

# THE GLOBAL LAW OF THE LAND

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*Are we witnessing the gradual universality of national land laws, which have traditionally been considered to be the paradigm of legal idiosyncrasy by virtue of their reflection of place-specific society, culture, and politics? This Article offers an innovative analysis of the conflicting forces at work in this legal field, based on a historical, comparative, and theoretical study of the structures and strictures of domestic land laws and current cross-border phenomena that dramatically affect national land systems.*

*The central thesis of this Article is that, irrespective of our basic normative viewpoint regarding the opening up of domestic land laws to the forces of “globalization,” we must come to terms with the particularly difficult institutional and jurisprudential constraints involved in moving away from the traditional local basis of land laws. Thus, in order to systematically succeed in intensifying cross-border land law rules, global and national actors need to construct more comprehensive supranational institutions, prevent normative over-fragmentation within each legal system, and pay close attention to localized interplays between law, politics, economics, and culture.*

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## INTRODUCTION

In 2001, the Sawhoyamaxa Indigenous Community of the Enxet People submitted a petition to the Inter-American Commission on Human Rights, alleging that the government of Paraguay violated the American Convention of Human Rights,<sup>1</sup> including the right to property.<sup>2</sup> The tribe argued that the government failed to recover part of the tribe's ancestral lands in line with the American Convention and with Paraguayan domestic legislation, both of which recognize the right of indigenous peoples to preserve their way of life in their habitat.<sup>3</sup> The government contended that the land in question was privately owned by German investors, such that its attempts to expropriate the land were blocked in light of a Bilateral Investment Treaty ("BIT") between Germany and Paraguay.<sup>4</sup> In March 2006, the Inter-American Court ruled in favor of the tribe, reasoning that the "enforcement [of BITs] should always be compatible with the American Convention."<sup>5</sup> Thus, the land property rights of some individuals protected under one legal regime (the American Convention together with domestic

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1. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights].

2. *Id.* art. 21.

3. Case of the Sawhoyamaxa Indigenous Cmty. v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C.) No. 146, paras. 116–24 (Mar. 29, 2006).

4. Gesetz zu dem Vertrag vom 11 August 1993 Zwischen der Bundesrepublik Deutschland und der Republik Paraguay über die Förderung und den Gegenseitigen Schutz von Kapitalanlagen [Law on the Agreement of August 11, 1993 Between the Federal Republic of Germany and the Republic of Paraguay on the Promotion and Reciprocal Protection of Capital Investments], Bundesgesetzblatt Jahrgang 1997 Teil II Nr. 48, Seite 2080, available at [http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger\\_BGBL](http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBL) [hereinafter Germany-Paraguay BIT].

5. *Sawhoyamaxa Indigenous Cmty.*, 2006 Inter-Am. Ct. H.R., para. 140.

legislation) trumped property rights of other individuals protected under a different legal regime (the Germany-Paraguay BIT).

As this case, discussed further below, demonstrates, land conflicts increasingly implicate international, national, and sub-national norms and institutions. This Article offers an innovative approach to addressing and analyzing this growing complexity in the analysis of property rights in land. It sets out to identify whether, and to what extent, recent geopolitical and economic changes in the world of real estate create substantial cross-border effects on the very foundations of nationally-based land laws.

The traditional concept of land law was that it literally represented the “law of the land.” This was partly because for centuries land was considered to be the most essential and valuable nationally-based resource due to the prominence of agriculture and the ever-increasing demand for dwellings as population grew. But an even more important reason for this view was that control of land had been closely associated with localized issues of territorial control, socio-political structure, and sovereignty.<sup>6</sup>

The world has since changed, and long-standing legal concepts are being increasingly challenged by dramatic cross-border developments that no longer allow domestic land laws to exist in isolation, but instead present pressing issues of cross-influences, regionalism, and universalism.<sup>7</sup> This Article focuses on three such contemporary phenomena. First, this Article addresses the phenomena of the expansion of multilateral conventions and institutions that include property protection clauses affecting the sovereignty of domestic land laws. Conventions, such as the European Convention of Human Rights,<sup>8</sup> create certain reciprocal commitments among nations that subject in various degrees the rule of states vis-à-vis their own nationals to supranational norms, which are then interpreted and applied by forums such as the European Court of Human Rights.<sup>9</sup>

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6. See *infra* Part I.

7. See *infra* Part II.

8. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol 11, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention of Human Rights].

9. See, e.g., *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) 9 (1986), 8 Eur. H.R. Rep. 123 (1986) (applying the provisions of Article 1 of the European Convention of Human Rights, as well as the Court’s judicial principles of “fair

Second, BITs and similar cross-national instruments, such as Chapter 11 in the North American Free Trade Agreement (“NAFTA”),<sup>10</sup> have rapidly proliferated over the past few decades. BITs originally stemmed from the reluctance of foreign investors to be entirely subject to domestic lawmaking and regulation, due to significant non-parities in the legal, public, and cultural environments among various countries.<sup>11</sup> For these reasons, exporters of capital—who are increasingly investing in real estate around the globe—have been seeking to incorporate independent standards of property protection by having their home countries sign cross-national BITs and by working to directly enforce such protective provisions through extra-local tribunals or arbitrators.<sup>12</sup>

Third, the complexity of overlapping norms and rules, and of respective institutions, is not just a matter of national versus supranational origin. Rather, in many countries control and use of land implicate volatile and intricate relationships between state institutions and local groups such as indigenous tribes.<sup>13</sup> A further twist is added to these complexities when supranational norms and institutions pertaining to land law directly affect such sub-state orderings, as the brief presentation of the Sawhoyamaxa case indicates.<sup>14</sup>

However, in spite of the acute challenges that these scenarios increasingly pose, the jurisprudence of cross-border land related norms and institutions seems to develop in a very ad-hoc manner. This is true not only because the vast number of courts and tribunals that resolve cross-border land law disputes are not inter-institutionally coordinated,<sup>15</sup> but also because there is a lack of a comprehensive theory and broad-based understanding of the major ingredients of cross-border land regimes and their potential benefits and costs vis-à-vis more “isolated” systems. This Article thus has a threefold aim: to identify the insufficiency of current legal and economic

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balance” and “proportionality,” to a dispute concerning the taking of land from British residents by the United Kingdom government).

10. North American Free Trade Agreement, U.S.-Can.-Mex., Ch. 11, Dec. 17, 1992, 32 I.L.M. 605 (1993).

11. Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 2008 U. ILL. L. REV. 265, 267–69 (2008).

12. See *infra* Part II.B.

13. See *infra* Part II.B.

14. See *infra* Part II.C for a detailed discussion of *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. 2006 Inter-Am. Ct. H.R. (ser. C.) No. 146, paras. 116–24 (Mar. 29, 2006).

15. See *infra* Part II.B.

theories in managing the complexities of cross-border land regimes; to map out the determinants of law, politics, economics, and culture and their potential interplay in this context; and to suggest preliminary theoretical tools for addressing these rapidly-growing phenomena.

This Article argues that the inherent, distinctive features of domestic land laws are not only a matter of local pride or irrational fear of change, nor are they necessarily part of an international struggle for power. Due to the unique traits of land as a resource and the intertwined nature of property rights and interests involved in it, current forces attempting a hasty switch to non-local norms are bound to encounter types of problems that I refer to in this Article as “institutional incompleteness” and “normative over-fragmentation,” which are particularly troubling in land law as compared to other legal fields.

By the term “institutional incompleteness,” I refer to the systematic problem by which a property regime in land cannot be sustained when an extra-national court or tribunal takes out “a piece of the puzzle” and rearranges it to fit its specific mandate while effectively ignoring all other consequences. Such incompleteness might heavily undermine the entire structure of the land system in question, that is, the other layers of property norms within the system.<sup>16</sup>

The term “normative over-fragmentation” addresses the counterintuitive fact that extra-national rules and decisions do not necessarily result in more uniformity in the law, but may rather exacerbate unwarranted internal differentiation.<sup>17</sup> For example, since a single country may be signatory to dozens of different BITs, each of which may include different procedural and substantive provisions about the protection of property rights, the result may very well be one of normative over-fragmentation of the property regime within a certain country. This problem is especially severe in the case of land because the already complicated web of intertwined rights and interests pertaining to the same asset is further fragmented when people seek to enjoy their *lex specialis* as foreign residents.<sup>18</sup> Moreover, with the ever-growing phenomenon of foreign investment

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16. See *infra* Part II.B.

17. See *infra* Part II.B.

18. This is especially so when the asserted “foreignness” is merely strategic. United Nations Conference on Trade and Development, Geneva, Switz., Sept. 2007, *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, 10–15, U.N. Doc. UNCTAD/ITE/IIA/2007/3, available at [http://www.unctad.org/en/docs/iteiia20073\\_en.pdf](http://www.unctad.org/en/docs/iteiia20073_en.pdf) [hereinafter UNCTAD].

in real estate, no one can anticipate how many different land-related legal provisions can arguably be applied to the same tract of land at a given point in time.

In addition to the above issues, there exists an essential need to resolve the mix of law, politics, culture, and economics of a certain society so as to enable effective changes in land law systems.<sup>19</sup> This challenge places yet another institutional and jurisprudential constraint on cross-border land law reforms, even if one is otherwise in favor of accommodating domestic land laws to the forces of “globalization.”

This Article is structured as follows: Part I offers a brief historical and comparative analysis of how land systems have always been inseparably intermingled with socio-political structure, economic organization, and sovereignty. Part II examines some prominent cross-border phenomena that have come to greatly affect and challenge local land markets and land laws in recent years. Part III evaluates the limited ability of current economic and legal theories to address the complexities of cross-border land regimes, and consequently aims at offering fresh theoretical concepts to better evaluate the institutional and jurisprudential prospects and constraints of globalizing land laws. Part IV presents the central thesis of the Article: for the intensification of cross-border land law norms to systematically succeed, global and national actors must build more comprehensive supranational institutions, prevent normative over-fragmentation within domestic legal systems, and pay closer attention to the complex localized interplays between law, politics, economics, and culture.

In so doing, the Article not only invites a new scholarly discourse on the potential reconceptualization of land law in the face of these recent developments, but also aims at informing international institutions, as well as national and local governments, about the scope and nature of property design dilemmas as these legislative, administrative, and adjudicative bodies continue to grapple with the changing realities of land law and policy.

## I. LAND LAW AS A NATIONAL CONSTRUCT

This Part briefly analyzes the “classical” concept of land law, one that continues to dominate the theoretical discourse as

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19. See *infra* Part III.C.

well as popular perceptions about land law, even in an era of more “globalized” economies that challenges many of the underlying assumptions of this classic viewpoint. As I demonstrate by referring to land regimes from different times and places, this social, political, and legal concept construes land law, first and foremost, as a national construct. This is true even though domestic land systems have often been shaped in some measure by external influences and principles.

The control of land and the socio-political construction of communities and nations have gone hand-in-hand throughout history. For many centuries, land was considered not only the most essential source of independent economic livelihood, but moreover a chief indicator of a person’s social and political status.<sup>20</sup> More broadly, the way in which different societies shaped the allocation, control, and enforcement of land entitlements was tightly intertwined with their political, religious, social, and economic structure.<sup>21</sup>

Probably one of the most vivid illustrations of this interconnectivity is the evolution of the land tenure system in England. As Pollock and Maitland suggest in their *History of English Law*: “[I]n so far as feudalism is mere property law, England is of all countries the most perfectly feudalized.”<sup>22</sup> Indeed, one cannot truly understand the way land law has evolved in England since the Norman Conquest without coming to terms with the socio-political developments in the country from that time onwards.<sup>23</sup> The system of land tenure played a constitutive role in the reorganization of English society following King William’s rise to power. Societal standing was formally defined in terms of relationship to land, such that each person was explicitly made subservient to another—his landlord—and all were subservient to the King from whom all titles in land originated.<sup>24</sup>

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20. See, e.g., Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 345–47 (1996).

21. As discussed *infra* in Part II.C., this is the case not only for nations, but also for sub-society communities. The control of land, and the specific configuration it takes within the community, is tantamount to the group’s ability to preserve its unique “enclave” within general society. See Amnon Lehavi, *How Property Can Create, Maintain, or Destroy Community*, 10 THEORETICAL INQUIRIES IN LAW 43, 67–70 (2009).

22. 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 235 (2d ed. 1899).

23. For a detailed analysis, see THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 506–623 (5th ed. 1956).

24. Under the feudal pyramid, the King parceled out lands to his tenants-in-

Subsequently, further socio-political changes in England directly affected the land tenure regime, and vice versa. The system, which started out as a genuinely interpersonal web of direct services and duties, gradually developed into one of sheer monetary rents received by lords from their subtenants and, respectively, of a more permanent and inheritable system of land entitlements.<sup>25</sup> Interestingly, the 1290 *Statute Quia Emptores*—originally aimed at prohibiting further subinfeudation, which had been abused by lords to avoid feudal incidents to those above them—actually marked the end of the original regime.<sup>26</sup> As a price for prohibiting subinfeudation, the greater lords had to allow free tenants to substitute a new tenant for all or part of their land without their consent.<sup>27</sup> This gradually made land entitlements not only inheritable but also freely alienable.<sup>28</sup> Eventually, this caused the disappearance of the intermediary lords, with most land coming directly from the Crown in return for revenues.<sup>29</sup> This process both reflected and exacerbated the centralization of political power, the shifting focus from the family to the individual as the subject of law, and the constant expansion of the market economy.<sup>30</sup>

Contemporary manifestations of the direct linkage between the prevailing political, ideological, social, and economic conditions of a certain country and the legal land system are abundant. One may consider, for example, the way in which land tenure systems were transformed in East European and Central Asian countries after the collapse of the Soviet Union in 1990–1991.<sup>31</sup> Whereas all of these countries generally moved away from centralized socialist regimes to adopt some form of market economy, they nevertheless substantially diverge in their underlying ideological, political, social, and

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chief in return for the provision of services (military and other), and the latter subsequently subinfeudated such lands downwards to subtenants. This unique organization created a hierarchal structure in which services flowed to the King at the top of the chain and land holdings extended down the feudal ladder of freehold possessory estates. JESSE DUKEMINIER ET AL., PROPERTY 198 (5th ed. 2002). Socio-political relationships and land entitlements were thus inseparably intermingled. See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 9 (1927).

25. DUKEMINIER ET AL., *supra* note 24, at 204–09.

26. *Id.* at 205–06.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. See generally ZVI LERMAN ET AL., AGRICULTURE IN TRANSITION: LAND POLICIES AND EVOLVING FARM STRUCTURES IN POST-SOVIET COUNTRIES (2004).

cultural environments. Consequently, they all varied in their approach towards one of the chief determinants of societal restructuring: ownership and control of land.<sup>32</sup>

For example, the fifteen former Soviet republics had to decide how, if at all, to depart from the totalitarian principle by which the state recognized only a single form of land ownership—state ownership.<sup>33</sup> Whereas most of these countries, including Russia and Ukraine, gradually recognized and validated private ownership,<sup>34</sup> a few countries followed a different path, reflecting their distinctive ideological stance. Tajikistan and Uzbekistan retain full state ownership of lands in their new state constitutions.<sup>35</sup> Belarus restricts private ownership to household plots of up to one hectare.<sup>36</sup> Kazakhstan also originally limited private ownership to household plots, but is currently in the midst of change toward fuller privatization under the new, highly-controversial 2003 land code.<sup>37</sup> Turkmenistan recognizes private ownership but severely limits the rights of landowners to sell, exchange, or give land away as a gift—so that the owner's bundle of rights is in effect quite similar to that of state tenants in the few republics that remain loyal to centralized land ownership.<sup>38</sup>

South Africa presents another prominent instance of a land regime change as a result of national restructuring. In pledging to correct the wrongs of Apartheid and to create a more just and egalitarian society, South Africa has focused much attention on planning for comprehensive land reform.<sup>39</sup> The provisional 1993 Constitution and even more so the later 1996 Constitution, alongside legislative acts and government policies, include particularly strong, affirmative commitments to land reform. These include not only restitution of lands, but also other measures such as transformation of the land tenure system, planned mass-scale expropriation of privately-owned

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32. Zvi Lerman, Changes in Land Tenure in the Post-Soviet Space 5–9 (Dec. 2007) (unpublished manuscript, on file with author).

33. These former Soviet republics now comprise the twelve member countries of the Commonwealth of Independent States (CIS) and the three Baltic states.

34. Lerman, *supra* note 32, at 3–4.

35. *Id.* at 8.

36. *Id.* One hectare equals 2.47 acres.

37. *Id.*

38. *Id.*

39. See A.J. van der Walt, *Reconciling the State's Duties to Promote Land Reform and to Pay "Just and Equitable" Compensation for Expropriation*, 123 S. AFR. L.J. 23, 25–29 (2006).

lands for the purpose of equitable, wide-scale redistribution,<sup>40</sup> and an explicit constitutional right to have “access to adequate housing.”<sup>41</sup>

Section 25 of the 1996 Constitution forbids the deprivation of property “except in terms of law of general application,” “for a public purpose or in the public interest,” and “subject to compensation,”<sup>42</sup> but also explicitly states that “the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources.”<sup>43</sup> Moreover, the compensation paragraph creates a multi-factor test, in which the market value is but one component, aimed at achieving “an equitable balance between the public interest and the interests of those affected.”<sup>44</sup> While courts have only recently started to systematically deal with compensation disputes on expropriation for land reform, there is already a heated, wide-scale political and scholarly debate about the desirable extent of using expropriation for land reform, the proper compensation to be paid, and the adequateness of comparatively referring to foreign property clauses in designing South African land law.<sup>45</sup>

The strong bonds between land control, social structure, and political sovereignty were never confined, however, to strict and steady national borders. In a plethora of cases throughout history, the complexity and multilayered nature of land law has reflected the numerous variations and incidents of geopolitical processes, such as the evolution of nation-states out of tribal- or ethnic-based communities, imperialism, colonialism, and other types of conquests or cross-border migration of peoples, religions, and ideologies.<sup>46</sup> Whereas such phenomena have had enormous, highly complicated influences in all areas of legal ordering, land law has often been the subject of particular attention for all parties involved *because* of its close affinity to political power and collective or national identity.

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40. Redistribution will encompass up to 30 percent of all agricultural lands by 2012, according to a recent government plan. *Id.* at 23–25.

41. S. AFR. CONST. 1996 § 26(1).

42. *Id.* § 25(1)–(2).

43. *Id.* § 25(4).

44. *Id.* § 25(3).

45. Compare Jill Zimmerman, *Property on the Line: Is an Expropriation-Centered Land Reform Constitutionally Permissible*, 122 S. AFR. L.J. 378 (2005), with van der Walt, *supra* note 39.

46. See, e.g., Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUD. S359, S365–67 (2002) (describing the design of land regimes in English colonies in Australia, New Zealand, and Fiji).

A prominent example in Western history is the evolution of private Roman law during the centuries-old life of the Roman Empire. The *ius civile* was the body of law originally designated for the citizens of the city of Rome and extended to foreigners who were endowed with *commercium*, the right to participate in the processes and transactions of the *ius civile*.<sup>47</sup> However, constant expansion of the Empire and increased interactions with foreigners led to the gradual development of the *ius gentium*, which was considered to be of universal applicability.<sup>48</sup> The formal jurisprudential differences between the two systems of property law, and land law in particular, were significant and, even when less drastic in practical terms, reflected the basic distinction along this fundamental political dimension.<sup>49</sup> Thus, the highest and ultimate form of property ownership, *dominium*, was formally restricted to the *ius civile*, although the lesser peregrine ownership typical of the *ius gentium* came to be protected in time by some modified version of *vindication*, the standard proprietary remedy securing ownership rights.<sup>50</sup>

This is, of course, not to say that such distinctions were clear-cut along the history of the Empire. Besides the inevitable divergence that had always practically existed between remote parts of the Empire, even under the guise of a “universal” *ius gentium*, Roman law came to be increasingly influenced by external sources. Examples of these external influences include: ecclesiastical law; eastern (especially Greek) influences; and barbarian codes— those corresponding to the intensification of the respective processes of the conversion to Christianity, the east-west division of the Empire, and the fifth-century collapse of the Western Empire (whose territories came to be ruled by the various barbarian kings).<sup>51</sup> But this is exactly the point made: the political control of land and its legal ordering have always been closely intertwined.

The analysis so far should not be understood to mean that the design of land law in a particular territory is always an expression of sovereignty as legal idiosyncrasy or that “legal transplants” may only be the result of a forcible execution of

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47. ANDREW BORKOWSKI & PAUL DU PLESSIS, TEXTBOOK ON ROMAN LAW 158 (3d ed. 2005).

48. See W.W. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW 28–29 (2d ed. 1947).

49. BORKOWSKI & DU PLESSIS, *supra* note 47, at 101–11.

50. *Id.* at 157–62.

51. *Id.* at 52–54.

foreign supremacy.<sup>52</sup> Throughout history, cross-border influences on the design of land regimes have also been the product of voluntarily received intellectual and jurisprudential external influences.

The influence of Roman law reached its peak in Western Europe well after the collapse of the Roman Western Empire.<sup>53</sup> Justinian's *Corpus Juris Civilis*, written in the sixth century, was revived and gained unprecedented respect starting in the late eleventh century, when it was taught in the first modern European university in Bologna by a group of scholars known as the Glossators and the Commentators.<sup>54</sup> Jurists who studied at Bologna brought the *Corpus Juris Civilis* to their emerging nation-states.<sup>55</sup> Thus, Roman law gained the status of the *ius commune* of Europe during the rise of the nation-states and later substantially influenced the great codifications of the nineteenth century.<sup>56</sup>

The immigration of English land law to the American colonies, and later the United States, obviously cannot be told here, even in the briefest fashion.<sup>57</sup> Yet it can be stated with confidence that the way in which English land law was transplanted, implemented, and then gradually transformed was clearly tied not only to the distinctive economic, geographical, and technological characteristics of America,<sup>58</sup> but also to political and cultural processes and ideologies. Thus, for example, the legal principles of *fee tail* and *primogeniture* were viewed by Thomas Jefferson as wrongfully perpetuating a hereditary aristocracy. As a result, around the time of the American Revolution, Virginia abolished both mechanisms. Many other legislatures embraced this reform in the following years.<sup>59</sup>

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52. On the different types of "legal transplants," i.e., when either an entire legal system or a major part of it moves into a new territory, see ALAN WATSON, *LEGAL TRANSPLANTS* 29–30 (Univ. of Ga. Press 1993) (1974).

53. JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, *THE CIVIL LAW TRADITION* 7–11 (2d ed. 2007).

54. *Id.* at 9.

55. *Id.* at 9–11.

56. *Id.* at 10–11.

57. See LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 24–29, 167–79, 309–16 (3d ed. 2005).

58. See, e.g., Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1189–90 (1982) (explaining the development of new types of servitudes in America both by the lessened fear of impeding assignability in a country that had vast resources of uncultivated land and by the existence of an early, efficient recording system in the United States).

59. DUKEMINIER ET AL., *supra* note 24, at 218.

As a final example, in 2007, after years of stormy debates, China enacted its Property Rights Law of the People's Republic of China.<sup>60</sup> The statute, viewed as a dramatic event in public and legal discourse,<sup>61</sup> was explicitly influenced in its drafting by codes of civil-law countries, most prominently Germany and Japan.<sup>62</sup> But this does not necessarily indicate that China simply turned its back on its ideological, cultural, and legal past, or that the adoption of "Western" formats and concepts (such as the *numerus clausus* principle or the creation of a unified conclusive land registry system)<sup>63</sup> necessarily dictates a particular substantive outcome. For example, alongside the protection of individual property rights in Article 4, by which such rights "shall not be infringed by any institute or individuals,"<sup>64</sup> the statute simultaneously includes the same protection for state and collective property rights. The law maintains a division of labor between these categories of ownership so as to implement "the socialist market economy, ensuring equal legal status and right [sic] for development of all market players."<sup>65</sup> Accordingly, Articles 47 and 58 reiterate the principle already embedded in China's constitution by which all lands in China "are owned by the State, that is, by the whole people,"<sup>66</sup> with some lands owned by collectives, so that any individual rights in land are basically only usufructuary. Moreover, the underlying assumption of the law is that "equal protection" does not mean an equal role for private and state ownership, thereby maintaining the dominant role of public property in Chinese society.<sup>67</sup>

To summarize, land law is traditionally closely intertwined with national identity, societal values, and sovereignty (or lack thereof, in the case of military conquests, imperialism, colonialism). Whereas sovereign, and especially newly independent,

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60. Property Rights Law (promulgated by the Nat'l People's Cong., March 16, 2007, effective Oct. 1, 2007). An unofficial English version is available at <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/property-rights-law-of-the-peoples-republic-of-china.html>.

61. See *Chinese Congress Passes Law For "Equal Protection" of Public, Private Property*, BBC MONITORING INT'L REP., Mar. 17, 2007; Mo Zhang, *From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China*, 5 BERKELEY BUS. L.J. 317, 321 (2008).

62. Zhang, *supra* note 61, at 345-46.

63. See Property Rights Law, *supra* note 60, arts. 4, 9-22.

64. *Id.* art. 4.

65. *Id.* art. 3.

66. *Id.* art. 45.

67. Zhang, *supra* note 61, at 345.

countries have never been isolated from external influences and principles, they have adopted ideas for their domestic land laws through the unique prism of local values, ideologies, and other territorial, social, and economic factors. Land law has thus been, first and foremost, a national construct.

## II. THE GROWING CROSS-BORDER EFFECTS OF LAND SYSTEMS

Even the most “local” type of resource—land and the law of the land—does not remain indifferent to significant cross-border processes and trends. Traditional legal concepts are thus being exceedingly challenged by recent geopolitical, economic, and intellectual factors that no longer allow land laws to exist in isolation. Rather, these challenges present pressing issues of strong cross-influences, regionalism, and universalism.

This Part does not attempt to offer an exhaustive survey of the influx of cross-border phenomena and institutions that have direct or indirect bearing on local land markets and land laws. It instead focuses on three major types of developments that have already proved significant in reshaping national real estate legal institutions and concepts: (1) supranational conventions and institutions; (2) cross-border investment treaties and similar bilateral financial instruments; and (3) sub-society rights and corresponding legal mechanisms that enjoy growing acceptance around the world and thus further undermine the unity and exclusivity of national land law systems. The analysis of the web of legal sources, economic institutions, and political dynamics will serve as the basis for the theoretical and normative discussion offered in Parts III and IV about the state of local land laws in a global setting.

### A. *Supranational Conventions and Institutions*

International conventions and institutions<sup>68</sup> are by no means a novelty, even in the field of property law. Probably most notably, ever since the 1883 Paris Convention for the

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68. For the sake of clarity, I use the term “international” for conventions or institutions that apply to a large number of countries and are consequently recognized as part of international law in its regular sense. I use the terms “supranational” or “cross-national” to describe conventions, agreements, or institutions that apply to more than one country, but do not necessarily involve a large number of countries so that they may not be considered as part of the conventional “universal” international law.

Protection of Industrial Property,<sup>69</sup> and the 1886 Berne Convention for the Protection of Literary and Artistic Works,<sup>70</sup> the world of intellectual property has been constantly engaged in matters of cross-boundary institutions, norms, and procedures.<sup>71</sup>

Such regimes of cross-national institutions and norms protecting property rights have, however, traditionally skipped land—and not due to sheer neglect. A 1980 study of restrictions on the acquisition of land by aliens found such measures to exist in many countries, including in highly industrialized, democratic nations, as well as in developing countries.<sup>72</sup> Alongside economic and social reasons—e.g., fear of rising prices, instability, decline of agriculture, or exhaustion of land supply for public needs—security, national, and ethnic grounds for prohibiting foreign land ownership were explicit and prevalent.<sup>73</sup> Such measures have enjoyed legal backing not only by domestic courts but also by international laws.<sup>74</sup>

The world has since changed. Multilateral conventions and institutions now affect the sovereignty and isolation of land laws by creating certain reciprocal commitments among nations and by subjecting countries to supranational norms that implicate realms traditionally considered to be under purely local control.

Within the European Union, the turning point was the Treaty of the European Union signed in Maastricht in 1992, and taking effect in 1994.<sup>75</sup> Dramatically expanding the scope and nature of reciprocal obligations among the EU countries,

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69. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 25 Stat. 1372, 1 Bevans 80. See World Intellectual Property Organization, [http://www.wipo.int/treaties/en/ip/paris/trtdocs\\_wo020.html](http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html), for the complete amended text.

70. Convention Between Belgium, France, Germany, Great Britain, Haiti, Italy, (Liberia), Spain, Switzerland, and Tunis for the Creation of an International Union for the Protection of Literary and Artistic Works, Sept. 9, 1886, 168 Consol. T.S. 185, as amended July 24, 1971 (Paris), 25 U.S.T. 1341, 828 U.N.T.S. 221. See World Intellectual Property Organization, [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html), for the complete amended text.

71. For such an evolutionary analysis of international and regional law in the copyright context, see Roberto Garza Barbosa, *Revisiting International Copyright Law*, 8 BARRY L. REV. 43 (2007).

72. Such Western countries included Australia, Canada, France, Holland, New Zealand, Scandinavian states, then West Germany, and the United States. See Joshua Weisman, *Restrictions on the Acquisition of Land by Aliens*, 28 AM. J. COMP. L. 39, 41–42 (1980).

73. *Id.* at 39, 42–48.

74. See PETER SPARKES, EUROPEAN LAND LAW 64 (2007).

75. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1.

the Maastricht Treaty prohibited all substantial restrictions on capital movements.<sup>76</sup> This provision was soon interpreted by the European Court of Justice (“ECJ”) to apply to the acquisition of land. In the landmark *Konle v. Austria* case,<sup>77</sup> the ECJ invalidated a legislative provision by which foreigners wishing to purchase land in the Tyrol region had to obtain an administrative authorization. Konle, a German citizen, was denied such authorization by the Austrian court in light of a policy limiting the purchase of second homes to preserve the Alpine environment.<sup>78</sup> The ECJ ruled that restrictions on cross-border land acquisition generally amount to hindrances of free movement of capital under the Maastricht Treaty.<sup>79</sup> As for the specific

Austrian legislation, the Court ruled that whereas “[t]he aims of securing land management and environmental protection are imperative requirements in the general interest,”<sup>80</sup> national legislation based on such aims must be applied in a non-discriminatory manner.<sup>81</sup> Furthermore, any such restrictions must also meet the test of proportionality. This means that such restrictions would be valid only when the regulatory aims are imperative and “cannot be pursued by measures that are less restrictive.”<sup>82</sup>

The *Konle* decision had major consequences for national land laws that imposed restrictions and limits on purchasing and developing land, not only in cross-national cases, but also in purely domestic matters. This is so because, alongside the nearly absolute prohibition of discrimination on the basis of nationality,<sup>83</sup> any restriction, even when applied equally to citizens and non-citizens, must be tested for its purpose-based justification.<sup>84</sup> Thus, even facially-legitimate aims, such as restrictions on second homes that preserve nature or promote agriculture values, must pass the three-prong test of proportionality. This three-prong test requires an overriding reason of general interest, the suitability of the restriction to the at-

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76. *Id.* art. G.

77. Case C-302/97, *Konle v. Austria*, 1999 E.C.R. I-3099, 2 C.M.L.R. 963 (2000).

78. *Id.* at 967–71.

79. *Id.* at 975–82.

80. *Id.* at 984.

81. *Id.*

82. *Id.*

83. See SPARKES, *supra* note 74, at 82–85.

84. *Id.*

tainment of the objective, and the adoption of the least intrusive means to attain such goal.<sup>85</sup> This test, which has proven to be a major obstacle for national legislation, indirectly affects foreigners as well as nationals—an issue of tremendous practical importance, since, for example, the overwhelming majority of second-home buyers in Britain are British.<sup>86</sup>

One should be cautious, however, not to come to the conclusion that there is already a substantially harmonized European land law within the EU. Most aspects of land law are still governed by the principle of territoriality regarding both site-based forum rules for dispute resolution and national site-based laws.<sup>87</sup> The EU Charter of Fundamental Rights (the Nice Charter), which recognizes a fundamental right to property<sup>88</sup> and is phrased in terms similar to Article 1 of Protocol 1 of the European Convention of Human Rights,<sup>89</sup> went into force only recently on December 1, 2009, following the ratification of the EU Lisbon Treaty.<sup>90</sup> It remains to be seen whether this Charter will affect a fundamental change in the extent of “Europization” of property and land law. It is possible that the cross-border effects on these themes will remain limited, relying on national land law on the one hand and piecemeal ECJ case law on the other.<sup>91</sup>

Much more far reaching in scope, both geographically and thematically, is Article 1 of Protocol 1 to the European Convention on Human Rights,<sup>92</sup> as interpreted by the European Court

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85. *Id.* at 85–86. Waivers apply, for example, for a number of new accession states that have received certain “grace periods” for nationally or substantively based limits on land purchases. *Id.* at 75–76.

86. *Id.* at 68–71.

87. *Id.* at 95–96.

88. Charter of Fundamental Rights of the European Union, Dec. 7, 2000, art. 17, para. 1, 2000 O.J. (C 364) 1.

89. European Convention of Human Rights, *supra* note 8, at 262.

90. See Treaty of Lisbon, Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 17, 2007, art. 1, 2007 O.J. (C 306) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0001:0010:EN:PDF> [hereinafter Treaty of Lisbon] (recognizing “the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties”). For the adapted version of the Charter, see European Parliament Council Commission, Charter of Fundamental Rights of the European Union, 2007 O.J. (C. 303) 1, available at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/c\\_303/c\\_30320071214en00010016.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/c_303/c_30320071214en00010016.pdf).

91. SPARKES, *supra* note 74, at 123–25.

92. European Convention of Human Rights, *supra* note 8, at 262.

of Human Rights (ECHR). As of 2009, forty-four European countries have ratified the First Protocol.<sup>93</sup>

Article 1<sup>94</sup> has had an enormous impact on property law—and land law in particular—throughout Europe because under the convention any resident may file a claim against his or her country. To date, the ECHR has heard thousands of cases dealing with Article 1 and has produced an extensive body of case law on the matter. In addition, many countries have formally internalized the First Protocol's provisions in their own laws, such as Britain's Human Rights Act of 1998,<sup>95</sup> so that domestic courts also constantly engage in Article 1 analysis.

The property jurisprudence of the ECHR, and in particular the question of whether the court will generally defer to domestic property law—aiming mainly at guaranteeing the “rule of law” within its jurisdiction<sup>96</sup>—or whether it is poised to create supranational, unified concepts and doctrines, is somewhat difficult to typify because it does not seem to follow a distinctive trend.

On the one hand, the Court has not hesitated to intervene in domestic practices in matters concerning due process, such as outright denial or excessive delays in payment of compensation for full-scale expropriation;<sup>97</sup> and, more substantially, in generally reading principles of “fair balance” and “proportionality,” with regard to both deprivations and regulation of property, into Article 1.<sup>98</sup>

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93. Council of Europe, Chart of Signatures and Ratifications of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, <http://conventions.coe.int/> (follow “Full list” hyperlink; then follow “Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms” hyperlink; then follow “Charts of signatures and ratifications” hyperlink) (last visited Oct. 27, 2009).

94. European Convention of Human Rights, *supra* note 8, at 262. The first paragraph of Article 1 reads: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” *Id.* The second paragraph states: “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 . . . .” *Id.*

95. Human Rights Act, 1998, c. 42 (U.K.). See Schedule 1, Part 2, Article 1 for the protection of property.

96. See Tom Allen, *Compensation for Property Under the European Convention of Human Rights*, 28 MICH J. INT'L L. 287, 292–94 (2007).

97. See, e.g., *infra* text accompanying notes 99–102.

98. For the application of the “fair balance” and “proportionality” principles, see *Sporrong & Lönnroth v. Sweden*, 52 Eur. Ct. H.R. (ser. A) at 26 (1982), 5 Eur. H.R. Rep. 35, para. 69 (1983) (reading into Article 1 “fair balance” and “proportio-

Thus, for example, between January 1992 and March 2003, 354 cases regarding expropriation of lands were filed against Turkey—more than 25 percent of all cases (1,357) submitted against Turkey to the ECHR during that period.<sup>99</sup> Out of these, 344 cases concerned adjustment of compensation to adjust for inflation for the lengthy periods between the valuation of compensation and its actual payment; eight dealt with the application of a twenty-year limitation period on claims against unauthorized government seizures of land; and one case considered a *de facto* expropriation without compensation.<sup>100</sup> The Court intervened extensively, with overall damages awarded amounting to nearly twenty-million Euros.<sup>101</sup> Following these decisions, Turkey, seeking to step up to ECHR standards, substantially revised its Expropriation Law.<sup>102</sup>

On the other hand, there have been cases in which the ECHR has been more ambiguous and cautious about intervening in domestic land law doctrines. In these cases, courts view the “fair balance” and “proportionality” requirements not as a single supranational blueprint, but as standards that must give substantial leeway to domestic rulemaking. This is especially true in areas involving complex legal, social, and political traditions.

*JA Pye (Oxford) Ltd. v. United Kingdom* is a case on point.<sup>103</sup> The ECHR’s Grand Chamber, in a 10-7 vote, reversed the Section 4 Chamber’s ruling that the law of adverse possession of the United Kingdom violated the Convention.<sup>104</sup> The

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nality” as “inherent in the whole of the Convention” and “reflected in the structure of Article 1”). These components were specifically implemented in the context of compensation for taking of property in *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) 9, 36 (1986), 8 Eur. H.R. Rep. 123, paras. 50–57 (1986).

99. Tashin Yomralioglu et al., Land Valuation Issues of Expropriation Application in Turkey 5 (2007) (unpublished manuscript, on file with author) (paper presented at the Seminar on Compulsory Purchase and Compensation in Land Acquisition and Takings, FIG Commission 9, Helsinki, Finland, Sept. 6–8, 2007).

100. *Id.* at 5–9.

101. *Id.*

102. Turkish Expropriation Law, Law No. 2942 (1983) (Turk.), *amended by* Law No. 4650 (2001), *available at* [http://www.ifc.org/ifcext/btc.nsf/AttachmentsByTitle/Tur+-+AnX+3.1/\\$FILE/RAP+-+Annex+3.1+-+Turkish+Expropriation+Law.pdf](http://www.ifc.org/ifcext/btc.nsf/AttachmentsByTitle/Tur+-+AnX+3.1/$FILE/RAP+-+Annex+3.1+-+Turkish+Expropriation+Law.pdf) (unofficial English translation). This Law now includes, *inter alia*, a duty to negotiate, placement of all administrative costs on the government, and preconditioning of the transfer of ownership to the payment of compensation determined by a court in case of conflict. Yomralioglu et al., *supra* note 99, at 9–11.

103. *J.A. Pye (Oxford) Ltd. v. United Kingdom (J.A. Pye II)*, App. No. 44302/02, Eur. Ct. H.R. (2007), 43 Eur. H.R. Rep. 45 (2008) (Grand Chamber).

104. *See id.*; *J.A. Pye (Oxford) Ltd. v. United Kingdom (J.A. Pye I)*, App. No.

Grand Chamber thus validated the House of Lords decision to grant judgment in favor of bad-faith squatters who occupied privately-owned and privately-registered land.<sup>105</sup>

Since the possession of the land in this instance took place between 1984 and 1999, the applicable English law was the one that preceded the new regime designed by the Land Registration Act of 2002.<sup>106</sup> According to the then-existing law, as set forth by the Limitation Act of 1980<sup>107</sup> and Section 75 of the Land Registration Act of 1925,<sup>108</sup> upon the passage of the twelve-year limitation period (and subject to a number of other conditions included in the Limitation Act and relevant case law), the adverse possessor gained not only immunity against any action by the owner, but was also entitled to apply for registration as the new proprietor of the land.<sup>109</sup> This doctrine has been traditionally grounded in discouraging people from “sleeping on their rights” and bringing stale claims, as well as ensuring that the unopposed occupation of land and its legal ownership coincide.<sup>110</sup>

In November 2005, the ECHR Section 4 Chamber ruled that the case does engage Article 1 because this provision applies not only to governmental expropriation but also to national laws facilitating deprivation of possession among private persons.<sup>111</sup> The Chamber further reasoned that although the then-in-force English adverse possession law may be deemed to serve a public interest, the interference with the registered owners’ rights was disproportionate and thus in violation of Article 1.<sup>112</sup> This was especially so since, in the Chamber’s opinion, the justifications for the adverse possession, originally conceived in previous eras when most lands were unregistered, are less clear for registered lands of which the owners are readily identifiable. This change has also found expression in the alteration—though not abolishment—of the adverse pos-

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44302/02, Eur. Ct. H.R. (2005), 43 Eur. Ct. H.R. 3 (2006).

105. See *J.A. Pye II*, *supra* note 103, paras. 71–85.

106. Land Registration Act, 2002, c. 9, §§ 96–98 (Eng. & Wales).

107. Limitation Act, 1980, c. 58, § 15 (Eng. & Wales).

108. Land Registration Act, 1925, 15 & 16 Geo. 5, c. 21, § 75 (Eng. & Wales).

109. *Id.*

110. See generally MARK P. THOMPSON, MODERN LAND LAW 201–29 (3d ed. 2006) (pointing to security of title as a particularly important rationale for a limitation doctrine in the context of land).

111. *J.A. Pye I*, *supra* note 104, paras. 49–52.

112. *Id.* paras. 68–76.

session doctrine under the new Land Registration Act of 2002.<sup>113</sup>

Reversing the Section 4 Chamber's decision in 2007, the ECHR Grand Chamber viewed the adverse possession legislation as falling under the "control of use" of land within the meaning of the second paragraph of Article 1, and not as a "deprivation of possessions" under the first paragraph. It concluded that the legislative provisions struck a "fair balance" between the means employed and the aim sought.<sup>114</sup> The Grand Chamber pointed to the abundance, among the Convention's member states, of "some form of mechanism for transferring title in accordance with principles similar to adverse possession in the common law systems"<sup>115</sup> without payment of compensation. The Grand Chamber further emphasized that "[i]t is a characteristic of property that different countries regulate its use and transfer in a variety of ways."<sup>116</sup> More broadly, the Grand Chamber emphasized that, especially in complex matters such as land law, the Court will respect the national legislature's judgment "as to what is in the general interest unless that judgment is manifestly without reasonable foundation."<sup>117</sup>

The Grand Chamber's recent ruling thus reflects a different stance toward the European Convention's unification of land laws. While subjecting all domestic rulemaking to supranational, substantive principles of "fair balance" and "proportionality," it nevertheless recognizes that the complexity of land law reflects a unique national construct, grounded in a distinctive economic, social, and cultural setting. However, it seems that the pendulum is far from having come to a halt, so one might very well expect a constant swing between deference to national rulemaking and supranational norm-setting in the ECHR's land law jurisprudence in the years to come.

Multi-national institutions and conventions establishing procedural and substantive norms on property—and land in

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113. *Id.* para. 74. Whereas the Land Registration Act 2002 did not abolish the adverse possession doctrine, it did introduce certain significant changes that seem to adapt adverse possession to the changing landscape of property in registered land. On the one hand, the limitation period has been reduced from twelve to ten years. On the other, the transfer of rights is no longer automatic. THOMPSON, *supra* note 110, at 230–39.

114. *J.A. Pye II*, *supra* note 103, paras 64–85.

115. *Id.* para. 72.

116. *Id.* para. 74.

117. *Id.* para. 75.

particular— are by no means restricted to Europe. For example, Article 21 of the American Convention on Human Rights<sup>118</sup> provides for the protection of the right to use and enjoy property and subjects any deprivation of property for the public utility or social interest to the payment of just compensation “according to the forms established by law.”<sup>119</sup> Accordingly, the Inter-American Commission on Human Rights (a supervising body and potential petitioner) and the Inter-American Court of Human Rights have increasingly dealt with petitions filed against member states for the infringement of property rights in land.<sup>120</sup>

One should also take note that beyond the binding supranational manifestations of “property” in the European Convention and other supranational conventions, there has been a growing number of attempts by international bodies, such as the United Nations Human Rights Council, to phrase a set of universal norms regarding certain aspects of rights to land.<sup>121</sup> These initiatives seek, *inter alia*, to address major humanitarian concerns over mass evictions of hundreds of thousands of people for large-scale infrastructure projects in places such as India, Nigeria, Zimbabwe, and China. For example, according to human rights groups, about 1.5 million people were compulsorily evicted from their homes in the Beijing area to make way for new infrastructure for the 2008 Olympic Games.<sup>122</sup>

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118. American Convention on Human Rights, *supra* note 1, at 143. The list of signatories currently includes twenty-four member states throughout the continent. See Inter-Am. C.H.R., *Annual Report of the Inter-American Commission on Human Rights 2006*, at ch. II(A)(6), OEA/Ser.L/V/II.127, doc. 4 rev. 1 (Mar. 3, 2007), available at <http://www.cidh.org/>.

119. American Convention on Human Rights, *supra* note 1, at 143.

120. See, e.g., *supra* notes 1–5 and accompanying text (discussing the *Sawhoyamaxa* case); see also Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WIS. INT'L L.J. 51, 54 (2009) (arguing that the Court’s “decisions generally conform to the principles set forth in the UN Declaration except in the area of state expropriation of natural resources on indigenous ancestral lands”).

121. See U.N. Hum. Rts. Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, 2, 10–11, U.N. Doc. A/HRC/4/18 (Feb. 5, 2007) (prepared by Miloon Kothari). The report, which identifies a normative gap in the non-recognition of the right to land in international human rights law, seeks to provide “practical and operational tools to promote, monitor, and implement the human right to adequate housing.” *Id.* Annex I to the report sets out “Basic Principles and Guidelines in Development-Based Evictions and Displacement.” *Id.* at 13–26.

122. The Associated Press, *China Evicting 13,000 per Month in Olympic Prep: Advocacy Group*, Dec. 5, 2007, <http://www.cbc.ca/world/story/2007/12/05/>

Whereas such initiatives are not yet binding in the international arena, they do seem to add to the already substantial layer of supranational institutions and conventions that constantly challenge, and at times reshape, the terrain of local land laws.

In sum, multinational conventions and institutions that engage in supranational oversight of property protection are increasingly encroaching on the “enclave” of local land laws. However, these institutions face a constant challenge to balance their own overarching standards with apt consideration for the local foundations of domestic land law and policy.

### *B. Bilateral Investment Treaties*

The influx of supranational legal issues concerning property rights in land is also a result of the dramatic increase in economic cross-border activities in large-scale real estate and infrastructure projects. Foreign investments in real estate throughout the world have boomed in recent decades,<sup>123</sup> with traffic going not only from West to East or North to South, but also coming in from what were once considered to be developing economies.<sup>124</sup>

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china-housing.html. For a report on recent evictions in West Bengal, India, see International Peoples Tribunal on Eviction of Peasants and Violation of Human Rights in Singur, Nandigram and Other Areas in West Bengal, India, Jan. 21, 2007, [http://www.foodsov.org/resources/First\\_Report\\_on\\_International\\_Peoples\\_Tribunal.pdf](http://www.foodsov.org/resources/First_Report_on_International_Peoples_Tribunal.pdf). See also Malcolm Langford & Ujjauni Halim, *Expropriation and Eviction: Human Rights and Grassroots Perspective*, in COMPULSORY PURCHASE AND COMPENSATION IN LAND ACQUISITIONS AND TAKINGS 174, 175 (Kauko Viitanen & Ibimina Kakulu eds., 2008).

123. See, e.g., *FDI in Chinese Real Estate Soared*, CHINA CHEMICAL REP., July 6, 2007, at 4; Jason Bush, *Ukraine: What Crisis?*, BUS. WK., Sept. 3, 2007, at 50 [hereinafter Bush, *Ukraine: What Crisis?*]; Jason Bush, *The Russian Towers Are Coming*, BUS. WK., Oct. 9, 2006, at 60; Roben Farzad & Christina Lindblad, *Extreme Investing: Inside Colombia*, BUS. WK., May 28, 2007, at 50; Erik Heinrich, *The Next Real Estate Boom*, CANADIAN BUS., Mar. 26, 2007, at 25–27 (describing growing investments by North Americans in Central and South America and Eastern Europe); Liu Jinping, *Chinese Realty Market Needs Fortification*, CHINA TODAY, Oct. 2007, at 11; Andrew Morse, *Tokyo Property Lures Goldman*, WALL ST. J., Aug. 27, 2007, at A4.

124. See Steven Weisman, *A Fear of Foreign Investments*, N.Y. TIMES, Aug. 21, 2007, at C1 (describing growing fears in the United States over multi-billion dollar foreign investments in bonds, stocks, and real estate coming from sovereign wealth funds in China, Russia, and Persian Gulf countries, and quoting American officials' concerns that these funds are politically involved and have non-transparent investment policies).

The changing landscape of foreign investment in real estate is not only quantitative but also qualitative. In the past, foreign investors sought to acquire land mainly to facilitate a specific pre-designated project (e.g., setting up a manufacturing plant).<sup>125</sup> Nowadays, persons and corporations are increasingly entering foreign real estate markets as regular actors, often purchasing land for investment or real estate entrepreneurship.<sup>126</sup>

The protection of property rights pertaining to real estate—as well as to other types of assets—poses a difficult challenge. This is especially true when foreign investors are reluctant to be subjected to the risks and perils of domestic lawmaking and regulation that may arise from the significant involvement of non-parities in the legal, public-governance, and cultural environments. In such instances, foreign investors are often not motivated solely to ensure nondiscrimination vis-à-vis local investors. They also seek to incorporate independent, non-local standards of protection through specific agreements between the investor and the host government, inter-governmental investment treaties, and so forth, and to enforce such provisions through extra-local tribunals or arbitrators.

In this context, Bilateral Investment Treaties (“BITs”), alongside investment clauses in Economic Integration Agreements,<sup>127</sup> have played a prominent role. Beginning in the late 1950s—with the decline of consensus over customary international law rules on cross-border investments—and booming in the 1990s,<sup>128</sup> the number of BITs has increased considerably—there were over 2,600 worldwide by the end of 2007.<sup>129</sup> These treaties typically include provisions that go beyond the mere right to “national treatment.”<sup>130</sup> These protections may include the right to “fair and equitable

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125. See Zachary Elkins et al., *supra* note 11, at 267–68, for examples of such “classical” types of commercial assets being expropriated by host governments.

126. See, e.g., Bush, *Ukraine: What Crisis?*, *supra* note 123, at 50–51 (describing a 60 percent price increase in twelve months in Kiev’s real estate market following the foreign investment boom, and the ability of powerful entrepreneurs to quickly push forward projects in what is otherwise a bureaucracy-laden country).

127. See, for example NAFTA’s Chapter 11. North American Free Trade Agreement, *supra* note 10, at 639.

128. For the evolution of BITs, see Ryan J. Bubb & Susan Rose-Ackerman, *BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment*, 27 INT’L REV. L. & ECON. 291, 293–97 (2007); Elkins et al., *supra* note 11, at 267–74.

129. UNCTAD, *supra* note 18, at 7, 23.

130. *Id.* at 40–43.

treatment”—a concept that originally evolved in customary international law as a standard explicitly detached from the host country’s domestic law<sup>131</sup>—“full protection and security,” “most favored nation” treatment, and the right of compensation for “expropriation.”<sup>132</sup> The effect of BITs on domestic laws and lawmaking powers has become particularly significant both in scope and content due to the influx of disputes brought before international tribunals and arbitrators.<sup>133</sup> Most prominent is the World Bank’s International Center for Settlement of Investment Disputes (“ICSID”).<sup>134</sup> Many of these tribunals adopt a relatively progressive approach in interpreting BIT clauses, intervening in numerous instances in local regulatory or legislative acts that are viewed as conflicting with such cross-national legal norms.<sup>135</sup>

This Article does not delve into a detailed analysis of the political, cultural, and legal cross-influences between BITs and property rights,<sup>136</sup> and will only refer to the somewhat winding paths that BITs have recently taken in implicating domestic property concepts.

Generally speaking, one can discern a shift in the nature of BITs. The demand for BITs originally came from Western countries looking to protect investments in developing countries.<sup>137</sup> Consequently, BITs were being typically signed between a developed country—the exporter of capital—and a developing one, so that BIT provisions were mainly placing constraints on the latter.

The economic and legal reality of BITs is now somewhat changing. These recent changes can be attributed, *inter alia*, to the fact that BITs and investment chapters in Economic Integration Agreements are increasingly being signed between pairs of developed countries as well as between developing countries themselves.<sup>138</sup> Additionally, the mounting flow of

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131. *Id.* at 40–47.

132. *Id.* at 47–61.

133. *Id.* at 7–9.

134. See International Centre for Settlement of Investment Disputes, <http://icsid.worldbank.org/ICSID/Index.jsp> (last visited Feb. 15, 2009).

135. UNCTAD, *supra* note 18, at 7–9, 46.

136. See Amnon Lehavi & Amir N. Licht, BITs and Pieces of Property: International Investment, Property Rights, and Local Culture 1–2 (2009) (unpublished manuscript, on file with author).

137. This was especially so after newly-independent countries in Africa and Asia nationalized key foreign assets in the 1950s and 1960s. Elkins et al., *supra* note 11, at 267–69.

138. Bubb & Rose-Ackerman, *supra* note 128, at 296–97.

capital from countries such as Russia, China, and India into Western countries<sup>139</sup> and the growing use of formal arbitrations—in which developed countries often find themselves as respondents—are making BITs more genuinely bilateral.<sup>140</sup>

The following case may serve as an example for a “classic” conflict arising in a developing country over protective BIT provisions, and for the political economy that typifies it. A few years ago, the government of Paraguay refused to apply its own land laws and to transfer title of lands in the village of Palmital to 120 landless peasant families, who had occupied an estate of over 1,000 hectares (nearly 2,500 acres) that had been idle.<sup>141</sup> The refusal to apply these agrarian reform laws to force the landowners to sell the lands or to expropriate them was grounded in the fact that the land was owned by several German citizens and that the 1993 BIT among the two countries arguably prohibited the expropriation of rural property owned by German citizens.<sup>142</sup> The peasant families were thus forcibly evicted from the land and their leaders were imprisoned.<sup>143</sup> Later, the peasants, the owners, and the government of Paraguay reached an out-of-court settlement that allowed the peasants to remain on the land.<sup>144</sup>

Whereas such “West-East” dynamics are obviously still abundant, the cross-effects of BITs on property rights, including rights to land, have also been taking other routes. For example, extensive litigation over the investment provisions in NAFTA has not only scrutinized Mexico’s domestic policies,<sup>145</sup> but also those of the United States and Canada.<sup>146</sup> The

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139. See *supra* note 124.

140. See *infra* note 146 and accompanying text.

141. For reports on this case, see UTE HAUSMANN & ROLF KÜNNEMANN, GERMANY’S EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS 13–15 (Ute Hausmann et al. eds., 2006), available at [http://www.eed.de/fix/files/doc/eed\\_Germanys\\_extraterritorial\\_human\\_rights\\_06\\_eng.pdf](http://www.eed.de/fix/files/doc/eed_Germanys_extraterritorial_human_rights_06_eng.pdf); *A German Privilege*, GERMAN-FOREIGN-POLICY.COM, Nov. 21, 2007, <http://www.german-foreign-policy.com/en/fulltext/56112>.

142. HAUSMANN & KÜNNEMANN, *supra* note 141, at 13.

143. *Id.*

144. *Id.*

145. See, e.g., *Metalclad Corp. v. United Mexican States*, ICSID (W. Bank) Case No. ARB(AF)/97/1 (Aug. 30, 2000), reviewed by *United Mexican States v. Metalclad Corp.*, [2001] 2001 BCSC 664 (Can.) (viewing restrictive measures on claimant’s use of land for an underground landfill and a subsequent decree announcing the land to be a wildlife protected area as an “expropriation” of claimant’s property).

146. For several prominent cases involving Canada and the United States as respondents, see UNCTAD, *supra* note 18, at 41–43. See also David Schneiderman, *Property Rights and Regulatory Innovation: Comparing Constitutional*

growing exposure of these countries to potential invalidation of their laws and regulations by cross-national treaties led NAFTA's three trade ministers to convene in 2001 and to offer a joint interpretation to key provisions in Chapter 11.<sup>147</sup> It also drove the United States and Canada to issue new model BITs in 2004.<sup>148</sup> These documents include a more closed-list definition of "investment," limit the scope of the "minimum standard of treatment" provision to its application in customary international law, and narrow the definition of "expropriation."<sup>149</sup> Other countries, both developed and developing, have also worked to renegotiate existing BITs or to redraft key provisions in new ones in response to what they deemed to be overly interventionist arbitration awards.<sup>150</sup>

This recent turn of events should not necessarily be interpreted as a conscious reciprocal policy by the various countries to scale down the scope of BITs as a potential trump against local powers, or as recognition by developed countries that, in cases of cross-border investments, "Western" values and concepts of property protection have no claim of superiority over the ones prevailing in other countries. Thus, for example, newly-drafted provisions on the requirement of "transparency" in domestic decision-making, such as Article 19 of the 2004 Canadian model BIT,<sup>151</sup> have already been viewed by the UN Conference on Trade and Development as a mechanism with the principle aim to "foster a more legalistic and rule-oriented administrative practice, which is in the general interest of the population of the host country."<sup>152</sup> The Western-oriented

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*Cultures*, 4 INT'L J. CONST. L. 371, 385–90 (2006) (arguing that NAFTA's investment chapter, and its discussion of concepts such as takings, may move Canadian constitutional culture further towards a U.S.-style government, undermining the Canadian state's better ability to handle problems of transition).

147. NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (July 31, 2001), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en>.

148. For a U.S. Model BIT, see Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, <http://www.state.gov/documents/organization/117601.pdf> (last visited Dec. 6, 2009). For a Canadian Model BIT, see Agreement Between Canada and ----- for the Promotion and Protection of Interests, [http://www.naftaclaims.com/files/Canada\\_Model\\_BIT.pdf](http://www.naftaclaims.com/files/Canada_Model_BIT.pdf) (last visited Oct. 28, 2009).

149. UNCTAD, *supra* note 18, at 71–78.

150. *Id.*

151. See Agreement Between Canada and ----- for the Promotion and Protection of Interests, *supra* note 148.

152. UNCTAD, *supra* note 18, at 79.

paternalistic flavor and potential for asymmetric application of this statement seems obvious enough.

Time will tell what form these new BITs will take in re-shaping and circumventing local property rules in general and land laws in particular. The future trajectory of BITs and similar financial instruments will continue to reflect the inherent tension between the interests of foreign investors, national policies of countries that “export” or “import” capital, private interests of domestic stakeholders, and so forth. Future developments must also address the inevitable institutional and normative pressure on mechanisms such as BITs to resolve the ever-complicated bundle of property rights in lands.

### *C. Sub-Society Rights: National and International Perspectives*

The complexity of overlapping norms and institutions in regard to land rights is not just a matter of national versus supranational origin. Even within the national realm, a country's land regime is not merely the result of general and exclusive national rulemaking. First, every country faces the dilemma of whether and to what extent decisions on land use and control should be entrusted to different levels of government.<sup>153</sup> This is the case with the federal-state division of powers in federal regimes, and with local governments in all countries. Institutional solutions, as well as interjurisdictional legal rules, are far from easy. This is especially true when different levels of government and their respective constituents deem the power to control and regulate land as one of particular importance.<sup>154</sup> Thus, any extra-national sources of influences add on to what is already a multi-layered legal regime.

Moreover, in many countries throughout the world, the control and use of lands implicate the relationships between state institutions and traditional local groups, such as indigenous tribes. An exhaustive survey of such issues is outside the scope of this Article, but it would be safe to say that land

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153. See Amnon Lehari, *Intergovernmental Liability Rules*, 92 VA. L. REV. 929, 935–40 (2006) (analyzing the prominence of local government power over land use in the United States). Other countries may opt for greater centralization in land use controls. See generally NATIONAL-LEVEL PLANNING IN DEMOCRATIC COUNTRIES: AN INTERNATIONAL COMPARISON OF CITY AND REGIONAL POLICY-MAKING (Rachelle Alterman ed., 2001).

154. See Lehari, *supra* note 153, at 940–48 (discussing interlocal zoning externalities).

control and the land-tenure system are probably the most fundamental issues in resolving questions regarding the place of traditional communities in liberal democracies such as the United States,<sup>155</sup> Canada,<sup>156</sup> Australia,<sup>157</sup> or New Zealand;<sup>158</sup> redress for historical injustices inflicted upon such groups; and the consequent nature of validating tribal interests and claims.<sup>159</sup>

The difficulties embedded in maintaining land systems that have multilayered structures and overlapping normative orders are especially acute in societies in which tribal claims are not recognized by the state or have not yet been fully resolved and enforced. In the context of many African and other developing nations, the result is often one of land-rights deadlock in which the state, tribal communities, and other parties are able to employ only partial exclusionary measures against others, thus leading lands to a state of forced, suboptimal “open access.”<sup>160</sup> Hence, state attempts to standardize property rights in land so that they are allegedly clearer and more straightforward (e.g., through Western-type land titling) may only cause the eruption of disputes and the collapse of traditional governance systems. This ambition of legal uniformity may thus exacerbate growing societal confrontation about norm-making and enforcement mechanisms.<sup>161</sup>

The *Sawhoyamaxa* case illustrates the further twist added to these complexities when supranational norms and institutions on land law come into the picture.

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155. See, e.g., Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 317, 318–20 (2006); Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1293–1300 (2001).

156. See Kent McNeil, *The Vulnerability of Indigenous Land Rights in Australia and Canada*, 42 OSGOODE HALL L.J. 271, 271–73, 297–300 (2004).

157. See *id.*

158. See P.G. McHugh, *Aboriginal Title in New Zealand: A Retrospect and Prospect*, 2 N.Z. J. PUB. & INT'L L. 139, 139–41 (2004); Jeremy Waldron, *Redressing Historic Injustice*, 52 U. TORONTO L.J. 135, 148–50 (2002).

159. See, e.g., Stacy L. Leeds, *Borrowing from Blackacre: Expanding Tribal Land Bases Through the Creation of Future Interests and Joint Tenancies*, 80 N.D. L. REV. 827, 829–38 (2004); Kristina L. McCulley, Comment, *The American Indian Probate Reform Act of 2004: The Death of Fractionation or Individual Native American Property Interests and Tribal Customs*, 30 AM. INDIAN L. REV. 401, 403–15 (2006).

160. Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L.J. 996, 1011–16 (2006).

161. *Id.* at 1037–45.

As mentioned above, the Sawhoyamaxa tribe based its petition on the contention that the government of Paraguay had violated the American Convention of Human Rights, including Article 21, which deals with the right to private property.<sup>162</sup> The tribe argued that the government had failed to complete its own initiative to recover part of the ancestral lands of the tribe of over 14,000 hectares (about 34,600 acres), even though Paraguayan law recognizes the right of indigenous peoples to preserve their way of life in their habitat and to protect the claimed lands.<sup>163</sup> As a result, community members were living in inhumane conditions, resulting in a number of deaths due to lack of food and medical care.<sup>164</sup> The government contended that although it was committed to solving the matter, the lands in question were formally owned by private German citizens. Therefore, the executive branch's efforts to expropriate the land were met with staunch resistance by the legislature in view of the provisions of the 1993 BIT between Germany and Paraguay.<sup>165</sup>

In March 2006, the Inter-American Court ruled in favor of the Sawhoyamaxa tribe.<sup>166</sup> The court reasoned that the enforcement of bilateral commercial treaties may not allow a state to infringe its obligations under the Convention, but rather that "their enforcement should always be compatible with the American Convention."<sup>167</sup> As for the problem of conflicting rights in the land, the court reasoned that although it is "not a domestic judicial authority with jurisdiction to decide disputes among private parties," it is nevertheless competent to "analyze whether the State ensured the human rights of the members of the Sawhoyamaxa Community."<sup>168</sup> In the court's view, the government of Paraguay's recognition of the tribe's communal property rights to traditional lands remains "meaningless in practice if the lands have not been physically . . . surrendered because the adequate domestic measures neces-

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162. American Convention on Human Rights, *supra* note 1, at 150.

163. Case of the Sawhoyamaxa Indigenous Cmty. v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C.), No. 146, paras. 122–24 (Mar. 29, 2006).

164. *Id.* paras. 73.61–74.

165. *See id.* para. 137.

166. *Id.* para. 248.

167. According to the court, the American Convention "is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States." *Id.* para. 140.

168. *Id.* para. 136.

sary to secure effective use and enjoyment of said right . . . are lacking.”<sup>169</sup> The court ordered the state to “adopt all legislative, administrative and other measures necessary to formally and physically convey to the members of the Sawhoyamaxa Community their traditional lands, within three years.”<sup>170</sup>

The Sawhoyamaxa case acutely demonstrates the implications of a multilayered land law scheme involving international, national, and sub-national norms and institutions, because it includes (1) an international human rights convention and respective international tribunal; (2) a cross-national investment treaty with its distinctive potential arbitral forum; (3) general provisions in the Paraguayan Constitution and in its national legislation about the recognition of traditional tribal rights and commitment to land restitution; (4) the standard land law of Paraguay with its land-titling system and the property rights that emanate from it; and (5) tribal norms, institutions and practices of sub-society groups—all of which are tied up in the same physical asset in a highly complicated and multi-directional manner.

Beyond the inevitable need to set up appropriate doctrinal rules about norm- and forum-based hierarchy and multiplicity in such instances of sub-national, national, and supranational multilayered regimes, cases such as Sawhoyamaxa serve as an illustration for broader theoretical questions about cross-national land law rulemaking and enforcement. Although such queries may and do arise with respect to any field of law that becomes governed by both domestic and supranational norms and institutions, the next Part argues that land law poses especially difficult normative and institutional challenges in dealing with the legal design of overlapping spheres of law.

### III. RESTRUCTURING THE THEORY OF CROSS-BORDER LAND LAW

The reality of cross-border, land-related norms and institutions is rapidly evolving due to a multitude of geopolitical, economic, and social phenomena, yet its corresponding jurisprudence seems to develop in a very ad hoc manner. This is not only due to the vast number of courts and tribunals that resolve disputes over specific cross-border land law issues with-

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169. *Id.* para. 143.

170. *Id.* para. 248.6.

out inter-institutional coordination. The state of events stems also from of the lack of a comprehensive theory and broad-based understanding about the major ingredients of legal cross-border land regimes and about their potential advantages and pitfalls vis-à-vis more “isolated” systems. This state of affairs is not surprising, considering the traditionally localized concept of land law, unlike other fields which have tended to develop in a more cross-border standardized, or at least a cross-border conscious manner.<sup>171</sup>

Though this Article does not attempt to offer a full-scale theory in the matter, it does make significant steps by identifying the insufficiency of current legal and economic theories to manage the complexities of cross-border land regimes, by mapping the determinants of law, politics, economics, and culture and their potential interplay in this context, and by suggesting primary theoretical and normative principles for future work.

Accordingly, Section A sets out to demonstrate why current theory pertaining to land law and policy does not provide supranational and national decision makers with appropriate tools to address the issue of shifting boundaries in what is allegedly a fixed-boundaries asset. Section B discusses two specific problems with the current development and management of national and supranational norm-making: one of “institutional incompleteness,” and the other of “normative over-fragmentation.” Section C points out yet another flaw in the current theory and practice of cross-border land law: the lack of a systematic analysis of the unique and complex interplay among law, politics, culture, and economy in the design of land regimes that moves beyond the classic contours of a unitary and exclusive state design model.

#### *A. Over- and Under-Inclusiveness of Current Theory*

To start with, it might be useful to roughly map out current theories into area-specific studies, universal theories, and comparative law works. First, for understandable methodological reasons, many empirical studies of land regimes and land markets tend to be rather focused, both geographically and thematically. One need only skim through recent tables of con-

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171. Examples for such more “natural” cross-border laws could be corporate and securities law, competition law, intellectual property, or certain non-economic human rights law (e.g., wartime rights of combatants and civilians).

tents of leading journals on real estate studies,<sup>172</sup> to see that empirical works tend to confine themselves to the boundaries of a city, region, or country.<sup>173</sup> In this sense, such theories tend to be under-inclusive in that they rely on certain economic and legal assumptions that may hold true for specific locations, but provide little guidance for settings that must rely on other sets of assumptions, let alone in a setting of overlapping economic and legal environments.

By contrast, whereas theories of property arguing for a validity that transcends specific time and place have long existed in the literature—John Locke’s theory of the natural right to private property being a seminal example<sup>174</sup>—there has been a recent proliferation of explicitly non-local normative theories of land law rules accompanying the growing dominance of the economic analysis of law. Two of the foundational writings of this school, Ronald Coase’s *The Problem of Social Cost*<sup>175</sup> and Guido Calabresi and A. Douglas Melamed’s *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*,<sup>176</sup> offer a “universal” menu or set of theoretical tools for designing an efficient system of property rights and duties. More recently, in *Optional Law*, Ian Ayres spins a sophisticated web of legal “put” and “call” option rules that could be employed by courts to more efficiently allocate rights and duties in regards to resources, and land in particular.<sup>177</sup> In this sense, such theories are overinclusive in that they ignore place-specific underlying peculiarities and suggest instead comprehensive blueprints for land law and design. In real life scenarios, however, as is demonstrated in *JA Pye (Oxford) Ltd.*

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172. See, for example, the journals *Urban Studies*, *Land Economics*, *Real Estate Economics*, *Journal of Real Estate Economics and Finance*, and *Journal of Real Estate Literature*.

173. This is not to say that such research takes for granted the underlying local conditions of the market, land regime, demography, etc. For example, a recent study on the effects of urban land supply policy on the real estate market in China explicitly discusses the normative peculiarities of the government’s monopoly over ownership of land and its use of land supply as a tool for social control. Hong Zhang, *Effects of Urban Land Supply Policy on Real Estate in China: An Econometric Analysis*, 16 J. REAL EST. LITERATURE 56 (2008).

174. JOHN LOCKE, SECOND TREATISE ON GOVERNMENT Ch. V. (C.B. Macpherson ed., 1980) (1690).

175. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1–2 (1960).

176. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

177. IAN AYRES, OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS 1–38 (2005).

and *Sawhoyamaxa*, opting for such one-size-fits-all economic formulas is not only institutionally impracticable, but may also be normatively undesirable.<sup>178</sup>

This is definitely not to say that all economic analysis of property in land has taken a locus-detached approach. One recalls Harold Demsetz's famous depiction in *Toward a Theory of Property Rights*<sup>179</sup> of a Native American tribe's evolutional switch to private ownership of land following the increase in fur trade with Europeans and the growing pressure on this resource, which arguably necessitated a restructuring of the tribe's entire property rights system. Demsetz's normative argument for private property thus claimed to be supported by a time- and place-specific historic evolution.<sup>180</sup> This aspect of Demsetz's work has been criticized recently by writers who chronicle numerous instances in which the shift to private property was not motivated by a search for societal efficiency but rather by rent-capturing.<sup>181</sup> Critics also point to situations in which interest groups blocked property changes that would have been expected under Demsetz's predictions.<sup>182</sup>

The growing comparative literature on land law takes a different approach. Up until quite recently, property law—and land law in particular—has not been the subject of much comparative study, given both the doctrinal reality of relative isolation and the consequent conception of this area as typified by inherently radical, inter-local differences.<sup>183</sup> This state of affairs has changed, however, in recent years, with scholars from various disciplines increasingly taking interest in cross-border studies of the field.<sup>184</sup>

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178. See *supra* Sections II.A and II.C, respectively, for a discussion of these two cases.

179. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

180. *Id.* at 350–53.

181. See, e.g., Banner, *supra* note 46, at S365–66 (arguing that the design of land regimes in English colonies in Australia, New Zealand, and Fiji was driven by a political agenda aimed at intensifying the British settlers' political rule and control of land).

182. Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117, 224–26 (2005) (portraying the delay in development of individual transferable quotas in U.S. federal coastal fisheries).

183. See Antonio Gambaro, *Preface* to LAND LAW IN COMPARATIVE PERSPECTIVE, at vii–viii (María Elena Sánchez Jordán & Antonio Gambaro eds., 2002).

184. See, e.g., UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION (2000).

In some instances, comparative work has been done with the clear purpose of inspiring changes in an existing legal system. Gregory Alexander offers an in-depth comparative analysis, especially of Germany and South Africa, with the explicit purpose of demonstrating that constitutional protection of property does not necessarily adhere to a single meaning but is rather the subject of interpretation, which is heavily influenced in turn by the background political-legal traditions, culture, and legal institutional context within which constitutions and courts operate.<sup>185</sup> Driven by a progressive viewpoint of property, the stated goal of Alexander's analysis is that "American takings law would be improved, both substantively and methodologically, by borrowing features of constitutional property law that are common in other liberal democracies. The most important of these is an explicit social-obligation norm."<sup>186</sup>

Alexander's innovative comparative analysis reveals, however, a point of methodological and theoretical weakness.<sup>187</sup> Assume that a certain legal system is willing, through the "dialoging and distancing" comparison, to promote its own "self-knowledge" and "self-understanding" of constitutional property law and affect changes for that purpose.<sup>188</sup> Alexander does not provide the necessary toolkit for transforming such insights through the prism of place-specific, political-legal traditions and culture and the legal institutional context of constitutional and judicial activity—the very components that he himself identifies as the key ingredients for giving content to the term "property."

Whereas the problem of actual cross-system doctrinal transferences is by no way unique to property, and applies to any instance of "legal transplants,"<sup>189</sup> the current theory seems especially lacking in the context of property in land. This is not only because of the particularly strong ties between local culture, politics, and history and the development of land law and

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185. See generally GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 97–199 (2006).

186. *Id.* at 21.

187. See Hanoch Dagan, *The Social Responsibility of Ownership*, 92 *CORNELL L. REV.* 1255, 1256–59 (2007) (supporting Alexander's normative argument, but rejecting reliance on comparative law in itself as a source capable of yielding thick and persuasive normative recommendations for a domestic legal system).

188. ALEXANDER, *supra* note 185, at 8.

189. See WATSON, *supra* note 52, at 6–7 (arguing that comparative law is not only a study of a foreign legal system, but moreover the "study of the relationship of one legal system and its rules with another").

policy, but also because land law is currently facing the increasing problem of normative over-fragmentation resulting from the multiplicity and simultaneity of institutions and norms. In other words, the theoretical and methodological challenge, which has been quite unsuccessfully dealt with up until now, is to resolve two questions: How does a certain country reshape its traditionally locally crafted land law to absorb ideas and concepts from across the border? And, more acutely, how can it adapt to the intensifying legal reality of simultaneous and often conflicting norms and institutions? The following Section discusses this query in more detail.

*B. On Institutional Incompleteness and Normative Over-Fragmentation*

While some of the arguments for refraining from a too-hasty jurisprudential ambition to move toward full-fledged, cross-national or universal land law are embedded in historical, political, social, and cultural considerations, other prominent reasons touch on the unique physical and economic traits of land as a resource.

To start with, probably more than with any other resource, different rights and interests within a certain piece of land and outside of it are bound up together in an exceptionally tight manner.<sup>190</sup> The same tract of land may implicate claimants or right-holders of ownership, lease, mortgage, various types of easements, and so forth. It may also implicate different groups of outside stakeholders, such as neighbors negatively or positively affected by the use of the land, or even the general public as influenced by aggregate spatial effects of land-use patterns such as in the case of the socio-economic composition of neighborhoods.<sup>191</sup>

Since claims and rights in specific lands often implicate numerous groups, the basic set of legal rules on which property entitlements and obligations rest must be explicated and made available to the various parties. This must be done in a way that creates and prompts basic social understandings and, in turn, promotes sufficient stability and security in lands generally. As I have argued elsewhere, the key to successfully reconciling the desirability of having a broad-based, relatively

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190. Amnon Lehavi, *The Property Puzzle*, 96 GEO. L.J. 1987, 2000–07 (2008).

191. *Id.*

straightforward core of a property system with the inevitable need to recognize the complexity and dynamism of the resource and the variety of parties implicated by it lies primarily in the nature of the *institutional mechanism* for decision making and rule announcement.<sup>192</sup> The core of the property configuration designated for a certain type of resource, and especially land, must be based on a resolution by society's collective decision-making institutions. This task relies in turn on "public reasoning," which should explicate the values and goals at the basis of property's core conceptions.<sup>193</sup>

The institutional problems with the dispersion of core decisions about property rights in land among various types of decision-making bodies arises especially where there is no clear division of power or normative hierarchy among such entities.<sup>194</sup>

Thus, for example, there exists an inherent tension in the Inter-American Court's statement in *Sawhoyamaxa* that it is "not a domestic judicial authority with jurisdiction to decide disputes among private parties"<sup>195</sup> but that it is nevertheless competent to analyze whether Paraguay ensured the human rights of the tribe and is able to order the transfer of all lands within three years.<sup>196</sup> The court's intervention in this matter creates a dramatic upset of the Paraguayan land regime by effectively holding that traditional tribe interests trump formal registered rights under Paraguayan land law, and that the government of Paraguay must immediately act to validate such supremacy. Yet the court explicitly ignores, in the name of lack of jurisdiction, the major jurisprudential components that are inherently involved in such a fundamental change.<sup>197</sup> It practically disregards the many layers of interests and categories of stakeholders that are physically inseparable from one another due to the unique traits of land—and that must be comprehensively dealt with so as to effectively rearrange the overall property bundle.

Even within a national legal system, jurisdiction is divided among different branches of government and among different

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192. *Id.* at 2014–21.

193. *Id.*

194. This is also very much the case with the relationship between national and extra- or supra-national jurisdictions.

195. Case of the Sawhoyamaxa Indigenous Cmty. v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C.), No. 146, para. 136 (Mar. 29, 2006).

196. *Id.* para. 215.

197. *Id.* para. 136.

types or levels of government within the same branch. But national legal systems include a clearer hierarchy of normative rules and decision making as well as institutional mechanisms that are able to cause systematic changes and revisions in land law, chiefly by generally applicable legislation. This comprehensive institutional structure is something that is largely missing in the type of cross-national institutions discussed in previous Sections.

The issue here therefore is not simply one of “judicial activism” by supranational courts and tribunals in matters of domestic land law, but rather one of “institutional incompleteness.” A property regime in land, with all its unique complexities and interconnections, cannot be sustained when each extra-national court or tribunal takes out a piece of the puzzle and rearranges it to fit its specific mandate while effectively ignoring all other consequences. The existing state of affairs lacks sufficient institutional mechanisms to broadly design and redesign the land system as a whole.

This is obviously not to say that such mechanisms cannot develop over time at the multi-national level. The ability of the EU to truly harmonize, fully or partially, many fields of law, and to sustain them as such over time, stems from the fact that legal institutions within the EU are becoming more comprehensive and clearly-structured, thus allowing for the fundamental restructuring of such fields.<sup>198</sup> But the absence of such institutional completeness in other cross-national contexts, whether merely temporary or long-term, is something that must be taken into consideration in evaluating and advocating for strong cross-border norms and remedies within local land law systems.

A second type of problem for collective property ordering that is especially acute in the case of land stems from the somewhat counterintuitive consequences of supranational instruments such as BITs. While BITs were originally intended to increase certainty and stability, supranational rules and decisions do not necessarily mean more uniformity in the law. In fact, these rules may exacerbate unwarranted internal differentiation. A vivid example is the property provisions in BITs. Since a single country may be signatory to dozens of different BITs, and each of these BITs may include different

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198. See, e.g., BERRY ELSPETH & SYLVIA HARGREAVES, EUROPEAN UNION LAW 11–27 (2007).

procedural and substantive provisions about the protection of property rights, the result may very well be “normative over-fragmentation” of the property regime within a certain country.

The problem of normative over-fragmentation is especially severe in the case of land law. This is because the already complicated web of intertwined rights and interests pertaining to the same asset is further fragmented when people seek to enjoy their *lex specialis* as foreign residents pursuant to BITs.<sup>199</sup> And with the ever-growing phenomenon of foreign investment in real estate for the purposes of investment and speculation, with investments flowing in various, often counterintuitive directions (for example, from “South to North” or from “East to West”), no one can anticipate how many different land law provisions will be argued to apply to the same tract of land in a specific place at a given time.

The problems of institutional incompleteness and normative over-fragmentation are thus problems that must be dealt with when analyzing the theoretical dimensions and policy implications of cross-national effects on land law—regardless of whether one is driven by a basic normative viewpoint of stubborn localism, universalism, or something in between.

### C. *Configuring the Mix of Law, Politics, Culture, and Economics*

In addition to the problems of institutional incompleteness and normative over-fragmentation that are potentially involved in cross-border land law norms, practical attempts to thicken the body of cross-border land law to create theoretical models that will offer a blueprint for land law systems must face the unique mixture of law, politics, economics, and culture in each country. The key challenge that both decision makers and commentators face is thus to understand the cross-influences of these different aspects and the complex ways they interact to produce certain outcomes. Obliviousness to these particular local processes is bound to cause the failure of even the most benign reformatory initiatives.

The issue of land titling serves as a vivid example. This Article has already shown how an ambition to standardize and “clarify” property rights in land, through a sweeping switch to

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199. This is especially so when the asserted “foreignness” is merely strategic. UNCTAD, *supra* note 18, at 10–15.

a uniform land titling system, may result in an increase in disputes, a collapse of the existing property governance system, and an exacerbation of confrontational pluralism in societies typified by stratification and overlapping normative orders.<sup>200</sup>

But the potential fallacy of automatically identifying a uniform and exhaustive land titling system with social order, productivity, and a sense of security, may also present itself in societies in which governments are able to effectively set up and enforce land laws. As Peter Ho shows in the context of agricultural land in China, the Chinese government's decision to create "intentional institutional ambiguity" in the legal structure of land ownership and the registration of titles in such lands has had rather positive effects on the functionality of agricultural land for many decades.<sup>201</sup> For example, the lack of an exact definition for "collective" or "communal" land ownership avoided a renewed stream of historic ownership claims and widespread intra-local social conflicts.<sup>202</sup> Moreover, the occasional reallocation of use rights in agricultural lands, especially in times of crisis, was supported by the majority of farmers who viewed tenure in agricultural lands as a system of employment and social security, and not as a commodity.<sup>203</sup> Whereas economic reality is changing in modern day China, the important institutional point made is that for property reforms to succeed, they must be adapted to socio-economic conditions and further create socially-credible institutions that can create and manage changes over time.<sup>204</sup>

Other research also demonstrates that there is no single blueprint for land titling, but that the efficient creation of land titling institutions essentially hinges on empirical observations about the particular circumstances pertaining to the relevant country.<sup>205</sup> This is especially the case with transitional

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200. See *supra* text accompanying notes 160–61.

201. PETER HO, INSTITUTIONS IN TRANSITION: LAND OWNERSHIP, PROPERTY RIGHTS, AND SOCIAL CONFLICT IN CHINA 12 (2005).

202. *Id.* at 188–89.

203. *Id.* at 186–88.

204. *Id.* at 2–3.

205. See Benito Arruñada & Nuno Garoupa, *The Choice of Titling System in Land*, 48 J.L. & ECON. 709, 710–12 (2005). Arruñada and Garoupa compare the recording system prevalent in some countries with the registration system that exists in others, and they also discuss the possibility of people either acquiring private title assurance, as in the case of a recording system, or opting out altogether from the public titling system. They stress that the choice of an efficient titling system in a given jurisdiction is an empirical issue which cannot be solved on purely theoretical grounds. *Id.* at 713–25.

economies where issues of timing and institutional choice regarding reforms in the land titling system depend crucially on the particular mix of prevailing social, political, and cultural aspects of the society at stake.<sup>206</sup>

This is not to say that a local system of land titling should be hailed as trustworthy, efficient, and fair, and be always immune from intervention by authorized extra-local decision makers such as arbitral tribunals. As this Article argues in the following Part, in the context of the recent mass evictions of populations to make way for large-scale projects in China, India, Zimbabwe, and Nigeria,<sup>207</sup> the imposition of supranational norms—even if currently fragmented and institutionally-incomplete—may have special normative force when a specific conflict exposes systematic abuse of government power in other scenarios in which the property infringement can be seen as undermining core human rights.

#### IV. LAND LAWS IN A GLOBAL ERA: BREAKING NEW GROUND

Part III showed that the distinctive features of different domestic land laws are not only a matter of local pride, an irrational fear of change, or a part of a cross-national power struggle. Due to the unique traits of land as a resource and the intertwined nature of rights and interests in it, problems of institutional incompleteness and normative over-fragmentation are particularly troubling as compared to other fields of law. Unlike, for example, merchant law or maritime law, land law was not originally conceived by sectors of society that had close ties with their counterparts across the border so as to create a “natural” process of universal norms.

Moreover, land rules implicate people of all strands of society, not only as an abstract matter, but also in a very concrete manner with regard to specific assets. Consider again the setting of the *Sawhoyamaxa* case<sup>208</sup>—the possibility of creating a regime of legal discrimination among different categories of persons or nationals with respect to land is particularly problematic.<sup>209</sup> In addition, the essential need to consider the mix

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206. See Peter Ho & Max Spoor, *Whose Land? The Political Economy of Land Titling in Transnational Economies*, 23 LAND USE & POL’Y 580, 581 (2006).

207. See *supra* text accompanying notes 121–122.

208. Case of the Sawhoyamaxa Indigenous Cmty. v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C.), No. 146 (Mar. 29, 2006).

209. For example, compare this with the law of personal taxation irrespective of our normative viewpoint about the desirability of such legal discrimination.

of law, politics, culture, and economics of a certain society so as to enable effective changes in land law systems places another institutional and jurisprudential constraint on cross-border or universal land law reforms. This is so even if our basic normative viewpoint is favorable to opening up the traditionally local field of land law to the forces of “globalization.”

This Part seeks to illuminate the resulting lessons for future policymakers in the matter. First, a consistent reform in domestic land laws aimed at expanding commitment to supranational or cross-border norms, such as ones stemming from international or bilateral treaties, hinges most crucially on creating more *comprehensive institutions* that have a clearer division of authority between them and a workable hierarchy vis-à-vis national institutions. As potential guidance for such an institutional restructuring, one can think about the ongoing efforts within the EU designed to systematically address the issue of jurisdictional overlap. This has been accomplished mainly through an institutional configuration of legislative, administrative, and judicial bodies between the Union and the different member states.<sup>210</sup> Such types of institutional efforts are essential, *inter alia*, for realizing and absorbing the full effects of transforming domestic land laws into more supranational ones. Without more complete institutions and their respective capacity to reform land laws in a comprehensive manner, we are probably bound to see more ad hoc decisions, inconsistency, and ineffectiveness in the years to come.

It should be emphasized, however, that “more complete” institutions do not necessarily mean supranational harmonization of substantive laws. As the *JA Pye Oxford* case demonstrates, an adjudicative body such as the ECHR may adopt a normative policy of deference to state-level institutions in “domestic” matters of land law.<sup>211</sup> Yet from an institutional perspective, such a relatively “complete” body has the capacity to better observe and consider the issue of overlapping jurisdictions and boundaries.

A second point is that land law is particularly vulnerable to normative over-fragmentation. In this context, the multiplicity of BITs, as discussed in Part II.B, poses an especially difficult challenge—even a genuine threat—to the viability of land regimes in the different countries. It is true that the

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210. For the latest step in this direction, see the Treaty of Lisbon, *supra* note 90.

211. See *supra* note 117 and accompanying text.

growing use of BITs is the result of the weakening of international customary law in the matter and the lack of broad-based international treaties.<sup>212</sup> Yet the potential differentiation in the application of land law rules to different nationals is becoming more and more troublesome with the intensification of foreign investment in real estate, the manipulation of national affiliation, and the explosion of extra-local arbitrations for each of the different BITs. Whereas such phenomena may naturally result in some backlash, such as hesitation to sign new BITs or renew existing ones,<sup>213</sup> one may be skeptical as to how many countries would have the resilience to systematically opt out of such mechanisms.

Thirdly, there is a growing external pressure on countries—especially developing ones—to accommodate their land laws to the demands of foreign investors, other states, international decision-makers, and international organizations—a particularly difficult chore even when the “recipient” country is generally willing to act upon such pressures.<sup>214</sup> The unique nature of land as a resource, and the special complexities of law, politics, culture, and economics involved in land law regimes, requires a careful redesign of local land laws by both domestic and external decision makers. This not only promotes better equity, justice, and fairness, but also allows land law systems to function properly.

There is, however, a crucial issue that needs to be addressed: the problems of institutional incompleteness and normative over-fragmentation will most likely not be resolved quickly. But at the same time, the reality of cross-border investments and the corresponding demand for dispute resolution jurisprudence is constantly on the rise. Thus, one should ask what basic approach should guide bodies such as the European Court of Human Rights or the Inter-American Court of Human Rights when dealing with specific land law disputes, given deficiencies in the current state of affairs. When, if at all, should the protection of property provisions in supranational conventions, treaties, and agreements trigger such

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212. See generally Bubb & Rose-Ackerman, *supra* note 128.

213. See Anne van Aaken, *Perils of Success? The Case of International Investment Protection*, 9 EUR. BUS. ORG. L. REV. 1, 3 (2008) (arguing that BITs may become less and less worthwhile for countries that take into account the growing costs of constraining their regulatory activities).

214. Consider, in this respect, the two instances involving the conflict between the Paraguay government’s adherence to the BIT with Germany and other binding sources of law, as discussed *supra* in Sections II.B–II.C.

bodies to intervene and to award substantial remedies that upset local land laws, even at the risk of incompleteness, fragmentation, and insufficient sensitivity to local peculiarities of society, culture, economics, and politics?

This is a difficult query that has no simple solution. One guiding principle could be to evaluate the relationship of property to other objects of protection in these supranational instruments, most specifically human rights such as the right to bodily liberty and security, the right to fair criminal proceedings, freedom of expression, freedom of religion, and so forth. This requires not only comparing the respective rights but also examining the way in which these mesh with, or rather stand out from, one another.

However, one must also be cautious of the potential pitfalls of an overly broad identification of the right to property with other types of human rights, not only from an ethical or ideological viewpoint, but also from an institutional and jurisprudential perspective. For example, in *The Morality of Property*, Thomas Merrill and Henry Smith seek to equate property rights with other, non-economic human rights.<sup>215</sup> They argue that since both types of rights are *in rem* in nature—meaning that they create corresponding obligations of noninterference on a very large and unspecified mass of duty holders—the content of the respective rights must remain correspondingly simple. Moreover, both types of rights must rely on a broad moral, societal consensus about “dos and don’ts” that people will tend to respect even outside formal legal rules.<sup>216</sup> Although Merrill and Smith restrict their thesis about the morality of property and the specific legal consequences that it should have to the American setting,<sup>217</sup> they nevertheless seem to suggest an inherent similarity between the social construction and decision-making process of property rights and other types of human rights.<sup>218</sup> This may lead one to think that the gradual universalization of human rights, such as the right to bodily liberty and security or the right to a fair trial, consequentially implicates the right of property.

I submit that this is generally not the case, and that the *in rem* nature of property rights does not indicate that they are

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215. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007).

216. *Id.* at 1853–58.

217. *Id.* at 1870–91.

218. *Id.* at 1852–58.

shaped and understood throughout the world and within legal systems in the same way as traditional human rights. Very broadly speaking, “hardcore” human rights such as the right to bodily liberty and security are counter-majoritarian rights that aim at protecting very fundamental values of what a human being is or should be against a potentially oppressive majority, especially in times of crisis (such as war) during which there is special reason to fear that such rights will be bluntly pushed aside.<sup>219</sup> This explains why we tend to see at least a universal *discourse* about what the content of such rights should be, even if actual consensus and transition into legal rules may be hard to attain.<sup>220</sup>

I see property rights differently. At its core, property is a socio-political institution. This means, among other things, that property regimes and the property rights that emanate from them are the result of conscious decisions by the state’s authorized entities to designate resources as objects of property and to create a certain set of entitlements and obligations in them.<sup>221</sup> Moreover, property has a clear allocative capacity, meaning that the institutions and rules of property determine the way in which finite resources are divided among the members of society so that property rights are owned and exercised by individuals, not only vis-à-vis government, but also against one another. Society thus must use its coercive power to construct a system of correlating rights and duties that directly implicates all members of society both in their individual capacity and in their collective one. This typically not only makes property a source of constant friction and the subject of costly implementation but also vividly demonstrates why the construction of a property system is not merely a matter of preventing potential one-sided abuses or deprivations of entitlements that theoretically could have been otherwise enjoyed by all members of society.

The fact that society creates property law does not in any way mean that property is void of ideas about ethics, justice, morality, or any other values and goals. It also does not mean that certain types of interests in land, such as the right to shelter, may not be considered to be instrumental in attaining

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219. See generally JOHN ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

220. See, e.g., UNIVERSAL HUMAN RIGHTS: MORAL ORDER IN A DIVIDED WORLD (David A. Reidy & Mortimer N.S. Sellers eds., 2005).

221. See Lehari, *supra* note 190, at 1993–97.

certain basic human rights, such as the right to dignity. All it means is that the normative considerations that stand at the basis of the property system pass through the prism of society's decision-making institutions, and are not—nor should they be—imposed on the legal regime through a “natural right” or any other type of pre- or extra-societal reasoning.<sup>222</sup>

But clearly, even socio-political institutions such as property have their limits. Referring again to the recent mass evictions of populations to make way for large-scale projects in China, India, Zimbabwe, and Nigeria discussed in Part II.A,<sup>223</sup> one should take note that hundreds of thousands of longtime residents without any formal rights in the land—given the land titling rules and practices of these countries—were left out of formal expropriation and compensation procedures.<sup>224</sup> The imposition of supranational norms, even if currently fragmented and institutionally incomplete, may have special normative force in land conflicts. For example, supranational norms can expose systematic abuse of government power and reveal the disenfranchisement of individuals or groups on an on-going, self-conscious, and non-reciprocal basis. Supranational norms may also apply to other situations in which the property infringement can be seen as undermining core human rights that are more appropriately viewed and broadly understood as “universal,” at least to some degree. There are scenarios in which we can reasonably identify a certain wrong or infringement of a property right as also constituting a violation of a core “human right” that is otherwise familiar and broadly accepted within the international community. In such cases, cross-border intervention may trigger less anxiety about overly pervasive intrusion into a legal field, land law, that tends to struggle more with comprehensive normative border-crossing.

Drawing the line between infringements of property rights that substantially implicate core human rights and those property violations that do not is obviously an extremely difficult chore. But with the current state of affairs, it may be the only method to recognize, on one hand, the instrumental role that property rights in land may play for attaining other fundamental, internationally-recognized human values that have sufficient normative force and jurisprudential acceptance to trump local decision making and, on the other, the danger of a too-

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222. *Id.*

223. *See supra* note 122 and accompanying text.

224. *See supra* note 122 and accompanying text.

aggressive intervention in specific land law disputes that might inadvertently bring about the malfunction or even collapse of entire land law systems.

#### CONCLUSION

Land laws around the world are in the midst of dramatic changes, but their trajectories are still far from clear. This Article has set out to fulfill a threefold mission: to identify the insufficiency of current legal and economic theories for managing the complexities of cross-border land regimes; to map out the determinants of law, politics, economics, and culture and their potential interplay in this context; and to suggest preliminary theoretical tools for addressing the rapidly-growing phenomena of supranational implications of land laws. The main outcome of the analysis is that even astute supporters of universalism must realize and confront the peculiar institutional and jurisprudential limits on the movement away from nationally-based land laws. For cross-border land law rules to systematically succeed and be effective over time, it is essential to build more comprehensive supranational institutions, to prevent normative over-fragmentation within each legal system, and to pay careful attention to localized interplays between law, politics, economics, and culture. Otherwise, the law will fail to properly respond to the rapidly-evolving realities of real estate properties.