community, trade union, labour, cooperation networks, etc.

Secondly, I would like to further explore the possibility of actively incorporating into legal institutions ecofeminist assumptions that situate humans as a component of nature and advocate respect for all living beings, human and non-human, that cohabit it. To this end, I would like to investigate in greater depth and detail historical and contemporary examples of laws and judgments that have incorporated principles consistent with an ecofeminist perspective, and to gather the ideas and information they contain in order to

make them applicable to other laws, cases and policies. Likewise, it can be interesting to examine the power dynamics within judicial spheres, to see how cases that directly or partially affect environmental, gender, care and commons issues are resolved.[8]

Thirdly, I would also like to further explore the idea of whether the proposed reconstitutionalisation of property would be compatible with a basic income system. Tentatively, I suspect that the scenario I propose in this thesis could be favoured by the introduction of a periodic cash payment, unconditionally granted to all citizens on an individual basis, with no means or work requirements. Even if the universal basic income is not exactly a commons regime, I do consider it to be the minimum on which the transition to the commons should be built. It is a key building block in the construction of free, fully inclusive societies. From my point of view, building community bonds for the management of the commons requires having the guaranteed material existence to be able to participate effectively in decision-making processes about all kinds of social and resource relations that we are building. Providing individuals with a minimum income could empower them, and this would potentially give them more time to empower themselves collectively. Renegotiating the terms of use of resources and services, productive and reproductive spaces, and creating new ones, would then seem easier.

Note on previously published contents

Some of the contents of the research I present here has already been published, or is in the process of being published, in the following references:

ESTEVE JORDÀ, Clara. 'Vulnerabilidad y agencia: mujeres frente al cambio ambiental' (2022) 13 (1) Revista de Investigaciones Feministas 185.

ESTEVE JORDÀ, Clara. 'El impacto de género de la COVID-19. El caso de España' in Fuentes Gasó, Josep Ramon et al (eds). *El Impacto social de la Covid-19. Una visión desde el Derecho* (Tirant Lo Blanch 2020) 187.

BOYUK, Esra; ESTEVE JORDÀ, Clara and FÀBREGAS, Maria. *Domestic violence against women in times of Covid. The perspective of grassroots organisations* (December 2021), Regional Academy of the United Nations & Ban Ki-moon Centre for Global Citizens.

ESTEVE JORDÀ, Clara. 'Ecofeminising law: Some notions for rethinking law towards equity and sustainability', in Đurđević, Goran and Marjanić, Suzana (eds), *Ecofeminism on the Edge* (Emerald 2023), forthcoming.

[8] For example, court voting patterns by gender (and probably other variables such as age, ethnicity and race) in environmental cases could be analysed quantitatively. Similarly, the differing views of different judges could be analysed linguistically to assess whether gender influences language, attitudes and frames of reference on environmental issues. The relationship to the environment derived from social constructions may differ in terms of conceptualisation, policy priorities and perceived needs. These are more difficult variables to analyse, so mechanisms should be sought to codify these conditions of interpretation. It would also be very interesting to compare these characteristics across countries, to try to identify biases. Needless to say, the purpose is not to perpetuate the male/female binomial, but to bring about a real change that will eventually make gender distinctions unnecessary.

Chapter 1. Unmasking the Anthropocene. Property rights as a driver of unsustainability and inequality

Le démon de la propriété infecte tout ce qu'il touche.

[The property demon infects everything it touches].

JEAN-JACQUES ROUSSEAU, 1762[9]

1.1. On the aim of this chapter

In this first chapter, I examine the concept of property from a legal, historical and ecofeminist perspective. I argue that property has been configured in an atomistic and androcentric pattern that has largely shaped the distribution of the planet's resources. Oriented towards self-determination and never towards vulnerability, property greatly favours the few and disadvantages the many. A small number of people in a small number of sovereign states accumulate large masses and make decisions that affect a large number of poor people who survive on a small number of assets. Even today, perhaps more than ever, capitalist property relations —largely private property— remain at the heart of the hegemonic legal model. In fact, the right to property has become the defining standard for most rights. Everything revolves around ownership. This is, in my view, the main cause of the unprecedented changes in the ecosystems of which humans are a part. Thus, it will be important to look at how property has been legally configured, since it does not fit in with the ecological transition and social justice that the planet and society seem to need. Moreover, it ignores the planet's biophysical limits and does not propose a minimal change in the dominant property relations.

Therefore, I will critically analyse the legal assimilation and configuration that law has made of property rights, especially, through its absorption into private law over public law. In this sense, law, as a discipline that organises social relations, has assumed that the biosphere is a privately exploitable resource and not a common good. I will also examine the legal articulation of the modern subject within the community: a stable normative order in which the autonomous life projects of human individuals unfold.[10] Underlying this legal discourse of modernity is the implicit conviction that the means of subsistence that guarantee individual autonomy are permanently available. Thus, it is supposedly possible to appropriate them in order to satisfy individual autonomy within the pattern of possessive individualism. In other words, according to this hegemonic

[9] Jean-Jacques Rousseau, *Émile, Ou de l'Éducation* (book IV, Charpentier 1848) 531. Original publication: 1762.

[10] Jordi Jaria-Manzano, 'La insolación de Mirèio. Seis tesis y un corolario sobre los derechos (ambientales) en la era del Antropoceno' (2022) 26 Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid 453.

narrative, the interaction of individuals with physical reality does not substantially modify it, since it is understood as a mere repository of resources, indifferent and inexhaustible to human activity.[11] Indeed, the system presupposes that individuals can hold private property rights beyond the absorptive capacity of the atmosphere.

However, law has not only legitimised the exploitation of natural resources, but also social hierarchies through their unequal distribution. Indeed, the subject of property rights is not random or haphazard, but recognisable. It is also easy to distinguish who does not enjoy these privileges. But what are the reasons for these inequalities? Such intraspecific hierarchies cannot be ignored when trying to understand the current ecological crisis. Ultimately, we will never be able to address the future of humanity in a meaningful way if we ignore the dynamics that fragment it. Therefore, I will analyse how laws have silenced some realities of dependency and subordination of real subjects, in very different conditions according to their position in the capitalist context.

Of course, I am well aware that many drivers have conditioned this unjust distribution of property and that this would be a very complex and extensive analysis. Rights, privileges and power relations are shaped by gender, race, ethnicity, caste, age, class or sexual orientation, as well as by educational level or access to land. Clearly, the intersection of these axes of identity and experience offers different possibilities in terms of ownership. It is not possible to explore all these axes, as this would result in a superficial thesis. As I indicated in the introduction, my research will focus primarily on the intersection between property and the gender issue. In particular, I will try to explain how property has been used as the legal artefact with the greatest impact on the subjugation of women.[12] Gender is thus only a starting point, a critical axis around which other categories and hierarchies are embedded.[13]

[11] ibid 455.

[12] I want to clarify, from now on, that when I allude to 'woman/women' or 'man/men', I do not talk about the (supposed) biological sex of people, nor their way of expressing their gender. I refer to the set of expectations that society has about a person classified as a man or as a woman. And I also refer to the social, cultural and legal norms that apply to each group. On the other hand, although we may think of a day when it may not be necessary to differentiate between 'men' and 'women', the history of oppression that carries the concept of 'woman' cannot simply be forgotten. To overcome social constructions, it is first necessary to understand their past and present in a critical way. For this reason, I will speak of 'women' and 'men'. I am not interested in talking about men or women as natural or biological groups, but as social, material, concrete and historical entities. The antagonistic relationship between men and women cannot be reduced to a war of sexes or the principle of complementarity, but rather to a contradiction whose resolution means the death of men and women as social classes. Thus, my arguments find a place within the structural understanding that rejects the pre-existence of sexual difference under naturalistic or essentialist conceptions. I conceive of gender as a web of political, economic and socio-cultural relations, generated by the domination of the hegemonic white, heterosexual male class over all other classes. Vid. Kate Millett, *Sexual Politics* (University of Illinois Press 2000); Ochy Curiel and Jules Falquet (comps), *El patriarcado al desnudo. Tres feministas materialistas: Colette Guillaumin- Paola Tabet- Nicole Claude Mathieu* (Brecha Lésbica (ed) 2005) 8; Catalina Díaz Espinoza, 'Multiculturalismo sexual: diferencia, diversidad e identidades sexo-género en el régimen heterosexual neoliberal' (2018) 14 Revista Anales 295.

[13] Throughout this thesis, I use the terms 'sex' and 'gender' interchangeably most of the time, in an attempt to refute the essentialist idea that either category is natural and therefore immutable. As Simone de Beauvoir observed in her seminal work: "One is not born, but rather becomes, a woman". Likewise, drawing on Michel Foucault's work, Judith Butler suggests in her queer theory that sex, like gender, is a social category; discursively and performatively produced: "If the immutable character of sex is contested, perhaps this construct called 'sex' is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all." As

Patriarchy is an essential pillar of global power and an ally in reinforcing other oppressive regimes. It also serves as a matrix for the development of new structures of privilege. Within this system, women embody the most significant symptom of inequalities. From my point of view, the configuration of property rights based on an abstract subject has had a very negative impact on them. The analysis of this relationship illustrates very well the problems of injustice and unsustainability. In this sense, I do not intend to study the situation of women, but to point out, by means of some examples, women's unequal access to resources as a symptom of this problematic configuration of property. From there, the problem crosses, to a greater or lesser extent, many other gendered subjects, such as gay, lesbian, trans, bisexual, intersex, asexual and queer collectives. Even, of course, cisheterosexual men. What is more; in my proposal for the transformation of the commons in Chapter 4, the potential achievement of gender equality serves perfectly well as a practical example of overcoming inequalities.

1.2. Who is the 'Anthropos' of the Anthropocene?

1.2.1. The Anthropocene as a narrative of the present

In the current complex global scenario, characterised by the impact of human activities on the Earth system, part of the scientific community has argued that we have entered a new ecological epoch, the Anthropocene.[14] For the past 12,000 years, humans lived in

Monique Witting pointed out, the 'sex' category would rather be a specifically political use of the category of nature for the purposes of reproductive sexuality. That is, the binomial classification of sex into male/female would hide the economic (and expansionist) needs of heterosexuality. In short, 'sex' would also be an institutionalised system, an undercover one. Particularly interesting is also the contribution of Paul B. Preciado, for whom society is dominated by the "scientific-market axiom of sexual binarism". The social, labour, affective, economic, or gestational spaces are segmented in terms of masculinity or femininity, of heterosexuality or homosexuality, but actually, they would be political frontiers invented by humanity. These are not ontological entities; they do not exist in nature independently of social relations and discursive networks. They are the effect of power relations, sign systems, cognitive maps, and political regimes. The distinction between 'sex' and 'gender', as a nature/nurture divide, limits the multiple possibilities for the expression of identity, desire, and sexuality that are opened up by freeing the 'sex' category from its biological foundations. Distinguishing between sex/gender in this way also entails a misunderstanding of how law produces its subjects. Vid. Simone de Beauvoir, *The Second Sex* (1st edn, Vintage Books, 2011) 330; Judith Butler, *Gender Trouble. Feminism and the Subversion of Identity* (Routledge 1999) XV; Judith Butler, *Undoing Gender* (Routledge 2004); Monique Wittig, *The Straight Mind and other essays* (Beacon Press, 1992) 77; Paul B. Preciado, *Un apartamento en Urano* (Anagrama 2019) 30; Dianne Otto, 'Lost in Translation: re-scripting the Sexed Subjects of International Human Rights Law' in Orford A. (ed.) *International Law and its Others* (Cambridge University Press 2006) 319; Margaret Davies, 'Taking the Inside Out: Sex and Gender in the Legal Subject' in Ngaire Naffine and Rosemary J. Owens (eds.), *Sexing the Subject of Law* (LBC Information Services 1997) 32; Fausto-Sterling A, *Sex/Gender. Biology in a Social World* (The Routledge Series Integrating Science and Culture 2012); Fausto-Sterling A, *Sexing the body: Gender politics and the construction of sexuality* (Basic Books 2000).

[14] Diatom researcher Eugene F. Stoermer originally coined the term 'Anthropocene' in the early 1980s, to refer to the evidence of the effects of human activity on the planet Earth. It combines the Greek root 'anthropo-,' meaning 'human,' with the suffix '-cene,' the standard suffix for 'epoch' in Geology. In 2000, Stoermer and Nobel Prize-winning atmospheric chemist Paul Crutzen proposed the concept of the Anthropocene to emphasise the central role of humankind in geology and ecology. The word 'Anthropocene' became popular in 2002, through Crutzen's article in *Nature*, 'Geology of mankind: the Anthropocene,' which showed that the effects of human activity on the global environment had been escalating in the past three centuries. But neither the International Commission on Stratigraphy (ICS) nor the International Union of Geological Sciences (IUGS) has officially approved the term as a recognised subdivision of geological time. Vid. Andrew C. Revkin, 'Confronting the 'Anthropocene'' *Dot Earth – New York Times blog* (11 May 2011) <https://perma.cc/3F9B-GMD6> accessed 14 April 2021. Paul J. Crutzen and Eugene F. Stoermer, 'The "Anthropocene" (2000) 41 Global Change Newsletter 17. Paul J. Crutzen, 'Geology of Mankind: The Anthropocene' (2002) 415 Nature 23.

the Holocene epoch, a fairly temperate time when the Earth was predominantly and gradually shaped by natural forces. But today humans are the most important influence on the physical state of the planet, to the point of generating a distinct period in Earth's history. Consequently, the new epoch bears our name: the age of humans. The term 'Anthropocene' thus provides a point of reference capable of articulating the conviction that, in the present, the Earth system is now being configured primarily by human action.

Although others had placed the beginning of the Anthropocene at the end of the 18th century, the scientific stratigraphic community has placed it in the mid-20th century.[15] The Anthropocene Working Group of the Quaternary Stratigraphy Subcommission defined it as follows:: "The present time interval, in which many geologically significant conditions and processes are profoundly altered by human activities."[16] This implies changes in erosion and sediment transport associated with a variety of anthropogenic processes, including colonisation, agriculture, urbanisation, and the chemical composition of the atmosphere, oceans and soils, with significant anthropogenic perturbations in the cycles of elements such as carbon, nitrogen, phosphorus and various metals. Likewise, it includes the environmental conditions generated by these perturbations, for instance, global warming, ocean acidification and spreading oceanic 'dead zones,' the transformation of the biosphere both on land and in the sea, as a result of habitat loss, predation and species invasions.[17]

Thus, the Anthropocene era is characterised by the fact that human activity —not nature— is the dominant force transforming the physical world. The concept has gained much attention within the scientific community, making its fortune as a narrative of the present.[18] The magnitude and speed of this transformation are unprecedented in the history of the planet Earth. The main cause of the geological transition is considered to be the social metabolism promoted by the capitalist world-economy, which has its origins in the 16th century. At that time, this world-system was located in only one part of the globe, mainly in parts of Europe and America. Over time it expanded to cover the whole planet. As Wallerstein notes, the modern world-system "is and has always been a world-economy. It is and has always been a capitalist world-economy."[19]

A world-economy is a large geographical area in which there is a division of labour and therefore a significant internal exchange of basic or essential goods as well as flows of capital and labour. The capitalist system develops itself in the context of a world-economy because it requires a very special relationship between economic producers and

[15] The Anthropocene Working Group (AWG) of the ICS Subcommission on Quaternary Stratigraphy (SQS) voted in May 2019 to submit a formal proposal to the ICS, placing possible stratigraphic markers in the mid-20th century. Vid. Anthropocene Working Group (AWG), 'What is the 'Anthropocene'? – Current Definition and Status' <https://perma.cc/5JZ3-LLSK> accessed 15 April 2021.

[16] ibid.

[17] ibid.

[18] Vid. e.g.: Damian Carrington, 'The Anthropocene Epoch: Scientists Declare Dawn Of Human-Influenced Age', *The Guardian* (20 August 2016) <shorturl.at/ovPTY> accessed 10 February 2023; Jeremy Davies, *The Birth Of The Anthropocene* (University of California Press 2018); J.R. Mcneill & Peter Engelke, *The Great Acceleration: An Environmental History Of The Anthropocene Since 1945* (Harvard University Press 2016); Jedediah Purdy, *After Nature: A Politics For The Anthropocene* (Harvard University Press 2015).

[19] Immanuel Wallerstein, *World-systems analysis. An Introduction* (Duke University Press 2004) 23.

the holders of political power. Capitalists need a large market, but also a large number of states in order to be able to take advantage of cooperation between them, and to bypass states hostile to their interests in favour of states friendly to their interests.[20] This effectiveness would be a function of the ever-expanding wealth that a capitalist system provides. As will be seen below, this capitalism recognises the right to free economic activity and economic exchange based on private property and the market, through competition.

In any case, the narrative of the Anthropocene goes beyond the economic theories of capitalism, and functions as an interdisciplinary operational concept. From many different fields of study, it allows for an understanding of the challenges that humanity, as a species and as a global community, must face in the present in order to secure the future. In the Anthropocene, the relationship between society and nature has been understood mainly in terms of the exploitation of natural resources, through their manipulation and transformation into capital, capable of satisfying human needs.[21] Thus, in the last two centuries, we have moved from being a species that adapted to the environment and defended itself against threats from nature, to being a living being that defines its own conditions of existence within the Earth system.

1.2.2. Inequality as a necessary evil for accumulation

The Anthropocene narrative has tended to point to an abstract and homogeneous subject as the cause of the geological transition and its consequent environmental impacts. Thus, humanity as a whole would be to blame for the collapse of the planet. Of course, human responsibility for the accelerating destruction of the biosphere is self-evident. However, it would be a grave mistake to overlook that political, economic and legal privileges have historically conditioned differentiated human action. For who is, in fact, the *Anthropos* of the Anthropocene?[22] Indeed, other names have been given to the new epoch, to point out the fallacy of humanity as a homogeneous force.[23]

Regardless of its name, and regardless of whether the onset of the epoch should be considered at one time or another, or even whether it should be considered a geological epoch proper, a boundary event, or nothing of the sort, these are all questions to be resolved by climatologists and palaeontologists. Nevertheless, these narratives ignore profound social inequalities, disregard differentiated responsibilities, and are unaware

[20] ibid 24.

[21] Max Weber, *Historia económica general* (Fondo de cultura económica 1978) 210.

[22] For an extended discussion of this topic, vid. Grusin R (ed), *Anthropocene Feminism* (University of Minnesota Press 2017).

[23] Some scholars have proposed other names for this new era, pointing to other causes, such as 'Capitalocene', 'Plantationocene', 'Manthropocene' or 'Androcene'. Vid. Jason W. Moore (ed), *Anthropocene Or Capitalocene: Nature, History, and the Crisis of Capitalism* (Kairos 2016); Kate Raworth, 'Must the Anthropocene be a Manthropocene?' The Guardian (20 October 2014) <https://perma.cc/X67R-SGXU> accessed 12 February 2021; Lucile Ruault et al (coords), 'Androcène' (2021) 40(2) Nouvelles Questions Féministes <https://perma.cc/8CLD-JP7V> accessed 24 January 2023; Karen Morrow, 'Tackling climate change and gender justice - integral; not optional' (2021) 11 (1) Oñati Socio-Legal Studies 207; Wendy Wolford, 'The Plantationocene: A Lusotropical Contribution to the Theory' (2021) 111 (69) Annals of the American Association of Geographers 1622; Andreas Malm and Alf Hornborg, 'The geology of mankind? A critique of the Anthropocene narrative' (2014) 1 (1) The Anthropocene Review 62.

of the different consequences that different human groups are facing in this geological transition. Human hierarchies are part of the current ecological crisis and cannot be ignored in attempts to understand it.[24]

What is more: intra-species inequalities were necessary preconditions for the inauguration of the Anthropocene. Inequality consequently remains alive because there is no control over capital accumulation. The fundamental social architecture of capitalism is the main cause of economic inequality, so there is no capitalism without inequality: it is an inescapable and necessary consequence of the rules of the system. Marxist theories, for example, maintain that inequality is inherent in the capitalist mode of production, inevitable in the normal functioning of capitalist economies, and cannot be eradicated without fundamentally altering the mechanisms of capitalism.[25]

A crisis that concerns humanity as a whole can never be adequately addressed if the power that fragments humanity itself is overlooked in our own narratives. Therefore, claiming that the '*Anthropos*' is the cause of the climate emergency can obscure rather than clarify. This term obviates the conflicts and dilutes the power relations underlying this ecological crisis. From the Industrial Revolution to the present day, certain social groups —and most notably those who fit the white, Western, heterosexual, male pattern— have understood the overexploitation of the biosphere's absorptive capacity as a de facto private property right. As Bosselmann has described it, "Individually, property rights represent rights to use the environment. Collectively, the exercise of rights leads to systemic and large-scale environmental degradation".[26]

In effect, private property has served as a premise for the hoarding and plundering of resources and their use at individual discretion, without taking into account the environmental externalities on the biosphere. The doctrine of individual rights, latent at the core of property, recognises that people are masters of their own lives and have the right to live them as they wish, as long as they do not violate the rights of others. This mechanism has been used in the capitalist system to exacerbate and maximise the so-called ideology of "rugged individualism" in people, thus maintaining —or rather, accelerating— the social metabolism.[27]

This has undoubtedly been made possible by increasingly sophisticated institutional mechanisms and legal structures. Legally constituted property rights have established and guaranteed the effectiveness of the rules for the unequal distribution of these resources, at the cost of the unjust subjugation of other human and non-human beings. The Anthropocene has continued to glorify the side of the traditionally valued dualism (men, reason, science, technology, civilisation, culture, etc.) in opposition to the Other

[24] Anna Grear, 'Deconstructing Anthropos: A Critical Legal Reflection on 'Anthropocentric' Law and Anthropocene 'Humanity'' (2015) 26 Law Critique 225.

[25] Richard Peet, 'Inequality and poverty: a Marxist-Geographic theory' (1975) 65 (4) Annals of the Association of American Geographers 564.

[26] Klaus Bosselmann, *The Principle of Sustainability: Transforming law and governance* (2nd edn, Routledge 2017) 138.

[27] Here I borrow the concept of 'rugged individualism' from Henry Rosemont Jr, in *Against Individualism. A Confucian Rethinking of the Foundations of Morality, Politics, Family and Religion* (Lexington Books 2015).

(women, non-whites, non-humans, savages, nature, etc.).[28] Thus, the Anthropocene narrative cannot be understood without taking into account what I consider to be the three most relevant hierarchical systems: heteropatriarchy, capitalism and colonialism. These, in turn, have enabled other regimes of oppression. It is therefore important to make visible the historical power relations that have generated the current dynamics of injustice and inequality, as they can reveal the path not only towards equity but also towards resilience.

This kind of holy trinity —heteropatriarchy, capitalism and colonialism— has historically cut across property. Within this macrostructure, the paradigm shift brought about by the rise of the Industrial Revolution is linked to the development of individualist political thought, which advocated a natural right to private property and private ownership of the means of production.[29] This historical moment laid the foundations for the recognition of a fundamental right to private property that still dominates Western legal systems. Property has even been recognised as a human right. Such an individualistic cultural development has been useful for the legal recognition of private property as a legal basis for human appropriation of nature. In other words, law has allowed private property to be seen as the default institution for everything that needs to be organised, without the possibility of being challenged or reversed.[30]

The Anthropocene is an epoch of extraordinary global change in terms of speed, scale and intensity. In this context, the classical concept of property, as defined by European legal culture, may be structurally inadequate to respond to the social challenges of the Anthropocene, by configuring dominion over a specific good as the conceptual centre of the system of allocating responsibilities over the biosphere. Within the Anthropocene, therefore, the institution of property —particularly the modern conceptualisation of property still embedded in current legal systems— keeps capitalism and hierarchies of all kinds (based on gender, race, religion, social class, etc.) alive, determining who gets the biggest share of the pie and who is subordinated to these beneficiaries.

Consequently, in an uncertain world of constant and accelerating change, the only certainty is that major changes will be required in our legal system, including changes in property law. The geological transition challenges the hegemonic concept of property, especially private property. The principles surrounding this institution will need to be reconsidered in the process of adaptation that humanity is currently undergoing, in order to develop inclusive strategies that enable a just transition. In this chapter, therefore, I propose to deconstruct the concept of property and property rights as the cornerstone of the Anthropocene. This will allow me to explore the possibility of a new scenario in which the commons have a place.

[28] Robin Eckersley, 'Geopolitan Democracy in the Anthropocene' (2017) 65 (4) Political Studies 983.

[29] Stefania Barca, *Forces of Reproduction. Notes for a Counter-Hegemonic Anthropocene* (Cambridge Elements, Cambridge University Press 2020) 41.

[30] Irene Sotiropoulou, 'Commons and private property as a patriarchal trap' (Heteropolitics International Workshop Proceedings. Refiguring the Common and the Political, Aristotle University of Thessaloniki, 2018) 46.

1.3. Property. A preliminary analysis

1.3.1. Property as a socio-legal construct

The term 'property' has been defined as "an object or objects that belong to someone". Also, as "a building or area of land, or both together". Within the field of law, it has been considered "the legal right to own and use something". Thus, property is not only a thing but the legal and ethical rights attached to that thing. The complexity of the contemporary right to property lies in the difficulty of defining the legal subject protected —e.g., human beings or also companies— as well as the type of property that is protected —for consumption or production purposes— and the grounds on which property may be restricted —e.g., for regulation, taxation or in the general interest. The object of this first-generation right is property already owned or possessed, or property acquired or to be acquired by lawful means. In the case of private property, it includes at least: use, exclusivity, and disposition.

The republican idea of property assumes that ownership of any basic resource or asset is public, and therefore private property is "the private appropriation of the resource in question as a public fideicomissus".[31] In this fiduciary social relationship, the private owner is a mere trustee of public or sovereign property, while the sovereign is the trustor. Nevertheless, it should also be noted that private property is the assertion of the authority of the holder of this right (individual, collective or entity) and it is therefore up to the holder's will to grant its access to others. Thus, private property is not only about controlling goods and resources but also the lives of others. The origin of private property lies in the relationship between human beings and confers a form of sovereignty on the holder of the rights; the owner can exclude some people from certain activities and allow others to engage in them. In either case, the law assists the owner in carrying out this decision.[32] Private property is, in other words, a dynamic social construct, a cultural creation and a legal conclusion.[33]

Precisely for this reason, property in all its forms is norm-dependent; it depends on and is defined by the rules of particular legal systems.[34] Which forms of property should be recognised, and to what extent each form should be legally recognised, is a political question, guided by economics and probably by moral philosophy. Ultimately, all forms of private property could be abolished, and all uses of a thing prohibited, except for specific uses granted by the public authorities to specific individuals. Given this possibility, a socialisation of property would be possible and could still allow the actual use of certain things by certain people.

Such a stewardship of things would require a significant deployment of public law structures and institutions, without prejudice to the eventual recovery of other practices, such as common property. In this scenario, private property would imply a devolution of

[31] Antoni Domènech and Maria Julia Bertomeu, 'Property, Freedom and Money: Modern Capitalism Reassessed' (2016) 19 (2) European Journal of Social Theory 251.

[32] Joseph William Singer, *Introduction to Property* (2nd edn, Aspen 2005) 13.

[33] C. Edwin Baker, 'Property and its Relation to Constitutionally Protected Liberty' (1986) 134 University of Pennsylvania Law Review 741.

[34] Neil MacCormick, *Institutions of Law. An essay in Legal Theory* (Oxford University Press 2007) 152.

power over the use and enjoyment of things, at the discretion of each member, to a multitude of people in ways that vary constantly in the context of markets. The desirability of this devolution is one of the questions I want to explore in the course of this thesis, for it is true that even the most fully socialised legal systems allow for some forms of private property exercised by particular persons over particular kinds of things.

As I already advanced, the right to private property has no meaning except as a product of the relationship between individuals. The course of the centuries has transformed the ways of relating to the land, to human and non-human living beings and with it the concept of property. And property, as an element of social relations, cannot be understood without its inseparable partner: liberty. Property fulfils a different function not only according to the liberty one has, but above all according to how it is socially understood. The present analysis can therefore only be carried out by linking property to the way liberty has been understood in different epochs, from a historical-legal perspective. To better understand this relationship between property and liberty, the analysis must go back a few centuries, to antiquity.

1.3.2. The Roman conception of property as a prerequisite for liberty

Already in ancient Rome, the right to property was a recognised institution based on the rule of law. Roman jurists were the first to formulate the concept of absolute private property (*dominium*). Roman law defined private property as *"ius utendi, fruendi et abutendi, exclusis aliis, quantum iuris ratio patitur* [the right to use, enjoy and dispose entirely of a thing, to the exclusion of others, as far as justice permits]".[35] The conditions for an object to be considered as such were its legitimate, exclusive, absolute, and permanent acquisition.[36] The right to property, however, belonged only to the patriarch. The *pater familias* had a legal privilege over the family property and various degrees of authority; *usus* (use), *fructus* (economic exploitation) and *abusus* (the right to sell, transform or destroy) over his dependents: his wife, his children, certain relatives through blood or adoption, clients, freedmen, and slaves.[37]

In this sense, this primitive form of property was completely linked to the conception of liberty as participation in the polis. Only the property-owning man was truly free, something that was projected in a premature liberalism through census suffrage. The Athenian model, in fact, denied political participation to those who did not own land. Private wealth became a condition of admission to public life, as it ensured that the owner would not have to pursue the means of use and consumption and was thus free to adopt a public stance. In other words, public life was only possible once the urgent needs of life had been satisfied. In fact, the means to meet them came from work. Thus, a person's

[35] A. Millán-Puelles, *Léxico filosófico* (Rialp 1984) 227.

[36] Robert Besnier, 'De la loi des douze tables à la législation de l'après-guerre : Quelques observations sur les vicissitudes de la notion romaine de la propriété' (1937) 9 (46) Annales d'histoire économique et sociale 321.

[37] Although this is not the case in Sparta. While Athens has a highly developed private property system, the Spartans are reported to have been forbidden to own not only material goods but even their wives and children: wives are to be shared with other men, in order to produce healthier and stronger offspring. Vid. Richard Pipes, *Property and liberty* (The Harvill Press 1999) 11.

wealth was often determined by the number of workers —i.e., slaves— he owned.[38] In short, (private) property meant having the necessities of life covered and thus being potentially free to transcend one's own life and enter the public sphere.

Workers, whose bodies provided "the bodily service for the necessities of life" and women, whose bodies ensured the physical survival of the species, were set apart.[39] Slaves and women were in the same category, excluded from public participation, because they themselves were someone's property and because their lives were "laborious".[40] Property was thus the key to the emergence of legal and political institutions that guaranteed liberty. For Plato, private property should be allowed, but the state should ensure that extremes of wealth and poverty were not reached, especially in the distribution of land. In turn, his disciple Aristotle regarded private property as an indestructible institution and ultimately a positive force.[41] Cicero, for his part, argued that the government could not interfere with private property because it was created to protect it.[42]

Nevertheless, it should not be overlooked that the legal categories of Roman law, systematically codified in Justinian's *Corpus Iuris Civilis,* distinguished between *res extra commercium* —inalienable and inappropriate goods such as sacred, religious, holy and public things— and *res communes* —goods belonging to everybody: to humankind (*res communes omnium:* oceans, air), to the people (*res publicae:* state's roads, harbours, ports or bridges), to the cities, *municipia* or *coloniae* (*res universitatis*), or to the whole community of "men" (the air, the running water, the sea, game and fish).[43] In this sense, such goods were 'public', not in the sense of belonging to the state but to the community of "mankind",[44] since by their very nature no one could be excluded from them. It should not be forgotten that the word '*publicus'* usually has had the meaning of '*communis'*. Furthermore, Roman civil law also provided for *res nullius*, or things that

[38] Hannah Arendt, *The Human Condition* (2nd edn, The University of Chicago Press 1998) 67. Original publication: 1958.

[39] "Again, as between the sexes, the male is by nature superior and the female inferior, the male ruler and the female subject. (…) [A]ll men that differ (…) (and this is the condition of those whose function is the use of the body and from whom this is the best that is forthcoming) these are by nature slaves, for whom to be governed by this kind of authority is advantageous (…). For he is by nature a slave who is capable of belonging to another (and that is why he does so belong), and who participates in reason so far as to apprehend it but not to possess it (…). And also the usefulness of slaves diverges little from that of animals; bodily service for the necessities of life is forthcoming from both, from slaves and from domestic animals alike. The intention of nature therefore is to make the bodies also of freemen and of slaves different—the latter strong for necessary service, the former erect and unserviceable for such occupations, but serviceable for a life of citizenship (…)." Vid. Aristotle, *Politics* (book 1, sec. 1254b, Harvard University Press 1944). Original publication: 4th-century BC.

[40] Arendt, *The Human…* (n 38) 72.

[41] Pipes, *Property…* (n 37) 27.

[42] Marcus Tullius Cicero, *On Duties (De Officiis)* (Loeb Classical Library 1913) 249.

[43] Paolo Maddalena, 'I beni comuni nel codice civile, nella tradizione romanistica en ella Costituzione della Repubblica italiana' (2011) 19 federalismi.it 6.

[44] As I will also do on other occasions throughout the thesis, I strictly respect here the term "men" and "community of men" used in Roman law, to make it clear that women were not being thought of as legal subjects at that time.

had not yet been appropriated.[45] All these figures show that, in practice, the Romans also had to recognise limits to the power of the owner. In a certainly hidden and perhaps unconscious way, the question of reducing power was indeed crucial.

1.3.3. Feudal property

With the dissolution of the Roman Empire, the conceptual scheme of collective ownership lost its effectiveness.[46] Gradually, the new property relations took hold and were anchored in the institution of the fiefdom. Land was the central element of the feudal order, the basis of the military, judicial, administrative and political system. Its status and function were determined by legal and customary rules.[47] In the Middle Ages, the serf who worked the land had the *dominium utile*; he did not own it in the full sense, but had the right to possess, use and enjoy it in exchange for fiscal and political obligations, giving the feudal lord a share of the harvest. The feudal lord held eminent domain (*dominium eminens*) over the land he had granted and the people who lived on it (vassals, sharecroppers, villeins, serfs, slaves),[48] and had the right to administer justice, take inventories and collect taxes.[49] In a sense, he was the real owner. This feudal parcelling out of sovereignty in the West endowed private property with public power.[50]

"Actual" ownership and the other phenomena of property law flowed into each other. They were all just variations, weaker or stronger expressions of the same basic idea, namely that human beings took natural property into their care and use, actual and legal administration. It followed quite naturally that two people could participate in the same thing with a different form of ownership: one as the direct landowner, for example, who steered the plough and brought the fruit into his barn; the other as the lord of the interest, to whom the landowner paid a tax in money or kind. Both landowners, one in one way, the other in another.[51]

At the same time, certain communal rights over the exploited land prevented anyone from claiming absolute ownership and enclosing land.[52] This period, dubbed "the long

[45] Bru Laín and Edgar Manjarín, 'Private, Public and Common. Republican and Socialist Brueprints' (2022) Issue 171, 69 (2) Theoria 54.

[46] Only the *allodium,* the prototypical Roman ownership, seemed to survive as an absolute tenure not subject to any feudal obligation. Vid. ibid 55.

[47] Karl Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time* (Beacon Press 2001) 73. Original publication: 1944.

[48] Antoni Domènech, 'Dominación, derecho, propiedad y economía política popular (Un ejercicio de historia de los conceptos)' 5. Colloquium "Miradas sobre la Historia", Faculty of Political Science of the UNAM and the Colegio de México, 17 November 2009 <shorturl.at/hnoV5> accessed 20 August 2022.

[49] Nicola Capone, 'Del diritto d'uso civico e collettivo dei beni destinati al godimento dei diritti fondamentali' (2016) 4 Politica del diritto 616.

[50] Ellen Meiksins Wood, *Liberty and Property. A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012) 6.

[51] Justus Wilhelm Hedemann, *Sachenrecht des Bürgerlichen Gesetzbuches* (De Gruyter 1924) 56.

[52] It is at the end of the Middle Ages that the abstract concept of the individual begins to take shape. The idea of the autonomous subject gradually becomes independent of community identity. The modern constitutional tradition, based on rights, will later be founded on this subject. Vid. Jaria-Manzano, 'La insolación de Miréio…' (n 10).

twelfth century" by Linebaugh,[53] culminated in England in 1215-17 with the Magna Carta and the Forest Charter. As a result of the great peasant movements, the bonds of subordination and servitude were gradually loosened and the lower classes extended their rights of joint and several uses over common goods, such as manorial and ecclesiastical forests, pastures, meadows, rivers and lakes, as well as wasteland and marshes.[54] These communal relationships with the land and natural resources were called different things according to their geographical location: the *commons* in England, the *ejidos* in Castile, the *Allmende* in the southern Germanic territories, the *Märke* in the north, the *communes* in France, or the *commune* in Italy.[55] Within these relationships, private property in the modern sense did not yet exist.[56]

1.3.4. The dawn of private property: the enclosures

Meanwhile, during the conquest of the Americas, the alliance of the Iberian crowns with the Genoese merchants began to cook the breeding ground for capitalist accumulation. From the very beginning, as Moore points out, capitalism was transatlantic or it was nothing.[57] In this context occurred what I consider the crux of the matter: the building of the new empires during the 16th century was made possible by the generalisation of a new and modern private property regime. The central function of these new states was the internal maintenance and external defence of private property, which rapidly expanded and globalised. The strategic aim was to cut off the peasantry from non-commercial access to land: arable and grazing land, forests, wetlands, and everything else.[58]

Indeed, the intensification of land enclosures, which had already begun in England in the mid-15th century, was a *sine qua non* for proletarianisation and the development and refinement of private property in this period of the rise of industrial capital.[59] The so-called Parliamentary *Enclosure Acts* were decrees of expropriation of the people, by which the landlords granted themselves the people's land as private property.[60] In this counter-revolutionary process, the state appeared as the body responsible for guaranteeing the right to private property *erga omnes*.[61] To this end, it hastened to unify

[53] Peter Linebaugh, *The Magna Carta Manifesto. Liberties and Commons for All* (University California Press 2008) 24.

[54] François Ost, *La nature hors la loi : L'écologie à l'épreuve du droit* (La Découverte 2003) 50.

[55] Domènech, 'Dominación…' (n 48) 5.

[56] Pierre Crétois, *La part commune. Critique de la propriété privée* (Éditions Amsterdam 2020) 23.

[57] Moore, *Anthropocene or…* (n 23) 86.

[58] Alvaro Sevilla-Buitrago, 'Capitalist Formations of Enclosure' (2015) 47 (4) Antipode 999.

[59] It should be noted, however, that the mere expropriation of land and resources was not enough to create the proletariat, for many peasants preferred vagabondage, begging and crime to miserable wages as labourers, whose subjugation is presented as liberation. Vid. Mark Neocleous, 'International Law as Primitive Accumulation; Or, the Secret of Systematic Colonization' (2012) 23 (4) The European Journal of International Law 941.

[60] Karl Marx, *Capital: The Process of Production of Capital. Volume I* (Progress Publishers 1995) 453. Original English publication: 1887.

[61] Gerardo Pisarello, *Un largo termidor. La ofensiva del constitucionalismo antidemocrático* (Editorial Trotta 2011) 62.

its legal regime and eradicate the pluralistic medieval system of property rights, including communal rights of land use. The result of such dispossession was a decisive factor in the original accumulation of wealth.

What is more, in Marxist terms, the enclosures *would mark* the original accumulation. Above all, they served to impose the dogma that private property promoted the maximisation of land productivity.[62] The place of the independent peasants was now taken by small farmers on annual leases, dependent on the whims of the landlords. This helped to swell the large estates, which in the 18th century would become capital or mercantile farms, and to "liberate" the agricultural population as proletarians for the manufacturing industry.[63] During this process, most of the communal economies in England were wiped out sometime between the 15th and 19th centuries. While in 1700 most of the land was still communal, by the mid-19th century, around 1840, most of it had been expropriated.[64] Enclosure and expropriation processes also took place in other European countries.[65] Similarly, in the American territories, the English carried out a dynamic of enclosure and private appropriation of land that extended to indigenous lands.

These processes of land dispossession involved a fierce struggle in defence of the commons throughout Europe, where peasants were persecuted and beaten, but this did not prevent the enclosures from gradually changing community relations. Indeed, there was a shift from a communal to an individualised relationship.[66] This dispossession of the peasantry from communal land would have very serious consequences for women, who would suffer from the enclosure of both their land and their own bodies. As Federici puts it, the social function of the common fields, as traditional community ties, had been especially important for women.[67] As they had fewer land rights, they had been more dependent on them for their subsistence, autonomy, and sociability. Within communal land, they had been able to meet, exchange news, receive advice and form their own point of view, autonomous from the male perspective.

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[62] Marx, *Capital… Vol I* (n 60) 453.

[63] To illustrate this idea, Marx uses the following extracts, as follows: "In several parishes of Hertfordshire, 24 farms, numbering on the average 50-150 acres, have been melted up into three farms". "In Northamptonshire and Leicestershire the enclosure of common lands has taken place on a very large scale, and most of the new lordships, resulting from the enclosure, have been turned into pasturage, in consequence of which many lordships have not now 50 acres ploughed yearly, in which 1,500 were ploughed formerly. The ruins of former dwelling-houses, barns, stables, are the sole traces of the former inhabitants. A hundred houses and families have in some open-field villages dwindled to eight or ten… The landholders in most parishes that have been enclosed only 15 or 20 years, are very few in comparison of the numbers who occupied them in their open-field state. It is no uncommon thing for 4 or 5 wealthy graziers to engross a large enclosed lordship which was before in the hands of 20 or 30 farmers, and as many smaller tenants and proprietors." In: Thomas Wright, *A Short Address to the Public on the Monopoly of Large Farms* (Galabin 1779) 2-3; and Stephen Addington, *An enquiry into the reasons for and against inclosing the open fields* (Coventry, 1767) 37, 43. quoted by Marx in *Capital. Vol I* (n 136) 453-454.

[64] JM Neeson, *Commoners: common right, enclosure and social change in England, 1700-1820* (Cambridge University Press, 1993) 5.

[65] María Julia Bertomeu, 'Fraternidad y mujeres. Fragmento de un ensayo de historia conceptual' (2012) 46 Estudios de Filosofía 17.

[66] Ugo Mattei, *Beni comuni. Un manifesto* (Editori Laterza 2011) 54.

[67] Silvia Federici, *Caliban and the Witch* (Autonomedia 2004) 100.

The enclosures meant the disappearance of the communal village, of such female solidarity networks and the migration of many women. This nomadic life, of course, exposed them to male violence. Many had mobility difficulties, due to pregnancies and childcare. Others had no choice but to join the armies as cooks, laundresses, or prostitutes.[68] Gradually, with the privatisation of land and the introduction of monetary relations, women were confined to increasingly devalued reproductive labour. All these changes resulting from the enclosures ultimately redefined women's position in society as invisible workers and increased their dependence on men. I will come back to this point, which I consider crucial.

By the end of the Middle Ages, through a long and complex process, the *dominium eminens* (the right to ownership of land and dominion over the people who inhabited it) was transferred to the sovereign, and with it, sovereignty was also transferred.[69] Property, now absolute and in the sole hands of a monarch, became the embodiment of power over the people. The apocryphal phrase *"L'État, c'est moi*" attributed to Louis XIV of France illustrates these changes.[70] The phrase identifies the king with the state in the context of absolute monarchy. But if all landed property really belonged to the king, it would have been tantamount to saying that all landed property belonged to the state. For "I am the state" to become a reality, private property would have had to be abolished. And that never happened.

In any case, communal property was fragmented, first into fiefdoms, then into larger geographical pieces, until the formation of the first territorial states in Europe. After being transferred to the Crown — and through a few bloody historical episodes—property passed into the hands of the state, which thus became the owner of property that was supposed to be at the disposal of all.[71] The state thus became the manager of collective property. Gradually, however, the roles were virtually reversed: the state became the owner of property, encumbered with easements of use by the community. Paradoxically, private property did not disappear.

1.4. The modern conception of property: an historical analysis

1.4.1. The seed of modern property: Locke

Although the emergence of modern property did not happen overnight, the French and American revolutions certainly provided the fuse. Nevertheless, it is not possible to isolate revolutionary politics from what came before and after, for to do so would render it unreadable. Indeed, the revolution of property did not come alone. I guess we can agree to some extent that it owes a great deal to the ideas of the English Enlightenment. Locke's

[68] ibid 73.

[69] Capone, 'Del diritto d'uso…' (n 49) 616.

[70] The historian Lemontey attributed this lapidary expression to Louis XIV in 1818, in connection with the day of 13 April 1655, when the king himself forbade the Parisian parliamentarians to deliberate over the edicts registered in a court. Nevertheless, it has been noted that this formula could not correspond to the traditions of the time. Vid. Lucien Bély, *Louis XIV: le plus grand roi du monde* (Éditions Jean-Paul Gisserot 2005) 77.

[71] Capone, 'Del diritto d'uso…' (n 49) 616.

theory of property, originally intended to refute the absolutist theses of Robert Filmer, had an enormous influence on Western political thought.[72] It clearly pointed to the beginnings of the liberal constitutionalist tradition. In his *Second Treatise of Civil Government*, Locke proclaims that man is by nature the owner of his own existence, liberty, and goods, to which no one else has a right:

> 87. Man being born, as has been proved, with a title to perfect freedom, and an uncontrouled enjoyment of all the rights and privileges of the law of nature, equally with any other man, or number of men in the world, hath by nature a power, not only to preserve his property, that is, his life, liberty and estate, against the injuries and attempts of other men; but to judge of, and punish the breaches of that law in others, as he is persuaded the offence deserves, even with death itself, in crimes where the heinousness of the fact, in his opinion, requires it.[73]

According to this statement, human beings have the right and duty of self-preservation, and the right to own the things necessary for that purpose. Locke's ideas are not far removed from either Aristotelian liberty or from the Dutch model of modernisation.[74] Indeed, there is a constant tension-relationship between property and liberty. Individual liberty has been considered, in fact, as the foundation of the system of private property.[75] Or, in other words, liberty itself has been property.[76] To be free would be precisely to hold property rights that one could not be dispossessed of by arbitrary action, as opposed to being a tenant at will, through precarious possession at the mercy of the will of others. The German idealists (Kant, Fichte and Hegel) also described property as a sphere of free action, an external realisation of the freedom of the individual.[77] Many throughout

[72] The fact that the *Second Treatise* was published just at the time of the Glorious Revolution (1688) seems to have been purely coincidental. He wrote his political thesis almost a decade before this Revolution, after reading Filmer's texts, which makes it impossible that he did so in the heat of the Revolution. Sir Robert Filmer, a royalist writer of the Civil War era, had published *Patriarcha, or the Natural Power of Kings* in 1680. Locke's *Second Treatise* sought, as in his *First*, an intellectual attack on this advocate of monarchical absolutism. Filmer's idea was that all authority among human beings came from a patriarch in every family and a monarch in his kingdom. They were essentially rights of ownership, over human beings as well as over land and material goods. Since no human being had a right over his own life, and since all human rulers had the right to take the lives of their own subjects, it must follow that the rulers derived this right from God himself. In reply, Locke sought to distinguish sharply between the duties of subjects to obey and the rights of rulers to command. Vid. James Tully, *A discourse on property. John Locke and his adversaries* (Cambridge University Press 1980) 53; John Dunn, *Locke* (Past Masters – Oxford University Press 1984) 32-44.

[73] John Locke, *Second Treatise of Government* (Crawford Brough Macpherson (ed), Hackett 1980) 46. Original publication: 1690.

[74] It is plausible to claim that Hugo Grotius and Samuel von Pufendorf laid the foundations for Locke's future conceptual developments of property theory. In this sense, Locke looked to the Dutch pattern to develop his theories of property, which were based on the construction of modernity from the action of free citizenship by the property-owning bourgeoisie, as opposed to the French pattern, which was based on the promotion of modernity through royal absolutism. Vid. Adriana Luna-Fabritius, Estudi Introductori in *John Locke, Hugo Grotius, Samuel von Pufendorf. Sobirania i autogovern. Dret natural i propietat en el pensament polític del segle XVII* (Institut d'Estudis d'Autogovern– Generalitat de Catalunya 2022) 37.

[75] James M. Buchanan, *Property as a Guarantor of Liberty* (The Locke Institute 1993).

[76] Thus, for example, Polanyi quotes Jeremy Bentham, who wrote: "The condition most favourable for the prosperity of agriculture exists when there are no entailments, no inalienable endowments, no common lands, no rights or redemptions, no tithes…". This dealing with property, and especially with the ownership of land, formed an essential part of the Benthamite conception of individual liberty. Vid. Polanyi, *The Great…* (n 47) 189.

[77] Eduardo Cordero Quizacara and Eduardo Aldunae Lizana, 'Evolución histórica del concepto de propiedad' (2008) 30 *Revista de estudios histórico-jurídicos* 347.

modern history have argued that there must be constitutional limits on overt political intrusions into property rights as a meaningful measure for the achievement of liberty and autonomy.

As the previous quotation makes clear, this conjunction of freedom with the right to property was very present in the work of John Locke. Private property creates a zone that is free from the interference of others. It is nothing more than a particular form of freedom, legally configured and protected, with the essential note of exclusivity. In other words, property is defined as an instrument for the exercise of individual liberty. Arguably, the right to property is a set of commands and prohibitions that give the individual the power to demand that others behave in a certain way, to limit their freedom of action, and to be respected when taking advantage of or benefiting from something.

Since for Locke property was a fundamental human right that preceded government, the role of the state was not to create the right to property, but to guarantee it.[78] The purpose of public institutions was to protect the subject's sphere of autonomy, shaped by liberty and property. Two concepts that would become the standard for the rest of the rights that would gradually emerge. This idea led to the affirmation of the individual human being as an autonomous element, independent of the political community. This individual self-determination appeared as the starting point of the political system:[79]

> A man, as has been proved, cannot subject himself to the arbitrary power of another; and having in the state of nature no arbitrary power over the life, liberty, or possession of another, but only so much as the law of nature gave him for the preservation of himself, and the rest of mankind; this is all he doth, or can give up to the common-wealth, and by it to the *legislative power*, so that the legislative can have no more than this. Their power, in the utmost bounds of it, is *limited to the public good* of the society.[80]

For Locke, safeguarding the right to property, the separation of powers and other checks and balances may help curb state abuses. His view was certainly individualistic. In saying that political society was established to better protect property, he was asserting that it served the private (and not the political) interests of its constituent members. The social contract did not promote some good that could only be realised in community with others, but an individual human being as an autonomous element, independent of the political community.

Moreover, for Locke, property is derived from one's labour. In the natural state, goods were common to all. Everyone had the right to appropriate them, and they became the property of a particular individual when he modified them through his labour, adding something of his own (or, I suppose, of her own too). The individual took from this state the goods that belonged to all and appropriated them for himself. The limits lay in the human ability to carry out such appropriation and in the durability of the fruits/goods. Accordingly, the right of appropriation was naturally curtailed, and labour was both the

[78] Locke, *Second Treatise*... (n 73) 77-83.

[79] Jaria-Manzano, 'La insolación de Mirèio...' (n 10) 456.

[80] Locke, *Second Treatise*... (n 73) 70-71.

source and the limit of the appropriation of goods. Thus, Locke's arguments for private property were as follows: a) private property is a natural right; b) it is acquired through work; c) it rewards merit; and d) no one has the right to interfere with it.

For Locke, property was something dynamic, not static, the fruit of *man's* effort and economic activity. Therefore, the individual processing and appropriation of natural resources could directly establish an inviolable private property right. From my point of view, labour cannot create property rights because it does not really increase the stock of goods in the world, but on the contrary; it reduces the raw materials necessary for the realisation of labour. Since labour affects and diminishes the equality of access rights of third parties, the individual act of appropriation cannot by itself create property rights. In addition, since the appearance of money, individuals have been able to acquire goods beyond their needs and their capacity to appropriate them through labour. Furthermore, the right to property derived from labour is inconsistent with the right of inheritance enshrined in most modern constitutions, since the heir inherits without having rendered any service.

Moreover, Locke was convinced that there was an abundance of raw materials and land in the world, and therefore that all human beings had an equal opportunity to establish property. I suspect that at the time —and we can hardly blame him for this— Locke could not even imagine the brutal plundering of resources that would eventually deplete much of the original wealth. I do not think I am wrong in saying that, in a finite world, the individualisation of the rights of ownership and use of external objects cannot take place by itself. Thus, the accumulation of capital, on which property is based, necessarily entails inequality. The only justification for the unequal appropriation of natural resources was meritocratic, based on the profit one made from one's property. Locke's concern was to secure liberty at all costs, and therefore each human being should be able to secure their own existence, regardless of the amount of property to be accumulated.

Of course, Locke's arguments came in handy for the emergent bourgeois civil society and landowners of 17th-century England. The dismantling of feudalism and the fall of the commons suited these new social classes perfectly. The old disputes between peasants and feudal lords were diluted into a war of each against all, with each privately constituted individual contributing to the common good as long as that individual did not exceed the absolute dominion of the other.[81] After that, the owner-capitalists became the parasites with impunity. If the feudal lord still bore some responsibility for the fief, the capitalist landowner now bore virtually none. It is interesting to see how, from then on, property evolved from limited rights to land, to practically unlimited rights, to the point where today we speak practically only of private property.

Indeed, the emergence of a capitalist market economy meant that the concept of common property, once so important, was conceived as practically contradictory to the concept of ownership. Whereas once property consisted of the right not to be excluded from sharing in the goods of life, now property essentially comprised the right to exclude strangers from *oneself*, one's *rights* and one's *things*. Macpherson, who interpreted that, for Locke, individuality could only be fully realised by accumulating property, called this concept

[81] Laín and Manjarín, 'Private, Public and Common…' (n 45) 62.

"possessive individualism".[82] In effect, the individual came to be conceived, and immediately legally configured, as the primary subject of the group: an abstract actor, supposedly rational and autonomous.[83]

Of course, this definition of the individual —a property-owning being independent of all other property-owning beings— in seventeenth-century England deliberately excluded women. And I am not just referring to the loss of property rights of adult women in marriage. Women —just like slaves, for example, or, if I may say, the proletariat in Marx's sense— rarely owned their own person, never enjoying the absolute right to dispose of their body, their time, their sexuality or their reproductive capacity. In my view, the requirement that a citizen be the owner of *his* own person is the Lockean argument that excluded women from their place in the political system. I believe that this paradigm shift from common to private marked a turning point in human history and, to a large extent, in the sophistication of what I will henceforth call 'environmental patriarchy'. It is for this reason that the conception of property and its legal treatment is one of the essential narrative points of my thesis.

Furthermore, Locke stated that property, together with liberty, were natural and inalienable rights belonging to the subject's own sphere. The theory of property as a natural right derived from labour is, in my opinion, mainly based on an essentialist fallacy.[84] Property rights cannot be the result of the mere physical transformation of a material object. Not even all labour is based on the transformation of material objects. Likewise, misleading conceptions are assumed: legal rules as the product of purely empirical physical actions, the individual nature of man and man's possessive instinct as a constitutive premise of the property system. These premises have served to perpetuate a structure historically dependent on the capitalist economic order. As will be seen later, there have never been any substantive guidelines for the concrete design of the institution of property, which has allowed a corresponding freedom of design for the constitutional legislators.

In addition, Locke's notion that labour creates property makes property seem potentially infinite; therefore, it would be humanly possible to eliminate poverty. This labour that gives rise to land ownership is defined in exclusively European terms, i.e., as the cultivation and improvement of land. It is precisely this argument that allowed the spoliation of indigenous peoples in the Americas of their property rights over their territories, which Locke defined as uncultivated or "waste",[85] just because they were not cultivated in the European manner. This ideology also motivated many of the

[82] Vid. Crawford Brough Macpherson, *The political theory of possessive individualism. Hobbes to Locke* (Oxford University Press 1962).

[83] Moreover, the concept of legal personhood "fairly systematically contributed to support a rather particular interpretation of the person, in intimate connection with its companion concept, property." Vid. Ngaire Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66 Modern Law Review 346.

[84] Prior to this, and contrary to Locke, for Thomas Hobbes the state of nature was characterised as a lawless, warlike state in which there was no property, only actual possession. Only the state creates law and property, assigns property rights to individuals and thus establishes the property system. Since the state, in Hobbes, is endowed with unlimited powers, it does not have to respect the property of the individual but can access property at will. Vid. Thomas Hobbes, *Leviathan* (Penguin Classics 2017). Original publication: 1651.

[85] Locke, *Second Treatise*... (n 73) 24.

revolutionaries of 1688-89 to transform England from an agrarian society, limited by raw materials, to a manufacturing society, driven by the limitless possibilities of human creation.[86] For English modernisation, the revolutionaries looked for political inspiration to the Dutch Republic, based on manufacturing and the free autonomy of the property-owning bourgeoisie, rather than to the absolutist French monarchy.[87]

In parallel with Locke, Jean-Jacques Rousseau considered that the only true right that existed in the state of nature was liberty. *Men*[88] were born free and equal, but society perverted them. Capitalist private property and its consequent enclosures, expropriations and proletarianisation of the peasantry had founded civil society.[89] For him, private property was morally justifiable only for the proper and full development of the personality. Private property arose through the "right of the first occupant",[90] which was legitimate when three conditions were met. Firstly, land could not be occupied; secondly, no one could occupy more than he needed to survive; thirdly, possession could only be claimed through labour on the land. Rousseau agreed with Locke on two ideas: first, that private property originated when a first occupier worked on a resource or land; and second, that the social contract was a means of protecting private property from the brutal results that natural liberty allows.

Both Rousseau and Locke knew that private property generates inequality. For Locke, however, it was a legitimate outcome derived from the divine right of human beings to improve their condition by using the commons. For Rousseau, on the other hand, inequality was a natural injustice that reason and intelligent organisation could overcome. For this reason, the obligation to respect what belonged to others needed negotiation to be accepted by all those who must suffer its effects.[91] In other words, this obligation was not therefore full and complete by nature, but the result of a convention. In contrast, Locke's proposal against inequality went through the law. He argued that no form of acquisition would be possible if the consent of all had to be sought. It was law

[86] In the context of the Glorious Revolution, the Tories and the Whigs were at loggerheads due to deep ideological differences over economic development. For the conservative Tories, property was a natural creation. For the Whigs, in line with Locke, property came from human effort and was therefore infinite. While the Tories struggled to promote a Land Bank, the Whigs created the Bank of England and succeeded in introducing land taxes that would encourage the development of a manufacturing-based society. Their enthusiastic opposition against the modern Catholic monarchy of Louis XIV was to ensure the existence of European markets for English manufactures and the preservation of European liberty in the face of French absolutism. Vid. Steve Pincus, *1688. The first modern revolution* (Yale University Press 2009) 398.

[87] ibid 6.

[88] I strictly respect here the term used by Rousseau, since he was clearly not thinking of the whole population.

[89] "The first man who, having enclosed a piece of ground, bethought himself of saying «This is mine», and found people simple enough to believe him, was the real founder of civil society. From how many crimes, wars and murders, from how many horrors and misfortunes might not any one have saved mankind, by pulling up the stakes, or filling up the ditch, and crying to his fellows, "Beware of listening to this impostor; you are undone if you once forget that the fruits of the earth belong to us all, and the earth itself to nobody." Vid. Jean-Jacques Rousseau, *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* (Commented by J. L. Lecercle, Éditions Sociales 1971) 108.

[90] Jean-Jacques Rousseau, *On The Social Contract* (1762), in David Wootton (ed), *Modern Political Thought: Readings from Machiavelli to Nietzsche* (2nd edn, Hackett 2008) 438.

[91] Rousseau, *Discours sur l'origine...* (n 89) 67.

that should be concerned with establishing general criteria for the acceptability of a right. Such criteria were open to debate and collective acceptance.[92]

1.4.2. 1789, or the transition from absolutism to liberalism

The Lockean theory was framed within the liberal ideas of the 17th century but would influence subsequent centuries up to the present day.[93] It became the essential outline of classical English political thought, where it was argued that the landlords were the owners of the English territory. Therefore, they had a natural right to erect whatever government they wished. But Locke was also well-received in other countries. During the US and French Revolutions, the ownership of civil and political rights, such as the right to vote, was tied to the question of property. There was great opposition to universal suffrage, as voting should only be for those who owned a "stake" in society. In the nascent United States, for example, the right to vote was extended to white men who owned a certain amount of real and personal property. Needless to say, Locke took for granted the exclusion of women from the realm of politics. By exalting their role in the home, he perceived no political danger.[94]

I would argue, with some caution, that the dominant contemporary concept of property in its current sense, should be traced back to 1789. The French revolutionary experience witnessed a massive reorganisation of property and would be crucial to the way in which the modern world would legally conceptualise the institution of property.[95] This process laid the foundations for the Napoleonic Code and modern notions of property.[96] The popular and bourgeois movements that broke out in Paris in 1789 had two fundamental aims: the removal of formal public power from the sphere of property and the excision of property from the realm of sovereignty.

The uprising thus entailed a revolution of property, which in turn became a real means of overthrowing the *Ancien Régime* and a lever for transforming society, the state and the organisation of political life.[97] From this profound rupture emerged a radical distinction between the political and the social, the private and the public, the state and society. It gave rise to the key liberal ideas about property that would evolve over the centuries until today's neoliberalism. Here liberty and property met again; emancipatory

[92] Although I suppose that at a time when women had no public representation nor the right to vote, Locke was not thinking of their inclusion in such a legal discussion.

[93] Tully, *A discourse on property*… (n 72) 124.

[94] Meiksins Wood, *Liberty and property*… (n 50) 266.

[95] Quoting Hippolyte Taine: "Quels que soient les grands noms dont la Révolution se décore, elle est, par essence, une translation de propriété ; en cela consiste son support intime, son moteur premier et son sens historique" in Marcel Garaud, *Les origines de la France Contemporaine* (vol. II, Hachette 1878) 386.

[96] Vid. Rafe Blaufarb, *The Great Demarcation: The French Revolution and the Invention of Modern Property* (Oxford University Press 2016); Polanyi, *The Great*… (n 47) 189.

[97] Rafe Blaufarb, *L'Invention de la propriété privée : Une autre histoire de la Révolution* (Champ Vallon 2016) 5.

movements, including the emerging French liberal feminism, focused on the question of property.[98]

But while the role of property was crucial in creating an unprecedented regime, it was not exactly what the legislators and intellectuals had in mind. The liquidation of the feudal property also meant the gradual elimination of corporate relations, and the individual became the sole owner. In the context of an expanding real estate market, landed property took on new meanings. The revolutionary programme was ostensibly popular, as people from various social strata benefited from it. Yet it should not be overlooked that it was not the poor and working classes who fared best, but the emerging bourgeoisie, who saw the properties of the old nobility transferred into their hands.[99]

What is certain is that with the removal of sovereignty from the absolutist monarchy, and hence the suppression of royal property, the imperative need arose to assign owners to property susceptible of individual ownership. In other words, all property required and tended towards individual ownership. Only when it was utterly incapable of attaining this status would property pass by default into the national domain. Ultimately, this ownerless property would constitute the new category of 'public property' to fill the equally new 'public domain' of which French law spoke for the first time.[100]

In France, the Declaration of the Rights of Man and of the Citizen (1791)[101] was the legal instrument that sought to recognise natural rights. Article 17 defined property as an "inviolable and sacred right" of which "no one may be deprived", although it must be limited and "public necessity, legally ascertained, shall clearly require it". In practice, however, the French revolutionaries did not extend civil and political rights to everyone. The idea was that only the contributors to the public establishment were the real shareholders of the great royal enterprise. Women were thus excluded from property and, consequently, from their political rights and the public sphere. This was largely because the daily reproductive work of most women was not considered a contribution to society.[102]

1.4.3. Arriving at a modern definition of property

From this set of ideas, it is possible to arrive at a modern definition of private property that brings together all the elements that make up its concept. It can be stated that private property is: a) a natural right rooted in the individual; b) who must be able to acquire property through his own labour; c) who deserves to be the full owner of the fruits of his labour; d) who does whatever he wants with what belongs to him (enjoy, use, exploit,

[98] Vid. e.g.: Lena Halldenius, 'Mary Wollstonecraft's Feminist Critique of Property: On Becoming a Thief from Principle' (2014) 29 (4) Hypatia 942.

[99] Hannah Callaway, 'Régimes de la propriété, entre l'ancien et le nouveau' (2018) 15 La Révolution française : Cahiers de l'Institut d'histoire de la Révolution française 5.

[100] Blaufarb, *The Great Demarcation…* (n 96) 147.

[101] Déclaration des Droits de l'Homme et du Citoyen du 26 août 1789. Legifrance.

[102] Alicia del Águila, 'Carole Pateman y la crítica feminista a la teoría clásica de la democracia (Locke y Rousseau)' (2014) 22 (2) Revista Estudos Feministas 449.

sell, destroy…); and e) no one can restrict or interfere with the free use of property.[103] Later, Sir William Blackstone would refine this exclusivist notion of property in his often-quoted passage: "that sole and despotic dominion which one *man* claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe".[104]

Modern property is thus associated with the exercise of self-determination, the safeguarding of which would be the object of political society. This makes property, as an institutional expression of capitalism, the foundation of the modern constitutional order, leaving behind the ideas of participation and responsibility associated with property in other contexts. Such conception also removes the barriers to private property in other contexts, allowing for the more or less precarious existence of non-owners, with their characteristic forms of sociability, particularly important in relation to women, as will be seen below. Although in truth, judging by historical events, it could be argued that private property has not really liberated but created dependency.

As seen above, private property would indeed have existed before modernity. In the context of techno-capitalism, however, its role would no longer be as closely linked to citizenship as it was in ancient Rome, but to individual self-determination as the foundation of the social order. In any case, property and liberty would once again go hand in hand; property would be functional to a certain conception of liberty. Indeed, the advent of capitalism prompted an enormous conceptual leap in modern liberty, which would now mean self-determination. Consequently, from that moment on, the role of private property would be entirely focused on the individual. Admittedly, modern property and liberty would have to pass through many epochs and be shaped by several historical events before they could be understood as they are today.

As we shall see below, Blackstone was already aware of the existence of common property and communal rights over nominally private land.[105] In practice, property rights were not absolute and completely static, but used to be restricted and coexist with other rights, such as easements, servitudes or restrictive covenants, as well as the doctrine of nuisance, which mitigated the rigidity of the system.[106] Perhaps it would be more accurate to say that the ideal of absolute and individual dominion was just that, an almost mythological ideal. For in reality, English and colonial property relations involved a wide range of social practices that were far from absolute power: they were property rights fragmented and distributed among several holders, or collectively managed, or of dependency or even subordination, surrounded by restrictions on use and alienation, or regulated for state purposes.[107] In short, they were relationships destabilised by

[103] For this definition, I have taken the characteristics set out by Crétois in *La part commune* (n 56) 24.

[104] William Blackstone, *Commentaries on the Laws of England* (Book II, Ch 1, West Publishing 1897) 167.

[105] David Casassas and Jordi Mundó, 'Property as a Fiduciary Relationship and the Extension of Economic Democracy. What Role for Unconditional Basic Income?' (2022) 69 (2) Theoria 78; Jordi Mundó, Soledad Soza and Nayara F. Macedo de Medeiros Albrecht, 'Privatization and the Governance of the Commons' in Albena Azmanova and James Chamberlain (eds), *Capitalism, Democracy, Socialism: Critical Debates* (Springer 2022) 49.

[106] John G. Sprankling, 'Property Law for the Anthropocene Era' (2017) 59 Arizona Law Review 744.

[107] Robert Gordon, 'Paradoxical property' in John Brewer and Susan Staves (eds), *Early Modern Conceptions of Property* (Taylor and Francis 2014) 96.

fluctuating and conflicting regimes of legal regulation. The classical 18th-century doctrines did not escape the relative nature of property relations either.

In any case, it seems important to remark that property has played a central and complex role in the social order up to the present day. Its influence on legal systems has also been extremely important, including in the modern notion of human rights and, consequently, in the fundamental rights recognised in constitutions. Private property, deeply embedded in the ideological structure of liberal law, has served to build the discourse of human rights on the privilege of a dominant, atomistic and autonomous legal subject. Traditionally designed to protect the interests of the capitalist bourgeois class, property rights have legitimised the classic forms of social and economic exclusion, to the detriment of other human rights. Thus, Article 17 of the Universal Declaration of Human Rights (UDHR),[108] which is still valid today, enshrines the right to property as follows:

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

This right, like many others, was included in response to the atrocities of the Holocaust, when the Nazis confiscated property from Jews and other groups, often to enrich themselves.[109] Despite this justification, when the UDHR was being drafted between 1946 and 1948, the world was already preparing for the Cold War, with democratic, capitalist countries on one side and non-democratic socialist states on the other. Socialist countries, as well as some developing countries, were hostile to the idea that private property was a fundamental human right. This suspicion has persisted in many cases to the present day, for example among the advocates of communism, environmentalism and some feminist movements.[110]

At the same time, the UN Declaration on the Rights of Indigenous Peoples recognises the rights of indigenous peoples concerning their lands, territories and resources. However, controversy over the definition of the right to property meant that it was not specifically expanded in subsequent human rights conventions, such as the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (ICESCR). Some of them prohibit discrimination on the basis of property, but none of them includes a specific right to private property. In short, this demonstrates the extent to which property has been, and continues to be, a source of conflict for the socio-legal order.

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[108] UN General Assembly*, Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

[109] Office of the High Commissioner for Human Rights (OHCHR), *Article 17: Right to Own Property. 30 Articles on the 30 Articles. The Universal Declaration of Human Rights at 70: Still working to ensure freedom, equality and dignity for all* (November 2018), United Nations Human Rights.

[110] Vid. Verónica Gago and Luci Cavallero, 'La batalla por la propiedad en clave feminista' *El Salto* (26 June 2020) <shorturl.at/bkW09> accessed 23 January 2023; Juan Gómez Valdebenito, 'La propiedad privada como fuente del machismo y el feminicidio' *Pressenza* (25 Abril 2021) <shorturl.at/CHOT8> accessed 23 January 2023.

1.5. From common to private: the family as insurer of (private) property

1.5.1. Revisiting the origins of the family

In my view, there is one element that has played a key role in the development of property, and which has become a lever for its transformation. An examination of this element offers many clues to the current debate on private property. I refer, indeed, to the concept of the family. To do so, I must go back to prehistoric times. The theories developed by Friedrich Engels seem plausible and consistent enough for this analysis, but other theses with a gender perspective will help me to contrast them. Arguably, the first and most primitive form of the family was marriage by groups.[111] It was a form in which entire groups of men and women belonged to each other, with little room for jealousy and the idea of incest —though without prejudice to the union of couples for a certain time.

Over time, the idea of the impropriety of sexual union between different generations (parents with children) and between members of the same generation (sisters and brothers) may have emerged. In this promiscuous stage of families by groups, the paternity of children was still unknown, but maternal filiation was already recognised. The woman regarded all the sons and daughters of the horde as her own and assumed maternal duties towards them. However, she knew how to distinguish her own children from the others. Thus, the birth of children, although attributed to an individual woman, was a communal event, the care of the offspring and all others was a function of the whole community or clan based on what they could get from nature.[112]

In the Stone Age, the prehistoric period from the time humans began to make stone tools until the discovery and use of metals, the land was common to all members of the clan. The rudimentary nature of the primitive sow and hoe limited agricultural possibilities: female forces were adapted to the work required to exploit the orchards. At that time, there was already an early division of labour, but no sex/gender antagonism. While it was women's duty to control the means of production in the home, it was men's responsibility to provide food, for which they had to forge and maintain the necessary tools. Hence, women kept the goods inside the home, men those outside it.[113] Household tasks involved productive work: making clay pots, weaving, gardening; and so, women had an important role in economic life, not just reproductive life.[114]

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[111] 19th-century thinkers Bachofen, Morgan, Engels and Marx could be considered forerunners of this theory which has been developed extensively until today, namely: Johann Jakob Bachofen, *Das Mutterrecht: Eine Untersuchung über die Gynaikokratie der alten Welt nach ihrer Religiösen und rechtlichen Natur* (Krais & Hoffmann 1861); Lewis Henry Morgan, *Ancient Society. Researches in the Lines of Human Progress from Savagery, Through Barbarism to Civilization* (Charles H. Kerr & Company 1985), original version: 1877; Friedrich Engels, *The Origin of the Family, Private Property and the State* (Penguin Books 2010), original version: 1884; Karl Marx, *The Ethnological Notebooks of Karl Marx (Studies of Morgan, Phear, Maine, Lubbock)* (2nd edn, Lawrence Krader (ed), Van Gorcum 1974), original version: 1880-1882.

[112] Soma KP and Richa Audichaya, 'Stream 2: Women's Work Is Work: A Feminist Perspective on the Commons as Process' Heinrich Böll Stiftung. The Green Political Foundation (November 2013) 4 <https://shorturl.at/ekqvQ> accessed 27 April 2023.

[113] Rosalind Delmar, 'Looking Again at Engels's Origins of the Family, Private Property and the State' in Juliet Mitchell and Ann Oakley (eds), *The Rights and Wrongs of Women* (Penguin Books 1976) 271.

[114] Engels, *The Origin of the Family*… (n 111) 71.

Over time, the introduction of new techniques, such as livestock breeding, metalworking, weaving and agriculture led to a substantial change in the configuration of the family. The discovery of copper, tin, bronze and iron enabled the invention of new tools for hunting and fishing, and even for defending against enemy tribes. Men then began to handle weapons better than women since the former had more strength. Even though women were much more robust than they are today, in the eyes of primitive men this was an undeniable physical difference. In this way, the man no longer recognised the woman as his equal, but became what de Beauvoir would call "the Other".[115] From then on, women remained at home and took care of the domestic tasks of housework and childcare.[116] The new system meant that instead of the whole group going out to hunt, someone had to be responsible for giving and sustaining life. Women's job was to breed the species. At this point, the role of reproduction lost value, because risking life, as men did, became much more important.[117] Moreover, the sexual appropriation of women's bodies, often violent, already represented a conquest: men were able to appropriate women's bodies as an expression of dominance.

Furthermore, the increase in male labour productivity led to the creation of a surplus, which men could appropriate as wealth. This gave men new economic power over women.[118] If mothers had previously ruled the home, it was now domestic work that ensured men's supremacy. Mothers' housework became less important than men's work outside the home. Nevertheless, matrilineal law still applied, and children continued to inherit property from their mothers. Men then saw the need to alter filiation according to maternal law and thus, replaced it with male filiation and patrilineal inheritance.[119] Two new elements were thus introduced: property and paternity.

As the needs of the communities evolved and the size of the communities grew, and with it the knowledge of how to cultivate and manage the production for sustainability, so did the notion of establishing the identity of the "seed" of the offspring with that of the "father", an instinct to establish the male lineage and to appropriate it as a claim, from which emerged the concept of organisation as a family, and of clans and territory in the patrilineal claim[120]. Progressively, men implemented father-right and turned women into sexual servants and instruments of reproduction. This is how, according to socialist theory, the patriarchal family was born.[121] Quoting Engels, "The overthrow of mother-

[115] de Beauvoir, *The Second Sex*... (n 13).

[116] Beauvoir states about the primitive woman: "She was given hard work, and in particular it was she who carried heavy loads; yet this latter fact is ambiguous: probably if she was assigned this function, it is because within the convoy men kept their hands free to defend against possible aggressors, animals or humans; so their role was the more dangerous one and demanded more strength. But it seems that in many cases women were robust and resilient enough to participate in warrior expeditions." ibid 99.

[117] ibid 99.

[118] Delmar, 'Looking...' (n 113) 274.

[119] Anay Marta Valladares González, 'La familia. Una mirada desde la Psicología' (2019) 6 (1) Revista Médica Electrónica 3.

[120] KP and Audichaya, 'Women's Work...' (n 112) 4.

[121] The etymological origin of the term 'patriarchy' means "the rule of the father". Historically, patriarchy designates a type of social organisation where authority is exercised by the head of the family. He is the master of the patrimony, the children, the wife, the slaves and the goods. The family is the patriarchal

right was the world historic defeat of the female sex".[122] This point is crucial to everything that was to follow.

Gradually, and largely as a result of the growing competition for wealth, private property appeared. The family began to evolve towards a reduction of the circle. Little by little, there was a progressive exclusion of relatives from the heart of the community. Herds now belonged only to one mother and one father. Ultimately, the conjugal union of opposite sexes remained: the man-woman couple. The monogamous family had been born.[123] In this primitive patriarchal law, the father was the lord and master of the family. Both wife and children became the property of the paterfamilias, as did slaves and livestock.[124]

To ensure the woman's fidelity, which was necessary to ratify the paternity of the children, she was placed under his power. In this way, the monogamous family, as a cellular social form, was consolidated on the basis of male dominance. Its expression was the procreation of children whose paternity was undisputed, so that property could be easily transferred. Gradually, the motive for monogamous marriage became the triumph of private property over common property. The accumulation of power by the man became the diminution of the well-being and the repression of the woman. Engels describes this conflict as follows: "The first-class opposition that appears in history coincides with the development of the antagonism between man and woman in monogamous marriage, and the first-class oppression coincides with that of the female sex by the male."[125]

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institution in its most primitive form, the crucial space of oppression for women, at the mercy of fathers and husbands. Vid. 'patriarchy' (Cambridge Dictionary, Cambridge University Press) <https://perma.cc/6R5S-CHDE>; 'patriarchy' (Collins English Dictionary) <https://perma.cc/U5NX-E7S9>; 'patriarchy', *Encyclopedia Britannica* (2022) <https://perma.cc/2EPU-HDLL>; all cited sources accessed 23 January 2023; Jane Pilcher and Imelda Whelehan, *50 Key Concepts in Gender Studies* (Sage Publications 2004) 44; Sascha Kneip and Wolfgang Merkel, 'Patriarchy', in Austin Harrington, Barbara L. Marshall and Hans-Peter Müller (eds), *Encyclopedia of Social Theory* (Routledge 2005).

[122] Engels, *The Origin of the Family…* (n 111) 30.

[123] As Engels points out, it must be recognised that in the early stages of the monogamous family, before it consolidated as such, polygamy and polyandry coexisted for centuries. Some historical accounts of the transition to monogamy in the Western world suggest that polygyny prevailed until industrialisation. However, there is extensive literature asserting that family, as a monogamous institution, is not a creation of capitalism, but much older. In my opinion, if there is so much multidisciplinary debate about the origin of the monogamous family, it is because polygyny and monogamy are not excluded; both have coexisted historically. Alongside monogamy, the *hetaira* customs do not prevent the prohibition and punishment of adultery by married women. Monogamy is, from its origin, only for women, not for men. Numerous anthropological, sociological and biomedical works support this argument. For further understanding of the formation of the monogamous family, in an anthropological sense, see Adam Kuper, *The Reinvention of Primitive Society: Transformations of a Myth* (2nd edn, Routledge 2005). For a biomedical discussion, vid. Ligia Vera-Gamboa, 'Historia de la sexualidad' (1998) 9 Revista Biomédica 116. Vid. Alan F. Dixson, *Sexual Selection and the Origins of Human Mating Systems* (Oxford University Press 2009). For a sociological analysis, vid. Annette Kuhn and AnnMarie Wolpe, *Feminism and Materialism. Women and Modes of Production* (eds) (vol 7, Routledge 2013); Sadettin Haluk Citci, 'The rise of monogamy' (2014) 5 SERIEs 377.

[124] María José Infante Trescastro, 'La influencia de la sociedad patriarcal en la comunidad de vida y de amor', in Federico R. Aznar Gil (coord), Cu*rso de Derecho matrimonial y Procesal Canónico para Profesionales del Foro XII* (Universidad Pontificia de Salamanca 1996) 83.

[125] Engels, *The Origin of the Family …* (n 111) 35. For Christine Delphy too, women constitute a *class*, as a group effectively subject to the relationship of production. She adds that they also constitute a *caste*, a category of human beings destined by birth to become members of this class. Vid. Christine Delphy, 'L'ennemi principal' (1970) 54 Partisans 157.

In early civilisations, monogamous marriage protected property. In Babylonian societies, the family was monogamous, and the role of marriage was to procreate and protect property.[126] Admittedly, in the case of Egypt, most of the property was public, either in the case of the Pharaoh or in the case of the temples.[127] It is therefore difficult to apply ideas about individual ownership in relation to gender patterns and the family. Also in Roman times, social structures were already strongly patrilineal. The head of the family had power over his wife, children and slaves, with Roman parental authority and the right of life and death over all of them. In Gaius' time, this was expressed as "the family, *id est patrimonium*" (i.e., inheritance). In classical Athens, the nuclear family was a constituent element of the *polis*, the foundation of the socio-political system. However, concubinage was common and accepted by custom. The problem lay in adultery committed by the wife, since it jeopardised the authenticity of her descendants and thus the correct transfer of property.[128] It was a matter that affected the whole community, so female adultery was severely punished in an institutionalised way.[129]

In Sparta, *oikos* and *polis*, i.e., the private and public spheres, were also intertwined. Although the institution of marriage was predominantly monogamous, access to Hellenistic women maintained effective polygyny among male citizens.[130] The Spartan family was a place of reproduction, and wives were primarily mothers. There was a close relationship between reproduction and property concerns. Actually, the economy of the *oikos* was based on inheritance and dowry. Even so, Spartan women enjoyed certain independence: they had some influence and volition in reproduction and many of them even ran the *oikos* and commanded their children. They could even own land and

[126] Although Hammurabi's code allowed the Babylonian husband to have secondary wives if the primary wife could not have children. This ensured that property could be transferred in some way. In the case of Egypt, only the Pharaoh could have multiple wives. It seems that in Hebrew society, on the other hand, the husband could have several legitimate wives and concubines, under the Deuteronomy. Vid. Linda L. Lindsey, *Gender Roles. A Sociological Perspective* (6th edn, Routledge – Taylor & Francis 2016) 395.

[127] Curiously enough, in any case, the word 'pharaoh' derives ultimately from the Egyptian compound pr ꜥ, */ˌpaɾuwˈʕaʁ/ 'great house', written with the two biliteral hieroglyphs pr 'house' and ꜥ 'column', meaning 'great' or 'high'. It was the title of the royal palace and was only used in broader phrases such as smr pr-ꜥ "Courtier of the High House", with specific reference to the court or palace buildings. From the 12th dynasty onwards, the word appears in a wish-formula "Great House, may he live, prosper and enjoy health", but again only with reference to the royal palace and not to a person. Vid. Alan Gardiner, *Egyptian Grammar: Being an Introduction to the Study of Hieroglyphs* (3rd edn, Oxford University Press 1964) 71–76.

[128] As the famous passage from Demosthenes describes: "For we have courtesans (*hetairai*) for pleasure, concubines (*pallakai*) for the daily service of our bodies, and wives (*gunaikes*) for the production of legitimate offspring and to have a reliable guardian of our household property". Vid. Demosthenes, *Apollodorus Against Neaera,* in Jess Miner, 'Courtesan, Concubine, Whore: Apollodorus' Deliberate Use of Terms for Prostitutes' (2003) 124 (1) The American Journal of Philology 19.

[129] The husband had the power to repudiate the adulterous wife, expel her from home and cease family cohabitation. The Athenian woman had no citizenship or political rights. She was legally subject to the father, the legal guardian or the husband, for whom she was no more than the mother of his heirs. If she was widowed, she became subject to their children. Athenian women were part of the polis as wives, daughters, mothers or female relatives of free male citizens, but not in their own right. Vid. Walter Scheidel, 'Monogamy and polygyny in Greece, Rome, and world history' (Conference: "Cross-cultural approaches to family and household structures in the ancient world," Institute for the Study of the Ancient World, June 2008); Sian Lewis, *The Athenian Woman: An Iconographic Handbook* (Routledge 2002) 172.

[130] Satoshi Kanazawa and Mary C. Still, 'Why Monogamy?' (1999) 78 (1) Social Forces 25.

manage their property. As wives and mothers, women were actively involved in making decisions that benefited the family.[131]

At the same time, the Quran had a major influence on the Islamisation of Arab tribal societies, and its interpretation was adapted to those prescriptions that best suited the prevailing social and family model at each moment.[132] It appears that Muslim women enjoyed property rights centuries before women in the West. Although Islamic law limited women's right to inherit, it prescribed equality in women's ability to own, manage and dispose of property.[133] Irrespective of their marital status, Muslim women enjoyed an autonomous legal identity and separate property rights from the 7th century onwards.[134] Indeed, the Quran preaches that "if you perceive in them right judgement, give them their property". According to prevailing legal interpretations, men and women have equal rights to acquire, manage and dispose of property.[135]

1.5.2. Property, family and the sexual division of labour

Coming back to the West, in the early European Middle Ages, patriarchal relations played a major role in the organisation of production (who produced and how, who owned what, etc.). The family, and not the economic society around it, structured the division of labour. For Marx —albeit with surprising biological determinism— the activity of procreation would have developed this division: "Within a family, and after further development within a tribe, there springs up naturally a division of labour, caused by differences of sex and age, a division that is consequently based on a purely physiological foundation (…)".[136] At this early historical stage, men, women, and children worked together in the home, on the farm or in the countryside to produce what was needed to survive. Production and reproduction were thus both located within the family. Women were both procreators and nurturers of children, but the needs and organisation of work limited the impact of this gender role distinction. This does not mean, of course, that there was sexual equality in pre-capitalist times.

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[131] Sarah B. Pomeroy, *Spartan Women* (Oxford University Press 2002) 71.

[132] Gema Martín Muñoz, 'Patriarcado e islam' (2007) Quaderns de la Mediterrània 7, Mujeres en el Espejo Mediterráneo, IEMed 65.

[133] Sunni and Shi'i schools of law differ on inheritance rights. In Shi'i jurisprudence, a single surviving daughter may inherit her father's entire estate. A father may also choose to bequeath more to female relatives in discretionary portions of his estate, whereas Sunni *fiqh* does not allow similar concessions. Shi'i *fiqh* prohibits widows from inheriting real estate from their husbands, while mainstream Sunni interpretations do not distinguish between types of property. Vid. Mary F. Radford, 'The Inheritance Rights of Women under Jewish and Islamic Law' 23 (2) Boston College International and Comparative Law Review, 23 (Spring 2000) 145.

[134] However, the fact that religious doctrine conferred strong property rights on Muslim women says little about whether they were capable of exercising these rights. Archival research from the Ottoman Empire reveals a large number of property disputes in which men attempted to disinherit women. Despite these limitations, there is considerable evidence that many women enjoyed effective property rights. Women were active in the buying and selling of real estate and, in some places, they run trusts. Courts often upheld women's rights to property and inheritance when they challenged male restrictions on their rights. The courts, and by extension the state, generally upheld women's property rights. Despite religious dictates, Muslim countries vary in the degree to which they grant women equal property rights. Vid. Benjamin G. Bishin and Feryal M. Cherif, 'Women, Property Rights, and Islam' (2017) 49 (4) Comparative Politics 506.

[135] Quran, 4:6.

[136] Marx, *Capital… Vol I* (n 60) 231.

This division of labour would have led to the first appearance of property within the family. Wife and children themselves became the slaves of the man.[137] This latent slavery within the family, though still very rudimentary, was for Engels and Marx the first property: "(…) but even at this early stage it corresponds to the definition of modern economists who call it the power to dispose of the labour-power of others. The division of labour and private property are, moreover, identical expressions".[138] Indeed, the Marxist conception is that the property arising from the division of labour in the act of procreation is no different from the property arising from capital relations.

In any case, within medieval society, collective relations prevailed over family relations. Peasant communities were not based on an algebraic sum of individuals, but on inter-individual, qualitative, and ecological relations with nature, on a common way of being. Social cooperation within a given group determined the status of each individual.[139] Within this community structure, the work was collective, self-managed and decided by the whole community. It was in this common making that knowledge circulated, was exchanged and perfected. In it, women in cooperation performed productive and reproductive tasks. They shared experiences and traditional knowledge and practices. Despite so much patriarchal violence, this structure of female coexistence was a source of power and protection for women. Through their sociality and solidarity, women learned how to control their reproduction and, in some way, they fought against sexual discrimination.

1.5.3. The rise of capitalism and the weakening of communal structures

In the last stage of the Middle Ages and the early years of the Modern Era, capitalism emerged as a result of economic development.[140] Questions of the transferability and restriction of land, the meaning of property rights and the uses to which land could be put were removed from the organisation of buying and selling and subjected to a set of institutional rules.[141] After the enclosure and expropriation of the land, people were divided according to their means of production and subsistence. A large section of the landless population was forced to move to the city, leading to the progressive disintegration of the patriarchal peasant family. From then on, the family ceased to represent the unit of production and gradually lost its role of ordering the agrarian society.[142] The family was relegated to the private sphere of reproduction, lost its

[137] Zillah R. Eisenstein (ed), *Capitalist Patriarchy and the Case for Socialist Feminism* (Monthly Review Press 1979) 12.

[138] Karl Marx and Friedrich Engels, *The German Ideology* (Prometheus Books 1998) 21.

[139] Mattei, *Beni comuni…* (n 66) 30.

[140] In its first phase, the mercantile one, the capitalist world economy would have developed through the construction of national markets. Born in the West at the end of the Middle Ages, mainly in parts of Europe and America, it progressively expanded, incorporating all geographical areas of the planet. Vid. Jordi Jaria-Manzano, *La Constitución del Antropoceno* (Tirant Humanidades 2020) 51-52; Weber, *Historia económica…* (n 21) 156.

[141] Polanyi, *The Great…* (n 47) 73.

[142] Cinzia Arruzza, 'Remarks on Gender. I. Patriarchy and/or Capitalism: Reopening the Debate' Viewpoint Magazine (2 September 2014) <https://perma.cc/U6VQ-J5YG> accessed 6 August 2020.

centrality and came to be seen as just another part of the superstructure.[143] Even so, the family would continue to function as a key institution to ensure the transfer of property and the reproduction of the labour force. As for domestic work, it now took place within the home, organised in a non-collective and non-cooperative way.

In this new framework, the "dominant patriarch" combined the need to own and control women with the capitalist ethos of greed.[144] Actually, the centre of power shifted from some patriarchs to others; that is, from the aristocracy to the bourgeoisie, until it reached today's wealthy middle classes. The truth is that not enjoying wealth by birth, bourgeois men initially had to generate it for themselves. Accordingly, this economic evolution of patriarchy required an ideological restructuring. One that allowed for the maximum exploitation of the labour capacity of men and women of subaltern social classes. One that took advantage of the natural resources, in the form of raw materials, of the peoples to be conquered. It was a game of mastering nature, territories and the creation of life itself.[145]

Although capitalism hatched at the beginning of the 16th century, it did not reach maturity until the 19th century, with the Industrial Revolution.[146] This period saw the monetisation of economic life in all spheres, both in the countryside and in the city. This phenomenon benefited the supporters of the market economy —the growing bourgeoisie— who welcomed money as a new common good, replacing subjection to the land and introducing criteria of objectivity, rationality and personal freedom. Nonetheless, the spread of monetary relations became destructive and exclusive. Money and the market divided the peasantry into categories; income differences became class differences. This included a large mass of poor people who could barely survive on periodic donations.[147] In effect, money was the new property, a prerequisite for access to other properties.

There came a point when small free producers could no longer compete with the concentration of land ownership and the private use of dependent labour: the big capitalist machine was beginning to impose its superiority. Productivism and money now ruled, even if this could lead to stagnation and workers' revolts. From that moment on,

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[143] Eisenstein, *Capitalist Patriarchy*… (n 137) 15.

[144] bell hooks, *We Real Cool: Black Men and Masculinity* (Routledge 2004) 17.

[145] Laura Mora Cabello de Alba, 'La relación entre patriarcado y capitalismo: Frankenstein y la huelga del clima' El Salto (8 October 2019) <https://perma.cc/4UPB-W53F> accessed 6 August 2020.

[146] During the 19th century, in its industrial phase, capitalism grew in the context of the Industrial Revolution. This entailed the systematic exploitation of nature, the standardisation of products and the progressive distancing between the centres of production and those of consumption. At the same time, it implied an extension of the use of technologies derived from the Scientific Revolution. The narratives of the time argued that economic growth rested on perpetually increasing fossil energy consumption; that environmental and social costs were negligible; and that natural resources needed to be put under private ownership regimes to become productive. Human beings made a qualitative leap in the use of fossil energy and progressively marked the transition towards a new paradigm in the transformation processes of the Earth System. However, the progressive depletion of the system's consumption capacity generated the need to move towards the *financialisation* of the economy. Vid. Jaria-Manzano, *La Constitución del*… (n 140) 53-54. Henry Heller, *The Birth of Capitalism. A Twenty-First-Century Perspective* (Pluto Press 2011) 93; Stefania Barca, 'Energy, property, and the industrial revolution narrative' (2011) 70 (7) Ecological Economics 1314.

[147] Bronisław Geremek, *Poverty: A History* (John Wiley & Sons 1997) 56.

the Lockean justification of "improvement" ceased to make sense. The political economy of self-preservation and subsistence had no place in a world of accumulation. Gone was the idea of ownership where everyone had enough and the rest was held in common.

In this context, women rarely controlled the financial resources that started to be created, as they required a large amount of start-up capital, which was often not available to them. Even though wage labour seemed to offer potential opportunities, women were paid much less than men, if not directly through their husbands or partners. Sure enough, social class marked the course of inequalities; a bourgeois woman had nothing in common with a working-class woman. In any case, domestic and family responsibilities prevented women from accessing occupations that required extensive travel. Even productive paid jobs within the household —such as washing or sewing— were defined as reproductive domestic work.[148] That is, as non-work. In this new capitalist regime, "*women themselves became the commons*, as their work was defined as a natural resource, laying outside the sphere of market relations".[149]

This trivialisation is partly explained by the fact that the concept of value was reduced to that of price. Only that which could be expressed in monetary units had value. Production thus became any process that took place in the market sphere, regardless of whether it satisfied needs or not. As a result, life-sustaining work was made invisible and banished from the field of economic study. Since it was not paid, it did not translate into economic growth which made it a natural resource, available to all.[150] In short, although women constituted a large slave labour force across the world, to suggest that their work was important would undermine the prevailing economic order. This separation of production from the domestic sphere and the emergence of the family would become the paradigm of privacy and domesticity.[151]

Within the process of capitalist accumulation, women were dispossessed of the various forms of property to which they had had access.[152] Gradually, the increasing commercialisation of life destroyed their community structures and reduced their access to property and income. In rural areas, they were excluded from owning land, especially single or widowed women. As a result, by the 15th century, they already made up a high percentage of the urban population. In the city, most of them lived as best they could, working in poorly paid jobs as maids, hucksters, retail traders, spinsters, members of the lower guilds and prostitutes.[153] However, city life gave many of them a new social autonomy. Not all of them were subordinate to male tutelage. Some lived alone, others as heads of households with their children, or shared a house with other women. Over time, women gained access to many occupations that would later be considered male jobs, such as blacksmiths, butchers, bakers, candlestick makers, hat makers, brewers,

[148] Merry E. Wiesner-Hanks, 'Patriarchy', *Encyclopedia of European Social History, Encyclopedia.com*. <https://perma.cc/RY2U-8WAP> accessed 29 July 2020.

[149] Federici, *Caliban and the Witch* (n 67) 97.

[150] Yayo Herrero et al, *La vida en el centro. Voces y relatos ecofeministas* (Libros en Acción 2019) 26-33.

[151] Carole Pateman, 'Selfownership and the Property in the Person. Democratization and a Tale of Two Concepts' (2022) 10 (1) *Journal of Political Philosophy* 35.

[152] Vid. Maria Mies and Vandana Shiva, *Ecofeminism. With a foreword by Ariel Salleh* (Zed Books 1993).

[153] Federici, *Caliban…* (n 67) 30.

wool carvers and merchants. Others worked as teachers, doctors and surgeons, especially as obstetricians, and some even went to university.[154]

In response to this new female independence, however, a violent misogynist reaction began. In this sense, Silvia Federici's work reveals the witch hunts as a decisive historical defeat in women's lives. The European witch hunts lasted from the 12th to the 17th century,[155] until the beginning of the modern era, and spread to colonial America.[156] Although many of the women accused of witchcraft were impoverished women, another surprisingly large group of suspects were also singled out: women landowners. That is, women who had inherited land from their deceased fathers or husbands and did not have to give it up because they had no children. These landowning women were the envy of others. Male relatives coveted the widow's share, and unmarried men saw unmarried women with property as targets for exploitation. Conveniently, if women landowners were convicted, then the transfer of property was unblocked, and other male relatives

[154] ibid 31.

[155] For centuries, both secular courts and the Inquisition persecuted, tortured and burned at the stake because they tried to preserve a certain autonomy over their bodies, in particular over their generative forces. The charges against them were mainly related to female sexuality: preventing conception, causing miscarriages, abortions, stillbirths, making men impotent, seducing men, having sex with the devil, giving birth to demons... Due to their customary roles in society (as cooks, healers and midwives) they were vulnerable to charges of "harmful magic". In this regard, women became professional rivals to the new male healers, priests and university-trained doctors that began to assist in the process of childbirth. Hence, this "sexocide" sought to destroy the control that women had exercised over their reproductive function, which facilitated the development of an even more oppressive patriarchal regime. It destroyed a world of women's practices, collective relations and knowledge systems that had been the basis of women's power in pre-capitalist societies, as well as the necessary condition for their resistance in the fight against feudalism. From a historical perspective, this process of institutional violence appeared as a pillar for the construction of new structures of state power and the establishment of capitalism. Vid. Federici, *Caliban...* (n 67) and *Re-enchanting the world. Feminism and the Politics of the Commons* (PM Press 2019); Barbara Ehrenreich and Deirdre English, *Witches, Midwives, and Nurses. A History of Women Healers* (2nd edn, The Feminist Press 2010) 74; Anne Llewellyn Barstow, 'On studying witchcraft as women's history. A Historiography of the European Witch Persecutions' (1988) 4 (2) Journal of Feminist Studies in Religion 7; Brian P. Levack, *The Witch-Hunt in Early Modern Europe* (4th edn, Routledge, 2016) 146; John Riddle, *Eve´s Herbs: A History of Contraception in the West* (Cambridge University Press 1997) 137; Alison Rowlands, 'Witchcraft and Gender in Early Modern Europe' in Brian P. Levack (ed) *The Oxford Handbook of Witchcraft in Early Modern Europe and Colonial America* (Oxford University Press 2013) 331.

[156] Witch-hunting also played a key role in the colonisation of the Native American population. Federici points to a certain extension of the strategies of repression and terror to the New World, to destroy collective resistance, silence entire communities and pit their members against each other. Colonialism in the Americas, when fused with capitalist patriarchy, also wreaked havoc on women. They defended the old, pre-colonial way of life most fiercely and led the opposition to the new power structure, probably because they were the most affected. Before the conquest, American women had their own organisations, and their activities were socially recognised. The Spaniards, upon their arrival, subjected women to their political and economic power, through the patriarchal family, the influence and power of the Catholic Church and, especially, through the Code of the Seven Partidas. Even the traditional chiefs, to maintain their status, began to expropriate women's rights to the use of water and land. Women were thus subjected to a double subjugation, by the settlers and by their aboriginal chiefs. The authorities used the women's refusal to cooperate to persecute them as witches. Vid. Selma R. Williams and Pamela Williams Adelman, *Riding the Nightmare: Women and Witchcraft from the Old World to Colonial Salem* (Harper Collins 1992); Irene Silverblatt, *Moon, Sun, and Witches: Gender Ideologies and Class in Inca and Colonial Peru* (Centro de Estudios Regionales Andinos 1990) 197, 159; José María Duarte Cruz and José Baltazar García-Horta, 'Igualdad, Equidad de Género y Feminismo, una mirada histórica a la conquista de los derechos de las mujeres' (2016) 18 Revista CS (Universidad ICESI) 107; Maria Mies, *Patriarchy and Accumulation on a World Scale. Women in the International Division of Labour. With a Foreword by Silvia Federici* (3rd edn, Zed Books 2014) 70.

could then take over their land.[157] The fact that the stay in prison had to be paid for by special fees is a further confirmation of this. In many cases, these fees were collected through the expropriation of land.[158]

1.5.4. Property as part of the sexual dispositive

Ultimately, this defeat of women, both in Europe and in America, allowed a new model of femininity to emerge at the end of the 17th century: the ideal woman-wife, chaste, passive, obedient, docile and always busy with her tasks.[159] This cause-and-effect relationship links the persecution of witches to the contemporary development of a new sexual division of labour that confined women to reproductive work. It was these women who were destined to build the new modern proletariat, both in Europe and in the "New World". Women's relative sexual and economic independence also posed a threat to the emerging bourgeois order. After all, sexual autonomy was closely related to economic autonomy. A process of sexual discipline began that would distort emotionality and reproduction in favour of production. Thus, the "dispositive" of sexuality became more powerful in modernity than in any other context in the history of Western civilisation.[160]

In this context, the state became the authorised manager of class relations and the main supervisor of labour. The sexual device imposed at that moment illustrates very well the fact that the nation-states, since their consolidation as such, have disciplined the bodies of individuals to transform them into labour power, which in turn has favoured accumulation. To this end, biopower —*biopouvoir*— has been an indispensable tool. Without prejudice to the control exercised over women's bodies today, it is worth recalling the strict surveillance exercised over women as potential pregnant wombs at least until the 20th century. In effect, the state has been shaping the birth rate, reducing or increasing the labour force according to the economic needs of each historical moment. A wide range of institutional techniques and discursive strategies of regulation and coercion (law, family, marriage, property, education, medicine) have made it possible to intervene in the behaviour, health and everyday life of bodies, a control that has been projected through the repression of sexuality (*refoulement*).[161]

For the state, it is not yet a question of individuals, nor of a "people" in terms of identity, but of a "population" and its specific phenomena: birth rate, morbidity, life expectancy, fertility, health, frequency of illnesses, access to food and housing. In this way, states do not expand naturally, but according to their industrial and productive needs. To this end,

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[157] Peter Charles Hoffer, *The Salem Witchcraft Trials: A Legal History* (University Press of Kansas 1997) 6, 83, 136.

[158] Casandra Fargas García, 'El fenómeno de la caza de brujas. El caso de las acusaciones por brujería en la aldea de Salem' (2016) 9 Revista Historia Autónoma 79.

[159] In fact, there is another relevant matrix in the accusations of witchcraft provided by Carol Karlsen: many of the accused in New England were usually women who did not conform to the prevailing social norm, and therefore represented a source of resistance to patriarchy and a danger to the survival of this model. Vid. Carol F. Karlsen, *The Devil in the Shape of a Woman: Witchcraft in Colonial New England* (WW Norton & Company 1998) 182.

[160] I use the term 'dispositive' here as a translation of the term *dispositif* coined by Foucault in *Histoire de la sexualité, Vol. 1. La volonté de savoir* (Éditions Gallimard 1976).

[161] ibid 62.

they investigate birth rates, age at marriage, the prevalence of contraceptive practices, or how fertile or infertile sex is.[162] For instance, prostitution was institutionalised in Europe at the end of the 15th century with the establishment of municipal brothels. This public service was seen as a useful remedy against the turbulence of proletarian youth and homosexuality, the latter feared as a cause of depopulation.[163]

At other times, as in the 16th century, the state punished any behaviour that hindered population growth and family life. This capitalist reproductive policy was implemented through pro-natalist disciplinary methods, such as public assistance and pro-marriage laws that criminalised celibacy. But above all, through the aforementioned witch-hunts. The demonisation of any form of birth control and non-reproductive sexuality was achieved by imposing severe penalties, such as torture, social ostracism or even death against contraception, abortion, and infanticide.[164] Later, in the 18th century, it became clearer that the future of society was linked not only to the number of citizens, nor to the rules of marriage and family, but also to the way sex was used. The state needed to know what happened to people's sex, but it also wanted everyone to be able to control this function. A whole campaign of surveillance networks began to monitor sexual behaviour and its effects, attempting to turn the sexual behaviour of couples into concerted economic and political behaviour.[165]

Within this sexual dispositive, the affluent classes clung to the idea that family solidity guaranteed private property.[166] The bourgeois family, as an inherently capitalist invention, implanted the notion of the 'housewife', and women were "naturalised back into nature". The bourgeois wife was defined as a mere nurturer and guardian of the heirs of the capitalist class, to ensure the transmission or circulation of the family property produced by the working woman, while guaranteeing the reproduction of labour power.[167] In both cases, women were seen as just another piece of property. From a materialist feminist perspective, four basic structures can define the existence and oppression of women in the capitalist society, as: a) reproductive beings, b) socialisers of children, c) sexual beings and d) working individuals.[168]

In this sense, I wonder whether property is not in fact part and parcel of the sexual dispositive. The modern configuration of property has been partly underpinned by sexual property: the patriarchal assumption of property rights over the sexuality, reproductive

[162] ibid 45.

[163] Vid. Ruth Mazo Karras, 'The Regulation of Brothels in Later Medieval England' (1989) 14 (2) Signs 399; Jamie Page, *Prostitution and Subjectivity in Late Medieval Germany* (Oxford University Press 2021), Eukene Lacarra Lanz, 'Legal and Clandestine Prostitution in Medieval Spain' (2002) 79 (3) Bulletin of Hispanic Studies 265, Helen Kavanagh, 'The Topography of Illicit Sex in Later Medieval English Provincial Towns' (MPhil in History, Royal Holloway, University of London 2020) <shorturl.at/ghHO6> accessed 14 February 2023.

[164] Federici, *Caliban*... (n 67) 37.

[165] In the line of Foucault, *Histoire de la sexualité, Vol. 1*... (n 160).

[166] de Beauvoir, *The Second Sex*... (n 13) 32.

[167] Karl Marx and Frederick Engels, *The Communist Manifesto* (Foreign Languages Press 2020) 52. Original publication: February 1848.

[168] Juliet Mitchell, *Psychoanalysis and Feminism* (Pantheon 1974) xviii.

capacity and emotionality of others, and most particularly of women.[169] This idea has historically functioned as a powerful mechanism of social control over intimate relationships and the family. In this sense, the state has not been blameless, but has enabled this domination of women through a normative legal structure, becoming itself the main owner of female sexuality.

For the family to function as a transmitter of property, the marriage contract has played a very important role. Until recently, marriage itself was a transaction: the dowry that the woman's family gave to the husband served to contribute to the marital burdens. The woman herself was the burden. Arriving at marriage as a virgin was, and still is in many cultures, a prerequisite, even tantamount to a private and exclusive property document. Note how the classic wedding ceremony still represents in Europe the transfer of the woman as property. The father of the bride "hands her over" to the groom at the altar, thereby transferring his title to the new owner. No one has to hand over the groom, as he is not a property. After the ceremony, the wife is engraved with the surname of her new owner. In a world where the contraceptive pill, the paternity test and the chromosomal processes of reproduction were still unknown, the institution of marriage functioned as a Eurocentric biopolitical regime that legitimised the creation of the family, understood as the combination of the heterosexual act and the procreation of consanguineous children.[170] Every birth from the wife's womb was attributed to the *pater familias*, who ensured the transmission of his property through inheritance.

Hence, homosexuality and transsexuality were excluded: they threatened the patriarchal, capitalist and colonialist project. They did not ensure the multiplication of the working and consuming population and therefore did not serve to transmit the accumulation of property.[171] These Western plans were to be extended to large parts of the world through colonialism. Only when the capitalist project has been able to absorb non-reproductive bodies —through pink-washing strategies, surrogacy, assisted reproduction, legalisation of same-sex marriage, etc.— have dissident subjects been integrated into the logic of accumulation, consumption and property.

All in all, marriage, the control of sexuality and the family still develop or function around private property. So far, the family, whatever its model, has remained the nuclear and basic ordering institution of human relations, which ultimately conditions the status of women.[172] Recent crises —especially the financial crisis of 2008 and Covid-19— have reinforced the division between owners and non-owners according to the heteronormative family model. For example, when rent cannot be paid due to income constraints, inherited or conjugal housing becomes the only way to secure housing, to the exclusion of other forms of cohabitation. When social benefits and wages are insufficient, family property becomes the only housing available. This confirms that it is

[169] Susan McCoin, 'Law and Sex Status: Implementing the Concept of Sexual Property' (1998) 19 Women's Rights Law Reporter 237.

[170] Mies, *Patriarchy and Accumulation…* (n 156) 46.

[171] In the line of Preciado, *Un apartamento en Urano…* (n 13) 25.

[172] Catharine MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) 71; Juliet Mitchell, *Woman's Estate* (Penguin Books 1971) 152.

almost impossible to exercise the right to housing outside the jurisdiction of the family.[173] Moreover, the fact that access to property is linked to the family often also guarantees free domestic labour for those who do not own property.

We might dare to ask whether the disappearance of the family as it has been understood until now should be a necessary consequence of the abolition of private property. Or, to put it another way, whether women's liberation will come with the end of private property and the family.[174] In fact, these are not new ideas. Marx and Engels, though not with feminist intentions, had already proposed that communism would make the institution of the family disappear.[175] The abolition of the family has also been a fashionable slogan among certain youth in the European and North American communist and feminist militancy. Whether the family is abolished or not, it seems that the time has come for the law to begin to recognise the new forms of shelter, care and accompaniment that subjectivities outside the heteronormative family have begun to reinvent.

1.6. Women and nature as property

1.6.1. Shared violence in environmental patriarchy

Even in late capitalism,[176] where there has been a false appearance of sexual liberation, there remains an implicit discipline that fixes the attributes and functions of women and their bodies as attached, dependent and disposable: as appropriable. As Irigaray points out, men have historically alienated women's bodies, desires and labour, treating them as if they were their property.[177] From the first hair born on their skulls to the soles of their feet: their wombs[178], their vaginas and their curves. Their faces, their mouths, their

[173] Lucía Cavallero and Verónica Gago, 'A feminist perspective on the battle over property' *Feminist Review* (21 July 2020) <t.ly/BBks> accessed 27 April 2023. Vid. also: Luci Cavallero and Verónica Gago, *Una lectura feminista de la deuda ¡Vivas, libres y desendeudadas nos queremos!* (2nd edn, Tinta Limón 2021) 56.

[174] Juliet Mitchell, *Woman's Estate* (Penguin Books 1971) 22.

[175] Marx and Engels, *The Communist Manifesto*... (n 167) 93.

[176] During the 1960s and 1970s, certain changes oriented the world economy towards a predominantly financial structure, where monetary flows multiplied and, consequently, the dynamics of homogenisation and unequal exchange intensified. Firstly, due to the emergence of the euro-currency market, which functioned more loosely than other markets. Secondly, due to the collapse of the Bretton Woods system and the abandonment of the dollar standard. And finally, with the 1973 oil crisis and its impact on the price system. This financial phase was further intensified by the WTO, starting with the opening of national financial services to global competition in 1995-2000. The unprecedented growth of the world economy was thus based on the phenomenon of debt. Savings were no longer necessary; on the contrary, consumption was stimulated, and social metabolism increased as a result. In the current phase, called 'late capitalism', transnational corporations have drawn on the situation, by acquiring a series of competitive advantages that allow them to grow, act beyond the control of states and maximise their social and planetary impact. Now, the concentration of capital is global. Capitalist patriarchy in this latest phase can be described as neoliberal, hierarchical, technological, productive, speculative and plutocratic, based on unlimited growth and possessive individualism. This sophistication of capitalism has allowed for a new division of labour, with higher economic profits and more effective social control. Vid. Wallerstein, *World-systems*... (n 19) 86.

[177] Luce Irigaray, *Ce sexe qui n'en est pas un* (Les Éditions de Minuit 1977) 143.

[178] In particular, surrogacy appears as a new twist from the point of view of the commodification of human life, as it is the organisation and legitimisation of a market for children, and the definition of both the mother's womb and the child as property that can be transferred, bought and sold. Silvia Federici, *Beyond the Periphery of the Skin* (PM Press 2020) 63.

legs. Their productive and reproductive forces. Indeed, women's sexual and reproductive functions have been big business, both as potentially appropriable by their husbands, partners and fathers and as the common property of all men.[179] Or, rather, as part of the sexual property device as a whole. They have been dominated, oppressed and exploited for labour, sexual and reproductive purposes.[180] They have been controlled, sold, traded, trafficked, bought, rented, raped, mutilated, beaten and killed.

Paradoxically, in the current era of capitalist accumulation —the Anthropocene— certain similarities can be observed between the dynamics of the colonisation of peripheral countries and the conception of women as property: economic dependence, cultural appropriation and the identification of dignity with the oppressor.[181] Indeed, the functions embodied by women and nature remain a precondition for the accumulation of labour and wealth. The "schizophrenia of commodity-producing societies"[182] makes nature, the periphery[183] and women's bodies appear as appropriable and sacrificial spaces to be put at the service of capital accumulation, subordinated to the production of profit, regardless of the violence this entails.[184] They are conceived as territories to be appropriated by men: the men of industry, the men of war, the men of medicine, the men of the state, the men of religion and, of course, the men of the family.

Violence against the Earth and violence against women are part of the same logic: that of imposition, the hierarchical exercise of power and appropriation. As Vandana Shiva states, "what is called development is a process of 'maldevelopment', a source of violence against women and nature all over the world,"[185] whose roots lie in the patriarchal postulates of homogeneity, domination and centralisation that form the basis of dominant models of thought and development strategies. Those who do not collaborate with power live at risk of being colonised or expelled. Violence itself is one of the quickest ways to impose a system of overproduction.[186] The "yield" of the Earth and bodies is extracted, squeezed, destroyed and plundered. Otherwise, it would be quite difficult to

[179] Carol Smart, *Feminism and the Power of Law* (Routledge 1989) 41.

[180] Silvia Walby, *Theorizing Patriarchy* (Basil Blackwell 1990) 214.

[181] Sheila Rowbotham, *Mujeres, resistencia y revolución* (Txalaparta 2020) 317.

[182] Here I borrow the term coined by Maria Mies in: Mies and Shiva, *Ecofeminism*... (n 152) 297.

[183] Although the most popular theory of capitalism distinguishes between North and South, the geographical demarcation that attempts to differentiate between rich and poor countries is only partially true. There are rich countries in the South and poor countries in the North, and poverty and wealth are experienced by people in both hemispheres. In this thesis, I have therefore opted for the core-periphery theory. The global core comprises the industrialised and consuming countries, while the global periphery includes those that revolve around capitalism, supplying and producing for the core. These two categories are nothing else than an existing study proposal developed by the Latin American structuralist school. Its main exponent was ECLAC (Economic Commission for Latin America), which had a great influence on the thinking of its members, especially the Argentinean economist Raúl Prebisch. Vid. Raúl Prebisch, 'La periferia latinoamericana en el sistema global del capitalismo' (1981) 13 Revista de la CEPAL 163; Armando Di Filippo, 'La visión centro-periferia hoy' (1998) No.CREX01 Revista de la CEPAL 175.

[184] Maria Mies and Vandana Shiva, *La praxis del ecofeminismo. Biotecnología, consumo, reproducción* (Icaria, Antrazyt 1998) 27.

[185] Vandana Shiva, *Staying alive. Women, Ecology and Development* (Zed Books 1989) 87.

[186] Mina Lorena Navarro Trujillo and Raquel Gutiérrez Aguilar, 'Diálogos entre el feminismo y la ecología desde una perspectiva centrada en la reproducción de la vida. Entrevista a Silvia Federici' (2018) 54 Ecología Política 119.

keep up with the current pace. In this sense, one could speak of a kind of 'environmental patriarchy'.

1.6.2. The 're-patriarchalisation' of territories

The Marxist utopia was that the violence of the early phases of capitalist expansion would recede as capitalist relations advanced, when the exploitation and disciplining of labour would be carried out primarily through economic laws.[187] But history itself has disproved this fallacy. Violence has been present in every phase of capitalist globalisation, including the current one, showing that the continued expulsion of peoples from their lands, war and plunder on a global scale and the degradation of women have always been necessary evils for the existence of capitalism.[188]

What is more, gender-based violence and violence against nature are often closely linked. Women's rape, for instance, is often used as a strategy to recolonise land and extract its resources. Sometimes it generates spectacle and instils fear. At other times it leads to their forced exile because of the shame and disgrace it brings. It is also used to impregnate women and "stain" them with the blood of other races, religions or ideologies. It is no coincidence that rape culture is very present in regions with extractive industries such as mining, fishing or oil palm plantations.[189] The implementation of extractive projects increases exponentially along with a kind of "re-patriarchalisation" of territories, which adds to the existing male violence.[190] Sexual violence is often used as a tool to demonstrate, control and maintain power over nature.

What had been communal land is now being privatised. This new process of enclosure is based on the plundering not only of basic livelihoods and communal resources, but also of social relations, as had already happened in Europe and the Americas in the 16th century.[191] Extractive companies tend to promote the masculinisation of public spaces by encouraging interaction with like-minded local leaders or with heads of households (usually men). This implies the exclusion of women from decision-making on issues that affect their territories and their lives.[192] Moreover, the jobs created by looting activities are strongly associated with male labour. Women are often excluded from employment and therefore subordinated to their husbands' salaries. The work they continue to do is even more undervalued. This creates new unequal social relations and deepens the structural differences between men and women within the community. This is frequently exacerbated by the massive arrival of male workers from outside the communities and

[187] Marx, *Capital… Vol I* (n 60) 366, 407.

[188] Federici, *Caliban…* (n 67) 13.

[189] Julie Wark and Daniel Raventós, 'Papúa Occidental: Violar a las mujeres para violar la tierra' *Sin Permiso* (11 April 2021) <https://perma.cc/FW4W-KZA3> accessed 12 April 2021.

[190] Colectivo Miradas Críticas del Territorio desde el Feminismo, '(Re)patriarcalización de los territorios. La lucha de las mujeres y los megaproyectos extractivos' (2018) 54 Ecología Política 67.

[191] Federici, *Caliban…* (n 67) 102.

[192] Gloria Chicaiza et al, *'La herida abierta del Cóndor. Vulneración de derechos, impactos socioecológicos y afectaciones psicosociales provocados por la empresa minera china EcuaCorriente S.A. y el Estado ecuatoriano en el Proyecto Mirador'* (2017), Colectivo de Investigación y Acción Psicosocial.

the processes of militarisation of the territory by public and private security forces, which are also highly masculinised.[193]

Company employees occupy the canteens and even build new ones. Brothels proliferate, often associated with the trafficking of women for sexual exploitation.[194] In extractive contexts, the commodification of sex is functional to the accumulation of capital and serves to channel the stress of the male labour force[195] and the lust for power. Thus, men who perpetrate violence against women play an ordering and disciplining role in the context of the capitalist system, as vectors of the structure of power relations. Moreover, it is more convenient for tribal leaders to negotiate the extraction of their resources in exchange for sex and alcohol seems more convenient than having to watch strangers rape the women of their tribe to gain access to their land.[196]

The occupation of public space for the benefit of the male sector creates social enclosure and, in particular, confines women to the private sphere,[197] reinforcing gender roles and sexist stereotypes that support the male provider and the female dependent. This phenomenon often fosters the conditions of male control, weakens community networks and closes off avenues of escape and support for many women in terms of health, care and social support.[198] Worse still, the wages paid to men by extractive companies encourage alcohol consumption, which often leads to an increase in male violence in the home.[199]

Gender-based violence also goes hand in hand with access to and control over natural resources. Cases have been reported of women who, when trying to access farmers' markets to sell their produce, have faced domestic violence from their partners, who have

[193] Colectivo Miradas Críticas…, '(Re)patriarcalización…' (n 190) 70.

[194] Such a social phenomenon is reported by numerous sources. Vid. Boris Miranda, 'Las economías perversas del crimen organizado. Minería ilegal, trata y explotación sexual' (May-June 2016) 263 Nueva Sociedad 145 and 'La "escalofriante" alianza entre la minería ilegal y la explotación sexual en Sudamérica', *BBC Mundo* (12 April 2016) <https://perma.cc/UEF3-ESCT> accessed 25 February 2021; Anastasia Moloney, 'La explotación sexual prospera en el Amazonas peruano pese a medidas en contra de la minería ilegal', *Thomson Reuters* (21 January 2020) <https://perma.cc/5DNU-NC2N> accessed 25 February 2021; Ana Palacios, 'De 'prostibares' por el Amazonas: así funcionan las redes de trata en la selva', *El País* (30 July 2020) <https://perma.cc/EWC2-6C26> accessed 25 February 2021.

[195] Julia Ann Laite, 'Historical Perspectives on Industrial Development, Mining and Prostitution' (2009) 52 (3) The Historical Journal 739.

[196] Wark and Raventós, 'Papúa Occidental…' (n 189).

[197] Federici, *Caliban…* (n 67) 127.

[198] In this regard, it has been found that when home confinement increases, as during the Covid-19 pandemic, these dynamics are exacerbated, with serious consequences for women. Vid. María Teresa Gallo Rivera and Elena Mañas Alcón, 'Territorios vulnerables a la violencia de género en tiempos de confinamiento' (2020) Documentos de Trabajo 2/2020, (IAES, Instituto Universitario de Análisis Económico y Social <t.ly/BUQG> accessed 16 February 2023; Clara Esteve Jordà, 'El impacto de género de la COVID-19. El caso de España' in Fuentes i Gasó, Josep Ramon et al (eds). *El Impacto social de la Covid-19. Una visión desde el Derecho* (Tirant Lo Blanch 2020) 200; Esra Boyuk, Clara Esteve Jordà and Maria Fàbregas, 'Domestic violence against women in times of Covid. The perspective of grassroots organisations' (Regional Academy of the United Nations - Ban Ki-moon Centre for Global Citizens 2021).

[199] Eva Vázquez et al, 'Esperanza Martínez: "La actividad petrolera exacerba el machismo"', in *La vida en el centro y el crudo bajo tierra. El Yasuní en clave feminista* (Colectivo Miradas Críticas del Territorio desde el Feminismo 2014) 31.

tried to control finances and have not allowed them to sell without their permission.[200] In other cases, especially in peripheral rural areas, environmental changes mean that livelihoods are increasingly far from home. Women have to make longer journeys to collect firewood and water, increasing their vulnerability as they are at greater risk of being harassed, assaulted or raped along the way.[201]

Resource use is also often a source of sexual exploitation. On some occasions, authorities suggest or demand sexual favours in exchange for land rights,[202] in other cases fishermen sell fish to poor women only in exchange for sex.[203] It has also been reported that some supervisors in extractive industries or rural areas sexually harass and abuse women, punishing those who refuse to submit.[204] Gender-based violence is also used to reinforce power imbalances and sometimes to aggressively discourage or prevent women from defending their environmental rights. For instance, incidents of gender-based violence against women environmental human rights defenders are on the rise, hindering their access to justice.[205] Gender-based violence is thus both a symptom of gender inequality and a tool to reinforce this inequality in the control of resources, so that both women and nature are dominated in this environmental patriarchy.

[200] Illustrative of this is a study in Cameroon where women were not allowed to sell their farm produce, as this is considered the responsibility of the men. Some explained that their husbands beat them if they tried to question why they were selling the products without informing them. Vid. Itzá Castañeda Camey et al 'Sex-for-fish: Sexual exploitation in the fisheries sector', in Jamie Wen (ed), *Gender-based violence and environment linkages* (2020), International Union for Conservation of Nature (IUCN); Nancy A. Wonders, 'Climate change, the production of gendered insecurity and slow intimate partner violence' in Kate Fitz-Gibbon et al (eds), *Intimate Partner Violence, Risk and Security: Securing Women's Lives in a Global World* (Routledge 2018).

[201] Several case studies confirm this problem. To give a few examples: In rural Kampala (Uganda), in urban Kabul (Afghanistan), in the semi-urban city of Buea (Cameroon) or in overcrowded Delhi and Mumbai (India). Vid. Marni Sommer et al, 'Violence, gender and WASH: spurring action on a complex, under-documented and sensitive topic' (2015) 27 (1) Environment & Urbanization 105.

[202] This is the case in Madagascar, Sierra Leone or Zimbabwe, for instance, where local authorities or land officials ask women for sex in exchange for solving a problem, access to agricultural land or land titles. Their vulnerability is not only due to this abuse of power but also to the consequences on their physical and mental health, partly due to social exclusion and exposure to sexually transmitted diseases and infections. Vid. Phil Matsheza, Anga R Timilsina and Aida Arutyunova (eds), *Seeing Beyond the State: Grassroots Women's Perspectives on Corruption and Anti-Corruption* (October 2012), United Nations Development Programme; Ursula Casabonne et al, *Violence Against Women and Girls. Land Sector Brief* (July 2019), Violence Against Women & Girls (VAWG).

[203] In some sub-Saharan African countries, poor, single or widowed women fish processors and traders are sometimes forced to offer sex to access and/or sell fish products to support their families. For example, on the Kafue River in Zambia or western Kenya, fishermen may refuse to sell fish to women if they do not have sex with them. Vid. Christophe Bené and Sonja Merten, 'Women and Fish-for-Sex: transactional sex, HIV/AIDS and Gender in African Fisheries' (2008) 36 (5) World Development 875.

[204] This is the case in some tea plantations in India and Kenya. Vid. Castañeda Camey et al, 'Sex-for-fish…' (n 200) 58.

[205] Alda Facio, '¿Por qué la perspectiva de género es necesaria para analizar la situación de agresiones contra las defensoras?', in Marusia López and Verónica Vidal (coords), *Agresiones contra defensoras de derechos humanos en Mesoamérica: Informe 2012-2014*, Iniciativa Mesoamericana de Mujeres Defensoras de Derechos Humanos (IM-Defensoras).

1.7. On the patriarchal configuration of property

1.7.1. Gender barriers in access to and control over resources

As observed, the new macro-system characterised by the intensification of environmental degradation processes (deforestation, desertification, climate change, etc.), has intersected with the pre-existing hierarchies. If this is already fraught with tensions, the impact is even greater when neoliberal governance policies are implemented to control increasingly scarce resources. Indeed, this regime has led to a reconfiguration of natural resource use patterns, through economic reform programmes aimed at privatisation and commercialisation.[206] In this scenario, property plays a leading role, and is often associated with socially recognised and supported claims or rights, based on laws, customs and conventions.[207] Moreover, social assumptions, and gender in particular, reinforce differential access to resources, and thus to property.[208] Almost everywhere in the world, there are still many barriers that prevent women from accessing and controlling the environmental goods and services on which their very existence depends.[209] Their possibilities of becoming involved in the socio-political processes that affect the management and control of these resources (livestock, forestry, fisheries…) are often limited.[210]

To start with, gender appears to be a critical variable in terms of access to original wealth: land ownership is overwhelmingly male. According to gender-disaggregated statistics from 2022, women account on average for less than 20% of the world's landholders, but represent an estimated 43% of the agricultural labour force.[211] Particularly in much of South Asia, Africa and Latin America, for example, gendered dynamics of access, control and dispossession of resources are mainly due to family and/or marital authority

[206] Rebecca Elmhirst, 'Feminist political ecology', in Tom Perreault, Gavin Bridge and James McCarthy (eds), *The Routledge Handbook of Political Ecology* (Routledge 2015) 519.

[207] Jesse C. Ribot and Nancy Lee Peluso, 'A Theory of Access' (1998) 68 (2) Rural Sociology 155.

[208] I am aware that not only gendered experiences, but also other intertwined axes of domination condition the relationship with property. Roles, responsibilities, and vulnerabilities are also crossed by race, ethnicity, age, class, sexual orientation and identity, as well as educational level or access to land. Moreover, these categories can change and be renegotiated throughout life. The intersection of these variants of identity and experience offers differential opportunities for individuals and allows for diverse forms of adaptation and transformation. Vid. Djoudi Houria and Maria Brockhaus, 'Is adaptation to climate change gender neutral? Lessons from communities dependent on livestock and forests in northern Mali' (2011) 13(2) International Forestry Review 123; Alicia Puleo, *Claves ecofeministas. Para rebeldes que aman a la Tierra y a los animales* (Plaza y Valdés 2019) 72.

[209] A distinction must be made here between 'ownership' (or property) and 'access'. The former implies the "*right* to benefit from things" and the latter "the *ability* to derive benefits from things". Thus, access has more to do with "bundles of *powers*", while ownership has more to do with "bundles of *rights*". Moreover, 'control', differs from access, as it implies some form of decision-making power over objects or resources. Vid. Ribot and Peluso, 'A Theory of Access'… (n 207) 155.

[210] Elmhirst, 'Feminist political ecology' (n 206) 520.

[211] Alda Facio, 'Insecure land rights for women threaten progress on gender equality and sustainable development' (July 2017) Working Group on the issue of discrimination against women in law and in practice, United Nations Human Rights Special Procedures <https://perma.cc/T8DE-BZKA> accessed 25 January 2023; 'These numbers prove that rural women are crucial for a better future. But they're not getting what they need to succeed' (*Ifad,* 7 March 2022) <https://perma.cc/4N5T-CWED> accessed 24 January 2023.

relations and the sexual division of labour.[212] Socio-cultural assumptions place men as heads of households; they enjoy rights to land, labour and capital, they control and manage and are responsible for women's financial security. This implicitly reflects the view that women are incapable of effectively managing productive resources such as land. Even in countries with apparently non-discriminatory laws, women are often restricted to so-called 'secondary land rights', which they can only enjoy through male family members. In the event of divorce, widowhood or migration of the husband, the woman risks losing these rights, which increases her specific vulnerability.[213]

In any case, there is often no interest in handing over the productive resources to women, as they are "lost" to another family in case of marriage, divorce or (male) death.[214] It should be kept in mind that legal culture plays an important role in this configuration of access to resources, as will be seen below. Due to the prevalence of patrilineal inheritance customs, both productive resources and property, such as household assets[215], end up in the hands of men rather than women.[216] In some indigenous communities, for example, women who marry outside their ethnic group risk having their children excluded from access to the clan's communal land. In other words, the aspirations of a rural woman in certain regions are limited to being dependent on a man and being satisfied with the conditions that this relationship indirectly provides. Ignorance of existing laws and a lack of understanding of legal remedies are largely due to women's limited levels of education. As a result, they are unable to interact with and challenge male-dominated institutions.[217]

Laws and customs that negatively affect women's access to and control over resources hinder their economic progress. If they do not have access to property, they are also unable to access new agricultural technologies and farming techniques that could eventually enable them to improve the performance of their assets or to decide on their management. However, it is important to be critical of the assumption that promoting women's ownership of agricultural assets necessarily guarantees their access to and control over them. Likewise, the allocation of private ownership of resources on an individual basis, within the household, can continue to generate dynamics of exploitation and unlimited growth, as well as dynamics of social exclusion. The problems of poverty and gender inequality are not only a domestic problem but are also caused by macro-level dynamics and historical legacies. Therefore, structural, cultural and historical contexts need to be taken into account when formulating strategies to improve equity in resource ownership.

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[212] Ribot and Peluso, 'A Theory of Access'... (n 207) 153.

[213] Rebecca Elmhirst, 'Ecologías políticas feministas: perspectivas situadas y abordajes emergentes' (2018) 54 Ecología Política 52.

[214] UN Women and UN Human Rights, *Realizing women's rights to land and other productive resources* (2013).

[215] Vid. 'assets' (n 4).

[216] Susana Lastarria-Cornhiel et al, 'Gender Equity and Land: Toward Secure and Effective Access for Rural Women', in Agnes R. Quisumbing et al (eds), *Gender in Agriculture. Closing the Knowledge Gap* (FAO and Springer 2014) 117.

[217] Paul Dalton et al, 'In-depth analysis: Discriminatory Laws Undermining Women's Rights' (May 2020), Policy Department for External Relations <https://perma.cc/8S64-7PKT> accessed 28 February 2021.

In Europe, women's access to resources, not to mention their ownership, also remains a pending issue, as their position in rural policy is still marginal.[218] According to the Eurostat, slightly more than two-thirds (68.4%) of farm managers on the EU holdings in 2020 were male.[219] The gender imbalance was particularly pronounced in the Netherlands, where only one in every twenty farm managers (5.6%) was female, as well as in Malta (10.8 %), Germany (10.8%), Denmark (10.9%) and Ireland (11.4%). The proportion was even lower among European women farmers aged under 44 years (5,5%).[220] The sexual division of labour and the rigidity of gender roles and status, especially on family farms, mean that many women engaged in agricultural work do not receive a separate income from their husband or other male members of the household, as their work is informal.[221] As a result, they are often not entitled to social security and do not hold property rights to land or farms.

Access to energy and water is also gendered.[222] In countries without modern energy and water management services, women and girls spend most of their day doing physically strenuous and time-consuming work collecting biomass fuels and going to wells. Unequal gender relations limit women's ability to participate and voice their energy and water needs in decision-making at all levels of the energy system, needs that affect the household where the whole family lives.[223] Lacking land tenure, women cannot apply for electricity, wind or solar installations for farms or agricultural systems, or for improved irrigation or household water supply canals.[224] At both national and household levels, there is no investment in improved cooking technology. Similarly, without property deeds, women cannot invest in technology to improve their productivity.[225]

In my view, the constraints that property entails, as an essentially hierarchical and ultimately patriarchal device, can limit the capacity to respond to environmental change. It is not so much a problem of access to property, but of overcoming property as it is understood today. By way of example, market-based approaches to climate change

[218] Sally Shortall and Bettina Bock, 'Introduction: rural women in Europe: the impact of place and culture on gender mainstreaming the European Rural Development Programme' (2015) 22 (5) Gender, Place and Culture 662.

[219] According to the definition provided by Eurostat: "Farm managers are those responsible for the normal daily financial and production routines of running a farm. As such, they make the decisions on what to plant or how many livestock to rear, just as much as when to buy materials and sell stock. Only one person per farm can be identified as a farm manager. Often the farm manager is also the owner of the farm, but this need not be the case especially when the farm has a legal form." Vid. 'Farmers and the agricultural labour force – statistics' (*Eurostat*, 2022) <https://perma.cc/3WBB-MVE4> accessed 10 January 2023.

[220] 'Females in the Field' (*European Commission*, 2021) <https://perma.cc/4VMB-W7GK> accessed 10 January 2023.

[221] Ramona Franić and Tihana Kovačićek, *The professional status of rural women in the EU* (May 2019), Policy Department for Citizens' Rights and Constitutional Affairs.

[222] Stefani van der Merwe, Imke H de Kock and Josephine Kaviti Musango, 'The state of the art of gendered energy innovations: a structured literature review' (2020) 31(3) South African Journal of Industrial Engineering 144; Anne Coles and Tina Wallace, *Gender, Water and Development* (Routledge 2020) 6.

[223] Md Moniruzzaman and Rosie Day, 'Gendered energy poverty and energy justice in rural Bangladesh' (2020) 144 (111554) Energy Policy 1.

[224] FAO, *How can women control water? Increase agriculture productivity and strengthen resource management* (2016).

[225] Katrine Danielsen, *Gender equality, women's rights and access to energy services An inspiration paper in the run-up to Rio+20* (February 2012).

mitigation through payments for ecosystem services reward resource users for avoiding deforestation. This method relies on property rights that many women do not enjoy, as their access to resources is based on custom.[226] Besides, the land allocated to women is often of lower quality, smaller, less accessible and poorly irrigated. Some studies show that men tend to own the largest types of livestock and tracts of land, widows own large and small types of livestock, and married women own smaller types of livestock. At other times, the land is publicly owned but informally allocated by the village council to heads of households (either male or female, but usually male).[227] The constant environmental changes affecting these marginal and poor-quality assets can create more difficulties than benefits, as there is no possibility of selling, leasing or using them for credit.[228]

Still today, not only rural but also urban and leisure spaces are generally organised by and for men. The modern city is not a neutral or asexual space. Like all human institutions, it bears sex/gender markers. Public space, apparently the same for all citizens, is constituted in opposition to the domestic space (traditionally feminine and devalued) and the private space (as a refuge and solace for men).[229] Although the boundaries between the private and the public seem to be increasingly blurred, one only has to look at the street nomenclature of virtually any city to see the legacy of the collective patriarchal imaginary that reinforces the male-culture nexus.[230] Certainly, there are no legal barriers to women's freedom of movement in communal and public spaces. But a kind of tacit male control of such spaces discourages them: leering, verbal provocation, sexual aggression... The threat of male dominance, even if only symbolic, is a determining factor in women's relationship with the public space.[231]

Moreover, urban planning and policies tend to privilege quantitative aspects, such as morphology and energy, over qualitative aspects such as experience, well-being and equity. Likewise, cities are a network of relationships and accelerated rhythms that revolve around a body designed by and for a neutral, autonomous and independent subject. It tends to be a white, bourgeois, male, adult and heterosexual subject that moves within the logic of global capitalism in its financialised stage, led by the real estate sector,

[226] Judith Carney, 'Gender conflict in Gambian wetlands', Richard Peet and Michael Watts (eds), *Liberation ecologies: environment, development, social movements* (2nd edn, Routledge 2004) 293.

[227] Alessandra Galiè et al, 'Exploring gender perceptions of resource ownership and their implications for food security among rural livestock owners in Tanzania, Ethiopia, and Nicaragua' (2015) 4 (2) Agriculture & Food Security 6.

[228] Lora Forsythe et al, 'Strengthening Dryland Women's Land Rights: Local contents, Global Change' (2015) Thematic Paper 1, in the series 'Women's empowerment in the drylands', Natural Resources Institute, University of Greenwich <https://perma.cc/RUD5-YHFP> accessed 28 February 2021.

[229] Micaela Anzoátegui and María Luisa Femenías, 'Problemáticas urbano-ambientales: Un análisis desde el ecofeminismo' in Alicia Puleo (ed), *Ecología y género en diálogo interdisciplinar* (Plaza y Valdés 2015) 219.

[230] To give just a few examples, and with 2020 data, streets named after women made up 6.1% in Brussels, 3.5% in Rome, 7.6% in Barcelona and 0.6% in Berlin. Vid. Helena Davenport, 'Auf diesen Straßenschildern werden Frauen geehrt' (*Der Tagesspiel*, 6 March 2019) <https://perma.cc/A8LE-8ETL>; Pierre-Nicholas Schwab, 'The feminisation of street names: useful debate or a political artifice?' (*Into the Minds*, 11 March 2020) <https://perma.cc/MY7M-MY4L>; Edgar Sapiña, 'Tan sólo el 7% del callejero de Barcelona tiene nombre de mujer' *ElDiario.es (*15 March 2019) <https://perma.cc/MZ4J-BKWN> accessed 27 February 2021.

[231] Françoise Collin, 'Espacio Doméstico. Espacio Público. Vida Privada' (Ciudad espacio público, Seminario Permanente Ciudad y Mujer, 1994) 236 <shorturl.at/emoDN> accessed 11 September 2021.

business, investment, production and consumption.[232] Several empirical studies from countries in both the global periphery and the global centre have shown that women tend to travel shorter distances, to make chain trips, to have more non-work-related trips and to travel at off-peak times.[233]

In addition, women use public transport more than men, partly because they tend to have lower incomes and cannot always afford a car, and partly because the car is an inconvenience in the city during the multitude of daily trips they make. However, streets are organised around the centrality of cars and big business. Urban planning has not prioritised walking and local travel, community meetings, or the management of basic needs —taking children to school, caring for the elderly, stocking up on food, etc.— tasks that are more often performed by women.[234] Even parks and school playgrounds devote most of their space to a single central activity, usually ball games, traditionally associated with boys because of gender roles.[235]

In urban areas, energy access is also a gendered issue, as it takes place in the context of gender roles and responsibilities and unequal power relations.[236] Women process, prepare and cook food and are responsible for obtaining drinking water and energy to perform these tasks. They spend more time at home, where they do not always have access to heat, clean water or light. In poor urban settings, women have no choice but to use biomass (including charcoal), liquefied petroleum gas (LPG) and paraffin, as access to other energy sources is often complicated, expensive and illegal.[237] Even when electricity is provided to slum settlements by companies and utilities, the reliability of supply is often questionable, and the poor condition of buildings and appliances makes them energy inefficient.[238] Lack of tenure and identity documents, low incomes and inflexible and unaffordable tariffs are major barriers for the urban poor, especially women.[239]

In effect, women have the smallest share of what might be called the 'environmental cake' in neo-capitalist discourse. Even though the arrangements for governing productive

[232] María José Capellín, in the campaign organised by women's groups and trade unions for a Basque Law on Dependency Care (Bilbao, 13 May 2005), spoke of the BBVA subject: "*Blanco, Burgués, Varón, Adulto* [White, Bourgeois, Male, Adult]". Power and resources are concentrated around him; life itself is defined. Amaia Pérez Orozco takes up this idea, adding the "h" of heterosexual in: *Subversión feminista de la economía* (Traficantes de Sueños 2014).

[233] Wei-Shiuen Ng and Ashley Acker, 'Understanding Urban Travel Behaviour by Gender for Efficient and Equitable Transport Policies' (February 2018) Discussion Paper No. 2018-01, International Transport Forum, Organisation for Economic Co-operation and Development <https://perma.cc/28HR-LLHE> accessed 12 February 2021.

[234] Herrero et al, *La vida en el centro…* (n 150) 49.

[235] Adriana Ciocoletto and Alba González Castellví (coords), *Patios educativos. Guía para la transformación feminista de los espacios educativos* (2019) Col·lectiu Punt 6 and Coeducacció 66 <https://perma.cc/9CYE-DFFG> accessed 12 May 2022.

[236] Mette Mechlenborg and Kirsten Gram-Hanssen, 'Gendered homes in theories of practice: A framework for research in residential energy consumption' (2020) 67 (101538) Energy Research & Social Science 2.

[237] Senay Habtezion, *Gender and energy* (2013), Gender and Climate Change Asia and the Pacific, Policy brief 4, United Nations Development Programme.

[238] Joy Clancy et al, *Gender Perspective on Access to Energy in the EU* (December 2017), Policy Department for Citizens' Rights and Constitutional Affairs.

[239] Danielsen, *Gender equality…* (n 225) 43.

resources and services—especially the most valuable ones— are biased in favour of men, women tend to suffer environmental damage first-hand, largely because of the gendered roles they carry.[240] Human beings experience the world according to the physical, human, social, ecological and livelihood resources available to them, and respond to adversity accordingly. While men lead in resource ownership —through individual or corporate private property— and in the most material and energy-intensive production, it is impoverished people who suffer most from the consequences of the Anthropocene. And poverty is not gender-neutral. Especially since many women work for free.

1.7.2. Women's agency in the face of environmental change

I am firmly convinced that it is worth considering the essentially hierarchical and patriarchal background that underlies the configuration of property. Firstly, because women contribute to the degradation of the planet through their various daily productive, reproductive and consuming activities. Secondly, because, at the same time, they possess complex knowledge and understanding derived from their experiences.[241] This may make it possible to address more effectively the complex dilemmas posed by political and environmental laws. Finally, because they have been found to be the most affected by environmental degradation worldwide.[242] Such a trilemma would seem to call for a radical rethink not only of women's access to property, but of the concept of property itself. It may be that as it is currently configured, we are missing opportunities to address current and forthcoming environmental changes.

In many countries around the world, women are still largely responsible for sustaining the lives of their families and the sick, spending many hours at home. They make the main consumption decisions, they cook, clean, wash, tidy and manage. They are aware of the water and food they handle at home, how to preserve it and use leftovers, and how to repair, mend and reuse clothes. They master healing practices and remedies without drugs and or visits to the doctor, and how to prevent illness. They know techniques to keep the house warm or cool with little energy, ways to grow crops without chemicals in gardens and urban orchards, and how to choose seeds according to water, light and nutritional needs.[243]

Women are also proactive in negotiating and adopting innovative individual and collective strategies to cope with and adapt to the climate emergency. Especially in countries located on the periphery of industrialisation, they can become real agents of transformation and adaptation to change, as they are fully aware of the biodiversity with which they live and know the best way to ensure food security and prevent disease. Women are aware of climate variability, and know strategies for adaptation,

[240] Galiè et al, 'Exploring…' (n 227) 11.

[241] Nhanenge J, *Ecofeminism. Towards Integrating the Concerns of Women, Poor People, and Nature into Development* (University Press of America 2011) 426.

[242] Karen Morrow, 'Ecofeminist approaches to the construction of knowledge and coalition building – offering a way forward for international environmental law and policy', in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks *(eds), Research methods in environmental law* (Edward Elgar Publishing, 2017) 290.

[243] Herrero et al, *La Vida en el Centro…* (n 150) 77-85.

communication, and negotiation on environmental change, despite ownership barriers. They provide proposals for successful adaptation through their knowledge, experience, agency and role in agriculture, food security, livelihoods, income generation, household management and natural resources. From the margins, many are developing adaptation strategies based on the resources that become available to them. In this way, their local social and environmental knowledge allows them to expand technical and planning knowledge and to inform complex agro-ecologies.[244]

It is therefore timely to recognise the relevance of women's knowledge and daily work in global environmental change; i.e. their agency; both their capacity to absorb unknown, novel and unforeseen disturbances, to regenerate after them, and to develop strategies for adapting and transforming environmental resources towards a more desirable socio-ecological state.[245] Promoting women's agency in the face of changing environmental realities can also become an emancipatory path of resistance to the capitalist and patriarchal subjugation they endure, along with other unbalanced power relations that intersect with their condition as women.[246] The threshold derived from an environmental crisis can open the doors to the contestation of other crises. To this end, it is necessary to explore the potential emancipatory elements, both collective and individual, and to outline goals for such social change. Indeed, reclaiming old and rethinking new forms of ownership can enable the creation of spaces that challenge institutional structures and cultural gender barriers.

1.8. Women defending the commons

1.8.1. Women at the forefront

It seems no paradox that where exploitation and violent control by foreign empires prevailed for centuries, certain practices continue to give off a suspicious stench of neo-colonialism.[247] The countries categorised as 'undeveloped' turn out to be the real booty of capitalism. In particular, Latin America, Africa and some parts of Asia still provide

[244] Thomas A. Smucker and Elizabeth Edna Wangui, 'Gendered knowledge and adaptive practices: Differentiation and change in Mwanga District, Tanzania' (2016) 45(S3) Ambio 276.

[245] Fiona Miller et al, 'Resilience and Vulnerability: Complementary or Conflicting Concepts?' (2010) 15 (2) Ecology and Society 11.

[246] This argument about the importance of harnessing women's agency is developed further in: Clara Esteve Jordà, 'Vulnerabilidad y agencia: mujeres frente al cambio ambiental' (2022) 13 (1) Revista de Investigaciones Feministas 189.

[247] From Europe, China, USA, Canada, Japan, South Korea, Australia... See, for instance: N. Craig Smith and Erin McCormick, 'Barrick Gold: A Perfect Storm at Pascua Lama', in Gilbert G. Lenssen and N. Craig Smith (eds), *Managing Sustainable Business. An Executive Education Case and Textbook* (Springer 2018). Aloysius Marcus Newenham-Kahindi, 'A Global Mining Corporation and Local Communities in the Lake Victoria Zone: The Case of Barrick Gold Multinational in Tanzania' (2011) 99 Journal of Business Ethics 253. Ruben Gonzalez-Vicente, 'Mapping Chinese mining investment in Latin America: politics or market?' (2012) 209 The China Quarterly 35. See also: Giuseppe Lo Brutto and Cruz Humberto González Gutiérrez, 'La influencia China en la Cooperación Sur-Sur Latinoamericana, durante la segunda década del Siglo XXI' (2015) Documento de Trabajo cooperación y desarrollo 2015/2, Cátedra de Cooperación Internacional y con Iberoamérica - Universidad de Cantabria <https://perma.cc/9CRX-3XXB> accessed 8 February 2021. Ji-Hyun Seo, 'Neoliberal Extractivism and Rural Resistance: The Anti-Mining Movement in the Peruvian Northern Highlands, Cajamarca (2011-2013)' (DPhil thesis, University of Liverpool 2014).

enough raw materials to sustain global consumption.[248] No one tells these countries that the 'development' they are promised is not for them. That, in reality, it is only about more development for the corporations in the global centre; transnational corporations settling in their lands and taking over their strategic sectors.[249] The outcome is predictable. The plundering of natural resources (oil, gas, water, gold, diamonds, wood, palm oil, etc.)[250] and the expropriation of formerly communal lands only seems to make rich countries richer and poor countries poorer.

The implementation of megaprojects and external economic models is particularly aggressive in Latin America. In these lands, the impact of logging, excavation and construction of extractive infrastructures is enormous. It includes floods, desertification, droughts, the contamination of land and water by chemicals and oil itself, the disappearance of artisanal fisheries and crop wealth or deforestation and the consequent loss of biodiversity and ancestral knowledge.[251] Opencast mega-min, extensive, genetically modified monocultures sprayed with carcinogenic herbicides and energy initiatives generate the construction of infrastructure, housing estates and shopping centres that do not benefit the inhabitants of the hills and forests at all. Land prices rise, but the territory deteriorates as pollution increases. Companies, whose workforce is not local, take advantage of this to bribe community leaders.

In this context, it is no coincidence that women, despite not being the private owners of the land and despite suffering patriarchal violence, are at the forefront of the defence of the commons. In these territories, the sexual division of labour closely links women to the original wealth. Because of their socially constructed role, women provide their communities with the natural resources on which they depend: land, forests, water, seeds and biodiversity. It is the food they need to feed themselves and their families, so the destruction of nature poses a threat directly related to their livelihoods. Worldwide, women are responsible for 70% of water-related tasks.[252] Where water management has historically been communal, they fetch and transport water from wells and use it for cooking, washing and family care. In farming communities, forests and wetlands, they manage much of the livestock, fishing and agriculture, and know the medicinal properties of plants. Likewise, they pass on knowledge within their community and between generations, something essential for their survival.[253]

Due to the development of all these tasks, it is not surprising that women are the first to perceive the symptoms of environmental degradation: pollution, scarcity, drought, and

[248] Andrea Torres Bobadilla in: La Directa, CooperAcció (prod), *Cuidar entre terres. Qui sosté la vida quan les dones migren? (*2019) <https://perma.cc/2F5X-RBHE> accessed 2 February 2021.

[249] Sara García in ibid.

[250] Edith F. Kauffer Michel, 'Pensar el extractivismo en relación con el agua en América Latina: hacia la definición de un fenómeno sociopolítico contemporáneo multiforme' (2018) 16 Sociedad y Ambiente 33.

[251] Luz Myriam in *Cuidar entre terres…* (n 248).

[252] Namratha Rao and Anita Raj, 'Women May Be More Vulnerable To Climate Change But Data Absent' (*IndiaSpend,* 1 July 2019) <https://perma.cc/F5X9-RP7M> accessed 24 January 2023; Stockholm International Water Institute (SIWI) and Alliance for Global Water Adaptation (AGWA), *The gender dimension of water and climate change*, Policy Brief (June 2017).

[253] Federica Ravera et al, 'Gender perspectives in resilience, vulnerability and adaptation to global environmental change' (2016) 45 (S3) Ambio 235.

so on. They know perfectly well the biodiversity they live with, the best way to ensure food security and prevent disease.[254] So when foreign industries invade their communal territories, polluting or appropriating their water and food resources, women are the first to notice any alteration of the natural resources they manage. They might detect a suspicious taste in the water, a strange colour in the food they handle, or a delay in the growth of wild plants useful for treating diseases. Moreover, their role at home as the main caregivers of the family means that they quickly detect any anomaly in the health status of their family members: either if they become ill, have difficulty breathing or if any physical disorder appears. Women are keenly aware that the money generated by these concessions is clearly no substitute for either their natural livelihoods or their well-being.

It is interesting to note that the threat posed to these communities by transnational corporations has, for better or worse, somehow empowered many women. The companies are not alone but are backed by governments, both progressive and neoliberal, which have contributed significantly to this disarticulation of social organisation, to the consolidation of these extractive projects and the patriarchal alliances they have created.[255] This explains to a large extent why, although women still do not have the last word in resource decisions, since they are not the official owners of the land, for many of them it has been an opportunity to speak out and defend community spaces, to raise awareness and to encourage the organisation of struggles against the plundering of common goods. While some women protest on the picket lines, others ensure the maintenance of care for the elderly and children from the rear. Concomitantly, these same women organise themselves in commissions to provide food —grinding corn or cassava, milking cows, preparing condiments, sausages, cheese, rice— to all the frontline defenders of the commons.[256]

To cite just a few movements, Central America has seen the emergence of women's movements against the mega-infrastructures associated with the Puebla Panama Plan, mining exploitation and hydroelectric megaprojects.[257] In Guatemala, the Xinca women's struggle against mining in the Xalapán mountain since 2009 stands out.[258] In Mexico, the neo-Zapatista women's movement has played a leading political role.[259] In Ecuador, indigenous women leaders from the Amazon have been leading protests against oil exploitation since 2013.[260] The women of Cajamarca in Peru are organising, fighting and

[254] Luz Myriam in *Cuidar entre terres*... (n 248).

[255] Colectivo Miradas Críticas..., '(Re)patriarcalización...' (n 190) 67.

[256] Mirtha Vásquez in *Las Damas Azules* (2015), Bérengère Sarrazin (dir), Enginyeria Sense Fronteres (prod) <https://perma.cc/ZM9C-J6JS> accessed 5 February 2021.

[257] Vid. Almudena Cabezas González, 'Mujeres centroamericanas frente al Plan Puebla-Panamá' in Heriberto Cairo Carou, Jaime Antonio Preciado Coronado and Alberto Rocha Valencia (cords) *La construción de una región: México y la geopolítica del Plan Puebla-Pánama* (Los Libros de la Catarata 2007) 231.

[258] Vid. Claudia Dary Fuentes, '¡Nosotras somos las portavoces! Biopolítica y feminismo comunitario frente a la minería en Santa Rosa y Jalapa, Guatemala' (2016) 3 (1) Ciencias Sociales y Humanidades 17.

[259] Vid. Georgina Aimé Tapia González, 'Mujeres de todos los colores de la tierra: En defensa del territorio, los derechos étnicos y de género' (2010) 1 Investigaciones Feministas 139.

[260] Vid. Ivette Vallejo Real and Miriam García-Torres, 'Mujeres indígenas y neo-extractivismo petrolero en la Amazonía centro del Ecuador: Reflexiones sobre ecologías y ontologías políticas en articulación' (2017) 11

defending their mountains and water from the threats and impacts of mining.[261] In Bolivia, the National Network of Women in Defence of Mother Earth, created in 2013, has raised its voice against mining extractivism.[262] In Argentina, some women's organisations are opposing the spraying of genetically modified soybeans with toxic agrochemicals.[263]

Beyond Latin America, in India and the Philippines, women have replanted trees in degraded forests, rallied to chase away loggers, staged blockades against mining operations and dam construction, and led the revolt against water privatisation. In many African cities, they have taken over plots of public land and planted maize, beans, cassava along roadsides, in parks, along railway lines…[264] Credit associations that function as monetary commons are also common in many peripheral countries. These are autonomous banking systems, self-managed by women, which provide cash to individuals or groups who have no access to banks, on the basis of trust alone, as opposed to the microcredit systems promoted by the World Bank, which are based on mutual surveillance and public shaming of women defaulters.[265] In this way, grassroots women's communalism has struggled to preserve and reinvent nature, the commons and customs, forging collective identity and forming a counter-power at home and in the community.

1.8.2. Too bad there was oil on their land

It is still difficult for rural women to fight against enclosure, privatisation and the plundering of the commons. After persuading their male peers, they have to go to the cities to complain and be heard. But there they are looked down upon with contempt and disdain; they are just illiterate peasants, Indians, *cholos*.[266] No one sees them as the guardians of the environment that they really are. The struggles often do not prevent the advance of transnational invasions that upset the balance of local economies and activities, to the point of annihilating the self-sufficient model of communities.[267] The

(1) Brújula; Jaime Giménez, 'Mujeres indígenas contra petroleras chinas en Ecuador: "Estamos dispuestas a morir por nuestra selva"' *elDiario.es* (25 March 2016) <shorturl.at/mFXZ8> accessed 23 February 2021; Soraya Constante, 'Mujeres indígenas se manifiestan en Quito contra la explotación natural' *El País* (Quito, 18 October 2013) <shorturl.at/tvSV6> accessed 27 December 2020.

[261] Vid. Sarai Fariñas Ausina, Jordi Peris Blanes and Alejandra Boni Aristizábal, 'La Agencia de las mujeres en el conflicto minero de Conga como ejercicio para la ampliación de capacidades. Estudio de caso en Cajamarca, Perú' (2014) II Congreso Internacional de Estudios del Desarrollo "Perspectivas alternativas del desarrollo" <shorturl.at/cjAE4> accessed 23 February 2021.

[262] Colectivo Miradas Críticas…, '(Re)patriarcalización…' (n 190) 68.

[263] See, for instance: Marla Torrado, 'Madres en contra de la soja: planeamiento, salud y resistencia en Córdoba, Argentina' in Markus Rauchecker and Jennifer Chan, *Sustentabilidad desde abajo: Luchas desde el género y la etncidad* (Clacso 2017) 169; Estefanía García Forés, 'Madres contra fumigaciones' (2012) 11 Soberanía Alimentaria Biodiversidad y Culturas 33.

[264] Federici, *Re-enchanting the world…* (n 155) 107.

[265] ibid 108.

[266] Ana María in *Las Damas Azules…* (n 256).

[267] Berta Camprubí, 'L'extractivisme de béns comuns es trasllada a les cures' (2019) 480 *Directa* 8 (25 June 2019) <shorturl.at/dehn6> accessed 18 August 2020.

impoverishment of rural life forces thousands of peasant communities to migrate from the countryside to the cities.[268]

This banishment often throws them into the slums of large metropolises, such as Bogotá, Lima or Sao Paulo.[269] From there, women try to maintain their families and community networks by taking care of upper-class urban families. At the same time, they try to maintain food sovereignty, through urban gardens and poultry. But urban population growth generates socio-economic tensions; the volume of people displaced from rural to urban areas is often unmanageable.[270] Moreover, the rupture caused by displacement has such a strong economic and psychological impact, that a Latin American city often becomes the first stop on the final migration, this time transnational, to Europe or North America. Thus, in the former communal lands where there is now a strong presence of multinationals of the global capitalist core, women have stopped taking care of their families to take care of others' families. The same women who were the subjects of the rooting; the ones who used to hold the land in place. So, who comes to take care of the land that women leave behind? When there is contamination, who comes to care for the sick? If the water does not reach the houses, who makes the journey to get it?

Technocapitalism promotes the urban model as the most desirable and is condescending towards rural life. Except for certain practices promoted by civil society, such as urban gardens, there is no planting, harvesting or fishing in cities. Yet it is the cities that benefit most from the countryside. When women leave their rural territories, they not only leave their lives behind but also abandon and orphan the local struggle for common land and ancestral agrarian knowledge. And this has consequences for the countryside as well as the city, for the periphery as well as the global centre. In short, the Anthropocene that oppresses women is curiously the same one that requires their labour to sustain itself. Without it, any attempt at metabolism would be futile.

1.8.3. Preliminary findings and next steps

The historical analysis of the concept of property shows that it has not always been understood in the same way. Indeed, from property as a basis for participation in the polis in antiquity, we moved on to feudalism, which, although deeply hierarchical, ensured certain bonds between the lower classes, and women in particular, through communal land. With the rise of capitalism and modernity, land began to be enclosed and the nuclear family was consolidated, leading to the confinement of women to the private sphere and the devaluation of their reproductive work. The rural population had to move to the emerging cities, gradually forming what would become the proletariat. At this point, communal and social relations broke down and the struggle for the hoarding of resources began, under the banner of possessive individualism and absolute property, which Locke defended amid European absolutism in meritocratic terms based on labour. Meanwhile, the European bourgeoisie began to look for ways to consolidate private property.

[268] Mirtha Vásquez in *Las Damas Azules*... (n 256).

[269] Berta Camprubí, 'L'extractivisme...' (n 267).

[270] Mirtha Vásquez in *Las Damas Azules*... (n 256).

From the French Revolution onwards, the liberal movement will emerge, and the bourgeoisie will fight to maintain its privileges, not exempt from the constant revolutions of the popular classes. With the advance of the capitalist world-economy, from the 20th century onwards, it became clear that certain limits had to be placed on property. These efforts were interrupted by the atrocities of the Second World War. Subsequently, with the establishment of welfare states, a new form of private property was also born, neoliberalism, which continued to generate inequalities and accelerated the hoarding of resources. This resulted in unprecedented environmental degradation, leading to what is now known as the Anthropocene.

As can be seen, the main subjects of reproductive labour today are still women, who have largely depended on access to communal natural resources and have been the most penalised by their privatisation. It is therefore not surprising that they have become seriously involved in their defence.[271] Nonetheless, it is not just a matter of extolling women as a victim-collective, but of highlighting their community practices that have allowed, and still allow, property to be seen through a different lens. A much broader and more inclusive lens. If gender differences in relation to property are framed as a problem of access —as proposed by liberal feminism, i.e., private property for all— the utopia of equality is unlikely to become a reality, as it clashes with the physical limits of the biosphere. Indeed, equal access to private property seems to be a fallacy, an expectation of dubious fulfilment in the context of the Anthropocene. Perhaps it is necessary to go further and consider more radical options: to look for alternative resource relations beyond the current ownership configuration.

A particular layer of this analysis is the legal aspect of property. At the end of this historical inquiry, an important question arises in relation to the challenge posed by the Anthropocene: what is the role of law in institutionalising property and transforming social and resource relations? What is the role of law in regulating the negative effects of property? And finally, how can law be used to achieve more resilient and equitable societies in the context of the current climate emergency? These are the questions I intend to address in the following chapters, which analyse the legal conception of property in the modern era, particularly from a constitutional perspective. As an academic discipline, law has been approached from the logic of the market economy. As a result, much of contemporary legal scholarship is confined to the dominant view of the market as something ahistorical and universal, operating according to laws similar to those of nature. This has had the effect of stifling critical perspectives and institutional imagination in questioning the legal structure of the market.[272]

This requires an analysis of the root of the problem. I have already argued that, in my view, the modern legal conception of property has played a major role in the Anthropocene of private resource grabbing. From the axiological core of the legal systems, i.e., the modern Western constitutions, an idiosyncrasy was articulated around property rights, characterised in particular by rigidity —the vocation of duration and

[271] Federici, *Re-enchanting the world*... (n 155) 107.

[272] Saki Bailey, 'The Common Good in Common Goods. The Decommodification of Fundamental Resources through Law' (PhD Thesis, University of Gothenburg, School of Business, Economics & Law Department of Law 2020) 100 <https://shorturl.at/qtGHW> accessed 18 April 2023.

stability in time— and absolutism —the exclusion of any person from property and the consideration of property as immutable. For this reason, it is crucial to analyse the configuration of property as a fundamental element of modern Western constitutionalism. This is precisely the subject of the next chapter, "*Property in modern constitutionalisms. Navigating the liberal era*".

Chapter 2. Property in modern constitutionalisms. Navigating the liberal era

La propriété, c'est le vol.
[Property is theft].

PIERRE-JOSEPH PROUDHON, 1840[273]

Ihr entsetzt Euch darüber, daß wir das Privateigenthum aufheben wollen. Aber in Eurer bestehenden Gesellschaft ist das Privateigenthum für 9 Zehntel ihrer Mitglieder aufgehoben; es existirt gerade dadurch, daß es für 9 Zehntel nicht existirt. Ihr werft uns also vor, daß wir ein Eigenthum aufheben wollen, welches die Eigenthumslosigkeit der ungeheuren Mehrzahl der Gesellschaft als nothwendige Bedingung voraussetzt. Ihr werft uns mit einem Wort vor, daß wir Euer Eigenthum aufheben wollen. Allerdings das wollen wir.

[You are horrified at our intending to do away with private property. But in your existing society, private property is already done away with for nine-tenths of the population; its existence for the few is solely due to its non-existence in the hands of those nine-tenths. You reproach us, therefore, with intending to do away with a form of property, the necessary condition for whose existence is the non-existence of any property for the immense majority of society. In a word, you reproach us with intending to do away with your property. Precisely so; that is just what we intend]

KARL MARX AND FRIEDRICH ENGELS, 1848[274]

2.1. On the aim of this chapter

Classical Anglo-Saxon legal doctrines and French post-revolutionary, liberal exclusivist notions of property have proved very attractive to those who assume that they can do whatever they want with their property. They can use it as they please, sell it to whom they want, and even exclude others from using it.[275] Such theories nourished the social and political imaginary of the Western world during the 19th and part of the 20th century, and left their mark on contemporary thought. As argued in the previous chapter, social inequalities and the exclusivity of resources are not rooted in the differentiated access to property, but in property itself; in its patriarchal and individualistic configuration, based on relations of power and hierarchy. Perhaps we should question the true origin of this exclusive right to property. For has it not often depended on an

[273] Pierre-Joseph Proudhon, *Qu'est-ce que la propriété? Ou recherches sur le príncipe du droit et du gouvernement.* Premier Mémoire (Édition électronique réalisée avec le traitement de textes Microsoft Word 2001 pour Macintosh, complétée le 25 février 2002) 12, 17, 18. Original publication : 1840.

[274] Karl Marx and Friedrich Engels, *Manifest der Kommunistischen Partei* (February 1848) 13. The literal wording of the quotation, in the German form of the time, has been preserved.

[275] Casassas and Mundó, 'Property as a Fiduciary…' (n 105) 77.

illegitimate origin, through violence, conquest, theft and extortion? Or, even if the laws authorise exclusive ownership, even if the owners respect the laws, shouldn't the reasons for these laws be scrutinised?

Certainly, and despite the combined efforts of international institutions and public international law, the nation-state remains the regulatory reference for property. For centuries, the Western configuration of property rights in national constitutions, as the axiological core of legal systems, has made it possible to maintain a structure suitable for the development of the process of capitalist accumulation. After all, property rights are enforced *in* every single state, *by* every single state. The state is almost always the final arbiter of the regulation of this right, the ultimate "landlord"; it controls the use values of non-human nature and delivers these rents to capital.[276] Although capital metabolism transcends nation-states, the legal framework of property is territorially fixed and modern states remain the political units, the indispensable mediating membranes that sustain capitalism: they manage, produce and deliver living beings and nature for accumulation.[277]

The constitutional right to property, and a host of other related rights, have created the conditions for the unequal exchange of resources. In this chapter, I will begin with a general exploration of how law shapes the concept of property, making it a source of inequality and environmental degradation. I will then go back a few centuries to the liberal era, to review the configuration of property rights in some of the most influential Western constitutions of the liberal revolution, considering this period from the late 18th to the early 20th century. This retrospective analysis aims to trace the origins of this understanding of property as individual and quasi-absolute, and to see how this conception has influenced legal systems up to the present day.

For reasons of time and space, I have made some methodological restrictions. My intuition is that modern European and North American constitutionalisms have been the legal matrix for capitalism, the most pervasive form of resource appropriation. These regimes have contributed most to the colonisation of resources, territories, and bodies. They launched the war on sustainability and justice that has ultimately dragged humanity into the Anthropocene. Within modern European constitutionalism, I have opted for four constitutional traditions: the French, the German, the Italian and the Spanish. As an example of constitutionalism in the common law context, I have chosen the United States.

Although other constitutions might be equally interesting to analyse here, I consider that the modern French and German texts best illustrate the traditional and liberal concept of property within the civil law systems. The French property system enshrined in the Declaration of the Rights of Man and of the Citizen inaugurated the paradigm of property embodied in the civil codes of the 19th century, which in turn structured patriarchal capitalism. The pan-German Constitution of Frankfurt attempted to satisfy the main demands of the liberal and nationalist movements of the *Vormärz* (pre-1848 March Revolution), irrespective of property requirements, and provided a basis for fundamental

[276] Moore, *Anthropocene or Capitalocene…* (n 23) 170.

[277] ibid 182.

rights. However, it eventually differentiated on the grounds of property and established a constitutional monarchy headed by a hereditary emperor (*Kaiser*). Meanwhile, the German Empire became a federation of 25 states under the permanent presidency of Prussia, the largest and most powerful state, under the constitution instigated by Otto von Bismarck.

For its part, the gestation of the Albertine Statute and its extension to the whole of the Kingdom of Italy in the complicated process of Italian unification deserves to be studied. The Albertine Statute marked the awakening of (French-style) Italian liberalism, joining constitutionalism with some delay. In addition, the Spanish constitutions of the 19th century illustrate the notions of property rights at the height of the bourgeoisie's prosperity. As will be seen, none of these texts can be understood without the indispensable reference to the civil codes, a symbol of the liberal era par excellence and, as we shall see, quasi-constitutional texts due to the function they exercised regarding property, in the absence of real property rights configurations in official constitutions.

Finally, I have chosen the United States as the quintessential example of constitutionalism in the common law tradition. I am aware that English constitutionalism is much older than the US constitutional system, and indeed the former has been the fundamental basis of European constitutionalism. However, the fact that the United Kingdom does not have a written constitution is an academic limitation for me, coming as I do from a codified civil law system with a written constitution. The English constitutional law system is unique and complex, so my contribution to this analysis would have been rather insubstantial. Moreover, the United States perfectly illustrates the framing of the property guarantee and the scope of property protection that have led to environmental patriarchy.

Notwithstanding that some of the liberal constitutions timidly acknowledged the capacity of the state to expropriate certain property for reasons of public utility, by means of compensation, much emphasis was placed on the field of inviolability of private property. Clear examples of this include, among others, the Declaration of the Rights of Man and of the Citizen (1789), the Frankfurt Constitution (1849), the Prussian Constitution (1850) and the Albertine Statute (1848). This chapter is devoted to an analysis of the right to property in these and other constitutional texts, as well as in some European civil codes, which will allow me to put the liberal conception of property into context. As we shall see, the 19th century was a very much contentious period between the first constitutions that formally created nation-states and the civil codes of private law, in which property played a major role. The selection of the five nation-states (France, Germany, Italy, Spain and the United States) reflects their interest, their pioneering spirit, their position and responsibility in the imperialist era and their relevance to the present day.

2.2. Private property at the core of Western law

2.2.1. Law as a grammar of property

As I explained in the first chapter, while property was once largely collective and represented a space of socialisation, the capitalist regime has constantly pushed towards privatised property structures. With the emergence of the process of resource

accumulation, private property as the most refined form of ownership became the core element of the institutional structure of capitalism, as it seemed the most suitable technique for appropriation. Indeed, this configuration of property began to drive the mechanisms of exploitation associated with the process of capitalist accumulation, since whoever owned a resource was entitled to whatever value was associated with it. Thus, private property began to promote efficiency by providing the owner of resources with an incentive to maximise their value. The more valuable a resource was, the more commercial power it provided to its owner.

At the same time, capitalism was configured as a form of patriarchy, which implied the subjugation of women in terms of power, and their dispossession from the property to which most of them had had access collectively. The liberal-democratic tradition defined an isolated and independent subject who freely deployed his activity and derived individual benefit from it. Freedom, property, and self-realisation thus became the pillars of his inviolable sphere. Over time, this meant that, in the distribution of resources, the largest piece of the cake was taken by the most powerful and dominant social groups, not jointly, but in constant competition with the other autonomous subjects. This meant that, from the very beginning, capital was by no means evenly distributed within capitalist society.

However, this system has not been forged outside the legal margins. Perhaps, the form in which the structures of domination have been most comfortable has been, precisely, through the discipline of law. Indeed, Western legal culture provided the rules for the distribution and appropriation of nature, bodies and peoples, and the optimal conditions for the accentuation of inequalities.[278] Law has been deeply implicated in the systems that have sustained capitalist social metabolism on a planetary scale, brought about the end of the Holocene, and precipitated the current eco-social crisis.[279] Law is thus an important explanatory variable for current economic, social, and political outcomes, just as it has had a direct impact on the environment.

The exploitation of natural and human resources within the framework of the capitalist world-economy revolves around the possessive individualism promoted by the hegemonic legal doctrine. Indeed, the concept of legal personality "fairly systematically helps to support a quite particular interpretation of the person, and one which has an intimate connection with its companion concept, property."[280] In this way, legal systems are reduced to the recognition of the attributes of a particular man. A model of a man who probably only exists in fiction. The central position of a white heterosexual male appears, wholly and exclusively, as the status of all individuals in the orbit of the legal system. The prevailing legal justice, a legacy of liberal constitutionalism, is conceived as abstract, general, universal and blind to concrete particularities.

[278] Lynne Henderson, 'Book Review. Law's Patriarchy' (1991) 25 (2) Law & Society Review 411 <shorturl.at/bqsu4> accessed 16 November 2020.

[279] Nicholas A. Robinson, 'Fundamental Principles of Law for the Anthropocene?' (2014) 44 (1-2) Environmental Policy and Law 13.

[280] Naffine, 'Who are Law's Persons?...' (n 83) 346.

Yet he is a disembodied human being; he does not suffer. Liberal rights theory dissociates itself from the physical bodies precisely because it addresses legal subjects as abstract personalities. This is what Anna Grear calls 'quasi-disembodiment'.[281] Law's tendency towards abstraction and disembodiment, combined with its ideological elevation of property, makes it more suited to powerful corporations than to vulnerable human beings. Ultimately, disembodiment enables the reification of reality, the definitive hierarchisation.[282] This phenomenon calls into question the fundamental patterns of legal thought and poses a challenge to the construction of constitutional frameworks of governance for the Anthropocene.

This legal configuration of property has made it possible to maintain hierarchies, oppressing a large part of the population and conferring power only to a very specific type of individual. Under the trap of the universal vocation of law, a minority of people, mostly male, have been able to configure and control law as an institution, as a practice and as a source of meaning. Legal texts and practices, inherited from modernity, have contained, produced and reproduced heteropatriarchal capitalism, determining much of its content and form, and normalising and legitimising inequalities, especially gender subordination.[283] By claiming an extraordinary capacity to transform the planet, the law has denied agency to those considered 'nature:' women, racialised and colonised people, because of the ways in which their actions and labour have historically been subsumed under nature.[284]

Today, oppression is still present and takes many forms, often as a legacy of long historical exclusion. However, this dominant collective is neither pure nor simple nor perfectly defined. For instance, there are women who hoard resources and men at the lower echelons of power. And I am aware that I cannot claim that the collective 'women' can be encapsulated as a homogeneous group, as if they all suffered from the same marginal social position in relation to 'men'. In fact, to insist too much on women's universal vulnerability as their general problem would be to deny them agency and ultimately reinforce the differences between women and men as something natural and immutable.[285] As I have already advanced, what should be questionable is not just women's limitations on property rights and access to resources, but the very configuration of property rights, their foundations, and the intrinsically masculine nature of the modern legal subject.[286]

Very often, the problem remains the absence of a legal umbrella that takes into account human vulnerability.[287] In effect, the law is discriminatory because it was never built in

[281] Anna Grear, *Redirecting human rights. Facing the Challenge of Corporate Legal Humanity* (Global Ethics Series, Palgrave MacMillan 2010) 40.

[282] Jaria-Manzano, *La Constitución del…* (n 140) 343.

[283] Phumzile Mlambo-Ngcuka, 'Unequal under the law' (*Sustainable Development Goals, United Nations Association – UK*, 19 June 2019) <https://perma.cc/DU5N-GG3V> accessed 30 October 2020.

[284] Val Plumwood, *Feminism and the Mastery of Nature* (Routledge 1993) 4.

[285] In the line of Seema Arora-Jonsson, 'Virtue and vulnerability: Discourses on women, gender and climate change' (2011) 21 Global Environmental Change 744.

[286] MacKinnon, *Toward a Feminist…* (n 172) 138.

[287] Esteve Jordà, 'Vulnerabilidad y agencia…' (n 246) 190.

the sense of fragility. The hegemonic understanding of the legal subject remains an impoverished one, anchored in an ideology that values freedom over equality and ownership over commonality, and manipulates contractual notions of choice and consent to justify exploitative relationships. Instead of placing the vulnerable subject at the centre of political and social endeavour, a self-sufficient and independent liberal subject is still envisaged as the legal entity.[288] The individual is configured as the primary subject of the group: he is a supposedly rational and autonomous actor.

2.2.2. Beyond the law itself

In most cases, unequal relationships with resources do not stem from laws that explicitly prohibit women from owning property.[289] Customary practices can often be more powerful than formal institutions in maintaining the status quo.[290] Some gender-discriminatory traditions take advantage of the weaknesses of written laws, which may be gender-neutral, but in practice cannot easily protect the interests of women and other vulnerable groups.[291] For example, land has traditionally been inherited from father to son, and women have remained the breadwinners, simply because it has always been so. Today, however, discrimination against women in customary law has less to do with tradition than with the pressures of commercial agriculture and the loss of communal land.[292]

Discrimination in the distribution of resources can also result from gendered education, the sexual division of labour, or the performance of undervalued roles, all of which are supported by legal systems. For instance, laws that allow early marriage, implicitly linked to early pregnancy, prevent many adolescent girls from continuing their education. This means fewer opportunities for skilled employment, to own land, make decisions about environmental assets, or access financial and health services.[293] Thus, health, education, employment and family law are all embedded in the fabric of environmental patriarchy. Another issue related to women's lack of control over land is the impact on their sexuality and reproductive functions. Access to land is often conditioned on the ability to have sons.[294] Some women have more children than they desire in the hope of gaining more secure access to land. In addition, the lack of land tenure makes it difficult for women

[288] 'Definitions for The Vulnerability and the Human Condition Initiative' (*Emory University*, 2020) <https://perma.cc/2D3F-7HQQ> accessed 27 November 2020.

[289] See, for example, the dynamics of women's denial of land rights in Africa in: Silvia Federici, 'Women, Land Struggles, and the Reconstruction of the Commons' (2011) 14 WorkingUSA. The Journal of Labor and Society 45-47.

[290] Lemlem Aregu et al, 'The impact of gender-blindness on social-ecological resilience: The case of a communal pasture in the highlands of Ethiopia' (2016) 45 (S3) Ambio 287.

[291] Lotsmart Fonjong, Irene Fokum Sama-Lang and Lawrence Fon Fombe, 'Implications of Customary Practices on Gender Discrimination in Land Ownership in Cameroon' (2012) 6 (3) Ethics and Social Welfare 260.

[292] Federici, *Re-enchanting the world…* (n 155) 120.

[293] Secretariat of the WHO, *Early marriages, adolescent and young pregnancies* (March 2012), Sixty-fifth World Health Assembly, provisional agenda item 13.4, A65/13, World Health Organisation; Naana Otoo-Oyortey & Sonita Pobi, 'Early marriage and poverty: exploring links and key policy issues' (2003) 11 (2) Gender & Development 44.

[294] Federici, 'Women Land Struggles…' (n 289) 47.

farmers to have some autonomy and reduces their bargaining power in the family, making them more vulnerable to sexual harassment and domestic violence.[295]

Even if it is not explicitly defined in their constitutions and laws, most contemporary societies are patriarchal in practice.[296] Land distribution criteria, while not explicitly gendered, often use male-dominated categories, such as 'permanent agricultural labourers' (while women are concentrated in seasonal and temporary agricultural labour) and 'registered owners' (while women work the land but rarely own it). In addition, many agrarian programmes issue land titles in the name of the head of the household, who is often —*de jure* or *de facto*— the husband/father. Even registration processes can be negatively affected by gender differences in language skills, access to information, contacts and resources, time availability and more general socio-cultural factors.[297] Indirect discrimination arising from legal norms is much more difficult to tackle, as the burden of proof is extremely complex.

The judiciary also plays an enormous role in the Anthropocene tournament, as the rules seem to be predetermined or "contaminated" by male demands and positivist tradition, determining what is allowed and sanctioning what is not.[298] Moreover, women have only recently been involved in the study, design and implementation of the law. Until a few decades ago, their contribution to the development of laws and judicial decisions on property, land tenure, resource management or housing had been limited. In addition, while the number of women law graduates worldwide is relatively high, data shows that their presence on high courts and international tribunals is rather limited.[299] This is

[295] ibid 47.

[296] Henderson, 'Book Review. Law's…' (n 278) 412.

[297] Lorenzo Cotula, *Gender and Law: Women's Rights in Agriculture* (2006), FAO Legislative Study 76, Rev. 1, Food and Agriculture Organization of the United Nations 76.

[298] In this sense, vid. Frances Olsen, 'The Sex of Law' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (3rd edn, Basic Books 1998) 691.

[299] With figures consulted at the beginning of 2023, the Spanish Supreme Court was made up of 12.3% women, without a single female president to date. The German Federal Court, which has only had one female president in its entire history, is composed of 35% women, yet in the Federal Supreme Finance Court and Federal Patent Court, women represent 28% and 27%, respectively. In the UK, women represent 10% of the Supreme Court. In the European Court of Human Rights, they are 31.9%, in the Court of Justice of the European Union, 27.8%, and in the European Court of Justice, only 22.2 %. The US Supreme Court is made up of 44.4% of women. The average percentage in Latin America is 30.4% of women judges in the highest court or Supreme Court. Bolivia (11.1%), Brazil (18.2%) and Colombia (21.7%) stand out for their low percentages. The average number of women judges across all High Courts in India is 3.04, and 11.1% in the Supreme Court. Vid. ¿Cuántas personas trabajan en el Tribunal Supremo y cuál es el porcentaje de mujeres?' (*Poder Judicial España,* 2023) <https://perma.cc/EN28-QUUK>. 'Besetzung der Senate des Bundesgerichtshofs' (*Bundesgerichtshof*, 2023) <https://perma.cc/FG7G-RTPG>. Veronika Gebertshammer, 'Frauen sind nur beim BVerfG in der Mehrheit' (*Beck-Stellenmarkt.de*, 2022), 'Pressemitteilung: 22-18: Bunderichter*innenwahl 2022: Endlich – Chance genutzt!' (*Deutscher Juristinnenbund*, 8 July 2022) <shorturl.at/rATZ9>. Ministry of Justice United Kingdom, *Diversity of the judiciary: Legal professions, new appointments and current post-holders, 2022 statistics* (*Gov.uk,* 2022). 'Gender Statistics Database. European courts: presidents and members' (*European Institute of Gender Equality,* 2022*)* <shorturl.at/hkpw7>. Rebecca D. Gill & Christian Jensen, 'Where are the women? Legal traditions and descriptive representation on the European Court of Justice. Politics, Groups, and Identities' (2020) 8 Politics, Groups, and Identities 122. Nienke Grossman, 'Shattering the Glass Ceiling in International Adjudication' (2016) 56 Va. J. Int'l L. 1, 9. 'Achieving Sex Representative International Court Benches' (2016) 110 Am. J. Int'l L. 82. 'Current Members' (*Supreme Court of the United States,* 2023) <shorturl.at/bhuCR>. Gender Equality Observatory for Latin America and the Caribbean, 'Judicial power: percentage of women judges in the highest court or Supreme Court' (ECLAC - United Nations - Division for

particularly relevant in common law countries, where the influence of high court decisions is very significant.

But where do all these legal trends come from? Has it always been like this? Since when, then? Of course, as I have already suggested, the rise of capitalism and the onset of modernity have had tangible consequences for the development of law, with a direct impact on the legal conceptualisation of property. At this point, I consider it relevant to go into the heart of a concrete stage of capitalism in which these changes were particularly noticeable. A historical and political period in which the legal configuration of property would mark a before and after in terms of social relations.

Indeed, it seems to me appropriate to analyse property in the constitutional tradition of the 18th and 19th centuries, in a highly exalted Western Europe, which had nothing left of medieval customs, as well as in the already independent United States. At that time, the absolute concept of property became the basic element of the liberal system of public law (in the constitutions) and private law (in the civil codes). Individual freedom of disposal over land ownership was enacted, legally permitting its commodification, commercialisation and capitalisation. My intuition is that the liberal constitutionalisms of those centuries, namely European and North American constitutionalism, were a catalyst for the colonisation of resources, territories, peoples, and women. In other words, property in the constitutional tradition became a nuclear element in the institutional structure of capitalism. Without further ado, I will now proceed with this analysis.

2.3. Property in liberal Western constitutionalism

2.3.1. The utopia of freehold as a device for the achievement of freedom

From its inception, the capitalist world economy required a homogeneous and predictable institutional architecture to facilitate commercial exchange and the monetisation of social metabolism. The accumulation of capital depended on the brute force of patriarchy and colonialism, but also on the power of the state, i.e., the concentrated and institutionalised force of society. During this capitalist process, the states, through constitutional law, consolidated the legal system of sources, compared to the a-systemic and pluralist situation of medieval Europe.[300] In this way, especially in states with a continental tradition, law was reduced to legislation —and, in the case of common law, to jurisprudence— which would be the epistemological foundation of legal positivism and the emergence of the rule of law. This process was guided by the Kantian

Gender Affairs, 2021) <shorturl.at/pCM04>. Gauri Kashyap, '11.7% of High Court Judges are Women' (*Supreme Court Observer,* 24 June 2021) <shorturl.at/rNTV5>. Kanu Sarda, 'Supreme Court gets all-woman judge bench, third time in history' *India Today* (1 December 2022) <shorturl.at/uv045>. All sources were consulted on 10 January 2023.

[300] Jaria-Manzano, *La Constitución del…* (n 140) 86.

idea of *Rechtstaat,*[301] which implied the recognition of the property and freedom of individuals (or of some of them).[302]

With the rise of capitalism, the natural political community broke down, and society itself appeared more as a framework outside the individual. Indeed, the individual became the centre of the world, and the legal system did not remain on the sidelines of this development. From the 16th century onwards, law would be increasingly produced as a subjective right, rather than as a general rule that transcended private interests. As a result, there was also a significant change in ecological terms: whereas in the Middle Ages property had been based on what was necessary for the ecological balance of the environment in which the community lived, now there was an atomised and dynamic order based on the division and circulation of property.[303] Any idea of protecting nature was thus sacrificed on the altar of property.

In contrast to pre-modern communal political cultures, such as the Greek polis or the medieval village, possessive individualism became the basis of contractualism. In this scenario, law, or rather rights, reinforced this allegedly abstract legal subject with formality and legitimacy. Accordingly, private interest and the preservation of property held this society together.[304] In these Western communities, liberal individualism ignored the cohesive role of land. It came to be understood as a mere possession, an economic fact, destined to be exploited, rather than as an element of rootedness or cohesion that mobilised community responsibilities.[305] Incongruously, the sphere where human beings coexisted was reduced to a space where individuals developed independently.

If subjectivity became the dominant feature of liberal law, then at the heart of this system, as the matrix for life in society, liberal democracies configured the subjective right to property: a personal right to act. Indeed, the essential link between modernity and individualism was sealed by an immune notion of law that protected property above all else. This annihilated the bond implicit in all kinds of community structures, where the obligation was reciprocal.[306] In the medieval community of goods, inalienable and destined to be bequeathed from generation to generation, the liberal revolutions saw only an intolerable brake on individualism, an attack on freedom and a vestige of feudalism, all of them economic aberrations that had to be eliminated. Social relations were now based on the condition of an individual right to property, and social life was to be mediated by the legitimate exercise of this dominion (*dominium*), which constituted the

[301] Rechtsstaat (lit. "state of law") can be translated into the Anglo-American common law concept of the "rule of law" but differs from it in that it also emphasises what is just (i.e., a concept of moral rightness based on ethics, rationality, law, natural law, religion or justice). It can also be assimilated to the Hispanic concept of "imperio de la ley". A Rechtsstaat is a constitutional state in which the exercise of government power is limited by law. In a Rechtsstaat, the power of the state is limited in order to protect citizens from the arbitrary exercise of authority. Citizens share civil liberties based on law and have recourse to the courts.

[302] Jaria-Manzano, *La Constitución del…* (n 140) 88.

[303] Ost, *La nature hors la loi…* (n 54) 52.

[304] Karl Marx and Frederick Engels, *Sobre la religión* (2nd edn, Sígueme 1979) 123-125.

[305] Luis Martínez Andrade, *Feminismos a la contra. Entre-vistas al Sur Global* (La Voragine 2019) 17.

[306] ibid 17.

essence of law.[307] The individual was seen not as a member of the community, but as an owner: the real and true subject was the man who owned.

European constitutionalism inherited the idea of a legal subject of a male, white, property-owning, acquisitive and largely Eurocentric morphology, as a generic being of an abstract nature, acting upon a world constructed as a juridically territorialised extension. The rest only really appeared in law as 'others' to the central master subject.[308] Thus, in this liberal-capitalist framework, the rest of the living community became property: animals were no more than transactional commodities, and nature appeared as a catalogue of appropriable resources. As noted above, and like slaves and non-whites, virtually all European women, by virtue of their functionalities, were also conceived of as partially human, as another potential property.

In this context, the link between the liberal constitutional tradition and capitalism becomes evident. Capitalism promotes the social prestige of the individual through exclusive ownership. Modern constitutional rights secured the conditions for a small dominant social group to appropriate and exploit resources. This utopian foundation of the liberal constitutional tradition —individual self-determination— triggered a dynamic of the desire for property that drove consumption and the consequent depredation of resources. Under this capitalist expansion, the state remained at the disposal of this owner-subject, looking after his individual rights, i.e., private property and freedom. The modern state, through its property regime, its infrastructures and its scientific and intellectual practices, provided the original wealth and made it accessible.

As the name suggests, 19th-century liberalism was characterised by liberty rights, which were oriented towards the search for spaces of personal autonomy in which political power could not interfere. The aim of liberty rights was precisely to guarantee the individual a sphere free from the state. Such liberalism regarded property as a fundamentally unrestricted right of the master, both vis-à-vis the state and vis-à-vis individual members of the community. Typical rights in liberalism —and today's neoliberalism— are thus: the right to private property, freedom of trade and enterprise, security of the person and similar rights. These rights were conceived as sacrosanct and

[307] Marx and Engels, *Sobre la religión…* (n 304) 94.

[308] Here it is interesting to bring up the feminist theories of otherness. Luce Irigaray stated that women are "*ce sexe qui n'en est pas un* [this sex which is not one]." Within an all-male language, women make up the unrepresentable: the sex that cannot be thought of. Women can never be because they are the element of difference, through which dominance marks itself. In another sense, the definition of "the Other", by Beauvoir, explains the division of society into two large groups: that of men, which is the oppressive group, and that of women, the Others, which is the oppressed group. Thus, in the patriarchal society, the woman appears as the Other before whom man stands as pure transcendence, as the only transcendent being. The whole of the human race has always been considered masculine. In it, the man defines the woman in relation to himself, since she is not considered an autonomous or independent being: *"(…) elle est l'inessentiel en face de l'essentiel. Il est le sujet, il est l'Absolu : elle est l'Autre.* [(…) she is the inessential in front of the essential. He is the subject; he is the Absolute. She is the Other.]" According to Hegel, self-consciousness, and consequently self-determination, can only develop in opposition to life, transcending the mere fact of being immersed in life cycles. Sartre and de Beauvoir call this 'immanence'. De Beauvoir thus posits that man achieves his freedom and transcendence by separating himself from immanence and making the woman his Other. Vid. Irigaray, *Ce sexe qui…* (n 177) 23; Simone de Beauvoir, *Le Deuxième Sexe* (Éditions Gallimard 1949) 16.

prior to the state, and therefore could not be subject to its disposition.[309] In the face of these rights, power was supposed to be constrained. Beneficial or social rights, which required positive action by the state, were conspicuous by their absence.

In this liberal constitutional order, property and liberty once again seemed inseparable. Intellectual support was provided by thinkers such as Hobbes and, above all, Locke, although the constructive role of the first cultivators of iusnaturalism, such as Grotius, should not be forgotten.[310] Liberalism defended the general idea of liberty (pun intended) as a protected realm of individual rights and freedoms, including a set of constitutionally guaranteed exclusive and absolute private property rights. Classical liberal mechanisms were enshrined in monetary constitutions that protected efficient production in a flourishing capitalist system populated by possessive individuals. In this context, the environment was presented as an instrumental legal good to protect and guarantee the well-being of the individual. To this end, the private property dispositive was indeed necessary.

2.3.2. Property as a condition for suffrage

In my view, the most representative mechanism of this particular configuration of property in the 19th century was the right to vote. Its conception as a rational act, based on a certain imbrication and participation in socio-economic structures, meant that, in practice, not everyone was entitled to intervene in political life and thus to decide on its orientations. Apparently, only the great landowners, the military, ecclesiastical, scientific and university aristocracies, as well as industrialists, manufacturers and merchants; in short, men with a certain amount of wealth, had something to say. Only they were supposed to be able to act in full knowledge of the facts and only their vote could be interpreted according to the parameters of political rationality.

Voting and being voted for did not mean representing the general will, but defining the interests of the nation, which curiously coincided with the compatibility of the individual interests of the richest minority. Private property was thus decided in under-represented parliaments. Apparently, if property was a natural right, non-proprietors were naturally incapable of deciding on property issues such as taxes and contributions. So-called census suffrage kept most of the population out of political decision-making for much of the very liberal 19th century, which turned out to be undemocratic, rarely egalitarian and blatantly discriminatory. In short, for centuries suffrage was a marker of political exclusion. It was not a positively constructed right but, on the contrary, the gateway to public exclusion.

It is interesting to mention here, if I may use the wedge, the difference between the struggle for universal suffrage led by the labour movement and the struggle of the feminist suffragettes. Indeed, the exclusion of workers made universal (male) suffrage one of the great demands of the labour movement during the 19th century. This was

[309] Franz Neumann, 'The Social Significance of the Basic Laws in the Weimar Constitution' (1981) 10 (3) *Economy and Society 331.*

[310] Faustino Martínez Martínez, 'Europa y la(s) constitución(es)' (2012) 13 Historia Constitucional 768. Review of: Roberto L. Blanco Valdés, *La construcción de la libertad. Apuntes para una historia del constitucionalismo europeo* (Alianza Editorial 2010).

particularly evident during the 1848 revolution. Thus, while the collective strength of the proletariat increasingly grew through its strong organisations, it would take much longer for women to gain the necessary leverage to fight for the establishment of universal suffrage without gender exclusion.[311]

As I mentioned in the introduction to this chapter, in the following pages, I propose to undertake a constitutional analysis of the right to property as it was conceived in some Western constitutions of the liberal period. As it shall be seen, in such constitutions, the rights of the private owner were understood as an area to be protected against arbitrary interferences, such as those of the legislature. The right to property —or property rights, according to some constitutionalisms— was exclusive and exclusionary, and its limits were external: the rights of the public authorities or other private individuals.

Before I begin the analysis, I must make a rather striking observation. During the era of liberal splendour, constitutional courts as such did not yet exist to interpret the constitutions that were being promulgated. There were therefore no judicial interpretations of the constitutional provisions of the 19th century, such as those that later proved so valuable in the 20th and 21st centuries. In this analysis, therefore, I rely on my perceptions and knowledge as a legal researcher and on the doctrinal interpretations of the time that I have been able to recover (not without some difficulty). In addition, the recent legal doctrine allows for a contextual retrospective that looks back with a certain perspective, with a historical relativism that allows for a better understanding of this liberal era.

2.4. France

2.4.1. Contextualisation

The French Revolution transformed the French property system prior to 1789. The conceptual basis of the *Ancien Régime*, which made no clear distinction between the property regime and the constitutional order, disappeared. The foundations of the new French constitutional order were laid, and modern ways of conceiving political systems and societies emerged. This revolution in property entailed a radical distinction between the political and the social, the state and society, sovereignty and property, the public and the private.[312] During the French Revolution, several movements attempted to provide a constitutional conception of property. To build a new constitutional order based on national sovereignty, liberty and equality, the revolutionaries had to separate power from property and replace land ownership with absolute individual ownership. To do this, they created modern property.[313]

[311] Women's suffrage was not recognised until the 80's of the nineteenth century in some US states, as well as in New Zealand in 1893, in Finland in 1906, in Australia in 1907 and in Norway in 1913. Later, in the 20th century, and after the First World War, women's suffrage was accepted in Germany, the United States and the United Kingdom and its dominions, but not yet in France (1944) or Spain (1931). Strangely enough, women in Switzerland would not achieve it until 1971.

[312] Blaufarb, *The Great…* (n 96) 1.

[313] ibid 5.

On the one hand, republican Jacobinism embraced the natural rights tradition and the associated idea of communal ownership and management of property rights, with common property as the backbone of the programme. Others, such as the Girondins, supported the constitutionalisation of a natural right to private property. For their part, Robespierre and his allies did not deny the existence of private property, but its abuse. He presented the prerogative of ownership as a social institution. Private property was thus an instrument that was subject to the respect and requirements of natural rights, in particular the right to existence.[314]

2.4.2. The Declaration of 1789: Liberté, Égalité et… Propriété

In the end, the legislature opted for the liberal version of property rights, namely individual ownership. Interestingly, the highly political Declaration of the Rights of Man and of the Citizen of 26 August 1789 (hereafter DDHC, for its French acronym), still has constitutional value. Article 2, in its purest form, embodies supposedly self-evident and immutable truths fundamental to the life of the community. It proclaims, among other indispensable elements, liberty and property as natural and imprescriptible rights of 'man' (*de l'homme*): *Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression.* [The aim of any political association is to preserve the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression]. Rights and freedoms are thus surrounded by a sacred aura and an ontological value that is intrinsic to the human being.[315]

Article 17 of the Declaration also states that property is an "inviolable and sacred right of which no one may be deprived". And, although it is not stipulated literally, the constitutional social function of property can be deduced from this Article 17. Indeed, this provision adds the rigorous tagline "*(…) si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité* [(…) unless public necessity, established by law, clearly requires it, and under the condition of a just and prior compensation of the owner.]"

Certainly, private property was limited, in part, by Articles 4 and 5 of the Declaration. The former established two limits to liberty: that it should not harm others, and that it should ensure the enjoyment of the same rights by other members of society. These constraints on liberty were therefore directly applicable to its inseparable ally, property.

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[314] In his speech on property, Robespierre defended the following "truths": *I. La propriété est le droit qu'a chaque citoyen de jouir et de disposer de la portion des biens qui lui est garantie par la loi. II. Le droit de propriété est borné, comme tous les autres, par l'obligation de respecter les droits d'autrui. III. Il ne peut préjudicier ni à la sûreté, ni à la liberté, ni à l'existence, ni à la propriété de nos semblables. IV. Toute possession, tout trafic qui viole ce principe est illicite et immoral.* [I- Property is the right of every citizen to enjoy and dispose of the portion of property guaranteed to him by law. II- The right of property is limited, like all others, by the obligation to respect the rights of others. III- It may not prejudice the security, liberty, existence, or property of our fellow men. IV- Any possession or traffic which violates this principle is illicit and immoral.] Vid. Maximilien Robespierre, 'Déclaration des Droits de l'Homme et du Citoyen, proposée par Maximilien Robespierre, 24 avril 1793, imprimée par ordre de la Convention nationale (24 avril 1793)' in Daniel Fromont (prod) *Discours par Maximilien Robespierre. 17 Avril 1792-27 Juillet 1794* (Project Gutenberg 2009) 66.

[315] Martínez Martínez, 'Europa y la(s) constitución(es)…' (n 310) 768.

Thus, (individual) property was limited by the property of others. These limitations were subject to the reservation of the law, which, according to Article 5, could only prohibit actions that were harmful to society. It is interesting, however, for such an avowedly liberal text, that the term 'society' was used in this formulation rather than 'individual'.

It is worth mentioning that between 1789 and 1792, the Girondins' programme pursued unlimited freedom of negotiation and secured the "sacred right" of private property. This policy was denounced by Robespierre, who considered that it created a new absolute and exclusive right of private property, contrary to the spirit of the Declaration. However, this did not prevent the adoption of a monarchical, censorial and slave-owning constitution in 1791, which once again divided society into active and passive citizens. The DDHC 1789 was placed at the head of the Constitution of 1791, which was intended to guarantee respect for the fundamental principles adopted two years earlier.[316] For the future, it relied on the legislative branch established by the constitutional text to implement the necessary guarantees.[317] The nature and scope of the human rights promoted in 1789 were tempered, universal suffrage was eliminated, equality was declared a formal-legal principle, and the right to exist was subordinated to the right to free trade. From then on, as will be seen, there was a succession of declarations. I will now take a brief look at those that were most relevant in terms of property.

2.4.3. The Declaration of the Year I (1793)

On 24 June 1793, known as Year I, the Montagnard Convention adopted a new constitution with a democratic and decentralised republican regime. It consisted of a declaration supplementing and replacing that of 1789 and a constitutional law on the organisation of the public authorities. However, it was never implemented, because on 10 October of that year, the Convention decreed that the government would be revolutionary until peace was restored. The Constitution of 1793 was established by the Decree of 21 September 1792.[318] Its second point declared the safeguarding of persons and property under the protection of the nation. Moreover, the new declaration did not change Article 2, which continued to include property as a natural and imprescriptible right. Article 8, on the other hand, did add that security was the protection that society afforded to its members for the preservation of their property, in addition to their persons and rights.

The new Declaration was clearly concerned to insist on the importance of property as one of the pillars of the new French nation. Specifically, Article 16 defined the right to property as "*celui qui appartient à tout citoyen de jouir et de disposer à son gré de ses biens, de ses revenus, du fruit de son travail et de son industrie* [that which belongs to every citizen to enjoy and dispose of his property, his income, the fruits of his labour and his industry as he pleases]" and Article 17 added that "*Nul genre de travail, de culture, de commerce, ne peut être interdit à l'industrie des citoyens* [No kind of work, culture,

[316] Constitution de 1791 - 3 et 4 septembre 1791. Conseil Constitutionnel.

[317] Jean Morange, *La Déclaration des Droits de l'Homme et du Citoyen* (Presses Universitaires de France 2002) 87.

[318] Constitution de l'An I - Première République - 24 juin 1793. Conseil Constitutionnel.

trade, can be forbidden to the industry of citizens]", but instead, Article 18 decreed that "*sa personne n'est pas une propriété aliénable* [the person is not alienable property]. It was thus clear that the concept of property remained that of an almost absolute right. One based on the maxim of individual freedom. Only Article 19, an imitation of the former Article 17, mentioned the compulsory fair compensation of the owner in the case of expropriation for a legally established public necessity.

As for the Constitutional Act that accompanied the Constitution, which never came into force, it is interesting to mention its Article 4. To exercise citizenship rights, the requirements were to be male, born and resident in France, and 21 years old. Foreigners had to have lived and worked in France for at least one year, to have acquired property, be married to a French woman (not to mention homosexuality or extramarital relations), adopt a child or care for an elderly person. In other words, if one was not useful to French society, either economically or socially, he was not a citizen. It should be added that Article 122 of the Constitutional Act did, of course, include property among the rights guaranteed.

2.4.4. The constitutional impasse (1793-1814)

The Declaration of 1795, or Year III,[319] does no more than replicate the Declaration of two years earlier as far as property is concerned, although it does separate rights from duties. Regarding the latter, Article 8 of the Declaration of 1795 understands that the cultivation of the land, production, the means of work and the social order rest on the maintenance of the land. A great responsibility is thus attributed to property, and the need to exploit it is already latent. As far as the Constitution itself is concerned, Article 357 recognises the right to intellectual property, while Article 358 again reiterates the need for just compensation in the event of expropriation. Furthermore, although universal male suffrage was first introduced in 1792, it was replaced by indirect census suffrage in 1795. Thus, Article 35 of the 1795 Constitution stipulated as a requirement for voting to be the owner, usufructuary or tenant of a property equivalent to a specific rent for each ownership regime and municipality.

For its part, the Proclamation of the Consuls of the Republic of 24 Frimaire Year VIII (15 December 1799),[320] makes no mention of property other than in the preamble, where it is still enshrined as a sacred right. Suffice it to add that, on the other hand, universal (male) suffrage was reinstated at this time. It is also curious that, in 1804, during the approval of the Civil Code, the Imperial Constitution of the year XII entered into force.[321] However, it went completely unnoticed, as the most important legal book in Europe in the 19th century had just been promulgated. In any case, this Constitution made no mention of property.

[319] Constitution de l'An III - Directoire - 5 fructidor An III - 22 août 1795.

[320] Constitution de l'An VIII - Consulat - 22 frimaire An VIII - 13 décembre 1799.

[321] Constitution de l'An XII - Empire - 28 floréal An XII - 18 mai 1804.

2.4.5. The First and Second French Restorations (1814-1830)

On 4 June 1814, during the so-called Second Restoration, King Louis XVIII granted a charter to the French state.[322] Although it had constitutional force, this document was not a constitution as such, but a *Charte octroyée* granted by the King. It was in force during the First and Second French Restorations. Of course, this charter also recognised property as "inviolable". But it also explicitly added that national properties were also subject to this characteristic (Art. 9), something typical of a monarchical constitutional text. Not many years had passed since the storming of the Bastille and the Tuileries Palace. Given that national property was now in the hands of a king, it is not surprising that Article 10 reserved the right of the state to demand the sacrifice of property "for reasons of public interest", albeit with compensation. The Charter of 1814 established a very restrictive system: the census of voters was set at 300 francs for direct contributions and 1,000 francs for those eligible to vote.[323]

Furthermore, the Additional Act to the Constitutions of the Empire of 22 April 1815, drafted by Benjamin Constant at the request of Napoleon I, slightly improved the Charter of 1814.[324] Also known as the *Benjamine,* its Article 33 stipulated that industry, manufacturing and commercial property would have a special representation. Article 63 also guaranteed the "inviolability" of all property legally acquired or possessed, as well as credits against the state. Later, after the riots of 27, 28 and 29 July 1830, known as the *Trois Glorieuses* (Three Glorious Days), a new charter established the July Monarchy.[325] Articles 8 and 9 of this 1830 Charter are a copy of the aforementioned Articles 9 and 10 of the 1914 Charter, so no substantive changes were made.

The Charter of 1830 promised a reform of the suffrage. As a result of the restricted census of 1814, there were in fact 92,500 electors and 15,000 eligible to vote in 1830.[326] Republicans and Bonapartists wanted to return to the Constitution of 1791, or even to that of Year III, as an alternative to universal suffrage, which had few supporters. Some legitimists were also in favour of extending suffrage, considering that the wealthy peasantry had remained loyal to the legitimate monarchy. Finally, the electoral law of 19 April 1831 contended to reduce the electoral roll to 200 francs for direct contributors and 500 francs for those eligible to vote.[327] This excluded non-landowners and small and medium-sized landowners. And women, of course.

2.4.6. The II Republic (1848)

In February 1848, a Parisian minority overthrew King Louis-Philippe I and the Second French Republic was proclaimed on the 24th of that month and, after a series of events,

[322] Charte constitutionnelle du 4 juin 1814.

[323] Paul Meuriot, 'La population et les lois électorales en France de 1789 à nos jours' (1916) 57 Journal de la société statistique de Paris 222.

[324] Acte additionnel aux Constitutions de l'Empire - 22 avril 1815. Conseil Constitutionnel.

[325] Charte de 1830, monarchie de Juillet - 14 août 1830.

[326] Meuriot, 'La population…' (n 323) 226.

[327] Loi électorale du 19 avril 1831. Vid. Antoine-Élysée Cherbuliez, *Études sur la loi électorale du 19 avril 1831, et sur les réformes dont elle serait susceptible* (A. Royer 1840).

also on 4 May 1848. Universal male suffrage, introduced on 5 March of that year, had given a great deal of political weight to the rural population (three-quarters of the electorate) and allowed the creation of a fairly diverse assembly. Republican propaganda had had little effect on them, and they were rather under the economic influence of the notables, in regions with strong sharecropping, and under the ideological direction of the Concordat Catholic clergy, who were subordinate to their bishops. On 4 November 1848, the National Assembly approved a new constitution.[328] Point IV of the preamble of this constitution named, as principles of the nation, rights as freedom, work, family and property, among others. Furthermore, point VIII explicitly stated that the Republic must protect the citizen (*le citoyen*) in 'his' property.

In line with previous constitutions, Article 11, which recognises property as inviolable, requires the state to compensate the owner justly if a property has to be sacrificed for a legally established public purpose. More interestingly, Article 10 abolishes titles of nobility and all distinctions of birth, class or caste. Equally relevant is Article 12, which states that confiscation of property shall never be restored. Moreover, Article 15 adds that every tax "*est établi pour l'utilité commune. Chacun y contribue en proportion de ses facultés et de sa fortune* [is established for the common good. Each person contributes to it in proportion to his abilities and his wealth]". It was therefore a much more socialist, protective and welfare constitution than its predecessors.

As I have advanced, it was not until the Constitution of 1848 that universal male suffrage was definitively established. Article 25 reads: "*Sont électeurs, sans condition de cens, tous les Français âgés de vingt et un ans, et jouissant de leurs droits civils et politiques*. [All French citizens aged twenty-one years and enjoying their civil and political rights shall be eligible to vote, without any condition of census]". Article 26 granted the right to be elected to any voter over the age of 25. The electorate grew from 246,000 to over 9 million.[329] The law of 31 May 1850,[330] also known as the *Loi des Burgraves*,[331] further restricted the electorate by imposing a three-year residence requirement on voters, which excluded a large and unstable population of village artisans and industrial or agricultural workers who had to move frequently.

Moreover, since the length of residence was mainly attested by registration in the personal contribution register, the poorest were relegated to the role of passive citizens by means of a fiscal discrimination very similar to census suffrage. The law also prolonged the repression of the revolutionary movement by excluding from suffrage those convicted of rebellion or disturbance of public order and the vagrants. The new law

[328] Constitution de 1848, IIe République.

[329] 'Quelles sont les étapes de la conquête du droit de vote ?' (*Vie publique*, 20 October 2022) <t.ly/7Ohl> accessed 9 march 2023.

[330] Loi du 31 mai 1850 modifiant la loi électorale de 1849.

[331] As a curiosity, the satirical press gave its parliamentary leaders the pejorative nickname of 'Burgraves', after the name of a play by Victor Hugo.

amputated 30% of the electorate,[332] i.e., some 2.9 million voters.[333] This law was repealed after the coup d'état of 2 December 1851 by Louis Napoleon Bonaparte. From then on, universal male suffrage was no longer in question.

Nonetheless, it would still take almost a century before women could vote. Speaking for the opponents of women's suffrage, Esmein declared that "*le suffrage politique des femmes n'est ni conforme aux principes, ni utile à la société* [political suffrage for women is neither principled nor useful to society]".[334] The idea that women should remain confined to the private sphere and that political participation was incompatible with their social role remained strong: "*le progrès véritable consisterait, non pas à attirer les femmes vers la vie politique ou vers les professions jusqu'ici réservées aux homes, mais à leur rendre le mariage plus facile (...). Ainsi, l'exclusion des femmes (...) dérive d'une loi naturelle, de la fondamentale division du travail entre les deux sexes (...)* [true progress would consist, not in attracting women to political life or to professions hitherto reserved for men, but in making marriage easier (...). Thus, the exclusion of women (...) derives from a natural law, from the fundamental division of labour between the two sexes (...)]."[335]

2.4.7. The Second Empire (1855)

After the coup d'état of 2 December 1851, Louis-Napoléon Bonaparte (Napoleon Bonaparte's nephew) put an end to the Second French Republic and with extreme celerity promulgated the Constitution of the Second Empire on 14 January 1852.[336] This text rejected the *Ancien Régime* and distanced itself from the censorious monarchies of the 19th century in favour of popular sovereignty. It also praised the French Revolution and reaffirmed the principles proclaimed in the Declaration of 1789. To govern, Louis-Napoléon believed that democracy should be embodied in a man who held personal power, maintained by universal male suffrage through plebiscites.

It should be noted, however, that neither the *Corps législatif* nor the *Sénat*, the two parliamentary chambers, had much power, as they were closely controlled by the Emperor. Although the *Corps législatif* was elected by direct universal male suffrage (Art. 36), it is no coincidence that the division of electoral districts and the system of official nominations favoured the supporters of the Empire, nor that the "president" was appointed by the government. On the other hand, the *Sénat* was composed of cardinals, marshals and admirals, as well as members appointed by the Emperor (Art. 20).

[332] M. Jacques Larché, *Rapport fait au nom de la Commission des lois constitutionnelles, de législation, du suffrage universel, du règlement et d'administration générale sur le projet de loi, adopté par l'Assemblée Nationale après déclaration d'urgence, modifiant le code électoral et relative à l'élection des députés*. N° 301 Sénat Seconde Session Ordinaire de 1984-1985 Annexe au Procès-Verbal de la Séance du 22 Mai 1985.

[333] Alain Garrigou, *Histoire sociale du suffrage universel en France: 1848-2000* (Seuil 2002) 124.

[334] Adhémar Esmein, *Éléments de droit constitutionnel français et comparé* (6th edn, Librairie du Recueil Sirey, Léon Tenin 1914) 352-353.

[335] ibid 353.

[336] Constitution de 1852, Second Empire - 14 janvier 1852. Conseil Constitutionnel.

Although the legislative body could not propose or amend laws until 1869, the Senate could be consulted to amend the Constitution.

Regarding the institution of property, the Constitution provided that the Senate could oppose the promulgation of laws that violated on the inviolability of property (Art. 26). It must be stressed, however, that this was an imperial system. Although it was not a "pure" monarchy, the regime protected the property of the Crown (Art. 6), which was not subject to taxation. Nevertheless, like private property, it had to be registered and subject to municipal and departmental charges (Art. 12) and was subject to the civil rules of the Napoleonic Code (Art. 15), with the exception of the Emperor's private property in terms of disposal (Art. 19).

To conclude the analysis of property in the French constitutions of the 19th century, and before moving on to the analysis of property in the Napoleonic Code, it should be added by way of information that between February and June 1875, three laws of a constitutional nature were adopted by the National Assembly, which established the Third Republic. However, these laws were merely organisational in nature, as they did not contain a declaration of rights. Consequently, there seems to be nothing remarkable about the concept of property within this constitutional block of 1875.

2.4.8. The Napoleonic Code of 1804

Despite the aspirations of "*Liberté, Égalité, Fraternité*" proclaimed during the French Revolution, by the end of the 18th century property remained exclusive and exclusionary. The political instability of the post-revolutionary period and the continuing disagreements over the shape of the new French political order did little to consolidate a lasting constitution. On the contrary, the 19th century was characterised by constant constitutional change and the constant promulgation of new constitutions. Despite their legal morphology, it could be said that they were in fact laws disguised as constitutions.

Rather, it was the discipline of unlimited property rights embodied in the Napoleonic *Code Civil* of 1804 that actually defined property.[337] Article 544 recognised this exclusivist notion by stating that "*La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements* [Property is the right to enjoy and dispose of things in the most absolute manner, provided that it is not used in a manner prohibited by laws and regulations]." This absolute character, which would continue to exert a profound influence on modern libertarianism, denotes the persistence of the natural right of ownership inherent in the Roman tradition.

The concept of property enshrined in the French Civil Code is eminently subjective, allowing for the development of the economic liberalism postulated by the bourgeois sectors that took control of France during the Revolution. The close temporal proximity between the Declaration of Rights of 1789 and the Civil Codification of 1804 accentuated the highly individualistic nature of the right to property. Furthermore, it encouraged the legislature to refrain from imposing any restrictions that might call into question the

[337] Code Civil des Français 1804. Légifrance.

absolute nature of the subjective right.[338] Thus, the Code formally established the right to property as absolute, exclusive and perpetual.[339]

In the transition from the DDHC to the Code, the proclamation of property as a natural right lost its political character and took on a more strictly technical formulation, emphasising the absolute nature of the right and the exceptional limitations that could be imposed on it.[340] It seems that the aim was to break with the tradition of the *Ancien Régime*, in which the lord had the right of eminent domain over property and the vassal had only the right of possession or useful dominion over it. In addition to freeing property from eminent domain, the Code aimed to free the individual's right to property from the burdens of family ties and other possible forms of dismemberment of the right, such as, for example, servitude over the free enjoyment of the property.[341]

This preference for liberty and the rejection of any arbitrary intervention by the state strengthened the guarantees of the expropriation procedure and made legitimate recourse to the expropriation of private property an exception. The Napoleonic Code thus clarified the scope of the guarantee of property and centralised it within the civil law system. The right to property would no longer be the mere regulation of a legal institution like any other. From then on, ownership would be the measure of each individual's situation, to which attention would have to be paid in order to define any other situation. Property was to be a form of appropriation characterised by a tendency towards unlimited power on the part of the owner. The structure of the absolute right in rem was emphasised, purified of coercive elements.

Collective ownership and the division between the actual possessor-occupier and the lord who had originally granted the land were thus ruled out, and only individual appropriation was given legal significance. After such a mixture of private and communal relations in the Middle Ages, the Code restored private autonomy and plenitude, as well as freedom of economic initiative in agriculture, industry and commerce. In short, the Code was intended to replace the medieval legal system, characterised by a plurality of hierarchical sources, with a single legal text containing a unified normative complex, systematically ordered, simplified and subdivided into articles, in favour of legal certainty.[342]

Nonetheless, it cannot be denied that some of the pre-19th century practices continued to coexist with the new French rules. For the actual legal application of property law was much more complex and plural than the unitary legal imaginary might evoke. In fact, the effective triumph of absolute ownership was challenged by legal practice and

[338] Anna Moscarini, *Proprietà privata e tradizioni costituzionali comuni* (Giuffrè Editore 2006) 54.

[339] Casassas and Mundó, 'Property as a Fiduciary…' (n 105) 80.

[340] Jean-Philippe Lévy, *Histoire de la propriété* (Presses universitaires de France, 1972) 92.

[341] With the exclusion of those easements justified by the requirements of the proper exploitation of the property.

[342] Guido Astuti, *Il Code Napoleón in Italia e la sua influenza sui codici degli Stati italiani successori* (G. Giappichelli 2015) 4.

jurisprudence throughout the 19th century.[343] Article 544 itself, by defining ownership as the "most absolute" form of possessing things, in fact betrayed its relativistic character: there are then other forms of possessing things. Indeed, there is a doctrine which argues that the superlative form used in Article 544 was intended to clearly distinguish between dominion and usufruct,[344] in order to make it impossible to restore the feudal forms of ownership covered by this figure.[345]

In fact, the extremely liberal content of Article 544 of the Civil Code was developed during the 19th century, the century of liberalism, as a result of an ideology that was not intended by the fathers of the Code. Thus, the definition of property as an exclusive, absolute and perpetual right, closely linked to the individual as a subject and based on personal freedom, would have come from the most representative interpreters of the Code, who would have filled it with a content alien to its original pretensions.[346] Thus, for Aubry and Rau,

> *[l]a propriété, dans le sens propre de ce mot (dominium), exprime l'idée du pouvoir juridique le plus complet d'une personne sur une chose, et peut se définir, le droit en vertu duquel une chose se trouve soumise, d'une manière absolue et exclusive, à la volonté et à l'action d'une personne.*
>
> *Telle est l'idée que les rédacteurs du Code paraissent avoir voulu exprimer dans l'art. 544. (…) cet article fait plutôt, par voie d'énumération des principaux attributs de la propriété, une description de ce droit, qu'il n'en donne une véritable définition*.[347]

And Demolombe would even affirm: "*Droit absolu, la propriété confère au maître sur sa chose un pouvoir souverain, un despotisme complet* [As an absolute right, ownership gives the master a sovereign power over his property, a complete despotism]".[348] In any case, the well-known bureaucratic tendency so characteristic of the French administration necessarily implied that the state would interfere in the sphere of private autonomy and, in particular, in the exercise of the right to property.[349] For example, the

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[343] Rosa Congost, 'Rights and Historical Analysis: What Rights? What History?' (2003) 181 Past & Present 88.

[344] The usufructuary is only entitled to use the thing in accordance with its purpose, and is only entitled to enjoy it, i.e., to collect the fruits, and is not entitled to the extraordinary products, as in freehold ownership.

[345] Vid. Alfons Bürge, *Das französische Privatrecht im 19. Jahrhundert: zwischen Tradition und Pandektenwissenschaft, Liberalismus und Etatismus* (Vittorio Klostermann 1991).

[346] Enrique Brahm García, 'El concepto de propiedad en el Código Napoleónico. Una nueva interpretación de su artículo 544 en la historiografía jurídica alemana' (1996) 23 (1) Revista Chilena de Derecho 10.

[347] (transl.) "[o]wnership, in the proper sense of the word (*dominium*), expresses the idea of the most complete legal power of a person over a thing, and can be defined as the right by virtue of which a thing is subject, in an absolute and exclusive manner, to the will and action of a person". This is the idea that the drafters of the Code seem to have wanted to express in article 544 (…) this article describes this right by enumerating the main attributes of ownership rather than giving a true definition. Charles Aubry et al, *Cours de droit civil français, d'après la méthode de Zachariae. Tome II* (Hachette Livre-BnF 2014) 255-256. Original publication: 1897.

[348] Charles Demolombe, *Cours de code Napoléon, Vol. IX*. (Auguste Durand and L. Hachette et C^{ie} 1870) 485.

[349] This was acknowledged by Portalis himself, one of the drafters of the Code. Vid. Jean-Étienne-Marie Portalis, 'Discours préliminaire du premier projet de Code civil (1801). Discours prononcé le 21 janvier 1801 et le Code civil promulgué le 21 mars 1804. Préface de Michel Massenet' (Éditions Confluences 2004) 66.

central administration reserved for itself the power of expropriation by decree, which was incompatible with the idea of an absolute right to property. This is illustrated by the fact that the administration laid down architectural and urban planning criteria that applied, for example, to the facades of certain districts of Paris. Even under Napoleon III, the state was able to define public utility by imperial decree.[350] Thus, liberalism itself suffered from restrictions, especially on the right to property.

2.4.9. On balance

The Revolution of 1789 was a key moment in the redefinition of property, both for the emerging French state and for other nation-states that would be inspired by its liberal ideas. France had to choose between an absolutist and individualist conception of property or a communitarian one. Both positions defended the tradition of natural rights, the inviolability of property and its primacy over the state, but while some believed in the abusability and exclusivity of property, others gave more value to the use of things. Ultimately, the DDHC and subsequent constitutional texts pioneered a liberal version of property rights that emphasised individual property as an imprescriptible, inviolable, and sacred right. Throughout this liberal period, and in turn, some of these constitutions linked active and passive suffrage to the payment of a direct contribution, to the receipt of income or directly to the ownership of property.

The elitist tendency would reappear with the ratification of a new centralist constitution in 1795,[351] paving the way for the Civil Code. Although some exceptions were made, such as the prohibition of harming others, the French Civil Code redirected the liberal aspirations of absolute property a few years later. On the one hand, the Code of 1804 was intended to put an end once and for all to the servitudes inherited from feudalism and to all the vestiges of communal property. On the other hand, it made it clear that the most important thing was to preserve the freedom of the individual, and therefore property had to serve this purpose. The Code's achievement was to impose private law on public law. Ostensibly, it was now a compendium of private law that would determine the course of events, rather than the weak constitutions of the 19th century, which were always adopted with difficulty in conditions of social instability and constant interstate conflict, especially for colonial reasons.

On the other hand, in the course of the 19th century (1793, 1795, 1814, 1830 and 1848), a long series of other texts (constitutions, charters and constitutional laws) were adopted in which property was enshrined as one of the fundamental inviolable constitutional principles. Admittedly, some constitutions already included a certain social function of property, recognising that if a property had to be sacrificed for a legally established public utility, this had to be fairly compensated.[352] But the discrepancies were a constant throughout the long and prolific 19th century. Certainly, from 1793 onwards, the Declarations lost all legal value. Nevertheless, they marked the consolidation of the

[350] Brahm García, 'El concepto de propiedad (n 346) 9.

[351] Bru Laín Escandell, 'Democracia y propiedad en el republicanismo de Thomas Jefferson y Maximilien Robespierre' (PhD thesis, Universitat de Barcelona 2016) 438 <shorturl.at/glpS8> accessed 22 February 2023.

[352] For instance, vid. Article 11 of the 1848 Constitution (I Republic).

Declaration of 1789 as a permanent part of French constitutional law. Proof of this is that the Declaration is still in force today, as an integral part of the French constitutional block.

2.5. Germany

2.5.1. Contextualisation

During feudalism, and until the 19th century, what we know today as Germany consisted of a disjointed and heterogeneous set of land plots, loosely held together in the political league of the so-called Holy Roman Empire of the German Nation.[353] All the land belonged to the king or *Kaiser* (from the word 'Caesar'), who distributed portions of it among his loyal nobles: magnates, secular and ecclesiastical.[354] Nevertheless, it did not figure as a "national monarchy", the idea of a unified nation-state did not yet exist.[355] The king granted land to the upper vassals or lords (*dominus, senior*), who in turn granted land to the lower vassals (*vassus, homo)*. The lower vassals used serfs to cultivate the land.[356] Between levels, loyalty and help during wars were the prices to be paid in exchange for land concessions.[357] Knights could also hold fiefs, although they did not have land grants. The German feudal system was thus a mixture of the legacy of the Roman system of patronage and the clan society of the Germanic kingdoms.

The beginnings of this property regime date back to the 9th century, with the disintegration of the Frankish kingdom and the transition to the reigns of the Ottonian dynasty, which achieved a certain degree of unification of the counts, and reached its maximum medieval expression in the 12th century with the appearance of what is known as the First Serfdom.[358] In the realm of land ownership, there was no essential difference between the branched structures of serfdom and ownership, only a quantitative one. There was still room for all kinds of gradations, especially for different types of restricted and tied ownership. The abstract purity of the Roman dominium was never achieved. On the contrary, German ownership remained always adapted to the changing needs of the environment and the state community. The social element was organically linked to the original German concept of property. In the words of the legal historian Otto von Gierke:

> *Das Eigentum des deutschen Mitelalters (…) ist nicht zum Mißbrauch, sondern zum rechten Gebrauch verliehen. Seinen Inhalt bildet nicht willkürliche, sondern*

[353] Constitutionnet, 'Constitutional history of Germany' [*International Institute for Democracy and Electoral Assistance (IDEA)*, 2016] <t.ly/lboG> accessed 23 February 2023.

[354] Peter G. Stein and Mary Ann Glendon, 'Rise of feudal and monarchial states' *Encyclopedia Britannica* (2023) <t.ly/MyZE9> accessed 9 April 2023.

[355] William W. Hagen, *German History in Modern Times: Four Lives of the Nation* (Cambridge University Press 2012) 23.

[356] Bruno Aguilera-Barchet, *A History of Western Public Law. Between Nation and State* (Springer 2015) 155.

[357] Particularly noteworthy are the large estates in the Kingdom of Prussia, whose landed nobility were known as the Junkers (a medieval word for the young noble "*jung Herr*"). Their subjects performed heavy labour, and in some regions, they were bound to their home villages as serfs (*Leibeigene*). Vid. Hagen, *German History…* (n 355) 46.

[358] James Westfall Thompson, 'German Feudalism' (1923) 28 (3) The American Historial Review 444.

> *rechtlich geordnete Macht. Und es ist nicht reine Befugnis, sondern mit Pflichten gegen die Familie, die Nachbarn und die Allgemeinheit durchsetzt.*[359]

However, the late reception of Roman law by the Germanic peoples took place gradually. The first task was to bring the legal relations found in the flourishing feudal and agrarian system into contact with the sources, i.e., with the ancient texts of the *Corpus Iuris Civilis*. On the one hand, it was unthinkable to abandon those German institutions that were popularly rooted. On the other hand, passages from Roman sources were verified as authentic. A fusion had to be attempted. There was a rejection of the Roman theorem according to which only one could be the *dominus*, while the other had to be content with the real rights over the alien thing. From certain passages of the Corpus was built the doctrine under which there should be a *dominium utile* of the tenant in addition to the *dominium directum* of the feudal lord.[360]

In the 16th century, while there was a reassessment of power relations in what Marx and Engels called the Second Serfdom, absolutism prevailed in other parts of Germany.[361] After Napoleon's defeat in 1815, the German Confederation, consisting of 39 sovereign states, emerged to replace the Holy Roman Empire. However, the German Confederation was more of a treaty community than a political union. The aristocracy in Central and Eastern Europe retained its landed power until the mid-19th century. In fact, the bourgeois March Revolution of 1848, despite its failure, can generally be seen as the end of feudal principles of government in Germany.[362]

2.5.2. The 1848 March Revolution and the Frankfurt Constitution

During the hungry 1840s, the upper echelons of the Germanic states stagnated, unable to agree on the question of federal reform, a concern that had already transcended institutional spheres and become popular.[363] Many had begun to revolt, demanding basic rights and a unified German nation. The lower classes, who had long been suffering from the economic consequences of industrial and agricultural rationalisation, provoked riots

[359] (transl.) "is not conferred for abuse, but for rightful use. Its content is not arbitrary but legally ordered power. And it is not pure authority, but is interspersed with duties towards the family, the neighbours and the general public". Vid. Otto von Gierke, *Die soziale Aufgabe des privatrechts. Vortrag gehalten am 5. April 1889 in der juristichen Gesellschaft zu Wien* (Springer-Verlag Berlin Heidelberg GmbH 1889) in Hedemann, *Sachenrecht…* (n 51) 56.

[360] ibid 60.

[361] Engels and Marx corresponded with each other in December 1882. In the letters in question, Marx and Engels rely on the appearance of a "milder" form of serfdom in Germany in the 15th and 16th centuries, in contrast to the more severe form characteristic of the early feudal period, when the features of actual slavery were present. Vid. Johannes Nichtweiss and Gwyn Seward, 'The Second Serfdom and the So-Called 'Prussian Way': The Development of Capitalism in Eastern German Agricultural Institutions' (1979) 3(1) *Review (Fernand Braudel Center)* 99-100; Sheilagh Ogilvie, 'Communities and the 'Second Serfdom' in Early Modern Bohemia' (2005) 187 Past & Present 69.

[362] Theodore S. Hamerow, 'History and the German Revolution of 1848' (1954) The American Historical Review 60 (1) 29.

[363] Konrad Canis, *Konstruktiv gegen die Revolution. Strategie und Politik der preußischen Regierung 1848 bis 1850/51* (Brill 2022) 2.

in several states.[364] Finally, by the end of the decade, this widespread popular discontent transformed the German Confederation into a full-blown revolution.

It is worth noting that Marx took an active part in the revolution and, as editor-in-chief of the *Neue Rheinische Zeitung*, he documented its rise and fall. Marx unequivocally supported constitutionalism and the struggle for civil and political rights in all German territories. He firmly believed that a constitutional revolution could arm the working class to win political power and help lay the foundations for a more emancipatory political system.[365] Marx's journalistic writings from this period provide valuable insights into the importance of limiting executive power and broadening the scope of democratic politics.[366] What is more, Marx and Engels' famous Communist Manifesto, commissioned by the Communist League, dates from November 1847.[367]

The revolts culminated in March 1848, following the news that the regime of the bourgeois king Louis-Philippe had been overthrown by an insurrection in Paris.[368] The Spring Uprising culminated in the passing of the Imperial Law guaranteeing the Fundamental Rights of the German People by the Frankfurt Parliament. For the first time in German history, human and civil rights were made legally binding. Among other things, it recognised equality before the law, freedom of speech and the abolition of the death penalty, which influenced subsequent German constitutions. The following year, in March 1849, the Parliament adopted the Frankfurt Constitution (or *Paulskirchenverfassung*), which was to become the Constitution of the German Empire.[369] This monarchical charter created a bicameral parliament, consisting of a directly elected *Volkshaus* (House of Commons) and a *Staatenhaus* (House of States) composed of representatives sent by each of the confederated states. For the first time, men were allowed to vote in the Frankfurt Parliament by "universal" suffrage.

Article IX. §164.I of the Frankfurt Constitution declared property inviolable:

> *Das Eigenthum ist unverletzlich. Eine Enteignung kann nur aus Rücksichten des gemeinen Besten, nur auf Grund eines Gesetzes und gegen gerechte Entschädigung Vorgenommen werden. Das geistige Eigenthum soll durch die Reichsgesetzgebung geschützt werden.*[370]

Its recognition as a fundamental right was intended to express a principle repeatedly demanded by the bourgeoisie: private property had to guarantee protection against arbitrary state action. However, §164.II explicitly limited the right to property by

[364] 'The revolutions of 1848–49', *Encyclopedia Britannica* (2023) <t.ly/13cg> accessed 23 February 2023.

[365] Nimer Sultany, 'Chapter 13: Marx and critical constitutional theory' in Paul O'Connell and Umut Özsu (eds), *Research Handbook on Law and Marxism* (Edward Elgar Publishing 2021) 209.

[366] Igor Shoikhedbrod, 'Marx and the Democratic Struggle Over The Constitution in 1848–9' (2022) 43 (2) History of Political Thought 357.

[367] Vid. Marx and Engels, *The Communist Manifesto*... (n 167).

[368] 'The revolutions…' (n 364).

[369] Verfassung des Deutschen Reiches. ["Frankfurter Reichsverfassung" bzw. "Paulskirchen-Verfassung"] [vom 28. März 1849]. Zentrum für Arbeitsbeziehungen und Arbeitsrecht (ZAAR).

[370] (transl.) "Property is inviolable. Expropriation may be affected only for reasons of the common good, only on the basis of a law and against just compensation. Intellectual property shall be protected by imperial legislation".

providing for the possibility of state expropriation, albeit only under three conditions: for reasons of the common good, by virtue of a law, and in return for just compensation.[371] Consequently, the formula of inviolability in the first paragraph should not be read dogmatically; property was given a certain social orientation. The recognition of the function of property as a fundamental right in the Paulskirche Constitution was crucial.[372] It would later inspire the Weimar Constitution of 1919 and the Basic Law of the Federal Republic of Germany in 1949.

The Constitution also provided for the protection of intellectual property by imperial legislation (Art. IX. §164.III, Art. VII. §40). The purpose of this provision was twofold: the individualistic idea of protecting the author of an intellectual work from unauthorised imitation and the idea of promoting industrial development.[373] However, all these legal provisions were qualified by §165, which guaranteed the fundamental right to the free availability of land, as well as the freedom to acquire land.[374] The aim was to overcome class servitude concerning land ownership: to abolish the concentration of land ownership, to reduce the indebtedness of the large estates and to promote increased economic productivity. §168 abolished forever all bonds of submission and servitude, especially agricultural taxes such as the tithe.[375]

2.5.3. The Prussian Constitution of 1850

Despite the Frankfurt Constitution's attempt to create a unified German nation, most German princes refused to relinquish their sovereignty and the Confederation was restored in 1850. The Constitution of 1849 was therefore never actually implemented. In any case, an important aspect of the imperial constitutional regime was the clear primacy of Prussia over the other German states, whose size and population exceeded that of the rest of the Empire combined.[376] The Kingdom of Prussia had initially adopted a Constitution on 5 December 1848. A major revision, often treated as a separate constitution, was adopted on 31 January 1850 under Frederick William IV of Prussia and lasted until Prussia became a republic in 1918. It was less liberal than the federal constitution of the rest of the German Empire, not precisely in a more social sense, but

[371] Interestingly, Baden in 1835 and Bavaria in 1837 had already enacted independent expropriation laws.

[372] Michael Stolleis, *Public Law in Germany, 1800-1914* (Berghahn Books 2001) 71.

[373] Eerke Pannenborg, 'Inhalt und Bedeutung der Grundrechte der Paulskirchenverfassung von 1848/49 für die deutsche Verfassungsentwicklung im 19. und 20. Jahrhundert' (Bachelor + Master Publishing 2013) 13.

[374] *§. 165. Jeder Grundeigenthümer kann seinen Grundbesitz unter Lebenden und von Todes wegen ganz oder theilweise veräußern. Den Einzelstaaten bleibt überlassen, die Durchführung des Grundsatzes der Theilbarkeit alles Grundeigenthums durch Uebergangsgesetze zu vermitteln. Für die todte Hand sind Beschränkungen des Rechts, Liegenschaften zu erwerben und über sie zu verfügen, im Wege der Gesetzgebung aus Gründen des öffentlichen Wohls zulässig*. (transl.) "Every landowner may dispose of his real property inter vivos and upon death, in whole or in part. The implementation of the principle of divisibility of all real property shall be left to the individual states by means of transitional laws. For the dead, restrictions on the right to acquire and dispose of real property are permissible by way of legislation for reasons of the public good".

[375] *§. 166. Jeder Unterthänigkeits- und Hörigkeitsverband hört für immer auf.* (transl.) "Every bond of servitude and bondage ceases forever."

[376] In particular, the population of Prussia made up two-thirds of the total population of the Empire. Vid. Ana Victoria Sánchez Urrutia, 'La fuerza de la Constitución y la Constitución de la fuerza' 37 (1993) Revista Española de Derecho Constitucional 314.

more absolutist. Far from being a democratic state, the king had an absolute veto over legislation.

Under this regime, Article 71 of the Prussian Constitution divided the voters in the lower house (*Landtag*), only men (*Wahlmänner*) over the age of 25, into three constituencies according to the amount of direct state taxes they had to pay. In other words, according to how much each voter owned. Once again, property was at the service of politics. Of course, this three-class electoral system (upper, middle and lower) severely limited the political participation of the lower classes, since each group elected the same number of representatives. The minority of rich men, grouped in the first two classes, thus had the same representation as the great mass of the people. The new regime also included an upper chamber, the House of Lords (*Herrenhaus*), composed of persons in their own right, together with others appointed by the sovereign or chosen by the nobility or the major taxpayers.[377] The *Herrenhaus* was controlled by the *Junkers*, who made up the conservative landed gentry, and the emerging industrialists of the Rhineland and Westphalia.[378]

Article 9 of the Prussian Constitution established that property was inviolable and gave it that peculiarly liberal character, in which the right was to take precedence over the state. Property could only be expropriated or intervened for reasons of public utility, and only subject to the reservation of law and in exchange for a predetermined compensation. The Constitution emphasised that, even in urgent cases, a preliminary valuation and compensation had to be made.[379] Thus, the injured party had to be compulsorily compensated. Article 40 prohibited the creation of fiefdoms and the foundation of family entailments, two legal forms of land tenure. The existing ones became freehold by law. However, these provisions did not apply to the fiefs of the throne (Art. 41), to the royal household and the entailed estates, nor to fiefs outside the state and to estates and entailed estates formerly under the sovereignty of the Reich, insofar as the latter were guaranteed by German federal law.

Article 41 guaranteed that the right to freely dispose of real property was not subject to any restrictions other than those of the general law. The divisibility of real property and the redeemability of real property charges were guaranteed, and restrictions on the right to acquire and dispose of real property through death were permitted. Many of the rights of the former landlords were now abolished without compensation (Article 42) and, as can be seen, these provisions are very similar to the Article 164 of the above-mentioned Frankfurt Constitution:

> *1. die Gerichtsherrlichkeit, die gutsherrliche Polizei und obrigkeitliche Gewalt, sowie die gewissen Grundstücken zustehenden Hoheitsrechte und Privilegien;*

[377] Only male Prussian citizens over 30 years of age who had been resident in their municipality for at least six months and either paid eight thalers in taxes per year or had an income of at least 500 thalers or possessed assets of at least 5000 thalers were eligible to vote.

[378] Hartwin Spenkuch, *Das Preußische Herrenhaus. Adel und Bürgertum in der Ersten Kammer des Landtages 1854-1918* (Droste Verlag 1998) 174.

[379] Gesetz-Sammlung für die königlichen Preußischen Staaten, Verfassungsurkunde für den Preußischen Staat 31. Januar 1850. Julius-Maximilians-Universität Würzburg.

2. die aus diesen Befugnissen, aus der Schutzherrlichkeit, der früheren Erbunterthänigkeit, der früheren Steuer- und Gewerbeverfassung herstammenden Verpflichtungen.[380]

2.5.4. The Bismarck Constitution of 1871

The Austro-Prussian War of 1866 led to the definitive dissolution of the German Confederation and the formation of the North German Confederation under Otto von Bismarck in 1867. Following the defeat of France in the Franco-Prussian War, the German Empire was established in 1871.[381] Interestingly, this did not result in a new constitution, but rather most of the text of the 1867 Constitution of the North German Confederation was retained without significant amendment, which became the Constitution of the German Confederation. It changed the name of the country to *Deutsches Reich* (German Empire) and gave the title of *Kaiser* to the Prussian king, thus perpetuating the supremacy of that kingdom.[382] The Kaiser delegated civilian power to a *Kanzler* (chancellor), a position apparently filled by the main architect of this regime: von Bismarck.

The Constitution of 1871 established the Federal Council or *Bundesrat* (upper house), composed of 58 representatives from each state, and a *Reichstag* (lower house) as the unifying element of the imperial constitution. The nearly 400 members of the Reichstag were elected by universal, secret and direct suffrage by all men over the age of 25. The supposedly "universal" suffrage —as it was only for men— led to fears that the parliament would have too many members from the lower classes. This was countered by stipulating that members of the Reichstag would receive no parliamentary allowance, i.e., no remuneration. As a result, the democratisation of Germany in the 19th century was only partial. While suffrage (always male) was democratised relatively early, the system of government in the strict sense was not democratised until later.[383] The German Empire lasted from 1871 until the German Revolution of 1918, which transformed Germany into a republic.

Although the protection of liberty and property dominated the constitutional movements of the 19th century, the Bismarckian Constitution of 1871 was almost entirely devoid of these two concepts. Citizens appeared only marginally in the constitutional text. The emphasis was on civil equality: Article 3 provided that all German citizens of each federal

[380] (transl.) 1. the sovereignty of the courts, the sovereign police and the sovereign authority, as well as the sovereign rights and privileges to which certain properties are entitled; 2. the obligations arising from these powers, from the former patronage, from the former hereditary subjection and the former tax and trade constitution".

[381] The German Empire, proclaimed in the Hall of Mirrors at Versailles on 18 January 1871, consisted of 26 unities: 4 kingdoms (Prussia, Bavaria, Württemberg and Saxony), 6 grand duchies, 5 duchies, 7 principalities, 3 free cities (Hamburg, Bremen and Lübeck) and the imperial provinces of Alsace and Lorraine.

[382] In addition to the fact that the King of Prussia held imperial dignity, it must be emphasised that Prussia had decisive veto power in the Bundesrat, where, with its 17 members out of 58, it needed only 14 votes, and in the Reichstag, given its population size (two-thirds of the total). Vid. Wolfgang J. Mommsen, 'La constitución del Reich alemán de 1871 como compromiso de poder dilatorio' (1992) 5 Ayer - Revista de Historia Contemporánea 118.

[383] Heinrich August Winkler, '1871: Die Reichsgründung' (*deutschland.de,* 2023) <t.ly/Gpix> accessed 27 February 2023.

state (*Land*) were to be treated as nationals in all other *Länder* and could therefore acquire property. Article 20, on the right to vote, was the only provision that directly affected citizens. And here the electoral guarantees were formulated not as rights of citizens, but as characteristics of the vote.[384] Be that as it may, the Parliament of the German Empire (*Reichstag*) was one of the first popular assemblies to be elected by universal, free, secret and equal suffrage. The principle of electoral equality was more progressive than the censorial or class voting rights still found elsewhere in Europe: all men over the age of 25 were entitled to vote.[385]

Admittedly, this was primarily a question of legal equality. There was still a long way to go before material equality of opportunity for all citizens was recognised. Electoral boundaries were never adjusted after the foundation of the Empire, so fast-growing cities were disadvantaged while rural areas were favoured. Moreover, the logic of run-off elections, favoured candidates and parties from the political centre, who were more likely to be seen as compromise candidates in the run-off than candidates from the wing parties. Finally, it was not uncommon for the election day to be scheduled during working hours, making it difficult for workers to go to the polls.[386]

2.5.5. The Bürgerliches Gesetzbuch

In the context of the German Empire, quite a few rules of private law applied throughout the entire German territory, such as Roman law in the original form of the Imperial Justinian law, as well as Germanic customary law, which was applied in a subsidiary manner.[387] In some regions, however, there were still independent codifications.[388] The similarities were slight, as the content and grounds of validity were different. The rule of law as a whole appeared to be incoherent. After the codification debates of the 19th century, which pitted the liberal Thibaut against the conservative Savigny,[389] in 1871

[384] Verfassung des Deutschen Reichs (1871). (Nr. 628.) Gesetz, betreffend die Verfassung des Deutschen Reichs. Vom 16. April 1871. *Artikel 20. Der Reichstag geht aus allgemeinen und direkten Wahlen mit geheimer Abstimmung hervor. Bis zu der gesetzlichen Regelung, welche im § 5 des Wahlgesetzes vom 31. Mai 1869 (Bundesgesetzblatt 1869 S. 145) vorbehalten ist, werden in Bayern 48, in Württemberg 17, in Baden 14, in Hessen südlich des Main 6 Abgeordnete gewählt, und beträgt demnach die Gesammtzahl der Abgeordneten 382.* (transl.) "The Reichstag is elected by universal and direct election with a secret ballot. Until the legal arrangement reserved in § 5 of the Election Laws of 31 May 1869 (Federal Law Gazette, 1869, p. 145) has been made, there are to be elected: in Bavaria, 48; in Württemberg, 17; in Baden, 14; Hesse, south of the Main, 6 members; the total number of the members consists, therefore, of 382."

[385] The Reichstag elections were organised as majoritarian elections in constituencies. The candidate who obtained an absolute majority of the votes in a constituency was elected. If no candidate won, a run-off election was held. Vid. Christoph Gusy, 'Die Unzeitgemäße Verfassung: die Reichsverfassung von 1871' in Gilbert Krebs and Gérard Schneilin (dirs), *La Naissance du Reich* (Presses Sorbonne Nouvelle 1995) 133.

[386] The turnout started at 50% (1871) and rose to 84.5% (1912). The situation was very different in Prussia, where elections were based on the three-class electoral system. Here the turnout in the third class remained consistently low, falling towards the end of the century to 20%. Vid. ibid 135.

[387] Hedemann, *Sachenrecht*... (n 51) 52.

[388] Such as in Prussia, Jutland, Bavaria or Baden. Moreover, in the areas on the left bank of the Rhine the French Civil Code of 1804 was applied.

[389] In fact, the academic articulation of constitutional law owes much to Friedrich Karl von Savigny the driving force behind the Historical School of Law and the winner of the polemic with Anton Friedrich Justus Thibaut on the need for codification in Germany. Although Thibaut had published a *System des Pandektenrechts* (1803) much earlier, Savigny's *System des heutigen römischen Rechts* (1840) guided the

there was a growing demand for uniform private law legislation. To this end, the legislative powers of the Reich had to be extended by Article 4.13 of the Constitution of the German Empire.

After the foundation of the German Empire, the task was therefore to complete the unification of the private law system along the lines of the French model. With the German Historical School of the 19th century, the post-Savigny generation concentrated its efforts on systematising, organising and studying the institutions of Roman law, as codified in the Digest. This gave rise to a fully consolidated school that has influenced the study of the law down to the present day: the so-called 'jurisprudence of concepts', led by Puchta, which develops legal institutions theoretically, giving them a rational structure and order, from which it arrives at general concepts.[390] From these it is possible to draw the appropriate consequences for the specific case by means of a logical subsumption operation. In this way, the deductive technique can be applied: from a general rule, the concrete case is extracted.

Naturally, property, traditionally assigned to the private sphere, was to play a leading role in this arduous task. There were conflicting views on how property should be regulated in this code. Some thought that private, individualistic property inherited from Roman law had saved humanity from the traditional servile bonds of the Middle Ages. For the great pandectists, such as Windscheid, "*Das Eigentum ist als solches schrankenlos, es ist die Negation der Beschränkung* [Property as such has no limits, it is the negation of limitation]". His younger contemporary, Dernburg, stated that "*Alle Rechte des Individuums, insbesondere auch das Eigentum, sind durch die Rücksicht auf die Gesellschaft beeinflußt und rechtlich gebunden.* [All the rights of the individual, especially property, are influenced and legally bound by consideration for society]."[391]

On the contrary, the Germanistik scholars advocated a "social task of private law" in contrast to the liberal (pandectist) conception of property. See, for example, this extract from von Otto von Gierke:

> *In Wahrheit ist das Eigenthum nicht heiliger als die Freiheit. […] Im Nothfall darf sogar die Rechtsordnung nicht davor zurückscheuen, nicht blos den Mißbrauch des Eigenthumes zu verbieten, sondern auch die Pflicht des rechten Gebrauches in dem sozial gebotenen Umfange zur Rechtspflicht zu stempeln. […] Mit dem Satze 'kein Recht ohne Pflicht' hängt innig unsere germanische Anschauung zusammen, daß jedes Recht eine ihm immanente Schranke hat. Das romanistische System an sich schrankenloser Befugnisse, welche nur von außen her durch entgegenstehende Befugnisse eingeschränkt werden, widerspricht jedem sozialen Rechtsbegriff. […] Damit entfällt die absolutistischen Begriffe des Eigenthums, wie er in unseren Pandektenlehrbüchern sich spreizt und vom deutschen Entwurf in legale Form*

approach to Roman law studied at the university in the absence of codified German law, consolidating the Pandektenwissenschaft as a standard for the scientific study of law. It also determined the orientation of academic jurists towards dogmatic construction based on legal institutions organised in a rational structure. Vid. Friedrich Carl von Savigny, *System des heutigen Römischen Rechts* (Bande 1-9, 1840-1849) and Justus Thibaut, *System des Pandekten-Rechts* (Friedrich Mauke 1834).

[390] Elvia Lucía Flores Ávalos, 'Jurisprudencia de conceptos' in Núria González Martín (coord), *Estudios jurídicos en homenaje a Marta Morineau, Tomo I: Derecho romano. Historia del derecho* (Universidad Nacional Autónoma de México 2006) 221.

[391] (transl.) "All the rights of the individual, especially property, are influenced and legally bound by consideration for society". Vid. Heinrich Dernburg, *Pandekten. Vol 1* (H. W. Müller 1884) 435.

> *gebracht wird: […] Darum ist es auch ein schädlicher Irrthum, daß das Eigenthum überall sich selbst gleich und von der Natur seines Gegenstandes vollkommen unabhängig sei. Vor allem ist das Grundeigenthum seinem Inhalt nach von vornherein beschränkter als das Eigenthum an Fahrniß. Daß ein Stück unseres Planeten einem einzelnen Menschen in derselben Weise eigen sein soll, wie ein Regenschirm oder ein Guldenzettel, ist ein kulturfeindlicher Widersinn. […] Das ist nicht blos unsoziales, das ist antisoziales Recht. Gerade wer dem Grundeigenthum wohl will, kann nicht scharf genug betonen, daß dasselbe keine den Sachkörper absorbierende Alleinherrschaft, sondern in letzter Instanz nichts als ein begrenztes Nutzungsrecht an einem Theile des nationalen Gebietes ist.* [392]

The Viennese professor Anton Menger, for his part, criticised the formalism and inviolability with which the constitutions of the time approached the institution and described the Bürgerliches Gesetzbuch draft as an instrument of the bourgeoisie for the exploitation of the "propertyless classes":

> *Da ich nun zu den wenigen deutschen Juristen gehöre, welche auf die Gebiete des Rechts das Interesse der besitzlosen Volksklassen vertreten, so habe ich es für meine Pflicht gehalten, in dieser wichtigen Nationalangelegenheit die Stimme der Enterbten zu führen. (…) der Entwurf eines bürgerlichen Gesetzbuches für das deutsche Reich die Besitzenden einseitig begünstigt und die besitzlosen Volksklassen selbst dort zurücksetzt, wo eine solche Zurücksetzung durch die Grundgedanken unserer Privatrechtsordnung nicht geboten ist. Aber ist das jemals anders gewesen? Hat das römische und das deutsche Recht, auf welchem uns er heutiges bürgerliches Recht beruht, die ärmeren Volksschichten nicht noch schroffer und einseitiger behandelt? Welche Veränderungen in den Machtverhältnissen der beiden grossen Volkskreise sind eingetreten, um eine so eingreifende Umbildung uralter Zustände zu rechtfertigen, wie sie in diesen Blättern gefordert wird?*[393]

Be that as it may, the *Bürgerliches Gesetzbuch* (hereinafter referred to as BGB), adopted and implemented in 1896, came into force on 1 January 1900. Impregnated with the classical liberal ideology of the time, it promoted private autonomy and property. Its

[392] (transl.) "In truth, property is not more sacred than freedom. […] In cases of emergency, even the legal system must not shy away from not only prohibiting the abuse of property, but also from stamping the duty of rightful use to the socially required extent as a legal duty. Our Germanic view that every right has an immanent limit is intimately connected with the sentence 'no right without duty'. The Romanist system of intrinsically unrestricted powers, which are only limited from the outside by opposing powers, contradicts every social concept of law. With this, the absolutist concept of property, as it spreads in our pandect textbooks and is brought into legal form by the German draft, no longer applies […] Therefore it is also a harmful error that property is everywhere equal to itself and completely independent of the nature of its object. […] That a piece of our planet should be owned by a single person in the same way as an umbrella or a florin note is an anti-cultural absurdity. […] This is not merely antisocial, it is an antisocial right. It is precisely those who want to benefit landed property who cannot emphasise strongly enough that it is not an exclusive dominion absorbing the material body, but in the last instance nothing more than a limited right of use of a part of the national territory." Vid. von Gierke, *Die soziale Aufgabe…* (n 359) 17.

[393] (transl.) "Since I am one of the few German jurists who represent the interests of the propertyless classes in the field of law, I have considered it my duty to lead the voice of the disinherited in this important national matter. […] the draft of a civil code for the German Reich unilaterally favours the propertied classes and relegates the propertyless classes even where such relegation is not required by the basic ideas of our private legal system. But has it ever been otherwise? Did not Roman and German law, on which our present civil law is based, treat the poorer classes of the people even more harshly and one-sidedly? What changes have occurred in the power relations of the two great popular circles to justify such an invasive reshaping of age-old conditions as is demanded in these sheets?" Vid. Anton Menger, *Das bürgerliche Recht und die besitzlosen Volksklassen: eine Kritik des des Entwurfs eines bürgerlichen Gesetzbuches für das Deutsche Reich* (Laupp 1890) 2.

third book, which is still in force today, is devoted exclusively to property law. Section 903, for example, describes the ordinary powers at the disposal of the owner of a thing:

> *Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschließen. Der Eigentümer eines Tieres hat bei der Ausübung seiner Befugnisse die besonderen Vorschriften zum Schutz der Tiere zu beachten.*[394]

In reality, the formula used in the BGB seems to say nothing. With its double provision of "to the extent that" (limitation) and "at his discretion" (absolute right of the owner), it reveals a duality that seems to counteract each other. The first draft still provided that the owner could settle the matter "arbitrarily", but this possibility was strongly criticised by some quarters. The second Commission relented, although it stated that the wording "arbitrarily" was correct. However, the term had caused offence inasmuch as it could be understood as a recognition that the owner should also be exempt from all restrictions on the use of the property imposed by the dictates of morality. This offence could be avoided by replacing this expression with "at will". But even this met with resistance.[395] Hence the neutralising provision that eventually resulted.

Although it resembles Article 544 of the French Civil Code, the BGB does not exalt the absolute nature of property, but emphasises the importance of its legal limitations, even before specifying the rights or powers of the owner. Thus, for example: *"Die Befugnis zur Verfügung über ein veräußerliches Recht kann nicht durch Rechtsgeschäft ausgeschlossen oder beschränkt werden* [The power to dispose of an alienable right cannot be excluded or limited by a legal transaction.]" (Sect. 137). All these restrictions are those which follow from section 903, such as the non-prohibition of influence on another's property if the interference is necessary to avoid a present danger (904), the prohibition of excavations affecting the neighbouring plot (909), the obligation to tolerate encroachments (912), etc.

Even if it is true that the BGB dates from 1900 and that the concept of property bears the stamp of possessive individualism, this is not entirely consistent with the German authors of the time who criticised it for this, as seen above. Certain German doctrines and jurisprudence of the 19th century held that absolute private property was inconceivable in society.[396] They pointed out that there were limits to its exercise, since the individual did not live in isolation but in society. Therefore, the interests of the community could not be ignored. Naturally, these interests were translated in the matrimonial property regime into the husband's administration and use of the wife's property.[397] It was only in 1957 that this was replaced by a system of separate

[394] (transl.) "The owner of a thing may, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and exclude others from every influence. The owner of an animal must, when exercising his powers, take into account the special provisions for the protection of animals".

[395] Hedemann, *Sachenrecht…* (n 51) 66.

[396] E.g., the aforementioned von Gierke and Menger.

[397] §.1363 BGB (1896 version). The property of the wife is, through marriage, subject to the management and use of the husband (contributed property). Property acquired by the wife during the marriage also belongs to the contributed property. Vid. Bürgerliches Gesetzbuch. Vom 18. August 1896. (1. Fassung - Reichsgesetzblatt 1896, S. 195, Nr. 21, ausgegeben am 24. 08. 1896, in Kraft seit 01. 01. 1900).

administration and equal participation in the value of acquisitions made during the marriage.

2.5.6. On balance

As can be seen, the Revolution of 1848 was an opportunity for great change in Central Europe, both for the working and peasant classes and for the emerging liberal bourgeoisie. The landed gentry, on the other hand, viewed these uprisings with fear, as the unification of the German kingdoms could mean an extension of rights for everyone. In keeping with the times, the Frankfurt Constitution had liberal tones and thus recognised property as inviolable, a natural right before the state. Although it was intended to put an end to the Germanic feudal system, it was not really implemented. Indeed, the German principalities opposed the unification of the German Empire, and the German Confederation was restored.

Prussia, the dominant kingdom in this confederation, maintained a constitution which, while attempting to put an end to any remaining vestiges of feudal serfdom, set strict limits on expropriation, recognised the property of citizens, but above all protected the monarch's holdings. This property regime, together with the three-class male franchise, perpetuated the existing socio-economic inequalities and made Prussia a quasi-absolutist kingdom. Later, when the German territories were reunited under Bismarck's heavy hand, the Constitution of 1871 preferred not to be explicit about property. It did, however, recognise universal male suffrage, putting Germany a step ahead of other European states that maintained deeply unequal systems de jure and de facto.

The concept of ownership, as it is set out in the BGB, seems to be entirely adapted to the formula of "dominion over the thing". The provisions dealing with property offer little guidance for its interpretation. There is no fixed structure of property according to economic aspects or general human values, nor is there any real definition of what property is. The starting point of the German Civil Code was that the owner's power is conceived as unlimited and all-encompassing. Since it does not enumerate the individual powers deriving from ownership, the latter is practically emptied of content. This has largely forced the courts to provide this content, and through their interpretations, they have gradually dissected the owner's power and revealed his spheres of action at every point in history.

Of course, if property was considered inviolable, it was only for those who owned it. In this whole process of Germanic unification and reunification, women enjoyed neither property rights, nor the right to vote, nor freedom. They were the other, something outside the norm. They could not own anything, and therefore could not vote, be elected or participate in political life. For how could they be political subjects if they did not pay taxes, or rather, if they did not own anything that could be taxed? Once again, freedom, property and the possibility of making decisions that concerned everyone were only a matter for men. *Universal* suffrage was only for a male universe that did not consider women as citizens, as part of the universe.

2.6. Italy

2.6.1. Contextualisation: 1848

Undoubtedly, 1848 was the year of the great European revolutions that changed the mentality of the ruling classes. These revolutionary upheavals convinced the bourgeoisie of the need for political change to contain a situation of widespread discontent.[398] At the time, Italy was nothing more than a group of kingdoms more or less grouped together by a common language and an absolutist monarchical system. On 4 May 1848, King Charles Albert of Sardinia signed the Fundamental Statute of the Savoy Monarchy (immortalised as the *Statuto Albertino*). The preamble defines the Charter as a "*(l)egge fondamentale, perpetua ed irrevocabile della Monarchia* [(p)erpetual and irrevocable fundamental Law of the Monarchy]".[399] As a result of this new constitutional regime, the Electoral Law adopted for the formation of the Sardinian Houses had a patrimonial basis. It required registration (i.e., the payment of an annual tax of 40 lire) and the age of 25 to vote, except for the illiterate.[400] This elitist system excluded women, the propertyless, the uneducated and the young were excluded. However, the census restrictions did not apply to several professional categories, such as university graduates and professors, civil and military servants and judges. This is what has come to be known as 'capacity suffrage'.[401]

2.6.2. The extension of the Albertine Statute

It was not until 1861, with the Law of 17 March, that the *Statuto Albertino* (hereinafter referred as SA) became the fundamental charter for the entire territory of the newly proclaimed Kingdom of Italy, which included the territories of Sardinia, Piedmont, Lombardy, Tuscany, Marche, Umbria and the Kingdom of the Two Sicilies.[402] Contrary to what happened in the rest of Italy, where the constitutional charters were quickly abolished, the Statute was preserved and applied in the Piedmont, which predestined its application and extension to the entire territory of the new Kingdom of Italy.[403] It was not a voted constitution, but a constitution granted (*ottriata*) by the sovereign to his subjects.[404] Albeit with amendments, it remained formally so, even during the Fascist regime, until the entry into force of the Republican Constitution on 1 January 1948.[405] As a flexible constitution, the Albertine Statute could be amended or supplemented by laws

[398] Esther González Hernández, 'El Senado en la Carta Constitucional de Carlos Alberto de Saboya. La parlamentarización de Italia o el declive de su cámara vitalicia' (2003) 0 Revista Electrónica de Derecho Comparado 79.

[399] Statuto fondamentale del regno in data 4 marzo 1848, corredato di Lettere Patenti, Decreti, Proclami, Plebisciti con intestazioni degli atti di governo e formola per la promulgazione delle Leggi.

[400] 'Dal 1848 al 1882' (*Camera dei deputati, Parlamento italiano)* <t.ly/IqX0> accessed 5 March 2023.

[401] Miguel Ángel Ruiz de Azúa, 'La larga marcha hacia la ampliación del derecho de sufragio y el tema de la edad' (2009) 85 Revista de Estudios de Juventud 1.

[402] On the process of Italian unification, vid. for instance: Salvatore Lupo, *L'unificazione italiana: Mezzogiorno, rivoluzione, guerra civile* (Donzelli Editore 2011).

[403] Umberto Allegretti, *Profilo di storia costituzionale italiana. Individualismo e assolutismo nello Stato liberale* (Il Mulino 1989).

[404] Alberto Mario Banti, *L'età contemporanea: dalle rivoluzioni settecentesche all'imperialismo* (Laterza 2009) 182.

[405] Pisarello, *Un largo termidor…* (n 61) 133.

adopted following the ordinary procedure. In fact, a constitutional law has only existed in the Italian legal system since the 1948 Constitution, which is rigid. This made the Statute a rather weak constitutional charter, which allowed the Fascist regime to be established without any major problems.

Between Articles 24 and 32, the Statute recognised a number of fundamental freedoms, above all civil and political rights, which were so characteristic of that liberal period. Thus, for example, individual liberty, the inviolability of the home, private property, freedom of assembly and even equality before the law were enshrined on paper. Of course, this formal recognition was not substantial, but rather a dead letter, since the state delegated legislative power to a Parliament that was only partially elected by the people (through the Chamber of Deputies), and at the mercy of ordinary legislation. In fact, the Statute was silent on the nature of the franchise. Certainly, the deep malaise that already gripped Europe in 1848 reflected in part the unpopularity of the public rule of the censorious bourgeoisie. It therefore seemed neither opportune nor prudent to link the fundamental charter to a largely exclusionary electoral system. But the non-remuneration of parliamentary functions (Article 50 SA) made the logic of a census system clear.[406]

The Statute required deputies to be subjects of the King, to have reached the age of 30 and to enjoy civil and political rights (Article 40 SA). The Electoral Law of 1882 (Zanardelli Law) cautiously extended this right. From then on, men over the age of 21 who had successfully passed the compulsory elementary course —which was public and free under the Coppino Law of 1877— or those who paid an annual direct tax of at least 19.80 lire, could vote.[407] This made it possible to include in the electoral body tenants of rural land who paid an annual rent of at least 500 lire, tenants of a fund with a contract for the distribution of produce or tenants who paid a rent that varied according to the number of inhabitants of the municipality in which they lived. As a result of these changes, the electoral base increased significantly, from 2.2% to 6.9% of the population.[408]

In 1912, Law No. 666 of 30 June extended suffrage to all male citizens over the age of 30, or over the age of 21 if they met the patrimonial requirements of being registered in the census, having completed primary school or having done military service. This brought the electorate to 23.2% of the population,[409] although the question of women's suffrage remained unresolved. Members of the Senate had to be men over the age of 40, appointed for life by the King, and represented the military, feudal, agrarian, bureaucratic, plutocratic and academic aristocracies. In fact, among those eligible were representatives of the clergy, the bureaucracy, the judiciary, the army, ministers, ambassadors, as well as men who had paid three thousand lire in direct taxes for three years on account of their property or industry (Art. 33 SA). In short, only representatives

[406] Giuseppe Maranini, *Historia del poder en Italia, 1848-1967* (Universidad Nacional Autónoma de México 1985) 127.

[407] Vid. Giorgio Candeloro, *Storia dell'Italia Moderna. A lo sviluppo del capitalismo e del movimento operaio* (Volume VI, Feltrinelli 1977).

[408] Luigi Ciaurro, 'Statuto Albertino' in *Dizionario del liberalismo italiano. Vol. 1* (Rubbettino 2011) 1001.

[409] 'Il suffragio universale' (*Camera dei deputati, Parlamento italiano)* <t.ly/IqX0> accessed 5 March 2023.

of power and property could participate in the affairs of the state. The various attempts to reform the upper chamber (in 1886 and 1910) were doomed to failure by the opposition of both the Crown and the senators themselves.[410]

Among the fundamental freedoms proclaimed by the Statute (Arts. 24 to 32) was the right to private property. Article 29 established the inviolability of the right to private property and the possibility of just compensation in accordance with the law: *"Tutte le proprietà, senza alcuna eccezione, sono inviolabili. Tuttavia quando l'interesse pubblico legalmente accertato, lo esiga, si può essere tenuti a cederle in tutto o in parte, mediante una giusta indennità conformemente alle leggi* [All properties, without exception, are inviolable. However, when the legally ascertained public interest so requires, they may be required to be surrendered in whole or in part by means of just compensation in accordance with the law.]" This formulation shows the fundamental importance of this institution in the legal system of the time. Essentially, property was seen as an extension of the general principle of individual liberty. It was therefore genetically resistant to the supreme power of the state, which was recognised as having a modest right of compression over the right to property.[411]

The guarantees of property are laid down in Articles 30 and 31 SA, which affirm the exclusive competence of the legislature in tax matters and declare 'inviolable' any commitment of the state towards its creditors. The specific content of this guarantee contained in the Statute was then largely determined by laws: expropriation laws, tax laws, procedural laws and public security laws, which were destined to undergo profound oscillations depending on changing political circumstances.[412] In addition, the aspirations to fit the absolutist monarchy with doctrinal liberalism were well reflected in Articles 19 and 20 SA. They stipulated that all Crown property —royal palaces, villas, gardens and outbuildings, as well as all its movable property— would be maintained in the King's own right, without prejudice to any property he might subsequently acquire, which would be integrated into his private patrimony. The King could also dispose of his private property either by deeds between living persons or by will, without being subject to the rules of civil law (which limited the amount available).

2.6.3. The Codice Civile of 1865

Perhaps, once again, it is more accurate to say that the real "constitutional" text on property in the 19th century was not the Albertine Statute, but, as in other states at the time, the Civil Code of 1865. Drawn up on the model of the Napoleonic French Code, the *Codice Civile* has been considered "the code of property".[413] It is divided into three books: the first is devoted to persons, the second to goods and the various modifications of

[410] Daniele Trabucco and Michelangelo De Donà, 'La rappresentanza politica in parlamento dallo Statuto Albertino all'introduzione del suffragio maschile universale del 1919' (2015) 1 Rivista di Diritto e Storia Costituzionale del Risorgimento 2.

[411] Cristiano Tripodi, La proprietà: analisi dell'istituto dell'art. 832 c.c dallo Statuto Albertino ad oggi (*Diritto.it*, 24 September 2021) <t.ly/4-4f> accessed 4 March 2023.

[412] Maranini, *Historia del poder*… (n 406) 120.

[413] Moscarini, *Proprietà privata*… (n 338) 61.

property, and the third to the means of acquiring property.[414] The provision on the content of property, which is characterised by the absence of restrictions, practically reproduced the French text.

According to Article 436 of the Civil Code, "(*l)a proprietà è il diritto di godere e disporre delle cose nella maniera più assoluta, purchè non se ne faccia un uso vietato dalle leggi o dai regolamenti* [(p)roperty is the right to enjoy and dispose of things in the most absolute manner, provided that no use prohibited by laws or regulations is made of them]". It is therefore a perfect, full and absolute right of ownership, including the power to enjoy the thing (*ius utendi*), to extract its natural or civil fruits (*ius fruendi*) and to dispose of it by consuming it or alienating it in whole or in part (*ius abutendi*). It is also the right to create other limited rights in rem, to abandon the thing without transferring it to third parties, and to exclude third parties from any participation in its enjoyment.[415]

The dominant tendency of the time demanded the construction of a strictly individual property, conceived as a complete and independent situation, as absolute and stable as possible. As in the French model, it had to reflect a situation qualitatively different from the rest of the rights in rem, alternative and separate from the limited rights in rem. Property was defined as the sum, the bundle of rights which, if divided, could give rise to lesser rights in rem, but whose integral complexity could only be identified in its entirety. It thus became an interpretive scheme that constituted an essential dimension of individual freedom, concretely manifested in individual preservation and subsistence. At the same time, individual property guaranteed the development of entrepreneurial activity, the basis of wealth and the dignity of the individual.

Interestingly, the Italian Code of 1865 made it possible to favour agrarian property in the face of incipient industrialisation and the need to build road systems. The conflict that arose between the injured landowners and the railway companies during the construction of the infrastructures was resolved in various trials at the end of the 19th century. The judgments were in favour of the landowners and the companies were ordered to pay compensation for the damage caused by sparks from the trains that had caused fires on neighbouring land.[416] This is just another example of how, in the Italian model, the concept of property acquired a connotation inextricably linked to personal freedom and social dignity.

2.6.4. On balance

Following the French model, the Albertine Statute enshrined property as a sacred and inviolable right. The profoundly liberal constitutional charter had a long life: it remained formally in force for a century, until 1947. But what was established on paper was one thing, and the extremely unequal reality experienced by the subjects of the Italian monarchy was quite another. Indeed, both property and gender remained grounds for exclusion from political life and power. The exercise of civil and political rights remained

[414] Codice Civile del Regno d'Italia, Torino, 1865.

[415] Astuti, *Il Code Napoleón*... (342) 8.

[416] Moscarini, *Proprietà privata*... (n 338) 63.

for a long time subject to patrimonial conditions. The electoral census was subject to registration, which was only available to those who paid a certain amount of taxes. Those who paid taxes were, of course, those who owned property. The rest, therefore, were not yet considered citizens, which meant that voter turnout was extremely low until after the Fascist era. Not to mention women, who only got the vote after the Second World War in 1945.

The literal wording of the Italian constitutional text of 1848 thus reflects a weak and reformist constitutionalism. Only later would legal doctrine and the pressure of political forces transform the meaning and impact of the Albertine Statute.[417] This was possible in part because the Constitution was flexible, and everything was subject to the reservation of the law. It is from the definition in the Italian Civil Code that property rights take concrete and tangible forms in the lives of citizens. The *Codice Civile* clearly recognises the owner's power of enjoyment, of extracting from the legal asset the benefits that it can produce, which takes the form of the choice to use or not to use the asset, in the manner and at the time that the owner considers appropriate. This principle concludes with the recognition of the fullness and exclusivity of the owner's right.

2.7. Spain

2.7.1. Contextualisation

The transformation of Spanish agriculture throughout the 19th century was certainly slow, a fact that largely explains Spain's marginalisation from the European industrialisation process. For historical reasons, each kingdom of Spain —as it is known today— had a different land distribution regime, which gave the nascent nation-state a heterogeneous structure: the Galician massif was based on smallholdings, the north of Spain on medium-sized plots with long-term leases and the inner plateau on medium-sized farms leased in small plots and on a short-term basis, while the south was based on latifundia.[418]

The liberal-progressive governments of this century promulgated a new legal conception of land rights, through agrarian reforms. This implied the liquidation of the forms of the *Ancien Régime* (seigniory, entailed estate, communal property, dead hands…) and the consolidation of private land ownership as an essential element of the new capitalist economic organisation. Through ecclesiastical and municipal confiscation laws, the abolition of manorial jurisdiction, as well as enclosure acts, laws on freedom of tenure and the end of cattle-raising privileges, landowners were given the freedom to dispose of their land, which became a commodity that could be freely bought and sold. This did not mean the loss of the land rights of the former lords, as many were able to convert their former estates into private property.[419]

[417] Paolo Comanducci, 'Formas de (neo)constitucionalismo: Un análisis metateórico' (2002) 16 Isonomía 94.

[418] Emilio Gómez Ayau, 'Reforma agraria y revolución campesina en la España del siglo XX' (1971) 77 Revista de Estudios Agrosociales 10.

[419] Mª Teresa Pérez Picazo, 'La propiedad de la tierra y los regímenes de tenencia, siglos XIX y XX' 1991 (2) Historia Agraria 13.

Of course, many peasants rebelled against these rulings and aspired to own the land they cultivated, but most courts systematically ruled in favour of the nobility, since only the possession of legal documents (contracts) conferred ownership. The peasants were thus freed from the rents of the nobility, but their situation improved little. After the reforms, they became tenants or employees of a private landowner. The land confiscations that took place after the Constitution of Cádiz, during the Liberal Triennium and later, as well as the confiscations of Mendizábal (1836) and Madoz (1855), allowed thousands of properties to be put on the market.[420] As a result, thousands of properties changed hands and the number of private owners increased.

2.7.2. The Cádiz Constitution (1812)

Throughout the 19th century, Spain, as a newly constituted nation-state, navigated between various liberal and rather short-lived constitutions. Most of them were monarchical, although there were some attempts at republicanism, but in all of them, individualist property prevailed. At that time, the political subject was already the 'Nation'. However, it was not identified at all with all the members of society, but only with some of them. This primitive liberal conception appeared in the Spanish Constitution of 1812 and was present in all the historical Spanish constitutions until 1931. To start with, the Preliminary Discourse to the Cádiz Constitution paid very little attention was paid to property,[421] confining itself to expressing the need to reform the legal regime of territorial property in order to remove the obstacles to the free circulation of goods.

I find it curious that the Cádiz Constitution, although inspired by Articles 2 and 17 of the French DDHC of 1789, remained silent on the absolute nature of property. Article 4 of the 1812 Constitution, also known as *La Pepa*, stated that the Nation had the duty to "*conservar y proteger por leyes sabias y justas la libertad civil, la propiedad y los demás derechos legítimos de todos los individuos que la componen* [preserve and protect by wise and just laws the civil liberty, property and other legitimate rights of every individual that compose it]".[422] Thus, the responsibility for guaranteeing these rights rested not only with the state and its institutions, but also with the citizens. None of the provisions of the Cádiz Constitution, however, was devoted to a precise definition of what property or property rights were.

Only Article 172.10 prohibited the King *"tomar la propiedad de ningún particular ni corporación, ni turbarle en la posesión, uso y aprovechamiento de ella* [to take the property of any private individual or corporation]". Furthermore, it added that if the

[420] Mendizábal began the confiscation of the ecclesiastical goods and lands that had been amortised in 1836. It consisted basically of the expropriation of property, its nationalisation and subsequent sale at public auction to the best buyer. The confiscation sought revenue to pay off the state's public debt and the Carlist War, to broaden the social base of liberalism with the purchasers of confiscated property and to create an agrarian middle class of peasant landowners.

[421] Agustín de Argüelles, *Discurso preliminar leído en las Cortes al presentar la Comisión de Constitución el proyecto de ella* (Centro de Estudios Constitucionales 1989).

[422] Constitución Política de la Monarquía Española. Promulgada en Cádiz a 19 de marzo de 1812. Art. 4: The nation is obliged, by wise and just laws, to protect the liberty, property and all other legitimate rights, of every individual who composes it.

property of a private individual was necessary for the general advantage of the public good, compensation would at the same time be obligatory, as well as "*el buen cambio a bien vista de hombres buenos* [the good exchange in the sight of good men]". A curious guarantee of property, since instead of leaving the calculation of compensation to a later law, it was the unknown judgement of unknown men that was to determine it. Likewise, Article 173 included in the formula of the monarch's oath before the *Cortes* the promise never to take anyone's property. In general, then, I find it striking that property, one of the cornerstones of the liberal state, received so little attention in such a pioneering constitution.

In terms of political rights, the possibility of becoming a deputy to the Cortes was very limited. It was necessary to be a citizen, over 25 years of age, born or resident in the provincial constituency for seven years, and to have a proportional annual income from one's own property (Arts. 91 and 92). It was a clear declaration of male census suffrage, linked to property ownership, with an exclusive system of citizenship to which only a few could have access, typical of the imperialist and colonialist context of the time. Even to be a member of a provincial deputation it was necessary to be a landowner, with such a derogatory provision as *"que tenga lo suficiente para mantenerse con decencia* [having enough to support oneself with decency]" (Art. 330).

2.7.3. The Royal Statute of 1834

After the death of King Ferdinand VII in 1833, María Cristina de Borbón became Governor of the Kingdom during the minority of her daughter Isabel II, and a new text was introduced, the Royal Statute of 1834, which was not a constitution, but a charter granting very restrictive rights.[423] As a matter of fact, in the Exposition of the Council of Ministers that preceded this Statute, there was already a serious misgiving in linking political rights to non-proprietors:

> *Aun en las repúblicas antiguas, cuyas sábias instituciones nos ha trasmitido la historia, los que ningunos bienes poseian no ejercían derechos políticos; ni puede nación ninguna confiarlos, só pena de pagar tarde o temprano su temeridad é imprudencia, á quien no tenga vínculos que enlacen con la misma nación.*
>
> *De ahí es que en todos los siglos y países se ha considerado á la propiedad, bajo una ú otra forma, como la mejor prenda de buen orden y de sosiego; asi como, por el extremo opuesto, cuantos han intentado promover revueltas y partidos, soltando el freno á las pasiones populares, han empleado como instrumento á las turbas de proletarios.*[424]

Indeed, bourgeois thinkers feared that the working classes might pose a threat to the existing order if they were to be granted political rights, and therefore their participation

[423] Estatuto Real para la Convocación de las Cortes Generales del Reino, 10 de abril de 1834.

[424] (transl.) "Even in ancient republics, whose wise institutions history has handed down to us, those who possessed no property did not exercise political rights; nor could any nation entrust them, on pain of paying sooner or later for their rashness and imprudence, to anyone who had no ties linking him to the same nation. Hence it is that in all countries, property, in one form or another, has been considered the best pledge of good order and tranquillity; just as, at the opposite extreme, all those who have attempted to promote revolts and parties, by releasing the restraint of popular passions, have employed as an instrument the mobs of proletarians."

in the political sphere had to be avoided at all costs. It was therefore important to safeguard the rights of the wealthy classes through a restricted franchise based on property capacity. The Statute of 1834 established the *Estamento de Próceres del Reino*, a kind of illustrious chamber composed of the clerical elites, the "Grandes de España" (i.e., members of the nobility), the holders of the titles of Castile, men in illustrious or prestigious positions and, finally, the landowners or owners of factories, manufactures or commercial establishments who, in addition to their personal merits and relevant circumstances, had an annual income of no less than sixty thousand reals (Article 3). The other chamber, *the Estamento de Procuradores*, was not inclusive either, being limited to the possession of an annual income of its own (Article 14.3).

2.7.4. The 1837 Constitution

The clash between the moderates and the progressives led to the *Motín de La Granja de San Ildefonso*, a sergeants' mutiny in August 1836, which forced the Regent María Cristina to restore the Constitution of Cádiz, albeit with modifications. This led to a new monarchical constitution in 1837. Promoted by the progressive wing but with a conciliatory tone, it included for the first time a systematic and homogeneous declaration of liberal rights. These included traditional political and civil rights such as personal liberty, the inviolability of the home, freedom of expression, criminal and procedural guarantees, the right to petition, equal access to public office and, of course, guarantees of the right to property.

Article 10 established that: "*No se impondrá jamás la pena de confiscación de bienes, y ningún español será privado de su propiedad sino por causa justificada de utilidad común, previa la correspondiente indemnización.* [The penalty of confiscation of property shall never be imposed, and no Spaniard shall be deprived of their property except for a justified cause of common utility, after due compensation has been paid]."[425] A clearer recognition of the social function of property can be seen here, although the reservation of a law to determine compensation does not appear either. In addition, Article 74 specified that a special or budgetary law was required to dispose of state property and to borrow on the nation's credit.

Regarding suffrage, the Congress of Deputies was elected by a census voting system. The Constitution delegated the property conditions directly to a law (which would be the Electoral Law of 20 July 1837). Article 7 of this law limited the right to vote according to the annual payment derived from direct contributions, the annual net income, the rent or the price of the house in which one lived. And yet it would still be almost a century before women got the vote, it is curious that men could count their wives' property as their own (Art. 8). Furthermore, Art. 11 of the law denied the right to vote to those who were bankrupt, insolvent or in receivership, or whose property had been seized, including debtors to public funds as secondary taxpayers.[426] In short, property mattered.

Regarding the Senate, Article 17 of the 1837 Constitution required, to be a senator, to have means of subsistence. This upper chamber had a mixed composition: on the one

[425] Constitución de la Monarquía Española promulgada el 18 de junio de 1837. Congreso.es.

[426] Ley electoral (20 de julio de 1837). Universitat de Barcelona.

hand, there were the elected senators, appointed by the King from among those included on a triple list drawn up by the same voters who had taken part in the elections to the Congress. Article 56 of the Electoral Law of 20 July 1837 defined these means as an income of their own or a salary of not less than a certain amount per year, or the payment of an annual contribution to trade subsidies. On the other hand, there were senators in their own right: the children of the King and the immediate heir to the Crown from the age of 25.

2.7.5. The 1845 Constitution

The period between 1837 and 1840 was marked not only by wars and institutional and monarchical instability, but also by the changes in ownership that took place as a result of the Mendizábal confiscations. This was a decree from 1836 that put up for sale all the property that had belonged to the suppressed religious congregations, as well as any other property that had been awarded to the Nation for any reason whatsoever, and any that would be adjudicated to the Nation in the future.[427] This context, together with the demands for change from both absolutists and liberals, culminated in the Constitution of 1845 and ushered in the so-called *Década Moderada* (Moderate Decade). Its Preamble expressed the intention to reform the previous Constitution of 1837. It sought to perfect and deepen it in a liberal sense, strengthening the position of the Crown and consolidating a moderate bourgeoisie that sought the right balance between revolutionary radicalism and the conservatism of the *Ancien Régime*. However, it borrowed the literal wording of Articles 10 and 74 of the previous constitution, which were reproduced in Articles 10 and 77 respectively.[428]

Instead, it developed suffrage in greater detail. The "sovereignty of the nation" no longer appeared, but the traditional historical formula of sovereignty shared by the Cortes and the King was restored. Although it was no longer possible to adopt the hereditary principle due to the abolition of the entailed estates, it was decided to opt for a Senate appointed for life by royal decree and reserved for various personalities endowed with a certain income. Only the upper classes regulated by Article 15, who also enjoyed a certain fixed income or salary, could be senators. These included, among others, the King's children over the age of 25, veteran senators or deputies, ministers, councillors, archbishops, bishops, *Grandes de España*, judges of the High Courts and high officials of the army and navy.

Likewise, Article 22 of the Constitution required to be a deputy, among other things, the enjoyment of income from real estate or the payment of direct contributions in the amount prescribed by law, which was specified in Article 4 of the Electoral Law of 1846. In order to limit the participation of the working classes, it was also stipulated that the office of deputy was free and voluntary (Art. 13 of the 1846 Electoral Law).[429] Regarding active suffrage, Art. 14 of the Electoral Law provided for the payment of a direct

[427] Josep Fontana Lázaro, 'La desamortización de Mendizabal y sus antecedentes' in Ramon Garrabou i Segura (lit. ed.), *Historia agraria de la España contemporánea* (Vol 1, Crítica 1985) 219.

[428] Constitución de la Monarquía Española promulgada el 23 de mayo de 1845. Congreso.es

[429] Ley electoral para el nombramiento de Diputados a Cortes (18 de marzo de 1846). Universitat de Barcelona.

contribution in order to be included on the lists as a deputy, although this contribution was reduced to half if one belonged to certain categories, such as members of Academies, doctors and graduates, members of the Church, judges, employees whose salary amounted to an annual sum, retired army and navy officers of a high rank, and members of the liberal professions (Art. 16).

The era of this Constitution was a very moderate one, concerned with guaranteeing opportunities to rich men, a moderate bourgeoisie seeking the middle ground between revolutionary radicalism and the conservatism of the *Ancien Régime*. Moreover, this Constitution strengthened the position of the Crown and excluded from political participation those who could not contribute anything in terms of wealth. The Constitution of 1845 marked the end of monarchical absolutism, the completion of the bourgeois revolution and the definitive triumph of the liberal state.[430] Despite an attempt to interrupt it with another constitution in 1856, which never succeeded, it ran its course until 1869.

2.7.6. The 1869 Constitution

The heat of revolutionary fervour that swept Europe in 1848 also reached Spain, giving it a marked political dynamism. A series of revolts, uprisings and coups d'état, as well as the dethronement of Queen Isabel II, gave rise to a wide variety of political projects: from constitutional monarchy to democratic and republican formulas, from unitary to federal models. Later, in 1868, the Spanish Glorious Revolution was welcomed by broad sections of the population, who demanded universal suffrage under the banner of democratic liberalism. In 1869, a new constitution[431] was adopted that established a monarchy with national sovereignty, universal suffrage and a broad declaration of rights that became a kind of Magna Carta of Spanish liberalism.[432] This constitution, which was much more democratic, paid particular attention to the property regime, by extending its provisions:

> *Art. 13. Nadie podrá ser privado temporal o perpetuamente de sus bienes y derechos, ni turbado en la posesión de ellos, sino en virtud de sentencia judicial. Los funcionarios públicos que bajo cualquier pretexto infrinjan esta prescripción serán personalmente responsables del daño causado. Quedando exceptuados de ella los casos de incendio o de inundación u otros urgentes análogos, en que por la ocupación se haya de excusar un peligro al propietario o poseedor, o evitar o atenuar el mal que se temiere o hubiere sobrevenido.*
>
> *Art. 14. Nadie podrá ser expropiado de sus bienes sino por causa de utilidad común y en virtud de mandamiento judicial, que no se ejecutará sin previa indemnización regulada por el juez con intervención del interesado.*[433]

[430] 'Constitución de 1845' (*Congreso.es*, 2023) <t.ly/R6jB> accessed 7 March 2023.

[431] Constitución Democrática de la Nación Española promulgada el día 6 de junio de 1869. Congreso.es.

[432] 'Constitución de 1869' (*Congreso.es*, 2023) <t.ly/W2sk> accessed 7 March 2023.

[433] (transl.) "Art. 13. No one may be temporarily or perpetually deprived of their property and rights, or disturbed in the possession thereof, except by virtue of a court ruling. Public officials who, under any pretext whatsoever, infringe this prescription shall be personally liable for the damage caused. Exceptions are made in cases of fire or flood or other similar emergencies, in which the occupation is intended to avert a danger to the owner or possessor, or to prevent or mitigate the evil that is feared or has occurred. Art. 14. No one may be expropriated of their property except in the common interest and by virtue of a court order, which

The right to property in Articles 13 and 14 was essentially the same as in previous constitutions, but in a more detailed and casuistic form.[434] The individual's property was highly protected and guaranteed. Furthermore, it was no longer the judgement of "good men", but rather the rulings of the judges who would determine the compensation for expropriation, even after prior consultation with the party concerned. In addition, Article 103 prohibited the government from disposing of state property without legal authorisation.

Regarding political rights, the 1869 Constitution established universal (male) suffrage. Article 16 prohibited the denial of the right to vote in elections for senators, deputies to the Cortes, provincial deputies and councillors to Spaniards in full enjoyment of their civil rights. This proved that the 1848 revolution had reached the Iberian Peninsula. However, those registered as beggars were not included according to the Electoral Law of 23 June 1870, which was in force during this constitutional regime.[435] Moreover, Article 40 made it clear that these senators and deputies represented the whole nation and not just the electorate that appointed them, something certainly insolent considering that half of the population could not even vote because of the sex they were born with.

On the one hand, in addition to being over 40 years of age, senators had to fall into one of the categories listed in Article 62, such as former president of Congress, three-time deputy, minister, mayor of a large city more than twice, army captain or admiral, ambassador, judge of a high court, archbishop or bishop, rector or university professor, among others. It could be argued that such conditions were no longer so directly linked to the fact of possessing wealth, but also to social and intellectual prestige. But this was supplemented by the subsequent article, which stipulated that the 50 largest contributors to land taxes and the 20 largest contributors to industrial and commercial subsidies in each province were also eligible. On the other hand, the 1869 Constitution was silent on the other political categories, but the Electoral Law of 1870 established a series of incapacities for the passive suffrage of deputies to the Cortes, provincial deputies or councillors, including (Art. 8, 3rd and 4th) debtors to the state and debtors as second taxpayers, guarantors and joint and several debtors.

2.7.7. The 1876 Constitution

The period following the 1869 Constitution was a very dynamic one: the accession to the throne of Amadeo I of Savoy in 1870, two different forms of republic —a federal

shall not be executed without prior compensation regulated by the judge with the intervention of the interested party."

434 Francisco Astarloa Villena, 'Los derechos y libertades en las constituciones históricas españolas' (1996) 92 Revista de Estudios Políticos 232.

435 *Artículo 1. Son electores todos los españoles que se hallen en el pleno goce de sus derechos civiles, y los hijos de estos que sean mayores de edad con arreglo a la legislación de Castilla. Artículo 2. Exceptúense únicamente: 4.º. Los que careciendo de medios de subsistencia, reciben esta en establecimientos benéficos, o los que se hallen empadronados como mendigos y autorizados por los municipios para implorar la caridad pública.* (transl) "Article 1. All Spaniards who are in full enjoyment of their civil rights, and their children who are of legal age in accordance with the laws of Castile, shall be electors. Article 2. With the sole exception of: 4th. Those who, lacking the means of subsistence, receive them in charitable establishments, or those who are registered as beggars and authorised by the municipalities to implore public charity". Vid. Ley electoral de 23 de junio de 1870.

presidential republic (1873-1874) and a unitary republic under military dictatorship (1874)—, a draft republican constitution of 1873 that never came into force,[436] a colonial war in Cuba and two civil wars —the Third Carlist War (1872-1876) and the Cantonal Uprising (1873-1874). The failure of the First Republic led to the establishment of a Bourbon monarchy in 1876 under Alfonso XII, with the support of Cánovas del Castillo. The constitution of this period[437] established a conservative system in which sovereignty was shared between the King and the Cortes. This constitution was the one that lasted the longest, as it was not repealed until 1931, although it was an unstable period.

Like other constitutions, it established a bicameral system and informed the population of the members of the Senate, but not of the members of the Chamber of Deputies. The right to vote was still restricted by income, although this was established not by the Constitution but by the Electoral Law of 1878, based on wealth, education and social status.[438] As a result, only 5% of the population could vote.[439] Later, the 1890 Electoral Law[440] would extend it to qualified male suffrage, for men over 25 years of age, although it still excluded from the electoral roll and from voting those who were debtors to the state, their guarantors or "implorers of public charity".[441]

> *Artículo 2.º No pueden ser electores:*
>
> *(…)*
>
> > *Cuarto. Los concursados o quebrados no rehabilitados conforme a la ley, y que acrediten documentalmente haber cumplido todas sus obligaciones.*
> >
> > *Quinto. Los deudores a fondos públicos como segundos contribuyentes.*
> >
> > *Sexto. Los que se hallen acogidos en establecimientos benéficos, o estén, a su instancia, autorizados administrativamente para implorar la caridad pública.*
>
> *Artículo 5.º Están incapacitados para ser admitidos como diputados, aunque hubiesen sido válidamente elegidos:*
>
> > *Primero. Los que se encuentren comprendidos en alguno de los casos que determina el artículo 2.º de esta ley.*

The voters elected a body that shared decisions with the Senate. Moreover, the King could veto these decisions. However, this period was marked by *caciquismo* and the almost

[436] And which, curiously enough, recognised in its preliminary title: "6º The right to property, without the power of attachment or amortisation". Vid. Proyecto de Constitución Federal de 1873 (17 de julio de 1873).

[437] Constitución de la Monarquía Española promulgada el 30 de junio de 1876. Congreso.es.

[438] Ley electoral de los Diputados á Cortes. «Gaceta de Madrid» núm. 364, de 30 de diciembre de 1878, páginas 885 a 890. Ministerio de la Gobernación. BOE-A-1878-9359.

[439] Margarita Caballero Domínguez, 'El derecho de representación: sufragio y leyes electorales' (1999) 34 Ayer 45.

[440] Ley electoral para la elección de Diputados a Cortes (28 de junio de 1890). Universitat de Barcelona.

[441] (transl.) "Art 2. They cannot be electors: 4th. Bankrupt or insolvent persons who have not been rehabilitated in accordance with the law, and who can provide documentary proof that they have fulfilled all their obligations. 5th. Debtors to public funds as second contributors. 6th. Those who are sheltered in charitable establishments, or are, at their request, administratively authorised to implore public charity. Art. 5. The following shall be disqualified from being admitted as Members of Parliament, even if they have been validly elected: First. Those who are included in any of the cases set out in Article 2 of this law."

chronic falsification of the electoral processes.[442] As for the explicit regulation of property, the Constitution of 1876 summarised it more succinctly than its predecessor, in Article 10:

> *No se impondrá jamás la pena de confiscación de bienes, y nadie podrá ser privado de su propiedad sino por autoridad competente y por causa justificada de utilidad pública, previa siempre la correspondiente indemnización. Si no procediere este requisito, los jueces ampararán y en su caso reintegrarán en la posesión al expropiado.*[443]

Regarding the prohibition of the government to dispose of public property without legal authorisation, the Constitution of 1876 would imitate Article 103 of the previous Constitution in Article 86.

2.7.8. The Civil Code of 1889

For mainly political and historical reasons, and as a result of the codification movement that took place in Spain throughout the 19th century, the Spanish Civil Code was promulgated belatedly in 1889 and has survived, with some modifications, to the present day. Its liberal-conservative and moderately individualist character is particularly evident in the regulation of institutions such as property, inheritance and contractual freedom.[444] Naturally, the right to property, as a key institution of the liberal revolution, appears to be thoroughly regulated as the central axis of all the institutions contained, not only in Book II but throughout the entire Code.[445]

Like the Italian Civil Code of 1865, Article 348 of the Spanish Civil Code defines ownership as the fullest possible, immediate and exclusive power of the individual subject: "*el derecho de gozar y disponer de una cosa o de un animal, sin más limitaciones que las establecidas en las leyes* [the right to enjoy and dispose of a thing,[446]

[442] The *caciques* were people with economic power, with an entourage working for them, made up of armed groups who threatened their neighbours with physical harm if things did not go according to the cacique's wishes. The caciques controlled the votes of all the voters in their area. The Spanish liberal regime was dominated by widespread fraud and abstentionism in the electoral process until the Second Republic, except for brief periods in between. Vid. Javier Moreno Luzón, 'Viejas y nuevas visiones del caciquismo español' (2000) 18 Foro hispánico: revista hispánica de Flandes y Holanda 21; 'Teoría del Clientelismo y Estudio de la Política Caciquil' (1995) 89 Revista de Estudios Políticos 191; José Varela Ortega (ed), *El poder de la influencia: geografía del caciquismo en España (1875-1923)* (Marcial Pons 2001).

[443] (transl.) "The penalty of confiscation of property shall never be imposed, and no one may be deprived of their property except by a competent authority and for a justified cause of public utility, always after the corresponding compensation has been paid. If this requirement is not met, the judges shall protect the expropriated person and, where appropriate, shall reinstate him in possession."

[444] Santiago Carretero Sánchez, 'La propiedad. Bases sociológicas del concepto en la sociedad postindustrial' (PhD Thesis, Faculty of Law, Universidad Complutense de Madrid 1994) <shorturl.at/jGSX9> accessed 9 March 2023.

[445] Juan Baró Pazos, *La codificación del derecho civil en España, 1808-1889* (Universidad de Cantabria 1992) 123.

[446] If I may digress, I think it is relevant that in 2021 the term 'animal' was added to this article as an appropriable good, as previously only 'things' were mentioned. Although designating animals specifically intended to differentiate them from things, as something progressive or left-wing, this reform rather makes me think of the whole series of dreadful things that it may evoke in the Spanish animal imaginary. Article 48 was amended by Art. 1.10 of Law 17/2021 of 15 December 2021. Ref. BOE-A-2021-20727. Vid. for instance: Núria A. Orellana Cano, 'La reforma del régimen juridico de los animales: de "cosas" a "seres sintientes"' (2022) 5 Actualidad civil.

without any limitations other than those established by law.]"[447] Thus, by identifying possible limitations to the law, a form of interventionism is in a sense allowed. Despite being inspired by the DDHC, the Spanish Code deliberately does not refer to the "most absolute manner" of enjoyment and somehow moves away from the iusnaturalist conception according to which property precedes the law: it is established as a formal concept. This first legal provision lists the first two powers that ownership allows: to enjoy and to dispose of.

The third power that is recognised is that of claiming the owned property, through the action of vindication, and it is recognised in Article 348 *in fine,* which places the owner in relation to other figures of property: "*El propietario tiene acción contra el tenedor y el poseedor de la cosa o del animal para reivindicarlo* [The owner has an action against the keeper and the possessor of the thing or the animal to claim it.]". Ownership is thus configured as a right that places the owner in a situation of absolute dominion. The right-holder seems to have all possible powers over the property: the enjoyment of all its potentialities and the power to decide on its destiny. Civil law has therefore understood it as an individual and personal right par excellence. The civil concept of property is characterised by the fact that it protects the individual interest of the subject in the thing, normatively translates this purpose and considers property as an end in itself, and not as a means to achieve an end.[448] Property is conceived as an active situation of power, as a subjective right.

In addition, this right is reinforced by Article 349 CC, which provides more explicit protection: "*Nadie podrá ser privado de su propiedad sino por Autoridad competente y por causa justificada de utilidad pública, previa siempre la correspondiente indemnización. Si no precediere este requisito, los Jueces ampararán y, en su caso, reintegrarán en la posesión al expropiado.* [No one may be deprived of their property except by a competent authority and for a justified reason of public utility, always after the corresponding compensation has been paid. If this requirement is not preceded, the Judges shall protect and, where appropriate, reinstate the expropriated person in possession]".

The possibility of expropriation for the justified reason of "common utility" is thus allowed. The right to property guarantees owners that their right will not be altered, except for reasons of public utility or social interest. This article provides further guidance on the concept of property, although it does not define it either, but recognises a further limit to the right to private property, albeit always with guarantees for the individual private owner. In order to define it, the Spanish Code lists the powers that make up ownership; it is not an indicative definition, but a sum of powers. In general, Articles 348 and 349 are typical of a modern and more or less progressive approach to the concept of ownership, which is not really defined. Moreover, the Spanish drafters of the Code never seemed to consider the possibility of joint or simultaneous ownership,

[447] Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil. «Gaceta de Madrid» núm. 206, de 25/07/1889. Ministerio de Gracia y Justicia. BOE-A-1889-4763.

[448] Vicente Luis Montés Penadés, *La propiedad privada en el sistema de Derecho civil contemporáneo* (Civitas 1980) 60.

i.e., ownership of the same thing under the shared control of two or more individuals. In short, the codifier always had private property in mind.

2.7.9. On balance

The completion of the bourgeois revolution in the first decades of the 19th century in Spain had as its central theme the abolition of feudal property rights and their constitutional redefinition in terms of privatisation. With slight nuances, the Spanish constitutions from Cádiz to 1876 established a closed right to private property. It seems that in the more democratic and/or republican periods, there was an increase in the regulation of this right, while in the more moderate periods, there did not seem to be a genuine social interest in this issue, which could lead to a challenge to the social order.[449]

Instead, there was an extensive regulation on suffrage —though not an extensive suffrage, which was very restricted throughout the century— that was always subject to patrimonial conditions and the male sex/gender. Indeed, the successive electoral laws of Spanish liberal constitutionalism always required a high income or salary, or belonging to a certain class, to enjoy civil and political rights. Decisions were taken by the 'national sovereignty', that is, by those who could prove their citizenship, on the economic principle that it would be irresponsible for those with less 'validity' to participate in political life; those who owned property had responsibility and could therefore decide.

Although not always explicitly, facilities were provided to enable the wealthy classes to participate in the Cortes. On the other hand, every effort was made to limit political life to the proletariat. The participation of non-Spaniards and women was still inconceivable during these constitutional processes. A constitutional period that, by the way, always referred to women as "*hembras*", which from my perception, conferred them a particularly sexual connotative meaning, subtracted their agency and kept them on the right side of the production/reproduction scheme.

Except for those who placed themselves outside the liberal order, socio-political events generally took place under this roof. It was only in the first third of the 20th century that this complacent and uncritical view of capitalist property began to be challenged by certain doctrines, inspired by the so-called legal socialism, to which I will return in the next chapter. In any case, it must be admitted that the historical-legal approach to 19th-century property law requires relativising its sacrosanct character, and moving away from its reductionist, idyllic and highly theoretical or abstract image.[450] Such an application could not be automatic or simultaneous in all parts of the national territory, as it was conditioned by the specific economic and social situation of each place and affected by the multiple interests that different social groups had in property. Furthermore, in practice, property in the 19th century was not as beneficial, new, individual, perfect and absolute as it had been made out to be, not even in the Civil Code

[449] Vid. Javier Infante Miguel-Motta, 'Un hito en la historia constitucional de España: El derecho de propiedad en la Constitución Republicana de 1931 (una aproximación)', in Salustiano de Dios, Javier Infante, Eugenia Torijano (coords), *En torno a la propiedad: estudios en homenaje al profesor Ricardo Robledo* (Ediciones Universidad de Salamanca 2013) 108.

[450] Margarita Serna Vallejo, 'Apuntes para la revisión del concepto de propiedad liberal en España doscientos años después de Cádiz' (2011) LXXXI Anuario de Historia del Derecho Español 474.

of 1889, which allowed expropriation under certain conditions and left the door open to all kinds of legal restrictions on property.

2.8. The United States of America

2.8.1. Contextualisation

By 1750, most American colonists owned land and lived under English law, inspired by Locke's ideas of property as a protection against government arbitrariness.[451] The colonists, mostly small and medium-sized landowners, were more or less self-organised. There were charters such as those of Connecticut, Massachusetts, Rhode Island or Virginia, but they were subject to the rules of the Crown.[452] Yet property was relatively dispersed, rural landowners met in town meetings to discuss and participate in public affairs. This mentality of self-organisation led to a certain habit of representative forms and a strong belief in personal and collective rights.[453] Gradually, however, they abandoned the English model in favour of a new republic. From a revolutionary experience, the process of independence of the American colonies began in the 1770s, giving way to a great modern constitutional movement. Throughout this process, there was a desire to move away from common law and colonial charters towards a true recognition of inviolable and self-evident natural laws, individual rights, life, liberty and the pursuit of happiness.

At the Philadelphia Congress of 1776, Thomas Jefferson delivered the Declaration of Independence he had been charged with. Jefferson, an anti-Federalist planter from Virginia, called for an agrarian republic made up of small landowners and a regime that would ensure local self-government and prevent the concentration of power. His text made no mention of the common law or colonial charters, but of natural laws that made "self-evident and inviolable" the necessity of the consent of the governed for any representative government, and respect for individual rights. The period between the Declaration of Independence in 1776 and the adoption of the final text of the Constitution in 1787 was turbulent. Popular revolts for change in existing property relations coexisted with the conservative views of those who advocated a constitutional framework that protected large creditors. For them, pure democracy was incompatible with personal security or property rights.

This was stated in *The Federalist Papers*, published between 1787 and 1788 by Alexander Hamilton, John Hay and James Madison under the pseudonym Publius. They opted for a representative republic that "would avoid abrupt alterations in the distribution of property".[454] Thus, the formula "republican form of government" was intended precisely

[451] Pablo Ruiz-Tagle and José Luis Martí, *La concepción republicana de la propiedad* (Fundación Coloquio Jurídico Europeo 2014) 79.

[452] H. Lowell Brown, *The American Constitutional Tradition. Colonial Charters, Covenants, and Revolutionary State Constitutions, 1578-1780* (Fairleigh Dickinson University Press 2017) 136.

[453] Pisarello, *Un largo termidor…* (n 61) 63.

[454] James Madison, 'Federalist no. 10. The Same Subject Continued: The Union as a Safeguard Against Domestic Faction and Insurrection' *New York Packet* (23 November 1787) <shorturl.at/AGTV8> accessed 25 July 2022.

to avoid democracy, understood as the tyranny of the majority, because of the destabilising effect on a government of "the superior force of an interested and overbearing majority".[455] Political participation was thus to be limited to male property owners, whose status made them politically active citizens, while excluding all those who were not, including such majorities as women, workers and slaves.

This constitutionalism culminated in the adoption of the Philadelphia Constitution in 1787.[456] As Beard points out, the Founding Fathers of the Constitution happened to be lawyers, moneylenders and wealthy in terms of land, slaves, factories and maritime trade.[457] This naturally favoured the interests of the more conservative Federalists, such as Alexander Hamilton, and alienated the more democratic anti-Federalists, such as Jefferson, from the process. Interestingly, the movement that grew out of the Constitution was more conservative than the popular movement that had produced the Declaration of Independence.[458] The constitutional text ended up being a rather elitist text that did not even take into account indigenous peoples, African Americans or women. Only later, with the extension of the franchise —although women's suffrage was not granted until 1920— and the redistribution of property brought about by the abolitionist war of 1860, did a slight change in property relations begin to take place.

2.8.2. The US Constitution of 1787

Although it may seem paradoxical, the United States Constitution of 1789 does not contain a specific provision on property rights, as they are not considered to be natural rights, but rather derived from civil society itself.[459] The concept of property rights was somewhat different from the commonly accepted classical liberal idea of property. In the text of the Constitution, which is still in force, only the Fifth[460] and Fourteenth Amendments[461] prohibit the deprivation of property without due process of law (the Due Process Clause), and the taking of private property for public use without just compensation (the Takings Clause). The principle derived from these clauses is that the government should not impose excessive burdens on isolated individuals, even in support of an important public good. When this happens, the payment of fair compensation is one means of removing the burden.

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455 ibid.

456 Constitution of the United States of America, 1787. Senate.gov.

457 Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (Dover Publications 2004) 28. Original publication: Macmillan Co.1913.

458 Pisarello, *Un largo termidor*... (n 61) 68.

459 Thomas Jefferson, for instance, did not regard property as a natural or absolute right. The natural rights of liberty and happiness had to be secured through property, which could therefore be neither unrestricted nor absolute. Vid. Thomas Jefferson, *The Works of Thomas Jefferson* (vol. VIII, Paul Leicester Ford (ed), The Knickerbocker Press 1904) 196.

460 U.S. Constitution, Amendment V: "No person shall (...) be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation". This amendment was ratified on December 15, 1791, within what is known as the "Bill of Rights."

461 U.S. Constitution, Amendment XIV: "No State shall (...) deprive any person of life, liberty, or property, without due process of law." This amendment was passed by Congress on June 13, 1866, ratified on July 9, 1868, and interpreted to extend the expropriation clause to state and local government actions.

Certainly, some of the Founding Fathers saw property as a right backed by liberty. But they did not consider the Takings Clause as a central feature of the Constitution or the Bill of Rights.[462] It has been the role of the US Supreme Court, especially since the 20th century, to define the scope of some elements of property, to modify the traditional property rights of landowners in response to human pressures, and to develop new, more flexible doctrines to resolve disputes between property owners. Until then, the United States seemed like an endless expanse of land within the reach of many, and urban life was comparatively simple.

In 1926, in the case of *Village of Euclid v. Ambler Realty Co*., the Supreme Court explained that with the great increase and concentration of population, the problems had increased, necessitating additional restrictions on the use and occupancy of private lands in urban communities. "Regulations the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive".[463] Furthermore, in 1922, in *Pennsylvania Coal Co. v. Mahon*, the Supreme Court had for the first time recognised that a mere government restriction, in the absence of physical occupation or appropriation of the land, could trigger a Fifth Amendment right to compensation if the regulation was so restrictive as to render the landowner's remaining property rights virtually valueless.[464]

Moreover, in 1978, in *Penn Central Transportation Co. v. City of New York*, the Supreme Court articulated a multifactor test for determining, on a case-by-case basis, when a regulation becomes an expropriation: (1) the economic impact of the regulation on the claimant; (2) the degree to which the regulation has interfered with various investment-backed expectations; and (3) the character of the governmental action.[465] The case remains one of the most prominent property rights cases. It continues to be used as a standard by the US Supreme Court, and the academic and legal literature on the justification and relevance of this doctrine is extensive.[466] Likewise, the 'harmful or noxious uses' principle has traditionally been used to allocate the burden of socially responsible land use where the use of property is harmful to other property owners and the source of the nuisance is identifiable. However, the justification for government regulation of land use is less straightforward when the regulated use cannot be considered a nuisance, in part because the US Constitution does not contain explicit limits on the right to use property.[467]

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[462] William Michael Treanor, 'The Original Understanding of the Takings Clause and the Political Process' (1995) Columbia Law Review 791.

[463] *Village of Euclid v. Ambler Realty Co*., 272 US 365, 386-87 (1926).

[464] *Pennsylvania Coal Co. v. Mahon*, 260 US 393, 414-15 (1922).

[465] *Penn Central Transportation Co. v. New York City*, 438 US 104, 124 (1978).

[466] J. Peter Byrne, 'Penn Central in Retrospect: The Past and Future of Historic Preservation Regulation' (2021) 33 The Georgetown Environmental Law Review 400.

[467] The 'harmful or noxious uses' principle was the Court's first attempt to constitutionally describe why the government may, under the Takings Clause, affect property values through regulation without obligation of compensation. On the social obligation of property, vid. *Lucas v. Coastal Council*, 505 U.S. 1003, 1022-23 (1992): "It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of

Indeed, US courts interpret the Takings Clause of the Fifth Amendment as protecting the economic value and expectation of value of property. They rarely articulate the purpose of protecting property. Interestingly, there is no affirmative recognition of property rights or explicit recognition of private property as a legitimate institution in the Due Process and Takings Clauses of the US Constitution. In any case, the US Supreme Court, through the "bundle of sticks" doctrine, has recognised four types of essential rights inherent in the citizen's relationship with the physical thing: possession, use, exclusion of others and disposition.[468] Although the destruction of one strand of the bundle is not normally considered an expropriation because the bundle must be considered as a whole,[469] the Supreme Court's jurisprudence has occasionally emphasised one strand over the others. [470]

Be that as it may, there is no doubt that property rights in the United States emphasise individual freedom.[471] Even though the US Constitution does not explicitly recognise a social obligation arising from the use of property, private property is the dominant feature.[472] The home ownership rate in the United States amounted to 65.9% in 2022,[473] which illustrates this view very well. In contrast to French and German constitutionalisms, US courts have not regarded property as a fundamental right and are reluctant to describe property relations as natural rights.[474] Thus, in limiting the social obligation of property, the US Supreme Court emphasises the economic impact of regulation rather than its effect on the dignity or autonomy of the property owner.

Furthermore, while Roosevelt's New Deal could have prompted some reinterpretation of the concept of property in the 1930s, it was not really aimed at anything other than saving

property may be proscribed by government regulation without the requirement of compensation. (…) The State reasonably concludes that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, compensation need not accompany prohibition (…) but they have made clear (…) that a broad range of governmental purposes and regulations satisfy these requirements."

468 This theory is actually indebted to the Hohfeld doctrine, although he never coined that phrase. Professor Wesley Newcomb Hohfeld published an article in 1913 entitled 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning'. Hohfeld argued that property does not consist of things, but of fundamental legal relationships between persons. Hohfeldian theory conveys that one who has a right is opposed to another who has no right, and that these opposites are a set of legal relations that can describe any kind of property. These legal relations are sets of claims and rights in tension, held by some persons against others. The person who has the right has the support of the state because he can enforce his right in court. The person who does not have the right has an obligation to stay off the property and can be sued for trespass. Vid. Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 (1) The Yale Law Journal 16.

469 "A full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard*, 444 US 51, 65-66 (1979).

470 The right to exclude others is generally "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003 (1984)*.

471 Rebecca Lubens, 'The social obligation of property ownership: A comparison of German and US law' (2007) 24 (2) Arizona Journal of International & Comparative Law 389.

472 Polanyi, for instance, stated that: "The American Constitution (…) isolated the economic sphere entirely from the jurisdiction of the Constitution, put private property thereby under the highest conceivable protection, and created the only legally grounded market society in the world. In spite of universal suffrage, American voters were powerless against owners". Vid. Polanyi, *The Great…* (n 47) 234.

473 United States Census Bureau, *Quarterly Residential Vacancies and Homeownership. Fourth Quarter 2022,* Release Number: CB23-08 (31 January 2023).

474 Lubens, 'The social obligation…' (n 471) 389.

US capitalism. The proposed re-reading of the constitutional amendments rested on an ultra-liberal economic conception that entailed a rejection of public price regulation and anti-trust legislation, such as the Sherman Act of 1890, as infringements on the autonomy of private enterprise. In fact, the most controversial part of anti-trust legislation was used against labour organisations themselves, which were alleged to be illegally interfering with the right to private property.[475]

2.8.3. On balance

Today, public discourse in the US still focuses on individual property rights and property as a commodity.[476] In reality, however, there are many limits to property rights recognised in US law and jurisprudence (neighbouring rights, zoning laws, environmental protection measures and other administrative rules and regulations). Admittedly, there is some flexibility on the part of the courts, which require a vague sense of 'public purpose' to review expropriation legislation and measures. However, although conservation appears to be a generally accepted public purpose, restrictions on the use of property remain difficult to justify under the Supreme Court's interpretation of the Takings Clause.[477]

US property rights materially define the legal and political sphere in which citizens can pursue their private agendas, free from state coercion. The Fifth Amendment serves as a fundamental right to prevent any legislative or regulatory action that frustrates the full satisfaction of these individual preferences. This constitutional concept of property as a bundle of rights —and not as a unitary right, as in other countries such as Germany or France— becomes a negative claim of the owner against others, including the state, not to be interfered with in the use, possession and enjoyment of property, and not to be deprived of the individual interests by redistributive measures of the state.

The bottom line is that private property plays a central role in the United States, even though the Constitution of 1787, which is still in force, did not bother to define property rights. It is precisely because of this, and the efforts of the US Supreme Court to define the concept, that the Fifth Amendment and the Takings Clause have survived historical change. The legal recognition and protection of property rights remains a true symbol of freedom, something typical of the liberal era in which they were forged, but very relevant in the current US neoliberal wave. At the heart of the constitutional system of property is a strong notion of protecting the private sphere from government overreach. Courts in the United States have faced strong resistance, both from property owners and from their legal and political advocates to the obligations that the state imposes on property owners in the public interest.[478] Linking the reasonableness threshold to fair market value has proven difficult for courts to administer and has left lower courts confused about what the property clause guarantees and what it prohibits.

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[475] Bruce Ackerman, *We The People. Foundations*. (vol 1, Harvard University Press 1991) 117.

[476] Gregory S. Alexander, *Commodity & Propriety: Competing Visions Of Property In American Legal Thought 1776-1970* (The University of Chicago Press 1997) 375.

[477] Lubens, 'The social obligation…' (n 471) 401.

[478] ibid 449.

2.9. Some common remarks

Between the end of the 18th century and the 19th century, it can generally be stated that the constitutional texts of liberal Europe and the United States of America contained few rights and freedoms, subject to the interpretation of the legislature and, above all, of the executive.[479] They were rights and freedoms of a very general, vague and diffuse nature, at the disposal of the authorities. Individual, civil and political rights prevailed; little progress was made in the social and economic spheres. They had to be specified by the parliamentary elites, who were more concerned with maintaining the public order than with the emergence of genuine areas of civil freedom.[480] It should also be noted that during this constitutional period, there were no constitutional courts to interpret the constitutions and thus property rights in a constitutional sense.

Such moderate constitutionalisms correspond to the triumphant liberal thinking of the time, characterised by the defence of individual property owners against the threats of the state rather than by the struggle against inequality. The liberal motto seemed to be, as Faustino Martínez puts it: "*Derechos, por supuesto que sí, pero sin alcanzar a todos; derechos, por supuesto que sí, pero dentro del orden marcado por las oligarquías que conforman la auténtica nación* [Rights, of course, but not for everyone; rights, of course, but within the order set by the oligarchies that make up the real nation]".[481] Private property seemed to take the place of liberty. Or, in other words, liberty was conceived only from the point of view of property, as an extension of it. This contributed to the exaltation of individualism and freedom of exploitation, to the abolition of feudal rights and the various medieval forms of property, but also to the gradual disappearance of common property.

Curiously, the discipline of private property law in this period was contained in the codes. In fact, they became much more important and consistent than the constitutions of the time.[482] A clear symptom of this is that, during the long 19th century, only one civil code was enacted in each state, while, on the other hand, a long series of constitutions were adopted, especially in France and Spain. Certainly, property did not originate in the constitutional order, but in infra-constitutional legality, in this case, in civil law. Apparently, liberal constitutions took it for granted that systematised civil laws would already regulate the content of property. In fact, the only case in which the existence of a civil code is irrelevant, precisely because of its absence, is in the United States, a country where the doctrine of judicial precedent and the courts —especially the Supreme Court— have traditionally had a significant weight.

This prompts reflection on the importance of civil law in continental systems in relation to constitutional law when it comes to defining the legal regime of property and, therefore, the axiological core of the political system and the power relations associated

[479] In fact, the state of siege, martial law or the suspension of all or part of the constitution was a common practice that had no constitutional, or even legal, place. Vid. Martínez Martínez, 'Europa y la(s) Constitución(es)…' (n 310) 770.

[480] ibid 770.

[481] ibid 770.

[482] Moscarini, *Proprietà privata*… (n 338) 54.

with it. This is clear, for example, if we compare the *Déclaration* with the Napoleonic Civil Code of 1804, or the Albertine Statute with the Italian Civil Code of 1865. It cannot be denied that the aspirations of such civil codes respond to a certain moment of economic progress and relative peace, and thus have the tone of a conservative liberalism and a tempered individualism.

The modern regulation of property law integrated elements of rationalist natural law: its configuration as a unitary —though not so much in US constitutionalism, which understands it as a bundle of rights— subjective right, the autonomy of the will, the freedom of contract and the recognition of the civil personality in every individual. What is more: Lockean iusnaturalism persisted in all these legal elaborations, which presumed property as inherent to the individual. In continuity with the individualism proposed by the most influential philosophers of the 18th century, modern constitutions reaffirmed the individual nature of the right to property and the need for liberation from all ties and restrictions that could constrain private property.[483]

They affirmed the impossibility of sacrificing the natural right of every *man* to own *his* property. But since property was apparently immanent, the fathers of these constitutions never felt the need to define it. To put it bluntly, neither the constitutions nor the civil codes of the time actually defined property. What they did, by limiting it, was to create it, to establish it. So it seems that property was incorporated into constitutional law. It is not that constitutional law was obscured by property, but that constitutional law *was* property; property was a constitutive part of constitutional law.[484] In short, private law was stripped of its public law components, while the public legal system acted as the guardian of private law.

In any case, the property system was relatively easy to regulate for centuries when the physical conditions affecting the land were relatively stable. Changes brought about by nature tended to be minor and slow, while the human impact on the world was rather limited. The property rights that emerged in this environment reflected this stability. Their temporal and spatial dimensions were relatively rigid, and the substantive content of these rights tended towards absolutism, quite free from state constraints.[485] In short, the property systems of this stable epoch did not include mechanisms that could respond to major external changes.

Furthermore, as has been seen, during this long liberal period, in which the banner of civil and political rights was raised, suffrage was strongly linked to the patrimonial element. From the censorious point of view, wealth and private property guaranteed a qualified, responsible and conscious vote by the privileged few. Otherwise, if political rights were granted to the working classes, there was the fear that the vote would be used as an instrument for revolution and destabilisation of the state order. Likewise, the non-remuneration of the office of deputy or senator ensured that only the wealthy classes who

[483] Moscarini, *Proprietà privata*... (n 338) 55.

[484] Here I use the argument about the position of property in constitutional law in an analogical way to the rationale used by China Miéville when he talks about colonialism in international law. Vid. China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 169; 226.

[485] Sprankling, 'Property Law...' (n 106) 738.

owned property could, for a certain period, neglect domestic affairs and attend to the affairs of the state.

As a result of this analysis, it is easy to detect certain hegemonic constitutionalism, consolidated in the evolution of the institutional structure of the capitalist world-economy. An attempt was made to homogenise European (but also North American) private property to the exclusion of other legal approaches. This supposedly universal standardisation gradually penetrated other peripheral states, especially those colonised by European imperialism. Those customs, principles and traditions of the peoples that were no longer useful for the expansion and establishment of capitalism were left behind. As a result, the spaces of social, cultural and legal exchange shrank, leaving only room for the hegemonic world system of private property.

Colonised societies and their natural resources were quickly incorporated into the process of capitalist homogenisation. Even later, the supposed emancipation of the new, allegedly decolonised Latin American republics was based on the promotion by the Creole elites of state structures suitable for the incorporation of the American territories into the capitalist world-economy. In effect, the indigenous peoples became the Other, as opposed to the abstract individual subject, now in the form of a citizen of the new republic. “He” was presented as a desirable alternative to indigenous identity, allowing for the dissolution of community ties and the emergence of private ownership of resources.

Hand in hand with this came the primacy of the individual subject, possessive individualism and competitiveness, even in the periphery of capitalism. This imitation and the consequent uniformity of patterns contributed to the process of exploitation of natural resources, which has, in short, led to the environmental crisis and the hypersophistication of capitalist patriarchy. Finally, the culture of rights around the idea of the individual subject created the conditions for the appropriation of nature, generated hierarchies and produced a trivialisation of cultural diversity. This culture became a crucial factor in the conceptual apparatus that generated the social processes responsible for the geological transition.

But all that being so, the transition to the transformation of property rights seemed imminent. The revolutions that shook the continent in the mid-19th century timidly started changing the landscape. Liberal thought began to perceive the social changes in an industrialised Europe —less so in the United States— and sought new fronts from which to protect its citizens. Social and democratic concerns gradually led to the emergence of welfare states. Albeit formally enunciated, equality remained absent because it was materially difficult to fit it into such an unequal framework as that of the 19th century.

Such tentative changes developed in the 20th century, especially during the inter-war period, and freedom seemed less threatened: material equality began to be a greater concern, as did gender equality. Many of the legal literal formulations were overtaken by the reality of the facts: the evolution of economic conditions, the emergence of movements and the demand for the constitutionalisation of social rights led to the introduction of real limits to the dogma of absolute property. Long gone seemed the

much-vaunted liberty of the French Revolution, long gone seemed the doctrines of the absolute nature of property rights.

Or have vestiges of the liberal configuration finally seeped through? Could they remain in our current regimes under a new morphology? Surprising as it may seem, the absolute concept of property is gaining ground against public intervention in the context of the financial phase of the process of capitalist accumulation. For this reason, the texts analysed here, including some that have survived the passage of time and remain in force, still seem relevant insofar as they illustrate the progressive adaptation of constitutionalism to the evolution of capitalism.

Chapter 3. Exploring the social function of property. A constitutional comparative overview

Le propriétaire capitaliste est investi d'une fonction sociale déterminée. Son droit subjectif de propriété, je le nie ; son devoir social, je l'affirme.

[The capitalist owner is invested with a specific social function. His subjective right of ownership, I deny it; his social duty, I affirm it.]

LÉON DUGUIT, 1908[486]

El pitjor error que es pot cometre és mirar el passat amb condescendència.

[The worst mistake that can be made is to look at the past with condescension].

ANTONI DOMÈNECH, 2017[487]

3.1. On the aim of this chapter

Certainly, the classical liberal conception of property, as a subjective and quasi-absolute right permeated modern thought quite deeply, especially in the Western constitutionalisms of the 19th century closely linked to the exercise of civil and political rights. However, the characteristics of this institution were better reflected in private law, particularly in civil law countries where it was codified, than in the constitutions, which generally avoided defining this right. The holder of this right was an individual who could use, exploit and dispose of property at will, as long as the limits imposed by the legal system and the common good were not violated. Individual autonomy and property thus went hand in hand.

Nevertheless, from the first third of the 20th century onwards, constitutional law began to undergo transformations, as a result of unprecedented historical events and the critical movements that considered this liberal conception of property illusory in relation to the social reality of the time. Critics pointed out, for example, that classical liberal property obscured the obligations and connections that the subject had with the community, as well as the unequal distribution of wealth that resulted. Communism in its modern form had emerged from the socialist movement in Europe a few decades earlier, encouraged by the ideas of Marx and Engels developed in the 19th century, although it was not until the Russian Revolution of 1917 that the Bolsheviks came to

[486] Léon Duguit, *Le droit social, le droit individuel et la transformation de l'État : conférences faites à l'Ecole des hautes études sociales, Paris, en mars 1908* (2nd edn, Félix Alcan 1911) 118.

[487] Antoni Domènech, 'Centenari de la Revolució Bolxevic', Jornades de la Universitat Progressista d'Estiu de Catalunya, 7 July 2017 <shorturl.at/aCGW5> accessed 3 September 2022.

power.[488] Working-class thought blamed capitalism for the misery of urban factory workers and advocated the abolition of private ownership of the means of production. 20th-century constitutional proposals did not go so far, but they did advocate strong state intervention in property rights to achieve redistributive goals. This particular emphasis on the (re)distributive role of property in society is known as social constitutionalism.

In this chapter I propose to analyse the social function of property through exemplary 20th-century constitutions, to see to what extent they can be useful for this purpose today. However, the social function of property was born out of a legal conception that seems to have been left behind, at odds with its historical matrix. Precisely, a genealogical study of the principle is necessary and can lead to interesting revelations. It is important for me to identify the discrepancies between what is enshrined in the constitutions and current realities; the deviations and ruptures between the intrinsically coherent notion of the social function of property and the socio-economic changes that have taken place over the last century. At the same time, I am interested in contrasting the individualist notion of property enshrined in the liberal constitutions of the 19th century, discussed in the previous chapter, with the social constitutionalism of the 20th century.

One thing that will be seen in the selected constitutions, for example, is that they have regulated property as an end rather than as a means. Some in the form of a fundamental right, others in the form of an economic right, they contain various formulas that go beyond private property. At a general level, they aim to guarantee the personal sphere, i.e., the freedom of the individual without neglecting or jeopardising the social or common interest. This comparative constitutional study of the social function of property responds to my interest in whether common property is really conceivable within the constitutional framework that each state allows. That is, whether it is possible to thread the concept of the commons within the social function of property, as its main defining element. Or finally, to see whether property rights should not actually be conceived as constitutional rights, but rather as a means or instrument for the fulfilment and respect of "real" fundamental rights.

To this end, I will analyse the constitutions that have become the dominant tone, the template for other constitutional processes. First, I will examine the Mexican Constitution of 1917, because of the striking force of its Article 27, which is devoted to property, because it set a precedent and was one of the pioneers in recognising the social function of property. Later, I will analyse some European constitutions of the 20th century, because of the particular circumstances created by the two World Wars, which significantly modulated the concept of property. Through the constitutional texts that make up the French block of constitutionality, which is still in force, I will investigate why the right to property is considered a fundamental right. The German review is essentially based on the existence of a specialised constitutional jurisdiction (the German Federal Constitutional Court) that enriches the analysis of property. To a large extent, it

[488] Marxism-Leninism emerged as the main banner of communism in world politics under Lenin. The Communist International (Komintern) was born in 1919, with the Russian Bolsheviks as the main force. From then on, communism would continue to split, as in the case of the *Kommunistische Partei Deutschlands* (KPD), in Germany, the *Partito Comunista Italiano* (PCI) in Italy, the *Parti Communiste Français* (PCF), in France and the *Partido Comunista de España* (PCE) in Spain.

is the jurisprudence of this High court that has been providing a definition and content of property, rather than the German Constitution itself.

The Italian Constitution is also interesting in this respect, as a daughter of the Second World War. The Constitution of 1948 marked a before and after in the history of European constitutionalism and democracy, by literally dividing the property into public/private, and it still does, as it is fully invested by the tension between the social state model and neoliberal projects. Indeed, the triad of Constitutions cited (French, German and Italian), have been constitutional models for other Western and non-Western constitutional states. In the case of the Spanish Constitutions, I will examine whether or not the post-Franco Constitution of 1978 is more open to the social function of property, which is manifestly recognised in the Republican Constitution of 1931.

Finally, I will analyse the formulation of property in the Ecuadorian Constitution of 2008. Together with other Andean constitutions, it became a forerunner of neo-constitutionalism, a constitutional phenomenon that emerged from social movements. It calls for the creation of egalitarian democratic spaces and respect for human rights, with particular emphasis on third- and fourth-generation rights. The Constitution of Ecuador was also the first to give constitutional recognition to the rights of nature. It materialised a completely new and complete regime, marking a before and after in the constitutional regulation of the environment. In particular, it was the culmination of a process of constitutionalisation of the environment that had been developing in some Latin American countries, such as Colombia, Bolivia, Argentina, Chile or Peru.[489] As will be seen, the Constitution of Ecuador marks a new paradigm of governance on the continent.

3.2. The social function of property as a pillar of the social state

In the late 19th century, at a time of rapid industrialisation, some scholars in Europe began to debate the limits of property in the "public or general interest", a vague concept developed to protect capitalism from its own excesses. The general interest gave the public authority the power to protect the community as a whole. It was a "police power" to curb the unbridled selfishness of the private landowner, whose absolute subjective right to charge or collect rent could make social life impossible.[490] In the following years, this thesis would be further refined in response to the prevailing liberal doctrines at the time. Probably, one of the most suggestive and influential concepts of the 20th century, and closely related to the general interest, is that of the 'social function of property'.

At the beginning of the century, the French jurist Léon Duguit argued that the right to property had an inherent social content. Or that rather, that property was not really a right, but a social function.[491] For him, there were no rights of individuals and no rights

[489] Vid. Luis Huerta Guerrero, 'Constitucionalización del derecho ambiental' (2013) 71 Derecho PUCP: Revista de la Facultad de Derecho 477.

[490] Ugo Mattei and Alessandra Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Edward Elgar Publishing 2018) 25.

[491] Léon Duguit, *Les transformations du droit public* (Armand Colin 1913) 39.

of social groups, but a social function to be fulfilled.[492] Duguit described the so-called 'social function' of property as the obligation of the owner to use his goods to satisfy his needs and the collective needs of the society.[493] According to this perspective, property no longer had only external limits, as classical liberalism had hitherto conceived it, but also internal ones.[494] Owners had obligations towards their things: they could not do as they pleased with their property. Consequently, the wealth controlled by the owners had to be put at the service of the community through economic transactions.[495]

Indeed, Duguit was concerned that the traditional liberal theory of property did not allow for the imposition of obligations on individuals: since they were free to decide whether or not to use their property, the state could not force them to perform acts on the thing in order to exploit it economically.[496] If the right to private property included the right to use, enjoy or dispose of it, it also implied the right not to use, enjoy or dispose of it. For the French jurist, this had to be avoided: the land had to be exploited (with some exceptions). The state should protect property only when it fulfilled its social function.[497] If the owner did not act in accordance with his obligations, the state had to intervene. To this end, the state was empowered to draw the attention of landowners who did not use their land and, if necessary, to provide itself with the means to sanction them for their inactivity and to ensure the full utilisation of resources, such as taxation or expropriation.[498]

Duguit criticised the weaknesses of the classical liberal theory of property, which was based on a subjective law that emphasised the individual and his natural rights, with individual property being a synthesis of all individual rights.[499] Since people were essentially autonomous and rational beings, individuals should be able to articulate, transform and attempt to realise life plans by through the use of reason.[500] Consequently, the political community was a voluntary creation of individuals aimed at increasing the likelihood the autonomous and rational construction of their life plans.[501] For Duguit, interdependence between people, i.e., solidarity, was the central element of civil society. Solidarity was not a political principle, but a social fact.[502] The idea of the social function

[492] Léon Duguit, *Les transformations générales du droit privé depuis le Code Napoléon* (Félix Alcan 1912) 29.

[493] ibid 24.

[494] Sheila R. Foster and Daniel Bonilla, 'The Social Function of Property: A Comparative Law Perspective' (2011) 80 Fordham Law Review 103.

[495] Duguit, *Les transformations du droit public* … (n 491) 52.

[496] ibid 5.

[497] ibid 83.

[498] Duguit, *Le droit social, le droit individuel et la transformation de l'État* (Félix Alcan 1908) 88.

[499] Duguit, *Traité de Droit Constitutionnel. Tome Premier : La règle de droit – Le problème de l'État.* (2nd edn, Fontemoing & Cie / E. De Boccard 1921) 422 ff.

[500] Duguit, *Le droit social…* (n 498) 32.

[501] Duguit, *Les transformations du droit privé …* (n 492) 26.

[502] ibid 27.

of property was thus based on solidarity as one of its primary foundations. It was a notion that sought to guarantee the goal of human prosperity for all citizens of any state.[503]

The French jurist asserted the individuality of every human being: there was a similarity in the needs of *men* belonging to the same social group and, at the same time, a diversity in the needs and abilities of *men* belonging to the same group.[504] The division of social labour was therefore essential to ensure that these needs were met.[505] For the people and the community to prosper, each individual had to fulfil a set of functions determined by his (or her) position in society. Duguit found the individualism of the liberal right to property unrealistic, denying the existence of an isolated individual who sought to realise his life projects alone. Human beings were deeply interconnected and needed each other to satisfy their physical and spiritual needs.[506]

Likewise, it would make no sense to impose negative duties on third parties (i.e., not to interfere with other people's property) if the individual lived in isolation and absolute separation from other members of society.[507] For Duguit, the fact that classical liberal property served only individual interests obscured the connections between the economic needs of the community and the wealth derived from property.[508] Property therefore had to be placed at the centre of economic policy in the service of the community, and thus be made productive. Otherwise, the unproductiveness of property would not meet the needs of the community and social cohesion would be threatened.

There is no doubt that Duguit's theories deserve attention and consideration, in a context of full liberal splendour. The value of the French jurist's contributions lies in the rethinking of the articulation between public law and private law in favour of public law. By pointing out that the institution of property *is* a social function, one can no longer think of it as a "beast" covered with an appeasing legal cloak called 'general interest', but as an institution whose entrails *are* precisely this social function. Duguit also pointed out the impossibility of an individual holding a right in isolation from society. For is not every right, by definition, a relationship between people?

One wonders, however, whether the Léon Duguit of the 21st century would have placed more emphasis on a particular dimension of the social function of property: its ecological function. Indeed, the way in which resource management is conceived today is crucial for the protection of the environment. A century later, Duguit's postulation that the owner should be obliged to exploit his property strikes me as ironic at best, given that the summum of capitalism has been the exploitation of individual property on a global scale. The right to property entails the imposition of collective duties, but we would agree that these are sometimes more like duties not to do.

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[503] Colin Crawford, 'The Social Function of Property and the Human Capacity to Flourish' (2011) 80 (3) Fordham Law Review 1089.

[504] Of course, like any male thinker of the time, the designated term for the members that make up society is 'men' (*les hommes*). Duguit, *Les transformations (...) droit privé...* (n 492) 27.

[505] ibid 28.

[506] Duguit, *Traité de Droit Constitutionnel...* (n 499) 111 ff.

[507] Duguit, *Les transformations (...) droit privé...* (n 492) 18.

[508] Duguit, *Les transformations du droit public...* (n 491) 55.

Indeed, the private exploitation of resources has led to the plundering of the commons and ultimately to the climate crisis we are experiencing. Duguit's perspective, so typical of the constitutions of the first third of the 20th century, sought to project the Faustian idea of the systematic exploitation of nature from liberal individualism onto a supposedly concerted and rational social action. It was not until the 1970s, when the current neoliberal paradigm began to consolidate, that confidence in the ordering action of the state and in the prospect of the collective organisation of exploitation would enter into crisis. Only then would the limits of growth begin to become apparent.[509]

Moreover, his whole project appears as a mere transformation of the justification of property, rather than a real limitation of property or the overthrow of private property itself, as Marx postulated. Duguit did not imagine a society without private property, but justified it, as long as it was subject to limits. At no time did he consider that if the rich continued to own things privately, even within the limits imposed by their social function, inequalities would persist in relation to those who owned nothing. It never occurred to Duguit that it might not be necessary to control private property, but to replace it with other forms of property, such as communal, cooperative or associative property.

Similarly, basing the wealth of the community on the functions determined by each person's position in society indicates a certain statism. From this point of view, social classes would remain fossilised at the centre of the system, with no possibility of escape. This position would have a very negative effect: the rich would always remain rich; the poor would always remain poor. And women, of course, would be forever confined to the kitchen. In any case, the limitations of Duguit's project should not lead us to condemn it out of hand. On the contrary, his courageous attempt to address the problem of social justice can still be seen as a source of inspiration for social and political thinkers.[510]

Be that as it may, the notion of social function would mark a turning point in constitutional history, the state model and the concept of property itself. The Industrial Revolution in Europe had led to the development of factories, the rural exodus, the growth of cities... All this meant a huge change in society, its relationships and its ways of life. These industrialised societies were complex and incapable of self-regulation. The state necessarily had to intervene in health, education and housing in order to redistribute wealth and provide basic social services to citizens. It therefore also had to intervene in the question of property.[511]

Some of the theoretical foundations on which the first measures were based at the end of the 19th century came from the ideologist and disciple of Hegel, Lorenz von Stein in Bismarck's Prussia. For him, the main purpose of the administration was to solve the

[509] Precisely, in March 1972, the Club of Rome published *The Limits to Growth*, the landmark report that for the first time modelled the planet's interconnected systems and showed that if trends in population growth, industrialisation, resource use and pollution continued unchanged, the Earth's carrying capacity would be reached and exceeded at some point in the next hundred years. Vid. Donella H. Meadows et al, *The Limits to Growth. A report for the Club of Rome's project on the predicament of mankind* (Universe Books 1972).

[510] Thomas Boccon-Gibod, 'Duguit, et après ? Droit, propriété et rapports sociaux' (2014) (XXVIII) 3 Revue internationale de droit économique 299.

[511] Luis Villar Borda, 'Estado de Derecho y Estado Social de Derecho' (2007) 20 Revista Derecho del Estado 83.

social problem by protecting and assisting the weakest.[512] There was a tendency to believe that society was also responsible for poverty and that individual defence was insufficient. Security against the risks that threatened workers began to be seen as a collective obligation, which meant that the state took on new responsibilities. It was also necessary to clarify whether the inhumanity inherent in capitalism could be overcome by abolishing private property, or whether the economic freedom of the individual should be protected alongside property, provided that this freedom was consistent with a just socio-economic order that combined the right to property with the abstract notion of the common good.[513]

The definitive consolidation of the social state took place when economic and social benefits for the population (social security) were introduced into the constitutions adopted immediately after the First World War, obliging the public authorities to intervene to promote material equality.[514] The states could no longer abstain from these constitutional issues. Thus, the social constitutions adopted in the 20th century added so-called social rights, which emphasised the position of the individual in society. The generalisation of social security systems and social rights testified to the emergence of a new state, the 'social state'. The new functions of the state implied a change in its nature and conception, i.e., the constitution of a new social contract in which the relationship of the whole to the parts changed.[515]

Social constitutionalism sought to reconcile the interest of the individual with the interest of the collective, establishing normatively that individual rights should be limited in their practice or exercise by the common interest.[516] It aimed to strengthen services and guarantee rights, and the maintenance of the standard of living necessary to participate as a full member of society included, if necessary for the general interest, the extension of public property at the expense of private property, by virtue of the social function of property.[517] These rights, in contrast to the civil and political rights typical of liberal constitutionalism, were called social rights.[518]

As will be seen, the theory of the social function of property crystallised in the Weimar Constitution of 1919 and, as a result of a long debate that began in the early 1930s and especially after the Second World War, was subsequently incorporated into other European constitutions, such as those of Austria, Sweden, France, Italy and Spain, but also in South America, post-colonial Africa and the Middle East.[519] The central idea of

[512] Vid. the work of Lorenz von Stein, considered one of the best syntheses of socialism of the time: Lorenz Von Stein, *Der Socialismus und Communismus des heutigen Frankreichs. Ein Beitrag zur Zeitgeschichte* (Otto Wigand 1848).

[513] Ignacio Sotelo, *El Estado social. Antecedentes, origen, desarrollo y declive* (Trotta 2010) 197-198.

[514] Villar Borda, 'Estado…' (n 511) 86.

[515] Mª Josefa Rubio Lara, *La formación del Estado Social* (Ministerio de Trabajo y Seguridad Social 1991) 187.

[516] Martín E. Paolantonio, 'Antecedentes y evolución del constitucionalismo. Constitucionalismo liberal y constitucionalismo social' (1987) 47 Lecciones y Ensayos 207.

[517] Sotelo, *El Estado social…* (n 513) 198.

[518] Paolantonio, 'Antecedentes…' (n 516) 207.

[519] Mattei and Quarta, *The Turning Point…* (n 490) 25.

this clause is that property can be limited by public regulation in order to realise a social interest and to prevent excessive self-interest on the part of the owner. In the following sections, I will analyse the configuration of the social function of property in various constitutional texts, as I have already advanced in the introduction to this chapter.

3.3. Mexico

3.3.1. The Mexican Revolution and the Constitution of Querétaro: the dawn of social constitutionalism

In my view, any comparative analysis of the social function of property in constitutional law should begin by considering the Mexican Constitution of 1917.[520] During the 19th century, local and indigenous peoples in Mexico had been experiencing a gradual dispossession of access to communal property. Meanwhile, the *haciendas* —large estates— had been growing exponentially, through speculation and transfers made possible by various laws designed to promote the use of agricultural land. This obliteration of communal ownership of rural land began to accelerate in 1876, with the dictatorship of the liberal general Porfirio Díaz.

The rich landowners owned more and more large estates, while the peasants owned fewer and fewer. Moreover, 77% of the capital invested in all sectors was foreign-owned.[521] Popular unrest continued to grow during the first decade of the 20th century. This process of privatisation of communal property is in fact connatural to the consolidation of the capitalist world-economy. The fact that such enclosures took place in Mexico during the Porfiriato period expresses, to a certain extent, the backwardness of its incorporation into the capitalist world-economy in relation to the centre of capital. This would, in a way, foreshadow Mexico's semi-peripheral condition in later developments.

In 1910, the armed popular uprising broke out, led by the rebellious middle class of Francisco Madero and quickly backed by the peasantry. The insurrection was in the name of the democratisation of the political regime and soon took on a distinctly social character. For years, both the bourgeoisie and the peasantry fought against the big landowners for a fairer distribution of land. Despite the triumph of the right wing, a Constituent Court was convened in 1916. The faction would push through the future Article 27, inspired by the Zapata, Villa and Carranza agrarian reforms that had taken

[520] Constitución Política de los Estados Unidos Mexicanos (5 de febrero de 1917), que reforma la de 5 de febrero de 1857. Diario Oficial, Órgano del Gobierno Provisional de la República Mexicana.

[521] Julio Martínez-Cava, 'Una alternativa al liberalisme: la funció social de la propietat a la Constitució de Querétaro' (2022) 43 Eines 111.

place during the Revolution.[522] As Kelly points out: "The Mexican Revolution began as an anti-reelection campaign but ended as a struggle for land".[523]

It was therefore the Political Constitution of the United Mexican States that kick-started the recognition of social rights. Promulgated in the city of Querétaro in February 1917, it served as a model for other constitutions, such as the Soviet one of 1918, the German one of 1919 and the Spanish one of 1931. One of the backbones of the fundamental Mexican text was the subordination of property rights to their social function. The new social conception of property represented a break with the paradigm of modernity. The forcefulness of the extensive and very detailed Article 27, the cornerstone of Mexican land tenure law, is still striking today.[524] The language of Article 27 is meticulous and detailed, somewhat rhetorical and exalted by its proximity to the revolution.[525]

It declared that all land, water and mineral rights belonged to the Mexican people. It also gave the government the mandate and authority to expropriate land from large landowners and give it to qualified agrarian communities. Likewise, it included the annulment of acts that had led to the monopolisation of land, water and natural wealth by a single person or company. Article 27 granted powers over fundamental aspects of property to the state. When it determined that "*[l]a a propiedad de las tierras y aguas comprendidas dentro de los límites del territorio nacional, corresponde originariamente a la Nación* [the ownership of the lands and waters within the limits of the national territory is originally vested in the Nation]", it established strict rules for individuals, associations and entities to acquire ownership of these lands and waters. It also provided the nation with broad powers to limit private property:

> *La Nación tendrá en todo tiempo el derecho de imponer a la propiedad privada las modalidades que dicte el interés público, así como el de regular el aprovechamiento de los elementos naturales susceptibles de apropiación, para hacer una distribución equitativa de la riqueza pública y para cuidar de su conservación.*[526]

In such matters, the Nation's ownership was "inalienable and imprescriptible". This led to the expropriation and distribution of land, while restricting the right to sell communal land, the expropriation of foreign oil in 1938 and the nationalisation of electricity companies in 1960.

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[522] The Mexican Revolution was championed by libertarians such as the Flores Magón brothers, the peasant leaders Emiliano Zapata in the south, and Pancho Villa in the north. In 1911, Zapata proclaimed the Plan of Ayala. It was a political programme in which he called to arms to return land ownership to the peasants. The plan demanded that they present their land titles, most of them communal. After Madero's execution and Victoriano Huerta's coup d'état, the peasant revolt was divided between the right, represented by Venustiano Carranza, who aspired only to political reform, and the radical "Jacobin" left, represented by the Villista-Zapatista union. In the end, Carranza prevailed, with Villa banished and Zapata assassinated. Vid. ibid 110-112.

[523] James J. Kelly, 'Article 27 and Mexican Land Reform: The Legacy of Zapata's Dream' (1994) 25 Columbia Human Rights Law Review 541.

[524] For reasons of space, it is not possible to reproduce Article 27 in its entirety here.

[525] Maria Pilar Villabona, 'La Constitución Mexicana de 1917 y la Española de 1931' (1983) 32-32 Revista de Estudios Políticos (Nueva Época) 207.

[526] (transl.) "The Nation shall at all times have the right to impose on private property the modalities dictated by the public interest, as well as to regulate the use of natural elements susceptible of appropriation, in order to make an equitable distribution of public wealth and to take care of its conservation".

Article 27 also prevented churches from owning real estate. Prescriptions four and five contained an extensive list of natural resources that were part of the national patrimony: minerals, oil, subsoil resources, seas, lagoons, rivers... The seventh prescription declared that contracts and concessions granted since the Porfiriato (1876) would be subject to review if there was evidence of theft of the Nation's land, water and natural wealth, with the possibility of declaring them null and void if they implied serious damage to the public interest. It also opened the process of dividing up the great properties on a specific basis, in order to proceed with their distribution. Finally, it entrusted the states of the Federation with the task of determining the maximum number of hectares that an individual could own.

3.3.2. The 'ejidos'

The Real Academia Española (RAE) defines the *ejido* as a "*Campo común de un pueblo, lindante con él, que no se labra, y donde suelen reunirse los ganados o establecerse las eras* [Common field of a village, bordering it, which is not ploughed, and where livestock is usually gathered or where threshing floors are established.]"[527] The World Bank, for its part, defines the *ejido* as an "institution, formally constituted by the Mexican federal government, through which property is assigned to a specific demographic group; the *ejido* is a form of social property; the property rights conferred to this demographic group are inalienable, non-transferable and unseizable; the property should be exploited as an integral production unit, preferably organised according to collective guidelines".[528] In other words, the *ejido* in Mexico is a type of land demarcation, mainly associated with the revolutionary agrarian reform, which projected the Agrarian Law of 1915 as a collective, undivided land that could not be sold or inherited. It is therefore a piece of land with a communal character.

Although the *ejido* was born as a provisional arrangement, in less than two decades it was consolidated as the main instrument of state land redistribution.[529] After the fall of Porfirio Díaz's government, this type of rural community was an effective political tool for establishing peace and responding to peasants demands. However, it must be acknowledged that in the post-revolutionary period, the restitution of communal and indigenous property spaces ended up as a practical policy of state control.[530] In 1927, Article 27 of the Mexican Magna Carta was revised to restrict the rights of peasant women to own *ejidos* in their own name unless they were the sole breadwinner of the family unit.[531] Women *ejido* holders lost their *ejido* rights if they married another *ejidatario*. Essentially, the land was considered a family resource, and only one *ejido* was granted

[527] Vid. 'Ejido' (Diccionario de la Lengua Española, Real Academia Española) <https://dle.rae.es/ejido> accessed 7 September 2022.

[528] John Richard Heath, 'Enhancing the contribution of land reform to Mexican agricultural development' (February 1990) Policy Research Working Paper Series 285, The World Bank <shorturl.at/bdlm0> accessed 8 September 2022.

[529] Emilio Kourí, 'La invención del ejido' *Nexos* (1 January 2015) <https://perma.cc/BKS4-NW49> accessed 8 September 2022.

[530] ibid.

[531] Sarah Hamilton, 'Neoliberalism, Gender, and Property Rights in Rural Mexico' (2002) 37(1) Latin American Research Review 121.

per family. It was not until 1971 that the Agrarian Reform Law lifted these restrictions, allowing spouses and their children to inherit.[532]

Over the next sixty years after the Revolution, administrations sporadically redistributed land of varying quality. Throughout the 20th century, the legislation underwent various changes, in accordance with the economic and political projects of the governments in power. By 1988, more than three million households lived in over 28,000 *ejidos*.[533] In 1992, under the government of Carlos Salinas de Gortari, a major revision of the 1917 Constitution modified Article 27, allowing for the privatisation of the *ejidos* and ending land redistribution.[534] The 1992 Amendment to the Agrarian Law allowed the *ejidos* to be converted into private property and sold. Indeed, it favoured neoliberal policies that increased land privatisation in favour of agribusiness. Once again, the privatisation of the commons was linked to the establishment of a programme of integration into capitalism, in this case within the framework of the current neoliberal paradigm.

The reform was intended to create a real estate market and allow for the creation of larger and more productive agricultural enterprises. In theory, the *ejidos* are collective lands that cannot be divided, sold or inherited, but local businessmen managed to acquire them through legal means. Between 1992 and May 2019, more than 500,000 hectares of communal land were privatised in the Yucatan Peninsula.[535] Women were considered to be more economically vulnerable in this 1992 change, as they made up a small proportion of the *ejidatarios*.[536] Interestingly, in terms of land tenure, the current land structure is predominantly male, with 76.3% of landholders being male and 26.4% female.[537]

Today, the *ejido* is regulated by Title III of the Agrarian Law of 26 February 1992.[538] *Ejidos* comprise communal land, individual plots and an "urban" area. Rights holders are divided into *ejidatarios*, *avecindados* and possessors. The *ejidatario* (Article 12) is the legal owner of the parcel; the *avecindado* (Article 13) is allowed by the General Assembly to live on the *ejido* but has no rights to the land; the possessor (Article 48) can hold a parcel while his application for *ejido* rights is being approved. In terms of the current national agrarian situation in Mexico, at the end of 2020 the total area under the

[532] ibid 121.

[533] Kelly, 'Article 27 and…' (n 523) 541.

[534] ibid 541.

[535] Gabriela Torres-Mazuera, Sergio Madrid and Raúl Benet, *Tres décadas de privatización y despojo de la propiedad social en la Península de Yucatán* (January 2021), Consejo Civil Mexicano para la Silvicultura Sostenible (CCMSS); Carlos Salinas Maldonado, 'Más de 500.000 hectáreas de tierras comunales han sido privatizadas en la península de Yucatán' *El País,* 12 February 2021 <shorturl.at/ehM34> accessed 8 September 2022.

[536] Hamilton, 'Neoliberalism…' (n 531) 121.

[537] Roberto Candelas Ramírez, 'La relevancia de los ejidos y las comunidades rurales en la estructura social de México' (2022) Documento de Trabajo núm. 31, Centro de Estudios Sociales y de Opinión Pública <shorturl.at/deGKR> accessed 8 September 2022.

[538] Ley Agraria de los Estados Unidos Mexicanos, publicada en el Diario Oficial de la Federación el 26 de febrero de 1992. Última reforma publicada DOF 08-03-2022.

social property regime represented 51% of the country's total area, of which 92% corresponded to *ejidos* and 8% to communities.[539]

3.3.3. On balance

Indeed, the Mexican Constitution sought to break with the previous liberal paradigm. Its visionary nature made it a radical model for its time, with its emphasis on economic and social rights.[540] It took into account to an unprecedented degree the needs and aspirations of large sectors of the population —peasants, workers, indigenous groups— who had been largely absent from previous constitutional debates. The Querétaro Constitution was even considered a precedent for future welfare states in the second half of the 20th century.[541] Such a revolutionary notion, which broke with Eurocentric schemes, suggests that we cannot and should not look for clues only within Europe. As will also be seen at the end of this chapter, key ideas about the organisation of society can also be found in the rest of the world, especially in colonised countries.

The experience of the 1910s made it possible to lay the legal and political foundations of a progressive vision of property that would later be applied to other democratic constitutions. It was a very different perspective from the liberal and neoliberal visions of possessive individualism: the democratic idea that the owner has obligations to society. Mexico's Magna Carta was a huge step. It was the legislature that had the power to determine the concrete form of the social obligations of property rights. As the ruler of economic development, the state had the legal power to limit the landed class. A door was even left open to the possible socialisation of all productive resources, which one might venture to call communism. Although, as we shall see, this social regime would never come to pass in Mexico. For many, and especially for the defenders of capitalism, Article 27 of the Mexican Constitution was nothing more than the end of property in general.[542]

3.4. Germany

3.4.1. The Weimar socialist Constitution

After the First World War, as a result of the extensive state intervention in the management of the economy, the trend towards socialisation gained momentum in Germany, as in most of the countries involved in the conflict.[543] The ensuing

[539] Secretaría de Desarrollo Agrario, Territorial y Urbano. *Diagnóstico 2022* (2022), Programa Presupuestario E003 "Ordenamiento y Regulación de la Propiedad Rural", 210-Dirección General de Ordenamiento de la Propiedad Rural, B00-Registro Agrario Nacional, QEZ-Procuraduría Agraria; Registro Agrario Nacional, *Datos geográficos de las tierras de uso común, por estado* (September 2020), Gobierno de México.

[540] Luca Mezzetti, 'La Constitución mexicana de 1917 en la perspectiva histórica: influencias y trascendencias' 44 (3) DPCE Online 3578.

[541] Martínez-Cava, 'Una alternativa…' (n 522) 110.

[542] Emilio Rabasa Estebanell, *El derecho de propiedad en la Constitución mexicana de 1917* (Fondo Cultura Económica, Centro de Investigación y Docencia Económicas, Suprema Corte de Justicia de la Nación, 2017) 18.

[543] Enrique Brahm García, 'La propietarización de los derechos en la Alemania de Entreguerras' (1992) 19(3) Revista Chilena de Derecho 411.

constitutional process attempted to update the social state project, but in a more inclusive and comprehensive sense than the Bismarckian model.[544] The consideration of property as a social concern can be found in the Constitution of the Weimar Republic (1919).[545] A constitution which, incidentally, for the first time recognised true universal suffrage, i.e., including for women, and therefore no longer linked property to political rights.[546] I think it could be considered the first constitution, along with the Mexican Constitution, to refer to provisions on social welfare rights, giving rise what is known as 'social constitutionalism'.

The provisions of the Weimar Constitution no longer explicitly stated that rights and freedoms were prior to the state, and therefore inviolable or sacred. Even property was not guaranteed in the sense of an inviolable fundamental right —as in the old Prussian Constitution, for example— but "*von der Verfassung gewährleistet* [guaranteed by the Constitution]". This granted a certain openness, a certain ductility, various ways of development. In line with Article 27 of the Querétaro Constitution, the Weimar Constitution stipulated that expropriations could only be carried out for the benefit of the common good, on the basis of a law, and for just compensation, unless otherwise provided for in a national law. Article 153 read as follows:

> *Das Eigentum wird von der Verfassung gewährleistet. Sein Inhalt und seine Schranken ergeben sich aus den Gesetzen.*
>
> *Eine Enteignung kann nur zum Wohle der Allgemeinheit und auf gesetzlicher Grundlage vorgenommen werden. Sie erfolgt gegen angemessene Entschädigung soweit nicht ein Reichsgesetz etwas anderes bestimmt. Wegen der Höhe der Entschädigung ist im Streitfalle der Rechtsweg bei den ordentlichen Gerichten offen zu halten, soweit Reichsgesetze nichts anderes bestimmen. Enteignung durch das Reich gegenüber Ländern, Gemeinden und gemeinnützigen Verbänden kann nur gegen Entschädigung erfolgen.*
>
> *Eigentum verpflichtet. Sein Gebrauch soll zugleich Dienst sein für das Gemeine Beste.*[547]

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[544] Pisarello, *Un largo Termidor*... (n 61) 126.

[545] Verfassung des Deutschen Reichs ("Weimarer Reichsverfassung") vom 11. August 1919 (Reichsgesetzblatt 1919, S. 1383).

[546] On 12 November 1918, the *Rats der Volksbeauftragten* (Council of People's Deputies), all men, established the legal basis for women's suffrage by announcing that all elections to public office would be held on the basis of equal secret, direct and universal suffrage for men and women of at least 20 years of age. The new electoral law (*Reichswahlgesetz*) came into force on 30 November of the same year. In January 1919, women voted in the first elections of the Weimar Republic. The Constitution established:

Art. 17. Jedes Land muß eine freistaatliche Verfassung haben. Die Volksvertretung muß in allgemeiner, gleicher, unmittelbarer und geheimer Wahl von allen reichsdeutschen Männern und Frauen nach den Grundsätzen der Verhältniswahl gewählt warden (...) [Every state must have a republican constitution. The representatives of the people must be elected by universal, equal, direct, and secret suffrage of all German citizens, both men and women, in accordance with the principles of proportional representation. (...)].

Art. 22. Die Abgeordneten werden in allgemeiner, gleicher, unmittelbarer und geheimer Wahl von den über zwanzig Jahre alten Männern und Frauen nach den Grundsätzen der Verhältniswahl gewählt (...). [The delegates are elected by universal, equal, direct, and secret suffrage by men and women over twenty years of age, according to the principle of proportional representation. (...)].

[547] (transl.) "Property is guaranteed by the Constitution. Its content and limits are derived from the laws. Expropriation can be carried out only for the benefit of the commonweal and on the basis of a law. It takes place for adequate compensation. Respecting the extent of compensation, the regular courts shall be kept

Indeed, according to the Weimar Constitution, property obliged because it fulfilled a social function. The general interest was no longer an irremediable evil, an indirect consequence of property, but an end in itself. This provision even opened up the possibility of expropriation without compensation. In any case, the Weimar Republic never passed a general expropriation law, and Article 153 was even suspended during the Third Reich.[548] But this was to be the precedent for the future Bonn Constitution. Moreover, Article 154 guaranteed the right to inherit according to civil law, without prejudice to the state's share as determined by law. The land was also reformed. Article 155 of the Weimar Constitution aimed to distribute land to ensure that all German families had sufficient land available to meet their needs. Expropriation was possible on a legal basis if it was necessary for the needs of space, the promotion of settlement or agriculture.

Furthermore, Article 155 stated that "*Die Bearbeitung und Ausnutzung des Bodens ist eine Pflicht des Grundbesitzers gegenüber der Gemeinschaft. Die Wertsteigerung des Bodens (...), ist für die Gesamtheit nutzbar zu machen* [The cultivation and exploitation of the land is a duty of the owner towards the community. The increase in the value of the land (...) shall be for the benefit of the community]."[549] Article 155 added that natural wealth and economically usable natural forces were to be placed under state control. Royalties of a private nature were to be transferred to the state by legislative measures. Meanwhile, Article 156 subjected the production and distribution of economic goods to "collectivist principles". It provided for public control of the economy in the general interest, either through the nationalisation of key sectors or through the development of cooperative forms of ownership. Similarly, Article 165 allowed for the planning of

open in the case of dispute unless otherwise provided by Reich law. Expropriation by the Reich against Länder, municipalities and non-profit associations may only take place against compensation. Property obliges. Its use shall at the same time be a service for the common good."

[548] The constitutional situation in the Third Reich was peculiar, as there was no formal repeal or replacement of the Weimar Constitution. The subsequent Nazi government would not exactly disregard the Weimar Constitution, although it was emptied of its real content and new social, racist and corporate legislation was passed. But the *Verordnung des Reichspräsidenten zum Schutz von Volk und Staat ["Reichstagsbrandverordnung"], 28. Februar 1933* [Reich President's Decree for the Protection of the People and the State of 28 February 1933] did expressly suspend Article 153 "*bis auf weiteres* [for the time being]". This decree was based on Article 48(2) of the Weimar Constitution, which authorised the Reich President to temporarily suspend the fundamental rights set out in Articles 114, 115, 117, 118, 123, 124 and 153 if this was necessary to restore public safety and order if they were seriously disturbed or endangered. In this sense, neither the *Verordnung des Reichspräsidenten zum Schutze des Deutschen Volkes* of 4 February 1933 nor the *Ermächtigungsgesetz* of 24 March 1933 were formally constituent acts, nor even a reform of the Weimar Constitution. In any case, from a material point of view, they implied the establishment of the *Führerprinzip* (leader principle). It expressed a fundamentally political decision in the sense of Carl Schmitt in his pamphlet *State, Movement, Volk,* and empowered the Führer as the depositary of a permanent constituent power. In this situation, of course, the Weimar Constitution did not apply. Vid. Richard S. Schubert, Compensation under New German Legislation on Expropriation, *(1960) 9 (1) The American Journal of Comparative Law* 84; Pisarello, *Un largo termidor...* (n 61) 133.

[549] Germany's large population of 61 million in 1919 required the confiscation of unused land. This implied the adoption of state measures, which allowed the alienation of private property in order to collectivise it and make it productive. Cultivation and production became a duty, as did the recasting of property in the collective spirit. The collectivisation of land introduced a socialising position of property, which would entail expropriation, but at the same time recognising private property within the constitutional framework. Vid. Juan David Restrepo Zapata, 'La Constitución alemana de Weimar (1919) ¿una utopía en medio de la crisis? Un análisis histórico a sus aspectos interventores, modernizadores y derechos sociales' (2018) 50(190) Estudios internacionales (Santiago) 97.

strategic sectors in the general interest and gave trade unions, through works councils, a central role in the socialisation of the economy.

However, these provisions were interpreted very broadly by the *Reichsgericht* (then the German Supreme Court). The court sought to broaden the content and scope of the guarantee of the protection of the right to property; in other words, to curb the clear socialising tendency reflected in the constitution. This showed that the new constitution was not accompanied by effective changes in the state apparatus. For example, the Weimar Constitution was supposed to protect not only the right to property in Article 903 BGB, but also all private property rights (credit, shares, rights in rem, copyright).[550] In this way, not only the administration but also the legislature was to be restricted. The interpretation of Article 153 of the Weimar Constitution was that expropriation was compensable in any case. The notion of expropriation was rapidly dissolved and the traditional characteristics of this institution were eroded. This broadening of the concept of expropriation paved the way for a progressive practice of strengthening the protection of private property against the state.[551]

3.4.2. The Grundgesetz: Article 14 and property guarantees

Interrupted by the National Socialist ideological programme, in which the government openly declared Article 153 of the Weimar Constitution inoperative and confiscated private property, the institution of property was resumed in the post-WWII period with the Basic Law for the Federal Republic of Germany (Bonn, 23 May 1949) —hereafter referred to as GG (*Grundgesetz*).[552] In the drafting of the Basic Law, the Parliamentary Council was guided by the guarantees of the Weimar Constitution.[553] This charter advocated the restoration of the property system on the model of a 'social market economy'.[554] In This was partly due to the return to the arguments of the natural right to property, as a result of the confrontation with the legal positivism of National Socialism, but also to shield the restoration of the old property order against the "virulent" alternative of organising common property. In any case, Germany was at an exceptional moment in its history. The entire political system seemed to be further to the left than it is today.

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[550] Martin Wolff, 'Reichsverfassung und Eigentum' aus der Festgabe der Berliner juristischen Fakultät für Wilhelm Kahl zum Doktorjubiläum am 19. April 1923, cited in Brahm García, 'La propietarización…' (n 543) 412.

[551] Hans Hattenhauer, *Conceptos fundamentales del derecho civil* (Ariel 1987) 122.

[552] Grundgesetz für die Bundesrepublik Deutschland in der im Bundesgesetzblatt Teil III, Gliederungsnummer 100-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 1 des Gesetzes vom 28. Juni 2022 (BGBl. I S. 968) geändert worden ist.

[553] Heinz-Joachim Pabst, 'Vererben und Verschenken aus grundrechtlicher Sicht' (2001). Juristische Schulung 1145.

[554] No specific provision in the German Basic Law makes the 'social market economy' a constitutional requirement. However, some constitutional elements lay the foundations of the German economic system. The GG establishes the principles of private property, freedom of contract, freedom of association and the right to choose one's profession and job. Furthermore, the GG states that the Federal Republic of Germany is a democratic country that promotes social justice. This means that neither a centrally planned economy nor an unrestricted market economy is possible in Germany. Vid. Ulrich Witt, 'Germany's "Social Market Economy": Between Social Ethos and Rent Seeking' (2002) 6(3) The Independent Review 365.

In the catalogue of fundamental rights, Article 14 GG contains the promise to guarantee property (*Eigentum*) and the right of inheritance (*Erbrecht*). It also mentions expropriation (*Enteignung*), which is only permitted in the public interest. The predecessors of this constitutional provision are Articles 153 and 154 of the Weimar Constitution, and it has never been amended since the Basic Law came into force.[555]

> *(1) Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt.*
>
> *(2) Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen.*
>
> *(3) Eine Enteignung ist nur zum Wohle der Allgemeinheit zulässig. Sie darf nur durch Gesetz oder auf Grund eines Gesetzes erfolgen, das Art und Ausmaß der Entschädigung regelt. Die Entschädigung ist unter gerechter Abwägung der Interessen der Allgemeinheit und der Beteiligten zu bestimmen. Wegen der Höhe der Entschädigung steht im Streitfalle der Rechtsweg vor den ordentlichen Gerichten offen.*[556]

Article 14 GG contains a subjective guarantee of the right to property as a right of freedom of private individuals vis-à-vis the state and a guarantee of private property as an institution. On the one hand, it protects citizens against public authorities in their right to freely use, manage and dispose of property. To this end, it permits the defence against sovereign interference.[557] On the other hand, Art. 14 GG guarantees that the legal system provides, shapes and protects property and inheritance law.[558] In any case, the constitutional concept of property is neither identified with nor exhausted by the definition of property contained in the BGB.[559] The Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) has referred to property as "*ein elementares Grundrecht* [an elementary fundamental right]"[560] which is determined in its scope by the "powers of use prescribed by law".[561] Finally, in 1968, the BVerfG broadly defined the right to property as a fundamental right linked to freedom, as follows:[562]

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[555] Nonetheless, in the Weimar Constitution, property was protected in a material sense; the economic value of property was guaranteed. In the *Grundgesetz*, on the other hand, property is protected in order to guarantee personal freedom from state intervention, in the tradition of the political liberalism of the time. Property thus moves from guaranteeing an economic value to a personal right, i.e., freedom.

[556] (transl.) "(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws. (2) Property entails obligations. Its use shall also serve the public good. (3) Expropriation shall only be permissible for the public good. It may only be ordered by or under a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts."

[557] BVerfGE 97, 350 (369), Beschluss vom 31.03.1998 - *Euro*.

[558] BVerfGE 24, 367 (388), Beschluss vom 18.12.1968 - *Hamburgisches Deichordnungsgesetz*.

[559] Otto Kimminich, 'Capítulo III. La propiedad en la Constitución Alemana' in Javier Barnés (coord), *Propiedad, expropiación y responsabilidad: la garantía indemnizatoria en el derecho europeo y comparado: Unión Europea, Convenio europeo de derechos humanos, España, Alemania, Francia, Italia* (Tecnos 1996) 151.

[560] BVerfGE 14, 263 (277), Beschluss vom 7.08.1962 - *Feldmühle-Urteil;* ibid BVerfGE 24, 367 (389); BVerfGE 42, 64 (76), Beschluss vom 24.03.1976 – *Zwangsversteigerung*; BVerfGE 31, 229 (273), Beschluss vom 07.07.1971 - *Schulbuchprivileg*.

[561] BVerfGE 58, 300 (104) – *Naßauskiesung*.

[562] BVerfGE 24, 367 (389) (n 558).

> *Art. 14 Abs. 1 Satz 1 GG gewährleistet das Privateigentum sowohl als Rechtsinstitut wie auch in seiner konkreten Gestalt in der Hand des einzelnen Eigentümers. Das Eigentum ist ein elementares Grundrecht, das in einem inneren Zusammenhang mit der Garantie der persönlichen Freiheit steht. Ihm kommt im Gesamtgefüge der Grundrechte die Aufgabe zu, dem Träger des Grundrechts einen Freiheitsraum im vermögensrechtlichen Bereich sicherzustellen und ihm damit eine eigenverantwortliche Gestaltung des Lebens zu ermöglichen. Die Garantie des Eigentums als Rechtseinrichtung dient der Sicherung dieses Grundrechts. Das Grundrecht des Einzelnen setzt das Rechtsinstitut Eigentum voraus; es wäre nicht wirksam gewährleistet, wenn der Gesetzgeber an die Stelle des Privateigentums etwas setzen könnte, was den Namen "Eigentum" nicht mehr verdient.*[563]

Thus, property rights are by no means relegated to an inferior position in Germany and are taken very seriously.[564] As fundamental rights, the rights to ownership and transfer of property and to protection against expropriation are subject to the guarantee of intangibility in their essential content, which is generally predicated for this category in Article 19(2) GG. Its formulation must be contextualised as a structural element in the process of German reunification, given the need to re-privatise state assets in a new market economy context.[565] In this sense, it should be noted that legal persons can also invoke Article 14 GG via Article 19(3) GG: "*Die Grundrechte gelten auch für inländische juristische Personen, soweit sie ihrem Wesen nach auf diese anwendbar sind.* [Fundamental rights shall also apply to domestic legal persons to the extent that the nature of such rights permits]." Furthermore, it is worth noting that, according to the BVerfG, a general guarantee of the value of pecuniary legal positions does not follow from Article 14(1) of the Basic Law. This article only covers the legal positions to which a legal subject is already entitled, but not the opportunities and profits that will arise in the future, since the value of an object is determined exclusively by the market.[566]

The German Constitution does not provide for a fossilised property right, nor does it specify which assets are to be included in the constitutional concept of property. Indeed, neither the GG nor the BGB provide a definition of the concept of property. Rather, the content and limits of the right to property are established as a matter of law. This has also been confirmed by the German Federal Constitutional Court, which has interpreted that the property rights guaranteed by the constitution at a given point in time are determined by what is defined as property under ordinary law at that point in time.[567]

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[563] (transl.) "Article 14 (1) GG guarantees private property both as a legal institution and in its concrete form in the hands of the individual owner. Property is an elementary fundamental right that is intrinsically linked to the guarantee of personal freedom. In the overall structure of fundamental rights, it has the task of ensuring that the bearer of the fundamental right has freedom in the area of property law and thus enables him to shape his life on his own responsibility. The guarantee of property as a legal institution serves to secure this fundamental right. The fundamental right of the individual presupposes the legal institution of property; it would not be effectively guaranteed if the legislature could replace private property with something that no longer deserves the name 'property'."

[564] David P. Currie, *The Constitution of the Federal Republic of Germany* (The University of Chicago Press 1994) 290.

[565] Torsten Stein, 'Garantías constitucionales en el derecho de propiedad alemán' (1998) Anuario de derecho constitucional Latinoamericano 355.

[566] BVerfG, Beschluss vom 26.06.2002 - 1 BvR 1428/91; BVerfGE 105, 17 (30), Beschluss vom 05.02.2002 - *Sozialpfandbriefe*.

[567] Stein, 'Garantías constitucionales…' (n 565) 359.

Thus, unlike the usual fundamental rights, the protection of property is strongly based on the law.

The fundamental right itself does not define the protection of property. The legislature, in the form of formal laws, defines what is meant by the protection of property within the meaning of the Constitution. This gives the legislative branch some flexibility to respond to changes in society. Of course, the legislature's power to define is not unlimited. It must be ensured that the core of property is not affected. In other words, the use of the property by the owner is guaranteed. Thus, not only the boundaries but also the content of property, which is subject to change, are defined by law.[568] In this sense, the Parliament has defined the legal status of the owner in a large number of areas through public and private law provisions. Some of the most relevant areas include building and planning, the environment, monument protection,[569] public commercial law,[570] police law, criminal law, social security law, tenancy law, neighbourhood law and company law.[571]

The BVerfG, for its part, has also defined the content of Article 14 GG, in a much broader interpretation than in civil law. In addition to real property, the constitutional right to property protects limited rights in rem, such as easements and encumbrances, claims under the law of obligations (*schuldrechtliche Ansprüche*),[572] intellectual property rights, such as copyright (*Urheberrecht*) and trademark rights (*Warenzeichen*),[573] shares in companies (*Anteilseigentum und Eigentum der Unternehmensträger*),[574] and possession (*Besitz*), which according to Art. 854 BGB is the actual control of property.[575] Moreover, the Federal Constitutional Court stated that property was also restricted by European law.[576] In particular, it is delimited by Article 1 of the Protocol No. 1 to the European Convention on Human Rights (ECHR),[577] which has an indirect effect on the German legal system and thus influences the interpretation of German law.

[568] ibid 359.

[569] Vid. BVerfGE 100, 226, Beschluss vom 02.03.1999 - *Denkmalschutz*.

[570] Vid. BVerfGE 97, 228 (252), Beschluss vom 17.02.1998 - *Kurzberichterstattung*.

[571] Hans D. Jarass, Martin Kment, Bodo Pieroth, *Grundgesetz für die Bundesrepublik Deutschland, Kommentar* (17 edn, C.H. Bech 2022).

[572] BVerfGE 112, 93 (107), Beschluss vom 07.12.2004 - *Stiftung 'Erinnerung'*.

[573] BVerfGE 31, 229 (n 560); BVerfGE 51, 193, Beschluss vom 22.05.1979 - *Schloßberg*.

[574] BVerfGE 50, 290, Beschluss vom 01.03.1979 - *Mitbestimmung*; BVerfGE 102, 197 (211), Beschluss vom 19.07.2000- *Spielbankengesetz Baden-Württemberg*.

[575] BVerfGE 89, 1, Beschluss vom 26.05.1993- *Besitzrecht des Mieters*.

[576] BVerfGE 111, 307, Beschluss vom 14.10.2004 - *EGMR-Entscheidungen*.

[577] Article 1 of Protocol No. 1 states: Every natural or legal person is entitled to the peaceful enjoyment of his/her possessions. No one shall be deprived of his/her possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. Vid. European Convention on Human Rights as amended by Protocols Nos. 11, 14 and 15 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16. European Court of Human Rights, Council of Europe.

Furthermore, the constitutional interpretation of property in Germany cannot contravene Article 17 of the Charter of Fundamental Rights of the European Union.[578]

Turning now to Article 14(2) GG — a legacy of Article 153 of the Weimar Constitution — this second paragraph recalls that property entails obligations and recognises the social function of property: "Its use shall serve (...) the public good". German doctrine has referred to this provision using various meanings, such as social binding (*Sozialbindung*), social obligation (*Sozialpflichtigkeit*), social subjection (*Sozialgebundenheit*) or social duty (*Sozialverpflichtung*) of property. Even certain doctrines have assumed the existence of inherent attachments to the right to property, based on its social function, without the need for legislative intervention.[579] Indeed, the framers of the Constitution did not conceive the guarantee of property as absolute. The social obligation bound both the Parliament, in determining the content and limits of property rights, and property owners, in exercising their rights.

The Basic Law thus expresses a rejection of a property regime "*in der das Individualinteresse den unbedingten Vorrang vor den Interessen der Gemeinschaft hat* [in which the individual interest has unconditional priority over the interests of the community]".[580] According to this recognition, property is neither a right of isolated individuals nor the epitome of material egoism, but is linked to the community and becomes a fundamental element of the social order. It must also be borne in mind that it is the legislature and not the owner who is to be regarded as the direct addressee of the social obligation clause of Art. 14(2) GG. According to the Federal Constitutional Court, it is the task of the legislature "*das Sozialmodell zu verwirklichen, dessen normative Elemente sich einerseits aus der grundgesetzlichen Anerkennung des Privateigentums durch Art. 14 Abs. 1 Satz 1 GG und andererseits aus der verbindlichen Richtschnur des Art. 14 Abs. 2 GG ergeben* [realising the social model, the normative elements of which result, on the one hand, from the constitutional recognition of private property through Article 14(1) and, on the other hand, from the binding guideline of Article 14(2)]".[581]

A third paragraph of the same article recognises the admissibility of expropriation, which should not be seen as a limitation, a restriction or a denial of the constitutional protection of property, but its consequence.[582] It is: "(...) *konkrete Rechtspositionen, die durch Art. 14 Abs. 1 Satz 1 GG geschützt sind, zur Erfüllung bestimmter öffentlicher Aufgaben vollständig oder teilweise zu entziehen* [the complete or partial deprivation of concrete subjective property positions in the sense of Article 14(1) GG for the fulfilment of certain

[578] Article 17 of the Charter of Fundamental Rights of The European Union (2000/C 364/01). 18.12.2020. Official Journal of the European Communities: 1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected.

[579] Kimminich, 'La propiedad...' (n 559) 155.

[580] BVerfGE 21, 73 (101) Beschluss vom 12.01.1967 - *Grundstücksverkehrsgesetz.*

[581] BVerfGE 37, 132 (140), Beschluss vom 23.04.1974 - *Vergleichsmiete I;* BVerfGE 25, 112 (117), Beschluss vom 15.01.1969. *Niedersächsisches Deichgesetz.*

[582] Kimminich, 'La propiedad...' (n 559) 163.

public tasks"].[583] This means, firstly, that expropriation can only be carried out by the state (in the broad sense), by law or by administrative act. The German expropriation regime thus requires the legislative power to make explicit when the social function in law limits the right to property and gives rise to expropriatory effects, as well as the form in which the corresponding compensation is to be made.[584] Disputes over the amount of compensation, which must in any case respect an equitable balance between the public interest and the interests affected, are heard by the ordinary courts.

Three cumulative conditions have to be met. First, the expropriation must be in the public interest, for reasons of public utility.[585] Second, the expropriation must be carried out under a law which determines the nature and extent of the compensation. Article 14(3) GG does not give rise to a claim for compensation,[586] but the law on which the expropriation is based must explicitly provide for compensation for the owner of the property. And third, the compensation must be adequate. The adequacy or amount of compensation is determined by weighing the interests of the general public and the affected party. Although the Parliament has some leeway, in practice, the market value is often used as a benchmark for the amount of compensation.[587] In addition to the abstract proportionality test, a concrete proportionality test must also be carried out in the case of an encroachment. Not every intervention, even if it is proportionate in the abstract, is also proportionate in the concrete. Each case must be examined in detail, weighing the interests of the parties involved.[588]

From an environmental point of view, it is important to mention that the restriction of the use of property without the transfer of powers to a beneficiary is not considered to be an expropriation. For example, prohibitions and restrictions of use under the nature conservation law, prohibitions of construction in water protection zones and the establishment of acceptable levels of road traffic emissions do not constitute expropriation. In addition, regulations prohibiting or restricting the use of property that is harmful to the environment are generally permissible.[589] Thus, there are environmental restrictions on property. In addition to this ecological function, the social relationship of the property in question is relevant to the appropriateness of the

[583] BVerfGE 102, 1 (15), Beschluss vom 16.02.2000 - *Altlasten*.

[584] Concerning the institution of expropriation, it is interesting to refer to the judgement of the German Federal Constitutional Court of 18 December 1968 (BVerfG, 18.12.1968 - 1 BvR 638/64; 1 BvR 673/64; 1 BvR 200/65; 1 BvR 238/65; 1 BvR 249/65). The Court points out that the legislature's power to determine the content and limits of private property is limited, as it must be proportionate and take into account the basic axiological decisions of the Basic Law in favour of private property in the traditional sense. The Court adds that it must also be in line with the rest of the constitutional norms. It gives as an example the principle of equality, of the social state and the rule of law and the fundamental right to the free development of the personality. Vid. Eduardo Cordero Quinzacara, 'Las garantías institucionales en el derecho Alemán y su proyección en el derecho de propiedad' (2007) 14 (2) Revista de Derecho Universidad Católica del Norte 81.

[585] BVerfG, Beschluss vom 18.01.2006, 2 BvR 2194/99; BVerfGE 115, 97 (112), Beschluss vom 18.01.2006, *Halbteilungsgrundsatz*.

[586] BVerfGE 58, 300 (320) (n 561).

[587] Hans Dieter Jarass, 'Eigentumsgarantie', *Handwörterbuch der Stadt- und Raumentwicklung* (Akademie für Raumforschung und Landesplanung 2018) 479.

[588] BVerfG, Beschluss vom 08.04.1987, 1 BvR 564, 684, 877, 886, 1134, 1636, 1711/84.

[589] BGHZ 99, 262, 269. Vid. Hans Dieter Jarass, 'Eigentumsgarantie' (n 587) 471.

expropriation. The legislature's power to determine the content and limits is "*umso größer, je stärker der soziale Bezug des Eigentumsobjekts ist; hierfür sind dessen Eigenart und Funktion von entscheidender Bedeutung* [all the greater the stronger the social relationship of the property object; its nature and function are of decisive importance for this]".[590]

Article 15 GG, for its part, reaffirms the social function of property by stipulating that land, natural resources and means of production may be placed under a regime of collective ownership or other forms of collective management, for the purpose of socialisation.[591] This socialisation is therefore abstract and general —unlike expropriation, which is concrete and individual— and is not a mandate but a possibility left to the legislature's discretion. Socialisation is therefore not a subcategory of expropriation, but an additional authorisation for the legislative power to intervene in the constitutionally guaranteed property.[592] In any case, socialisation based on public service approaches to social needs, can only take place through a law that provides for compensation and regulates its nature and scope. In practice, there have so far been no cases of socialisation under Article 15 GG to date. However, it has been a hot topic given the alleged socialisation of real estate in Berlin by companies owning at least 3,000 flats.[593]

Article 18 GG establishes that the defence of the fundamental regime of freedom and democracy does not justify the abuse of the right to property. Note here, then, how freedom is protected over property. It is worth saying that, despite the constitutionally recognised social function of property, this has not been reflected in policy. The German social and economic system has promoted individual experience of success over collective experience. See, for example, the institution of housing in Germany. When rents become unaffordable and competition between property owners increases, social solidarity is quickly destroyed. Property then no longer serves the common good; it does not redistribute capital but multiplies it.

An examination of how the constitution specifically links property and nature reveals that, firstly, sustainable ecological development appears as a constitutionally protected principle in Article 20a GG, in force since 1994. It recognises the state's responsibility

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590 BVerfGE 102, 1 (17) (n 583); 50, 290 (340 f.) (n 574); 100, 226 (241) (n 569).

591 Art. 15 Grundgesetz für die Bundesrepublik Deutschland 1949: Land, natural resources and means of production may, for the purpose of nationalisation, be transferred to public ownership or other forms of public enterprise by a law that determines the nature and extent of compensation. (...).

592 Foroud Shirvani, 'Wohnraummangel und Bodenordnung. Rechtliche Maßnahmen zur Behebung des Wohnraummangels im Fokus der Eigentumsverfassung' (2020) 135(3) DVBL Deutsches Verwaltungsblatt 178.

593 On 26 September 2021, a referendum was held in Berlin, thanks to the citizens' initiative *Deutsche Wohnen & Co. enteignen*, for the "socialisation" of flats in the city. More than 59.1% of the valid votes were in favour of the expropriation of large private housing companies. The socialised flats would be transferred to an institution under public law. This would affect 243,000 of the approximately 1.5 million rented flats in Berlin. The reasons are the rising rents on the Berlin property market and the abandonment of maintenance by large real estate companies. The main target, hence the name of the initiative, is the housing company Deutsche Wohnen, which with some 110,000 flats is the largest landlord in Berlin and, according to the initiative, pursues a policy of permanently maximising rents. Vid. 'Volksentscheid über einen Beschluss zur Erarbeitung eines Gesetzentwurfs durch den Senat zur Vergesellschaftung der Wohnungsbestände großer Wohnungsunternehmen' (berlin.de, 2023) <t.ly/jdMs> accessed 17 May 2023.

towards future generations and its duty to protect "*die natürlichen Lebensgrundlagen und die Tiere* [the fundamental elements of life and animals]", within the framework of the constitutional order, both through legislation —in accordance with the law and justice— and through executive and judicial action. This is certainly a task to which the state has committed itself, to a certain extent, in order to safeguard property.

Article 74(15) GG, in turn, provides that the transfer of land, natural resources and means of production to collective ownership or other forms of collective economy is a matter of concurrent legislative competence between the Federation and the Länder (federal states). The Federation can legislate on this matter "*wenn und soweit die Herstellung gleichwertiger Lebensverhältnisse im Bundesgebiet oder die Wahrung der Rechts- oder Wirtschaftseinheit im gesamtstaatlichen Interesse eine bundesgesetzliche Regelung erforderlich macht* [if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity makes federal regulation necessary in the national interest]" (Article 72(2) GG).

Nature conservation and landscape management are also concurrent matters (Article 74(1).29 GG). If the Federation makes use of its legislative power in this matter, the Länder may enact laws that deviate from this legislation, except for the general principles of nature conservation, the law on the protection of plant and animal species and the law on the protection of marine life. In practice, environmental legislation has been primarily the responsibility of the Federal Government, while the Länder remain primarily responsible for its implementation. Besides these constitutional provisions, the German legal framework for environmental law has been, to date, quite fragmented. It comprises cross-cutting legislation (about 30 individual federal laws), such as the Environmental Impact Assessment Act, the Environmental Information Act, the Environmental Appeals Act, the Environmental Damage Act, and environmental criminal law.

Furthermore, this analysis should not end without mentioning that German law is familiar with the concepts of cultural and natural heritage mentioned in the Convention Concerning the Protection of the World Cultural and Natural Heritage (UNESCO Convention). Furthermore, through the mechanisms of direct effect and supremacy of EU law, as well as through transposition into national law, some common property concepts have become part of German law. For instance, Art. 1 of the Water Framework Directive, which sets as one of its objectives the promotion of sustainable water use based on the long-term protection of available water resources, was transposed into Art. 1 of the German Federal Water Act (*Wasserhaushaltsgesetz*).[594]

In addition, German public law provides for the legal regulation of common use (*Gemeingebrauch*), which means that the general public can use them in accordance with their purpose without having to obtain a special permit.[595] For example, Section 7(1) of the Federal Roads Act (*Bundesfernstraßengesetz*) stipulates that public roads are accessible to all; Section 25(1) of the *Wasserhaushaltsgesetz* places surface waters under

[594] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, P. 1).

[595] Johanna Croon-Gestefeld, 'Property Meeting the Challenge of the Commons in Germany' in Ugo Mattei et al (eds), *Property Meeting the Challenge of the Commons* (Springer 2023) 173.

(limited) common use; and Section 59(1) of the Federal Nature Conservation and Landscape Management Act (*Bundesnaturschutzgesetz*) allows all persons to "enter the open landscape… for recreational purposes". There are therefore certain notions of German law that could leave the door open to the concept (and therefore management) of the commons.

It should also be mentioned that in parallel, the German Democratic Republic (GDR) knew three constitutions (1949, 1968 and 1974). The 1968 Constitution, adopted by the Socialist Unity Party of Germany (SED), explicitly called itself socialist.[596] Its very preamble was directed against "*der Imperialismus unter Führung der USA im Einvernehmen mit Kreisen des westdeutschen Monopolkapitals* [US-led imperialism in agreement with circles of West German monopoly capital]". Article 1 spoke of the achievement of socialism through the leadership of the working class and its Marxist-Leninist party. Article 10 stated that public property was the property of society as a whole, at the disposal of the state. It was managed by enterprises, institutions and, in some cases, by individual citizens on behalf of the state.

Article 13 of the 1968 Constitution stated that cooperative property was also managed collectively, and included the equipment, machinery, installations, buildings and livestock of agricultural cooperatives, craft cooperatives, etc., as well as the result of the use of cooperative land and means of production. Article 11 stipulated that only property serving the material and cultural needs of citizens could be personal property. Art. 23 of the GDR Civil Code of 19 June 1975 further specified the concept of personal property. Private property included the few private businesses of craftsmen, tradesmen and artisans, church property and privately leased land, as well as land owned by foreigners.

3.4.3. On balance

In 20th-century German constitutionalism, the state —i.e., the legislature— was entrusted with the task of defining the legal framework of the property system. In doing so, it had to take into account both the protection of freedom and the social obligation of property. The Weimar Constitution opted for very broad guarantees of the social function of property and would project its influence on Western European constitutions over the next three decades. Meanwhile, property in the German Basic Law is above all a right of exclusion from others and the state, and, in the tradition of political liberalism, a recognition of individual freedom. The literal wording of Article 14 GG seems to create a circle of intangibility around private property. However, Article 14 GG must also be interpreted in the context of the German social state and the social history of the Federal Republic. There does not seem to be an irreconcilable opposition between the two cornerstones of constitutional property law: freedom and social obligation. On the contrary, German history has shown that the legislature has struck a reasonable balance between the private benefit and the social use of property, thus ensuring legal peace.

Thus, the owner participates in the social order both through the use of their property and the recognition of social obligation as an important limit to the exercise of these

[596] Verfassung der Deutschen Demokratischen Republik vom 9. April 1968, geändert durch Gesetz vom 7. Oktober 1974 (GBl. I S. 425), neu bekannt gemacht am 7. Oktober 1974 (GBl. I. S. 432).

rights. The German state also participates in this social order by creating a property regime that provides the most favourable conditions for the acquisition of property for the greatest number of people, and by demanding social responsibility from property owners through the regulation of land use.[597] Even the right to the development of the personality in Article 2 (1) GG is expressly limited by its social context.[598] After all, as the German Federal Constitutional Court concludes:

> *Das Menschenbild des Grundgesetzes ist nicht das eines isolierten souveränen Individuums; das Grundgesetz hat vielmehr die Spannung Individuum – Gemeinschaft im Sinne der Gemeinschaftsbezogenheit und Gemeinschaftsgebundenheit der Person entschieden, ohne dabei deren Eigenwert anzutasten.*[599]

The backdrop of the strong social state in Germany and the public acceptance of interconnectedness and the general obligation of the community could therefore open a way and accommodate the concept of the commons that I intend to argue for in the next chapter.

3.5. France

3.5.1. The introduction of limitations on propriety in 20th century French constitutions

Certainly, as noted in Chapter 2, from the French Revolution until the middle of the 20th century, the right to property in France was conceived as an absolute right. However, although the Declaration of the Rights of Man and of the Citizen is still in force, the right to property has been limited over the years.[600] After the Second World War, a Constituent Assembly was convened in 1945, which altered the balance of political forces in France. The Socialists and Communists gained 15 points compared to 1936 and came close to an absolute majority of votes (49.6%). This advance of the left was above all that of the Communist Party, which doubled its pre-war political weight and became the leading party in France.[601] A first text, proposed by the French Communist Party, did not mention the right to property. This proposal was rejected and replaced by another that introduced limits on property, while the Preamble evoked the Constitutions of 1793 and 1848.

This draft was also rejected in a referendum with 53% of the vote. A new Constituent Assembly drafted a text that combined traditionalist right-wing thinking with a concern

[597] Lubens, 'The social obligation…' (n 471) 393.

[598] Article 2(1) GG: "Everyone has the right to the free development of his personality, insofar as he/she does not violate the rights of others or offend against the constitutional order or the moral law."

[599] (transl) "The Basic Law's conception of man is not that of an isolated sovereign individual; rather, the Basic Law has decided on the tension between the individual and the community in the sense of the community-relatedness and community-boundness of the person, without touching its intrinsic value". BVerfGE 4, 7, (291), Beschluss 20.07.1954 - *Investitionshilfe*.

[600] In 1970, the Constitutional Council recognised the constitutional value of the Declaration of the Rights of Man and of the Citizen of 1789, by including it in the constitutionality block of the preamble to the Constitution of 4 October 1958.

[601] Assemblée Nationale, Tableau des élections du 21 octobre 1945 a l'Assemblée Nationale Constituante dressé aux Archives de la Chambre des Députés, 1946.

for the social question.[602] The possibility of expropriation "for reasons of public utility" and the subordination of property rights to "social utility" were eliminated. Finally, in 1946, the Constitution of the Fourth Republic was approved by 36% of the registered voters.[603] The new Article 1 simply stated that France was "*une République indivisible, laïque, démocratique et sociale* [an indivisible, secular, democratic and social Republic]".

Moreover, its preamble recognised that "*Tout bien, toute entreprise, dont l'exploitation a ou acquiert les caractères d'un service public national ou d'un monopole de fait, doit devenir la propriété de la collectivité*. [Any property, any enterprise, the operation of which has or acquires the characteristics of a national public service or a de facto monopoly, must become the property of the community]." This preamble also committed the law, for the first time in constitutional form, to guaranteeing women the same rights as men in all areas, without any reference to property or gender.[604] In French constitutional law, this preamble is still in force today and is placed on the same level as the Declaration of 1789.

3.5.2. Property as a vague concept. Between the Constitution and the Code

Faced with the political instability of the Fourth Republic following the Algerian war and the Algiers crisis in May 1958, the President of the Council, Pierre Pflimlin, resigned to become President of the Republic.[605] In a message to the Parliament on 29 May 1958, the President of the Republic, René Coty, announced a new government. General de Gaulle's government took office on 1 June 1958. The Constitutional Act of 3 June 1958 empowered it to draft a new Constitution and set out the substantive and procedural conditions to be met. The final draft of the Constitution was approved by the Council of Ministers on 3 September 1958 and presented to the French people by General de Gaulle the following day at the Place de la République in Paris.[606] The text was approved by

[602] Pisarello, *Un largo Termidor*… (n 61) 142. Cfr. Sandro Guerrieri, 'Le modèle républicain français et la Constitution de 1946' (2005) 25 (1) Parliaments, States and Representation 215.

[603] Constitution de 1946, IVe République - 27 octobre 1946.

[604] On 18 March 1944, General de Gaulle, then President of the French National Liberation Committee, declared before the Provisional Consultative Assembly that the new regime should include representation elected by all the men and women of the country. On 24 March 1944, the same Assembly adopted the Fernand Grenier amendment, which introduced the right of active and passive suffrage for all French women. On 21 April 1944, Art. 17 of the Ordinance on the organisation of public authorities in France after the Liberation stipulated that "*Les femmes sont électrices et éligibles dans les mêmes conditions que les hommes* [Women shall be voters and eligible to stand for election under the same conditions as men]". The first elections in which women took part were the municipal elections of April-May 1945. Vid. Ordonnance du 21 avril 1944 relative à l'organisation des pouvoirs publics en France après la Libération, 326 (JORF du 22 avril 1944) ; 'Quelles sont les grandes étapes de la conquête du droit de vote des femmes ?' (*Vie publique*, 4 July 2022) <t.ly/3wwr5> accessed 14 March 2023.

[605] The *Algiers putsch* of 1958 was a political crisis in France during the turmoil of the Algerian War of Independence (1954-1962), which led to the collapse of the Fourth Republic. The coup aimed to oppose the formation of the new government of Pierre Pflimlin and to force a change of policy in favour of the right-wing supporters of French Algeria. About this historical episode, vid. 'The Spring of 1958' in David Galula, *Pacification in Algeria (1956-1958)* (RAND 2006) 213. Original publication: 1963.

[606] 'La Constitution de la Ve République : comment est-elle née ?' (Conseil constitutionnel, 2023) <t.ly/d9Vb> accessed 4 May 2023.

82.6% of votes in favour in a referendum on 28 September 1958, and promulgated as the Constitution of the Fifth Republic on 4 October 1958.[607]

In addition to the full text of the 1958 Constitution, there are other texts still in force that make up the French constitutional corpus: the Declaration of the Rights of Man and of the Citizen of 1789, the preamble to the Constitution of 1946 and the Charter of the Environment of 2004, as well as the fundamental principles recognised by the laws and other principles or objectives of constitutional value. This Constitution would be particularly relevant as it introduced constitutional review for the first time in France. Regarding property, its regime is effectively recognised in the Constitution. Article 34 of the French Constitution of 4 October 1958[608] reserves the property regime to the law. Associated with citizenship, local and national identity, and social and family status, private property is and has been a widely shared social ambition in France.[609]

> *La loi fixe les règles concernant :*
> - *les droits civiques et les garanties fondamentales accordées aux citoyens pour l'exercice des libertés publiques ; la liberté, le pluralisme et l'indépendance des médias ; les sujétions imposées par la défense nationale aux citoyens en leur personne et en leurs biens ;*
> - *(…) les régimes matrimoniaux, les successions et libéralités ;*
> - *(…)*
> - *les nationalisations d'entreprises et les transferts de propriété d'entreprises du secteur public au secteur privé.*
> - *La loi détermine les principes fondamentaux :*
> - *(…)*
> - *de la libre administration des collectivités territoriales, de leurs compétences et de leurs ressources ;*
> - *de la préservation de l'environnement ;*
> - *du régime de la propriété, des droits réels et des obligations civiles et commerciales; (…)*[610]

As contradictory as it may seem, the French constitutional tradition has considered the right to property to be a fundamental right. This seems to me to be particularly relevant, since property has not been endowed with this maximum protection in other constitutions. The Constitutional Council (*Conseil constitutionnel*), enshrined, in recital 16 of the Decision No. 81-132 DC of 16 January 1982, the "full constitutional value" of the right to property and its "fundamental character".[611]

> *(…) si postérieurement à 1789 et jusqu'à nos jours, les finalités et les conditions d'exercice du droit de propriété ont subi une évolution caractérisée à la fois par une*

[607] 'Le référendum du 28 septembre 1958' (*Assemblée nationale*, 2023) <t.ly/4Keg> accessed 4 May 2023.

[608] Constitution Française du 4 octobre 1958 instituant la Ve République. Legifrance.

[609] Vid. Sylvette Denèfle (dir), *Repenser la propriété. Des alternatives pour habiter* (Presses universitaires de Rennes 2016).

[610] (transl.) "The law shall lay down rules concerning: - civil rights and the fundamental guarantees granted to citizens for the exercise of public freedoms; the freedom, pluralism and independence of the media; the constraints imposed by national defence on citizens in their persons and property; - (…) matrimonial regimes, successions and gifts; - (…) - the nationalisation of companies and the transfer of ownership of companies from the public to the private sector. - The law determines the fundamental principles: - (…) - the free administration of local authorities, their powers and resources - the preservation of the environment; - the system of property, real rights and civil and commercial obligations; (…)".

[611] Décision n° 81-132 DC du 16 janvier 1982. *Loi de nationalisation.*

> *notable extension de son champ d'application à des domaines individuels nouveaux et par des limitations exigées par l'intérêt général, les principes mêmes énoncés par la Déclaration des droits de l'homme ont pleine valeur constitutionnelle tant en ce qui concerne le caractère fondamental du droit de propriété dont la conservation constitue l'un des buts de la société politique et qui est mis au même rang que la liberté, la sûreté et la résistance à l'oppression, qu'en ce qui concerne les garanties données aux titulaires de ce droit et les prérogatives de la puissance publique ; que la liberté qui, aux termes de l'article 4 de la Déclaration, consiste à pouvoir faire tout ce qui ne nuit pas à autrui, ne saurait elle-même être préservée si des restrictions arbitraires ou abusives étaient apportées à la liberté d'entreprendre.*[612]

The formula was partially refined in recital 18 of the Decision No 89-256 DC of 25 July 1989:[613]

> *(…) les finalités et les conditions d'exercice du droit de propriété ont subi une évolution caractérisée par une extension de son champ d'application à des domaines nouveaux et par des limitations exigées au nom de l'intérêt général ; que c'est en fonction de cette évolution que doit s'entendre la réaffirmation par le préambule de la Constitution de 1958 de la valeur constitutionnelle du droit de propriété.*[614]

For its part, the Court of Cassation ruled in a decision of 28 November 2006 that free access to one's property "*constitue un accessoire du droit de propriété, droit fondamental à valeur constitutionnelle* [constitutes an accessory to the right of ownership, a fundamental right of constitutional value]".[615] Despite this, it should be mentioned that in practice the right to property has not enjoyed the same protection as other fundamental rights.[616]

In any case, neither the 1958 Constitution nor the DDHC define property, let alone its content and the rights derived from it. This is certainly not an anomaly, but the norm in all the declarations of rights studied to date. The absence of a definition in the French constitutional texts makes it necessary to seek refuge in Article 544 of the Civil Code.[617]

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[612] (transl.) "(…) if, after 1789 and up to the present day, the purposes and conditions of exercise of the right to property have undergone an evolution characterised both by a notable extension of its field of application to new individual areas and by limitations required by the general interest, the very principles set out in the Declaration of Human Rights have full constitutional value both as regards the fundamental nature of the right to property, the preservation of which is one of the aims of political society and which is placed on the same level as freedom, security and resistance to oppression, and as regards the guarantees given to the holders of this right and the prerogatives of the public authorities; that the freedom which, according to Article 4 of the Declaration, consists in being able to do everything that does not harm others, cannot itself be preserved if arbitrary or abusive restrictions are placed on the freedom of enterprise."

[613] Décision n° 89-256 DC du 25 juillet 1989. *Loi portant dispositions diverses en matière d'urbanisme et d'agglomérations nouvelles*.

[614] (transl.) "(…) the purposes and conditions of exercise of the right to property have undergone an evolution characterised by an extension of its field of application to new domains and by limitations required in the name of the general interest; that it is in the light of this evolution that the reaffirmation by the preamble to the 1958 Constitution of the constitutional value of the right to property must be understood."

[615] Cour de Cassation, Chambre civile 1, du 28 novembre 2006, 04-19.134.

[616] Conseil constitutionnel, 'Quelques éléments sur le droit de propriété et le Conseil constitutionnel', Note d'information interne aux services du Conseil constitutionnel <shorturl.at/jxJK4> accessed 5 July 2021; Jean-François de Montgolfier, 'Conseil constitutionnel et la propriété privée des personnes privées' (2011) 31 (1) Cahiers du Conseil Constitutionnel; Pierre Bon, 'El estatuto constitucional del derecho de propiedad en Francia' (1998) 25 (3) Revista Chilena de Derecho 533.

[617] Code Civil des Français 1804, mise à jour du 2022-07-01 (n 337).

As discussed in the previous chapter, the civil text states that the right to property is the right to enjoy and dispose of things "in the most absolute manner",[618] thus reinforcing the absolute and exclusive nature of the right to property.[619] This right is divided into the three classical attributes derived from Roman law: *usus* (right to use the property), *fructus* (right to receive or collect and benefit from the fruits of the property) and *abusus* (right to dispose of the property based on the power to modify, sell or destroy it).[620]

The owner, therefore, exercises the broadest powers over their property, as long as it is not used in a manner prohibited by law and regulation. There is no doubt that the legislature was cautious with this last clause of the article, anticipating the various historical erosions of this right.[621] There is no list of enumerated prerogatives, since precisely, the right to property, as an extension of freedom, requires regulation only as an exception. Suffice it to recall that Article 546 of the Civil Code adds that the ownership of a thing, whether movable or immovable, confers the right to everything that it produces and to what is attached to it, either incidentally, naturally, or artificially.

As for the 'right' to property, even a fundamental right cannot be absolute and, in practice, it encounters multiple limitations. Certainly, the Parliament, through legislation,[622] and the courts, through case law, have gradually restricted and turned property into a relative right.[623] Legal limits are usually in the collective interest. The law may impose restrictions on the landlord for urban planning, environmental or rent control reasons. The French courts, for their part, have distinguished different types of restrictions in neighbourhood relations. Case law distinguishes between abuse of property rights (e.g., the owner who deliberately turns the property into a source of nuisance for the neighbours, through weeds, insects, odours, etc.) and normal neighbourhood nuisance (e.g., odours from barbecues).

The Constitutional Council merely ensures that these limitations do not violate the right to property as defined in the Declaration. Decision 81-134 DC of 05 January 1982 reinforced the prominence of the right to property as a fundamental constitutional principle, by stating that an enabling law could not exempt the government from respecting constitutional principles, particularly those relating to liberty, equality and

[618] This absolute character is the result of historical circumstances. Enacted in the wake of the French Revolution (itself the result of the break with the *Ancien Régime*), the French Civil Code of 1804, of Napoleonic style, dutifully reflects the liberal conception of property.

[619] Christian Bessy, 'Propriété. Introduction', in Christian Bessy and Michel Margairaz (dirs.), *Les biens communs en perspectives. Propriété, travail, valeur (XVIIIe-XXIe siècle)* (Éditions de la Sorbonne 2021) 22.

[620] Shael Herman, 'The Uses and Abuses of Roman Law Texts' (1981) 29 (4) The American Journal of Comparative Law 671; Laurent Aynès, 'Chapter VI. Property Law' in George A. Bermann and Etienne Picard (eds), *Introduction to French Law* (Kluwer Law International 2008) 153.

[621] Nicolas Bernard, 'Les limites de la propriété par les droits de l'homme' in Bénédict Winiger et al., *La propriété et ses limites/Das Eigentum und seine Grenzen* (Franz Steiner Verlag 2017) 55.

[622] See, for example, arts. 671 to 682 of the French Civil Code.

[623] In particular, in the field of urban planning. Vid. Marie-Laure Dussart, 'La garantie de la propriété à l'épreuve de la Question prioritaire de constitutionnalité' (2012) 92 (4) Revue française de Droit constitutionnel 799.

the right to property.[624] Of course, the French constitutionalists were always had private property in mind. Admittedly, France is a social republic, but not a socialist one; it is not based on the collectivisation of the means of production.[625] Thus, (private) property stands as the constitutionally desirable regime.

3.5.3. Expropriation

On the other hand, certain restrictions also make the right to property relative. The limitation par excellence would be the aforementioned social function, whose maximum restriction is outright dispossession, i.e., expropriation. However, this is not explicitly mentioned in the 1958 Constitution. The procedure of expropriation in the public interest or nationalisation may oblige private individuals to transfer their property rights to the state, a public authority or a private body with a public service mission. Expropriation must be justified, i.e., it must meet a public need established by law (Art. 17 DDHC). In 1804, the French Civil Code provided for expropriation in this way, although its Article 545 authorises expropriation "*pour cause d'utilité publique* [for public utility]" and no longer for "public necessity", as referred to in the DDHC.

Article L. 223-2 of the Expropriation Code requires the administrative judge to examine the public utility declaration in the event of its annulment in order to compensate for the abuse of public authority: "(…) *tout exproprié peut faire constater par le juge que l'ordonnance portant transfert de propriété est dépourvue de base légale et demander son annulation* [any expropriated person may have the judge declare that the order transferring ownership lacks a legal basis and request its annulment]".[626] However, there are special cases in which it is not necessary to resort to expropriation and in which the effects are in some way the same, without the need to compensate the injured owner: regrouping, administrative easement, incorporation into the public domain, requisition, town planning regulations, etc.

In addition, the full and exclusive nature of ownership is subject to numerous violations. For example, when a usufruct encumbers a property, the owner has only bare ownership. In usufruct, there is *usus* and *fructus*, but not *abusus*, so it is a real right that gives its holder the right to use and collect the rents and goods belonging to another person, with the obligation to preserve its form and substance. Servitudes, which can be of private or public utility, act as constraints, burdens imposed on a property for the use and utility of another not belonging to the same owner.[627] They include, for example, servitudes of passage, of drainage, of non-building (*non aedificandi*), of maintenance (*de tour d'échelle*), of water passage (*de marchepied*), etc. (Arts. 637-710 Code Civil). In this

[624] Décision nº 81-134 DC du 5 janvier 1982, cons. 6. *Loi d'orientation autorisant le Gouvernement par application de l'article 38 de la Constitution, à prendre des mesures d'ordre social*

[625] François Luchaire, 'Socialisme, propriété et Constitution' in Dominique Colas and Claude Émeri (dirs), *Droit, institutions et systèmes politiques. Mélanges en hommage à Maurice Duverger (Presses Universitaires de France* 1988) 129.

[626] Code de l'expropriation pour cause d'utilité publique. Version en vigueur depuis le 01 janvier 2015. Création Ordonnance n°2014-1345 du 6 novembre 2014 – Annexe.

[627] Vid. for instance: Articles 649 to 685-1 of the French Civil Code.

respect, there are also conventional limits, where co-owners can agree to limit their respective property rights.

Moreover, the Preamble to the Constitution of 1946, which is still in force, already stated in paragraph 9 that: *"Tout bien, toute entreprise, dont l'exploitation a ou acquiert les caractères d'un service public national ou d'un monopole de fait, doit devenir la propriété de la collectivité* [Any property, any enterprise, the operation of which has or acquires the characteristics of a national public service or a de facto monopoly, must become the property of the community]". This text provided the framework for the great wave of nationalisations of 1945 and 1946, when the French Communist Party was part of the Provisional Government of the French Republic. On the same basis, the left, which returned to power in 1981, hoped to do the same. The right-wing parliamentary opposition appealed to the Constitutional Council to declare the 1981-1982 nationalisations illegal. The Constitutional Council then issued an important decision, the aforementioned Decision No. 81-132 DC of 16 January 1982. It stated that: a) the right to property is a fundamental right; b) nationalisations are not limited to the cases provided for in the Preamble of 1946; and c) the legislature must respect the principles of the DDHC of 1789.

Over the decades, the Constitutional Council has issued numerous decisions on what the Constitution of the Fifth Republic (1958) allowed in terms of privatisation and denationalisation.[628] Although the Council has never explicitly recognised the existence of a constitutional public service, Decision No. 86-207 DC of 26 June 1986 raised the question of the compatibility of the privatisation of certain public enterprises in the public sector.[629] The notion of a constitutional public service was presented as a constitutional exception to the discretionary power of the legislature to privatise. These services cannot be privatised because of their constitutional nature. In other words, public property has the same constitutional value as private property and therefore

[628] Thus, for example, Recital 13 of Decision No 2006-543 DC of 30 November 2006. *Loi relative au secteur de l'énergie* about the privatisation of Gaz de France, recalls that *"(...) aux termes du neuvième alinéa du Préambule de 1946 : 'Tout bien, toute entreprise, dont l'exploitation a ou acquiert les caractères d'un service public national ou d'un monopole de fait, doit devenir la propriété de la collectivité' ; (...) l'article 34 de la Constitution confère au législateur compétence pour fixer 'les règles concernant... les transferts de propriété d'entreprises du secteur public au secteur privé'* [(...) under the terms of the ninth paragraph of the Preamble of 1946: 'Any property, any enterprise, the operation of which has or acquires the characteristics of a national public service or a de facto monopoly, must become the property of the community'; (...) Article 34 of the Constitution confers on the legislative branch the power to lay down 'the rules concerning... the transfer of ownership of enterprises from the public to the private sector']". A special law of 7 December 2006 finally carried out the privatisation of Gaz de France. The Constitutional Council ruled that the complete opening of the gas distribution market to competition on 1 July 2007, in application of a European directive, would cause Gaz de France to lose its status as a national public service. According to the Council, the public distribution of natural gas is a local public service and not a national public service; the regulated tariffs imposed on GDF cannot suffice to maintain its national public service status, as they are declared unconstitutional. This confirmed the rule that the national public service disappears at the will of the legislative power.

[629] Décision n° 86-207 DC du 26 juin 1986, cons. 53. *Loi autorisant le Gouvernement à prendre diverses mesures d'ordre économique et social.*

benefits from a constitutional regime of protection.[630] However, the Constitutional Council does not specify their content and limits.

There is a deep-rooted idea in French legal history that, when a service is related to the public interest, private parties are subject to specific rules of public law. Subcontracting does not, therefore, mean the eviction of public law values. What is true is that there is a certain common understanding that some goods and services will always be subject to public law values. The French model limits the scope of privatisation and applies a legal regime in which public law rules play an active role. Just as one aim of public law is to protect the interests and rights of individuals against state interference, another should be to reconcile it with a sense of community.[631]

3.5.4. The ecological function of property: The Charter for the environment

Since 2005, the environment has been given greater protection. The *Charte de l'environnement* was adopted in 2004 and inserted (*adosée*) into the French Constitution as part of the Preamble.[632] This neo-constitutionalist brief charter —10 Articles— states in its preamble that the environment is the common heritage of all human beings. Article 1 establishes an individual entitlement to the right to a healthy environment. One can see here the eminently individualistic essence of this Western approach: while the exercise of this right may be collective, it is ultimately an individual interest or need; it is only possible if everyone (*chacun*) can enjoy it for themselves.

The Charter is perhaps significant not so much for its catalogue of third-generation rights, already recognisable in other earlier European constitutional texts, but for the position it gives to such environmental rights (with constitutional rank), equating them with the Declaration of the Rights of Man and the Citizen. The Charter is also commendable for its orderly structure and the notion of environmental duty it introduces. The Charter raises to the constitutional level three important principles: prevention (Arts. 3 and 5), precaution (Art. 5) and the polluter pays (Art. 4). Articles 2 to 4 refer to the duty of all individuals, Articles 5 to 10 to the public authorities,[633] Articles 8 and 9 to the sectors concerned, such as education and research, and Article 10 to the inspiration for France's action at the European and international level.

Indeed, nothing is mentioned about property rights, e.g., what happens to property when it may negatively affect the environment. But the Charter gives judges the power to equate environmental protection with other rights and freedoms of constitutional value, such as the freedom to conduct a business and the right to property. Take, for example,

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[630] Pierre Bon, 'Capítulo IV. Francia. El estatuto constitucional del derecho de propiedad' in Javier Barnés (coord), *Propiedad, expropiación y responsabilidad: la garantía indemnizatoria en el derecho europeo y comparado: Unión Europea, Convenio europeo de derechos humanos, España, Alemania, Francia, Italia* (Tecnos 1996) 188.

[631] Manuel Tirard, 'Privatization and Public Law Values. A View from France' (2008) 15 (1) Art 12 Indiana Journal of Global Legal Studies 297.

[632] Loi constitutionnelle n° 2005-205 du 1er mars 2005 relative à la Charte de l'environnement (Journal officiel de la République française n°0051 du 2 mars 2005 page 3697).

[633] Including the right to information and participation in public decisions related to the environment (Article 7), in accordance with the Aarhus Convention.

the theory of neighbourhood nuisance. From the outset, Article 544 CC has limited the absolute nature of the right to property. Living in society means enduring certain nuisances in the neighbourhood, which, if they exceed a certain threshold, give the victim a right of action. Neighbourhood nuisance thus combines two constitutionally recognised rights: the right of the neighbours to enjoy a peaceful environment and the right of the perpetrator(s) of the nuisance to use their property or to freely exercise their professional activity in accordance with the law.

The Constitutional Council concluded that it is up to the legislative power to adopt new provisions and to amend or repeal previous texts, replacing them if necessary with other provisions, "*dès lors que (…) il ne prive pas de garanties légales des exigences de caractère constitutionnel* [provided that it does not deprive constitutional requirements of legal guarantees]."[634] In this case, however, no extraordinary legislative or constitutional change was required. The direct incorporation of the Charter for the Environment as a part of the constitutional body not only subjected the right to property to new purposes and conditions, but also gave it a new constitutional character, competing with the much-vaunted Article 2 of the DDHC. Recital 2 of the Environmental Charter, which states that the conservation of the environment must be pursued "*au même titre que les autres intérêts fondamentaux de la Nation* [in the same way as the other fundamental interests of the Nation]", is placed on the same level as the right to property.

The question then arises as to which takes precedence: the right to property or the right to a healthy environment. Of course, this will depend on each individual case, but it must be recognised that the French courts have been taking the new Charter seriously. In 2005, for example, the Court of Orléans acquitted the *faucheurs volontaires*[635] who had destroyed Monsanto's GMO trials in open fields. The Court held that the environment is a 'res communis' and that the *faucheurs volontaires* had therefore acted as owners of the environment to defend biodiversity in the interest of all, in accordance with the Charter. The judges weighed up the rights of two owners, that of the Monsanto company to its fields and that of the *faucheurs volontaires* to preserve the environment. Following the constant jurisprudence of the Constitutional Council, the Court of Cassation and the Council of State, the Court of Orléans ruled that, in this case, the right based on the defence of the general interest could prevail over the right based solely on the defence of commercial interests.[636]

[634] Décision nº 2011-116 QPC du 8 avril 2011. *M. Michel Z. et autre [Troubles du voisinage et environnement].*

[635] The *faucheurs volontaires* is a mainly French movement whose claimed activists committed themselves in writing to destroying transgenic trial plots and GMO field crops. Vid. 'Charte des Faucheuses et Faucheurs Volontaires' (Faucheuses et Faucheurs volontaires d'OMG, August 2018) <t.ly/1_gH> accessed 29 March 2023.

[636] Vid. Tribunal de grande instance d'Orléans, correctionnel, 9 décembre 2005, nº 2345/S3/2005, Société Monsanto c/Dufour et a.

3.5.5. On balance

The first conclusion to be drawn from an examination of the French body of constitutional law in force is that none of the constitutional texts specifically defines the content of property or the rights it embraces. This forces one not only to search through the rest of the constitutional block to see what other provisions say about it (or how they conflict with it), but also to go further, to see what the Napoleonic Code and laws directly or indirectly related to property have to say. Rather, it has been constitutional jurisprudence and legislation that have shaped and nuanced these concepts, over the decades making property a more relative right, while at the same time declaring it a fundamental right of constitutional value.

In fact, the French Constitution of 1958 does not even explicitly recognise the right to property, leaving the fundamental principles of the property regime to the law (Art. 34). It probably relied too much on the so-proclaimed Article 2 of the Declaration of the Rights of Man and of the Citizen, still in force after more than two centuries, and just like that, in the masculine form, as well as on the old Article 544 of the Napoleonic Code, which vindicate and sacralise the right to property. The Constitution of 1958 is thus a catch-all, that can accommodate as many forms of property as society, or rather, the legislature, wants at any given time.

It seems that none of the constitutional texts calls into question the exclusive nature of property, i.e., the absolutism of property itself, which remains intact. I find François Luchaire's comparison illustrative. For him, the right to property is a "*droit artichaut"* (artichoke right): *"même si on lui retire une série d'attributs, il reste lui-même; sauf si l'on touche au cœur, auquel cas il disparaît* [even if a series of attributes are taken away from it, it remains itself, unless its heart is touched, in which case it disappears]".[637] The heart is touched only in the case of expropriation or restrictions so severe as to distort the meaning and scope of the right to property. In other cases, the law merely infringes the right to property without questioning it. Of course, nobody touches property until it is constitutionally defined: it is a vicious circle. It is the laws on expropriation, urban planning or the environment, as well as the civil code itself, that have had to set some limits on property.

3.6. Italy

3.6.1. The post-war context

In 1955, the eminent professor of civil procedure Piero Calamandrei claimed in a speech that the Constitution of the Italian Republic was the child of the Resistance. Indeed, it was an anti-fascist text against Mussolini's dictatorship and the national-socialist regimes that had just triggered the Second World War.[638] On 2 June 1946, the first

[637] Louis Favoreu, 'La jurisprudence du Conseil constitutionnel et le droit de propriété proclamé par la Déclaration de 1789' in Conseil constitutionnel (éd), *La Déclaration des droits de l'homme et du citoyen et la jurisprudence : Colloque des 25 et 26 mai 1989 au Conseil constitutionnel* (Presses Universitaires de France 1989) 123.

[638] Piero Calamandrei, 'Discorso sulla Costituzione. Milano, 26 gennaio 1955' (*Memoteca,* 21 January 2012 <shorturl.at/IKRS2>.

elections since 1924 had been held in Italy. A powerful sign of a definitive change of mentality towards political participation was the Lieutenancy Legislative Decree no. 74 of 10 March 1946. Approved by the National Council on 23 February 1946, it gave women the right to vote and stand for election for the first time in Italy, almost 30 years after universal suffrage for men had been approved, regardless of income.[639]

Voters were given one ballot paper to choose between Republic or Monarchy, and another to elect the deputies to the new Constituent Assembly. The latter would have the task of drafting a new constitutional framework, as provided for in a decree of 16 March 1946. The Republic won with 12.7 million votes. Humbert II, the country's last King, left Italy on 13 June 1946. Five days later, the Corte di Cassazione officially proclaimed the victory of the Republic. The current Italian Constitution was drafted in 1946 and promulgated on 22 December 1947. The Constituent Assembly, elected by universal suffrage, covered a broad political spectrum, with a predominance of Christian Democrats, liberals and leftists. The sum of the seats of the *Partito Comunista Italiano* (PCI) and the *Partito Socialista Italiano di Unità Proletaria* (PSIUP), outnumbered *Democrazia Cristiana*.[640] They were all anti-fascist, so there was general agreement against an authoritarian constitution.

The Constitution of the Italian Republic came into force on 1 January 1948, a century after the promulgation of the Constitution of the Kingdom of Italy, the aforementioned Albertine Statute. The Republican Constitution became the fundamental charter of the Italian legal system and still stands today at the top of the hierarchy of sources. Considered as "labourist", the Constitution was read as the result of a compromise between capital and labour, and as a "constitutionalisation" of the class struggle, irrevocably linked to the industrial phase of mass production. In fact, today some consider this post-war constitution to be too far removed from the current capitalist phase to claim to be the basis of contemporary Italian law and society.[641]

Be that as it may, the main discipline of the right to property in the Italian legal system today is dictated by Articles 832 and following of the Civil Code (*Codice Civile)*[642] and by Articles 42 and following of the Constitution of the Italian Republic.[643] Together, these two provisions define the principles and limits that regulate the right to property in the Italian legal system. As is the case in other European countries, the *Codice Civile* predates the Italian Constitution. It was promulgated under the Fascist regime, by Royal Decree no. 262 of 16 March 1942, and replaced the previous Civil Code of 1865, which was almost

[639] Decreto Legislativo Luogotenenziale 10 Marzo 1946, N. 74. *Art. 1. L'Assemblea Costituente e' eletta a suffragio universale con voto diretto, libero e segreto, attribuito a liste di candidati concorrenti* [The Constituent Assembly is elected by universal suffrage with a direct, free and secret vote, attributed to competing lists of candidates].

[640] However, only 21 of the 556 constituent members were women.

[641] Maria Rosaria Marella, 'La funzione sociale oltre la proprietà' (2013) 31(4) Rivista critica del diritto privato 552.

[642] Codice Civile Italiano. Testo del Regio Decreto 16 marzo 1942, n. 262 aggiornato con le ultime modifiche apportate, da ultimo, dal D.L. 30 aprile 2022, n. 3 (n 414).

[643] Costituzione della Repubblica Italiana da 1947. Senato.it.

an Italian translation of the Napoleonic Code.[644] This current *Codice* was influenced by the *Bürgerliches Gesetzbuch* of 1900, although some parts of the code were based on the laws in force in Nazi Germany at the time, especially regarding corporate law.[645] During the drafting of this new Civil Code, the Fascist debate on the social function of property was aimed at containing the landowners, but in line with the needs of capitalism at the time, with a view to modernising the national economy, industrialising the country and making agriculture more productive.[646]

Regarding property, Article 832 *Codice Civile* provides that: "*Il proprietario ha diritto di godere e disporre delle cose in modo pieno ed esclusivo, entro i limiti e con l'osservanza degli obblighi stabiliti dall'ordinamento giuridico* [The owner has the right to enjoy and dispose of things fully and exclusively, within the limits and subject to the obligations established by the legal system]." The pre-constitutional code thus recognised a classical Lockean definition of property: the absence of limitations on the owner's ability to enjoy or dispose of the thing and the possibility of excluding anyone from enjoying the thing, within the limits and compliance with the obligations established by the legal system. However, the Constitution of the Italian Republic of 1947 would not take long to place greater limits on this civil law statement, which was conceived in a very different context. In any case, although a constitutional concept of property, independent of that contained in the *Codice*, has found its way into legal reflection, it remains a complex task to arrive at a constitutional meaning of the right to property, free from any reference to the pre-constitutional code. Thus, although the current Italian Constitution is, of course, open to interpretation, the legacy of the previous legal culture is palpable.[647]

3.6.2. The Italian Constitution: Articles 42 et seq.

The anti-fascist Italian Constitution of 1948 devotes three articles (42-44) to private property in the section on economic relations, describing both public and private property. Firstly, this deliberate placement seems to me very significant. The exclusion of the right to property from the list of fundamental rights represents a step away from the absolutist conception of property. The systematic and dogmatic consequence of

[644] The 1865 Code focused entirely on the concept of property, understood as a right guaranteeing individual freedom. Its article 436 stated that "*La proprietà è il diritto di godere e disporre delle cose nella maniera più assoluta, purchè non se ne faccia un uso vietato dalle leggi o dai regolamenti*. [Property is the right to enjoy and dispose of things in the most absolute manner, provided that it is not used in a manner prohibited by law or regulation]". In effect, it demanded the construction of a strictly individual property, conceived as an independent and full situation, as absolute and stable as possible. However, the wording of this article could not resist the rapid cultural and economic change, which would transform property (especially land) into property. Vid. Moscarini, *Proprietà privata…* n (338) 62.

[645] Pietro Perlingieri, *Manuale di Diritto civile* (11th edn, Edizioni Scientifiche Italiane 2022). Later, it would undergo some significant reforms, including the removal of references to corporate rules and racist provisions or amendments in family law, private international law or company law.

[646] Vid. Franco Angelini et al, *La concezione fascista della proprietà privata* (Confederazione Fascista dei Lavoratori dell'Agricoltura 1939).

[647] Gian Franco Cartei, 'Capítulo V. Italia. La propiedad en la Constitución Italiana' in Javier Barnés (coord), *Propiedad, expropiación y responsabilidad: la garantía indemnizatoria en el derecho europeo y comparado: Unión Europea, Convenio europeo de derechos humanos, España, Alemania, Francia, Italia* (Tecnos 1996) 201.

attributing a social function to the right to private property was this alienation of the right from the catalogue of fundamental or inviolable rights. The doctrine and jurisprudence of the Italian Constitutional Court did not endow this right with such a connotation either, considering that fundamental rights are universal, in the logical sense of the universal quantification of the subjects of the right, whereas property rights are singular rights, dominated by the logic of the exclusion of third parties.[648]

Nevertheless, despite private property not having the status of a fundamental human right in Italy, it is considered as such under Article 1 of the ECHR Protocol, which has had an impact on Italian jurisprudence. Compensation for sacrificed private property was set at market value following several decisions by the European Court of Human Rights condemning Italy for violating Article 1 of the ECHR Protocol, which forced the Constitutional Court to abandon its previous jurisprudence accepting legal limits on the amount of compensation as a practical application of the "social function clause".[649] I will come back to this issue later.

Be that as it may, the point is that the Italian Constitution not only protects property, but also "recognises" it, thus recalling that it is a right that predates its constitutional recognition, i.e., a natural right to property. The Italian Constitution thus bears traces of the 19th-century French iusnaturalist conception of property. Article 42 sets out property rights: to own property, to transfer property and to protection against expropriation. However, like all modern constitutions, the Italian Constitution does not define the substantive content of property or property rights. It only limits the guarantee of private property:

> *La proprietà è pubblica o privata. I beni economici appartengono allo Stato, ad enti o a privati.*
>
> *La proprietà privata è riconosciuta e garantita dalla legge, che ne determina i modi di acquisto, di godimento e i limiti allo scopo di assicurarne la funzione sociale e di renderla accessibile a tutti.*
>
> *La proprietà privata può essere, nei casi preveduti dalla legge, e salvo indennizzo, espropriata per motivi d'interesse generale.*
>
> *La legge stabilisce le norme ed i limiti della successione legittima e testamentaria e i diritti dello Stato sulle eredità.*[650]

As can be seen, a rather reductionist statement of goods follows from the first paragraph. Property is recognised in terms of the status —private or public— of the legal entity to which the ownership of the right belongs. Thus, the scheme of private property seems to be applied to the category of public goods, and only the subjective aspect of ownership is

[648] Moscarini, *Proprietà privata*... (n 338) 101.

[649] Ugo Mattei, Alessandra Quarta, and Filippo Valguarnera, 'Meeting the Challenge of the Commons: An Emerging Field of Common Core Research' in Ugo Mattei et al (eds), *Property Meeting the Challenge of the Commons* (Springer 2023) 24-25.

[650] (transl.) "Property is public or private. Economic assets may belong to the State, to public bodies or to private persons. Private property is recognised and guaranteed by the law, which prescribes the ways it is acquired and enjoyed, and its limitations to ensure its social function and make it accessible to all. In the cases provided for by the law and with provisions for compensation, private property may be expropriated for reasons of general interest. The law establishes the regulations and limits of legitimate and testamentary inheritance and the rights of the State in matters of inheritance."

considered, distinguishing property according to the person to whom it belongs.[651] The different functions of goods are not taken into account, precisely because of their utility; things are forced into the private domain of those who possess them. The implications of this interpretation are manifold, but the commons seem to have no place in this scheme. For a long time, this constitutional statement was understood by the doctrine and legislation in a simplistic, literal, descriptive way. According to this approach, the expression 'public property' was introduced, in coherence with a privatist approach, only to explain the nature of the property rights over state property.[652]

Be that as it may, it should also be noted that Article 42(2) of the Italian Constitution speaks of "economic assets", which makes it possible to extend the property regime to the category of assets subject to economic valuation, i.e., material assets (corporeal, physical, tangible) and immaterial assets (companies, copyrights, financial assets, etc.). Indeed, the concept of property has evolved as the number of assets covered by this right has increased, rendering obsolete the arguments that were made only about the ownership of land. The strong physical connotation of property had faded away, giving way to a complete dematerialisation of the concept into other abstract forms of ownership. Property had acquired aspects of relativity and had been fragmented and dissolved into a multitude of different property statutes.[653]

But what seems to me even more revealing about Article 42(2) is that it explicitly sanctions the social function of property, despite being fully inscribed in the apparatus of a recognised capitalist system. This aspect would be part of the minimum content of the property, untouchable by the legislative power. The owner can enjoy property only to the extent that it is justified by a general interest. Consequently, the right to property can only be fulfilled if it is not opposed by a social utility. Thus, property is not the mere object of a right as an expression of personal freedom. The right to property is a priori and by its very nature meritorious, but its exercise must be reasonable.[654] In this way, property is both limited and functionalised, oriented in some way.[655]

Indeed, the aim was precisely to guarantee the social function of property by making it "accessible to all" in order to avoid monopolistic dynamics. However, another possible interpretation of the constitutional text, contrary to the previous one, is that private property should be accessible to all to ensure the development of everyone's personality and leave no one behind. This would be understood as a social necessity to guarantee private property, and not so much to weaken the absolute character of property to ensure a social exercise. In fact, the social function of property is revealed as the instrument "*attraverso il quale una società, che riconosce la proprietà privata dei beni, tenta di dare a questa un più ampio respiro per trarne vantaggi adeguati* [through which a

[651] Massimo Severo Giannini, 'Basi costituzionali della proprietà privata' (1971) 4-5 Politica del diritto 452.

[652] Capone, 'Del diritto d'uso…' (n 49) 603.

[653] Francesco Manganaro, 'The Right of Property in the Italian Legal System and in the European Convention of Human Rights: a Conflict to be Resolved' (2013) 1 Ius Publicum Network Review 4.

[654] Francesca Niola, *Ambiente e valore costituzionale. Crisi del sistema e nuove prospettive di tutela* (Aracne editrice 2019) 81.

[655] Nicola Capone, 'The concrete Utopia of the Commons. The right of Civic and collective use of public (and private) goods' (2017) 7 Law & (dis)order. Norma, eccezione, fondamento 133.

society, which recognises private ownership of property, attempts to give it a broader scope in order to derive appropriate benefits from it]".[656] Considered not as a mere purpose of law but as an element of property law, the social function turns out to be a typical feature of a capitalist legal system.

In my view, even if the Italian Constitution does not provide a true definition of property, the distinction between the two types of ownership was already an important step forward. Other constitutions did not even consider mentioning it. However, this means that property has been limited to these two possibilities, these two ways of relating to goods, with apparently no room for the commons. The aforementioned contradiction between ownership and the function of property is affected by the dissociation between the legal notion of property and that of its use. I consider it is this obtuseness that causes the collective utility of some goods to be disregarded. Both the Civil Code and the Constitution emphasise only the ownership of property in the hands of private subjects or public bodies, without saying anything about its destination. This omits the distinction between property that the state can freely dispose of and common property that is inalienable and inappropriate: it belongs to the people, to the community or a group of subjects.

In addition, Article 42 constitutionalises a new concept of property as opposed to the liberal one, for which the right to property was the very core of the system of inviolable personal rights. Property is no longer the insurmountable limit at which the other must stop, but the material basis on which the social bonds of freedom can be woven.[657] The right to property is recognised and guaranteed so that everyone may have the means to fulfil their own social function. It is never conceived as an absolute limit at which others must stop, but as the material basis on which to forge social bonds in freedom.

The constitutionalisation of property makes it possible to restore the centrality of the social bond. It challenges the individualist model without denying the freedoms of each person, who will acquire more effective conditions for the extension and realisation of fundamental rights.[658] In this way, Article 42 of the Italian Constitution functions as a negative limit to the institution of property — as a right in rem — established in Article 832 of the *Codice Civile*, which has evolved to the point where the right of ownership is full and exclusive, but no longer absolute. It should be added that the *Codice Civile* identifies specific institutions for the fulfilment of social purposes, such as expropriation in the public interest, requisition, occupation, ownership of buildings and the regulation of land ownership (arts. 840 et seq.).

Furthermore, the Constitution is resolute in reserving the limitation of property rights to legislative action. Only state legislation can impose limits on property rights in order to shape them in accordance with a social function. This in fact excludes case law as a source of law. Therefore, as in the French and German constitutional texts mentioned above, the Italian judge does not directly implement the social function of property. Neither

[656] Stefano Rodotà, 'Note critiche in tema di proprietà' (1960) Rivista trimestrale diritto e procedura civile 1298.

[657] Capone, 'Del diritto…' (n 49652) 611.

[658] Stefano Rodotà, *Il terribile diritto. Studi sulla proprietà privata e i beni comuni* (Il Mulino 2013) 478.

ordinary judges nor the Constitutional Court (*Corte Costituzionale*) can make any use of the social function of property, except in a purely declamatory and aesthetic way in connection with conclusions already reached.[659] The content to be given to public property is thus delegated to the ordinary legislature. This means that the concept of public property can be adopted or adjusted in different ways: collective property of the whole community or smaller collectivities, collective property managed by the state or other public bodies, property managed by a public body but linked to the use of controlled private enterprises, property of a public body to be used for its own purposes… Thus, different forms of organisation and regulation of public property would be possible, as long as it is not reduced to a marginal meaning of state property law or public institutions.[660]

More specifically, Article 43 of the Italian Constitution provides for the ownership of enterprises of national interest by communities of workers and users. It provides that the law may prohibit private individuals from exercising certain economic activities in sectors in which there is a particular community interest:

> *A fini di utilità generale la legge può riservare originariamente o trasferire, mediante espropriazione e salvo indennizzo, allo Stato, ad enti pubblici o a comunità di lavoratori o di utenti determinate imprese o categorie di imprese, che si riferiscano a servizi pubblici essenziali o a fonti di energia o a situazioni di monopolio ed abbiano carattere di preminente interesse generale.*[661]

The monopoly is thus reserved for the state or public bodies. The same article establishes the power of the state to expropriate, in addition to private property, all essential public utilities or energy sources or monopolies, provided that there is an overriding public interest. This provision is the result of a compromise between the old economic statism that had characterised fascism and the freedom of enterprise that the Constitution seeks to guarantee.

As it is clear from both Articles 42 and 43, the Italian Constitution does not link compensation for expropriation to the market value of compulsorily purchased properties, nor does it require that compensation must be paid in advance. For this very reason, a plethora of specific laws regulate the amount and method of calculation of compensation in different ways, depending on the purpose of each law.[662] Meanwhile, a large body of constitutional case law has been clarifying the issue. The Constitutional Court affirmed that, on the basis of the principle of the social function and the imperative duties of economic and social solidarity referred to in Article 2 of the Constitution, the legislative power may establish a measure of compensation for expropriation that is

[659] Antonio Gambaro, *La proprietà. Beni, proprietà, possesso* (2nd Edn, Giuffrè Editore 2017) 113.

[660] Giannini, 'Basi costituzionali…' (n 651) 453.

[661] (transl.) "For purposes of general interest, the law may originally reserve or transfer, by means of expropriation and subject to compensation, to the State, to public entities or to communities of workers or users, certain enterprises or categories of enterprises, provided that they relate to essential public services or energy sources or monopolistic situations and are of overriding general interest."

[662] Antonio Gambaro, 'Constitutional Protection of Private Property' in Alessandro Pizzorusso (ed). *Italian Studies in Law. A Review of Legal Problems. Volume 1* (Martinus Nijhoff Publishers 1992) 126.

lower than the market value of the expropriated property.[663] In practice, the administration nowadays calculates the compensation based on the market value of the property, without prejudice to the right of the interested party to submit observations and initiate a dispute.

Finally, it is worth mentioning that Article 44 of the Italian Constitution seeks to impose restrictions on private land ownership, in order to ensure "rational" land use and "equitable" social relations. Such impositions may range from limiting the size of farms according to region and agricultural area to reorganising agricultural units, and may even take the form of support for small and medium-sized farms, land reclamation or the conversion of large estates. Similarly, the subsequent Article 45 recognises and mandates the legislative promotion of the social function of solidarity and non-speculative cooperation. The absolutist definition of property contained in the eighteenth-century Albertine Statute and the Napoleonic Italian Civil Code is therefore a long way off.

3.6.3. The Rodotà Commission

In June 2007, a group of eminent jurists, chaired by Stefano Rodotà, was set up at the Ministry of Justice to draft a bill to "constitutionalise" the Italian Civil Code of 1942 by amending the provisions of the Civil Code on public property. The Commission aimed to restore the concept of common property by drawing up guiding principles and criteria for the revision of Chapter II of Title I of Book III of the Civil Code, as well as the other parts of the same Book relating to property law.[664] The Rodotà Commission's proposal included: 1) the revision of article 810 of the *Codice Civile* to include intangible things as assets as property; 2) the distinction between common, public and private goods; 3) the provision of the category of commons, their conditions and instruments of protection, 4) the definition of the parameters for the management and valorisation of the public heritage; and 5) the classification of public goods into three categories.

In its search for a taxonomy of public goods that would reflect the social and economic reality of the different types of assets, the Commission identified the goods themselves as tangible or intangible objects that express "*fasci di utilità* [bundles of utility]". Hence the Commission's choice to classify assets according to the utilities produced, taking into account the constitutional principles and the rules deriving from the Civil Code, and linking the utilities of the assets to the protection of personal rights and essential public interests. According to the essential needs that can be satisfied by the use of public goods, there are three types of goods: necessary public goods —which satisfy fundamental general interests (airports, railways, roads, etc.)—; social public goods —which satisfy

[663] *"Livelli troppo elevati di spesa per l'espropriazione di aree edificabili destinate ad essere utilizzate per fini di pubblico interesse potrebbero pregiudicare la tutela effettiva di diritti fondamentali previsti dalla Costituzione (salute, istruzione, casa, tra gli altri) e potrebbero essere di freno eccessivo alla realizzazione delle infrastrutture necessarie per un più efficiente esercizio dell'iniziativa economica privata.* [Excessively high levels of expenditure for the expropriation of building areas intended to be used for purposes of public interest could jeopardise the effective protection of fundamental rights provided for by the Constitution (health, education, housing, among others) and could be an excessive brake on the realisation of the infrastructure necessary for a more efficient exercise of private economic initiative]." Sentenza Corte Costituzionale n. 348 del 24/10/2007; Considerato in diritto 5.7.

[664] 'Commissione Rodotà - per la modifica delle norme del codice civile in materia di beni pubblici (14 giugno 2007) – Relazione' (Ministerio della Giustizia, 2022) <shorturl.at/pqvG4> accessed 26 July 2022.

individual needs that are particularly relevant in the service society (public housing, hospitals, public schools, etc.)—; and profitable public goods —private goods that belong to the public and can be sold and managed using instruments of private law.[665]

Concerning the commons, the Commission declared that they expressed a functional utility for the exercise of fundamental rights and the free development of the individual. Thus, the commons would not be appropriable, and their utility would be linked to constitutionally protected rights. Just as the commons would be open to the enjoyment of all, and access to them would be a right, so too would everyone have a duty to respect their integrity, in accordance with the principle of "*salvaguardia intergenerazionale delle utilità* [intergenerational preservation of utilities]".[666] According to the Rodotà Commission, the commons are in a very critical situation, due to their impoverishment and insufficient legal protection.

In essence, common goods include natural resources such as rivers, streams, lakes and other bodies of water, air, parks, forests and wooded areas, high mountain areas, glaciers and perennial snows, coastlines declared environmental reserves; wildlife and protected flora; and all other protected landscapes. It also includes archaeological, cultural and environmental assets.[667] Within this scheme, therefore, the nature of the common good does not contradict the nature of ownership of the good itself, whether public or private. On the contrary, the application of the concept of the common good to public property can lead to a strengthened public regime.

At the institutional level, this attempt at reform remained unfinished. For the time being, the notion of the common good has only been partially incorporated as a legal category that is still under construction and far from being a reform of the Civil Code. However, some believe in the duty to adopt it as a cultural and political paradigm.[668] The Rodotà Commission did not only produce a large body of jurisprudence, but it was also the breeding ground for the birth of a movement of public opinion and civic action that has made it possible to update and enrich the idea of the commons. Countless experiences of reappropriation of public and private assets made it possible to paralyse certain ongoing privatisation processes.[669]

Although I do not want to go too far into non-constitutional provisions, it should also be mentioned that the Code on the Environment contains provisions on public waters, emphasising that their use "must serve the interests of present and future generations".[670] With regard to the status of cultural and natural heritage, the Code on

[665] ibid.

[666] ibid.

[667] *Commissione Rodotà sui beni pubblici* (14 June 2007), Istituto Regionale di Studi sociali e politici "Alcide De Gasperi" – Bologna, 3.

[668] Nicola Capone, 'Proprietà e società nella prospettiva dei beni comuni', in Antonio Tucci (ed), *Disaggregazioni. Forme e spazi di governance* (Mimesis 2013) 239.

[669] The Teatro Valle in Rome and the former Asilo Filangieri in Naples are perhaps the best-known cases in Italy. Vid. Capone, 'The concrete Utopia…' (n 655) 136; Capone, 'Del diritto d'uso…' (n 49) 602.

[670] Art. 144, par. 2 of the Legislative Decree No. 152/2006 approving the Code on the Environment, as amended by Laws no.167 and 205 of 2017: "*Le acque costituiscono una risorsa che va tutelata ed utilizzata*

Cultural and Landscape Heritage states that public and private property is subject to a high degree of discretion on the part of the competent administrative authorities. For example, emissions from buildings and any other intervention on these properties must be preceded by special authorisations aimed at preserving the cultural or environmental value of the properties.[671]

3.6.4. On balance

The current Italian Constitution only recognises property as either public or private. Both are recognised and guaranteed according to their social function. There is no mention of communal property or common goods, so there are two possible interpretations: a) that collective property does not exist; b) that it is absorbed by the public or private domain. The incorporation of the social function of property did not precede the establishment of a socialist system, but was perfectly adapted to the needs of each capitalist phase. In every one of them, this constitutional arrangement has excluded communities from any direct relationship with resources, that is, from any relationship that is not mediated through the filter of the state. For it is the state alone that applies and decides in each case on the social function of property. The very concept of the state embodies, in fact, the background of the social function of property.

In any case, it should be noted that the Italian conception of property has undergone interpretative changes over the last two decades. Recent doctrine and jurisprudence have considered that the interests of the community must be taken into account when talking about state property. According to the Court of Cassation, there is the idea of "*una necessaria funzionalità dei beni pubblici, con la conseguente convinzione che il bene è pubblico non tanto per la circostanza di rientrare in una delle astratte categorie del codice quanto piuttosto per essere fonte di un beneficio per la collettività* [a necessary functionality of public goods with the consequent conviction that the asset is public not so much because it falls into one of the abstract categories of the code as because it is a source of benefit to the community]."[672] This new formulation of public goods no longer

secondo criteri di solidarietà; qualsiasi loro uso è effettuato salvaguardando le aspettative ed i diritti delle generazioni future a fruire di un integro patrimonio ambientale [Water constitutes a resource that must be protected and used according to criteria of solidarity; any use of water is carried out safeguarding the expectations and rights of future generations to enjoy an intact environmental heritage].

[671] Art. 146, par. 4 of the Legislative Decree 22 January 2004, n. 42 Code of cultural and landscape heritage, pursuant to article 10 of the law of 6 July 2002, no. 137: "*La domanda di autorizzazione dell'intervento indica lo stato attuale del bene interessato, gli elementi di valore paesaggistico presenti, gli impatti sul paesaggio delle trasformazioni proposte e gli elementi di mitigazione e di compensazione necessari* [The application for authorisation of the intervention indicates the current state of the property concerned, the elements of landscape value present, the impacts on the landscape of the proposed transformations and the necessary mitigation and compensation elements].

[672] Cass. civ. Sez. Unite, Sent., 16-02-2011, n. 3813, *Demanio e patrimonio dello stato e degli enti pubblici - mare - proprieta' e confini – valli di pesca nella laguna veneta*. Vid. Also: Sez. Un. 14-02-2011, n. 3665; sez. un., 18-02-2011, n. 3937. The Italian Court of Cassation explicitly introduced the category of common property in fundamental cases concerning the fish valleys of the Venice lagoon. The Court ruled against the plaintiffs, private companies claiming a private right of ownership over the fish valleys. The qualification of the valleys as public property was sufficient to decide the case, but the Court went further, declaring that the fish valleys were a public good because they were deeply linked to constitutional values such as the development of the person and the social function of property. The case was referred to the European Court of Human Rights, which found that the applicant company had occupied the site and acted as owner without

understands them narrowly, as goods belonging to the state, but as a set of goods that, insofar as they belong to territorial public entities, must respond to the fundamental civic interests of the communities.

This recent social evolution of Italian law exacerbates the uncertainty in the interpretation of private property, since the need to protect common goods, the preservation of which requires a re-evaluation of the concept of property, has appeared on the legal scene.[673] In fact, the social function recognised by the Italian Constitution, far from denying private property, is rooted in a communitarian (not collectivist) vision of the legal system, in which rights and duties complement each other.[674] When the *Codice Civile* and the *Costituzione* use the concept of property, they refer to the ownership of a good for exclusive use. Things that are the subject of broad and collective rights seem incompatible with the legal categories of individual rights established by bourgeois legislators for individual goods. The challenge, therefore, is to find adequate ways to protect the common goods, and to ensure that they can be collectively defended.

This does not seem impossible. The reinterpretation proposed by the Rodotà Commission initiated a promising new path for the social function. The initiative comes close to the possibility of endowing the constitutional dictate with a strategic value, by overcoming the distance between the dimension of the commons and the public/private dichotomy. It seems feasible to separate 'access' from 'ownership'. Access should be able to be granted independently of ownership, when it serves to secure the interest in the use of property beyond forms of exclusive ownership. In this way, an advanced reading of the Italian Constitution could allow for adequate and fair benefits from the right to property. Exclusive ownership seems to be unable to account for the complexity of the relationships between people and things. This is why the commons can become the defining element of the social function: the formula against exclusivity, selfishness and possessive individualism.

3.7. Spain

3.7.1. The (unstable) Constitution of the Spanish Republic (1931)

The European trend towards advanced reformism, of a mixed economy with extensive state interventionism, did not take long to take hold in Spain either.[675] The Constitution

any intervention by the authorities. The site had been the basis of the company's fish-farming activity and, until the property was incorporated into the maritime public domain, the company had acquired a legitimate expectation of being able to continue its activity. The Court held that those circumstances gave the applicant company a substantive interest protected by Article 1 of Protocol 1 to the ECHR. The Court held that the incorporation of the fish valleys into the maritime public domain must be regarded as a 'taking' of property: lawful under Italian law because it was intended to preserve the environment and ensure the public use of the lagoon, but disproportionate because the applicant had not been offered fair compensation. The decision is relevant to the theory of the commons, as it confirms that, regardless of formal ownership, property capable of satisfying fundamental needs and rights in the interest of present and future generations must be subject to an appropriate regime of proportionate restrictions. Vid. Marco D'Alberti, Federico Caporale, and Silvia De Nitto, 'Meeting the Challenge of the Commons in Italy' in Ugo Mattei et al (eds), *Property Meeting the Challenge of the Commons* (Springer 2023) 198.

[673] Manganaro, 'The Right of Property…' (n 653) 6.

[674] ibid 9.

[675] Vid. Infante Miguel-Motta, 'Un hito…' (n 449) 110.

of the Spanish Republic of 1931 (hereafter CE'31)[676] was the result of the collapse of the increasingly weakened monarchical regime, which tied its fate to that of the dictatorship and was unable to return to constitutional normality once the latter became unviable.[677] It should also be remembered that the draft of the short-lived First Spanish Republic (1873-1874) never came into force. After long and heated debates, the Second Republic saw considerable emancipation of women, including the right to vote, with the entry into force of the Constitution on 1 October 1931.[678] In principle, civil and political rights would no longer depend on income, property or gender status. Women went to the polls on 2 November 1933 and again in 1936. However, with Francisco Franco's victory in the Spanish Civil War, neither women nor men could vote in national elections until 1977, two years after his death.

Another important and novel feature of the 1931 Constitution was the imposition of limitations on the right to property. Inspired by the Mexican and Weimar Constitutions —called "the mother constitutions" of the social state[679] and cited in the constitutional debate— republicanism believed that the recognition of the social or collective function of property was linked to the inexorable advance of contemporary democracy and the discovery of the possibilities of public intervention in the economy.[680] The workers' protests and the socialist and anarchist movements that had already shaken Spain in the 1910s had been driven by the conviction that property could not be the basis of true freedom and emancipation.[681]

Private property should disappear when political power was conquered. The socialist Fernando de los Ríos explained that the so-called "free economy", as opposed to a

[676] Constitución de la República Española de 1931, 9 de diciembre de 1931, Gaceta de Madrid núm. 344, de 10 de diciembre de 1931, 1578-1588, Cortes Constituyentes, BOE-A-1931-10008.

[677] Indeed, the Berenguer Dictatorship, prior to the proclamation of the Second Spanish Republic, was commonly known as the *Dictablanda* ("soft dictatorship"). It was the last period of the Bourbon Restoration and the reign of Alfonso XIII in Spain. The term 'Dictablanda' was used by the press to refer to the lack of definition of General Dámaso Berenguer's government, which neither continued the previous dictatorship nor fully re-established the 1876 Constitution, much less called elections to the Constituent Courts, as the Republican opposition demanded.

[678] Article 36 of the Constitution of the Second Republic was worded as follows: "*Los ciudadanos de uno y otro sexo, mayores de veintitrés años, tendrán los mismos derechos electorales conforme determinen las leyes* [Citizens of either sex, over the age of twenty-three, shall have the same electoral rights as determined by law.]"

[679] Jiménez de Asúa and Pisarello include here the Soviet Constitution of 1918. Vid. Luis Jiménez de Asúa, *Proceso Histórico de la Constitución de la República Española* (Editorial Reus 1932) 47; Pisarello, *Un largo Termidor*... (n 61) 131. Rubio Lara includes the Austrian Constitution (1920). Vid. Rubio Lara, *La formación*... (n 515) 141.

[680] Francisco Manuel García Costa, 'El derecho de propiedad en la Constitución española de 1978' (2007) 7 Criterio Jurídico 286.

[681] Although the origins of the workers' movement in Spain date back to the 1830s and 1840s, during the early industrialisation of Catalonia. This was the only place in Spain where modern industry existed, especially in the textile sector. The labour movement received a notable boost in 1869, with the Glorious Revolution and the creation of a worker's federation (*Tres Classes de Vapor*) in Barcelona and was reinforced during the Bourbon Restoration. By the first decade of the 20th century, workers' power was already considerable. The revolutionary general strike of 1917 and the *Canadenca* strike in 1919 showed their consistency. In the 1920s, with the dictatorship, there was even a certain setback due to the collaborationism of the General Workers' Union (UGT) and the illegalisation of the National Confederation of Labour (CNT).

"planned economy", led to slavery.[682] The economy should be subject to the public interest, and trade unions should play a fundamental role in guiding it. Even the Republican Liberal Right Party, while "recognising and respecting" the right to property, advocated "*una función con deberes, superior y distinta de la meramente individual* [a function with duties, superior to and distinct from the mere individual]".[683]

The section devoted to property is not exactly short. Specifically, Article 44 was framed within Chapter II. Family, Economy and Culture of Title III, which regulated the rights of the Spaniards. This article is said to have been one of the most controversial in the parliamentary debate and in the Advisory Legal Commission responsible for the drafting of the preliminary project. It contained what Claudio Sánchez Albornoz, spokesman for *Acción Republicana*, called the "*tendencia socializante* (socialising tendency)" of the Constitution, which his party supported.[684] The Commission's draft stated in its first paragraph that "*La propiedad de las fuentes naturales de riqueza, existentes dentro del territorio nacional, pertenece originariamente al Estado en nombre de la Nación* [the ownership of the natural sources of wealth existing within the national territory belongs originally to the state in the name of the nation]".[685]

According to the second paragraph, "*El Estado, que reconoce actualmente la propiedad privada en razón directa de la función útil que en ella desempeña el propietario, procederá de un modo gradual a su socialización* [The State, which currently recognises private property in direct relation to the useful function performed by the owner, will gradually proceed to its socialisation]". However, both socialist proposals were significantly modified during the long and eventful parliamentary debate. Surprisingly, however, the moderate and conservative sectors did not defend the individualist concept of property, while the socialists classified the criterion applied to the property formula as "transactional", which did not mean the triumph of the Marxist principle.[686]

Luis Jiménez de Asúa, the president of the Legal Advisory Commission in charge of drafting the Constitution, argued that the socialising sense of the initial Opinion presented by to the Parliament had been somewhat cut back, since Art. 44 required that the law declaring expropriation without compensation be approved by an absolute majority of the Cortes (the preliminary draft did not specify what type of majority). But the possibility of socialising property was recognised.[687] What was originally intended to be a duty of the state ended up being a power. Article 44 read as follows:

> *Toda la riqueza del país, sea quien fuere su dueño, está subordinada a los intereses de la economía nacional y afecta al sostenimiento de las cargas públicas, con arreglo a la Constitución y a las leyes. La propiedad de toda clase de bienes podrá*

[682] Santos Juliá, *La Constitución de 1931* (Iustel 2009) 255.

[683] Infante Miguel-Motta, 'Un hito…' (n 449) 110.

[684] Diario de Sesiones de las Cortes Constituyentes de la República Española. Tomo II, nº 28, 27 agosto 1931, 653. Vid. also Santos Juliá, *La Constitución de 1931* (Iustel 2009) 75; 255.

[685] Diario de Sesiones de las Cortes Constituyentes de la República Española. Proyecto de Constitución. Apéndice 4º al nº 22, 18 de agosto de 1931, 5.

[686] Jiménez de Asúa, *Proceso Histórico…* (n 679) 294.

[687] ibid 100-101.

> *ser objeto de expropiación forzosa por causa de utilidad social mediante adecuada indemnización, a menos que disponga otra cosa una ley aprobada por los votos de la mayoría absoluta de las Cortes. Con los mismos requisitos la propiedad podrá ser socializada.*
>
> *Los servicios públicos y las explotaciones que afecten al interés común pueden ser nacionalizados en los casos en que la necesidad social así lo exija. El Estado podrá intervenir por ley la explotación y coordinación de industrias y empresas cuando así lo exigieran la racionalización de la producción y los intereses de la economía nacional. En ningún caso se impondrá la pena de confiscación de bienes.*[688]

Under this Constitution, private property was no longer conceived simply as an individual right. Indeed, the CE'31 set considerable limits on the right to property, by recognising its social function ("property may be socialised"). The subordination of property to "social utility" allowed for expropriation, which could even be carried out without compensation through the approval of a law by an absolute majority of the Parliament (a requirement not contained in Art. 153 of the Weimar Constitution). The outcome of the text reflected the widespread acceptance of the principle that property was no longer the subjective right of the owner, but the social function of the holder of wealth.[689] For this reason, many considered the CE'31 to be "*una constitución avanzada, no socialista (el reconocimiento de la propiedad privada la hurta ese carácter), pero es una Constitución de izquierda* [an advanced constitution, not a socialist one (the recognition of private property robs it of that character), but it is a left-wing constitution]".[690]

Overall, the 1931 Constitution introduced many new features: full equality of men and women, including women's suffrage; the guarantee of civil and political rights; social rights, the writ of protection (*recurso de amparo*); the abolition of all privileges; divorce; the possibility of socialising property; the recognition of economic and social rights; unicameral Courts; the right of popular legislative initiative and referendum; the Court of Constitutional Guarantees; the integral state and the secular state. Moreover, the peculiar system of territorial division —into autonomous regions— established by the CE'31, meant that the powers over property were more or less dispersed. Thus, Article 15 CE'31 established that the state was responsible for legislation, and the autonomous regions could be responsible for the execution —to the extent of their political capacity, i.e., their founding Statutes— of the following:

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[688] (transl.) "All the wealth of the country, whomever its owner may be, is subordinate to the interests of the national economy and is affected by the support of public expenditure, in accordance with the Constitution and the law. Ownership of all kinds of property may be compulsorily expropriated for reasons of social utility by means of adequate compensation, unless otherwise provided by a law passed by the votes of an absolute majority of the Cortes. Subject to the same requirements, property may be socialised. Public services and exploitations affecting the common interest may be nationalised in cases where social necessity so requires. The State may intervene by law in the 'operation and coordination of industries and enterprises when the rationalisation of production and the interests of the national economy so require. In no case shall the penalty of confiscation of property be imposed."

[689] Francisco Javier Corcuera Atienza, 'La Constitución Española de 1931 en la historia constitucional comparada' (2000) 2 Fundamentos: Cuadernos monográficos de teoría del estado, derecho público e historia constitucional 640.

[690] This is how Luis Jiménez de Asúa referred to it on 27 August 1931, when he presented the draft to the Cortes. Vid. Diario de Sesiones… (n 684), 648-49.

2. Legislación sobre propiedad intelectual e industrial.

11. Derecho de expropiación, salvo siempre, la facultad del Estado para ejecutar por sí sus obras peculiares.

12. Socialización de riquezas naturales y empresas económicas, delimitándose por la legislación la propiedad y las facultades del Estado y de las regiones.[691]

Finally, it is worth asking whether the constitutional text was applied in its most innovative aspects, favouring social and public property, during the fleeting years of the Second Republic. Despite the short life of the CE'31, which was interrupted by the outbreak of the Civil War and the subsequent establishment of Franco's dictatorial regime, the head of the Republican government Manuel Azaña had time to implement an agrarian reform during the first biennium. This aimed to redistribute agricultural property in order to meet the demand of landless labourers. It should also be noted that the implementation of state secularism in Article 27 CE'31 was developed in 1933 in the *Ley de Confesiones y Congregaciones Religiosas* (Law on Religious Denominations and Congregations), which transferred the ownership of all the property of the Catholic Church to the state, "*como personificación jurídica de la nación* [as the legal personification of the nation]" (Art. 11).[692]

On 8 September 1932, the *Ley de Bases de la Reforma Agraria* (Law of Bases of the Agrarian Reform) was passed.[693] Its broad 5th Base provided for a wide range of expropriations, with compensation in almost all cases. However, since the landowners had to be compensated and the Ministry of Agriculture lacked the funds, the "political capital" of the Republican regime was in serious jeopardy.[694] Later, after the Sanjurjo coup d'état by the right-wing monarchists in August 1932, the Radical Socialist Party ordered the expropriation, without compensation, of the rural properties of nobles who had the status of *Grandes de España* (Great Aristocracy).[695] In 1934, however, Lerroux's right-wing Radical Party returned the property to the *Grandes*.

Finally, already during the Spanish Civil War, on 7 October 1936, a decree was passed which, using the possibilities opened up by the 1931 Constitution and, above all, in order to punish the rebels of the Francoist uprising, established a very extensive expropriation

691 (transl.) "2. Intellectual and industrial property legislation; 11. Right of expropriation, except always the power of the State to carry out its own special works; 12. Socialisation of natural wealth and economic enterprises, the ownership and powers of the State and of the regions being delimited by legislation."

692 Ley de Confesiones y Congregaciones religiosas de 1933. Aprobado por las Cortes Constituyentes y publicado en la Gaceta del 3 de junio de 1933.

693 Ley de Bases de Reforma Agraria de 1932. «Gaceta de Madrid» núm. 265, de 21 de septiembre de 1932, páginas 2095 a 2102.

694 Infante Miguel-Motta, 'Un hito…' (n 449) 118.

695 *Grande de España* is a person who holds the highest rank of Spanish nobility. The origin of the Greatness of Spain is to be found in the early reign of Charles I of Spain, who attached great importance to the ceremony and palace etiquette of this social status. The Greatness of Spain is hereditary. Although the *Grandeza de España* is a dignity traditionally closely linked to the title of duke, which is the highest-ranking title, it can accompany the titles of marquis, count, viscount, baron and lord. There are currently 417 noble titles that hold this dignity, although several *Grandezas de España* are held by the same individual. In certain cases, it can even be granted on its own, without being attached to a specific noble title. To date, there are 7 people in this category. Vid. Jaime de Salazar y Acha, *Los grandes de España (siglos XV-XXI)* (Ediciones Hidalguía 2012).

of land without compensation.[696] But as it can already be deduced from the subsequent historical circumstances, this would have no effect. The dictatorial regime imposed after Franco's victory in the Spanish Civil War, from 1939 onwards, attempted to restore the situation prior to the Second Republic, removing the significant restrictions on the right to property 1931 introduced by the 1931 Constitution. In any case, the Civil Code remained unaltered.

3.7.2. The Spanish Constitution of 1978: A step backwards?

The current Spanish Constitution is that of 1978 (hereinafter CE'78), adopted during a period of transition to democracy after the Franco dictatorship, which lasted almost forty years.[697] The drafting committee of the project —which included no women, but seven "founding fathers"[698]— deliberately decided to place property rights in Title I, Chapter II, Section 2. This meant that they were considered outside the package of "*derechos fundamentales y libertades públicas* [fundamental rights and public freedoms]" that required increased normative and judicial protection (Section 1). Instead, they were placed among the "*derechos y deberes de los ciudadanos* [rights and duties of citizens]". Therefore, the rights recognised in Article 33 are not protected by the procedure based on the principles of priority and summary proceedings. Its regulation is not reserved to organic law, and they are not susceptible to the *recurso de amparo*, a special judicial remedy to appeal to the Constitutional Court in the event of a violation of the most fundamental rights (Articles 53.2 and 161.1.b CE'78).[699]

Among the constitutional guarantees for the protection of the right to property is its mandatory development by 'ordinary law' (art. 53.1 CE'78)[700]. This means that its approval requires a simple majority in the Congress of Deputies, and not an absolute majority, as occurs with 'organic laws', which are reserved for matters of greater

[696] Infante Miguel-Motta, 'Un hito…' (n 449) 119.

[697] Constitución Española. Boletín Oficial del Estado nº 311, de 29 de diciembre de 1978.

[698] The Committee that drafted the preliminary Constitution was appointed at the constitutive session of the Constitutional Commission, on August 1, 1977. Its rapporteurs were Messrs. Jordi Solé Tura (Communist Parliamentary Group), Miquel Roca Junyent (Parliamentary Group of the Catalan Minority), José Pedro Pérez-Llorca y Rodrigo, Miguel Herrero Rodríguez de Miñón and Gabriel Cisneros Laborda (Parliamentary Group of Unión de Centro Democrático (centrist)), Gregorio Peces Barba Martínez (Socialist Parliamentary Group) and Manuel Fraga Iribarne (Parliamentary Group of Alianza Popular (conservative)).

[699] Thus, the violation of the right to property is not subject to *amparo* (Art. 53.2), but, if necessary, to an appeal of unconstitutionality of the rule (Art. 161.1.a) or to a question of unconstitutionality (art. 163), exclusively through an action of unconstitutionality of a law or regulatory provision having the force of law which has not respected the essential content of private property.

[700] In this sense, however, the Spanish Constitutional Court does not prevent either legislative delegation or regulation by decree-law (art. 82 C.E.), as it stated in Sentencia del Tribunal Constitucional Español — hereinafter referred to as STC—111/1983, of 2 December, FJ 10: "*La expresión 'mediante ley' que utiliza el mencionado precepto, además de ser comprensiva de Leyes generales que disciplinan con carácter general la intervención, permite la Ley singularizada de intervención que mediando una situación de extraordinaria y urgente necesidad y, claro es, un interés general legitimador de la medida, está abierta al Decreto-ley, por cuanto la mención a la Ley no es identificable en exclusividad con el de Ley en sentido formal.* [The expression 'by means of law' used in the aforementioned precept, in addition to being comprehensive of general laws that regulate intervention in a general sense, allows for a singularised intervention law which, in a situation of extraordinary and urgent need and, of course, a general interest legitimising the measure, is open to the Decree-Law, as the mention of the law is not exclusively identifiable with that of a law in a formal sense]." Vid. also, STC 166/1986, de 19 de diciembre.

importance that require more political consensus, requiring the approval of an absolute majority of the Congress. Likewise, the possible reform of the right to property, provided for in Article 33 CE'78, would follow the ordinary procedure (Art. 167 CE) and not the aggravated procedure (Art. 168 CE). This implies that this right is not a specially protected constitutional content, as are the fundamental rights contained in Section I of Chapter II of Title I of the Constitution (Arts. 15 to 29). The difference is that in the ordinary procedure the approval of the reform proposal requires 3/5 of both chambers (the Congress of Deputies and the Senate), whereas in the aggravated procedure 2/3 of each chamber is required.

This strategic position in the Spanish constitutional scheme is due to the fact that property has come to be regarded as a legal right and not as an individual right of the classical liberal state, as still proclaimed in the Civil Code. In any case, it is not accurate to speak of property rights in general. Article 33 of the Spanish Fundamental Norm recognises the right to *private* property and inheritance. It also states that both rights are subject to the social function that must limit their content:

> *1. Se reconoce el derecho a la propiedad privada y a la herencia.*
>
> *2. La función social de estos derechos delimitará su contenido, de acuerdo con las leyes.*
>
> *3. Nadie podrá ser privado de sus bienes y derechos sino por causa justificada de utilidad pública o interés social, mediante la correspondiente indemnización y de conformidad con lo dispuesto por las leyes.*[701]

Thus, the essential content of property as a subjective right is identified by the decision on the economic destiny of the thing. The owner, unlike any other holder of a real right, has *per se* the competence to decide on the economic destiny of the thing, for its insertion into the economic process, in one way or another. Ownership is dominion over the thing, and the core of this dominion is its essential content, which must be sought in the power of enjoyment. What distinguishes the owner is not just any enjoyment in terms of the use of the good or a certain type of enjoyment, but the possibility of ordering and deciding on the enjoyment: the choice of the type of enjoyment.[702]

However, the determination of the essential content of the right cannot ignore the social function that it must include. The Spanish Constitutional Court, in its Decisions 37/1987 and 170/1989, pointed out that the determination of the essential content "*debe incluir igualmente la necesaria referencia a la función social, entendida no como mero límite externo a su definición o a su ejercicio, sino como parte integrante del derecho mismo* [must also include the necessary reference to the social function, understood not as a mere external limit to its definition or exercise, but as an integral part of the right itself]".[703]

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[701] (transl.) "1. The right to private property and inheritance is recognised. 2. The content of these rights shall be determined by the social function that they fulfil, in accordance with the law. 3. No one may be deprived of their property and rights, except on justified grounds of public utility or social interest and with proper compensation under the provisions of the law."

[702] Montés Penadés, *La propiedad privada*... (n 448) 161.

[703] SSTC 37/1987, de 26 de marzo (FJ 2) and 170/1989, de 19 de octubre (FJ 8.b).

Furthermore, it may come as a shock that only 'private' property is mentioned. This completely undermines the existence of other types of property, such as public goods, not to mention the commons. Some have even spoken of a constitutional private right, since Article 33 is directly connected with general private law, i.e., civil law. But even this definition is not without difficulties, since it does not describe what private property is. Thus, the wording of the constitutional provision on private property as a fundamental right does not represent a sharp break with the previous system, inherited from French liberal postulates and from the fathers of American independence.[704] It remains a subjective right aimed at providing security to the owner and is one of the foundations of the Spanish system of public economic order. Nevertheless, I will qualify this idea in the following subsection.

Like other constitutional texts, the Spanish Constitution also refers to the laws to delimit the content of these rights. Indeed, it also provides for compensation for the deprivation of citizens of their property and rights, provided that it is for a justified reason of public utility or social interest. In other words, it gives constitutional recognition to the legal institution of compulsory expropriation. Unlike its predecessor, the CE'78 did not allow expropriation without compensation under any circumstances. The conception of the current Article 33 CE represents a moment of balance between the absolute individual interest postulated by the liberal-individualist conception and the common interest upheld by the collective conception. This constitutional provision embodies a new ideology of the right to property, overcoming the two previous ones, which corresponds to a moment in the evolution of the constitutional state: that of the so-called "*Estado Social y Democrático de Derecho*".[705]

Furthermore, the fact that private property is not considered a fundamental right in Spain, protected by the highest procedural and regulatory guarantees, is due to the constitutional and legislative interpretative shift that it underwent during the 20th century. Ownership came to be considered as a 'statutory' right rather than as an individual right of the classical liberal state —as would be the case in France. Constitutional law articulates it as an objective legal institution, subject to and limited by the burdens imposed by its social function. This social function is not conceived as a mere external limit to the definition of the exercise of the right to private property, but as an integral part of the right itself.

Since the late 1980s, the Spanish Constitutional Court (*Tribunal Constitucional*) has been confirming the definition of property and its social function. It has pointed out that the progressive incorporation of social purposes related to the use and exploitation of property has diversified the institution of property into a plurality of legal figures or

[704] Carretero Sánchez, 'La propiedad. Bases…' (n 444) 86.

[705] Such is the definition in Article 1.1 CE'78: *"España se constituye en un Estado social y democrático de Derecho (…)* [1. Spain is hereby established as a social and democratic State (…)]". The principle of the Social and Democratic State is the result of the evolutionary process undergone by the Constitutional State from its birth to the present day. Each of the three characteristic features of the State has been translated into a series of peculiar traits: the principle of legality, the division of powers, the rule of law, and the recognition of rights and freedoms (Rule of Law), universal suffrage (Democratic State) and the recognition of a set of Social Rights and the subsequent state intervention in socio-economic life (Social State). The Spanish State is each of these three qualifications, but it is none of them if it is not considered in conjunction with the others. A harmonious interpretation of the formula "Social and Democratic State" is therefore necessary.

situations, regulated with different meanings and scopes. It thus recognises "*la flexibilidad o plasticidad actual del dominio que se manifiesta en la existencia de diferentes tipos de propiedades dotadas de estatutos jurídicos diversos, de acuerdo con la naturaleza de los bienes sobre los que cada derecho de propiedad recae* [the flexibility or plasticity of ownership, which manifests itself in different types of property, endowed with different legal statuses, in accordance with the nature of the assets on which each property right falls]".[706]

According to the Court, "*la Constitución reconoce un derecho a la propiedad privada que se configura y protege, ciertamente, como un haz de facultades individuales sobre las cosas* [the Constitution recognises a right to private property which is configured and protected, certainly, as a bundle of individual powers over things]". Nevertheless, it also recognises it as "*un conjunto de deberes y obligaciones establecidos, de acuerdo con las Leyes, en atención a valores o intereses de la colectividad* [a set of rights and obligations established, according to the law, in response to the values and interests of the community]". That is, to the purpose or social utility that each category of property subject to ownership is called upon to fulfil. Thus, the definition of private property always includes this double dimension: individual utility and social function. Since the right to private property is a statutory right, it is modifiable by the legal system. That is why it does not generally give rise to compensation. Since it is a creation of the law, the holder has only the powers granted by the law.

In this regard, I must now refer to the most severe and radical restriction of property and other legitimate property rights: expropriation. The Fundamental Spanish Norm understands that the expropriated party, who was the holder of a legitimate property interest, must be compensated by the expropriating administration, for the patrimonial sacrifice entailed by the forced deprivation of the property or right. This interest covers "*tanto a las medidas ablatorias del derecho de propiedad privada en sentido estricto como a la privación de los 'bienes y derechos' individuales, es decir, de cualquier derecho subjetivo e incluso interés legítimo de contenido patrimonial* [both measures abrogating the right to private property in the strict sense, as well as the deprivation of all kinds of goods and individual rights and even legitimate property interests]".[707]

Compulsory expropriation thus involves the mandatory transfer of legitimate property rights and interests for reasons of public utility or social interest to a person who must receive fair compensation for the damage suffered. The Spanish Constitutional Court has distinguished the singular deprivation that expropriation entails from the mere legal delimitation or general regulation of property rights. The latter does not give rise to compensation as long as its essential content is respected.[708] The amount of compensation must correspond to the economic value of the expropriated property. In

[706] SSTC 152/2003, de 17 julio (FJ 5); 204/2004 (FJ 5), de 18 de noviembre and 281/2005, de 7 de noviembre (FJ 7), all of them citing STC 37/1987, de 26 de marzo (n 703) (FJ 2).

[707] STC 227/1998, de 29 de noviembre (FJ 11).

[708] STC 112/2006, de 5 abril (FJ 10).

other words, there must be a fair value, a proportional balance between the damage caused by the expropriation and its repair.

There is already a consolidated doctrine of fair value as a replacement value, which may even be higher than the market price, and which considers the subjective impact of the deprivation of the asset on the expropriated subject. The Spanish Supreme Court —not to be confused with the Constitutional Court— has established that the real value of the compensable asset or right is its objective value, established in accordance with the principles of equity and the use of estimation or exclusion criteria, without unjust impairment and without unjust enrichment.[709] Thus, the fair price of the expropriation must be close to the replacement value; it must provide the injured party with a sufficient amount to replace another asset of a similar nature, in accordance with the principles of conversion and equivalence. The Law of Compulsory Expropriation in force in Spain is pre-constitutional, dating from 1954. Expropriation by decree or special law is also possible. However, such expropriation by law must comply with constitutional guarantees, such as the declaration of the purpose of public utility or social interest, the declaration of compensation and compliance with the procedure laid down by law.

3.7.3. Beyond private property. Exploring public-community nuances

I would now like to explore other provisions of the Spanish Constitution relating to property beyond Article 33. Although the post-Franco Constitution expressly recognises private property as a fundamental right, the Founding Fathers of the 1978 Constitution acknowledged its limitations, by adapting it to the demands of the social state. In addition to the explicit reference in Article 33 to the social function of property and expropriation for reasons of public utility and social interest, Article 128.1 states that "*Toda la riqueza del país en sus distintas formas y sea cual fuere su titularidad está subordinada al interés general* [All the wealth of the country in its different forms and regardless of its ownership is subordinated to the general interest]".

It thus recognises public initiative in economic activity, the possibility of reserving essential resources or services for the public sector by law, and even the intervention of companies when the general interest so requires. Once again, the tension between individual utility and the social function of property is corroborated. Two elements that, precisely, for the Spanish Constitutional Court, "*definen, por tanto, inescindiblemente el contenido del derecho de propiedad sobre cada categoría o tipo de bienes* [therefore inseparably define the content of the right of ownership over each category or type of property]".[710]

Likewise, Article 129.2 CE'78 encourages the public authorities to promote the various forms of participation in the enterprise —although without specifying which ones— and to promote cooperatives by law. The state must also establish "*los medios que faciliten el acceso de los trabajadores a la propiedad de los medios de producción* [the means to facilitate workers' access to ownership of the means of production]". Worker-owned

[709] Sentencias del Tribunal Supremo de 18 de abril 1989, 27 de febrero de 1991, 13 de noviembre de 2007, 30 de noviembre de 2011 and 17 de diciembre de 2012.

[710] STC 37/1987, de 26 de mayo (n 703) (FJ 2).

companies, in which the majority of the share capital is owned by workers who provide paid services for an indefinite period, are thus given full constitutional recognition.[711] The Constitution recognises the value of cooperative formulas in order to achieve a more active integration of citizens in the different sectors of the economic activity (consumption, credit, housing, work).[712]

There is no doubt that this imperative, which even sounds Marxist to my ears, is perhaps the most inspiring in communal terms, as it offers extraordinary possibilities for public and collective action, both in the choice of participation mechanisms and in their qualitative definition. Indeed, private property and companies must "bear" a constitutional imperative of participation. Furthermore, the specific allusions in Article 129.2 CE'78 (cooperatives, companies, management bodies, etc.) are non-exhaustive examples of what is enunciated therein.[713] The possibility of a collectivist Spain could therefore seem immense.

However, the reference to "workers' access to ownership of the means of production" clashes head-on with the limits imposed by other rights previously enshrined in Title I of the Constitution. In fact, Article 33 (private property and inheritance) and Article 38 (freedom of enterprise in the market economy) are specifically protected by greater guarantees, as fundamental rights. In other words, the free-market system is the background to the mandate that Article 129 addresses to the public authorities to promote the various forms of labour participation in the company. The aim is to harmonise the productive process without altering the assumptions of the market economy system. That is why, strategically, the fathers of the Constitution opted for the formula "shall establish the means to facilitate access". Indeed, 'facilitate' is a verb full of nuances and subjective appraisals that do not necessarily 'oblige' the state. In this sense, this provision has not had any particular impact or legislative significance.[714] However, in recent years there has been a certain increase in interest in cooperation.[715]

Another important nuance should be noted in relation to Article 33 CE'78. Article 132 explicitly recognises 'public' and 'communal' property, mentioning the principles of

[711] With regard to the promotion of cooperatives "by means of appropriate legislation", the basic legislation is currently set out in the *Ley de Cooperativas* (Law on Cooperatives). Some specific types of cooperatives, such as credit cooperatives, agri-food cooperatives and European companies based in Spain, have their own regulations. Vid. Ley 27/1999, de 16 de Julio, de Cooperativas. Boletín Oficial del Estado nº 170, de 17 de julio de 1999, BOE-A-1999-15681.

[712] Mónica Moreno Fernández-Santa Cruz, 'Sinopsis artículo 129' (*Constitución Española*, 2023) <t.ly/-4UW> accessed 15 March 2023. Updated by Vicente Moret (2011) and by Alejandro Rastrollo (2016).

[713] ibid.

[714] Vid. María Eugenia Rodríguez Palop, 'Esta Constitución no es la nuestra. Propuestas para una Constitución feminista' in Rafael Escudero and Sebastián Martín (coords), *Fraude o esperanza. 40 años de la Constitución (Akal 2018) 133.*

[715] An example of this is Law 44/2015, of 14 October, on Worker-Owned and Participated Companies. In line with Law 5/2011, of 29 March, on the Social Economy, *"(…) refuerza la naturaleza, función y caracterización de la sociedad laboral como entidad de la economía social, poniendo en valor sus especificidades* [(…) it reinforces the nature, function and characterisation of the worker-owned company as a social economy entity, highlighting its specific characteristics]". Vid. Ley 44/2015, de 14 de octubre, de Sociedades Laborales y Participadas. Boletín Oficial del Estado nº 247, de 15 de octubre de 2015, BOE-A-2015-11071; Ley 5/2011, de 29 de marzo, de Economía Social. Boletín Oficial del Estado nº 76, de 30 de marzo 2011, BOE-A-2011-5708.

inalienability, imprescriptibility and unseizability, which clearly distinguish them from private property rights, as well as their decommissioning (*desafectación*).[716] In total, this article constitutionalises four types of property regimes: public, communal, state or national patrimony, although they do not all enjoy the same degree of importance. And in none of the cases does any form enjoy the same protection and guarantees as the private property regime provided for in Article 33.

The Constitution does not define the public domain property, but confers on the law the possibility to do so. Article 132.2 CE'78 literally mentions, at least, the maritime-terrestrial zone, the beaches, the territorial sea and the natural resources of the economic zone and the continental shelf. Likewise, the law must regulate the administration, defence and conservation of the State Heritage and the National Heritage (Art. 132.3 CE'78). Curiously, this article does not define common property, but neither does it leave open the possibility of defining it by law. The literal wording of this article leaves the commons in a very residual situation.

The essence of public property lies in its allocation or use for public utility. Public domain assets are true state properties, allocated for general use or public services, or, even if they are not so assigned, a law may expressly confer on the public character on it.[717] By framing private property as a fundamental right, while placing public property as an undefined concept —and not a right— under the heading of Economy and Finance, the Constitution seems to give free rein to the legitimate exercise of the right to private property. Everything that is not public is subject to private appropriation. In other words, there is no category of things or objects susceptible to appropriation reserved for private property in the Spanish Constitution, so the limit for extending the list of public goods is respect for the essential content of private property. According to the Spanish Constitutional Court,

> *En efecto, la incorporación de un bien al dominio público supone no tanto una forma específica de apropiación por parte de los poderes públicos, sino una técnica dirigida primordialmente a excluir el bien afectado del tráfico jurídico privado, protegiéndolo de esta exclusión mediante una serie de reglas exorbitantes de las que son comunes en dicho tráfico iure privato*.[718]

As mentioned above, the Constitution contains a list of assets that will in any case form part of the state's public domain, i.e., an open list. Interestingly, when the Constitution was being debated in the Senate in 1978, the Socialist Group proposed adding *bienes vecinales* (common goods) to the list of public and communal property, The argument was that, in the traditional Spanish property system, the commons were a separate class

[716] Decommissioning must be understood as the act that produces the effect of the loss of the public domain quality of the property in question, when it is no longer intended for general use or public service.

[717] Carmen de Guerrero Manso, 'La regulación del dominio público en la Constitución española de 1978' (2015) 20 Revista de Derecho Administrativo Económico 87.

[718] (transl.) "Indeed, the incorporation of an asset into the public domain is not so much a specific form of appropriation by the public authorities as a technique aimed primarily at excluding the asset concerned from private legal transactions, protecting it from that exclusion through a set of rules exorbitant to those common to such transactions *iure privato*." STC 227/1988, de 29 de noviembre (n 707) (FJ 14).

of goods, owned neither by the town councils nor by the community state, but by the local communities. However, this amendment was rejected by the Mixed Commission.[719]

In another vein, I think it is important to mention the right to a healthy environment in relation to property. In my view, when Article 33 mentions the social function of property, it could have explicitly included the environmental function as one of the dimensions of this category. However, in the late 1970s, environmental concerns in Spain did not seem important enough to be considered a fundamental right. The 1978 Constitution included the right to enjoy an environment suitable for personal development (art. 45 CE'78), albeit outside the section on fundamental rights. According to this right, "*Los poderes públicos velarán por la utilización racional de todos los recursos naturales, con el fin de proteger y mejorar la calidad de la vida y defender y restaurar el medio ambiente, apoyándose en la indispensable solidaridad colectiva* [The public authorities shall ensure the rational use of all natural resources in order to protect and improve the quality of life and to protect and restore the environment, relying on the indispensable collective solidarity]." (art. 45.2 CE'78).

The first purpose of this right is to protect and improve the quality of life, which already implies that the development of human beings to their fullest potential is paramount. This formula, in which no one knows how much a 'rational' use involves, is integrated into the pattern of defining welfare according to the bourgeois ethos of the continental social state and the Anglo-Saxon welfare state.[720] By focusing on human well-being, the exclusion of non-human entities does not seem to be the best way to establish human responsibility for ecological damage. The problem with this approach is that the environment is not classified as a legal asset. As a result, there are few mechanisms for protecting, conserving, defending and restoring nature. The Spanish Constitutional Court has underlined the complex nature of environmental issues, as "*un concepto jurídico indeterminado con un talante pluridimensional y, por tanto, interdisciplinar* [an undefined legal concept with a multidimensional and therefore interdisciplinary nature]".[721] In any case, recent developments in environmental law, outside of constitutional protection, e.g., on animal protection and welfare, should be highlighted.[722]

In addition to the right to the environment recognised in Article 45 CE'78, it is important to add that among the guiding principles of economic and social policy contained in Chapter III of Title I of the Spanish Constitution, other important references open up the possibility of protecting assets beyond the strictly public ones: the right of access to culture (Art. 44 CE), the conservation and promotion of the historical, cultural and artistic heritage (Art. 46 CE) and the right to decent and adequate housing (Art. 47 CE). These rights, which a priori may be entirely reserved to the public sphere of the state,

[719] de Guerrero Manso, 'La regulación…' (n 717) 105.

[720] Jaria-Manzano, 'La insolación de Mirèio…' (n 10) 461.

[721] SSTC 64/1982, de 4 noviembre (FJ 5) and 102/1995, de 26 junio (FJ 4, FJ 5).

[722] For example, in 2023, Royal Decree 159/2023 of 7 March was approved, establishing provisions for the application in Spain of European Union regulations on official controls on animal welfare, and amending several royal decrees. At a general level, the 2023 Animal Protection and Welfare Code includes all the amended regulations (civil, criminal, etc.) on this subject.

could nevertheless be managed differently, taking into account the ecological and social functions that the property *should* fulfil.

3.7.4. On balance

Apparently, the concept of the socialisation of property in the current CE'78 seems to be quite in line with the previous constitutional order, since no one can be deprived of their property except for a social interest or a public utility, with appropriate compensation. However, from my point of view, the constitutional treatment of the right to property in the CE'78 has regressed considerably compared to Article 44 of the CE'31. First of all, because when the post-Franco Constitution establishes property as a fundamental right, it only considers the private property and inheritance of the individual. In fact, it is not really a fundamental right, insofar as it is not included in the first section of the fundamental rights and is therefore not protected by the maximum constitutional guarantees.

The context of the transition from Franco's dictatorship to democracy was a very complex one; the political positions were multiple and conflicting. The content of Article 33 CE'78 can be interpreted as an example of the ideological compromise between the different constituent political forces of the time.[723] As in other constitutional texts, property remains an institution that the CE'78 recognises but does not define. Article 33 CE'78 begins with a broad recognition of the right to private property and inheritance, very much in line with the 19th-century constitutions. It cannot be said that the current Constitution does not consider the social function and public utility of private property. But the general allusion to this function as a delimiter of rights seems to pass glancingly through the constitutional text, as if by chance.

Admittedly, the 1978 Constitution protects extensive state intervention to redistribute wealth through the establishment of a welfare state. Nevertheless, this issue has been highly nuanced, depending on the budgetary policies of each government. An empirical comparison of the governments of different political orientations since 1978 that have existed in Spain since the restoration of democracy reveals some differences.[724] Any reference to non-compensatory expropriation, socialisation or state intervention in the economy that might have existed in its predecessor, the Republican Constitution of 1931, was removed from the 1978 text. The Constitution does provide for different property regimes: public, private, social and cooperative. However, Article 129.2 CE'78, which provides for the adoption by the public authorities of measures to facilitate workers' access to ownership of the means of production, requires further legislative development. As it comes under Title VII of the Constitution (Economy and Finance), it currently lacks specific guarantees.

Moreover, civil law should not turn its back on the changes in constitutional interpretation, especially those coming from the Spanish Constitutional Court. The fundamental text of 1978 hardly reveals an individual or liberal concept of property, but

[723] Carretero Sánchez, 'La propiedad. Bases…' (n 444) 96.

[724] Eduardo Montagut, 'La cuestión de la propiedad en la Constitución de 1931' *Textos Obreros* (11 January 2018) <shorturl.at/CY019> accessed 3 September 2022.

one in which the purely selfish interest of the *dominius* ought to be tempered by the need to achieve an objective that increasingly transcends the restricted sphere of the holder of the right. Although, to be more honest, I think that the current Spanish Constitution has become so obsolete that it would probably not be enough to reinterpret Article 33 CE'78. Rather, a new constitutional process should be launched to draft a new constitution that reforms not only this article, but all the pillars, starting with the monarchy, that legitimise an economic, patrimonial and heteropatriarchal system based on privileges and inequalities.

3.8. Ecuador

3.8.1. The 2008 Constitution of Ecuador: beyond public/private

Ecuador is considered one of the most biodiverse countries on the planet: it has the 9th highest biodiversity rate in the world.[725] This biodiversity is not limited to the number of species per unit area, but also includes the different types of natural environments or ecosystems that exist on the coast (including the Galapagos Islands), in the highlands and the Amazon rainforest.[726] The country is also rich in water, forest and mineral resources. Nonetheless, pressure on water systems, ongoing deforestation and land conflicts related to mining pose significant threats to the country's stability and biodiversity. Within Ecuador, land-related conflicts exist at many levels: between indigenous groups and settlers; between communities and private sector industry; and between illegal settlers and landowners.[727]

In 2006, left-wing economist Rafael Correa won the presidential election on a promise to write a new constitution for Ecuador that would reform some of the flawed aspects of the previous 1998 Constitution. After a bitter struggle, the former National Congress, made up mostly of opposition deputies, passed a referendum in 2007 to create a constituent assembly that could draft a new constitution, which was approved by 81% of the electorate.[728] This Constituent Assembly had a government majority, *Alianza PAIS*, which weaved alliances with other left-wing parties to form an absolute majority and dissolve the old National Congress.[729] The text was approved in by the Montecristi Assembly in July 2008 and in a constitutional referendum by universal suffrage in September of the same year, with 63.93% of the vote in favour. It has since been amended in 2011, 2014 and 2018.

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[725] Matthew H. Nash, 'The 201 Most (& Least) Biodiverse Countries in 2022' (*The Swiftest,* 22 September 2022) <t.ly/ZjfN> accessed 23 March 2023.

[726] Elisabeth Bravo Velásquez, *La biodiversidad en el Ecuador* (April 2014) Editorial Universitaria Abya Yala- Universidad Politécnica Salesiana de Cuenca.

[727] Vid. for instance: Mayuri Castro, 'Los desafíos ambientales de Ecuador en el 2021' *Mongabay* (18 January 2021) <t.ly/a45T> accessed 28 March 2023; Hans-Jürgen Burchardt et al (eds), *Nada dura para siempre. Perspectivas del neo-extractivismo en Ecuador tras el boom de las materias primas* (Universidad Andina Simón Bolívar de Ecuador – Ediciones Abya-Yala and International Center for Development and Decent Work (ICDD) 2016).

[728] 'Más del 81% votó por Asamblea en Ecuador' (*El Universo,* 17 April 2007) <t.ly/u59w> accessed 25 March 2023.

[729] On the Ecuadorian constitution-making process, vid. Hernán Salgado, 'El proceso constituyente del Ecuador. Algunas reflexiones Pesantes' (2008) 47 Revista IIDH 210.

The 2008 Constitution of the Republic of Ecuador (hereinafter referred to as CRE'2008)[730] pays particular attention to the concept of property. To start with, the very comprehensive Article 66, which contains a list of liberty rights of persons, recognises and guarantees in paragraph 26: "*El derecho a la propiedad en todas sus formas, con función y responsabilidad social y ambiental. El derecho al acceso a la propiedad se hará efectivo con la adopción de políticas públicas, entre otras medidas* [The right to property in all its forms, with social and environmental function and responsibility. The right to have access to property shall be enforced by the adoption of public policies, among other measures]". Indeed, the definition of property or the right to property is conspicuous by its absence. Property is a right whose content is taken for granted; nothing different from the other constitutions analysed.

Nevertheless, the 2008 Constitution provides for a series of elements that determine its nature and scope. Regarding the nature of property, which the Magna Carta conceived as a single, unitary right, the question arises as to whether it is to be considered a fundamental or a patrimonial right. It should be mentioned that between 1830 and 1929, Ecuadorian constitutionalism had treated property as an inherent and fundamental right, just like liberty.[731] It was not until the 1929 Constitution that private property would be considered with the restrictions required by social needs, although it was still considered a fundamental right.[732]

In contrast, the treatment of the right to property in the 2008 Constitution is striking: both as a liberty right and as an economic right. The Ecuadorian constitutional text chose not to explicitly qualify certain types of rights as fundamental. In fact, it only the right to water is considered fundamental (Art. 12 CRE'2008). The aforementioned article 66.26 CRE'2008 is included in the list of so-called "liberty rights", which means that there is no clear difference in guarantees among the different constitutional rights. What is more, Article 11.6 CRE'2008 itself states that all rights are of equal rank: "*Todos los principios y los derechos son inalienables, irrenunciables, indivisibles, interdependientes y de igual jerarquía* [All principles and rights are inalienable, unrenounceable, indivisible, interdependent and of equal rank]".

The Ecuadorian Constitutional Court has also pronounced itself in this sense, expressing the will of the constitutional jurisdiction to contribute to the consolidation of the constitutional state of rights, "*donde se reconoce la unicidad, universalidad e interdependencia de todos los derechos: individuales, económicos, sociales, culturales, colectivos y ambientales, para que todos los derechos sean para todas las personas y los pueblos* [which recognises the uniqueness, universality and interdependence of all

[730] Constitución de la República del Ecuador 2008. Publicada en el Registro Oficial No. 449, 20 de octubre de 2008. Asamblea Nacional República del Ecuador.

[731] Julio Tobar Donoso and Juan Larrea Holguín, *Derecho constitucional ecuatoriano* (Corporación de Estudios y Publicaciones 1980) 311.

[732] Article 151.14 CRE'1929 recognised as a fundamental guarantee: *El derecho a la propiedad, sujeto a las restricciones que las necesidades sociales y el progreso puedan requerir* [(…) The right to property, subject to the restrictions that social needs and progress may require (…)].

rights: individual, economic, social, cultural, collective and environmental, so that all rights are for all persons and peoples]."[733]

It should be added that new forms of property beyond the rights of freedom are also recognised in the form of economic, social and collective rights, which are protected by the state. There is therefore no hierarchy of rights. The right to property, as a right recognised by the Constitution, can be protected by the various guarantees (normative, judicial and political) provided by the legal system. Currently, the term "constitutional right" is used in jurisprudence and doctrine to refer to property, which makes it possible to overcome the theoretical debate on an abstract hierarchy and to place the right to property on an equal footing with the rest of the constitutionally recognised rights.[734]

On the one hand, the right to property is enshrined in the economic constitution under "Title VI. Development Regime". Indeed, the right to property must be used to achieve the objectives of improving the quality of life of the population, building a fair, democratic, productive, solidarity-based and sustainable economic system, based on the equal distribution of the benefits of development, the means of production, participation and social control, preserving a healthy environment and improving the quality of life, among others (Art. 276 CRE 2008). On the other hand, as it has been seen, it also belongs to the category of so-called liberty rights, since the state guarantees the right to property as long as the purposes established in the norm itself are fulfilled.[735] Furthermore, Article 321 CRE'2008 states: "*El Estado reconoce y garantiza el derecho a la propiedad en sus formas pública, privada, comunitaria, estatal, asociativa, cooperativa, mixta, y que deberá cumplir su función social y ambiental* [The State recognises and guarantees the right to property in all its forms, whether public, private, community, state, associative, cooperative or mixed- economy, and that it must fulfil its social and environmental role]".

This article, which I consider to be more of a statement, seems to me almost revolutionary, given the real Ecuadorian context of resource exploitation. In order to dispel any doubts, the Ecuadorian Magna Carta took the trouble to list the different types of property that the state had in mind, as indicated by the title of the section that this Article 321 CRE heads: *Tipos de propiedad* (Property types). The truth is that the Constitution does not provide an explicit, formal and direct conceptualisation of how the "right to property in all its forms" should be understood. Indeed, the Constitution does not specify the definition and scope of each of these forms of property. A clearer definition of property can be found in Articles 599 and following of Ecuador's pre-constitutional and more liberal Civil Code,[736] which was last amended in 2005:

> *Art. 599.- El dominio, que se llama también propiedad, es el derecho real en una cosa corporal, para gozar y disponer de ella, conforme a las disposiciones de las*

[733] Vid. Sentencia de la Corte Constitucional de Ecuador, de 9 de diciembre del 2009 (008-09-SAN-CC).

[734] Christian Rolando Masapanta Gallegos, 'Multidimensionalidad del Derecho a la Propiedad en el Constitucionalismo Ecuatoriano' (2022) 2 (1) JUEES 79.

[735] Pablo Egas Reyes, 'La propiedad en la constitución de 2008' in Santiago Andrade, Agustín Grijalva and Claudia Storini (eds), *La nueva Constitución del Ecuador. Estado, derechos e instituciones* (Universidad Andina Simón Bolívar/Corporación Editora Nacional 2009) 332.

[736] Código Civil de Ecuador (Codificación No. 2005-010).

> *leyes y respetando el derecho ajeno, sea individual o social. La propiedad separada del goce de la cosa, se llama mera o nuda propiedad.*
>
> *Art. 600.- Sobre las cosas incorporales hay también una especie de propiedad. Así, el usufructuario tiene la propiedad de su derecho de usufructo.*
>
> *Art. 601.- Las producciones del talento o del ingenio son propiedad de sus autores. Esta propiedad se regirá por leyes especiales.*[737]

In any case, the definition of property appears throughout the constitutional provisions. With regard to public property, the Supreme Charter explicitly recognises the state's access to property, in various ways throughout the constitutional text. In some cases, this property is given even greater protection, as it is inalienable, unseizable and imprescriptible. For example, Article 408 covers non-renewable natural resources, subsoil products, mineral and hydrocarbon deposits, substances other than soil, biodiversity and its genetic heritage, and the radio-electric spectrum. These assets are subject to the environmental principles laid down in the Constitution. Water and cultural heritage assets are also included in this list (Arts 12, 318, 411 and 379 CRE'2008).

Private property is also expressly mentioned as a right of freedom (Art. 66.26 CRE'2008). Its existence remains subject to two limitations: the social limit, if expressly established by law, and the environmental limit, since private property must respect nature and its rights. Although these limits depend, to a large extent on legislative development, the Constitution makes explicit mention of these social and environmental limits, for example: the prohibition of large estates and water grabbing (Art. 282.2), of oligopoly and monopoly of the media (Art. 17.3) or of foreign occupation in protected areas (Art. 405.2). The Ecuadorian Constitution also provides for expropriation. Article 323 CRE'2008 lists several objectives that, while limiting private property, implicitly recognise its existence. These objectives are social development, sustainable management of the environment and collective welfare, grounds that allow for the expropriation of property, subject to fair valuation, compensation and payment in accordance with the law. In addition, the prohibition of any kind of confiscation is literally underlined.

But the type of property that deserves more attention is, in my view, community property. No other constitution had so far recognised this type of property so explicitly.[738] Indeed, the Constituent Assembly wanted to recognise an ancestral right of the communities, that is, collective ownership of the land. Its ownership is not centred on an individual, but on the group, on the community. The Magna Carta understands and recognises this bond that the communities have with the land. In this regard, the decision

[737] (transl.) "Art. 599.- Dominion, which is also called ownership, is the real right over a tangible thing, to enjoy and dispose of it, in accordance with the provisions of the law and respecting the rights of others, whether individual or social. Ownership separated from the enjoyment of the thing is called mere or bare ownership. Art. 600. There is also a kind of ownership of incorporeal things. Thus, the usufructuary has ownership of their right to usufruct. Art. 601. The productions of talent or genius are the property of their authors. This ownership is governed by special laws."

[738] Although others have also done so since, such as the Bolivian Constitution of 2009, or the various initiatives to reform the Chilean Constitution, which also raised the issue during the various (failed) constitution-making processes.

of the Inter-American Court of Human Rights of 31 August 2001 should be mentioned,[739] as an inspiration for the Ecuadorian constitutional process.[740] In this famous decision, the Court recognised that:

> *Los indígenas por el hecho de su propia existencia tienen derecho a vivir libremente en sus propios territorios; la estrecha relación que los indígenas mantienen con la tierra debe de ser reconocida y comprendida como la base fundamental de sus culturas, su vida espiritual, su integridad y su supervivencia económica. Para las comunidades indígenas la relación con la tierra no es meramente una cuestión de posesión y producción sino un elemento material y espiritual del que deben gozar plenamente, inclusive para preservar su legado cultural y transmitirlo a las generaciones futuras.*[741]

Article 57 contanins a long list of collective rights, which are guaranteed to indigenous communes, communities, peoples (especially the Afro-Ecuadorian and Montubio peoples)[742] and nationalities. These include:

> *4. Conservar la propiedad imprescriptible de sus tierras comunitarias, que serán inalienables, inembargables e indivisibles. Estas tierras estarán exentas del pago de tasas e impuestos.*
>
> *5. Mantener la posesión de las tierras y territorios ancestrales y obtener su adjudicación gratuita.*[743]

But the Ecuadorian Constitutional Charter, which cannot be understood in isolation from the tireless struggles of the indigenous and peasant movements that inhabit the territory, goes even further. After listing collective rights, Article 57 recognises that the territories of peoples in voluntary isolation are of 'irreducible' and 'intangible' ancestral possession, and therefore prohibits extractive activities there. Article 60 *in fine* also recognises communes with collective land ownership as an ancestral form of territorial organisation. The importance of these provisions is immense, yet this exposes, by opposition, the other, very perverse side of the coin: Ecuador will continue to allow extractive activities to take place in the country, even if it is not in the ancestral territories.

Other collective rights granted to the communities by the 2008 Constitution include the right not to be displaced from their ancestral lands (57.11 CRE), and to practise their own

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739 Sentencia de la Corte Interamericana de Derechos Humanos, de 31 de agosto de 2001. Caso de la Comunidad Mayagna (Sumo) Awas Tingni Vs. Nicaragua. Para. 149.

740 Egas Reyes, 'La propiedad… 2008' (n 735) 337.

741 (transl.) "Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."

742 Art. 56 CRE'2008. The indigenous communities, peoples and nationalities, the Afro-Ecuadorian people, the Montubio people and the communes are part of the single and indivisible Ecuadorian State.

743 (transl.) "4. To keep ownership, without subject to a statute of limitations, of their community lands, which shall be unalienable, immune from seizure and indivisible. These lands shall be exempt from paying fees or taxes. 5. To keep ownership of ancestral lands and territories and to obtain free awarding of these lands."

or customary law as long as it respects constitutional rights, with special reference to women, girls and adolescents (57.10 CRE), as well as to participate in the management of the renewable natural resources within their lands (57.6 CRE). Regarding the exploitation and commercialisation of non-renewable resources found on communal lands, Article 57.7 CRE provides for the obligation of prior, free and informed consultation with communities when they may be environmentally or culturally affected. However, it is not very clear whether the communities' decision will be taken seriously if they refuse. This could undermine such constitutionally recognised collective rights.[744]

Concerning the communal nature of property, for the Ecuadorian Constitutional Court it implies that the owner of this property is not an individual or a group of individuals but the commune, community, people or indigenous nationality as a whole; and that its exercise is primarily governed by the law of each commune, community, people or indigenous nationality and not by the laws of the state.[745] This is evidence of the guarantee vision and the pro-community principle enshrined in Ecuadorian constitutionalism, where the ownership of communal lands allows the exercise of the collective rights of indigenous, Afro-Ecuadorian and Montubio peoples and nationalities, and their interrelationship with their natural environment, worldview and cultural practices.[746]

As for associative forms of ownership, it is a modality that allows several people to associate their assets or capital to carry out economic or productive activities, which reflects the social nature of the right to property. This has been developed in secondary legislation, the most important of which is the *Ley Orgánica de Economía Popular y Solidaria (LOEPS)* [Law on Popular and Solidarity Economy].[747] Article 18 of this law defines the associative sector as:

> *(...) asociaciones constituidas por personas naturales con actividades económicas productivas similares o complementarias, con el objeto de producir, comercializar y consumir bienes y servicios lícitos y socialmente necesarios, auto abastecerse de materia prima, insumos, herramientas, tecnología, equipos y otros bienes, o comercializar su producción en forma solidaria y auto gestionada.*[748]

Cooperative ownership, on the other hand, makes it possible to pool the assets of several persons in order to achieve a common goal. Art. 21 of the LOEPS states that the cooperative is the sector made up of those societies of individuals who voluntarily associate in order to satisfy common economic, social and cultural needs. As far as mixed ownership is concerned, this would be a form of exploitation of resources in which the state and a private individual would participate jointly. Articles 315 and 316 CRE'2008

744 Egas Reyes, 'La propiedad... 2008' (n 735) 338.

745 Sentencia de la Corte Constitucional de Ecuador, de 27 de octubre de 2021. No. 2-14-EI/21. Para. 115.

746 Masapanta Gallegos, 'Multidimensionalidad... (n 734) 85.

747 Ley Orgánica de Economía Popular y Solidaria. Presidencia de la Republica. Oficio No. T.4887-Snj-11-664. Quito, 28 de abril de 2011.

748 (transl.) "(...) associations composed by natural persons with similar or complementary productive economic activities, with the aim of producing, marketing and consuming lawful and socially necessary goods and services, self-supplying raw materials, inputs, tools, technology, equipment and other goods, or marketing their production in solidarity and self-managed".

refer to the regulation of the form of participation of both the state and the private party, which can take place in strategic sectors and public services. Art. 10 LOEPS confirms this power of the state to create mixed organisations of popular and solidarity economy.

Moreover, Ecuador's Magna Carta enshrines the need to preserve biodiversity and ecosystems through the promotion of the "*pequeñas y medianas unidades de producción, comunitarias y de la economía social y solidaria* [small and medium-sized community production units and the social and solidarity economy]" (art. 281, numeral 1 CRE'2008). Intellectual property is also taken very seriously by linking it to knowledge related to nature and agriculture. Thus, Article 322 prohibits the appropriation of collective knowledge, in the field of science and technology, but also, innovatively, in ancestral knowledge. Article 57 also reinforces this kind of protection for communities and peoples, with a final clause prohibiting any form of appropriation of their knowledge, innovations and practices. The appropriation of genetic resources containing biological and agro-biodiversity is also prohibited.

Ecuador also chose to explicitly protect the rights of the family (Art. 69). This included the unseizability of family property, legacies and inheritance. Ecuador is characterised by a partial community property regime in marriage, while inheritance laws provide for equal treatment of all children, regardless of gender. I would like to stress that the Ecuadorian Constituent Assembly was aware of gender inequalities in property ownership. This is evidenced by the fact that they wished to expressly include in the constitutional text the obligation of the state to guarantee equal rights and opportunities for women and men in access to property and in decision-making in the administration of conjugal relations and co-ownership of the property (Arts. 69.3 and 324 CRE).

Even so, at the time, and still today, there is a serious problem with women's access to land ownership, understood under the logic of private ownership.[749] In this sense, as noted in Chapter 1, Ecuador is an example of a country where property violence against women is clearly a form of gender-based violence. Women's lack of legal knowledge often undermines their ability to obtain a fair share in the division of property following separation, divorce or widowhood. Moreover, property violence is often compounded by the presence of other forms of violence against women.[750]

3.8.2. The social and ecological functions of property

I would now like to focus on the social and ecological functions that property fulfils, according to the Ecuadorian Charter of 2008. The text not only recognises them in Article 321 concerning property in general, but also mentions them specifically in relation to the city (Art. 31) and to land (Art. 282). On the one hand, the doctrine points out that the social function of property is linked to the principle of solidarity, and therefore, to a close relationship between human beings. On the other hand, the ecological function of property is broader, deeper and more complex than the first, since it implies an

[749] In this sense, vid. Carmen Diana Deere et al. 'Property rights and the gender distribution of wealth in Ecuador, Ghana and India' (2013) 11 The Journal of Economic Inequality 249.

[750] Carmen Diana Deere, Jacqueline Contreras and Jennifer Twyman, 'Patrimonial Violence: A Study of Women's Property Rights in Ecuador' (2013) 41 (1) Latin American Perspectives 143.

intergenerational responsibility and a close relationship between human beings and nature and future generations.[751]

The social function established by the Ecuadorian Constitution modifies the classical subjective concept of the right to property. The holder of the property right, whether individual or collective, is obliged, as part of society, to use the property in a way that best suits the rest of the community. In fact, it is the benefit of the community itself that limits the exercise of the subjective right to property, since it is linked to a social purpose. The CRE'2008 establishes a series of conditions for the exercise of the power and, in some cases, an obligation to exercise the property right in a specific way. Thus, it entails both obligations to do (duties) and obligations not to do (prohibitions).

From a constitutional perspective, the state also has obligations of provision and abstention. The former is expressed through public policies and legal and judicial guarantees that create mechanisms for access to this right, while the latter is linked to the protection of the private, collective and associative property of its inhabitants, especially by avoiding confiscatory acts or expropriations without payment of the fair price.[752] This dual dimension is confirmed by the Ecuadorian Constitutional Court, which recognises that the right to property imposes two obligations on the state: firstly, to promote access to property and secondly, to refrain from violating this right. Nevertheless, the state may limit one's property through expropriation, without this constituting a violation of the right to property, provided that it complies with the forms and conditions established by the Constitution and the laws.[753]

Regarding the ecological function of property, the protection of the environment is considered a legal limitation of the content of property, a condition for its exercise. That is, the environment must be protected by the entire Ecuadorian legal system. This value outlines, constrains and delimits the internal content of the right to property. Constitutional rights are protected by a general obligation to protect the environment, without exempting property. The environmental function of property presupposes, on the one hand, that the exercise of subjective powers over property does not affect nature as a subject of rights and, on the other hand, that it does not affect the individual, collective or community right of others to live in a healthy, ecologically balanced environment, free from pollution and in harmony with nature.

It is therefore in the general interest that the activities of economic agents do not harm natural resources or, within the Ecuadorian constitutional framework, the rights of nature. The environment and the constitutional right to live in a healthy and unpolluted environment cannot be sacrificed in order to achieve economic development. The Constituent Assembly was aware of the private interest that economic activity represents par excellence, and therefore constitutionally required that ecosystems be cared for and

[751] Carlos Alcívar Trejo, Juan T. Calderón Cisneros and Mery Susana Cuadrado, 'La función ambiental frente a la propiedad privada y su aplicación actual en la legislación ecuatoriana' (2014) 8 Revista Caribeña de Ciencias Sociales, Servicios Académicos Intercontinentales SL 8.

[752] Sentencia de la Corte Constitucional de Ecuador, de 1 de octubre de 2014 (146-14-SEP-CC), FJ 2.

[753] Sentencia de la Corte Constitucional de Ecuador, de 16 de octubre de 2019 (176-14-EP/19).

preserved.[754] This relationship of subordination between the ecological function and property entails two dimensions of the obligation of solidarity: 1) intergenerational, with future generations, who have the same right to use natural resources sustainably; and 2) intragenerational, towards current generations, which implies that the wealthy collectives reduce or modify their modes of production, trade and consumption (Arts. 317, 391, 397.5 y 400 CRE'2008).

The preservation of nature and natural resources is an objective that runs throughout the 2008 Constitution, which establishes a model that requires adequate and sustainable enjoyment not only by humans, but also by nature itself, under the approach of a biocentric paradigm. Thus, the Ecuadorian Magna Carta explicitly recognises the rights of nature: among others, to be respected, maintained and regenerated, to be restored, and not to be destroyed or permanently altered.[755] This idea was driven not only by international and comparative environmental law, but also by a reaffirmation of the cosmovision of indigenous cultures, which recognise the right and consider human beings as part of an integral and circular natural system, the *Pacha Mama*.[756] This is, of course, something completely new at the constitutional level, and has aroused huge interest among national and international legal scholars.[757] Although I have to admit that this is an extremely interesting topic, I should leave aside the analysis of the rights of nature, as it might take me too far away from the subject.

In any case, suffice it to say that from the ecological perspective of property, the use of natural resources must be responsible, in accordance with the needs of the country and the communities affected by such exploitation. It should also be remembered that the care of ecosystems and biodiversity is one of the essential pillars of *sumak kawsay*[758] or

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754 Santiago Andrade Mayorga, *Tutela constitucional del derecho de propiedad en Ecuador* (Universidad Andina Simón Bolívar 2019) 72.

755 Vid. Articles 71, 72, 73 and 74 of the CRE'2008.

756 Ricardo Crespo Plaza, 'Algunos casos de retrocesos en la legislación ambiental del Ecuador' in Mario Peña Chacon (ed), *El Principio de no regresión ambiental en Iberoamérica* (2015) UICN 125.

757 Vid. albeit not exhaustively: Jordi Jaria-Manzano, 'Si fuera sólo una cuestión de fe. Una crítica sobre el sentido y la utilidad del reconocimiento de derechos a la naturaleza en la Constitución del Ecuador' (2013) 4 (1) Revista Chilena de Derecho y Ciencia Política 43; René Patricio Bedón-Garzón, 'Aplicación de los derechos de la naturaleza en Ecuador' (2017) 14 (28) Veredas do Direito, Belo horizonte 13; Alberto Acosta and Esperanza Martínez (comps), *Derechos de la Naturaleza: El futuro es ahora* (Ediciones Abya-Yala 2009) and *La Naturaleza con Derechos. De la filosofía a la política* (Ediciones Abya-Yala 2011); Cletus Gregor Barié, 'Nuevas narrativas constitucionales en Bolivia y Ecuador: el buen vivir y los derechos de la naturaleza' (2014) 59 Latinoamérica - Revista de estudios Latinoamericanos 9; Daniel Bonilla-Maldonado, 'El constitucionalismo radical ambiental y la diversidad cultural en América Latina. Los derechos de la naturaleza y el buen vivir en Ecuador y Bolivia' (2019) 42 Revista Derecho del Estado 3; Louis J. Kotzé and Paola Villavicencio Calzadilla, 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) 6 Transnational Environmental Law 401; Juan José Guzmán, 'Decolonizing Law and Expanding Human Rights: Indigenous Conceptions and the Rights of Nature in Ecuador' (2019) 4 Deusto Journal of Human Rights 59; Laura Schimmöller, 'Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador' (2020) 9 Transnational Environmental Law 569.

758 *Sumak kawsay* is a Quechua neologism that emerged in the 1980s as a political and cultural proposal by indigenous organisations, adopted in the 21st century by socialist governments in Ecuador and Bolivia. The term alludes to the realisation of a socialism more independent of European socialist theories and more linked to the communitarian and ancestral way of thinking and living of the Quechua ethnic groups, to be promoted as a new model of social and state organisation. In Ecuador, it has been translated as "good life", although Quechua experts agree that the most accurate translation is "life in plenitude". Vid. for instance:

buen vivir (good living) (Arts. 14, 250, 275, 387 CRE'2008). It is also interesting to see article 395.1 CRE'2008, which provides that:

> *El Estado garantizará un modelo sustentable de desarrollo, ambientalmente equilibrado y respetuoso de la diversidad cultural, que conserve la biodiversidad y la capacidad de regeneración natural de los ecosistemas, y asegure la satisfacción de las necesidades de las generaciones presentes y futuras.*[759]

This constitutional provision summarises quite well the above-mentioned transversal criterion of environmental protection, the purpose of which is to guarantee the existence of human beings and nature and a balance between them.[760] Some of the measures that the 2008 Constitution requires the state to take in this regard, in addition to the aforementioned rights of nature, are the regulation of activities that may affect water and ecosystems (Art. 411), the adoption of measures for soil conservation (Art. 409), for the mitigation of climate change (Art. 414), for urban land-use planning, or the prohibition of the extraction of non-renewable resources in protected areas (Art. 407).

3.8.3. On balance

The literal wording of the 2008 Constitution of Ecuador undoubtedly reveals a desire for a paradigm shift in contemporary constitutionalism. Adopted well into the 21st century, it was intended to represent a turning point in the way human beings interact with and within nature. The Ecuadorian Magna Carta denotes a constitutional multidimensionality concerning property. It is understood as a right of liberty, as an economic right, as a social right and as a collective right, equal to all other constitutionally recognised rights. Since Ecuadorian constitutionalism overcomes the division of rights as fundamental or not, the right to property, as a 'constitutional right', is hierarchically equal to all others and enjoys the same normative, political and judicial guarantees.

Furthermore, the Ecuadorian Constitution guarantees the right to property in all its forms: public, private, community, associative, cooperative, mixed, intellectual and ancestral ownership of land. Particularly noteworthy is the recognition of communal property, understood not only as a matter of joint possession and production, but also as a material and spiritual element that should be fully enjoyed by the country's communities, peoples and nationalities. The 2008 Constitution commits the state to recognise the community's relationship with the land, as the fundamental basis of its culture, its spiritual life, its integrity and its economic survival.[761] This includes the recognition and protection of community and ancestral intellectual property.

Alberto Acosta, *Buen Vivir - Sumak Kawsay: Una oportunidad para imaginar otros mundos* (Ediciones Abya-Yala 2012) and Ariruma Kowii, 'El Sumak Kawsay' in Gioconda Herrera Mosquera, *Antología del pensamiento crítico ecuatoriano contemporáneo* (CLACSO 2018) 437.

[759] (transl.) "The State shall guarantee a sustainable model of development, environmentally balanced and respectful of cultural diversity, that conserves biodiversity and the natural regenerative capacity of ecosystems, and ensures that the needs of present and future generations are met."

[760] Egas Reyes, 'La propiedad… 2008' (n 735) 344.

[761] ibid 349.

The minimum requirement for the guarantee of any kind of property is the fulfilment of the social and ecological function established both in the Magna Carta itself and in the laws that determine its content. Both functions become the constitutional postulates that moderate the individualistic residual exercise.[762] On the one hand, the social function implies the adaptation of the means of production to the pursuit of constitutional economic objectives (the development regime) and involves a series of attitudes and obligations on the part of the owners, who are subject to control in order to verify that their property activity conforms to this characteristic of the institution. On the other hand, the ecological function of property recognised by the Ecuadorian Constitution is the culmination of previous constitutional processes that sought to highlight this relationship between humans and nature, and would at the same time be a true inspiration for the next constitutional processes.

The way in which property is configured in the 2008 Constitution reflects a clear tension based on three counterweights. One could imagine a kind of triangle, with property in the rights regime on one edge, property in the development regime on the second, and the ecological function of property and *buen vivir* on the third. In any case, fifteen years after its adoption, it cannot be said that the situation in Ecuador has changed, at least as far as property is concerned. Rather, it seems that neoliberalism has adapted to the new times, in the light of the development regime, preventing the full exercise of collective and environmental rights and without any significant positive impact from the introduction of the rights of nature.

3.9. Some common remarks

Both the 19th and 20th centuries showed that the conflicts, inequalities and contradictions inherent in capitalism make it a system prone to instability, disorder and crisis. To counteract this dynamic and ensure its orderly functioning, rational state action is needed to guarantee the stability of the accumulation process.[763] This is clear in both liberal constitutionalism and social constitutionalism. Be that as it may, the shift between the property absolutism enshrined in the liberal constitutions of the 19th century and the social constitutionalism of the 20th century is palpable. Arguably, social constitutionalisms sought to link property to a concept of responsibility and participation which, in reality, had never completely disappeared due to the very nature of property. Certainly, such conceptual changes in the constitutional right to property were consubstantial with the evolution of the capitalist world-economy: as the system became more sophisticated, this required changes in its essential core, i.e., property. Thus, the classical constitutionalism of the liberal state went into crisis insofar as it proved to be an inadequate conceptual framework to allow for the control of power in the late phase of the process of capitalist accumulation.[764]

The inter-war period saw the rise of socialism, which peaked just before the Second World War. The post-war trend would be much more moderate in terms of the

[762] Andrade Mayorga, *Tutela constitucional…* (n 754) 61.

[763] Albert Noguera, *El asalto a las fronteras del Derecho* (Editorial Trotta 2023) 77.

[764] Jaria-Manzano, *La Constitución del…* (n 140) 156.

socialisation of property, which would make the social programme appear "extremist" and lead to the reconstruction of private property as an institutional guarantee. The constitutionalism of the following decades would continue to be social, but with a clear downgrading of the most exacting democratic demands and an abandonment of the more emancipatory tasks proposed at the beginning of the 20th century by thinkers such as Duguit.[765]

In making some common observations about the institution of property shaped during this period, the first question that arises is why there is no definition of property. Not only in constitutional texts but also in civil codes, the concept of property seems to be taken for granted. Much more attention is paid to the constitutional regulation of its limits than to the content of property itself. Indeed, property seems to be a "beast" to be controlled; it is not good in essence, it must be limited. Thus, while most rights need to be protected to ensure their enjoyment, property must be restricted, so that the excesses of some individuals do not encroach on the property rights of others.[766]

In connection with this lack of a definition of property, however, a new element introduced in the 20th century should be mentioned. While in the liberal period, the protagonism of the states fell on the legislative power, in the following decades the role of the executive and the judiciary grew, to the detriment of the parliaments. The introduction of constitutional courts played, and continues to play, a crucial role in the conceptualisation and interpretation of property in the various constitutions that have been adopted. What were once simple statements in a text called 'constitution' were now given content, nuanced and debated by the new guardians of the constitutions. What is more, their pronouncements have, to a large extent, changed the political and social behaviour of each state with regard to property, and indeed concerning every other aspect of law that one can think of.[767]

Be that as it may, despite efforts to mention the social function of property, private property gained enormous importance in European constitutions in the post-World War II period. This was not only apparent from the literal wording of the specific articles regulating property right(s). In fact, private property was regulated transversally, in one way or another, when giving importance to issues such as the freedom of enterprise and the market, economic rights, the rights of the family as a natural society or the right of inheritance. Indeed, Western constitutions have been built on (private) property rather

[765] Pisarello, *Un largo Termidor*... (n 61) 138.

[766] Thus, for example, the right to life is guaranteed, the right to education is ensured and the right to equality is protected; no restrictions are imposed on them, but the maximum possible openness is sought.

[767] By way of example, in April 2021, the German Constitutional Court overturned the law limiting the price of rent in Berlin from 2020. The legal text, which came from an initiative to halt the rise in real estate prices in the German capital, was rejected on the grounds of competence (rent regulations are a federal competence and the Länder are only authorised to legislate "(...) *solange und soweit der Bund von seiner Gesetzgebungsbefugnis keinen abschließenden Gebrauch gemacht hat* [(...) as long as and to the extent that the federal government has not made final use of its legislative competence]"). On the other hand, Spain's Constitutional Court annulled in 2021 the housing law that the Catalan government had approved in 2019 for limiting the right to property. The High Court found that the law provided for "coercive, non-voluntary" measures for flat owners that could not be imposed by means of a decree law. This text provided for an obligation on large landlords to offer social rent to vulnerable people who illegally occupied housing. Vid. respectively: BVerfG, Beschluss vom 25.03.2021 - 2 BvF 1/20, 2 BvL 4/20, 2 BvL 5/20 (Germany), STC 16/2021, de 28 de enero (Spain).

than vulnerability, and on the individual subjects that make up society rather than the community.

Nor should it be forgotten that Article 1 of Protocol No. 1 to the ECHR, which recognises the right of every "natural" or "legal" person to enjoy "*his*" possessions, has been relevant in many cases, and has forced a reconsideration of the content of property as established in European national constitutions. For instance, it has partly transformed the right to property recognised in the Italian Constitution as "economic" into a fundamental right. Similarly, the case law of the European Court of Human Rights has also been clarifying, the meaning and scope of the right to property, especially private property, and thus redirected the case law of the European national courts on this point. As noted above, in some cases the Court has left the door open to a broad interpretation of public domain property, which could lead to the concept of common goods. Nevertheless, it is also true that the recognition of private property for legal persons is a sieve through which corporations can continue to promote an accelerated pace of resource grabbing.

Private property, in essence, excludes. Its exclusivity implies that, since it encompasses all the powers over the thing, it leaves no room for the intervention of anyone other than the person who holds its ownership, and therefore prevents the enjoyment of the thing by others.[768] Of course, public property and expropriation are constitutionally regulated. Nevertheless, they are generally subject to what happens to private property and the rest of fundamental rights. The constitutions analysed reveal a conception of property that is inextricably linked to the objectives of appropriation, exclusion and accumulation, which are most effectively achieved not simply through violence, but through the very foundations of constitutional law that permit and shape it. This model of concentration of powers has privileged the guarantees of private property over those of democracy, ultimately allowing for the unequal distribution of resources and the subordination of large masses of the population, even though the right to equality is always constitutionally recognised as a fundamental right.

For contemporary Western constitutionalism, state sovereignty and private property completely colonise the imaginary, exhausting the realm of the public and the private in a kind of zero-sum game.[769] In the Italian Constitution, for example, this reductive public-private logic is very clear. Only, depending on the political period and the colour of the party, one side of the balance is heavier than the other. It is the counterbalancing play of public-private forces: in left-wing programmes, more state and less market; in right-wing campaigns, more market and less state. These two notions sacrifice the common good for the benefit of the individual. There is no room for ecological or collective intelligence within the logic of capital accumulation.

The states, as agents of this logic, have gradually institutionalised a framework of constitutional arrangements designed to maximise the efficiency of capitalism. They are the administrative units for managing the world-economy, guaranteeing the global and

[768] Although the existence of other rights of a different type over the thing (e.g., an easement, a lease) is not prevented, without the right of ownership being distorted, the point is that there are not exactly two property rights over the same thing. In the case of co-ownership, this always implies a division: of space, of money, of time, etc.

[769] Mattei, *Beni comuni*... (n 66) 34.

domestic rights of capital.[770] And if states do not allow for relations other than public or private property, then we are trapped not only in capitalist thinking, but also in patriarchal thinking. My intuition is that patriarchy and capitalism will be able to reproduce themselves precisely as long as their main institution (property) remains unquestioned. For social constitutionalism, the public/private dichotomy should not be overcome, but should be generalised and re-specified within each functional system. And as long as constitutions reproduce the public/private distinction, they will always be at the service of private property and the worst dynamics derived from capitalist processes.

With regard to what initially seemed to be the protagonist of this period, the social function of property is to a greater or lesser extent embodied in the various constitutions studied. However, one should not be too complacent with this friendly-looking formula. I believe that Correas is right when he states that the social function of property, far from being a surpassing of capitalism, "*es la forma superior de la ideología capitalista* [is the superior form of capitalist ideology]".[771] Even if that unpleasant Napoleonic article of the civil codes —rather a naivety under a grandiloquent formula in which the most absolute property was claimed— was left behind, this does not mean that the bourgeois ideology did not remain in a certain way embedded in the constitutions of the 20th century. On the contrary, it was a more developed updating of this ideology, adapted to the capitalist context, which went beyond the liberal formula and led to a more sophisticated approach to property.[772]

Of course, some good lessons can be drawn from the historical experiences of the 20th century. States' efforts to change the classical liberal property paradigm must be acknowledged when comparing the period from which they came. Once again, it is important not to look at the past condescendingly and to always take into account the historicity of the law. In this respect, Ecuador's 2008 Constitution raised high hopes for emancipation from neo-colonialism and extractivism, with the introduction of community rights, rights of nature and the ecological function of property. With the adoption of this new Magna Carta, well into the 21st century, it seemed that any change was possible. However, sometimes a constitution does not make the country, as can be seen in the news every day.

Despite such hopeful constitutional statements, everyday experience often does not seem to show that property rights are subject to their eco-social function. We cannot let our guard down. At the turn of the century, neo-liberal thinking pervaded the Western world, transforming the economy, provoking endless crises that are still dragging on, increasing inequalities and widening the ozone hole at an unprecedented rate. Noguera Fernández is surely right to say that the social function of property is not a monolithic concept that

[770] Tony Evans and Alison J Ayers, 'In the Service of Power: The Global Political Economy of Citizenship and Human Rights' (2006) 10 (3) Citizenship Studies 239; Leo Panitch, 'Rethinking the Role of the State' in James H. Mittelman (ed), *Globalization: Critical Reflections* (Lynne Reiner 1996) 95, cited by Grear, *Redirecting Human Rights*... (n 281) 19.

[771] Oscar Correas, *Introducción a la crítica del derecho moderno (Esbozo)* (2nd edn, Fontamara 2013) 160. Original publication: 2006.

[772] ibid 161.

admits only static compliance.[773] It is not fulfilled or infringed without an intermediate point, but can assume different degrees according to the correlation of forces of each specific historical moment. Precisely the history of the burden of the social function of property is also the history of the class struggle.[774]

There is therefore no doubt that property as a legal institution must progressively adapt to the demands of today's societies. It is time to accept that property must submit to the imperatives of equity and resilience, and that it may need to be reconceptualised to respond to the new world around it. The evolution from a liberal to a truly eco-social conception of property thus seems imminent. In short, it is a matter of finding a new meaning for the concept of property. In my view, the eco-social function should restore the mechanisms of solidarity between individuals that private property and neoliberal thinking can endanger.

It should not be forgotten that the constitutions discussed in this chapter —with the exception, perhaps, of Ecuador— come from moderate social democratic visions, and thus may not represent a full-fledged alternative to the eco-social transition. It may be necessary to go further. If constitutions are critically and comprehensively rethought by legal actors in terms of environmental and social justice, they could be useful tools for changing the hegemony of the property system. But first, it should be questioned whether there are no other ways of conceiving property, i.e., what is produced, to satisfy what human needs, and under what interests. Secondly, there is a need to rethink how natural resources are used and, more importantly, how nature and the environment are affected by production processes. And finally, who controls the use of natural resources, which are a common heritage, and how they can be returned to the community, to move towards equity and build more resilience in the world to come.

[773] Noguera Fernández (coord), in *Regular los alquileres…* (n 7) 15.

[774] ibid 15.

Chapter 4. The commons as a proposal towards equity and resilience

If private property is a human creation, a mere mental abstraction, then it is something that a culture can change if and when it so chooses.

ERIC FREYFOGLE, 1996[775]

We must reappropriate resources, work less, regain control of our lives, and take responsibility for the well-being of a broader world than that of our families.

SILVIA FEDERICI, 2020[776]

4.1. On the aim of this chapter

In the previous chapter, I have pointed out some of the efforts of 20th-century constitutionalisms to recognise the social function of property. Some later than others, they also incorporated the constitutional right to equality, in the form of genuine universal suffrage, i.e., the recognition of women as political beings on an equal footing with men. But it is also worth asking why, despite this progress, the right to property does not prevent the current spiral of economic growth from continuing. Why property, after all, is still tinged with neoliberal overtones. And why private property still takes precedence over any other form of ownership. To a large extent, the reason is that property has been formulated as a space of individual autonomy, which denies vulnerability and renders the essential invisible. Likewise, the transposition of environmental issues into law, and especially into constitutions, remains anchored in a recognition of subjective rights that underpins an economic system centred on individual rights, industrial development and economic growth.

Of course, private property seems hard to replace in the current neoliberal and capitalist regime. As previously discussed, there is a considerable tradition that defends the legitimacy of private property only to the extent that it ensures the fairest possible distribution of public wealth. Thus, some scholars propose rethinking the institution of property by privatising common goods as long as they are distributed equally among all people.[777] In my view, however, this encourages an even more individualistic system than the current one, which does not take into account human vulnerability and the inevitable

[775] Eric Freyfogle, 'The Construction of Ownership' (1996) 1 University of Illinois Law Review 177.

[776] Silvia Federici, *Beyond the Periphery of the Skin* (PM Press 2020) 38.

[777] Thomas Piketty, for example, proposes giving 120,000 euros to everyone when they turn 25, with the risk that there is no second chance. According to the French economist, the "start-up money" would open up many opportunities for young people, such as buying a home or setting up their own business, and they would no longer have to accept jobs with miserable working conditions. The measure he proposes aims to reduce growing inequality and would be financed by wealth taxes. Vid. Thomas Piketty, *Capitalisme et Idéologie* (Seuil 2019) 1243ff.

need for care. Even though it starts from a position of common property, it moves towards a system of individual private use of resources which are not always infinite and cannot always be shared by all. The allocation of full property rights does not guarantee that resource degradation will be avoided either.

Moreover, it should not be forgotten that the constitutional limits of property are not only equality, but also the environmental limits of an increasingly uncertain and resource-scarce planet. Contemporary property law, as it has been conceived so far, is not prepared for the challenges of the Anthropocene. It evolved at a time when physical conditions were stable, and the need to accommodate large-scale negative externalities was therefore not pressing.[778] It is thus necessary to build a new law —from scratch, i.e., constitutional law— that is robust enough to restructure property rights in a way that can respond to systemic changes in the physical world. The doctrines of 20th-century social constitutionalism provide a considerable legacy for the (re)construction of general principles that can respond to the age of the Anthropocene.

But they have not been enough. The neoliberal capitalist regime has been able to permeate these formulations without much difficulty. The 1960s and 1970s saw very significant changes in the basis for the expansion of financial markets and the conditions for the dependence of states on their public policies to obtain resources from the international capital markets. From the 1960s onwards, the economy became increasingly transnational; economic activities no longer had concrete territorial limits and became a global force. In particular, the emergence of the euro currency market, the collapse of the Bretton Woods system and the oil crisis, as well as the information technology revolution and the logistics revolution brought about by international container traffic, contributed to the financial sector-centred economy and mass consumption that prevail today.[779] From the point of view of the social state, since the 1970s there has been an involution that has tended to reinforce private property over other forms of enjoyment and use of resources. It is therefore necessary to go further.

In this fourth chapter, it is time to explore a reconstruction of property rights from a communitarian perspective. A reconceptualisation from this focus should help to make visible four main aspects: interdependence, eco-dependence, resources scarcity and uncertainty. Furthermore, this perspective allows for the emergence of other values beyond autonomy and individuality: solidarity, empathy and responsibility. A reformulation of the right to property that is in line with social and environmental justice is therefore necessary, not only to move towards resilience in the face of a changing world, but also towards equality in that resilience. That is, to ensure that everyone has the necessary tools to cope with the adversities of the climate emergency.

To this end, I will explore the commons as an emancipatory tool and as a fundamental defining element of the social function of property. Through prepositional formulations, the idea is to move from the exaltation of the self-sufficient, autonomous individual to the recognition of social collectives with specific vulnerabilities. One of the key ideas is

[778] Sprankling, 'Property Law…' (n 106) 5.

[779] Eric Hobsbawm, *Age of Extremes. The short twentieth century. 1914- 1991* (Abacus 1995) 276 ff. Original publication: 1994.

that property rights must cease to be abstract and become pragmatic, labile, mobile and concrete. We would move from self-satisfaction and personal development to a more just, democratic, participatory and sustainable community that can satisfy everyone, with care as the leitmotiv. To this end, some natural resources, but also technology and knowledge, must be protected.[780] Not only in response to climate change but also to achieve a more egalitarian society. Not only by deprivatising assets, but also by preventing the public sector from appropriating the commons without community control, and by excluding certain goods from capitalist intervention.

However, this raises the question of the distinction between public and common property. The proposal of the commons goes beyond the state, through other forms of organisation. Of course, the state cannot be omitted, as it possesses important social wealth. The commons do not appear out of nowhere; they are a relationship of dispute and negotiation. In this new scenario, it would not be the state but the communities that would decide on childcare, water, housing construction, etc. Therefore, the communities should have the last word. I am not advocating a traditional communist, statist vision, but one in which communities are given a leading role, as I will develop in this chapter. To this end, social movements from below must be strengthened to facilitate the formation of self-governing communities. In this sense, public property would coexist with common property, according to the changing needs of each environment. For the commons cannot be something pure but must be negotiated with the environment.[781]

I must also announce in this introduction that I have reserved the final part of this chapter to make some proposals that I see as the basis for the transition to more resilient and equitable societies. I believe that these proposals are, in essence, the core articulation of my thesis. The theory of the commons that I propose will never be possible unless we put reproduction and care at the centre, which underlines the vulnerability and dependence of human beings on biodiversity, but also on society itself. 'Putting life at the centre' is not just a slogan, but a very complex idea. 'Putting life at the centre' as a common goal means respecting life, caring for it, waiting for its times, its needs, carrying out a profound work of socio-cultural transformation and return to nature.

4.2. Rethinking property rules. The commons as a counter-narrative to the private property paradigm

4.2.1. Basic premises for a new concept of property

In the previous chapters, I have focused on the notion of property and its different configurations in some of the Western constitutionalisms that have operated as hegemonic legal orders, to verify that property is not a static concept. Specifically, I have tried to make visible the very important role that private property has played in achieving a system of appropriation of nature and what has been constructed as feminine, and how

[780] Simon Caney, 'Resource Rights in the Anthropocene' (Why Private Property? II. How does the coming ecological crisis challenge contemporary theories of property?), Bordeaux, 14 June 2021 <shorturl.at/cKXY8> accessed 20 April 2022.

[781] Luis Martínez Andrade, 'Entrevista a Silvia Federici. «La justicia social debe ir más allá de la noción de justicia liberal burguesa»' in *Feminismos a la contra. Entre-vistas al Sur Global* (La Voragine 2019) 129.

this is at odds with the idea of interdependence. Indeed, private ownership of the means of production is the origin of social inequality, and the maintenance of social, political and cultural privileges. In such a scenario, despite the formal constitutional recognition of equality before the law (*de iure*), material or *de facto* equality still seems a chimaera.

Property law cannot escape the critical eye of the law reformer, since property rules have clear implications for social justice and environmental protection.[782] It is now time to put forward some legal proposals to reconceptualise property in the Anthropocene context. This is not a new exercise: to date, many efforts have been made to redefine the concept of property. My contribution here focuses on the construction of a constitutional theoretical framework that manages to bring together vulnerability and the need for care, property rights, environmental concerns and the notion of the commons. In other words, I aim to provide an updated ecofeminist legal perspective on the commons for the present day.

One of the key premises for reconceptualising property is to see it as a means to move towards social-ecological resilience and environmental governance, rather than as an end in itself. Social-ecological resilience is understood as the capacity of living beings to adapt to disturbances, adverse conditions, situations and stresses caused by environmental change.[783] In other words, the resilience of a system is its ability to perpetuate its dynamic structure in the face of various perturbations.[784] Indeed, adaptive institutions, ranging from local groups and private actors to the state and international organisations, will be needed to deal with complexity, uncertainty and the interplay between gradual and rapid change.[785] Environmental governance can be understood as the equitable and inclusive participation of all people in the formulation, implementation and enforcement of environmental governance decisions.[786]

Undoubtedly, these two moral ends require legal rules that prioritise the use of rights, and weigh up what is more necessary: private interests (individual liberty and private property of just a few) or collective interests (the future well-being of human and non-human life, collective enjoyment and freedom, the preservation of the biophysical basis on which humans are based, etc.). Certainly, the arbitration that delimits these priorities concerning property rights will depend on how democratic it is. History has already

[782] Jill Robbie, 'Moving Beyond Boundaries in the Pursuit of Sustainable Property Law', in Bram Akkermans and Gijs van Dijck (eds), *Sustainability and Private Law* (Eleven 2019).

[783] Stockholm Resilience Center, 'What is resilience?' (Stockholm University, 19 February 2015) <t.ly/mDlZ4> accessed 11 April 2023.

[784] This is achieved by: (i) negative feedback loops that return the system to its dynamic equilibrium state after perturbations with the necessary speed; (ii) multiple redundancies that allow resilience in the face of the loss of any element; (iii) high interconnected diversity that allows powerful innovation to respond to challenges; (iv) decentralised but interconnected decision making that makes them highly adaptive; and (v) they are sufficiently unstable to generate innovation, but sufficiently ordered to learn. Vid. Ramón Fernández Durán y Luis González Reyes, *En la espiral de la energía. Volumen II: Colapso del capitalismo global y civilizatorio* (2nd edn, Libros en Acción-Baladre 2018).

[785] Emily Boyd and Carl Folke (eds), *Adapting Institutions: Governance, Complexity and Social-Ecological Resilience* (Cambridge University Press 2011) 3.

[786] About environmental governance, vid. J.P. Evans, *Environmental Governance* (Routledge 2012) and Maria Carmen Lemos and Arun Agrawal, 'Environmental Governance' (2006) 31 Annual Review of Environment and Resources 297.

shown what happens when private interests take precedence. From my point of view, when collective interests are given priority, it is a question of recognising property primarily as a social function, rather than as a subjective right attributed absolutely to the individual. Even so, caution must be maintained. The social function of property is a flexible formula that can be used in various contexts to serve different political agendas. It can either acquire a productivist vocation in fascist regimes to modernise and industrialise the economy, or it can play an equalising and redistributive role in a welfare state.[787]

Or it can become a device[788] designed to ensure the efficiency of resource relations at the present stage.[789] In this sense, the law must correspond to a reasoned justification that is appropriate to this function. In other words, the law must intervene by setting limits to prevent damage to what is in the collective interest. If the Lockean conception of property discussed in the first chapter is somehow reversed, the analytical proposal appears as follows: a) the individual owner is not an absolute despot of his/her domain, but a member of communities and ecosystems in which he/she is included; b) there is no unitary property right, but a bundle of rights; c) such rights are neither absolute nor exclusive, but partial and relative; and d) they are not rights of separation but put us in relation to others.

Too often, the problem has been the absence of a constitutional umbrella that is conscious of human vulnerability. This notion should be the core matrix of constitutional law. On this basis, the specific nuances and forms of differentiation necessary for the design of effective legal protection regimes should be examined.[790] Moreover, the existing shortcomings of environmental rights (to water, to food, etc.) should be addressed. In my view, strengthening their protection and ensuring equal access to them would be a form of resistance to privatisation. This necessarily involves the inclusion of community-based rights of access and participation. On the other hand, I believe that property should be rethought not as an individual and exceptional privilege, but rather as a universal, probably collective, right that cannot be excluded from important spaces, places, resources and common goods. This more inclusive perspective would counter the danger of self-interest and the tendency of the rights discourse to disintegrate into atomised formulations. Moreover, I believe that this strategy can reinforce human concerns with an environmental dimension, for example, by providing an alternative meaning of the right to life.

Moreover, this path towards resilience and equity implies that the notion of common and common property is elevated to a much higher place in our social consciousness than it

[787] Marella, 'La funzione sociale…' (n 641) 558.

[788] Here I take up here Foucault's idea of 'dispositif', to refer to the heterogeneous ensemble consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions that enhance and maintain the exercise of power within the social body. This time, however, such a system of relations or 'dispositif' divides and distributes power equally.

[789] Marella, 'La funzione sociale…' (n 641) 558.

[790] Laura Westra, 'Environmental Rights and Human Rights: The Final Enclosure Movement' in Roger Brownsword (ed.) *Global Governance and the Quest for Justice Volume IV: Human Rights* (Hart Publishing 2005) 107–119.

is at present. Such a shift could play a potentially important political and rhetorical role, oriented towards non-individualistic conceptions of property relations. Indeed, it could provide a conceptual mechanism for constraining overly broad claims to exclusivity, in effect asserting the limits of property vis-à-vis other important interests. It would openly affirm the possibility and desirability of having 'no-go' property zones. In other words, the concept of the commons makes it possible to rethink property rights at their very core. It leads to a deconstruction of the discourse of private property and the individualism implicit in it, and can allow access to certain goods as an essential precondition for securing freedom, dignity and human integrity.

Before proceeding, I should make it clear that my proposals are designed for the medium term. The dynamic context of the climate emergency is rapidly affecting the resources that can be owned, so property principles must adapt to a changing social and physical environment. Nevertheless, law is limited in terms of time and the changes cannot be immediate. For example, it no longer makes sense to think in terms of stable land rights, as many plots of land will be shaken by climatic upheavals (sea-level rise, storms, hurricanes, floods, fires, etc.). In fact, sustainability itself "does not mean that things do not change. It is a dynamic process of co-evolution and not a static state".[791]

To affirm that resources belong to everyone in a group is to defend a social property that is essentially irreducible. All in all, everything we have is due to social cooperation; to interaction with the present society and with previous generations. And much of what we will have tomorrow will be due to future generations. This is not a discovery, but it must be recalled. From this it could be deduced that the state should intervene in the assets of individuals, to recover the number of resources that must be returned to society itself. For there is indeed a social debt. The use of everything that life in society offers us makes us debtors of knowledge, know-how, manufactured products, food, security, legal institutions, services...[792] Property is not an absolute right of the subject, based on mere individual merit, but on a pact linked to obligations towards the community.

Another basic premise, in my view, is that the state should become the legal guardian or custodian of some stipulated universal resources, to ensure their conservation, care and accessibility for present and future generations. With some reservations, of course. Indeed, it requires the collective capacity of the community, the true sovereign people of the goods and services, to determine how the resources need to be used. Thus, bottom-up control of state action, transparency and oversight are needed to ensure that public ownership does not degenerate into "parasitic bureaucratised statism".[793] In this way, the state would only act as a mere guarantor instrument and not the real owner. The state would therefore have duties of care, but no rights of ownership over things, which would somewhat diminish state sovereignty. To this end, it will be important to embrace the already existing tensions between social movements and political institutions.

[791] Fritjof Capra and Ugo Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Berrett-Koehler Publishers 2015) 177.

[792] Crétois, *La part commune*... (n 56) 25.

[793] Casassas and Mundó, 'Property as a Fiduciary...' (n 105) 86.

It should also be remembered that the state is not omnipotent. Its regulatory and redistributive action is limited, so it alone cannot guarantee that no individual will undermine what belongs to society. The question of which actors, subjects or institutions should decide when and how to intervene in the distribution of property is extremely important and, as will be seen in the following sections, it need not be the state alone. Rethinking property involves reconfiguring its regulatory ideal, if necessary through institutional arrangements. In fact, if the aim is to move towards social justice and resilience, perhaps new forms or old practices of resource distribution should be explored or revived. And I am not thinking precisely of forms of private property.

I wonder whether it might not be possible to turn the morphological characteristics that have traditionally been claimed for property (imprescriptibility, perpetuity and elasticity) on their head. The first question would be whether the right to property can be lost through non-use or misuse. Bearing in mind the Duguitian theory that property *is* a social function, perhaps it should be considered that certain things can be made subject to prescription if the owner does not use them properly. This proposal would necessarily involve taking into account the best use (or non-use) in the interest of the environment and society as a whole. Regarding the second aspect —perpetuity— I wonder whether, in reality, the exercise of property rights should only be admissible for a certain period of time, and renewable for a longer period only if the first premise is met. In this scenario, property rights over the thing would last at most for the life of the thing itself or the life of its owner, yet no longer. This would indeed call into question the legitimacy of the institution of inheritance.

For the last characteristic, elasticity, I propose that certain properties are constantly compressed by the existence of other real rights of enjoyment over them, such as usufruct, easements or public restrictions. That being so, it would probably not make much sense to raise property rights, since there would be no natural expiration of the right that would allow the property right to automatically reappear in the hands of the holder. So, to recapitulate, I propose that a reconceptualisation of property should include its prescriptibility, its perishability and its impossibility to be transferred *mortis causa*, and its obligation to bear servitudes in the eco-social interest.

4.2.2. Property as an instrument for the protection of rights

I have already tried to give an account of the central role that property plays in Western constitutionalism, even if it is not defined anywhere. Many rights are constructed on the basis of property and depend on it. I am firmly convinced that property should not be integrated as a constitutional or basic right (let alone a natural right). In fact, constitutions that conceived —and still conceive— property as a fundamental right clash head-on with other human rights that are indispensable for the future of humankind. A constitutional right cannot be dispensed with without denying the foundations of any just political life. Moreover, it is quite contradictory to claim that the right to property is a constitutional right because it is an important source of liberty. For how can it be

claimed that property is a constitutional guarantee for all, when in practice it is the market that ultimately decides who enjoys such rights and who does not?[794]

Although other constitutions have placed it among the ordinary rights, mostly as an economic right, I believe that property should be considered rather as a form of regulation of rights, as an instrument, as a set of secondary rules that allow the realisation of more essential values that guarantee certain relations of human beings with themselves and with the rest of society and the environment in which they live. It should not even be considered as a principle —as Article 17 of the DDHC and the subsequent French constitutions did— since it is nothing more than an auxiliary device, a support crutch for other constitutional rights to make them more meaningful. In other words, property is only legitimate in the service of essential values that are hierarchically superior to it.

The alternative approach I propose is thus to define property as something residual and relative to other rights, instead of a right above all others. The renunciation of property as a constitutional right makes it possible to oppose real constitutional rights to it, when it degrades the conditions of existence, the right to health, to education, to work, to the environment, etc. In short, private property is not essential for human fulfilment, but just another tool. A tool that needs to be reformulated, not just amended or nuanced. As Audre Lorde wisely said, "The master's tools will never dismantle the master's house".[795] Property, then, would only allow the use of things only after all other legitimate interests have been fully considered.

This makes even more sense when the two main aspects of property —use or appropriation— are weighed in the balance. On the one hand, legal thinking has so far focused on property in a static sense, on property as 'having', as 'owning'. On the other hand, however, there is also the possibility of understanding it as a living, dynamic, ever-flowing power. In this case, property would be a bundle of functions, replacing the position of rest with freedom of movement and the right to exploit with the right to use.[796] Of course, these two conceptions are never completely exclusive; there will always be some of each at the same time. But one of them is always the keynote, and this can then become decisive for the totality of the cultural and political conditions of a society.

Subscribing to the first point of view, i.e., defending the protection of ownership as such, emphasises the mere distribution of property. This inevitably leads to corollaries such as the owners being able to destroy their property at will and, conversely, being able to exploit it without control and limits, since the exercise of their power is not subject to public or common limits. This idea would be in line with the conception of absolute property fiercely defended by liberal constitutionalism in the 19th century. Indeed, this understanding of property is closely linked to individualism and maintains it as the cornerstone of capitalism.

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[794] Bailey, 'The Common Good in Common Goods…' (n 272) 106.

[795] Audre Lorde, 'The Master's Tools Will Never Dismantle the Master's House' (1984). Comments at "The Personal and the Political" Panel (Second Sex Conference, October 29, 1979).

[796] Hedemann, *Sachenrecht…* (n 51) 61.

On the other hand, the second point of view, which focuses on the use of property and the legal approach to it, makes it possible to oppose its excessive use from the outset. The focus is no longer on the static verb "to own", nor on the sharing of property —not even an equitable sharing— but on the constant control of the manipulation, participation, administration, management and possible alienation of the resources. In other words, the key element is the socialisation of goods and services,[797] a term that exudes much more dynamism. Of course, from my point of view, the second option sounds much more convincing in today's world, which is characterised by the dynamics of constant change, uncertainty and urgency.

It is interesting to mention here the concept of 'abuse of rights', created by case law in civil law jurisdictions — not so readily apparent in common law systems— which is the exercise of a legal right only to cause annoyance, damage or harm to another.[798] That is, when the exercise of an individual right is detrimental to the interests of the community. At first sight, the exercise of a subjective right appears to be in accordance with that right, but on closer examination it turns out to be contrary to the objective of that right and therefore abusive. Basically, the concept aims at correcting the application of a legal rule on the basis of standards such as good faith, fairness and justice when, despite formal compliance with the conditions of the rule, the objective of the rule has not been achieved.[799] This principle departs from the classical theory that "the individual who uses a right injures no one" by adopting instead the maxim that "a right ends where abuse begins".

To invoke the 'abuse of rights' doctrine, at least one of four conditions must be met: (a) the predominant motive for exercising the right is to cause harm; (b) there is no serious or legitimate interest in judicial protection; (c) the exercise of the right is contrary to good morals or violates good faith or elementary fairness (equity); or (d) the right is exercised for a purpose other than that provided for by law.[800] The doctrine of 'abuse of rights' makes it possible to impose liability on the wrongdoer for any damage in order to limit the abuse of rights or powers in the field of property law. I consider that this figure remains crucial to the articulation of property even if the priority is given to use rather than ownership, to limit any intention to hold overriding property rights. The doctrine of 'abuse of rights' can also play a role in promoting conceptual change in property. It can extend legal control to previously unregulated areas of property and fill gaps that arise in the face of rapid social and environmental change.

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[797] ibid 62.

[798] For instance, Art. 226 BGB (*Schikaneverbot*) states that the exercise of a right is unlawful, if its purpose can only be to cause damage to another. Art. 833 of the Italian Civil Code forbids the exercise of property rights purely for the purpose of harming others, and in France, the courts have interpreted Arts. 1382 and 1383 of the French Civil Code, which fix responsibility on the author of any harm to limit the abusive exercise of rights or powers in property law. For its part, Art. 7 of the Spanish Civil Code provides that an abuse of right may result from a deliberate intention, the aim pursued, or the circumstances of the harm caused. For legislative examples of abuse of rights in other jurisdictions, vid. Michael Byers, 'Abuse of Rights: An Old Principle, A New Age' (2002) 47 McGill Law Journal 389.

[799] Paulien de Morree, "The Concept of Abuse of Rights," in *Rights and Wrongs under the ECHR: The prohibition of abuse of rights in Article 17 of the European Convention on Human Rights* (Intersentia 2016) 121.

[800] 'Abuse of Rights Law and Legal Definition' (US Legal, 2023) < t.ly/LHTZ> accessed 21 May 2023.

4.2.3. To own or to use, that is the question

There is no doubt about the great importance of the conceptual antithesis —to own or to use. In the overall picture, use seems to be much more important than appropriation. Certainly, private appropriation is not necessary for individuals to fully enjoy things, resources, services, or knowledge. After all, what really provides the fullness of human existence is not the fact that the goods are ours, but the possibility of being able to access and enjoy them. For what is the point of a life based on appropriation if one cannot enjoy the functionalities of things? Indeed, exclusive ownership does not guarantee the enjoyment of things. Instead, enjoying all that things can offer us does not require ownership.

Property is thus nothing more than a means, a vector, among others, to ensure access to the functions of which things are bearers. We could even imagine a society without private property, or at least without the individualistic character with which it is conceived today. A scenario in which property is a living phenomenon, centred on the functionality and usability of goods and services, which treats its users as managers of them, even as trustees or guardians, and not as their owners. This vision would probably make it possible to move away from the neoliberalist vision and the purely civilistic dogmatism and to open up the field to the other branches of law that affect it.

Thus, one way to remedy the competition for resources is to share objects more: to create institutions and a culture of sharing. That is: fewer objects, but more rights of use. This would allow a shift from well-having (objects as symbols of prestige) to well-being (objects as satisfiers of needs).[801] In fact, this is already the trend. Society is evolving towards constant change and against close ties and commitments. This shift in mentality is having an impact on the concept of property, which has traditionally been associated with stability and rigidity.

Many people —and especially the so-called millennial and centennial generations— have begun to refuse to be tied down to property and the inconveniences that come with it, mainly because they cannot afford it.[802] Companies also know that the functionality of things can be exploited without the need for ownership, and many are already heading in this direction. It is possible to consume in a more respectful, sustainable and efficient way by renting goods and services such as furniture, gadgets, vehicles or electronics. This distribution system is more sustainable because the products circulate from one hand to another and therefore do not need to be produced as much.[803]

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[801] Timothée Parrique, 'Chapter 9. Transforming property' in 'The political economy of degrowth' (PhD Thesis, Economics and Finance. Université Clermont Auvergne - Stockholms Universitet 2020) 521 <https://shorturl.at/ioxEQ> accessed 2 June 2023.

[802] Alba Brualla and Mónica G. Moreno, ''Millennials' y 'generación Z', la ruptura entre comprar y alquilar vivienda' (*El Economista.es,* 30 May 2021) <t.ly/siFN>; Tom Huddleston Jr., 'Millennials and Gen Zers do want to buy homes —they just can't afford it, even as adults' *Make it* (12 June 2022) <t.ly/UoVd>; Tamara Kelly, 'Research reveals over a third of millennials never want to own a home —and these are the reasons why' (*Ideal Home,* 6 June 2022) <t.ly/8HKM8>, all links accessed 2 May 2023.

[803] Clear examples of this are *Simplr* and *Tribuapp*. Simplr is a flexible consumption channel that allows subscriptions not only to streaming platforms but also to food, drinks, furniture, bicycles, cleaning, etc. when they are needed and for as long as they are needed. Tribuapp is a start-up dedicated to coworking, to the rental of shared workspaces. Vid. <https://perma.cc/7LBY-24UR> and <https://perma.cc/S6BM-JZEL> accessed 16 May 2022.

Nobody needs to be the absolute owner of a house to enjoy it, of a plot of land to see a paradisiacal place, of a bicycle to ride it or, without aspiring to so much, of a place to live. Public services, for instance, allow people to enjoy what things provide through various institutions, without having to acquire them personally or become their owners. In the end, subsistence, independence, dignity and liberty can be guaranteed without the intervention of private property, which can rather be an obstacle to them. Such a proposal would imply a kind of "resetting" of resources and thus no longer considering things as properties but as function-bearers. The core of the issue to be regulated would therefore be the management of access to resources.

At this point I think it is appropriate to mention the concept of the "bundle of rights" or "bundle of sticks", wrongly attributed to Hohfeld, but to whom the main idea is due.[804] This metaphor —widely used in American law schools and US courts, but less so in civil law countries— allows one to argue that property is not the material object or thing over which one has legal rights, nor is it a relationship between a person and a thing.[805] The dynamics of property are more comprehensible through a rubric of different rights that reflect the different kinds of interests of the parties involved in social relations. The advantages or benefits of a right for one person imply the disadvantage or "no-right" for "third parties",[806] as well as the obligation to respect that right on pain of legal sanction.[807] Property is thus a social relation: where one holds an entitlement, this immediately implies that someone else must hold a disentitlement.[808]

In his famous pair of articles, Hohfeld denied that all legal relations could be reduced to 'rights' and 'duties', arguing that these categories were inadequate for analysing complex social relations.[809] He tried to show that such a classical legal understanding of basic legal concepts obscured the fact that the legal recognition of rights or freedoms for some people allowed harm to others without legal redress.[810] He then deconstructed "jural relations" into entitlements, privileges, powers and immunities to outline the fundamental components of any analysis of legal relations, a differentiated set of competing human interests in a resource, and related them to "jural opposites" and "jural correlatives":[811]

Jural Opposites { right/no-right privilege/duty power/disability immunity/liability

[804] The "bundle of rights" phrase precedes Hohfeld (at least as early as 1872), who in fact did not use this literal expression, but it has become the common label for his analysis of property as "a complex aggregate of jural relations. Vid. Gregory S. Alexander, *Commodity & Propriety*... (n 476) 319.

[805] Bailey, 'The Common Good...' (n 272) 127.

[806] Hohfeld, 'Some Fundamental... (1913)' (n 468) 36.

[807] Bailey, 'The Common Good...' (n 272) 126.

[808] Anna di Robilant and Talha Syed, 'Property's Building Blocks: Hohfeld in Europe and Beyond' in Shyamkrishna Balganesh, Ted M. Sichelman, and Henry E. Smith (eds), *Wesley Hohfeld A Century Later, Edited Work, Select Personal Papers, and Original Commentaries* (Cambridge University Press 2022) 227.

[809] Hohfeld, 'Some Fundamental... (1913)' (n 468) 28; Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 (8) The Yale Law Journal 713.

[810] Gregory S. Alexander, *Commodity & Propriety*... (n 476) 319-320.

[811] Hohfeld, 'Some Fundamental... (1913)' (n 468) 30 and 'Fundamental Legal... (1917)' (n 809) 713.

Jural Correlatives { right/duty privilege/no-right power/liability immunity/disability

When applied to property, Hohfeld's analysis illuminates the complex and relational nature of ownership. It reveals that ownership is not, as Blackstone suggested, the simple and asocial relationship between a person and a thing.[812] Understanding property as a disaggregated set of relations enables a focus on the physical consequences of the not necessarily physical nature of property. Indeed, the "bundle of sticks" metaphor illustrates the notion that property rights can be divided into many smaller segments or interests.[813] It shows that ownership is a complex legal relationship, reveals the fact that the constitutive elements of this relationship are legal rights and underlines the social nature of that relationship.[814] Furthermore, it allows for the analysis of different possible forms of property and their effects, and for the reconfiguration of property rights into new types of property institutions aimed at counteracting the negative effects of the market. In addition, it invites a wider set of stakeholders into decision-making, thus creating fertile conditions for democracy.

In summary, property comprises a bundle of rights derived from the relationship between persons over things: to sell, to alienate, to access, to remove, to manage, to exclude, etc.[815] This does not mean, however, that there is always a good moral reason to attribute to the owner all the property rights (or *sticks*, to keep with the bundle metaphor) over the thing. On the contrary, it seems that a good or resource is better secured if not all the corresponding property rights are in the hands of the same subject. In this sense, one may think of a kind of partial property rights, where individuals or collectives can —and often do— hold property rights that do not include the whole set of rights.

It is therefore possible to have entry rights without withdrawal rights, to have withdrawal rights without management rights, to have management rights without exclusion rights, and to have exclusion rights without alienation rights.[816] For example, a person or group of persons may have a right of ownership over a house encumbered by a bank mortgage and a neighbour's easement, giving their neighbours the right to cross a path belonging to the former's house to get to their property. Similarly, aircraft have the right to fly over such a house. The government has the right to expropriate that property, as well as environmental regulations and urban planning rights that may affect the property. It is thus worth considering that every right is relative and partial, and that there is always a correlative that gives it consistency and ensures its free enjoyment without contradictions.

[812] Cfr. Blackstone, *Commentaries*... (n 104) 167ff.

[813] Denise R. Johnson, 'Reflections on the Bundle of Rights' (2007) 32 Vermont Law Review 252.

[814] Alexander, *Commodity & Propriety*... (n 476) 319.

[815] The doctrine of the "bundle of rights", or "faisceau de droits" has been recovered in recent works by many jurists who have reflected on communal property systems. Vid. Benjamin Coriat (dir), *Le retour des communs. La crise de l'idéologie propriétaire* (Les Liens qui libèrent 2015); Crétois, *La part commune*... (n 56).

[816] Edella Schlager and Elinor Ostrom, 'Property-Rights Regimes and Natural Resources: A Conceptual Analysis' (1992) 68 (3) Land Economics 252.

Now, there is an evident conflict of interest. Society is diverse,[817] it has different interests and multiple ways of enjoying things. Indeed, it has just been stated that ownership is a partition of several rights of different stakeholders; a property can be simultaneously owned by several parties. But, within this multiplicity of interests, there is a common ground: social cooperation makes it possible for everyone to have a better life than they could have if they lived solely by their efforts alone. It will then be necessary to agree on a set of common principles to govern the fairest possible distribution of benefits and burdens, something that can only be achieved through genuine consensus. Such principles of social justice involve the allocation of both rights and duties in the basic institutions of society.

This is where the role of the state comes in, regulating a public minimum of justice through laws and institutions. As Rawls rightly points out, this would be a society in which: 1) everyone accepts and knows that others accept the same principles of justice and; 2) the basic social institutions generally satisfy these principles and are generally known to do so.[818] Justice is the fair and equitable distribution of the burdens and benefits of social cooperation,[819] and therefore any property so conceived requires a society with a basic structure that guarantees a system of cooperation that is fair to all. It is possible to consider changing the general rules that organise society. This would involve playing with the structure of property rights and, if necessary, redistributing them by no longer calling them rights. To ensure the legitimacy of what has been acquired, the system of cooperation has to be equitable. That is, acceptable to all.

This scheme could not be based on merit, as the neoliberal ideology advocates. Instead, the two basilar arteries would be the will for the thing and the realisation of all that is necessary to acquire it, respecting an equitable system of cooperation that not only does not harm anyone, but also aims to favour the most disadvantaged. Nevertheless, even leaving aside merit, it must be admitted that some constitutional rights can be based on unequal, more or less fixed natural characteristics that cannot be easily altered, such as sex, race or age. These are never merits or demerits. In such cases, an unequal allocation of ownership to one group with certain characteristics and not to others would only be justified by the benefit and acceptability from the point of view of those other groups.

Rawls offers a very illustrative example: if men are favoured in the allocation of basic rights, this inequality can only be justified by the difference principle if it is to the advantage of women and is acceptable from their point of view.[820] It should be remembered that justice is not the formalisation of the revenge of the "weak" united against the "strong", but the search for frameworks that ensure that no one is harmed by living together in society. It does not necessarily imply perfect equality of conditions, but it does impose on everyone the duty to see what belongs to everyone. In short, it requires

[817] I mean this in a laudatory sense, i.e., the diversity of society is something that should not be scary or uncomfortable to say.

[818] John Rawls, *A theory of justice* (The Belknap Press of Harvard University Press 2005) 18. Original publication: 1971.

[819] ibid 5.

[820] ibid 99.

the acceptance that there are common interests embedded in what has hitherto belonged to everyone.[821]

This theory is part of a voluntary and fair system of cooperation for all.[822] A system in which the right to access one's share of resources is based on the principles of equal justice. Liberty is not denied, but such a system is based precisely on a sum of freedoms. This strategy relies heavily on a prior examination of the problem underlying each type of discrimination, and the subsequent recognition of pre-existing vulnerabilities. After all, in the world of 'every man for himself' —or, in the (less patriarchal) Spanish version, *'sálvese quien pueda'*— the redemptive promise of liberty never quite arrives, because everyone ends up suffering some form of discrimination in their lives or part of them. The idea is not that everyone has the same rights, but that everyone has the rights they need. It is not that we are all equal, but that we are all dependent. Our interdependence means, for example, that at one moment in our lives, we have the right to be fed, and at other moments we have the duty to feed others. Rights should therefore be interpreted according to each person concerned, and modulated according to the position that the person occupies at any given time.

4.2.4. Between universalist and localist visions of the commons

Given the unequal distribution of resources and the crisis of traditional ownership categories, the need for a paradigm shift is undeniable. A change that allows for the collective capacity to control and shape the entire social and economic space in which human communities operate.[823] Such a change would imply, above all, a move towards community spaces based on the principles of responsibility, democracy and cooperation. From this point of view, halfway between the public and the private, but irreducible to either category, we would find the so-called 'commons'. In such a paradigm, the practice of mutual support, close community relations and sustainable resource management would be feasible. Some argue that the commons are not things, but social relations.[824] A common property system shares with a public property system the fact that no individual is in a particularly privileged position in relation to a resource. It shares with private property systems the fact that the resource is held by the group as private property to the exclusion of non-owners.[825]

Elinor Ostrom, perhaps the world's foremost expert on the commons and Nobel Prize laureate in Economics,[826] defined common resources as follows:

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[821] Crétois, *La part commune*… (n 56) 14.

[822] Rawls, *A theory*… (n 818) 13.

[823] Casassas and Mundó, 'Property as a Fiduciary…' (n 105) 83.

[824] Alain Lipietz, 'Questions sur les "biens communs", Intervention au débat de la fondation Heinrich Böll, FSM de Belém, *Esprit*, January 2010 <shorturl.at/kpsPV> accessed 3 June 2022.

[825] Lubna Hasan, 'Revisiting commons – Are common property regimes irrational?' (2002) MPRA paper 8316, University Library of Munich 5 <t.ly/jptqf> accessed 14 April 2023.

[826] In 2009, Ostrom became the first woman to win the Nobel Prize in economics. The Royal Swedish Academy of Sciences cited Ostrom "for her analysis of economic governance", saying that her work had shown how common property could be successfully managed by the groups that use it.

> Common-pool resources are natural or man-made resources where exclusion is difficult, and yield is subtractable. They share the first attribute with pure public goods; the second attribute, with pure private goods. Millions of common-pool resources exist in disparate natural settings, ranging in scale from small inshore fisheries, irrigation systems, and pastures to the vast domains of the oceans and the biosphere. The first attribute —the difficulty of exclusion— stems from many factors, including the cost of parcelling or fencing the resource and the cost of designing and enforcing property rights to exclude access to the resource. If exclusion is not accomplished by the design of appropriate institutional arrangements, free-riding related to the provision of the common-pool resource can be expected.[827]

Such a definition explains that the commons are at least rival but not easily excludable goods. However, it is not clear whether the commons are goods that are freely available and accessible to everyone, or resources that are shared by a group or community of individuals who have control over the use of and access to this/these resource(s). Indeed, there are several theories on the commons, some of which seem unpromising for the discussion I want to propose. On the one hand, there is the view that certain goods, by their intrinsic nature, cannot be privately appropriated, and lie beyond the sovereign jurisdictions, such as the sun, the oceans, the air, or the atmosphere, but also forests, parks, meadows, rivers, lakes, groundwater or wetlands.[828] A concrete example would be the Amazon, traditionally considered "the lungs of the planet"; if it disappears, humanity is likely to be next. As common goods of humanity, or global commons, they would in effect be nobody's property. That is, there would be no ownership relationship over them because, they would be appropriable.[829] The theory of the global commons is indebted to Grotius' idea of *mare liberum*, which sought to preserve free access for the benefit of all.[830]

This doctrine proposes to reconsider whether the protection of this type of goods as subjective rights is effective in responding to the ecological problems to which humanity is exposed. Such a proposition, though, is challenged by the fact that contemporary capitalism allows companies to appropriate these seemingly common goods, such as buying up islands or privatising beaches. Likewise, governments tax the use of the sun and the wind, whose profits serve to fill the coffers of states, and may even be private profits, if the management is in the hands of private companies. Thus, this theory does

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[827] Elinor Ostrom and Roy Gardner, 'Coping with Asymmetries in the Commons: Self-Governing Irrigation Systems Can Work' (1993) 7 (4) Journal of Economic Perspectives 93.

[828] Vid. for instance: Magnus Wijkman, 'Managing the Global Commons' (1982) 36 International Organization 511; Susan J. Buck, *The Global Commons: An Introduction* (Routledge 1998); Paul C. Stern, 'Design principles for global commons: Natural resources and emerging technologies' (2011) 5 (2) International Journal of the Commons 213; Mark Everard, 'Air as a common good' (2013) 33 Environmental Policy and Management 354; Surabhi Ranganathan, 'Global Commons' (2016) 27 (3) *European Journal of International Law* 693; Nico Schrijver, 'Managing the global commons: common good or common sink?' (2016) 37 (7) Third World Quarterly 1252.

[829] In this line, vid. José Luis Gordillo, *La protección de los bienes comunes de la humanidad* (Trotta 2006) 11; Jaria-Manzano, *La Constitución del…* (n 140) 345; Rafael Ibáñez and Carlos de Castro, 'Los comunes en perspectiva: eficiencia versus emancipación' (8-12) and César Rendueles and Igor Sádaba, 'Los bienes comunes en un entorno de fragilidad social: el caso del crowdfunding' (42-47), both in (2015) 16 Dosieres de Economistas sin Fronteras.

[830] Hvgonis Groti, *Mare Liberum, sive de jure quod Batavis competit ad Indicana commercia, Dissertatio.* Ex oficinâ Elzeviriana, 1609); Hugo Grotius, 'II. La llibertat dels mars. Els capítols de la controvèrsia' in Institut d'Estudis d'Autogovern (ed), *John Locke, Hugo Grotius…* (n 74) 167.

not seem fruitful for my intended propositions, since absolutely everything can be appropriated whether by individual, state or corporate subjects.

On the other hand, there is the theory of the commons as social goods that no particular state or individual, but an identified group or community, collectively owns, manages and controls.[831] It is thus a "positive community", circumscribed as legitimate to claim the benefits of the resource.[832] This group can control and make decisions about the common, including its use, while maintaining the long-term ecological integrity of the common's ecosystem. Such a community is thus responsible for the conservation, rational management and equitable sharing of the resources in question, as well as the benefits they generate. It is also shaped as a model that seeks to ensure the transmission of resources that make future life possible.[833] In general, this theory is based on goods that are owned but are still commons, because they are necessary for the survival of a group of individuals (a tribe, a local government, a community, etc.). So, for commons to exist, there must be a (de)limited community that excludes other individuals from these commons. I will return to the issue of exclusion later.

Public goods, typically administered by the state, presuppose the existence of a market economy and private property. The idea of the commons, on the other hand, evokes images of intense social cooperation.[834] The commons are neither private nor public, neither subject to market rules nor the coercive and technocratic management of the state. In this way, the state would be defined as a "custodian", rather than as a holder or owner of the commons. This means, among other things, that the state has duties, but not rights, over such common goods.[835] It is this more localist theory of the commons that seems to be the most appropriate to discuss in this dissertation. Under this umbrella, we would find fisheries, wetlands, forests or groundwater resources. One can think of common pastures open to all farming families in a village, fishing rights open to all members of a given community, cooperative housing (such as limited equity housing cooperatives), urban gardens, joint tenancies, community land trusts, tenancies in common, and so on.[836]

Moreover, traditional concepts of property were created by and for the ruling classes in an agrarian age when most of their capital was land. Today, much wealth is held in shares, stocks, bonds, etc., and is not only movable but mobile; it can cross oceans at the click of a button.[837] Thus, from the point of view of the legal theory of property, the

[831] Soutrik Basu, Joost Jongerden and Guido Ruivenkamp, 'Development of the Drought Tolerant Variety Sahbhagi Dhan: Exploring the Concepts Commons and Community Building' (2017) 11 (1) The Commons Journal 146.

[832] Judith Rochfeld, 'Penser autrement la propriété : la propriété s'oppose-t-elle aux « communs » ?' (2014) 28 (3) Revue Internationale de Droit Économique 361.

[833] ibid 353.

[834] Federici, *Re-enchanting the World…* (n 155) 116.

[835] Constanza San Juan, Luis Lloredo et al, 'Qué son los bienes comunes y por qué constitucionalizarlos' *CIPER* (24 April 2022) <shorturl.at/acmE0> accessed 19 April 2022.

[836] Most of the mentioned examples are cited by Thomas W. Merrill in 'Property and the Right to Exclude' (1998) 77 (4) Nebraska Law Review 750.

[837] Bernard Rudden, 'Things as Thing and Things as Wealth' 14 (1) Oxford Journal of Legal Studies 1994) 82.

concepts originally conceived for real property have been detached from their original object, in order to survive as a means of dealing with abstract value. The habitat of land is ultimately wealth, not land. Hence, it seems better to speak of 'the commons' rather than 'common goods', since we would be talking not only about movable or material natural goods, but also about social services (health, education) or means of communication (television, radio, Internet) and transport (roads, harbours, airports, etc.). This proposal also makes it possible to extend the scope of the commons to other areas such as information and research (Wikipedia, Creative Commons, copyleft strategies), currency, ecological and genetic resources, intellectual property (ideas, languages, traditional knowledge, cultural patrimony, etc.).[838]

The commons are based on the principles of use, free access, cooperation, and self-management. Admittedly, this may seem somewhat illusory, for without strict state regulation or some analogous institution behind it, the idea of free riders taking advantage of the commons is easy to conjure up. In 1968, Garrett Hardin popularised this dilemma as the 'tragedy of the commons'. In his classic narrative, he argued that, when a resource is freely accessible to all, each user is spontaneously driven to use it without limits, leading inexorably to its extinction. Hardin, influenced by the Cold War, assumed that individuals were rational, calculating and independent decision-makers.[839] This pessimistic vision, a kind of survivalist authoritarianism, prevailed until the early 1990s.

In 1990 Elinor Ostrom published *Governing the Commons*, in which she presented her research results on resources managed by communities in different parts of the world. The notion of 'common goods' developed by Ostrom makes it possible to argue that the mere fact that individuals have the opportunity to discuss and deliberate allows them to make optimal use of common goods.[840] Ostrom showed that the commons are not necessarily a tragedy at the local level. On the contrary, local communities often define principles of governance and share them in resilient ways to avoid the "tragedy". I will develop this antithesis in more detail in the following sections.

Similarly, Ostrom points to the breakdown of the dichotomy between public goods, managed by the state, and private goods, managed according to the rules of the market. She proposes the responsible and efficient management of common resources through a dynamic renewal of institutions, so that they become broadly participatory, with collective communication and deliberation playing a key role. Ostrom relies on collective and self-organised management configurations that regulate access to certain resources offered to all commoners participating in this management community. Thus, the term

[838] Luis Lloredo Alix, 'Bienes comunes' (2020) 19 Eunomía. Revista en Cultura de la Legalidad 221; Mattei, Quarta, and Valguarnera, 'Meeting the Challenge…' (n 649) 8; David Bollier and Silke Helfrich (eds), The Wealth of the Commons. A World Beyond Market & State (Levellers Press 2012) 219.

[839] Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 (3859) Science 1243.

[840] Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective* Action (Cambridge University Press 1990).

'commons' refers to a system of cooperative governance of resources, forms of collective management that are not based on a system of state ownership.[841]

Common property is thus linked to governmental and political practice. Ultimately, in my view, Ostrom's vision tries to find a way out of the reductive opposition between the state and the market, by exploring alternative economic and social forms, even if these two forms of governance can support its development. In short, the notion of commons appears not only as the most efficient, ecological and equitable way to protect natural resources, but also as a very interesting and relevant legal proposal for the problems associated with the current challenges related to equity and resilience. The commons try to nip the problem in the bud: they force citizenship —understood in a broad sense— to behave in a more environmentally responsible way, while at the same time reorganising this citizenship to make it more egalitarian.

In this sense, Peter Linebaugh calls this process *commoning*,[842] since 'the common' is not so much an intrinsic quality of certain things, but the result of a set of practices and institutions that seek to work together. This concept of *commoning* shifts the focus away from shared material wealth and places the act of sharing and the bonds of solidarity that are created in the process at the centre. Again, it is probably interesting here to distinguish between the 'common good' (i.e., the concrete resource/asset, such as water, gas, energy, an urban garden, etc) and 'the common', which would go beyond the common good itself to include the set of rights, relations, practices and performances surrounding it, collectively and sovereignly determined and managed by the community.[843] The commons would thus be defined not so much as physical things but as cooperative practices, as according to social and legal rules and mechanisms of use, sharing or co-production.

4.2.5. Democratising the capital

A group of individuals shares common property rights when the organisation exercises at least the collective-choice rights of management and exclusion over a defined resource system and the resource units produced by that system.[844] In this way, common property need not be for purely economic purposes, but becomes a means of realising normative political aspirations. In the transition to the commons, many changes should, in my view, take place within a democratic polity. What activities should be carried out? Through what concrete practices? How is it going to be organised? Who is going to do what? What will be necessary and what will not?

Some are committed to reconstructing the capitalist economy "in a more humane way". They advocate a responsible business model and the establishment of certain market limits. In this way, free market principles would be subordinated to "common good"

[841] Christian Bessy, 'Introduction. Histoire et actualité des biens communs' in Christian Bessy and Michel Margairaz (dirs), *Les biens communs en perspectives* (Éditions de la Sorbonne 2021) 8.

[842] Vid. Peter Linebaugh, *The Magna Carta Manifesto*... (n 53).

[843] Schlager and Ostrom, 'Property-Rights Regimes...' (n 816) 252; Ostrom, *Governing the Commons*... (n 840) 22; Coriat, *Le retour des communs*... (n 815) 27.

[844] Elinor Ostrom, 'Private and Common Property Rights' (2000) Encyclopedia of Law & Economics 342.

objectives.[845] Such practices could include environmentally sustainable production, gender parity in companies, fair wages or a cooperative economy. Others suggest excluding some resources from markets.[846] Still others go further, arguing that the only way to think about the commons is to nip the system in the bud.[847]

According to this, capitalism would not be an unequal model for contingent reasons — that is, it could have been different— but the fruit of an economic, social, and cultural constitution with patriarchal, anti-democratic and extractivist roots. Capitalism is therefore incompatible with a truly revolutionary idea of the commons.[848] It is this second perspective that I prefer to subscribe to. By recognising the commons, market capitalism is not possible, and the primacy of the individual is no longer the central idea. The democratisation of capital, therefore, means guaranteeing all citizens the right to establish institutional mechanisms that allow them to shape and manage all forms of production, reproduction, consumption, leisure and community participation.

Democratising the capital also means allowing people to decide in which social relations they want to participate in; in which spaces they want to live and work. It implies that their voices can be heard and taken into account, and that they can leave those spaces if the nature and functioning of those spaces go against their wishes. And, in that case, it involves opting for other spaces that offer them tools to resume their productive and reproductive lives under other terms and conditions.[849] Ultimately, this democratisation of capital involves the constant making and unmaking of social relations, either individually or collectively. This has significant implications for the law, as will be seen below.

This raises the question of the legitimacy of participation in social relations, i.e., of being involved in the commons. Surely, this requires a conception of wealth as a social or common product. All goods and services are the result of a common effort, part of dense networks of spaces and devices, of knowledge and information, produced collectively. Indeed, presumed wealth is hardly ever the result of individual merit, but rather of past activities and many forms of alien but largely intertwined efforts: productive labour, high, continuous and intense doses of care work, family wealth and inheritance, government support, or even the social heritage of knowledge, tools and infrastructure that has been accumulated throughout history.[850]

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[845] In this sense, see, for instance: Christian Felber, *Change Everything: Creating an Economy for the Common Good* (Zed Books 2015) 85; Jean Tirole, *Économie du bien commun* (Presses Universitaires de France, 2016) 24.

[846] Bru Laín, 'Common Property and (Pre) Distributive Justice' (2018) 12 Oxímora Revista Internacional de Ética y Política 83.

[847] In this other sense, see, for example: Vandana Shiva, *Reclaiming the Commons: Biodiversity, Traditional Knowledge, and the Rights of Mothe*r Earth (Synergetic Press 2020); Ugo Mattei, *Il benicomunismo e i suoi nemici* (Einaudi 2015) 14; Massimo De Angelis, *Omnia Sunt Communia. On the Commons and the Transformation to Postcapitalism* (Zed Books 2017) 357, Federici, *Re-enchanting the World*... (n 155).

[848] Lloredo Alix, 'Bienes comunes' (n 838) 217.

[849] Vid. David Casassas, 'Economic Sovereignty as the Democratization of Work: The Role of Basic Income' (2016) 11 (1) Basic Income Studies 1-15.

[850] Mariana Mazzucato *The Value of Everything: Making and Taking in the Global Economy* (Penguin 2018) 61.

If it is recognised that the origins of wealth are common, then collective agreements on how these commons are distributed in both the productive and reproductive spheres will be necessary. Legal institutions and arrangements have a very important role to play here. Certainly, the legal definition and protection of the commons will become two of the most important socio-environmental challenges we will face in the future. Reclaiming the commons means challenging the very foundations of the overexploitation of natural resources by an economic system of overproduction. It also implies dismantling a capitalist law based on the logic of individual interest and the free will of the moral person. It will also require political action to curb the activities of those who damage common resources, to limit their privileges and to ensure that any use of the resource is appropriate in terms of meeting collective needs and preserving the resource for future generations.

In any case, the category of commons can provide a response that is commensurate with the gravity of the socio-environmental crisis. This notion reappears as a legal category that provides a suitable legal framework for the protection of indispensable goods, much more appropriate than the old liberal concept of property right(s). Human existence depends on shared spaces and goods and, to a large extent, on solidarity, as eco-dependent and interdependent beings. Perhaps this is what the social function of property was all about. The social function emanating from property is about the commons; about commoning the spaces and the goods of this receptacle we call planet Earth, which must take centre stage in the Anthropocene.

And if equity is one of the guarantees that must guide the social function, the other major criterion must be environmental protection. Indeed, the ecological function of property should work as the objective counter-parameter to the absolute protection of private property. Nature is the boundary within which the limits of the function of property must be identified. In the framework of social and democratic states, profound constitutional reforms in the field of the environment will probably be necessary. This will involve not only including the inclusion of an article entitled “the right to a healthy environment”, or providing it with the highest constitutional guarantees, but also a much more transversal approach that recognises the ecological imperatives that already cut across all human rights. Of course, as will be seen, it will also involve rethinking the narrative of environmental protection and care in jurisprudence.

The benefits of natural resources are increasingly unstable, unpredictable and exhaustible. Environmental changes (torrential rains, droughts, floods, frosts) act mercilessly on the environment, without much discrimination as to who owns the assets. Indeed, the degree of uncertainty about the resources makes it more plausible to protect against risks in a system of common goods than in a system of private goods. In the first case, others can help, in the second, it can lead to the collapse of the individual’s economy, sometimes even the family’s livelihood. The communal structure creates incentives that make collective management a rational system. It is interesting to return to the question of care. Commons regimes are not only powerful at the level of benefits, but also at the level of care among the people under their regime. Thus, care for the commons and care for people must go hand in hand, to ensure the permanence of human communities.

This new legal framework should focus on the sustainability of life —including ensuring the social reproduction of future generations— and resilience to change, even if this entails burdens and limits on different forms of ownership, even if it means reducing the wealth of some. In addition, a more ambitious application and development of environmental rights requires the ecological overlay of economic, social and cultural rights, ensuring more and better guarantees of protection. It will not only be a question of rights, but also of the responsibility or duty of all citizens to participate in the protection and conservation of the ecosystem's biodiversity and to guarantee the rights of future generations.

Such a (re)constitutionalisation of these two functions —social and ecological— of property can enable significant progress towards more equitable and secure livelihoods in the face of the unstable and unpredictable changes that will dominate the remainder of the 21st century. In turn, it is precisely the potential social function derived from natural resources (land, rivers, forests) that allows for a constitutional claim to their collective use. It makes it possible to extend ownership to the whole community and to highlight the extraordinary role that natural wealth can play in extending a regime that is as democratic as possible. Because, as I said, this is, of course, also about democracy.

For the sake of this great transformation of societies, a reconsideration of private property seems indispensable. Liberalism and, in recent decades, neoliberalism, have tried to make society believe that private property is natural and inherent to human beings, spreading a general fear of loss of power among all classes, who are convinced that they will always be able to get more. Another way of understanding social relations seemed unquestionable. But the plenitude of freedom that liberalism proclaimed has been reduced to the freedom of those whose income, leisure and security need no improvement. For the non-owning classes, such freedom translates into mere misery; they can hardly attempt to make use of their democratic rights to shelter themselves from the power of the owners of property.[851] Moreover, recent experiences of privatisation (of pastures, forests, water, beaches, renewable and non-renewable energy, etc.) do not prove that this is the most efficient way to access resources. Thus, private property dispossesses —and is therefore unfair in terms of resource allocation —and destroys — and is therefore inefficient in terms of resource management.

Private property is in fact a fragile concept. A minority of people should not monopolise all resources, because the rest of the people will be dependent on the free will of that monopolising group. The European experiences of absolutism did indeed try this, and they did not end well. So it does not seem very advisable to privatise natural resources on which a population of no less than 8 billion people depend. Not even from the point of view of efficiency, i.e., internalising the costs and benefits associated with the resource in order to encourage the owner to use it more efficiently. The Earth is running out of room to manoeuvre and, as some have pointed out, "there is no Planet B".

Of course, even if I dare to make the comparison with the *Ancien Régime*, I am aware of the need to be careful about the historicity of property, for one cannot pretend that in an overpopulated world, everything will suddenly become common, as it was, for example,

[851] Polanyi, *The Great Transformation…* (n 47) 265.

in the Middle Ages. That purely agrarian society did not have the complexity and environmental problems that plague the planet today, and I do not think that too much complacency with a feudal, slave-owning, patriarchal system is a good thing either. From that period, only the idea of a society organised on the principles of sharing and enjoying collective goods seems consistent and convincing. As for everything else, coexistence on the planet will have to be built on completely new foundations.

4.3. Deepening the commons. Nuances, drawbacks and adaptations

4.3.1. Common property vs. open access

Sometimes, the commons are conceived as nobody's property. Indeed, if the commons are seen as belonging to no one, there is always a risk that they will become a stockpile to be used on demand for private purposes. This is the basic mechanism of neocolonialism. When public goods are good enough to be sold, it is easy to dispose of them by creating property rights over them. But the goods that nobody owns need to be conquered. Legally, what is not property is not so easy to appropriate, so it requires mere violence to become property.[852] Therefore, common property is not no one's property.[853] It is convenient to build the theory of the commons on the basic premise that the commons do belong to someone; to a group of people, whether large or small.

At this point, it is useful to distinguish between common property regimes, on the one hand, and open-access resources, on the other hand, which have no property arrangements at all.[854] In open-access property regimes, there are no property rights in things, but they belong to the capturing party. Everyone has equal rights, and no one can be excluded. Some open-access goods and services (*res nullius*) can only be captured once (e.g., a fish in a "no man's sea"[855]), while others can be captured infinitely many times (e.g., waste, such as trash, polluted air and water, dead species, etc.). The upper atmosphere and the aquatic life found in the deep sea are also considered to be unowned, and therefore unclaimed and uncontrolled goods.[856] It should be noted that there are common property resources with open-access features, such as open access journals or Wikipedia. Although the terminology can be confusing, they are subject to rules (no selling of consumed content, no plagiarism, no deletion, etc.). In other words, they are not uncontrolled resources.[857]

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[852] Sotiropoulou, 'Commons and private property…' (n 30) 52.

[853] As Coriat points out, *"[L]a propriété commune n'est pas synonyme d'absence de propriété. (…) "[I]l n'est pas nécessaire de garantir des droits à un quelconque « absentee owner » (propriétaire absent) pour assurer la préservation et l'exploitation raisonnée d'une ressource partagée : le droit partagé des « commonors » y suffit amplement.* [Common property is not synonymous with absence of ownership. (…) It is not necessary to guarantee rights to some absentee owner to ensure the preservation and wise use of a shared resource: the shared right of commoners is more than sufficient]". Vid. Coriat, 'Le retour…' (n 815).

[854] Andrea J. Nightingale, 'Commoning for inclusion? Political communities, commons, exclusion, property and socio-natural becomings' (2019) 13 (1) International Journal of the Commons 19.

[855] Nor any woman's, of course.

[856] Merrill, 'Property… Exclude' (n 836) 730.

[857] Parrique, 'The political… degrowth' (n 801) 510.

Open-access land tenure, for example, occurs when there is no effective regulation of land use. This allows anyone to exploit the land and its resources in a non-sustainable way. With open access, there is no incentive for the captor to invest in the exploitation or conservation of the resource.[858] In any case, there are far fewer open-access resources than one might think. In today's hyper-sophisticated and hyper-accessible world, it is difficult to find resources (at least natural resources) that nobody owns. Typically, these are areas that have been contested by two or more states and where the conflict has never been resolved.[859]

Situations of open access to resources occur in the absence of a system of governance and authority that enforces a set of rules of behaviour among participants with respect to the natural resource. That is, they are not embedded in a regulated social system, or institutional failures have undermined previous property regimes, whether private, public or common.[860] In contrast, common property regimes have well-defined rights of use and enjoyment and specific user groups. Common property is not really ownerless, because there is a designated entity —the community— that exercises the right to exclude outsiders with respect to these resources.[861] The commons (*res communis*) are therefore likely to function to the extent that their management modalities and managers are concretely defined.

A common property regime thus consists of "a well-defined and recognised group of users, a well-defined resource that the group manages and uses, and a set of institutional arrangements that regulate use".[862] Individuals use such defined resources individually or collectively, sequentially or simultaneously. A key feature of common goods is thus the low level of rivalry, as members cannot be prevented from enjoying the benefits regardless of their contributions to the common property regime. If anyone in the community can use it, it may not be possible to prevent other members of the community from doing so. In short, they do not belong to each individual, but to the group. This necessarily implies that the rules for using and respecting each resource are formulated and agreed upon collectively as a group. That is, the behaviour of all members of the group is subject to accepted norms that are visible to all. Everyone in any concrete common property regime, individually and/or collectively, must abide by such rules.

4.3.2. The myth of communal patriarchy

Another alleged drawback or disadvantage of the commons is that it is not certain that current hierarchies within the communities managing the commons will be abolished. Even before capitalism, communities had internal conflicts over the management of their

[858] Moses G. Maiangwa, 'Open-access property regimes in natural resources and how they engender resource depletion: a review' (2009) 15 (2) The Nigerian Journal of Research and Production 2.

[859] Two examples of open access or "no man's land" are the demilitarised zone between North and South Korea, and the UN buffer zone that lies between the Greek and Turkish-controlled territories in Cyprus, both born of conflicts that were never fully resolved. Vid. Jason Caffrey, 'Adventures in No Man's Land' *BBC News* (30 September 2015) <t.ly/Zdlw> accessed 15 April 2023.

[860] Bromley and Cernea, 'The management of common… (n 879) 5.

[861] Merrill, 'Property… Exclude' (n 836) 750.

[862] Hasan, 'Revisiting commons…' (n 825) 8.

resources and different power relations. As has been recalled, communal patriarchy and colonialism have existed historically and have not yielded good results in terms of equality. The institution of property itself, in whatever form, poses difficulties in disentangling it from hierarchy and exclusion, since property relations are never free from the ambivalences and contradictions of power.[863] The transition to the commons can take many forms and involve traditional actors, some of whom may reproduce, even unintentionally, oppressive, hierarchical and unequal social relations. In other words, inclusive and equitable governance cannot be equated with a single model of community-based resource management that operates in isolation from the outside world.[864]

The commons cannot simply be about empowering vulnerable and subaltern collectives by promoting community spaces where the same patriarchal and colonial dynamics of the past continue to play out, albeit now collectively. While new collective spaces can change the forms of social reproduction in which people share time and resources, they will not achieve social justice unless patriarchal-capitalist structures are challenged through radical cultural change. Gender, race, age and other intersecting axes must therefore be addressed, and a feminist perspective integrated, into these processes of production of the commons and social reproduction.

Feminist political ecologists have pointed out that a fundamental part of the *commoning* project must be "staying with the trouble"[865], being aware of the exclusions, 'others' and power over that *commoning* practices create.[866] Commoners within communities may inhabit contradictory and conflicting subjectivities. Many outcomes will be unexpected, some desirable and some less so.[867] It is not possible to control and manage all the outcomes of *commoning*, even in the most well-intentioned attempts to transform subjectivities and relationships. But focusing on the complex dynamics of power can help to understand how political communities of the commons emerge. Without constant attention, these issues can undermine the *commoning* efforts and their outcomes.

In all likelihood, another answer lies in the redistribution of work and resources. It seems objective to think that the more equitable the roles and responsibilities of individuals in their community, the fairer the decision-making process will be. And the less hierarchical the power relations in the management of natural resources and access to knowledge, the better humanity will be able to respond to environmental change. Undoubtedly, promoting the importance of the commons favours both the collective recognition of care relationships and the exchange with nature. In other words, the commons, within the framework of socio-natural and affective relations, can reveal the true character of the human being as a common and solidary subject.

Furthermore, the community dimension presents itself as an opportunity for the vindication and resistance of bodies in the face of the logic of capital accumulation.

[863] Nightingale, 'Commoning…' (n 854) 18.

[864] Floriane Clement et al, 'Feminist political ecologies of the commons and commoning' (2019) 13 (1) International Journal of the Commons 3.

[865] Vid. Haraway, *Staying with the Trouble…* (n 1).

[866] Nightingale, 'Commoning…' (n 854) 31.

[867] ibid 31.

Strengthening community spaces should make it possible to move towards an (eco)feminist break with the public-private dichotomy, transforming these spaces into a tool for the construction of other possible futures, where the sustainability of human (and non-human) lives is placed at the centre. This excludes violence, the violation of consent, the abuse of force or the objectification or sexualisation of the bodies that inhabit these shared spaces. On the contrary, they must be safe and comfortable spaces for everybody.[868]

4.3.3. The fallacy of an egalitarian and sustainable world full of rich private owners

Some theories of justice have argued for a universal right to private property, in the sense of the right of each person to actually receive a certain amount of property.[869] However, this is also a thorny issue. There are, of course, forms of private property that are perfectly compatible with the broad socialist aim of abolishing despotic domination over the means of production. Socialism and the workers' movements sought to restore fiduciary principles by adapting them to the conditions of possibility of their time. This included the appropriation of the means of existence, the control of political institutions and the preservation of humanity and its environment. In the finite and degraded world of the Anthropocene, however, it does not seem possible to envisage a world in which everyone has their own resources at their own discretion.[870]

Some believe that privatisation increases responsibility for the environment and the rational use of its resources. However, the era that humans have "created" is a perfect demonstration that the privatisation of resources has not served to protect them but, on the contrary, has accelerated their destruction. The idea of privatisation of resources as a panacea for conservation is therefore a fallacy. Similarly, the achievement of a so-called "paradise" of private property, where everyone gets a piece of the cake, is not so easy to manage. It takes time and money to define resources, allocate them and enforce property rights and obligations over them. This does not happen magically; someone has to decide how property rights are distributed. And whoever makes that decision will also realise that not all resources are fully divisible and suitable for individual ownership.

4.3.4. Not a problem of the commons but of resources

Another risk that discourages the defence of private property is that, in the struggle to obtain the greatest economic return from their property, individuals may intensify its use

[868] Vid. Lidewij Tummers and Sherilyn MacGregor, 'Beyond Wishful Thinking: A FPE Perspective on Commoning, Care, and the Promise of Co-housing' (2019) 13 International Journal of the Commons 62.

[869] Nasarre, for instance, considers that not owning the goods we need to use or have entails compromises that limit rights or may jeopardise the ability to satisfy our basic needs, citing the example of the burdensome and unstable tenancy agreements in the peripheral countries of the EU (Spain, Italy, Portugal...). Thus, the denial of ownership is not desirable. Moreover, the term 'collaborative' implies fewer rights (of disposal, privacy, freedom or intimacy). Therefore, everyone should be guaranteed the right to (private) ownership, which he calls "democratic ownership". Vid. Sergio Nasarre-Aznar, 'Ownership at stake (once again): housing, digital contents, animals and robots' (2018) 10 (1) Journal of Property, Planning and Environmental Law 69; 'Llueve sobre mojado: el problema del acceso a la vivienda en un contexto de pandemia' (2020) 37 Derecho Privado y Constitución 273. Vid. also n 777.

[870] Sprankling, 'Property Law...' (n 106) 752-755.

and exploitation, without considering the sustainability of such use as a basic principle, let alone taking into account the possible use and enjoyment by future generations. The market itself is supposed to be self-regulating, but it makes no provision for the ecological consequences of its operation. On the other hand, a regime of common goods, in which there are collective interests, is more likely to favour an environment that aims at the sustainability of resources. In this system, there are common rules that must be followed, and any non-compliance is more easily sanctioned by the rest of the group, sometimes without even entailing a cost. But if one would still insist on the inability of human beings to act rationally, there are mechanisms to enforce compliance with communal norms.

One figure reappears in this scenario, that of the state, which I consider to be one of the main actors responsible for ensuring the proper use of these common resources, even if it does not own them. Common goods belong to a group of people, but someone must ensure that some basic principles are respected (e.g., constitutionally enshrined fundamental rights, such as the obligation to ensure the sustainability of resources and equality in their use). In small collective spaces, this should not be a major problem. In a deliberately horizontal organisation, some are responsible for managing one part and others for another. But when thinking about large common goods —think of the sea, for example— then their management appears quite more complicated.[871]

Here it is certainly appropriate to bring up the doctrine of the public trust, a principle whereby an agent (e.g., the state) holds some resources in trust for public use, independently of, or even in the absence of, private property. The rationale of the public trust is based on the need for the agent or settlor to preserve an asset or assets for the benefit of the principal or trustee, who holds the assets in common. The preservation and protection of such asset(s) by the settlor is central to the trustee's ability to enjoy the asset(s) effectively, otherwise, such enjoyment and/or protection may never be achieved. The settlor must therefore perform its functions properly. This agent-principal relationship does not authorise the agent to safeguard the property in a discretionary manner, as the interest of the principal is at the centre of the governance structure.[872] Thus, the agent must not only protect the property, but must do so by virtue of a duty to ensure that the principal has access to the property in an optimum state of preservation. This doctrine may not only ensure the environmental protection of the commons, but can also serve to uphold human rights.[873]

[871] In international public law terms, the United Nations Convention on the Law of the Sea (UNCLOS), signed in 1982 in Montego Bay (Jamaica) and effective since 1994, currently establishes a legal framework for all marine and maritime activities, through a comprehensive regime of law and order in the world's oceans and seas establishing rules governing all uses of the oceans and their resources.

[872] Marcos de Armenteras Cabot, 'La aplicación de la doctrina del *public trus*t en Estados Unidos: de la protección de los bienes comunes a la conservación del medio ambiente' (2020) 81 Daimon. Revista Internacional de Filosofía 142.

[873] In this regard, I find this extract from a Philippine Supreme Court ruling (Minors Oposa v Factoran G.R. No. 101083 (224 SCRA 792), very interesting, as it highlights the basic right of the environment and the duty of the state to protect it: "While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. (…) these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers

Another criticised aspect of the commons is that the efficiency of resource use depends on a well-defined structure of property rights, which is not the case in common property regimes. Since resources are collectively owned and no one is in a privileged position to claim exclusive ownership, a unit of resources must be physically captured in order to be claimed. Moreover, because rule-making and enforcement require collective action and group consensus, the transaction costs associated with such regimes are high,[874] such as the costs of measurement and enforcement, and the time required to reach agreement. Certainly, experience has not shown the universal success of public and private management of these natural resources (and basic services). In many countries, forests are managed by state institutions. Similarly, many beaches are privatised everywhere. Neither these forests nor these beaches are free of difficulties and controversies; on the contrary, conflicts between the public administration and the administered citizens, and between private owners are the bread and butter of the courts.

Experience has also shown that the nationalisation of resources has often led to their degradation. Common pool resources are often appropriated by the state to provide guidelines for their sustainable use, but are then left unmanaged and uncontrolled, and thus degraded over time. Sometimes, these de facto nationalised assets tend more towards non-ownership or open access than ownership. Some of the reasons for this mismanagement may be a lack of political will and interest on the part of bureaucrats, as well as the inability of administrations.[875] It may also be due to the lack of information about the resource and its use, the inability to design and/or implement appropriate policies, lack of control, unreliable sanctions, or excessive administrative costs.[876] Furthermore, these decision-makers may be far removed from the reality of the place where the resources are located; they may have little knowledge of the ecology and sustainability of the territory and the social reality of the local inhabitants.

Similarly, many advocates of an interventionist role for central government assume that the state is neutral. But policymakers are inevitable stakeholders, as they are all part of parliamentary groups and political parties. Their decisions may affect their own interests, or the interests of social groups far removed from the area to be protected. In fact, they may never have set foot on the territory in question. Not to mention that their policies may tend to be short-sighted given the political games between parties. Thus, purely state management can also fail. Efficiency would not be so much a problem specific and exclusive to *common property regimes*, but rather related to the *resources* themselves, which are scarce, finite and uncertain.

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that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come —generations which stand to inherit nothing but parched earth incapable of sustaining life."

[874] Jeremy Waldron, *The Right to Private Property* (Clarendon Press 1988) 6.

[875] Piers Blaikie, *The Political Economy of Soil Erosion in Developing Countries* (Routledge 2016) 85. Original publication: 1985.

[876] Ostrom, *Governing the Commons*... (n 840) 12.

4.3.5. Debunking the Tragedy of the Commons

There is also the classic misperception that even if the user group agrees on a rule restricting the use of a resource, the collective action needed to enforce that rule is bound to fail. Commons critics are convinced that rational individuals will find it self-interested to ignore the norm and overuse the resource, believing that if they do not capture the benefits, others will (parasitism or free riding). Because there is a weak relationship between personal effort and return in a common property, the resource is bound to suffer from resource scarcity. Again, Garrett Hardin's tragedy of the commons is clearly one of the main objections to the theory I intend to defend.

What "anti-commons" theories deduce as a mandatory outcome need not be the case in all situations requiring collective action: free riding remains a possibility, but not an imperative.[877] Of course, there is always a risk that common property will be overused. The individual user may perceive that the costs of resource depletion are shared by all users. In contrast, the benefits are internalised. Nevertheless, individuals with access to common property regimes do not systematically choose activities that deplete natural resources. This is mainly because the common property regime requires all individuals to be well-informed about the system and the environment in which they operate. Each individual knows that his or her decision to overexploit the resource at a given point in time is likely to increase the propensity of others to overexploit it as well. To the extent that their decisions act as a signal that influences the decisions of others in the future, individuals will tolerate some sacrifice for the sake of conservation that benefits the group to which they belong.[878]

Likewise, conformity to group norms at the local level is an effective sanction against anti-social behaviour.[879] Sometimes these may be simple cultural norms, community practices passed down through tradition from generation to generation. In other cases, it may be the sufficiently persuasive ability of a critical mass to convince the individuals that it is in their own interest and benefit to abide by the rules of the communal regime. At other times, social coercion (non-violent, of course) may be necessary. In addition, a common property regime can be accompanied by economic and non-economic incentives to encourage compliance with the agreed rules, such as reduced taxes on the resource. However, the capitalist system is also often very good at creating incentives to push individuals towards private property, so it is important to study well what incentives and sanctions can be effective in any common property regime. They must also be functional and operational incentives and sanctions.

A last (pessimistic) argument against the success of the commons is the idea of long-term benefits. Indeed, it is easy for the individual under the communal regime to think that one day's overuse of the resource will go unnoticed. However, if one thinks about long-term abuse, it is easy for this infringement to come to light, and then not only will the

[877] Hasan, 'Revisiting commons…' (n 825) 9.

[878] Douglas Southgate, 'The Economics of Land Degradation in The Third World' (1988) The World Bank, Environment Department Working Paper No. 2, 7 <t.ly/fwsF> accessed 15 April 2023.

[879] Daniel W. Bromley and Michael Cernea, 'The management of common property natural resources: some conceptual and operational fallacies' (1989) World Bank discussion papers; no. WDP 57, 17 <t.ly/-IdF> accessed 14 April 2023.

offender be blamed by the rest of the community, but the resource will have been degraded and therefore the possibility of its use will have ceased. Instead, its good use may be compensated in the long run, for example by the fruits of the community's cultivation of the resource. Therefore, the drawback of the lack of incentive in commons can be countered precisely by the idea that this regime can bring benefits to the individual without much effort, unlike the private owner who may have to work hard to get a return on the asset. In many cases, access to shared ownership by multiple stakeholders or rights holders may not only be an appropriate solution, but the only way to ensure the long-term conservation and use of the resource.[880]

4.3.6. No universal recipe for resource management

All discerned so far is not to say that common property regimes are a panacea for social equity and resource sustainability. Common property can and does break down under internal and external pressures.[881] In some cases, this may be due to demographic or climatic pressures that make the continuation of a communal regime impossible. In other cases, it may be that the purpose for which the regime was established disappears, or diversifies, and such a system no longer makes sense. Similarly, if cultural pressures lead people to honour their commitments to the commons, these cultural ties may weaken and become ineffective. On the other hand, the technical tools and political mechanisms used to manage the commons may sometimes fail. They are likely to need some form of government support to ensure their success or revitalisation.

But, as has been pointed out, this does not make common property regimes intrinsically inferior. These are often problems of the resources themselves, and not of the regime used. In fact, they may be a more plausible alternative in cases where private ownership and state ownership regimes are costly in terms of time, environment and economics. Moreover, as stated above, ownership is rather a partial right that is negatively constrained by other constitutional rights and by the rights of third parties. Instead of thinking of private property as an institution engraved by a social mortgage, perhaps it should be thought as a social good engraved by certain individual encumbrances. In order to be positively delimited, it is in any case necessary to decide democratically what function resources are to fulfil in a given society. This means that the decision on the type of regime chosen, as well as its content, conditions and the limits of property rights will at least have to be decided collectively.

Admittedly, the commons and communal rights are not a pure concept, but a completely abstract one, with almost infinite possibilities. The commons are often conceptualised as a different form of property, detached from the public and the private. Property is thus presented as a triad of separate or differentiated, mutually exclusive institutions or regimes. In my view, this does not help to clarify the problem but rather to confuse it. In this sense, I believe that the conceptualisation should be the one provided by the republican tradition: the hypothesis that public, private and common property are best understood as part of the same legal and philosophical continuum. Instead of opposing

[880] Mundó, Soza and Macedo de Medeiros Albrecht, 'Chapter 3. Privatization…' (n 105) 37.

[881] Hasan, 'Revisiting commons…' (n 825) 18.

the commons to 'public' and 'private' property regimes, the republican framework understands them as part of the same fiduciary logic, leading to new institutional arrangements according to each historical and economic context. [882]

Moreover, among those who are not opposed to the idea of the commons, there is a tendency to see them as remnants of private property. They "tolerate" the commons as long as they do not prevent private property from taking its central place. In my view, this construction of the commons in this way misses the opportunity to deconstruct property as it has been understood so far. Rather, it encourages humanity to remain trapped by private property, and thus has the opposite effect: the commons end up as cannon fodder for privatisation. In my opinion, overcoming this problem implies rethinking property by starting with the idea of the commons as a core element of the system, and then seeing in which cases the nature of the commons cannot be separated from private property.

Even so, there is probably no single right answer to unsustainability and inequity. Unfortunately, there are no universal recipes for efficient, sustainable and equitable resource management. The solution may involve an open and mixed response, in which different types of property regimes coexist, not only the common ones. It is even possible to envisage different forms of property coexisting within the same legal system, especially of public-community synergies. Thus, where the commons can't reach, there will be goods owned by all and managed by the state, and private goods that allow everyone's needs to be met. It will depend on the choices made about the conditions of access to the use of assets.

How resource management is organised is indeed a matter of socio-political choice and therefore appear to be plural, even conflicting. Ideally, each regime should be decided on the basis of the comparative advantage of applying each ownership system in terms of equity, sustainability and resilience. For example, one can think of private ownership of some real estate, cooperative ownership of other housing, state ownership of roads and means of production, and communal ownership of urban orchards and local forests or, beyond the strictly natural, community childcare spaces, bike-sharing systems, and libraries of things. It is even possible to think, for example, of a universal basic income, which in reality would still be a form of private property. Each inhabitant would have ownership of a limited amount of money, and therefore the social base of the pyramid would be more or less covered. But then it remains to be seen what would happen at the top. In a society where money is no longer the norm governing social organisation, maximum income should probably ensure that collective wealth is not absorbed at the top of the distribution at the expense of the less well-off.[883]

Furthermore, it may sometimes be necessary to pragmatically combine elements of public, common and even private management. Not only ancient but also several recent experiences have shown that local people can greatly complement government

[882] Laín and Manjarín, 'Private, Public and Common…' (n 45) 50.

[883] Parrique, 'The political… degrowth' (n 801) 518.

institutions in halting resource degradation.[884] And it cannot be overlooked that some common goods may require public or private infrastructure, for example, for the communal management of energy or water. It would thus be about a mix of ownerships, with different types of property regimes converging. This would confirm that property is not, as Locke claimed, a well-defined natural legal institution.

Still, an effort should be made to give weight to communal forms of management, and to de-emphasise private forms of management. The basic idea is that the private does not exclude the common, but must be articulated with it because it is intertwined with it.[885] This might even be possible through transformations of existing property regimes. Think, for example, of the transformation of privately owned residential buildings into communally owned housing. The transformation of private spaces into common areas, and of private assets into neighbourhood assets, can also be envisaged, as is already the case in many places. Community rooms in which there are several communal elements not only save money for each individual but are also more sustainable for the environment: washing machines, dryers, screwdrivers, irons, and even refrigerators, ovens or other appliances and occasional use utensils.

Another example would be the transformation of companies (limited liability companies, joint stock companies, etc.) into other forms of social and solidarity economy, such as cooperatives, understood as "autonomous associations of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise".[886] Cooperatives are economic forms of participation characterised by voluntary and open ownership, democratic member control, member economic participation, autonomy and independence from other organisations (including the government), education, training, and information, cohesion within the cooperative movement and work for the sustainable development of the community.[887]

While conventional companies seek to increase profits, cooperatives' main objective is to satisfy human needs. Moreover, the form of participation should not depend on meeting a quota, but on one vote per person as a result of a prior consensus. Such a system could eventually eliminate the traditional hierarchies within companies, where a few monopolise power through larger shareholdings, and make decision-making spaces

[884] Vid. for instance, the examples described in: Margaret A. McKean, 'Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management '(1992) 4 (3) Journal of Theoretical Politics 247; Ostrom, *Governing the commons*... (n 840) 88-102; Annah E. Piggott-McKellar, 'Moving People in a Changing Climate: Lessons from Two Case Studies in Fiji' (2019) 8 (5) Social Sciences 133; Paschalis A. Arvanitidis and George Papagiannitsis, 'Urban open spaces as a commons: The credibility thesis and common property in a self-governed park of Athens, Greece' (2020) 97 Cities 102480; Jeremy Anbleyth-Evans, 'Toward marine democracy in Chile: Examining aquaculture ecological impacts through common property local ecological knowledge' (2020) 113 Marine Policy 103690; David Barton Bray, 'Chapter 14: Community Forestry in Mexico: Twenty Lessons Learned and Four Future Pathways' in David Barton Bray, Leticia Merino-Pérez and Deborah Barry (eds), *The Community Forests of Mexico: Managing for Sustainable Landscapes* (University of Texas Press 2005) 335.

[885] Crétois, *La part commune*... (n 56) 16.

[886] COOP, *Guidance Notes to the Co-operative Principles* (2015), International Co-operative Alliance 34.

[887] ibid 5-97.

more democratic.[888] Furthermore, the social and solidarity-based economy is oriented towards equity, sustainability, participation, inclusion and commitment to the community,[889] as opposed to the sole principle of generating profit for owners or shareholders in private companies. Finally, in a conventional company, dividends are usually distributed according to the percentage of shares held by each shareholder. In a cooperative, part of the profit is usually reinvested to improve the association.

4.4. Commoning law

4.4.1. Caution: communities under construction

The transformation of the social function of property throughout the 20th century and so far into the 21st century has been marked by a profound change in the relationship between the state and the market, between the public and the private. On the one hand, the nation-states seem to be shedding their skin, adapting to the new situation in their traditional position of institutional arrangements to facilitate the process of capitalist accumulation. The sovereign responsibility of governments is being reduced to ensuring the best deal for big investors. Even in states with the most democratic parliaments, governments are not free to respond to the demands of the citizens, as this might irritate and alienate capital.[890] Similarly, in a hyper-globalised world, nation-states are now less able to limit the monopoly power of transnational corporations.[891] The interests of this monopoly capital have prevailed over other interests, such as workers' labour conditions, poverty, the environment, and so on.

On the other hand, private property is experiencing a new phase of ascendancy. Thanks to the policies of global institutions —such as the World Bank, the International Monetary Fund and the World Trade Organisation— much of what was previously considered public domain has been appropriated and privatised.[892] This phenomenon, as Federici pointed out, has been overwhelming in Africa since the last decades of the 20th century.[893] This condition has been driven by the belief that excessive state involvement in the economy distorts the operation of the free market system.[894] But it is precisely this scenario that is highly conducive to the emergence of small and large, rural and urban, localised and diffuse *communities*. The current phase of capitalism is now

888 José Luis Coraggio, *Economía social y solidaria: El trabajo antes que el capital* (Ediciones Abya-Yala 2011) 46.

889 Unai Villalba-Eguiluz and Juan Carlos Pérez-de-Mendiguren, 'La economía social y solidaria como vía para el buen vivir' (2019) 8 (1) Iberoamerican Journal of Development Studies 114.

890 K. N. Harilal, 'World Economy and Nation States post COVID-19' (2 May 2020) 55 (18) Economic & Political Weekly 15.

891 ibid 15.

892 Peta-Anne Baker and Kimberly Hinds, 'Regulators of the Global Economy: The IMF, the World Bank and the WTO' in Lynne M. Healy and Rosemary J. Link (eds), *Handbook of International Social Work: Human Rights, Development and the Global Profession* (Oxford University Press 2012) 319.

893 About the process of reforms of communal land tenure (new enclosures) in Africa attempted by the World Bank in the 1990s, vid. Silvia Federici, 'Woman, Land Struggles…' (n 289) 41.

894 Marwan Mohamed Abdeldayem and Saeed Hameed Aldulaimi, 'Privatisation as a Worldwide Tool of Economic Reform: A Literature Review' (2019) 4 (2) International Journal of Social and Administrative Sciences 68.

characterised by the tension between the new privatised spaces and organised forms of free access and collective management of resources. The terrain is no longer contested by the state (the public), but by the demand for access and common use.[895]

The counterproposal on which I try to rely is the insistence —if I may use the oxymoron— on the collective nature of social relations. That is to say, the possibility of recognising the existence of certain inherently collective rights, namely the necessarily common enjoyment of certain resources. In this case, the commons should rather be understood as a process, the result of political activity of cooperation in a complex social system. Sustaining the commons is not just a technical management of resources (in space), but a struggle to realise liveable common relations (in time).[896] The starting point is not the existence of the community itself —a community that "is" or "has"— but the constitution of this community —a collective that structures itself through "doing".[897]

Community is therefore a process under construction, a vacuum that needs to be filled again and again through the creation of solidarity bonds based on common action.[898] In this sense, the term 'commoning' again underlines, among other things, this activity of transforming traditional private spaces into common spaces. This "doing" (reappropriating, reconstructing, reinventing...)[899] seems much more democratic than classical property law. Community is thus a "being-in-common"; it is, by definition, constituted by commonality. What characterises the community is the process and the place where it is produced by sharing property, practices or knowledge,[900] by recomposing, reconstructing and reinventing the commons.[901]

The building of constituent communities is inconceivable without a radical critique of private property rights. For, as has been seen, social justice cannot be organised where there is only private property. The social movements of the commons produce, through collective practices, alternative configurations of property to the capitalist agenda. There is no need to think of a single homogeneous global movement. The diversity of social micro-communities, each from their own realities, linked together in a global network, can provide a constitutional and deliberative process capable of progressively organising life towards the commons at local, national, and global levels, giving renewed relevance to the concepts of constituent power and popular sovereignty.

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[895] Marella, 'La funzione sociale...' (n 641) 565.

[896] Irina Velicu and Gustavo García-López, 'Thinking the Commons Through Ostrom and Butler: Boundedness and Vulnerability' (2018) 35 Theory, Culture & Society 3.

[897] Silvia Federici recounts a very interesting "doing" in several of her works. In some African countries, landless rural women who migrated to cities began to appropriate vacant plots of public and private land — along roadsides, railway lines, in parks, on university campuses— and used them to graze animals, create urban gardens and grow crops, in order to ensure the subsistence of their families or as a subsidiary activity to their jobs. Vid. Federici, 'Women, Land Struggles...' (n 289) 51ff.

[898] Lloredo Alix, 'Bienes comunes'... (n 838) 220.

[899] Wendy Harcourt, 'Gender and Sustainable Livelihoods: Linking Gendered Experiences of Environment, Community and Self' (2017) 37 Agriculture and Human Values 1010.

[900] J.K. Gibson-Graham, *A Postcapitalist Politics* (University of Minnesota Press 2006) 86.

[901] Chizu Sato and Jozelin Maria Soto Alarcón, 'Toward a postcapitalist feminist political ecology's approach to the commons and commoning' (2019) 13 (1) International Journal of the Commons 56.

Direct, probably assembly-based, forms of participation are involved in deliberation and decision-making, thus overcoming the classical, purely delegated spaces, as in systems of representative parliamentary democracy. Indeed, consensus requires a democratic deepening, based on genuine debates, which cannot be achieved on the basis of a simple strategic agreement between factions, or under tacit consents or popular ratifications without prior consensus, contaminated by fear, prudence or indifference.[902] It must be ensured, moreover, that such debates are conclusive and effective for subsequent legal elaboration. Indeed, all these organisations share operative forms of dense deliberative democracy and management procedures beyond the market and the state to successfully achieve their goals, which generally include the satisfaction of collective needs beyond the capitalist market.

At such a juncture, constitutions, as the fundamental basis of the system of organisation, should be oriented towards the expansion of the commons, to the detriment of the private, but also of the public.[903] If anything is really going to change, it is imperative to opt for a resolutely anti-capitalist conception of constitutional law. An approach that allows for the creation of spaces for work, production, exchange, consumption, knowledge and care outside the market, always starting from the bottom up of society. In such an ideal egalitarian "polis", constitutions would be based on the sharing of socially necessary labour, on the common ownership of production and, as has been suggested, on the reduction of the role of the state to that of a mere manager of things. This transformation could be brought about by processes of constitutional change or by the definition of a new legal texture through the accumulation of micro-conflicts.

There, the state should ensure the participatory management of common goods. The democratic vision of the commons is key to distinguishing them from public goods, which are governed by a vertical-bureaucratic logic and do not require citizen deliberation for their management. In this case, the challenge is to create a broadly democratic institutional framework that oversees and supports the state in its role as custodian of the commons.[904] The rule of law must facilitate the articulation of the necessary processes for reaching and channelling consensus. Deliberative politics, which I consider crucial, should not depend solely on the action or pressure of homogeneous groups, nor on individual efforts and virtues, but above all on the institutionalisation of procedures that guarantee dialogue.[905] The bourgeois proprietary ideology, according to which property must be protected from state interference, could be overcome by realising that in reality it is not the state that is to be feared, but the big landowners who privately appropriate everything.

In any case, it is crucial that in these emerging commons regimes, all commoners are well informed about the ecological characteristics of the goods they manage and use. Efforts should therefore be made to educate and train people on how best to manage the

[902] María Eugenia Rodríguez Palop, 'Reconocimiento, defensa y preservación de bienes comunes en los textos constitucionales' (2013) 122 Papeles de relaciones ecosociales y cambio global 62.

[903] Luís Lloredo Alix, 'Derecho y democracia: juntos, pero no revueltos' in René González De La Vega et al (dir.), *Democracia. Perspectivas políticas e institucionales* (B de f 2019) 54.

[904] San Juan, Lloredo et al, 'Qué son los bienes comunes…' (n 835).

[905] Rodríguez Palop, 'Reconocimiento, defensa…' (n 902) 65.

resources. They need to be aware of the consequences of mismanaging the assets —especially when they are vital to their livelihoods— and have sufficient knowledge of the most sustainable way to manage each asset in order to ensure its conservation. This may be achievable through high-quality information flows and communication channels suitable for high levels of interaction. Such tools make control and monitoring tasks less difficult and less necessary. It is therefore the communities themselves, through their *commoning*, that ensure compliance.

But, from a legal point of view, what seems to be most problematic and difficult to resolve is precisely how individuals are excluded from a common property regime. In other words, what criteria should be used to decide who can participate in the management and use of a common good, and who is excluded from such a common property regime. Precisely, this dissertation has been very critical of the robust and effective exclusionary power of private property, as it turns out to be a hotbed of inequality. In principle, this power of exclusion would seem to be eroded in common property regimes, as they aim precisely to be more inclusive in terms of resource management and use. But exclusionary rights are ubiquitous in property, including common property. Thomas Merrill even argued that the right to exclude remains the *sine qua non* of property.[906]

When all members of a community own a common good, the commoners do not have the right to exclude other members of the community. At most, if at all, they will have a right of exclusion for the duration of individual use if the common good can only be used by one person at a time. Except for this caveat, in general, the commoners of a tenancy in common cannot exclude each other from the full use and enjoyment of the property.[907] They may also have the right to prevent other commoners from taking more than a certain proportion of the resource. It is precisely the right of exclusion of the community as a whole —as well as the privilege of use— that turns it into a guardian.

The right to exclude external individuals outside the community from the resource is held by the community itself, through informal social norms or, if necessary, exercised by a designated entity within the community, such as a formal governance structure. This characteristic resembles private forms of management, and is probably the only significant link between private property and common property.[908] Thus, the difference between a common property system and a conventional private property system is qualitative, not quantitative, as the commons are based on access and inclusion rather than exclusion and deprivation.[909] It lies in the allocation, not the existence, of exclusionary rights.[910] The important thing, then, is to find a way to argue for a different configuration of exclusionary rights.

To resolve this question of who is excluded, note first of all that I have chosen the notion of common property regimes according to which common property belongs to a

[906] Merrill, 'Property and… Exclude' (n 836) 752.

[907] ibid 750.

[908] ibid 750.

[909] Mattei, Quarta, and Valguarnera, 'Meeting the Challenge…' (n 649) 6.

[910] James Y. Stern, 'What Is the Right to Exclude and Why Does It Matter?' in James E. Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press 2018) 57.

particular group of people, and not to property that belongs to no one. Common property is therefore private property for the group, since everyone else is excluded from using it and from making decisions about it. In this sense, then, it can be equated with private property in the exclusion of non-owners.[911] In a communal regime, the ownership group may vary considerably in nature, size and internal structure, but it is at least characteristic of all of them that they are

> [s]ocial units with defined membership and boundaries, with certain common interests, with at least some interaction among their members, with common cultural norms, and often with their own endogenous authority systems. Tribal groups or sub-groups, villages or sub-villages, neighbourhoods, transhumant groups, kinship systems or extended families are examples. These groupings have customary ownership of certain natural resources, such as farmland, pastures and water sources.[912]

The examples suggested do not exhaust the variety of common property regimes, which is relevant if one considers an increasingly heterogeneous society. If I argued earlier that law should be aware of and take account of the vulnerabilities of each person, there are reasonable grounds for thinking about a more pluralistic institutional regime that allows each individual to satisfy different purposes.[913] There are dangers in this, for what may be vital to one person may be disposable to another. In this diverse society, cooperation will be essential,[914] which means that the boundaries of the commons will have to be clearer and better defined. Not only because the uses of the common good will have to be negotiated, but also because there are unavoidable ecological limits to natural resources.

Accordingly, the exclusion of overpopulation from a common good may be acceptable under ecological criteria. Many goods are not divisible because they degrade the resource to the point of uselessness. Common property regimes, unlike individual property regimes, do not lead to atomisation, but seek ways to accommodate population growth. When this adaptation is successful, the long-term viability of the resource is assured. Similarly, where there are a considerable number of users of a common good and demand for the resource is high, the destructive potential of all users freely withdrawing from the regime could lead to the destruction of the resource and the organisation attempting to manage it.[915] Caution is therefore required, as both overuse and non-use can be detrimental. The legal challenge is thus to understand the interaction between human and biotic communities in such a way as to suggest property regimes that are conducive to both.[916] In any case, whenever exclusive forms of ownership lead to

[911] Daniel W. Bromley, 'The Commons, Property, and Common Property Regimes' (August 1990) Workshop in Political Theory and Policy Analysis, Indiana University, 17 <t.ly/iGe-> accessed 16 April 2023.

[912] ibid 16.

[913] Bojan Jovanović, 'The Challenge of Plural Identity' (2005) 36 Balcanica 77; Robert A. Dahl, 'Pluralism Revisited' (1978) 10 (2) Comparative Politics 200.

[914] Hanoch Dagan, 'Inside property' (2013) 63 (1) University of Toronto Law Journal 5; Gregory S. Alexander, 'Pluralism and Property' (2011) 80 (3) Fordham Law Review 1026.

[915] Elinor Ostrom, 'Design Principles and Threats to Sustainable Organizations That Manage Commons' (1999) W99- 6, Workshop in Political Theory and Policy Analysis, Indiana University, 17 February 1999, 2 <t.ly/u3OV> accessed 16 April 2023.

[916] Bromley, 'The Commons, Property…' (n 911) 22.

distortions and inequalities, access to the commons must be ensured and guaranteed by law.

4.4.2. Law from below

Throughout this thesis, I have tried to highlight the role of private property as an accomplice of the capitalist system and as responsible for the abandonment of its duty of guardianship over the material and immaterial resources that guarantee life on Earth. I have also pointed out the incompetence of the law, which has the inherent fragility of the Earth's inhabitants. If anything has been confirmed so far, it is that traditional law, as it has been created, applied and interpreted over the last two centuries, will not be feasible in the coming climate regime. The issues of unsustainability and inequality discussed here point to the urgent need to seek new rules of the game that will ensure the future habitability of this planet. Certainly, the protection of the commons will require creative and imaginative efforts on the part of jurists.[917]

Fortunately, the commons, as spaces of resistance and innovation, open up the possibility of transcending ownership and overcoming this era. It has been seen how the commons can create spaces for collective self-organisation and radical democratisation in the public sphere,[918] probably without the need for a hyper-regulatory state of contingent norms doomed to regulatory hypertrophy. Thinking about the scenario of the commons inevitably forces legal researchers to reflect on the different ways they can be legally articulated, and how these possible structures can be given the legitimacy, validity and effectiveness that any legal order requires. Such an undertaking will certainly not be a piece of cake; the guarantee of the commons is one of the most neglected constitutional provisions in history.[919]

The commons are not just a marginal element of contemporary legal systems but embody the premises of important transformative practices and discourses, and represent a subversive place in the legal order.[920] The legal changes that will be required by the implementation of common property regimes in current legal systems will be substantial. I even wonder whether it will be possible to introduce common property into such worn-out legal architectures —I am thinking in particular of the constitutional structures of Western Europe. But the global desire for a better life and the promising force of the commons may position them as a central environmental actor in achieving a post-Anthropocene outcome. The question is whether states, their institutions and their political subjects, not so much individually as collectively, will heed the call. Some of the hot spots lie in the way constitutional law shapes access to resources and property, the conception of the individual in relation to the community, as well as the prevailing economic systems and current equality policies, which are still centred on an atomistic and androcentric pattern.

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[917] Maria Rosaria Marella, 'The Commons as a Legal Concept' (2017) 28 Law Critique 62.

[918] Marco Aparicio Wilhelmi, 'El comú com a institucionalitat transformadora' (PaperClip 5, Institut d'Estudis d'Autogovern, January 2023) 16 <t.ly/_OLA> accessed 20 April 2023.

[919] Mattei, *Beni comuni*... (n 66) 33.

[920] Marella, 'The Commons ...' (n 917) 63.

Admittedly, the proposal of the commons is often distrustful of law. As seen in the previous chapter, rights, as a legal instrument, have traditionally been recognised within the capitalist-extractivist logic of individual and exclusive ownership and enjoyment. It is quite understandable to distrust the apparatus that is contributing, in large part, to the ecological crisis. Hence the difficulty of institutionalising community practices, at least from the current legal standards. All the evidence suggests that the coming years will require humanity (institutions, civil society, science, law, etc.) to be open to pragmatic adaptation to reality.

Understanding law simply as a grammar of power does not seem to encourage much of a rosy path to change. However, it does seem promising to think of it as a space in a continuous process of transformation. That is, as a social practice rather than something static and rigid. It has already been established that property is not an immutable natural right; but a historical and changing social relation that is functional to the model of accumulation in which it operates.[921] If the Anthropocene is by definition unstable, it seems ineffective to think in terms of a legal discourse of an "end-goal" or of a utopian horizon of individual salvation. Instead, it seems more appropriate to think of a legal system that is open to transformation and capable of responding to changing and unpredictable circumstances. A system that no longer aspires to promise sustainability, but to guarantee everyone the ability to adapt to change, i.e., resilience.[922]

This means, as I have already argued, putting the commons back at the centre of legal discussions, even before the public. For precisely, the development of a law of the commons allows the production of the commons itself as a process of deconstruction of power, as a strategy for more democratic and effective institutional management. This process of construction implies, in the first place, a decentralisation of state power over political life, and its reappropriation by the citizenry —the 'people'— through a certain dispersion of power. It should be clear from the outset that the commons, by their very nature, cannot be easily appropriated, either by the market or by state institutions.

This slimming down of state power would therefore involve reducing state protection of public goods in favour of spaces for self-organisation for the management of the commons. In other words, it would entail developing strategies for the transformation of state property, for the communalisation of the public. At the same time, the very practice of the commons by the citizenry itself can become the seed of this transformation of the public, and by transforming itself, it would complete the proposal of this circle. The intensity of the social struggles related to the commons can compel society to create a legal system more receptive to the creation, recognition and preservation of the commons, i.e., to establish a "hybrid, transitional, semi-state *ius communis* that is capable of incorporating the stock of social movements and receptive to the emerging forms of life".[923] In other words, the 'communitarisation' of law will necessarily take place

[921] Noguera Fernández, *Regular los alquileres…* (n 7) 17.

[922] Jordi Jaria-Manzano, 'Beyond Sustainability: Challenges for Environmental Law in the Era of Uncertainty' (2022) 52 (2) Environmental Policy and Law 102.

[923] Antonios Broumas, 'Movements, Constitutability, Commons: Towards a *Ius Communis*' (2015) 26 (11) *Law and Critique* 18.

through the cession of the public sphere to the commons by the state, and through the action of the 'communitarisation' of goods and services by citizens.

Undoubtedly, the state will play an important role in the transfer of these powers to the holders of self-governing rights. Here, the role of law will be to provide the legal-institutional tools to allow this permeation or incorporation of the commons into the state, to transform institutions and to enable a greater capacity for collective action in favour of real democracy. This dismantling of the state through the commons and the displacement of the capitalist market cannot be seen as a one-off event, but as a gradual process through the creation of spaces of common life in conditions of social autonomy that allow the democratisation of all sources of power.

Nonetheless, I am not talking about individual, self-managed islands, each in its own way. Rather, I am talking about extracting the potential of these realities and making them practicable and replicable, bringing them together and making them capable of becoming a gear of radical transformation, enabling "the common becoming of the public".[924] This social network would interact horizontally, as opposed to the traditional concept of pyramidal hierarchy. Always under the principle of subordination of the mercantile to the eco-social interests. As I noted, the difficulties facing the law are not minor. In a way, the debate tries to give back to the "people" its original power, albeit through very different criteria of recognition and belonging. It is thus a matter of re-storming the Bastille from the bottom up, of regaining power through the commons, of making law from below.

Such an approach immediately implies reconciling productive and reproductive spaces with a community perspective. In such spaces, it would perhaps not be unreasonable to speak of the recovery of customary community systems, collective and permanently *constitutive* forms of the administration of justice, never *constituted*.[925] One could speak of the exercise of permanently open constituent power, a creative contestation driven by a collective subject that does not wait for a salvific or "messianic moment in which its political freedom will be returned".[926] In these spaces, the commons create communal zones —redundancy notwithstanding— within which individuals become mutually vulnerable but also mutually bound. This means that the commoners acquire not only rights vis-à-vis the state but also opportunities to participate and duties to the community and, more broadly, to society.[927]

In other words, it now awaits the constitutional act in the hands of the traditional constituent power, that of the people/nation. The traditional constitutional moment, if it arrives at all, can only be the consequence of an accumulation of previous constituent moments and practices experienced by the multiplicity of hitherto subordinated,

[924] Marco Aparicio-Wilhelmi, 'Más allá de lo constituido. Lo común como hipótesis jurídico-constitucional' (2021) 45 Cuadernos Electrónicos de Filosofía del Derecho 316.

[925] Mattei, *Il benicomunismo e i suoi nemici* (n 847) 46.

[926] Bolívar Echeverría, *Crítica de la modernidad capitalista (Antología)* (Vicepresidencia del Estado de Presidencia de la Asamblea Legislativa Plurinacional de Bolivia 2011) 99.

[927] Roberto Mangabeira Unger, *False necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy, from Politics: A work in Constructive Social Theory* (vol. I, Verso Books 2004) 562.

forgotten, precarious subjects.[928] We will be dealing with multiple, dynamic subjectivities, linked to changing and uncertain needs. The determination of such constituent subjects, without committing oneself to the principled demand of assuming a single one with the cancellation of the rest, is what Clavero has called '*constituyencias*' —a made-up term that unfortunately has no exact translation in English.[929]

These forms of collective action already exist, and they are no longer understood so much in terms of experimentation as in terms of emergence, as operations of salvation, repair or rescue.[930] Practices based on ecofeminist, agroecological and communalist perspectives —or all of these at once— are flourishing in both rural and urban settings. In these cases, it is the communities themselves that develop the legal strategies for creating and defending spaces of collective solidarity. In other words, it is a matter of *commoning* law from below, of forging self-governing normative practices that ultimately use or combine the techniques or rules of traditional law.[931] Indeed, these counter-hegemonic alternatives need to be equipped with arguments and mechanisms of expression.

In this possible new paradigm, it is no longer the state monopoly, the political and economic elites or the hyper-professionalised law that are the protagonists in the regulation of resource management. On the contrary, they are organised from below: by the peasantry, neighbourhood associations, workers, consumers, trade unions, NGOs, community care networks... With the clear empowerment effect this has on them.[932] In other words, civil societies are the architects of their own law.[933] Within this more participatory framework, it seems easier to legally recognise the real concerns of society, regardless of class, race, gender, etc. Together, these alternative subjects and their practices can turn care for the Earth and living beings (human and non-human) into a real path to resilience and equity. Of course, such concerns can inspire new legal regimes and be translated into international standards, constitutions, laws, regulations, norms, and general principles. In other words, injecting collective practices into basic legal premises can reveal the best ways to deal with the political and legal problems arising from the Anthropocene. Hence the potential for communalist and ecofeminist practices and activism to inspire this new legal order.

[928] Aparicio Wilhelmi, 'El comú com a...' (n 918) 12.

[929] Vid. Bartolomé Clavero, *Ama Llunku, Abya Yala: Constituencia Indígena y Código Ladino por América* (Centro de Estudios Políticos y Constitucionales, 2000).

[930] Marina Garcés, *Nova il·lustració radical* (Nous Quaderns Anagrama 2017) 24.

[931] Regarding the law from below, vid. Lloredo Alix, 'Bienes comunes' (n 838) 223; Balakrishnan Rajagopal, *International law from below: Development, social movements and third world resistance* (Cambridge University Press 2003); Saki Bailey and Ugo Mattei, 'Social Movements as Constituent Power: The Italian Struggle for the Commons' (2013) 20 (2) 14 Indiana Journal of Global Legal Studies 976; Gavin W. Anderson, 'Societal Constitutionalism, Social Movements, and Constitutionalism from Below' (2013) 20(2) 11 Indiana Journal of Global Legal Studies 899; Capra and Mattei, *The Ecology of Law*... (n 791) 14, Tomaso Ferrando et al. 'Land, territory and commons: voices and visions from the struggles' (2020) 17(7) *Globalizations* 1284.

[932] ibid Balakrishnan Rajagopal, *International law*... 228; Patrizia Nanz and Jens Steffek, *Global Governance, Participation and the Public Sphere* (Cambridge University Press 2014) 315.

[933] Lloredo Alix, 'Bienes comunes' (n 838) 233.

4.4.3. The movements of the commons

In some places, a reconceptualisation of the law towards the commons is already taking place. The resistance of Native American peoples to the progressive privatisation of their lands has given new impetus to the struggle for the commons. The 1999 Venezuelan constitution recognises the right of native peoples to use the natural resources in their territories. The Andean concept of *buen vivir —sumak kawsay—* inspired the inclusion of the rights of nature in the constitutions of Ecuador (2008) and Bolivia (2009), where communal ownership is recognised. These incorporations are nothing more than a demand for greater protection of common natural resources. By their very nature, commons are not based on reliance on the legal apparatus of the state, but on social cooperation. However, such constitutional examples serve to illustrate the power that grassroots movements can have in creating new forms of social and resource provision from below.

On other occasions, law is constructed on the basis of social conflicts over access to certain resources, without the need to enshrine it in a constitutional text. Urban land in particular is often a hot spot. The issue of occupation deserves special attention. Not so much in the sense of traditional squatting or *okupation*, but rather in the sense of "taking" and *commoning* places, where occupiers reinvent social welfare by opening up public or private buildings —theatres, cinemas, factories and farms vacated by their owners— to a wider community, be it a neighbourhood, a village or a city. These commoners transform these assets into shared and communally managed facilities and services.[934] In many cases, even the courts have ended up supporting these commoners, arguing that property, whether public or private, should bear the burdens of a community's use by virtue of custom or long-standing tradition, since it fulfils a social or ecological function.[935]

Some of these paradigmatic examples can be found in Italy. The Teatro Valle Occupato, in the centre of Rome, was occupied in 2011 and is now a centre for and has been involved in the continuous production of immaterial goods, from artistic productions to conferences, seminars and training courses.[936] The Cinema Palazzo, a private theatre located in the San Lorenzo district of Rome, was also occupied by students and artists in 2011. The Court declared that the defendants were not the moral authors of the dispossession because they had not acted out of economic interest but were motivated by a genuine political objective: that of saving the original (cultural) use of the building.[937] Another case of communalisation was the occupation of the former Colorificio Toscano in Pisa, renamed the *Municipio dei Beni Comuni* in 2012, although it was eventually evicted.[938]

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[934] Marella, 'The Commons as…' (n 917) 83.

[935] ibid 83.

[936] Vid. Federica Giardini, Ugo Mattei and Rafael Spregelburd, *Teatro Valle occupato: la rivolta culturale dei beni comuni* (DeriveApprodi 2012).

[937] Tribunale di Roma, VII Sez. Civ., Sent. 8-02-2012.

[938] Vid. 'Rioccupato e già sgomberato l'ex Colorificio toscano' *La Nazione*, 7 December 2013 <t.ly/TTCvS> accessed 24 April 2023; 'Pisa, nuova occupazione ex colorificio di nuovo sgomberato' la Repubblica, 7 December 2013 <t.ly/SLtO> accessed 24 April 2023.

Other examples that I would like to highlight are the occupations in Spain of abandoned bourgeois houses, which are now self-managed, in most cases with the concession of their local councils, as a response to the lack of spaces for the development of recreational, artistic and political activities. To give just a few examples, there are many self-managed spaces in Barcelona, such as Can Vies, Can Batlló and Can Masdeu, or the CineCiutat in Palma de Mallorca. In Madrid, there is even a *Red de Espacios de Madrid Autogestionados* (Network of Self-managed Spaces of Madrid), which aims to involve the entire network of associations in the Spanish capital and to develop not only common strategies but also common knowledge.[939] I am quite sure that at least a couple of examples of self-managed community spaces in any city will come to the reader's mind.

Bringing social movements closer to constitutional theory is clearly challenging, both theoretically and empirically, because of the private property and developmental state that liberal constitutionalism presupposes. 'Societal constitutionalism' —as Gavin Anderson calls it— implies challenging the inherent institutional dimension inherent in Western liberal and normatively positive constitutionalism. But it also reinforces a genuinely pluralist and open vision of the constitutional enterprise, transferring the power from elites, the sovereign state and private ownership to a broader social majority. As protagonists in this scenario, social movements represent a form of "constitutionalism from below".[940] Their incorporation into the constitutional discourse reveals their transformative agency within a non-institutional dimension of constitutionalism.

The institutional dimension does not have to disappear in this framework; often the main objective of social movements, and particularly the movement of the commons, is a transformation of the institutions to make them more participatory and reaffirm the role of popular sovereignty. The main purpose would be to re-evaluate the understanding of institutions in terms of their necessary relationship with the non-institutional. Through counter-hegemonic uses of law —often extra-institutional means— such as mass protest, non-violent civil disobedience, pressure and blockade, social movements emerge as effective tools for reshaping political relations and creating alternative forms of governance and resource management.[941]

Once again, it should not be forgotten that we live in the Anthropocene, a global era. The advent of multi-level governance undermines the traditional unitary conception of statist politics. In this context, social movements, often transnational, are key actors in the negotiation of global governance, putting forward new ideals of sovereignty never thought of within nation-states and extending the notion of the public sphere beyond traditional political arenas.[942] In other words, a transnational constitutionalism that includes civil society is part of the solution to the problems of global governance. From

[939] Vid. Centre Social Autogestionat Can Vies <http://www.barrisants.org/canvies/csa.htm>; Can Batlló <https://canbatllo.org/>; Vall de Can Masdeu <https://canmasdeu.net/ca/>; Cineciutat <https://cineciutat.org/ca/mission-vision-y-valores>; Comunizar, 'Red de Espacios de Madrid Autogestionados' <t.ly/Lj2->. Websites accessed 24 April 2023.

[940] Anderson, 'Societal Constitutionalism…' (n 931) 882.

[941] Ronaldo Munck, *Globalization and Contestation: The New Great Counter-Movement* (Routledge 2007) 75.

[942] Saki Bailey and Ugo Mattei, 'Social Movements as Constituent Power: The Italian Struggle for the Commons' (2013) 20 (2), art. 14 Indiana Journal of Global Legal Studies 1012.

my point of view, the answer lies in a hybrid constitutional system that mixes legal institutional regulation with "external" social actors, now constitution-makers, who exert pressure through their constant participation.

The constitutional discourse of the Anthropocene should therefore be based on the mediation of increasingly diverse (and often antagonistic) interests, and on a social redistribution of power. Thus, the actions of politically active people, organised as grassroots movements, should not be seen as mere unimportant disturbances, but as real constitution-makers, as crucial as the formal political institutions. Indeed, this would imply a more diffuse constituent power, not limited only to formal politics. Nevertheless, each social system would be open to its own constitutional moment, to be decided according to the evolution of social and environmental realities.

Law from below opens the door to a wide and diverse range of legal knowledge, beyond the current hyper-technified law. It certainly includes epistemologies and practices produced by women, indigenous peoples, landless peasants, those working in the 'informal' economy, environmental activists, and so on.[943] It is also worth highlighting the potential for legal innovation generated by civil society environmental movements through climate litigation.[944] Indeed, it is not the only solution, since the judiciary does not always manage to mediate social conflicts effectively and legitimately, and the selection processes sometimes favour a certain majoritarian and deferential conception of power.[945] But it is a matter of exploring the possibility of articulating innovative counter-hegemonic responses in the context of existing socio-environmental conflicts, in order to advance towards an inclusive and just social response to the transformation of the planet.[946]

4.4.4. Towards the constitutionalisation of the commons. Lessons learned

Admittedly, no constitutional system is ever clean; every previous constitutional form has left its mark on every subsequent constitutional system. As argued in previous chapters, the enclosures of the commons left only two models remained: that of the state and that of private property. The 19th century was marked by the desire to consolidate the bourgeois proprietary ideology and the pretence that property was a natural and inalienable right to be enjoyed by the individual. In modern constitutionalisms, however,

943 Boaventura de Sousa Santos and César A. Rodríguez-Garavito, 'Law, Politics, and the Subaltern in Counter-Hegemonic Globalization', in Boaventura de Sousa Santos and César A. Rodríguez-Garavito (eds), *Law and Globalisation from Below. Towards a Cosmopolitan Legality* (Cambridge University Press 2005) 4.

944 On the innovative effect of conflict management through climate litigation, vid. for example: Gastón Alejandro Médici Colombo, 'Presupuesto de carbono y autorización de proyectos de producción de combustibles fósiles: el caso "Gloucester Resources Ltd. v. Minister for Planning'; Pau de Vílchez Moragues, *Climate in Court. Defining State Obligations on Global Warming Through Domestic Climate Litigation* (Edward Elgar 2022); Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38 (4) Oxford Journal of Legal Studies 841; César Rodríguez-Garavito, 'Human Rights: The Global South's Route to Climate Litigation' (2020) 114 American Journal of International Law Unbound 40; Marcos de Armenteras Cabot, 'El litigio climático ante la responsabilidad intergeneracional' (2021) 44 Cuadernos Electrónicos de Filosofía de Derecho 1.

945 Jordi Jaria-Manzano, 'El rol de los conflictos socio-ambientales en la configuración del derecho ante la transición geológica' (2019) 2 Rivista Quadrimestrale Di Diritto Dell'ambiente 115-116.

946 ibid 116.

there was a certain contradiction in this, since a natural right was attributed to only a few men through census suffrage. For liberal constitutionalism, the state represented the public, while the market represented the private. Both spheres completely colonised the imaginary.[947] This is how the constitutionalisms of the 20th century continued to conceive them.

During the interwar period, attempts were made to emphasise the social function of property, especially through the figure of expropriation, which was envisaged in the various constitutions adopted at the time (Mexico 1917, Russia 1918, Germany 1919, Spain 1931, etc.). However, this desire for the socialisation of property was somewhat deflated after Second World War, when the emphasis was placed on the separation between the market and the state, that is, between the public and the private spheres. It was not denied that the state should certainly intervene when the general interest required it. The new constitutionalisms that emerged at that time defined the political systems of each country as "democratic and social states governed by the rule of law".

But at the end of the 20th century, a neoliberal wave resurfaced, calling into question such social and democratic states, and giving way to new forms of resource appropriation and new legal morphologies in which to carry out this monopolisation, such as transnational corporations. This phenomenon was indeed characterised by new enclosures, i.e., the privatisation of goods and services that satisfy collective needs,[948] with the state being the main driving force behind this commodification. The new wave of wealth appropriation was thus more than ever the joint work of public power and private forces. To this day, this phenomenon structures the Western way of thinking and has also penetrated colonised countries. Their cultural heritage consolidated a dominant conception of property that excludes the category of the commons and is based on continuous and progressive privatisation as a certain, irreversible and desirable thing.[949]

Such neoliberal regimes have been based above all on a strong state, a strong market and strong legal institutions that have transformed public action. The state is subject to the same rules of competition and efficiency as private companies.[950] Both in the centre and the global periphery, the proletariat and the rural population, but also the middle classes, continue to be driven off their land and out of their cities. Sometimes this even happens under the pretext that it is for their benefit, as in the case of the current introduction of renewable energy. Natural resources, such as water, sun or wind are being privatised, with access, management and exploitation falling into the hands of a few.

Transport and telecommunications systems, as well as industries of all types in all kinds of countries, also suffer from this process of privatisation. Agricultural knowledge is

947 Mattei, *Beni comuni*... (n 66) 34.

948 On the "new enclosures" phenomena, vid. issue 10 of the Midnight Notes journal (1990), entitled *New Enclosures*, edited by the Midnight Collective, which included George Caffentzis, Silvia Federici and Peter Linebaugh, among others. See also: Camille Barbagallo, Nicholas Beuret and David Harvie (eds), *Commoning with George Caffentzis and Silvia Federici* (Pluto Press 2019).

949 Mattei, *Beni comuni*... (n 66) 49.

950 Eduardo Melero, 'El derecho de la globalización neoliberal como marco limitador de la promoción de los comunes. Un análisis desde el derecho público' (2021) 45 Cuadernos Electrónicos de Filosofía del Derecho 336.

stripped from its "traditional masters", leading to so-called biopiracy. Natural organisms are plundered from the global pool of genetic resources, passing off *res communis* as *res nullius* for the benefit of a few transnational biotechnology and pharmaceutical companies. Public knowledge institutions, such as research centres and universities, are also colonised by the private sector, even to the point of jeopardising services such as public education and health.[951] Everything seems appropriable. Enclosable. Colonisable. Every single good and body is liable to suffer in the clutches of late capitalism.

It is not surprising, therefore, that the constitutions that have emerged since the last third of the 20th century have sought to reconcile the capitalist system with environmental protection and the fight against inequality, resulting in a series of schizophrenic systems. Moreover, in some parts of the world —and especially in Latin America— there was a desire to give greater protection to ancestral goods that had belonged to and been handed down by peoples, communities and other forms of collective ownership. Such claims also sought to protect such organisations from the threats of transnational and neo-colonial capitalism. These are also the countries that made historic breakthroughs in constitutional recognition of the ecological function of property, even going so far as to recognise the rights of nature. The result has been a concerted effort to enshrine in their constitutions the social and ecological functions that property should fulfil.

Yet today's societies are still trying to navigate between the waters of possessive individualism promoted by an increasingly sophisticated capitalism and the unprecedented environmental changes that are taking place, making every summer the coldest of their lives. The successive crises that have devastated the planet in recent decades demonstrate the robustness of neoliberal capitalism, which is capable of overturning any good intention put down on paper, even a constitutional one. To mention only the most shocking on a global scale: the oil crisis (1973), the financial "crack" (2008) and the most recent one, the coronavirus pandemic (2019).

And what can be drawn from all this? Well, I dare say a lot. This whole historical process has provided nothing but lessons, has highlighted the need for a paradigm shift, and has illuminated the way to what our future should look like. Every event, every change and every constitutional process has not been a wrong step. And *what is done is done*, but it can be re-examined in search of the keys to our future and the lives to come. We have a duty —a moral duty, if one prefers— to ensure that the next generations can also write about our present, which will be their past to learn from and build on. What we do today will be the legacy we leave them for tomorrow. They will learn from our mistakes, but we can also ensure that they take away positive lessons.

One of the key lessons is the need to overcome the public/private dichotomy. Some of the constitutions studied, such as the Spanish Constitution of 1978, already offered an open door to alternatives to private property, although neither the framers nor the legislature bothered to define them.[952] Yet these are empty spaces that need to be filled.

[951] Most examples were borrowed from: Mundó, Soza and Macedo de Medeiros Albrecht, 'Chapter 3. Privatization…' (n 105) 47.

[952] Probably, this has to do with the fact that, beyond the rhetoric, the Spanish Constitution of 1978 was based on maintaining the power structures of Franco's regime.

For the traditional constitutionalist scholar, only the constitutional state is capable of transforming a provisional property into a fully valid property. There may be some truth in this assertion, but it should not be forgotten that it is its validly constituted citizens who give legitimacy to the constitutional state. In other words, there is no state without society.

The supreme norm of each national legal order —the geographical boundaries of which remain to be seen— will be affected by the profound transformations that this scenario implies. Conflicts and plural identities are likely to continue to emerge in this scenario. Feminism, ecologism, anti-racism, anti-colonialism, and a host of other grassroots movements are inherently dynamic; they tend to change in response to almost daily events and the needs of every moment. The existence of an emancipatory or egalitarian legal order seems contradictory in this scenario of versatile and fluctuating movements. It is precisely patriarchy and colonialism that resist change, that desire the static, that want to preserve the *status quo*.

If a real paradigm shift is to be considered, the rules of the game as they have been elaborated so far may have to change. Perhaps, the idea that everything is hyper-regulated by contingent formal norms will need to be overcome. By way of example, many communal organisations can be considered robust in the sense that their rules for daily functioning have evolved and changed over time in accordance with a set of collectively chosen constitutional norms.[953] It is possible to think of subjects that have the capacity to generate greater autonomy vis-à-vis the state and the market in the processes of satisfying their needs, namely energy consumption, housing, health, education, food, raising or caring for the elderly or dependent persons, the use and enjoyment of public space, cultural production, etc.[954]

An eventual society with an equitable distribution of unstable resources cannot rely on obtuse and rigid constitutions. The fundamental conceptions of power and law that underlie constitutional law will necessarily be affected. The constitutional dimension of the commons debate concerns its conception as a non-state institutional reality and its capacity to transform statehood itself. Such a capacity depends on the regime and scope of the commons not being entirely subordinated to recognition by public authorities, but also to the legitimacy conferred by the citizenry itself. Hence the need for constitutional protection of the commons.[955]

[953] In Spain, for example, there are still several paradigmatic cases of resources that are managed as commons. These include the Montes de Mano Común in Galicia, the recently recovered "A Huebra" land management modality in Palencia, the Hazas de la Suerte, food commons managed in Vejer de la Frontera (Cádiz), the Community of villages of Albarracín (Teruel) as well as the "montes de socios" in Soria and Guadalajara and the Valle de Mena, in the north of Burgos. All of them are examples of the enormous legal, territorial, social and economic relevance of the commons in Spain. Vid. José Luis Vivero Pol, 'La España vacía está llena de bienes comunes. Espacios de innovación para economías y relatos diferentes' (2019) 147 Papeles de relaciones ecosociales y cambio global 85.

[954] Aparicio-Wilhelmi, 'Más allá de lo constituido…' (n 924) 307.

[955] Following the line of ibid 322-323.

4.4.5. Constitution as conflict

It has been observed that the law is not fixed or rigid. In fact, it is much more ductile than it appears.[956] Constitutions, are therefore adaptable to each moment, and this can be a virtue. Moreover, one cannot turn a blind eye to the proliferation of international bills of rights. Contemporary constitutions are being enriched with ever newer human rights (there has even been talk of fourth-generation rights). In this way, the new discourses of rights can become even more powerful than the hegemonic private models of resource management. The abstract and indeterminate nature of rights makes them a plastic instrument, capable of serving very different political projects.[957] Constitutions can mutate. So can the meaning and content of some rights. The processes of freedom, equality and emancipation must therefore continue, without excluding the duty of interrelation and human solidarity. In short, rights continue to have a radical transformative potential, and the commons can become the condition for the possibility of such rights.

And if both the market and the state have been used by capitalism to serve its ends, by appropriating the commons, then all the evidence suggests that neither should be at the heart of future constitutional frameworks. The commons narrative removes private property and the state from the centre of the political system in favour of the interdependent ecosystem of relationships. Individuals are inconceivable as isolated monads. It is the relationship of sustainability and dependence that must be placed at the centre. All humans depend for their survival on their relationship with others, the community, the Earth, the environment.[958] The commons thus expose the unrealistic assumptions of neoliberal individualism. Their recognition promotes the construction of a common imaginary in which individual freedom is understood as the capacity to access and enjoy the commons and the communal social relations that individuals themselves make possible. Individuals deconstruct and reconstruct, they make and remake, they become thus judge and jury of their communities.

Indeed, the importance of the commons cannot be taken seriously without giving them constitutional status. If it has been said that the danger of the complete imposition of public property is the lack of the democratic element, it is in the constitutions that political systems must foresee the long-term ways of subtracting arbitrariness from the government of the day. The whole constitutional machinery should be reoriented towards inter-individual, qualitative and ecological community relations, and not be afraid to recognise the eco-social function that the (mis)called 'resources' of planet Earth should fulfil.

In any case, law is not a panacea for conflict resolution, but a tool to channel it. Accordingly, law, and not just constitutional law, cannot be seen as the path to a definitive and redemptive solution. Rather, the conflict itself can be seen as a strategy for

[956] In this sense, vid. Gustavo Zagrebelsky, *Il diritto mite. Legge, diritti, giustizia* (Einaudi 1992).

[957] Marella, 'La funzione sociale…' (n 641) 558.

[958] Vid. Yayo Herrero, 'Miradas ecofeministas para transitar a un mundo justo y sostenible' (2013) 16 Revista de economía crítica 278; Andrea Díaz Estévez, 'Ecofeminismo: poniendo el cuidado en el centro' (2019) 13 (4) Ene 1445.

moving forward. Any constitutional process requires prior political contestation with the power to dismantle the prevailing institutions, sufficient to break certain consensuses and cultural assumptions. Often, even civil disobedience and non-violent rebellion against the status quo must be permitted and decriminalised, if the true disempowering capacity of the commons is to be enhanced. In short, human existence will have to be recognised as a constant struggle between different points of view.

Therefore, everything points to the need to start looking at constitutions as a conflict. As a living process. As a battlefield,[959] though not in a violent sense. On the front line, rights cannot be reduced to a confrontation between different isolated subjective interests, or to a sum of totally fragmented individual choices and utilities. On the contrary, this living process must consider the collective interests of individuals as members of the society to which they belong.[960] Thus, the impulse of a constitutional process should not be conceived as a punctual event of rupture, but as the consequence of an accumulation of changes, practices, social, economic, institutional and legal innovations capable of advancing this political reconfiguration.[961]

The commons are not a site, a place or a community, and the constitution is not a block of steel to be imposed on societies without the possibility of change over time. On the contrary, the vision I advocate is one of commoning, based on the inevitable and constant transformation of socio-natural relations with the commons. "Doing the commoning" and "becoming in common" is a partial and transitory becoming that has to be (re)performed over time, precisely in order to be sustained.[962] Social conflicts can generate new concepts and new narratives beyond institutional channels, thus promoting the continuous reconstruction of the "constitution of the commons", so to speak.

The reflection, therefore, involves the design of constitutions that integrate multiple experiences and social interests, strong tensions and the uncertainty of the consequences of anthropic action. This proposal would move away from classical constitutionalism, which situates a material constitution within a formal framework of hegemonic legal processes and traditional legitimacies (the nation-state, the capitalist market and individual rights with possessive individualism as a central theme). Instead, more weight would be given to the aforementioned '*constituyencias'*, to collective processes of political redefinition. In it, the community understands the constitution as culture, as texture, as something open and labile that binds, but does not enclose.[963]

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[959] Vid. Jordi Jaria-Manzano, 'La constitución es un campo de batalla. Apuntes sobre el constitucionalismo global en el Antropoceno' (2021) 8 (1) P.A. Persona e Amministrazione Ricerche Giuridiche sull'Amministrazione e l'Economia 789.

[960] Rodríguez Palop, 'Reconocimiento, defensa…' (n 902) 62.

[961] Aparicio Wilhelmi, 'El comú com a…' (n 918) 6. By way of clarification, I must qualify that here this author refers to the impulse of a global constitution-making process (first European and then global), although I believe that this argument becomes equally valid for national constitution-making processes.

[962] Nightingale, 'Commoning…' (n 854) 31.

[963] Jaria-Manzano, *La constitución del…* (n 140) 177; Peter Häberle, *Europäische Verfassungslehre* (Nomos 2016) 204ff.

Constitutional bodies would correspond to a provisional contract between free, equal, and evolving parties, never permanent. They should therefore be promoted according to a dynamic vision of society, open to possible reinterpretation. If law is conceived as open, mutable and episodic, then it can recognise mobile categories that adapt according to socio-environmental disruptive conflicts and counter-hegemonic demands. Here, rights would be configured as complex, changing and adaptive discursive strategies or tools for protecting vulnerability.[964] In this sense, a constitutionalism of interdependence, emphasising the idea of care and responsibility, rather than self-determination, would project itself onto the protection of the vulnerable, both within human relations and in relation to the Earth and its sentient and non-sentient beings. This implies a biocentric worldview that is less rights-based and more responsibility-based.

Aparicio-Wilhelmi calls "constitutionalism of the commons" the set of these processes that, taken together, succeed in constituting[965] and challenging some of the main myths of political modernity, starting with the notion of revolution, but also that of the nation and even of democracy.[966] This constitutionalism is thus committed to emphasising collective processes of political redefinition. And if, under this formulation, the new — and not so new— ways of relating to resources are useful for giving content to these mutable rights, resolving concrete conflicts, then they can eventually crystallise in constitutional documents, thus giving greater coherence to these rights.

Certainly, the interpretation burden of more open, fluid and fragmented constitutions would be much higher. Moreover, this proposal may seem to contradict legal certainty and the democratic principle, as it is understood in formal (parliamentary) democracy. But it need not be less democratic if the whole process of making, applying and interpreting the law becomes more participatory. If the question consists of *commoning* law, and in the first instance the constitutions, this opens up a space for the civil society to have a greater voice, a greater capacity to scrutinise and a greater capacity to interpret. They may be able to deliberate and modify the national and international legal frameworks that exclude so many marginalised communities from fundamental political spaces.[967]

Thus, an open community of different system operators would, through ongoing debate, create a space for creative controversy, by introducing significant nuances around key concepts.[968] Such a system should operate under forms of democracy based on the possibility of reaching agreement through discussion, rather than on the simple aggregation of preferences.[969] That is, a plurality of constitutional sources would develop and mutually fertilise each other, promoting the updating of the conflict and the adaptability of the constitution in an uncertain and evolving context, to move towards inclusive social responses and resilience strategies in the face of a global change. This

[964] Jaria-Manzano, 'La insolación de Mirèio…' (n 10) 474.

[965] Aparicio-Wilhelmi, 'El comú com a…' (n 918) 12.

[966] Aparicio-Wilhelmi, 'Más allá de lo constituido…' (n 924) 314.

[967] de Sousa Santos and Rodríguez-Garavito (eds.), *Law… Below* (n 943) 9.

[968] Jaria-Manzano, 'La constitución es un campo…' (n 968) 824.

[969] Rodríguez Palop, 'Reconocimiento, defensa… (n 902) 62.

means overcoming the idea of the constitution as a definitive solution. As opposed to a mechanical application of the law, this allows for the construction of a flexible legal framework that is sensitive to social reality and the environmental changes that the Anthropocene is bringing to planet Earth.

In short, the constitutionalism of the commons will have to strike a balance between radical democratic utopianism and the pragmatic limitations of current social conditions and conflicts.[970] It should therefore consider horizontal forms of regulation that strengthen the emancipation of state law. Giving citizens legal authority to organise themselves could give this new constitution-makers enough power to challenge global capital. In this system, the state still seems to be the entity best placed at the moment to protect, condition, frame and direct the right of commoners to govern life on the commons. That is, to provide an adequate regulatory ecosystem to unleash the emancipatory potential of the commons.[971]

4.4.6. Constitutive principles for the consolidation of common property regimes

In this sub-heading, I would like to set out some basic principles that can ensure the consolidation of common property regimes. These are general and fundamental ideas, not mutually exclusive. The aim of these criteria is therefore not to create a hegemonic system of validation, but to reach a consensus on the minimum operating principles for the production and reproduction of the commons. Certainly, the rules on common property in the civil codes —which perfectly illustrate the residues of modernity— look askance at the communal legal form, considering it to be something practically medieval, from another age. It is enough to read Article 1111 of the Italian Civil Code and Article 400 of the Spanish Civil Code to perceive the disapproval of this juridical form, considered almost as an archaic pathology to be cured as soon as possible:[972]

> *Art. 1111 Codice Civile Italiano. (Scioglimento della comunione). Ciascuno dei partecipanti può sempre domandare lo scioglimento della comunione. (…) Il patto di rimanere in comunione per un tempo non maggiore di dieci anni è valido e ha effetto anche per gli aventi causa dai partecipanti* (…) *Se gravi circostanze lo richiedono, l'autorità giudiziaria può ordinare lo scioglimento della comunione prima del tempo convenuto.*[973]

> *Art. 400 Código Civil Español. Ningún copropietario estará obligado a permanecer en la comunidad. Cada uno de ellos podrá pedir en cualquier tiempo que se divida la cosa común. Esto no obstante, será válido el pacto de conservar la cosa indivisa*

[970] Broumas, 'Movements, Constitutability…' (n 923) 25.

[971] ibid 25.

[972] Mattei, *Beni comuni…* (n 66) 48.

[973] (transl.) "Art. 1111 Italian Civil Code. (Dissolution of the community). Each of the participants may always request the dissolution of the community. (…) The agreement to remain in the community for a period of not more than ten years shall be valid and shall also have an effect for the successors in title of the participants (…) If serious circumstances so require, the judicial authority may order the dissolution of the community before the agreed time".

> *por tiempo determinado, que no exceda de diez años. Este plazo podrá prorrogarse por nueva convención.*[974]

Such rules may be acceptable, but they seem to ignore the fact that many assets are not easily divisible, or that when divided, they can have harmful ecological consequences. In addition, they emphasise the fungibility of the condition of the co-owner rather than the importance of preserving the thing and the harmony of the community. Indeed, the civil legislature often looks at the community with disfavour.[975] Community can sometimes be cumbersome, uneconomical and a source of dispute. But it can also be in the interests of the co-owners, more economically efficient and more flexible, and therefore more advantageous than individual ownership.

It seems, however, that these communal forms require stability and commitment on the part of the commoners, as well as the ability to negotiate when agreeing on the use and distribution of the common property. It is therefore appropriate to leave the value judgement on the advantages and disadvantages of the community to the commoners, and not to the legislative power.[976] The only thing that can be required of the legislature is to establish some very basic principles and means to avoid the possible disadvantages of the community and, if necessary, to provide tools for consensus building and negotiation among the members of the community. A system of rules that defines certain forms of action as permitted, others as prohibited and still others as obligations and responsibilities. There must also be sanctions for breaking these rules.

The rules of each community organisation may vary considerably from one organisation to another.[977] Each communal regime works according to the specific characteristics of the community and the resource, depending on the size of the group, its traditional culture, the most appropriate way to use and conserve the resource, the physical and climatic characteristics of the place where it is located, and so on. To add to the complexity, these communities are constantly evolving, and their rules may change over time. They operate on the basis of trial and error and the changing characteristics of the resource in often changing external conditions. Such political communities must therefore be subject to permanent and deliberate evaluation, constantly initiating and restarting the process of deliberation and negotiation and facilitating the construction of democratic citizenship.[978]

In any case, I find it very interesting to bring up some premises that Ostrom put forward at the end of the 1990s after studying several cases of communal organisations, which can serve as ground rules for the functioning of communal regimes. She defined eight

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974 (transl.) "Art. 400 Spanish Civil Code. No co-owner shall be required to remain in the community. Each of them may request at any time that the common thing be divided. Notwithstanding this, the agreement to keep the thing undivided for a determined time, not to exceed ten years, shall be valid. This period may be extended by a new convention".

975 Antonio Cicu, *Derecho de Sucesiones: Parte general* (Real Colegio de España en Bolonia 1964) 740 ff.

976 José María Miquel González, 'Título IV. De algunas propiedades especiales' in Manuel Albaladejo (dir), *Comentarios al Código Civil y Compilaciones Forales. Tomo V, Vol 2º: Artículos 392 a 429 del Código Civil y Ley sobre Propiedad Horizontal* (Edersa 1985).

977 Ostrom, 'Design Principles…' (n 915) 1.

978 Rodríguez Palop, 'Reconocimiento, defensa…' (n 902) 64.

principles, namely: 1) Clearly defined boundaries, closing off access to outsiders; 2) Congruence between the rules of appropriation (restricting time, place, technology or quantity of resources) and provision (requiring labour, materials, and/or money) and the local conditions of the particular place; 3) Collective choice agreements, allowing the majority of those affected by the operating rules to participate in their modification; 4) Supervision, through monitors who actively check the conditions of the communal scheme and the behaviour of users; 5) Graduated sanctions, depending on the severity and context of the infraction; 6) Mechanisms (local forums) for conflict resolution between users or between users and officials; 7) Recognition of the organisational rights of users to design their own institutions, unquestionable by external governmental authorities; and 8) Nested enterprises (smaller scale organisations tend to be nested within larger and larger organisations).[979]

Despite these keys, Ostrom acknowledged that some community-based regimes ultimately fail because they are unable to effectively address the problems they face over time or within a few years. Other initiatives fail without even giving resource users time to organise themselves. The reason is often a lack of adherence to many of the design principles. By studying different contexts, the Nobel laureate identified eight possible threats to community governance. These are: 1) The Blueprint Thinking trap, i.e. forecasting problems on the basis of data from pilot projects and other studies that may differ from the reality of the organisation being created; 2) Reliance on voting rules (simple majority or unanimity) as the only decision-making mechanism for collective decisions; 3) Rapid exogenous changes (in technology, human, animal or plant populations, factor availability, substitution of the relative importance of monetary transactions, heterogeneity of participants).[980]

Also included are: 4) Failure to transmit from one generation to the next the operating principles on which community governance is based, due to rapid changes in population or culture; 5) Too frequent recourse to external sources of aid, from outside authorities or donors, with the risk of their being diverted for individual use by politicians or contractors; 6) International aid involving the implementation of technical projects that do not take into account indigenous knowledge and institutions; 7) Corruption and other forms of opportunistic behaviour; 8) Lack of large-scale institutional arrangements for the collection, aggregation and dissemination of reliable information; fair and low-cost conflict resolution mechanisms; education and extension services; and relief services when natural disasters or other major problems occur at the local level.[981]

While acknowledging that there are no infallible mechanisms against these threats, Ostrom identified three methods to consider: 1) the creation of associations of community-governed entities, such as federations; 2) comparative institutional research that provides a more effective knowledge base on design and operating principles as well as risks; and 3) the development of more effective high school, college and university

[979] Ostrom, 'Design Principles…' (n 915) 1-6.

[980] ibid 7-9.

[981] ibid 9-12.

courses on local governance, rather than national governance.[982] The latter is, in my view, the most important method. As always, a house cannot be built from the roof up, so it is essential to educate people from the outset on the principles of solidarity, cooperation and care. Making children and young people aware of their interdependence, their eco-dependence, and their ability to cooperate in society, can lead to global changes.

4.5. Going beyond: reproduction and care in the light of the commons

4.5.1. Life at the centre

Following the above conceptual lines, I would not like to end this chapter without recalling one essential point: the impossibility of reconstructing the commons without considering reproductive and care work as the fundamental element of the transition to more resilient and equitable societies. Reproductive work, as the material basis of human life and the first terrain on which human beings can put their capacity for self-government into practice, is the "ground zero of the revolution".[983] Indeed, the "forces of reproduction", as Barca calls them, are what keep the world alive.[984] If we are aiming for a post-Anthropocene paradigm shift, I am convinced, like many feminists, of the need to resituate reproduction as a central element of the commons, over which there would be no dominant relationship but a duty of care.[985] At the same time, the scenario of the commons seems to me to be potentially fertile ground, ideal for cultivating such a transformation of the reproductive sphere. In short, commons and care seem to be a perfect match.

As I argued in the first chapter, women's historical and still current reproductive role has made them highly dependent on access to common natural resources, the privatisation of which has severely penalised them. The great expropriations of common spaces through the enclosures in Western Europe between the 15th and 19th centuries were decisive in ratifying the modern separation between production and reproduction. At the same time, the occupation of the Americas by imperialism and colonialism largely functioned as the original pattern of accumulation that gave rise to the differentiation between capital and labour. It consolidated a framework for appropriation (of land), domination (of labour) and exploitation (of resources). In short, it inaugurated the process of capitalist accumulation.[986] This division contributed to the confinement of women to the family sphere and reinforced the system of patriarchal domination. It is precisely the traditional role of women that has made them very aware of the consequences of the plundering of the commons and the impossibility of continuing to feed a capitalist system, and has made them strongly committed to its defence. It is no

[982] ibid 12-13.

[983] Federici, *Re-enchanting the world…* (n 155) 196. Vid. Also: Silvia Federici, *Revolution at Point Zero: Housework, Reproduction, and Feminist Struggle* (2nd edn, PM Press 2020).

[984] Vid. Barca, *Forces of Reproduction…* (n 29).

[985] Jaria-Manzano, *La Constitución del Antropoceno…* (n 140) 345.

[986] Jordi Jaria-Manzano, 'Di-vision: The making of the "Anthropos" and the origins of the Anthropocene' (2021) 11 (1) Oñati Socio-Legal Studies 160.

coincidence, then, that many feminist reflections and debates are currently attempting to rethink the work of social reproduction in a more communitarian sense.

Indeed, conflicts and resistance movements over the commons have often intersected with gendered empowerment processes and other social conflicts.[987] Still today, environmental movements and struggles against land dispossession, for seed, water or food sovereignty are on many occasions headed by women.[988] Moreover, with the strength of their street mobilisation and their political organisation in domestic territories, they challenge both the romanticisation of the home and its definition in terms of the nuclear heterosexual family mandate. At the same time as denouncing the family home as an unsafe space for women, lesbians, gays, transvestites, and transsexuals, they are constructing a different experience of occupying space, transforming the uses of streets and cities.[989]

Their gendered social roles, economic positions and experience of paid and unpaid work responsibilities are logical reasons for this leadership.[990] At the global level, feminist climate groups, among others, include the Women's Environmental Network, Idle No More, Women's Earth and Climate Action Network, Via Campesina, Women's Environment and Development Network, Our Land Our Business, System Change Not Climate Change, and Gender CC-Women for Climate Justice.[991] No less important, local movements are also fuelled by women's leadership. Many girls, adolescents and adult women around the world, even elderly women,[992] according to their environmental and social realities, are putting their bodies on the front line to defend the commons, community life, respect for resource limits and the non-human living world.

Women are carrying out all these ecofeminist struggles from below but with determination, resolutely, courageously crossing the boundaries that have ignored them for so long. At the same time, they are making visible the other subjects that reproduce humanity by caring for the biophysical environment that makes life itself possible. Moreover, many grassroots women's groups have succeeded in creating entirely new structures at the community level that are both innovative and protective of women's

[987] Joan Martínez-Alier et al, (2016) 'Is there a global environmental justice movement?' 43 (3) The Journal of Peasant Studies 732, 737.

[988] Vandana Shiva, *The Violence of the Green Revolution: Third World Agriculture, Ecology, and Politics* (University Press of Kentucky 2016) 191; Federici, *Re-enchanting the world*... (n 155) 89.

[989] Cavallero and Gago, 'A feminist perspective…' (n 173).

[990] Patricia E. (Ellie) Perkins, '5. Ecofeminism, Commons, and Climate Justice' in Ana Isla (ed), *Climate Chaos. Ecofeminism and the Land Question* (Inanna Publications & Education Inc. 2019) 96.

[991] Cristina Awadalia et al., 'Climate Change and Feminist Environmentalisms: Closing Remarks' *Feminist Wire* (1 May 2015) <t.ly/iOOuK> accessed 26 April 2023.

[992] The struggle of older women against climate change is particularly paradigmatic and encouraging. For example, in the *KlimaSeniorinnen* case, a group of more than 2,000 Swiss women over the age of 65 brought the first climate litigation to the European Court of Human Rights, after suing the Swiss government in 2016 on the grounds that their lives and health were threatened by heatwaves caused by climate change. Vid. Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (European Court of Human Rights). Application no. 53600/20.

rights in practice. For example, some organisations are training community watchdogs and paralegals to protect women's rights.[993]

As a result, environmental and climate justice movements often use organising and activist techniques developed in feminist movements, such as consciousness-raising, unmasking patriarchy and contextual argumentation, i.e., grounding movement theorising in the lived experiences (situated knowledge) of women rather than in abstractions. They rely on respectful communication, peaceful but disobedient conflict resolution, shared provisioning, the transmission of ecological knowledge, and inspiration from ecofeminist and indigenous traditions. The activism of these women empowers themselves and succeeds in involving, by extension, other women, through the dissemination of knowledge and shared practice.

Some of the alternative practices they have undertaken include the creation of seed networks, time banks, urban food provision (community and rooftop gardens, urban fruit harvesting, local and slow food movements, community shared agriculture, agroecological consumption groups, collective food box programs, etc., such as the Guerrilla Gardening)[994], workshops on sustainable production, bike and car sharing, co-operative housing, neighbourhood assemblies, tool banks, skill sharing and repair workshops, freecycle goods exchanges, urban exploratory marches, and shared parenting networks.[995] This range of practices, which often require active and shared participation and the occupation of public spaces —both urban and rural— form a web of community ties of anti-capitalist struggle.[996] Without a centralised strategy or plan, people around the world are creating collaborative ways of meeting their basic needs that are much closer to the commons than to impersonal, commercialised private property.[997]

In any case, these examples must be treated with caution. Neither does the eventual end of capitalism guarantee the end of sexual (and racial) oppression, nor does socialist ownership of the means of production automatically ensure the abolition of discrimination, as communist experiences have shown. All property regimes may have a corresponding sexual order and division of labour, including common property regimes, if there is no awareness and no attempt to reverse the patriarchal status quo. In the late 19th century, during the expansion of industrialisation and the rise of the labour and Marxist movements, socialist feminism focused on working-class women and their working conditions, and on the inclusion of all women in the labour market as a way of becoming independent of men. Socialist feminism argued that women were oppressed not only by patriarchy but also by capitalism, and that the two were intimately linked. It held that women were a collective as such, a social class, and postulated that class society

[993] United Nations-Women and United Nations-Human Rights*, Realizing Women's Rights to Land and Other Productive Resources* (2nd edn, 2020) 52.

[994] Guerrilla gardening is the act of growing food, plants or flowers in neglected spaces where the gardeners do not have the legal rights to cultivate, such as abandoned sites, areas that are not being cared for, or private property. 'Guerrilla' refers to the lack of authorisation to grow in a given space—and this makes guerrilla gardening illegal in most cases. Vid. Guerrilla Gardening, 2023 <t.ly/EiQV> accessed 24 April 2023.

[995] Some of these (inspiring) examples can be found in: Friends of the Earth, *Why Women Will Save the Planet* (Zed Books 2015).

[996] Lloredo Alix, 'Bienes comunes' (n 838) 223.

[997] Perkins, '5. Ecofeminism, Commons…' (n 990) 97.

and gender differences had to be eradicated so that women could freely determine the conditions of their lives, thereby abolishing patriarchal capitalism.[998]

Nevertheless, it has been shown that historically no social class has been free from gender hierarchies, penetrating also into the family relations of the proletariat. Moreover, not every socialist model can put an end to the subordination of women, since the question of women has always been postponed by socialism. In the 60s and 70s of the 20th century, socialist feminisms reemerged in the United States, Europe and Latin America, posing a question mark over how the traditional left and the so-called 'new left' address "the women's issue" as something secondary. The 21st century has also seen a resurgence of socialist theories and demands for a new feminism that links the contemporary needs of women and subaltern identities with the need for the communalisation of resources and spaces.

All in all, there is no doubt that if the commons are emerging as one of the central alternatives to neoliberalism, they will necessarily have to go hand in hand with the feminist and environmental movements. The emancipatory potential of the commons makes it possible to redefine collective needs, while the emancipatory potential of feminist theories and practices, and especially ecofeminisms, makes it possible to redefine the productive and reproductive spaces in which these commons reside. And while there is a great diversity of theories and movements to be celebrated, what they all have in common is the idea that the social reproduction of community is not —or should not be— appropriable. For life is not a property.

4.5.2. Ecofeminising law

Given all this, as a legal researcher I cannot help but wonder about the implications of these ecofeminist and communitarian theories and practices for the law. If such arguments are increasingly permeating all disciplines —and this is one of the great virtues of the feminist movement— from politics to economics, it seems feasible to apply these perspectives to the discipline of law as well. This is what I have dubbed *ecofeminising law*.[999] Not in the sense of making it greener or more feminine, but in the sense of making it fully ecofeminist. Legal systems need not only the integration of the gender perspective and the effective deployment of the ecological dimension, but a fully integrated vision of both, i.e., a constructivist ecofeminist approach. Ecofeminism thus offers a perspective that links gender to human relations with the natural world. It explores the connections between the subordination of nature and the oppression of women, such as the aforementioned view of both women and nature as property.

This requires a rights-based approach that puts life at the centre, above all a life in common, and therefore, care work as an essential element of any legal system. Law as a

[998] Rosemarie Tong, *Feminist Thought: A More Comprehensive Introduction* (Routledge 2018) 125.

[999] For a more detailed discussion of this proposal, see: Clara Esteve Jordà, 'Ecofeminising law: Some notions for rethinking law towards equity and sustainability', in Goran Đurđević and Suzana Marjanić (eds), *Ecofeminism on the Edge* (Emerald 2023). However, at the end of this thesis, I prefer to speak of resilience rather than sustainability, as the former term better reflects the reality of the Anthropocene and is part of a vision of no return, of adaptation to the new climate regime, and not so much a utopian vision of a return to pre-industrial scenarios.

whole must recognise that the planet can only be sustained where care for others and for nature is the basis, where there is still a minimal awareness of the vessel that sustains the human being. Such an approach would mean, first and foremost, the constitutional recognition not only of eco-dependency, but also of inter- or co-dependency and of the inherent vulnerability as social beings. That is, the recognition of the right to care throughout life as a constitutional right and the duty of every human being to show solidarity and care towards others. The observance of this reproductive sphere would include, for instance, the protection of sex-affective and reproductive rights, including the right to self-determination of the body and sexual integrity.

It would be dangerously simplistic, however, to attempt to translate a single ecofeminist vision into law. Certainly, it seems unacceptable to assume that a homogeneous, one-sided perspective can be the solution to building an adequate response to the challenges posed by planetary transformation seems unacceptable. Ecofeminism is not an abstract or academic project, but something much more transversal. It is the plurality of visions, movements and everyday practices, often from the margins, that make real transformations possible. *Ecofeminising law,* therefore, means starting by listening to the diversity of these hitherto silenced voices, their experiences and their needs. But I think it is right to assert that the revolution of the commons will be ecofeminist or it will not be. I will now briefly give some examples of what an ecofeminisation of the law would entail.

4.5.2.1. Ecofeminist jurisprudence: Narrating other stories

As exposed in Chapter 2, property laws and customary norms and practices regarding ownership are often counterproductive for women, other subaltern identities, non-humans and nature itself. Still today, many laws that claim to promote gender equality do not take into account the capitalist system, which leaves women with burdens that do not allow them to break through the *glass ceiling* and the *sticky floor*, often leaving them subordinate to male figures, subject to various forms of violence and care responsibilities, and without control over resources. The tendency to view land as a commodity helped foster the abstraction of landed property as a disembodied idea in legal thinking.[1000]

Conventional legal approaches to nature, such as property law, have proved inadequate: land has been seen as an abstract entity that produces economic value to be used for anthropocentric purposes. Human activities have been seen as operating outside of nature, and parcels of land have been used without regard to their location and function within a particular ecosystem.[1001] Such a path has led to the current conflicts of resource exploitation and body oppression. In this context, and by extension, modernity's jurisprudence and legal institutions have constantly negotiated what counts as 'social

[1000] Eric T. Freyfogle, 'The Owning and Taking of Sensitive Lands' (1995) 43 (1) UCLA Law Review 97.

[1001] Chaone Mallory, 'Toward an Ecofeminist Environmental Jurisprudence: Nature, Law, and Gender' (Master Thesis, Philosophy and Religious Studies, University of North Texas 1999), 88 <https://shorturl.at/dEL06> accessed 18 April 2023.

reality', pushing the world into the Anthropocene, by attempting to dialectically impose dominance and control over nature and women.[1002]

It was also underlined how the law is still interpreted today by courts with a lack of gender and ecological awareness, under masculine values such as honour, discipline, culture, tradition, and so on.[1003] Not only because there is still a lack of women and subaltern identities at the highest levels of the courts, but also because there is a lack of education and training on these issues. Starting with law faculties, which have only recently begun to rectify this by embracing interdisciplinarity and striving to include environmental and gender perspectives in their curricula and syllabi in a cross-cutting way.

Throughout this thesis, I have insisted on the ductility and malleability of law. In societies and environments as dynamic as today's, laws must be open to change for the sake of efficiency, resilience and equity. Their application and interpretation, while maintaining objectivity and impartiality, are subject to such social and environmental changes. At a time of such drastic change, this will require a dynamic legal system that adapts to the needs of the times. Fortunately, there is hope. Recently, some legal professionals, from judges and lawyers to legal scholars, have begun to recognise the need for a legal system that is just for all the diverse segments of the population and for nature, through a combined project of environmental and feminist jurisprudence capable of deconstructing some of the ways in which the eco-social crisis is perpetuated by social institutions.[1004]

This is where the potential of 'ecofeminist jurisprudence' comes in. This concept could be described as understanding and interpreting law according to the principles of eco-dependency and interdependency, through recognising the non-neutrality of law, overcoming narratives of intra-human and intra-species hierarchies, and listening to the hitherto silenced and oppressed voices in the legal spheres. It considers that for social metabolism to be equitable, sustainable and resilient, law must emphasise values such as care, empathy, solidarity, social bonds, sex-affective needs and the delegation of power, rather than possessive individualism, private property and the self.

Ecofeminist jurisprudence seeks to explore alternative methods of legal reasoning that challenge the classical liberal view of the individual as a radically isolated, discrete and autonomous being. It sees the law not as an instrument of social control and repression, but as a means of ensuring the coexistence and cooperative exchange between beings with different interests and experiences, while respecting and valuing these differences.

[1002] Pratyush Pandey and Sarita Pandey, 'Ecofeminist Jurisprudence: Nature, Gender and Law' (2022) 24 (36) Satraachee 25.

[1003] This is particularly evident in common law countries through the inescapability of the jurisprudential doctrine of stare decisis —the obligation to act in a manner consistent with past decisions— by which every judge is presumed to be bound.

[1004] Vid. for instance: Mallory, 'Toward an Ecofeminist…' (n 1001); Pandey and Pandey, 'Ecofeminist Jurisprudence…' (n 1002); Jonathan Alexis Picado, 'Mother Nature, Lady Justice: Ecofeminism And Judicial Decision-Making' (Master Thesis in Political Science, Department of Political Science, University of Texas at El Paso, May 2020) <t.ly/YXZL> accessed 20 April 2023; Aga Natalis, Ani Purwanti and Teddy Asmara, 'Anthropocentrism vs ecofeminism: How should modern environmental law be reformed?' (2023) 13 (1) Sortuz. Oñati Journal of Emergent Socio-legal Studies 38.

In the eyes of ecofeminist jurisprudence, equality is not about treating everyone equally in all respects, but about treating unequal people unequally to give them equal opportunities, rights and quality of life, towards a society free from all kinds of domination, subjugation and exploitation.

Ecofeminist jurisprudence promotes radical, transformative and respectful ways of inhabiting the world. It retells the story of human beings in the natural world through narratives that acknowledge their embeddedness in nature.[1005] This makes it possible to destabilise the fixed definition of what counts as reality offered by modernity, revealing that law is made up of invented meanings, language games and power interests, and that no one can claim a superior moral authority for their actions and beliefs, not even in the realm of property. This generates the possibility of new histories not strangled by the same logics of appropriation and domination, not innocent either, but well aware of the mechanisms of power and desire.[1006]

Ultimately, this will require deconstructing the old anthropocentric legal narratives and inventing new ones that acknowledge human dependence on the natural world and on the rest of society. In such narratives, humanity will not conquer or negotiate, but will converse with the Earth as agent and subject, leaving open the possibility of continuing the relationship with natural beings in an evolving environment.[1007] This framework is very important for legal decision-making. Interpreting reality means understanding gender, race, identity, etc., so it is important to insist on the idea that courts should include a reasonably diverse range of legal actors.

4.5.2.2. Commoning care: Beyond the GDP

To begin with, one of the issues that urgently needs to be put on the agenda of the states and society at large is the question of care. It has been seen how the capitalist system has tried to sell the fallacy of individual autonomy under which everyone must be able to look after themselves. However, once this deception has been overcome, there is an urgent need to develop legal instruments that guarantee everyone the right to be cared for, but also the duty to care. In this way, care work should become a public-communitarian issue. Indeed, what happens in households is also political. It is the responsibility of the state and society to ensure the well-being of their fellow citizens.

On the one hand, the state should provide the means for everyone to care. And this implies ensuring that this *job* does not always fall to the same people —traditionally mothers and wives— but is shared among all individuals in society with the capacity to do so. For example, a legal tool should aim to guarantee time for reproductive tasks. It may be useful to reduce working hours (paid working time, traditionally considered as production time) without reducing wages, in order to be able to carry out these tasks, in a dignified manner. Indeed, cooking, washing, cleaning, shopping, farming, dressing, bathing, satisfying love and sex-affective needs, teaching, managing... All these tasks are

[1005] Mallory, 'Toward an Ecofeminist... ' (n 1001) 90.

[1006] Donna Haraway, *Primate Visions. Gender, Race and Nature in the World of Modern Science* (Routledge 1989) 288.

[1007] ibid 303.

not recognised by the GDP of states, nor by society in general, and often not even by family members themselves. But they are all time-consuming things that must be juggled with a full-time job to keep workers fit and able to work in the workplace day in and day out.

It is probably not so much a question of this work being paid for with money —although that could be an option— but of distributing it better. It should not only be women —and above all migrant women, in Western countries— who continue to carry out care work, but it should be done jointly. It would therefore also be a question of *commoning* care, of making it a shared task. Possibly, we should also change the perspective that only parents care within the logic of the nuclear family and go further by creating spaces for collective or shared care, which can be liberating and empowering. For care is not a private matter, but a common one. It does not seem far-fetched, therefore, to think of new forms of social links and cooperation in the reproduction of everyday life that are more open, visible, committed and supportive. Speaking in collective terms places the responsibility not only on the state —which indeed it does have— but on the whole community.

In this sense, the state should promote these common care spaces, by facilitating the meeting between caregivers and care recipients. A public system needs to be designed that allows for caring and being cared for, that enables *commoning* care and care spaces. One that reveals the fragility of bodies, the vital physical needs and the emotionality that capitalist patriarchy has appropriated. To strengthen these bottom-up community organisations, states should be asked to develop (more) policies to break down the sexual division of labour inside and outside the home. More investment in public care centres, community laundries and canteens seem to be good policies in this direction. Shared care leave should also be encouraged, without sanctions. Legal tools could even be developed to make carers visible and provide them with special benefits.

These spaces, once created, can become spaces for doing, for continuing to common and grow communities around the commons, enriching society as a whole. We will only be able to move towards resilient and equitable societies if we are all cared for. One can even imagine a utopia in which many commodified care tasks, such as sexual, reproductive and affective services, often in exchange for black and underpaid money, would cease to exist, at least as they are currently conceived. Such an approach would not only liberate women from oppression, especially racialised women, but also pave the way towards the emancipation of other subaltern identities, such as the LGTBIAQ+ collective, especially trans people.

4.5.2.3. Ecofeminist urbanism: Recognising a truly universal right to the city

In the first chapter, I pointed out how gender roles affect the construction of the urban space and its potential for transformation. Indeed, androcentrism has the virtue of segregating the majority into minorities and making the life of a minority universal.[1008] Moreover, cities are oriented towards the economic logic, under market and speculative

[1008] Oihane Ruiz Menéndez, '¿Qué pasa con la casa? (y las violencias contra mujeres y niñas)' *Pikara Magazine* (16 June 2021) <t.ly/5MzE> accessed 29 April 2023.

parameters that promote the unbridled consumption of things that people do not even need. The supposedly universal and hegemonic urbanism of the public sphere, the polis, is a patriarchal and capitalist project that usually contains segregating and elitist urban proposals. What is more, it is not only the progressive dehumanisation of urban life and the difficulty of meeting the needs and care of city dwellers, but also the fact that most cities today are metabolically unsustainable from an environmental and ecological point of view.[1009]

The reality is that the city is not only what materialises in the urban context. The city is in fact a changing construct, the fruit of an urbanity that is constituted as a social pact, built on the basis of constant conflict.[1010] In addition to the provision of legal infrastructures so that domestic work is valued and supported, the ecofeminisation of law implies a rethinking of urban law in terms of sustainability and redistribution of access to public space, and more precisely, a different way of creating public open spaces that consider care, education, communication, health, safety and work as core values. The feminist proposal for the city is not partial, it does not speak of a women's city, but of a radical transformation of the structure of cities.[1011] It addresses sexual difference and intersectionality in the urban space to create an equitable and sustainable experience of the city, using feminist and ecocentric qualitative approaches, through participatory analysis and design of urban open spaces that create community.

Ecofeminist urbanism shifts the focus, making the urban space less resource-consuming and reorganising cities according to the "real" needs of everyday life that do enable care for self and others: it is a caring city. The ecofeminist city makes visible the conflicts of gender, class, race, etc., and intersects them with health problems, the rights of children and the elderly, care and dependency. It takes into account the diversity of uses and rhythms, the different experiences and coexistences, and sees citizens as active subjects, not as consumers.[1012] The ecofeminist city is resilient and sustainable: it adapts to environmental changes and the effects of climate change, taking into account the gradual rise in temperatures, the progressive decrease in rainfall and the heat island phenomenon.[1013]

These urban spaces therefore revolve around health, education, sustainable and local consumption (as well as self-consumption). They aim to reintegrate working spaces into residential areas, to bring care spaces —nurseries, residential homes, day-care centres, etc.— closer to everyday life, to facilitate proximity between home and work, to encourage teleworking and, of course, to provide economic incentives for the use of public transport and walking and cycling routes. Ecofeminist urbanism also seeks to increase the stock of social housing. Instead of constructing new buildings, it seeks to rehabilitate and transform empty and/or disused public buildings and facilities, by rethinking their

[1009] Blanca Bayas Fernández and Joana Bregolat i Campos, *Ecofeminist proposals for reimagining the city. Public and community paths* (October 2021), Observatori del Deute en la Globalització (ODG) 30.

[1010] Oihane Ruiz Menéndez, 'Mujer, urbanismo y ecología' *El Salto* (9 July 2018) <t.ly/a_9u> accessed 29 April 2023.

[1011] ibid.

[1012] ibid.

[1013] Bayas Fernández and Bregolat i Campos, *Ecofeminist proposals*... (n 1009) 32.

functionalities and adapting them to the needs of citizens. To this end, it is protecting nature by extending green and wooded areas throughout the city and considering the possibility of building climatic and care shelters, where residents can seek refuge in times of heat, severe storms, etc.[1014]

As Lefebvre already stated, the right to the city *ne peut se formuler que comme 'droit à la vie urbaine', transformée, renouvelée* [can only be formulated as a transformed and renewed right to urban life].[1015] I believe that this statement makes more sense today than ever before. It does not matter whether the urban fabric is a legacy of peasant life; what matters is a meeting place that gives priority to the value of use and finds its morphological basis and its practical-material realisation. The right to the city manifests itself as a higher form of rights: the right to freedom, to individualisation in socialisation, to habitat and to inhabit. The right to work, to participation and to appropriation, clearly distinct from the right to property, are implicit in the right to the city. These rights define civilisation; they gradually become customary before being inscribed in formalised codes.[1016] The right to the city is the right to urban life, to a renewed centrality, to places for meetings and exchanges, to rhythms of life and uses of time that allow the full and complete use of these moments and places, etc.[1017]

Furthermore, a right to the city aims not only to satisfy basic needs, but also to be able to guarantee the urban space as a whole, to rebuild community and identity ties, and to promote social relations and cultural exchange.[1018] Urban law from an ecofeminist perspective must question the city in order to reverse the processes of accumulation, segregation, expulsion and pollution that take place within it. It implies placing community participation at the centre, incorporating the diversity of people's experiences and needs into urban planning processes and projects. Therefore, the right to the city must include spaces for meeting and exchange and mutual assistance that create community, such as halls, cafés, restaurants, community centres, etc.

Moreover, an ecofeminist city is made up of urban spaces free of violence. Women and dissident identities (such as indigenous, racialised and LGTBIAQ+, among others) are easy targets for violence and harassment and tend to feel less safe on the streets.[1019] Their rights to life, to dignity, to their own bodies and to a safe and liveable city are under constant threat. Guaranteeing the universal right to the city means diagnosing perceptions of safety and developing laws and policies to prevent and respond to sexual

[1014] ibid 33.

[1015] Henri Lefebvre*, Le droit à la ville suivi de Espace et politique* (Point Seuil 1974) 121.

[1016] ibid 146.

[1017] ibid 146.

[1018] Paula Pérez Sanz, 'Reformulando la noción de "Derecho a la Ciudad" desde una perspectiva feminista' (2013) 5 Encrucijadas. Revista Crítica de Ciencias Sociales 93.

[1019] Vid. for example, some reports on the perceptions of safety by women from different parts of the world, through case studies: Ariagor Manuel Almanza Avendaño, Martha Romero-Mendoza, Anel Hortensia Gómez San Luis, 'From harassment to disappearance: Young women's feelings of insecurity in public spaces' (2022) 17 (9) PLoS ONE 1; Vanessa Azevedo et al, 'Do you Feel Safe in the Urban Space? From Perceptions to Associated Variables' (2021) 31 (1) Anuario de Psicología Jurídica 75; Paulina Polko and Kinga Kimic, 'Gender as a factor differentiating the perceptions of safety in urban parks' (2022) 13 (3) Ain Shams Engineering Journal 1.

harassment. For instance, cities need to strengthen their response services to male violence to ensure agile and comprehensive responses (with psychological, economic, individual and group support for survivors of violence) through specialised services and resources. In addition to emergency response, prevention is equally important. Cities need to be well-lit, connected, integrated, provide adequate and sufficient transport between neighbourhoods, and ultimately be safe places for all citizens.

There is also an urgent need to promote awareness and non-sexist education through prevention and advocacy campaigns against gender-based violence.[1020] Non-sexist education and awareness-raising of patriarchal behaviour is urgently needed not only in nursery and primary schools, but also in high schools, universities, workplaces and leisure areas. In any case, in order to implement better laws and protocols against sexual harassment at the national or local level (e.g., through new or revised local ordinances, state laws, etc.), there must be adequate budget and resource allocation for law implementation and enforcement.[1021]

However, each city and each neighbourhood have its own reality. This urban redefinition must always be adapted to each territorial context and to each population, ensuring that public services, shops and transport are safe, universal and varied, at any time of day and regardless of the age, origin, functional diversity, family type and dependencies of each citizen.[1022] For this reason, it is important to carry out a prior diagnosis of each city, town and neighbourhood in order to find out from its inhabitants the challenges and needs, the actors and the proposals and alternatives that emerge outside the public network.[1023]

4.5.2.4. Joint land titling: Shared work, ergo shared rights

Turning now to rural areas, it was already pointed out how land is overwhelmingly owned by men worldwide, and how the small percentage of land owned by women is often of poorer quality. This perpetuates women's subordinate position and makes them more vulnerable. A priori, it would seem that the most viable option against these discriminatory situations would be to make legal efforts to grant women independent rights to land, i.e., to guarantee their individual private ownership of land, as proposed by women's rights conventions,[1024] as well as by some ecofeminists in the 1980s and 1990s, on the basis of the alleged "universality" of human rights.[1025]

[1020] Bayas Fernández and Bregolat i Campos, *Ecofeminist proposals…* (n 1009) 14.

[1021] UN-WOMEN, *Safe Cities and Safe Public Spaces for Women and Girls Global Flagship Initiative: International Compendium of Practices* (2019), 12.

[1022] Efraín Foglia 'Urbanismo feminista y Col·lectiu Punt 6' (2022) 121 COMeIN: Revista de los Estudios de Ciencias de la Información y de la Comunicación; Col·lectiu punt 6, *Urbanismo feminista. Por una transformación radical de los espacios de vida* (Virus 2019) 78.

[1023] Bayas Fernández and Bregolat i Campos, *Ecofeminist proposals…* (n 1009) 14.

[1024] I refer in particular to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 (CEDAW) (art. 14.1.g), the Beijing Declaration and Platform for Action (1995), and the Political Declaration and Outcome of Beijing +5 (2000).

[1025] For the case of South Asia, vid. Bina Agarwal, 'Gender and command over property: A critical gap in economic analysis and policy in South Asia' (1994) 22 (10) World Development 1455; Bina Agarwal, 'Gender and Land Rights' (1996) 31 (23) Economic and Political Weekly 1420. Agarwal later qualified this postulate,

Advocating laws that reinforce private property and abolish communal tenure implies supporting the same liberalisation programmes that have been used to transfer land to foreign investors, especially in Africa, South Asia and Latin America, and that have dispossessed millions of peasants, many of them women.[1026] It also involves adopting the language of the international financial institutions and erasing the question of land redistribution. It implies, also in Europe and North America, adhering to the hyper-sophisticated capitalist system of private property that allows land grabbing and its disproportionate exploitation that depletes resources. All this when the general characteristic is that land is limited.

The vision of women's individual ownership of resources also assumes that they are all middle or upper class, educated, and have enough money to acquire land, pay the taxes resulting from the acquisition of legal titles, and invest in agricultural businesses, whereas in many parts of the world, the land is the main means of production and livelihood for the poorest women.[1027] Thus, a privatising legal reform does not necessarily improve the socio-economic position of rural women, when land is scarce and only the rich can buy it. Not to mention that, in addition to perpetuating capitalism, these eventual legal reforms will not necessarily reduce patriarchal power relations if society is not re-educated and women are not included in the decision-making processes of these areas.

Here is the paradox: how are women supposed to acquire more land individually when they do not even have communal land left to cultivate due to its progressive destruction by neoliberal market competition? My intuition is closer to the arguments of Federici, Deere or León, who argue that joint titling of land and other assets such as housing is a crucial mechanism for women's inclusion in property ownership.[1028] This implies the transformation of individual ownership of farms into shared ownership, based on the participation of two or more persons in the management and economic risk of a farm, who in turn have the right to use and enjoy all or part of the means of production of the farm.[1029] Co-ownership of land in the broadest sense, is considered to be any situation where several natural and/or legal persons share an agricultural or livestock holding. These persons are considered co-owners of the holding regardless of who manages it, although for practical purposes of aid, taxation, etc., the share of each co-owner in the management and results of the holding must be clearly defined.

arguing that while women's individual rights remained important, it could be beneficial for women to work collectively as a group to cultivate purchased or leased land. In this sense, vid. Bina Agarwal, 'Gender and Land Rights Revisited: Exploring New Prospects via the State, Family and Market' (2003) 3 (1) Journal of Agrarian Change 184. For the case of Africa, vid. Aili Mari Tripp, 'Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda' (2001) 7 (4) African Studies Quarterly 1.

[1026] Federici, 'Women, Land Struggles…' (n 289) 48.

[1027] Ambreena S. Manji, *The politics of land reform in Africa* (Zed Books 2006) 66.

[1028] Vid. Federici, 'Women, Land Struggles…' (n 289) 47 ff; Carmen Diana Deere and Magdalena León, *Empowering Women. Land and Property Rights in Latin America* (University of Pittsburgh Press 2001) 8.

[1029] María Dolores Cabello Fernández, 'La titularidad compartida de las explotaciones agrarias como medida «bidireccional»' (2018) 66 (1) Estudios De Deusto 277.

This was the reform implemented by the Spanish government in 2011, through Law 35/2011, of 4 October, on Shared Ownership of Agricultural Holdings.[1030] The explanatory memorandum of the Spanish law states that

> *En el ámbito de la explotación familiar del medio rural, son muchas las mujeres que comparten con los hombres las tareas agrarias, asumiendo buena parte de las mismas y aportando tanto bienes como trabajo. Sin embargo, en la mayoría de los casos, figura sólo el hombre como titular de la explotación agraria, lo que dificulta que se valore adecuadamente la participación de la mujer en los derechos y obligaciones derivados de la gestión de dicha explotación, en condiciones de igualdad. En España, más del 70 por ciento de los titulares de explotación agraria son hombres. (…) Las mujeres rurales, hoy todavía a pesar de los avances en igualdad, siguen siendo vulnerables e invisibles; y sin embargo ellas son la base del mantenimiento, conservación y desarrollo de las áreas rurales en términos económicos, sociales, y culturales.*[1031]

For this reason, Article 1 of the Law 35/2011 establishes as an objective "*la regulación de la titularidad compartida de las explotaciones agrarias con el fin de promover y favorecer la igualdad real y efectiva de las mujeres en el medio rural, a través del reconocimiento jurídico y económico de su participación en la actividad agraria* [to promote and favour the real and effective equality of women in rural areas, through the legal and economic recognition of their participation in agricultural activity]". This law was thus intended to change agricultural structures so that rural women would enjoy effective equality of rights with men, to remove formal and material barriers, and to increase their self-confidence and visibility.

However, a subsequent report seven years later highlighted the lack of regulatory development and implementation of the register, an uneven distribution of registrations among Spanish regions, low dissemination by public administrations and the complexity of processing.[1032] This implies that this type of legislation should always be accompanied by good dissemination and monitoring, publicity campaigns, summary and didactic manuals of these laws (published in 2018 in the case of the Spanish law), simplification of procedures, coordination between administrations, etc.[1033]

4.5.2.5. Universal Basic Income: A minimum of real freedom for all

On another line, I have already raised the possibility that a system based on common property as the main form of ownership could be combined with other property systems. By its very nature, not all property can be *commonised*, so the law must act accordingly.

[1030] Ley 35/2011, de 4 de octubre, sobre titularidad compartida de las explotaciones agrarias.

[1031] (transl.) "In rural family farms, there are many women who share agricultural tasks with men, taking on a large part of them and contributing both goods and labour. However, in most cases, only the man is listed as the owner of the farm, which makes it difficult for women's participation in the rights and obligations derived from the management of the farm to be properly valued, under equal conditions. In Spain, more than 70% of farm owners are men. (…) Rural women, even today, despite advances in equality, continue to be vulnerable and invisible; and yet they are the basis for the maintenance, conservation and development of rural areas in economic, social and cultural terms".

[1032] Nahia Aragón Basabe, Titularidad Compartida de las Explotaciones Agrarias: contenidos, objetivos y avances Valladolid (1 March 2018), SG de Innovación y Modernización del Medio Rural 23.

[1033] Ibid 25.

It is surely the combination of communal forms of relating to resources and the community, with state forms, and even some forms of private property that can offer the best solution. Regarding the latter, I have already mentioned the Universal Basic Income, which is still a modest form of private property distribution. Although this measure is not a panacea for inequality and unsustainability, it would mean a life with guaranteed minimum rights for everyone, a step towards a more dignified and rewarding life.

The Universal Basic Income (hereafter UBI) is a radical policy proposal to provide a monthly minimum cash grant (hence *basic*) to all members of a community (hence *universal*), without means testing, regardless of their personal situation, without conditions and, according to most proposals, at a level high enough to provide a life free of economic insecurity.[1034] It is a measure of wealth redistribution and equality of opportunity, designed to be individual (not for households), unconditional (not subject to any conditions) and universal (for everyone, not just those with the lowest incomes).[1035] The aim of the UBI is not to provide support only to those who have the least, but to ensure that everyone has an income equivalent to the poverty threshold to meet basic needs. One of the arguments in favour is that government assistance to the poor does not end up reaching all those who deserve it, and that the large bureaucratic apparatus needed to determine who deserves it costs money.

In a Universal Basic Income social security system, the richest would also receive this benefit, and for it to work, it would have to be accompanied by other measures: a tax system in which the richest pay more, and possibly price regulation measures to prevent the Universal Basic Income from pushing up inflation. There have already been Universal Basic Income pilots and experiments in South Korea, Namibia, Kenya, Wales, Canada, Finland...[1036] Even in Alaska, the state set up a foundation to distribute part of the oil profits to all citizens, who have received about $2,000 a year each since 1982. Denmark, for its part, has a very important social safety net, almost like a basic income.[1037] Many governments are looking for ways to implement the UBI as a way to achieve more egalitarian societies.[1038] This system is perfectly compatible with common property regimes, as the share that all citizens would receive would not change any of the principles and proposals I have mentioned so far. Alternatively or additionally, the UBI could be substituted or combined with a system of basic goods and services provided

[1034] Juliana Uhuru Bidadanure, 'The Political Theory of Universal Basic Income' (2019) 22 Annual Review of Political Science 481.

[1035] Ministry of the Presidency, 'Universal Basic Income' (*Generalitat de Catalunya,* 2023) <t.ly/qcKVD> accessed 25 April 2023.

[1036] Some of these examples can be read about in: Paul Decker and Kevin Kelly (coeds), Bru Laín Amy Castro and Stacia West, 'Point/Counterpoint' (2022) 41 (2) Journal of Policy Analysis and Management 632–649; Hannah Shaw and Sian Price (Public Health Wales Observatory), *Mapping the potential outcomes of basic income policies and how these might be evaluated* (Public Health Wales NHS Trust, October 2021).

[1037] Sergi Raventós in: Josep Catà Figuls, 'La renta básica universal: un experimento llevado a cabo en varios países al que el Govern no renuncia' *El País,* 12 March 2023 <t.ly/4ew4> accessed 25 April 2023.

[1038] Renda Bàsica Universal - Office of the Pilot Plan to Implement Universal Basic Income in Catalonia, *Draft proposal for the design of a Universal Basic Income Pilot Plan in Catalonia,* Working document, March/April 2022, Generalitat de Catalunya- Departament de la Presidència.

directly free of charge. The IGP has dubbed this gratuity system as Universal Basic Services (UBS).[1039]

The idea of securing people's income as part of the right to life and the fair distribution of collectively created wealth is also part of the long history of feminist demands and struggles.[1040] Indeed, with an Unconditional Basic Income, many people would stop living in precarious situations by receiving a monthly income, including many women who currently lack money, time and rest. Those living in situations of domestic violence could have the opportunity to change accommodation. Unemployed people doing care work at home would receive an income, and those working in "official" jobs could reduce their working hours to have more time for creativity, study, training, self-learning, care for their families, and even choose better jobs and negotiate contract conditions.[1041] With the UBI, everyone would have more autonomy, decision-making power and freedom. In addition, the extra time provided by the UBI could be invested in the defence of the collective, in the strengthening of social relations; in short, in the construction of the commons.[1042]

4.5.3. From "every man for himself" to shared beneficial outcomes

As the Little Prince said: "The essential is invisible to the eye".[1043] Lifting the invisible layer, i.e., the foundations that have sustained the social metabolism in the capitalist context for centuries and studying the commons in an eco-social key reveals at least three things. First, it reveals the regulatory mechanisms of labour exploitation and the unjust sexual division of labour that have permeated social systems. Second, it highlights the importance of reproductive tasks in sustaining human life and social metabolism. Last but not least, it raises awareness of the fact that this common knowledge and resources will be vital for the future and that it is therefore important to ensure that they are passed on from one generation to the next. In other words, it enables society to identify the most sustainable ways of reproducing life, to learn about its limits and to better prepare for the environmental changes that lie ahead in the coming decades.

As many have argued, I believe that the set of relationships embedded in the global reproduction chain must begin to be de-privatised. On the basis of trust, interdependence and the moral principle of solidarity, it may be possible to stitch back together large communities that care for the well-being of children, adults and the elderly. In these communities, such care as a shared responsibility can enable a revaluation of life together. The spaces for rebuilding these communities already exist, but they may need

[1039] The UBS is defined as "the provision of sufficient free public services, as can be afforded from a reasonable tax on incomes, to enable every citizen's safety, opportunity, and participation". Vid. IGP, *Social prosperity for the future: A proposal for Universal Basic Services* (2017), Institute for Global Prosperity (IGP), Social Prosperity Network Report.

[1040] Alberto Tena, 'Genealogías feministas de la Renta Básica' *Sin Permiso* (8 April 2022) <t.ly/QBE9R> accessed 26 April 2023.

[1041] Puri Pérez Rojo, 'Una renta básica incondicional feminista' *ElDiario.es* (4 March 2021) <t.ly/rl--> accessed 26 April 2023.

[1042] ibid.

[1043] Antoine de Saint-Exupéry, *Le Petit Prince* (Éditions Gallimard, Collection Folio 3200, 1999) 83. Original publication: 1945.

to be dusted off: neighbourhood courtyards and meeting rooms, town squares, unused or abandoned buildings, workplaces, schools and universities, as well as public-community spaces, have proven to be suitable for socialising. Although these spaces have enormous potential, they are sometimes underused. The policies of the commons should aim to make the most of these centres of social and cultural exchange sustainably and respectfully. For example, schools could be used as sports halls, lecture theatres, libraries or community centres in the afternoons, and car-clogged squares as meeting places for citizens.

In this society, the personal inevitably merges with the common, and the common with the political. It is participation in the deliberation of the commons that determines the effective membership of a given community; relational and discursive practices define membership. Overcoming individualism makes it possible to recognise oneself in others and therefore to shed the burden of always being well. Ultimately, what binds a community together over time is a mutual debt (care) that all members are obliged to repay, in exchange for the benefit of receiving the same care.[1044]

Furthermore, analysing the conditions under which and the purposes for which technology is produced can lead to a more sustainable and responsible use of technology, allowing, for example, the mechanisation of some domestic tasks in favour of more time for affection. Perhaps then interpersonal communication can be restored; such a system leaves more time for comfort, companionship, sexual performance or the so trivialised love that every human being needs. In addition, collectivising care work saves reproductive and economic costs and reduces poverty. For example, building communal kitchens and laundries can make life easier for many people. Moreover, this can be a good measure of protection against ecological disaster, since the uneconomic multiplication of reproductive assets (washing machines, refrigerators, televisions, ovens, etc.) in single-family homes has a significant impact on the environment.

Notwithstanding the advantages, the most difficult challenge will be to get people to want this transition. A transition that, at best, can be aspired to by maintaining the eco-social conflict in order to gain community spaces in a context of constant crisis. In any case, there is still a long way to go, as it will be necessary to bring together not only legal institutions, but also citizen networks and organisations, and to convince them that the path towards commonality is the only possible way forward. There is not much time left for a sufficient mass of the population to realise that human beings are vulnerable and unfinished, and it is precisely this unfinishedness that deprives them of all immunity and self-sufficiency, so that human autonomy can only be understood in its relational dimension.[1045] The law and politics of the commons, as noted, must be directed towards the protection of social rights, democratic radicalisation, decentralisation and self-governance, giving people the opportunity to make decisions, facilitating encounters and building community.

[1044] María Eugenia Rodríguez Palop, *Revolución feminista y políticas de lo común frente a la extrema derecha* (Icaria 2019) 95.

[1045] ibid 104.

Moreover, it has been seen how ecofeminist voices belie the official proclamation that human beings are primarily separate, apart and disconnected from other beings in the world. They also reveal a dimension of human existence that knows itself to be deeply embedded in a matrix of relationships.[1046] Clearly, women can no longer be seen as *the other*, but as indispensable, both as environmental and political actors. Not because their socially constructed role has made them caretakers of the land. Nor because it is in their nature to defend the principles of community and environmental justice. Simply because a radical rejection of current gender/colonial/species/class relations[1047] means recognising them as true subjects of rights.

But men will also play a key role in this great transformation, once the patriarchal blindfold that forces them to be "real men" falls off. The one that constrains them to hide their emotionality, conform to the masculine canons of their culture, accumulate wealth through private property, be self-sufficient, strong, white, cis-heterosexual and fertile. Indeed, most men are taught, as children, to keep their emotions at bay. Not to recognise their vulnerability. To always take the first step. Not to ask for help. To always be brave, strong and successful. To fight, to win. Not to give up. In short, all men are, to a greater or lesser extent, oppressed, manipulated, beaten and killed by capitalist patriarchy.

This also implies denying other needs, such as self-care, compassion or forgiveness. And the internalisation of pain and suffering that cannot be expressed is masked by indifference or anger, states of mind that are allowed to men. Given all these pressures and oppressions, it should come as no surprise that the overall suicide rate for men worldwide is 1.8 times higher than for women, and as much as 3 or even 4 times higher in the Western world.[1048] Indeed, social constructions of hegemonic masculinity, related to strength, independence, risk-taking behaviour, economic status and individualism may prevent men from seeking help for suicidal feelings and depression, and these patterns are much stronger in the West. In general, women are more likely to maintain social and family ties to which they can turn for support during depressive episodes.[1049]

All this suggests that it is time to challenge traditional hegemonic social patterns and to relinquish current privileges. The opportunity to build alternative relationships and new family models seems to have arrived. Men need to accept and understand that feminism is not against them, nor against their sexuality, but against undeserved privilege and the achievement of global justice. Feminism also plays in their favour. Following this thread, the rethinking of masculinity and the redistribution of burdens has been called "new masculinities" in recent years. The concept designates a series of proposals that question

[1046] Mallory, 'Toward an Ecofeminist…' (n 1001) 17.

[1047] Barca, *Forces of Reproduction…* (n 29) 59.

[1048] World Health Organization, *Suicide in the world. Global Health Estimates* (2019).

[1049] Qingsong Chang, Paul S.F. Yip and Ying-Yeh Chen, *'Gender inequality and suicide gender ratios in the world'* (2019) 243 Journal of Affective Disorders 297.

the phenomenon of hegemonic masculinity exercised in the prevailing patriarchy.[1050] New masculinities encourage men to challenge traditional patterns, strive for horizontality, move away from violence, share public spaces respectfully, and create a broad network of men committed to deconstructing sexism, sharing, engaging and disseminating new ways of living.

In my view, perhaps it might be better to speak of "undoing gender", as Butler dubbed it.[1051] New masculinities need to go far beyond the basic equality that should exist between all people. The discourse ought to be one of the deconstruction of gender(s) and its/their expressions. A plea for joint liberation from heteropatriarchal burdens and pressures and the acceptance of co-responsibility. Instead of exchanging positions, they should be brought closer together. Paradoxically, it seems that the way to eliminate accumulated male privileges and comforts is to share them out so that everyone enjoys their basic rights. This means that the concept of winning must be understood as a concept of losing,[1052] not based on exclusion, but on the virtues of everyday coexistence. A concept not based on hoarding, but on counting on others and receiving help when needed, and on the satisfaction of being able to help others. A concept based on the exchange of knowledge and thoughts, experiences and feelings, on trust and respect.

Underlying this approach is the possibility of a world where everyone benefits.

A planet where it is no longer necessary to ask permission to live in dignity.

A diverse ecosystem where all forms of life count equally.

A tiny universe where equity and resilience are the drivers not of subsistence, but of the '*sumak kawsay*', '*buen vivir*', or 'good living'. Whatever the expression, doesn't the formula seem promising?

[1050] Vid. for instance, the recent works of: Todd W. Reeser, *Masculinities in Theory: An Introduction* (Wiley Blackwell 2023); Paul M. Pulé and Martin Hultman (eds), *Men, Masculinities, and Earth* (Palgrave Macmillan 2021); Alex Manley, *The New Masculinity: A Roadmap for a 21st-Century Definition of Manhood* (ECW Press 2023); James W. Messerschmidt and Michael A. Messner, '2. Hegemonic, Nonhegemonic, and "New" Masculinities', in James W. Messerschmidt et al (eds), *Gender Reckonings. New Social Theory and Research* (New York University Press 2018) 35.

[1051] Butler, *Undoing…* (n 13).

[1052] Pérez Orozco, 'Subversión feminista…' (n 232) 23.

Conclusions

As a result of this research, the main conclusions I have reached are the following:

1. The classical conception of property built within the framework of the capitalist world-economy has generated unsustainability and inequality, leading to the Anthropocene era. According to its classical conception in the modernity, property is a natural right rooted in the individual; a) who must be able to acquire property through *his* own labour; b) who deserves to be the full owner of the fruits of *his* labour; c) who can do whatever *he* wants with what belongs to *him* (enjoy, use, exploit, sell, destroy...); and therefore, d) no one can limit or interfere with the free use of property. This individualistic concept dominated the first phase of capitalism. Primitive accumulation involved the commodification of natural resources through exclusive private property rights. In this emerging capitalist context, Western states collaborated in the dispossession of goods and bodies through various forms of violence.

The patriarchal, colonial and hierarchical morphology of such a hegemonic conception of property has largely shaped the distribution of the planet's resources. Oriented towards self-determination and never towards vulnerability, private property has granted privileges to a few who conform to the largely affluent, middle and upper class, white, heterosexual, Western, male pattern. In contrast, it has subordinated, in one way or another, all those who do not conform to this model. Furthermore, this plundering of common resources has been underpinned by the belief that they were perpetually at the disposal of human beings. The exclusion and violence implicit in these dynamics have had a severe impact not only on the inhabitants of these dispossessed territories, but also on the biophysical basis that sustains human and non-human life. Thus, the Anthropos of the Anthropocene, the new era in which humans are modifying the planetary conditions, does not include all of humanity to the same extent.

2. The evolution of social relations towards the nuclear family allowed the consolidation of private property at the expense of more inclusive communal forms of resource management, with serious consequences for women. With the emergence of the capitalist system, the enclosure of common land, both in Europe and in the colonised territories, disrupted the relations of coexistence that had hitherto been a way of sharing resources, knowledge and time in society. On the other hand, the dichotomy between production and reproduction generated by the sexual division of labour prioritised the former and completely devalued the latter. Although patriarchy already existed in the pre-capitalist era, it became more sophisticated in this new economic regime, as the costs of life-sustaining economic reproductive functions, historically and predominantly performed by women, were externalised so that the price system allowed for the appropriation of unpaid labour. The social constructs surrounding women relegated them to the private sphere, stripped them of their knowledge and community ties and forced them to serve the family unit to this day.

Even today, private property, as a core element of the prevailing capitalist and patriarchal structures, requires reproductive tasks and the family —in its various renewed forms— as a buffer against the conflicts generated by the system itself. Nevertheless, the

subordination and oppression that takes place in the private sphere has not, until recently, been a matter for the state. Furthermore, the hierarchical and individualistic configuration of property ownership denies many women access, control and decision-making power over the livelihoods on which they depend. This is what I have called environmental patriarchy. At the same time, it perversely tolerates the invisibility of their reproductive work in the macro-economy, oblivious to the violence and life-support their bodies endure. In this way, the conditions of exploitation and overexploitation of labour are sustained by domestic and care work. Under these conditions, women are exploited, just like men under the capitalist system, but with a different impact.

3. Law as a grammar of power has legitimised the dynamics of resource appropriation that have ultimately led to the Anthropocene. Throughout the 19th century, modern liberal constitutionalisms emerged within nation-states in parallel with capitalism, seeking to enshrine a concept of property that went beyond monarchical absolutism but cautious about achieving social equality. The appropriation of the biosphere through its privatisation was legitimised and backed by a full constitutional guarantee of private ownership, disposal and alienation. Underlying this legal discourse of the modernity was the implicit conviction that the means of subsistence guaranteeing individual autonomy were permanently available. However, such constitutions never managed to define what property or the right(s) to property actually were. Rather, it was private law —codified in the case of continental civil law systems— that gave some content to property. They extended the notion of property as an absolute (exclusive and exclusionary), natural and individual right, completely linked to freedom, often based on a simplified interpretation of Roman law, consolidating the ideology of the possessive individualism during the 19th and 20th centuries. The right to property was mostly oriented towards the development of individual life projects of autonomous and abstract subjects.

Moreover, during this long liberal period, characterised by the defence of civil and political rights, constitutions based citizen's participation in political life—i.e., suffrage—on private property and gender, excluding half of the population as women and much of the rest as impoverished social classes. Otherwise, if the working classes were granted political rights, it was feared that the vote could be used as an instrument of revolution and destabilisation of the state order. Thus, the liberal right to property, based on ownership, legitimised not only the exploitation of resources, but also social and gender hierarchies through their unequal distribution, silencing multiple realities of dependency and subordination and privileging bourgeois men through the census suffrage, linked to the patrimonial element.

4. The social constitutionalism(s) that emerged at the beginning of the 20th century attempted to curb the abuses of private property by recognising its social function, but they encountered many obstacles. The modern legal device of private property, designed by the hegemonic ideology to guarantee the freedom and autonomy of the individual, excluded significant parts of society from the enjoyment of desirable living conditions. The intended spontaneous social order that was supposed to emerge from the economic freedom of the market did not seem to arrive. The growing demands of the workers' movements as inequalities increased —in line with the pace of

capitalist growth— and the setbacks of the First World War (and the Russian Revolution) gave rise to a new wave of constitutions in the first third of the 20th century, called social constitutionalism. These constitutions sought to limit liberal private property by emphasising the social function of property. As a result, these constitutions expanded the powers of the states and restricted those of the private sector.

Nonetheless, the wave of social constitutionalism was interrupted by the fascist and national socialist regimes in Europe and the geopolitical conflicts that ended with the Second World War. Later, and in parallel with the universal recognition of human rights, the fundamental concept of property was no longer restricted by social facts and practices, but intrinsically limited by the inalienable and equal rights of citizenship, both civil, political, economic and social. Capitalism, however, rebounded as never before. Recognising that socialism also had its limits, post-war constitutions sought to balance the state-market dichotomy by creating welfare states while giving free rein to private property.

5. The transition from industrial capitalism to its financial phase in the 1970s weakened the social state and led to the privatisation of resources to the detriment of the social function of property. While industrial capitalism in its late phase needed a social state to ensure a skilled workforce with the capacity to consume at the centre of the world-economy, this was no longer essential from the 1970s onwards with the rise of financial capitalism, leading to the weakening of the welfare state. The result has been a dysfunctional neoliberal system that continues to generate unsustainability and inequality. The cyclical crises since the financialisation of capitalism are evidence of this. In more refined forms, neoliberal states have used the public credit system —and the resulting public debt— as a lever for oligopolistic appropriation, further privatisation of goods and services in the hands of large landowners and transnational corporations, and the financialisation of goods to take resources away from those who no longer had anything: the non-owners.

Neo-liberal ideology continues to gain ground, and with it the idea that limits on property (such as its social function) have market-distorting effects to the detriment of collective welfare. A powerful theoretical apparatus supports the thesis that private property is the most efficient system of resource allocation. However, social and cultural practices of other periods, as well as new emerging practices, show that private property is just one way among others of regulating social relations over things. There is much to suggest that the debate on the eco-social function of property needs to be explicitly reopened. But this also means testing the resilience of the global constitutional project in a dynamic scenario that constantly crosses borders.

6. The search for adequate and inclusive responses to the eco-social transition requires a rethinking of the hegemonic concept of property and, most likely, a reconceptualisation of the constitutional right to property. The legal structure of property, deeply rooted in capitalist patriarchy from the local to the global scale, blocks the attempts to dismantle the dominant model inherited from modernity. It puts enormous pressure on the legal system to identify a single owner of any kind of property, and then to transfer to that owner as many property rights as

possible. Despite the constitutional recognition of the social function of property, the current system continues to allow, through ownership, the unjust private appropriation of a common resource, the biosphere, by certain groups. Still conceived as a guarantee of freedom, property underpins capitalist economic dynamics and profoundly structures social relations and the environment. The economic, political and legal consequences of the rhetoric of individual private property are dramatically evident today: they extend subjugation and dependency and threaten the very notion of de facto democracy. Moreover, the public/private dichotomy has obscured the complexity of the property debate. It has prevented recognition of the plural, open and changing nature of property rights and, above all, of the very existence of the commons.

In practice, there is legal and historical evidence that ownership has never been absolute but limited. There may be several property rights over the same object, whether tangible or intangible, which are neither exclusive nor exclusionary, but transferable and distributable to more than one person. The absence of private property does not necessarily imply the absence of rights of enjoyment over an asset, nor does it lead to inefficient management of resources. The future must be one of non-appropriation, because what matters is the use that can be made of things, their functionality, and not their ownership. A counter-hegemonic path must be sought to the current configuration of property, beyond the recognition of its social function. A new concept is needed that refutes the assumption that the biosphere is an exploitable resource, rather than a global common made up of multiple commons. If the classical concept of property is revised and transformed: a) the individual owner(s) are not absolute despots of their domain, but members of communities and ecosystems in which they are embedded; b) there is no unitary property right, but rather a bundle of rights derived from relationships between people and resources; c) they are neither absolute nor exclusive, but partial and relative; and, therefore, d) they are not separate rights, but are interrelated and therefore confer responsibilities.

7. Prioritising the commons within constitutional frameworks not only allows for a more sustainable management of resources, but also for a fairer redistribution of the burdens and benefits arising from human relations with nature, making society more resilient. The individualistic and atomistic concept of property must be overcome in favour of a notion directly linked to the common good, to social relations and to the limits imposed by nature itself. Commons epitomise the crisis of the public/private dichotomy in property law; they transcend both the individualistic approach of private law and the dogma of state sovereignty in public law. On the one hand, markets create strong incentives to overexploit resources, exclude some users whose needs must be met by other means, generate pollution, ignore ecosystem services and long-term impacts, and otherwise externalise the costs of resource use, undermining society's ability to meet these costs and to manage sustainably. On the other hand, states can be inefficient, inflexible and unqualified to know the real needs of each community. Moreover, neither the state nor the market has been able to deliver more democratic, egalitarian and resilient societies.

An emancipatory legal agenda should therefore be oriented towards a greater collectivisation of property. This reformulation implies the recognition of the ecological

frontier as a first step towards the protection of the commons, as well as the eco-dependence and interdependence that characterise human beings. It is also necessary to understand that while humans are interconnected with nature, they are not the only beings on the planet. The way to deal with the potential tragedy of the commons is to establish central authorities and provide incentives for individuals to promote a sustainable model of use. Admittedly, constitutional provisions for decentralised forms of collective ownership may not be a panacea for the environmental crisis we are experiencing. But they can push towards a greater redistribution of resources and a more democratic organisation.

8. The commons allow counter-hegemonic micro-alternatives to property to come to the fore, and through law from below, harbour spaces for greater equity and resilience. At the same time as it is necessary to (re)construct a law for the commons, the law itself also becomes a common, a collective process in which different instances, public-common institutions shaped by legal pluralism, are in tension but seek dialogue, in a process of *commoning*. In this sense, the constitution makes more sense as a constant conflict, as a changing process, than as a rigid compendium of sacred articles. In any case, the constitutionalisms in which these new ways of relating to resources are framed must have justice, democracy, resilience and maximum sustainability as their main limits or goals. That is to say, social and ecological limits are the red lines that go beyond economic utility in the service of capital. This is where the concepts of distributive justice and participatory governance come in, to assess the efficiency of resource use.

In this sense, the idea of communities caring for the commons and building law from below brings a broader vision: that of people working cooperatively, to create different modes of production, service provision and exchange that generate value and well-being, while integrating ecological and social care, justice and long-term planning to the extent that diverse communities are able to do so. The key point is that everyone can participate in resource decisions if they are well distributed socially. Fortunately, cooperative and more sustainable forms of natural resource management are already being reinvented, including cooperatives, land trusts and non-market or collective ways of organising production, distribution, consumption and waste management.

9. There is an urgent need to (re)politicise and democratise public and private spaces, which in many cases will imply a move towards greater communalisation. Adopting an ecofeminist view of property towards the commons seems to shed much light on the way to such a transition. Those ecofeminisms based on the social construction of the relationship between women, nature and property have been pushing for justice-based political, feminist and ecological action as a counter-hegemonic movement for decades. Ecofeminist theories and movements can be perfectly framed along the same lines as the commons, in favour of a different kind of property management or even a rethinking of property. This is especially true when one considers that life-sustaining reproductive tasks can be better performed in common settings, more equitably distributed, and by removing unfair and undervalued burdens. Therefore, the contribution of ecofeminisms to the reformulation of property and the

recovery of the commons is its focus on life, eco-dependence and interdependence, and thus on the need for a healthy nature and solidarity bonds.

To this end, my proposal is to '*ecofeminise* law', understood as the incorporation of ecofeminist perspectives into the discipline of law. Some of the ideas I put on the table are: 1) the *ecofeminisation* of jurisprudence and law, so that silenced stories can finally be told; 2) the *commoning* of care, i.e. the assumption that reproductive tasks are an inescapable duty of the whole society capable of caring, just as care must be recognised as a universal right; 3) the recognition of a right to the city, through the incorporation of urban planning policies and laws that take into account the real needs of people and are compatible with the sustainability of human and non-human life; 4) the promotion of forms of common land tenure that guarantee that shared labour implies shared rights; and 5) the guarantee of a universal basic income to ensure a minimum of freedom for all. Be that as it may, in this post-Anthropocene ecofeminist scenario, women are neither victims nor entrepreneurs, but human beings with vulnerability and agency, just like the rest of humanity.

Indeed, the challenge is extremely difficult. The future towards the commons should not be mythologised. It is society that must change the state, not the state that must change society, so much work lies ahead. It will take the cooperation of the entire population to move forward, to make all spaces common, from the bottom up and from the outside in. But in any case, this thesis leaves me in no doubt that we all have the right to a life worth living. I am convinced that dignity derives from our being and our doing in society, from our interdependence as the community that we constitute and constantly reconstitute. I would like to emphasise, once again, and as a final conclusion, that in this project of community and of the commons, in short, in this *commoning*, we all fit in, and we all win. This proposal to the world is not mine alone. It is a radical change that those of us who fervently believe in radical democracy are confident that there is still time to make, even though time is short. But hope is the last thing to be lost. What is inconceivable today may be common sense tomorrow

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6.3. Legislation[1054]

6.3.1. Ecuador

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6.3.2. France

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6.3.3. Germany

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6.3.4. Italy

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6.3.5. Mexico

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6.3.6. Spain

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6.3.7. United States of America

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