

The Human Right to Private Property

*Hanoch Dagan and Avihay Dorfman**

For private property to be legitimately recognized as a universal human right, its meaning should pass the test of self-imposability by an end. In this Essay, we argue, negatively, that the prevailing (libertarian) understanding of private property cannot plausibly meet this demanding standard; and develop, affirmatively, a liberal conception which has a much better prospect of meeting property's justificatory challenge. Private property, on our account, is an empowering device, which is crucial both to people's personal autonomy (understood in terms of self-determination) and to their relational equality (understood in terms of reciprocal respect and recognition among persons). The liberal conception of the human right to property has both vertical and horizontal significance — it implies respect from both the public authority and other individuals — which means that it is thoroughly political but not necessarily statist.

Our account generates important implications, both domestic and transnational. Domestically, it implies that whereas some property rights should be subject to strong constitutional protection, state law should facilitate other types of private and non-private property institutions, and these property institutions may well be subject to non-owners' claims to access and, more broadly, to being treated

* Stewart and Judy Colton Professor of Legal Theory and Innovation and Associate Professor of Law, respectively, Tel Aviv University Buchmann Faculty of Law. Thanks to Greg Alexander, Daniel Attas, Itzik Benbaji, Yochai Benkler, Eyal Benvenisti, Nestor Davidson, Sergio Dellavalle, Lee Fennell, Chaim Gans, Christine Godt, Oliver Hart, Bob Hockett, Michael Karayanni, Larissa Katz, Shelly Kreiczler-Levy, Roy Kreitner, David Lametti, Doreen Lustig, Maria Marella, Tom Merrill, Hanri Mostert, Katharina Pistor, Arthur Ripstein, Florian Rödl, Charles Sabel, Saskia Sassen, Tomer Shadmy, Joe Singer, Jeremy Waldron, Dan Weilsch, Katrina Wyman, Mikhail Xifaras, and participants in the Columbia Law School Conference on *Sovereignty and Property*, the Königswinter Workshop on the Core of Property, the Trento-Verona Progressive Property Workshop, and the TAU private law theory workshop for helpful comments.

respectfully. Furthermore, our conception of the human right to property requires that everyone have the unusual authority typical of full-blown private ownership. Transnationally, our analysis highlights a freestanding dimension of relational justice, which is relevant across borders even given that our distributive obligations are statist. This injunction of relational justice in transnational interactions brings into question the adequacy of the current state of the law, according to which these interactions are mainly governed by choice-of-law rules that conceptualize them as wholly subsumed under the capacities of the parties as citizens of their respective polities.

INTRODUCTION

The Universal Declaration of Human Rights announces that “[e]veryone has a right to own property,” and that “[n]o one shall be arbitrarily deprived of his [or her] property.”¹ To the extent that this announcement reflects an intuitively compelling implication of the status of individual natural persons as free and equal,² there is a series of persistent (and rather consequential) puzzles regarding the nature of this particular human right, if it is one. Moreover, alongside its alleged status as a human right, the right to private control of property is quite clearly — as Jeremy Bentham famously announced — a product of the law or, more precisely, a creature of what John Austin would later call a command issued by the sovereign.³ This positivistic overtone becomes even clearer (but not more analytically correct) in contemporary society, where an increasingly significant part of the rights relating to property is the product of top-down legislative or regulatory regimes.⁴

1 G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 17 (Dec. 10, 1948).

2 The qualified language of the test attests to the fact that the right to property is not included in all the international instruments that form the canon of human rights law. See, e.g., *Property, Right to, International Protection*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e864?rskey=K1Flqx&result=10&prd=EPIL> (last updated July 2009).

3 JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 15, 18 (London, John Murray 1832); JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 113 (R. Hildreth trans., 2d ed. 1914) (“Property and law are born together, and die together.”).

4 The “positivistic” view under discussion should not be confused with legal positivism (of either Bentham or Austin); the alleged intimate connection between the state and a system of private property reflects Bentham’s approach

How can these seemingly contradictory features of the right to private property coexist? In which sense, if any, can the right to private ownership limit — or might even transcend — state sovereignty, given its profound dependency on political authority? And how should the answers to these questions affect our interpretation of the Declaration's use of arbitrariness that should circumscribe the limits of states' authority to take property?

Furthermore, a textual reading of the Declaration seems to echo a very specific understanding of property as a human right, one which focuses solely on people's formal opportunity to become owners. On this understanding, violation of the right is cast in the narrow terms of deprivation of preexisting recognized rights to private property. This private-law libertarian understanding of property, as we shall call it, also dominates, again implicitly, contemporary international investment law,⁵ which may not be surprising given its crucial (even though, again, quiet) contribution to the development of a practice which Martti Koskenniemi terms "informal empire," namely: "a horizontal structure of horizontal relationships between holders of subjective rights of *dominium* — a structure of human relationships that we have accustomed to label 'capitalism.'"⁶ Whatever the virtues of an international system of commerce based on such a right may be, shouldn't its vices at least make us pause before we embrace its underlying private-law libertarian conception of property as the one that best accounts for the status of private property as a *human* right?

Our inquiry regarding these questions in this Essay begins with a brief sketch of our understanding of the most plausible case for conceptualizing private property as a human right, which is indeed quite different from this (in)famous, libertarian rendition. Private property, on our account, is an empowering device, which is crucial both to people's personal autonomy (understood in terms of self-determination) and to their relational equality (understood in terms of reciprocal respect and recognition among persons). More specifically, private property implies respect from both the public authority and other individuals, and it is this two-dimensional respect for natural persons' status as free and equal — both vertical *and* horizontal — which is, as we argue in Part I, the normative core of the human right to private property.⁷

to political morality, rather than to the classical question of jurisprudence, i.e., what law is.

5 See Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 261-71 (2015).

6 Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. TORONTO L.J. 1, 32 (2011).

7 We say *natural persons* in order to emphasize the limits of our proposed normative account of the *human* right to property. Thus, artificial persons — including, in

This understanding means, as we claim in Part II, that the human right to private property is neither pre-political nor apolitical; quite to the contrary, private property expresses a fundamentally political idea of being with others in the world. But our proposed account of the human right to private property also explains why it is not contingent in the Benthamite sense.⁸ Admittedly, to be valid and viable, private property obviously requires a conventionalist constitution, elaboration, implementation, and enforcement. But given that a significant part of the normative weight of the human right to private property does not rely on its aggregative role, but rather on its prominent place in establishing and sustaining people's interpersonal relations as free and equal persons, these are conventions that, all else being equal, any humanist polity *must* develop. And because an important subset of the normative value of private property is fundamentally horizontal, rather than only vertical, these conventions are *not essentially statist*.⁹ We do not deny the comparative advantages of the liberal state (in terms of both competence and legitimacy) in promulgating these conventions. However, we insist that private property need not depend on the state for its (legitimate) existence. This conceptual point is further motivated by the increasingly significant role that interpersonal transnational interactions play in our lives.

Indeed, our proposed account of the human right to private property entails significant implications in both the domestic and global domains, which we outline in the third Part of this Essay. Domestically, it sets important constraints on the scope of the claims made on behalf of private property. Since its core justification is rooted in our social relations as free and equal persons, the scope of private property is partially determined by reference to this ideal of social relations. Furthermore, appreciating the significance of private ownership to our social existence as free and equal implies that each of us is entitled to be a private owner not only in the uncontroversial sense that none should be denied the *formal* opportunity to become an owner, but also in the more demanding sense that our conventions (laws) that govern

particular, business organizations (but also communities of various kinds) — are beyond the scope of the inquiry.

- 8 Our jurisprudential position, at least in the abstract way in which it is presented in the main text, can be further elaborated by reference to various strands of non-positivism (John Finnis's rendition of natural law and a reconstructed version of Kant's theory of natural rights are first to come to mind). That said, it can also be made compatible with various strands of legal positivism (especially those that emphasize legal positivism's possible ambivalence regarding the moral/legal distinction, also known as the separation thesis).
- 9 See Hanoch Dagan & Avihay Dorfman, *Justice in Private* (Working Paper, 2015), <http://ssrn.com/abstract=2463537>.

private property demand that none should be denied the *real* opportunity to secure this status.

Our foray into the transnational domain is more preliminary and speculative, but no less important. We argue that transnational interactions involving private property should be based on the same interpersonal respect that undergirds this system of property in domestic settings. This proposition implies that the scholarly debate as per the (statist or cosmopolitan) scope of distributive justice obscures a freestanding dimension of *relational* justice, which is relevant across borders even if, for the sake of the argument, our distributive obligations are statist. Furthermore, the injunction of relational justice in transnational interpersonal interactions brings into question the adequacy of the current state of the law in which these interactions are governed mostly by choice-of-law rules that conceptualize them as wholly subsumed under the capacities of the parties as citizens of their respective polities.

I. PROPERTY, AUTONOMY, AND RESPECT

Let us assume, with Jeremy Waldron, that private property rules are typically organized “around the idea that contested resources are to be regarded as separate objects each assigned to the decisional authority of some particular individual (or family or firm).”¹⁰ This proposition seems rather uncontroversial since it helpfully leaves many important questions, notably regarding the scope, grounds, and possible justifications of this private authority, open. Our task here is not to address these debates at large.

Rather, we seek to investigate the possibility of conceptualizing private property as a human right.¹¹ This inquiry implies that we need not consider certain justifications that prominently figure in positivist or statist accounts of private property. Whatever its virtues may be by way, for example, of efficiently allocating scarce resources, economizing on communication costs, facilitating civic virtues, or decentralizing governance, these *collective* benefits do not qualify as even putative premises for property’s status as a human right. If property rights are to be able to claim *universal* validity and thus justifiably supersede otherwise legitimate decisions of government officials, legislatures, and even constitutional assemblies, the moral status of basic human rights

10 Jeremy Waldron, *Property Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 3, 6 (Dennis Patterson ed., 1996).

11 From another perspective, our inquiry is limited to the study of private property as a human right, and while we think that some of our conclusions may be relevant to other human rights, others might not, indeed should not, travel outside our limited domain.

ought to be conspicuously clear so as to meet the bar of legitimacy — and, all else being equal, demand coercive enforcement — irrespective of any state-democracy pedigree.¹² This means that if property rights can plausibly be regarded as human rights, it must be due to their significance for the maxim of treating every person as a human being whose dignity — or normative agency — fundamentally matters (or something along these lines).¹³

One possible route along this path is offered by libertarians (like Robert Nozick) and private-law libertarians (such as Ernest Weinrib and Arthur Ripstein) who interpret this maxim as being exhausted by people’s formal independence (or negative liberty).¹⁴ We (and others, of course) have discussed this interpretation and its pitfalls at some length elsewhere,¹⁵ so we will not rehearse (most of) our qualms here. Instead, we turn immediately to a competing interpretation, which situates private property on more satisfying normative foundations by following H.L.A. Hart’s observation that if people are to lead the fully human life they are entitled to, they should have a right to self-determination; and while this requires a measure of independence, it “is not something automatically guaranteed by a structure of negative rights.”¹⁶

People have a right to private property, in this view, because, and to the extent that, it is conducive to self-determination (or self-authorship), namely,

12 See NEIL WALKER, *INTIMATIONS OF GLOBAL LAW* 73-74 (2014). It may even be plausible to suspect that some human rights (property among them) are a prerequisite for democratic rule. In particular, it may be a prerequisite for the very possibility of forming a democratic society whose members regard one another as substantively free and equal agents. See Avihay Dorfman, *Property and Collective Undertaking: The Principle of Numerus Clausus*, 61 U. TORONTO L.J. 467, 515 (2011).

13 See RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 315 (2011); JAMES GRIFFIN, *ON HUMAN RIGHTS* 44-58 (2008). As the text implies, we reject a strict separation between law and morality in our (tentative) approach to the concept of human rights. Needless to say, defending this approach to human rights is beyond the scope of this Essay. For some of the challenges it must face, see Rowan Cruft et al., *The Philosophical Foundations of Human Rights: An Overview*, in *THE PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS* 1, 4-23, 31-40 (Rowan Cruft et al. eds., 2015).

14 See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* (2009); ERNEST J. WEINRIB, *CORRECTIVE JUSTICE* ch. 8 (2012).

15 See HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* 63-66 (2011); Hanoch Dagan, *The Utopian Promise of Private Law*, 61 U. TORONTO L.J. 392 (2016); Avihay Dorfman, *Private Ownership and the Standing to Say So*, 64 U. TORONTO L.J. 402 (2014).

16 H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 836 (1979).

to our right “to have, to revise, and rationally to pursue a conception of the good.”¹⁷ And private property is a *human right* — and not a right *simpliciter* — to the extent that it is *crucial* to our self-determination and insofar as it is made equally available to us all. A regime of private property complies with such demands if it provides all individuals alike entitlement to the authority over others with respect to certain resources when, and to the extent that, this authority secures the possibility of developing their own life-plans,¹⁸ rather than the plans imposed on them by other persons or by society at large.¹⁹ The unique contribution of private property to our autonomy lies in the forbearance that private property demands, whose significance is not captured by the assurance of having the “stuff” we may need or want, but is rather focused on the requirements it places on others, in both the vertical and horizontal dimensions.

The vertical dimension — the respect that private property requires from governments — is surely important but quite trite.²⁰ By contrast, clarifying the demands of private property in the horizontal, interpersonal dimension is helpful for both elucidating the potential virtue of private property beyond the state and underscoring the significant justificatory challenge of according private property this status of a human right. Morris Cohen’s classic contribution, *Property and Sovereignty*,²¹ can serve as a useful springboard for this purpose.²²

While Cohen did not commit himself to any definition of property, he highlighted two crucial features of property rights.²³ One feature is that “a

17 JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 19 (2001).

18 Developing a life-plan implies, as we have just noted (following Rawls), the ability to revise, which both explicates and justifies the unique (oftentimes semi-immutable) status within private property systems of the power to alienate and more generally to exit. See DAGAN, *supra* note 15, at 163-64.

19 Cf. BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 71-76 (1977); JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 207-08 (1990); JOHN RAWLS, *POLITICAL LIBERALISM* 298 (1993).

20 It is also important to explore the complex interconnections between these dimensions. This inquiry is beyond the scope of this Essay.

21 Morris R. Cohen, *Property and Sovereignty*, 13 *CORNELL L.Q.* 8 (1927).

22 There are, to be sure, a few aspects in which we find Cohen’s account unsatisfactory, notably as per his discussion of the justifications of property, *id.* at 15-21, and his claim that outside “organized society . . . there are things but clearly no property rights,” *id.* at 12. We focus on, and build upon, only the three propositions for which *Property as Sovereignty* became canonical: property’s intrinsic relationality; property as empowerment; and property’s justificatory challenge.

23 What follows can also be read as a response to the recent invocation (or resurrection)

property right is not a relation between an owner and a thing, but between the owner and other individuals in reference to things.”²⁴ The other is that the private authority, which typifies private property, implies that property law does not merely protect people in their possession. Rather, “the dominion over things” that “the legal order confers on those called owners” empowers them in their interpersonal relations and thus also implies a private “*imperium* over [their] fellow human beings.”²⁵

As Cohen recognized, property’s intrinsic relationality and its unique form of empowerment are importantly connected. But whereas Cohen looked at the way the former entails the latter, it is no less important to appreciate the inverse relation. Private property vests practical authority in an individual (the owner) to fix, in some measure, the normative standing of others in

of approaches which reject these features, insisting that property is first and foremost the law of things that can, indeed should, be analyzed and defended irrespective of its relational implications. See ALAN BRUDNER WITH JENNIFER M. NADLER, *THE UNITY OF THE COMMON LAW* ch. 3 (2013); J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* (1997); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012). For a more elaborate critique, see Hanoch Dagan, *Liberalism and the Private Law of Property*, 1 CRITICAL ANALYSIS L. 268 (2014); Avihay Dorfman, *Private Ownership*, 16 LEGAL THEORY 1 (2010); Avihay Dorfman & Assaf Jacob, *The Fault of Trespass*, 65 U. TORONTO L.J. 48 (2015); and Christopher Essert, *Property in Licenses and the Law of Things*, 59 MCGILL L.J. 559 (2014). Cohen’s approach — and ours — need not imply disregard for the significance of the person-resource relationship, and it is clearly divorced from the view of property as a formless bundle of rights. But it insists that property is irreducibly relational.

- 24 Cohen, *supra* note 21, at 12. Here Cohen obviously followed Wesley Hohfeld’s insight that as a species of “jural relations” property rights imply rights *vis-à-vis* people, and not things. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710, 720 (1917). This analytical insight goes even further back to Kant’s doctrine of private rights, which is a doctrine of fundamentally relational rights. See RIPSTEIN, *supra* note 14, at 93; Ernest J. Weinrib, *Rights*, in *The Jurisprudence of Corrective Justice* (2016) (unpublished manuscript) (on file with authors). To this extent, we share two of Kant’s most basic conceptual observations concerning the structure of private ownership: its relational character and the centrality of ownership’s normative power. As will become clear in due course, however, we part ways by insisting that the latter feature is not a natural right and that state support for the poor is not sufficient to render such a right legitimate.
- 25 Cohen, *supra* note 21, at 12-13. For related claims, see Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Louis L. Jaffè, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

relation to an object.²⁶ Indeed, owners have not only the power to control an object against non-owners' competing claims, but also the authority — the normative power — to determine what others may or may not do with this object.²⁷ This unusual authority, which commands deference regarding both what an owner plans to do with an object and her decision concerning the permissibility of others using her object, implies — as Cohen's metaphoric use of *imperium* suggests — that private property requires non-owners to defer to owners' authority to fix their own normative situation.

Herein lies the complex interaction of property's empowerment and its relationality. Private property empowers owners not only by securing them the means of self-determination, but also, and even more significantly, by making their intentions, and hence their subjectivity, a source of demands on others' conduct. A non-owner's respect of the owner's right to property is part of the former's respect of the latter's right to self-determination exactly because it implies a recognition of the owner as reason-providing for that non-owner. This sense of empowerment is thus relational through and through. It also helps refine Cohen's insistence that our (power-conferring) system of private property is responsible for the vulnerabilities of non-owners. As Cohen argued, my power to control "things [that] are necessary to the life of my neighbor . . . confers on me power, limited but real, to make him do what I want."²⁸ This meaning of "property as power"²⁹ is certainly important.³⁰ But it only captures private property's "power as influence," namely, the

26 See Dorfman, *supra* note 15, at 405-07.

27 Thus, Chris Essert mischaracterizes the view outlined in the main text above by supposing that the duty against committing trespass sets the basic norm of private ownership. See Christopher Essert, Legal Powers in Private Law 41-43 (Oct. 21, 2014) (unpublished manuscript) (on file with authors). But this supposition is false. As just mentioned, the basic normative setting is the normative power and its correlative liability of non-owners. The duty against trespassing (which, contrary to Essert's position, must be a duty against *unauthorized* use of another's object, rather than a duty against using another's object as such) is best seen as a necessary outgrowth of this more basic juridical relationship of power/liability. Another point worth emphasizing at this stage (because it shows up in Essert, *supra*, at 40-41) is that the special relational authority vested in private ownership does not imply that owners get to determine the content of the rights and the duties that arise in the course of exercising their normative powers as owners. See Dorfman, *supra* note 12, at 492.

28 Cohen, *supra* note 21, at 12.

29 *Id.* at 11.

30 Indeed, our emphasis on the relational, horizontal dimension should not be interpreted as suggesting that a given property system can be evaluated without

causal relation between ownership and non-owners' vulnerability, which is necessarily contingent. Appreciating the *normative* power accorded to owners highlights a non-contingent sense of non-owners' vulnerability because law's demand that they respect the owner's authority is unmediated by any further facts about the world.³¹

As Cohen intimated, the interpersonal implications of the normative power that owners enjoy *vis-à-vis* others are both significant and not easily defensible, because for these others private property potentially poses a normative threat. Cohen was careful not to necessarily condemn private property for having these attributes. Rather, he insisted that "it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government."³² This analogy to the challenge of legitimating government may have been aimed at highlighting property's justificatory challenge. However, it fails to fully capture its depth, because unlike public officials, a private property owner enjoys some measure of liberty to posit her subjectivity — her intention, judgment, and, indeed, point of view — as a source of legal claims over anyone else. When public officials occupy a position of discretionary authority over others, they purport to speak and act in the name of the state; therefore, their demands ought to be justified by reference to the reasons that render legitimate the state's authority, say, the good of democratic legitimation, the demands of right reason, and so on. Private owners, by contrast, purport to influence the practical deliberation of others not merely by way of reporting or identifying such independently-existing reasons for action, but rather by forming the expectations that non-owners will recognize owners' judgments as reason-providing for them. But subjecting non-owners to *such* an authority — typified, as it is, by a profound "accountability deficit" — offends the moral equality that exists between owners and non-owners by virtue of their shared status as private persons. This means that the demand for an adequate justification of private property is particularly pressing.³³

As we hinted at the outset, it is unclear — at least to us — whether this significant justificatory challenge can be met.³⁴ But here again our current

regard to the "power as influence" aspect, which necessarily hinges on the system's overall shape.

31 For a recent discussion of the distinction between these two meanings of power, see Essert, *supra* note 27, § 4.B.

32 Cohen, *supra* note 21, at 14.

33 See Dorfman, *supra* note 12, at 498-501.

34 An adequate inquiry regarding this question probably requires comparing a

task is rather modest: to articulate the most plausible understanding of private property that may account for the widespread recognition of private property as a human right. Some of the reasons for the relative acceptability of this understanding will come up only in Part III, where we spell out some of its implications. At this stage, it suffices to establish why the liberal conception of property we offer here fares better than its major rival — the libertarian conception of property we mentioned at the outset.

In its libertarian, or private-law libertarian, understanding, property is part — indeed the cornerstone — of a scheme of entitlements for interpersonal interactions that is guided by one underlying commitment: the ideal of people relating as *formally* free and equal persons. This ideal implies that “each person is entitled to be his or her own master . . . in the contrastive sense of not being subordinated to the choice of any *other* particular person.”³⁵ Accordingly, it requires that no one gets to tell you what purposes to pursue and is therefore “not compromised if others decline to accommodate you.”³⁶ Quite to the contrary: “Because the fair terms of a bilateral interaction [in this view] cannot be set on a unilateral basis, considerations whose justificatory force extends only to one party are inadmissible.”³⁷

Such a clear indictment of any form of interpersonal accommodation exacerbates the alarming implications of private property’s spectacular private authority — and the concomitant entailed vulnerability (if not subordination) — for non-owners. Recall that to qualify as a human right, private property needs to comply with (if not contribute to) the maxim of treating every person as a human being whose dignity — or normative agency — fundamentally matters; it needs, in other words, to be conceptualized in a way that renders it acceptable to free and equal persons; to pass the liberal test of “self-imposability by an end.”³⁸ It is hard to see how a structure that systematically fails to respect people as substantively free and equal persons can be a plausible candidate for a self-imposed law. Ascribing to non-owners, to whom the argument for property’s legitimation is first and foremost owed, any form of consent to such a system is not merely hypothetical, but rather counterfactual. Moreover, the predicament of such a structure’s legitimacy is not significantly ameliorated

world governed by the most justifiable form of private property as a human right (such as the one developed herein) and one which successfully uproots private property. It is an open question, and one which happened to plague Marxism, what counts as success in doing away with private property.

35 RIPSTEIN, *supra* note 14, at 4.

36 *Id.* at 14, 34, 45.

37 WEINRIB, *supra* note 14, at 36.

38 BRUDNER, *supra* note 23, at 142.

by the private-law libertarians' subscription to a public duty to support the poor so as to secure everyone's independence.

Private-law libertarianism follows the traditional liberal notion of a division of labor between the responsibility borne by the state to provide a fair starting point for all and the responsibility of the individual to set and pursue her ends using her fair share.³⁹ By assigning all the responsibility for people's self-determination and substantive equality — the ultimate values to which liberals (including private-law libertarians) are committed — to the public law, this strategy indeed makes the legitimacy of private property wholly contingent upon the state, thus rendering private property and the (welfare) state mutually dependent at a deep conceptual level.⁴⁰ This is, after all, the deontological version of Bentham's observation (mentioned at the outset) concerning property's symbiotic relationship with the (Austinian) state.⁴¹ In that, private-law libertarianism obscures the horizontal dimension of private law's justification by collectivizing it.

Furthermore, by placing at the core of private law the dissociated persons, whose only duty to one another is to avoid transgressing pre-politically fixed boundaries, this conception of private property leaves intact, and so authorizes, the interpersonal vulnerability which is Cohen's main concern, and ours. This is so because private-law libertarianism supports none other than horizontal obligations of noninterference, to the exclusion of involuntary duties of interpersonal accommodation.⁴² Thus, even if we assume — a dubious assumption, to be sure — that public-law measures flawlessly trace and address the vulnerabilities that such an unjust property regime generates, it would necessarily run afoul of the ideal of respecting and recognizing one another as *substantively* free and equal. Perhaps this worry could be set to one side in a world of perfect interpersonal independence. However, the world we occupy is radically different than that in the sense that relationships with other persons often affect our lives as free and equal persons in deep and profound ways. Therefore, the libertarian conception of private property

39 See RAWLS, *supra* note 19, at 268-69 (arguing that whereas state institutions, such as the tax system, enforce rules of distribution, private-law institutions are supposed "to leave individuals and associations free to act effectively in pursuit of their ends and without excessive constraints . . . secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made"); see also, e.g., BRUDNER, *supra* note 23, at 148, 352, 355; RONALD DWORKIN, *LAW'S EMPIRE* 296, 299 (1986).

40 See generally WEINRIB, *supra* note 14; Weinrib, *Ownership*, in *The Jurisprudence of Corrective Justice*, *supra* note 24.

41 For the Bentham/Austin discussion, see *supra* text accompanying note 3.

42 See generally ARTHUR RIPSTEIN, *PRIVATE WRONGS* (2016).

cannot possibly address property's justificatory challenge, especially given the difficult accountability deficit which constitutes the unique private authority that typifies private property.⁴³

Indeed, if any conception of private property can hope to pass the test of self-imposability by an end, it must repudiate this vision of private law and private property. Such repudiation underlies the view of private property briefly outlined above. Indeed, for us the value of private property lies in a certain vision of being *with others* in the world. It hangs on the respect from others that ownership implies — both other individuals and the polity as a whole — for the owner's subjectivity and her right to self-determine according to her own conception of the good. Law's recognition of the authority of owners in this view is not justified by reference to their aloofness — their property rights are not merely constraints on the permissible means of others, not merely limits (analogous to certain physical limitations) on what is available to non-owners. Rather, the authority of owners is founded on a requirement of *reciprocal* respect and recognition among self-determining persons. It is thus understood as part of a genuinely liberal private law that establishes frameworks of respectful interaction conducive to self-determining individuals, which are indispensable for any social setting where individuals recognize each other as genuinely free and equal agents.⁴⁴

This conception of private law takes the canonical liberal commitment to individual self-determination (and not merely formal independence) and to substantive (and not merely formal) equality seriously. Therefore, it rejects the private-law libertarian adherence to an uncompromising policy of no

43 See Dagan, *supra* note 23, at 274-76. See generally Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016).

44 We do not deny that some such interpersonal practices arise independently of political authority, while others are the unique creations of such authority, and yet an intermediate category of practices may require some degree of legal facilitation. However, except in the context of practices that are rightfully exempt from *any* legal treatment — either because legal enforcement might destroy their inherent moral value or since legal intervention might backfire by crowding out internal motivations — private law is deeply involved in setting out the terms of interaction amongst those engaging in the vast social domain of interpersonal practices. To be sure, insofar as social norms respond to the dictates of just relationships *and* are taken to have a broad obligatory nature so that they in fact govern people's interpersonal relationships, they may suffice. But this is only because they would then be law-like. If, however, this is not the case — and it is hard to see how it could be the case in our contemporary social environment — delegating this responsibility to social practices is at best tantamount to indirect and opaque endorsement of private-law libertarianism.

interpersonal accommodation, and casts instead our interpersonal relationships as interactions between free and equal individuals who respect one another as the persons they actually are, thus vindicating a robust conception of relational justice. This notion of relational justice, which we develop, defend, and illustrate elsewhere,⁴⁵ carries important implications for various private-law contexts, within and without property, such as housing and workplace discrimination, the duty to exercise reasonable care in the face of disabled risk-takers, and interpersonal affirmative duties. For the present discussion, it implies that non-owners' right to self-determination must be treated with respect. We need not delve into these matters here; for our purposes it suffices to conclude with the (undefended) promise of this vision of private law. If private law can indeed live up to the challenge of relational justice, then the autonomy-enhancing virtues of a conception of private property grounded on self-determination and reciprocal respect makes it an attractive candidate for the status of human right.

II. POLITICAL, BUT NOT NECESSARILY STATIST

A discussion of private property as a human right may be expected to treat property as pre-political or apolitical. Thus, a long tradition of natural lawyers presented private property as the pre-political baseline for our social contract, which as such sets the bounds of its legitimate demands.⁴⁶ Private-law libertarians, in turn, do not subscribe to this position — they allow for generous taxing and policing powers on the part of the state;⁴⁷ but for them the private law of property is apolitical: it pertains to “persons regarded as ends outside of human association” — to “morally self-sufficient” persons — and it should ignore any “common ends and member obligations even in a civil condition.”⁴⁸

45 See Dagan & Dorfman, *supra* note 9; Dagan & Dorfman, *supra* note 43.

46 See, e.g., NOZICK, *supra* note 14.

47 See, e.g., RIPSTEIN, *supra* note 42, ch. 10.

48 BRUDNER, *supra* note 23, at 353. Modern Kantians, to be sure, are careful to admit that whereas the introduction of property rights is required by the right to independence, it also threatens this independence, and that this “conceptual tension” can only be broken by a transition to “the civil condition of law-governed society,” which fulfills the public-law duty to support the poor. RIPSTEIN, *supra* note 14, at 90. As Part I above clarifies, we believe that this qualification underrates the justificatory challenge of private property. It is therefore not surprising that we find the response they offer to it inadequate. See *infra* text accompanying notes 67-70.

The understanding of private property sketched above is neither pre-political nor apolitical.⁴⁹ As an empowering device, property cannot be pre-political. To be sure, private property, as we will argue presently, is not purely conventionalist in the sense of being grounded in some express or tacit consent of the governed, at least insofar as the case for its status as a human right can be fully defended. But subscribing to a system that takes seriously the human right to private property is not entailed — as it is often presented by natural lawyers — by respect for autonomy's prescriptions as per the legitimate *limits* of a social contract. Quite to the contrary, empowering private individuals with the unique authority of ownership follows from the injunctions of such respect as per the way our social contract should *actively* design our interpersonal interactions.⁵⁰

Indeed, the right to private property as we understand it expresses a fundamentally political idea of being with others in the world. Private ownership is not the same as a (natural?) duty to refrain from interfering with the external freedom of others; rather, it constitutes a common framework of property coordination⁵¹ structured around the owner's demand for recognition from other persons. Private ownership is irreducibly political because no private individual living in the state of nature — or for that matter a private citizen of the state invoking her natural right to freedom — can legitimately claim the authority over other persons with respect to determining their use of and access to property.

Political does not mean contingent or statist, however. Private property is not a convention *simpliciter*; it does not serve only as a solution to a recurring coordination problem (although it certainly plays this role as well). As a human right, private property plays a crucial role, which we have analyzed above, for both people's self-authorship and their relational equality. This role implies that this convention is very different from other, garden variety conventions. By enacting or developing⁵² a convention of this kind, society empowers people “to become full agents” and to engage with others in relationships

49 The argument here builds on Dagan, *supra* note 15, and Dorfman, *supra* note 15, at 425-40.

50 Cf. HANOCH DAGAN & MICHAEL A. HELLER, *THE CHOICE THEORY OF CONTRACTS* ch. 3 (2017).

51 For more, see Avihay Dorfman, *The Society of Property*, 62 U. TORONTO L.J. 563 (2012).

52 As the text implies, we need not and do not take a position as to whether this convention arises by deliberate design, incremental adaptation, or rather spontaneously, say, from “a general sense of common interest.” DAVID HUME, *A TREATISE OF HUMAN NATURE* 490, bk. 3, pt. 2, § 2 (1965) (1739-1740); cf. James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 CORNELL L. REV. 139 (2009).

of mutual recognition and respect. Given the human predicament, in which people's embodiment and development "involve dependent, interdependent, and mutually enriching relationships with others," any polity committed to respecting people's dignity or normative agency — that is, to human rights — is obligated to have (or establish) such a convention.⁵³

This conclusion may justify the prominent role of the right to private property in the constitution of liberal states. Entrenching vertical and horizontal respect for people's subjectivity — their right to self-determination according to their own conception of the good — nicely coheres with the traditional commitment of the liberal state to individual autonomy and to substantive equality. The state is also, quite understandably, an obvious locus for promulgating the right to private property. The state enjoys significant comparative advantages — in terms of both legitimacy and competence — in performing the necessary tasks of elaborating, implementing, and enforcing the right to private property (in both its vertical and horizontal dimensions), because even in our era of increasing transnational interconnectivity the state is still "the most comprehensive legally-based social organization of the day."⁵⁴ But acknowledging these advantages and thus recognizing the central role of the state does not imply that the right to private property is *necessarily* statist. In fact, in sharp contradiction to its private-law libertarian counterpart,⁵⁵ our (thoroughly liberal) conception of the human right to private property is non-statist.

The reasons for insisting on this characterization are only partly contingent. Contingently, it seems increasingly unsatisfying to limit our attention to the right to private property at the border, given the receding social (as well as economic and cultural) significance of inter-state boundaries and the global reorganization of life in our time. The increasing presence — in terms of quantity, intensity, and quality — of transnational interactions certainly justifies the urgency of thinking about property (as well as contacts and torts, of course) as substantive concerns of international law. It is, in other words, quite curious to observe that alongside the development of substantive bodies of international labor law, international environmental law, or international intellectual property law, the transnational substantive norms of private

53 Cf. Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 520 (2008) (developing the argument mentioned in the main text in connection with the convention of promise).

54 Joseph Raz, *Why the State?* (King's College London Law Sch., Research Paper No. 2014-38, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2339522. To be sure, Raz also claims, in line with the discussion which follows, that this significance of state law does not justify exclusively concentrating on state law or neglecting "other law-like phenomena." *Id.*

55 See *supra* text accompanying note 39.

law — of property, contracts, and torts — are still prescribed mostly⁵⁶ by reference to choice-of-law rules; namely, that our transnational interactions that involve these norms are still conceptualized as *fully* mediated by our national identities.⁵⁷

Herein lies the conceptual, non-contingent reason for the non-statist importance of the human right to private property. This right transcends the state because a significant part of its normative weight has nothing to do with our relationship with or through the state. The horizontal dimension of this right, as elaborated above, governs our interpersonal relationships, that is, our interactions with other persons in their capacity as private individuals, and not as co-citizens.⁵⁸ Admittedly, even in this context the human right to private property depends for its effective instantiation on some institutional apparatus with legitimate enforcement powers. But because these relationships are not mediated *via* the state and their significance does not rely on their consequences for society as a whole, the right to private property — like the interpersonal human rights underlying private law more generally — is not, need not, and indeed should not be tied only to specific national systems.⁵⁹

III. IMPLICATIONS: CONSTITUTIONAL AND TRANSNATIONAL

This unique status of the right to private property as conceptualized herein highlights its divergence from both its traditional natural-law conceptualization and its traditional positivist understanding. Unlike the former, private property

56 The qualified language of the text derives from our recognition of the possible work of transnational law's implicit endorsement of the dubious private-law libertarian approach. See *supra* text accompanying notes 5-6.

57 Notice that this feature, which we hope to upset, would typify even the (otherwise attractive) program of a so-called “cosmopolitan law of conflict of laws” that seeks to denationalize conflict of laws doctrine in the sense of forcing it to ignore any domestic national legal objectives and “do justice to the transnational integration of democratic legal systems.” Florian Rödl, *Democratic Juridification Without Statisation: Law of Conflict of Laws Instead of World State*, in AFTER GLOBALIZATION: NEW PATTERNS OF CONFLICTS AND THEIR SOCIOLOGICAL AND LEGAL RE-CONSTRUCTION 29, 45-46 (Christian Joerges & Tommi Ralli eds., 2011).

58 We do not claim that this feature is unique only to property rights. Indeed, this Essay can be read as a preliminary inquiry into the concept of universal *horizontal* human rights.

59 See Hanoch Dagan & Avihay Dorfman, *Interpersonal Human Rights and Transnational Private Law* (Working Paper, 2016), <http://ssrn.com/abstract=2860275>.

on our account is thoroughly political and thus part and parcel of our social contract, rather than a constraint on its legitimate content.⁶⁰ But unlike the latter, the right to private property does not depend only on the sovereign's prescriptions. The specific norms that guarantee the (vertical and horizontal) viability of this right are not necessarily state-based, and their content is constrained. In Part I we sketched the normative underpinnings of this constraint: the underlying justification of the right to private property as a human right which serves our right to self-determination and relational equality. It is time now to flesh out some of its more specific prescriptions and their implications for both the domestic and global domains.

A. Domestic Implications: Pluralism, Accommodation, Equality

1. Pluralism and Accommodation

The domestic implications of this conception of the right to private property — and of private law more generally — are wide-ranging and their cumulative effects quite significant. Broadly speaking, a polity respectful of people's right to self-determination and their relational equality must conceptualize private law as a set of ideal frameworks for respectful interaction between self-determining individuals. Indeed, as we have argued elsewhere, only private law can form and sustain the variety of frameworks necessary for our ability to lead our conception of the good life; and only private law can cast them as interactions between free and equal individuals who respect one another as the persons they actually are, thus vindicating the demands of relational justice.⁶¹ Hence the two animating principles of a liberal private law — structural pluralism and interpersonal accommodation. A discussion of these principles, let alone of their doctrinal implications, is far beyond the scope of this Essay. But mentioning them here is important because it helps to situate the human right to private property in the fabric of a private law that also complies with these underlying commitments, which in turn point to the two animating principles that this right must uphold if it is to comply with the liberal test of self-imposability by an end.

Thus, the injunction of structural pluralism implies that alongside full-blown private property discussed in Part I, private law should offer other property institutions that facilitate other types of interpersonal relationships (e.g., more communal or more utilitarian). In other words, rather than aspire to exclusivity, private property functions best as part of a broad and diverse

60 See also *supra* note 8.

61 See generally Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409 (2012); Dagan & Dorfman, *supra* note 43.

repertoire of property institutions — such as various forms of coownership — conducive to self-authorship.⁶²

This prescription of heterogeneity entails important implications insofar as the scope of the claims for private authority encapsulated in full-blown private property is concerned. Recall that this unique private authority is crucial because — and thus insofar as — it is conducive to securing (vertical and horizontal) respect for people's self-determination. Some property rights — a right to a basic home or home-like space is an obvious example — nicely fall, at least in our conventional understanding,⁶³ within this framework.⁶⁴ But the spectacular demands of the human right to private property do not follow from the normative foundations of other property institutions. Property rights that rely on such other justifications — namely: *most* types of property rights (especially in commercial contexts) — need not, and often should not, be absolute. (Needless to say, this prescription is also relevant — indeed crucial — in transnational contexts, especially as per the proper meaning of the right of property in international investment law.⁶⁵) In such categories of cases, and especially where non-owners' claim to access the resource at hand is important for their own self-determination, owners' dominion should be — as it often is — subject to limitations and qualifications, including at times to rights to entry of other (and other categories of) people.⁶⁶

62 See Hanoch Dagan, *Property's Structural Pluralism: On Autonomy, the Rule of Law, and the Role of Blackstonian Ownership*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 27 (2014).

63 For the recent debate on this front, see GREGORY S. ALEXANDER & HANOCH DAGAN, PROPERTIES OF PROPERTY 309-20 (2012).

64 As the text implies, while we think that the selection criterion (significance to personhood) for the identification of the type of resources that can be the object of the human right to private property is universal, the specific identification of resources that comply with it (e.g., homes) is, to some extent, conventional. See HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES ch. 3 (1997).

65 See Arato, *supra* note 5, at 261-71.

66 For more, see DAGAN, *supra* note 15, ch. 2. The text hints at a structural difference between the appropriate constitutional analysis of rights, such as freedom of conscience, the scope of which at least roughly follows their scope as human rights, on the one hand, and — on the other hand — rights, such as private property, whose normative underpinning implies a significant gap between their scope as constitutional rights and their proper scope as human rights. Developing this proposition is beyond the scope of our present inquiry.

2. Equality of Private Ownership

There is another crucial aspect that our account prescribes — another prerequisite for the legitimacy of treating private property as a human right worthy of rigid constitutional protection, which is particularly important to our preliminary defense of this right's compliance with the test of self-imposability by an end. The human right to private property, which is premised on the significant role it plays in our social existence as free and equal, must reject the private-law libertarian approach to the problem of inequality, according to which poverty can be tackled by allowing non-owners to extend their scope of free action to involve the resources held *by the state* (say, in the form of public spaces, public housing or, more generally, support for the poor).⁶⁷ Indeed, while for private-law libertarians turning non-owners into private owners may be one possible response to inequality or a possible side effect of such a response, on our account it is the *point*, and thus the core, of any acceptable response.⁶⁸

In this sense, our account resembles, and can indeed draw on, Waldron's important claim that, unlike justifications of property that rely on a specific causative event (as in Locke's claims of labor or Hegel's claims of occupation), *general* right-based justifications of property, which build on its importance as such, imply that every human being is entitled to private property.⁶⁹ Thus, with Waldron and, more broadly, with contemporary liberal egalitarianism, our account supports a "*radical*" redistributive program, governed by "a requirement that private property, under some conception, is something all [persons] must have."⁷⁰ However, perhaps because our inquiry is limited to the *human* right to private property, and perhaps (relatedly) because Waldron defends a far less robust conception of private property, our account also departs from Waldron's, and to this extent takes an even more "radical" turn. State (or private-law based) provision of public access, however broadly defined and implemented, may supplement but never supplant private ownership for all, because such a provision cannot substitute for the role of private ownership in structuring people's interaction in and around external objects in relations of freedom and equality to each other. On our view, to play on Waldron, all persons must have the unusual authority characteristic of full-blown private

67 RIPSTEIN, *supra* note 14, chs. 8-9; WEINRIB, *supra* note 14, at 284-89.

68 Cf. PROPERTY-OWNING DEMOCRACY: RAWLS AND BEYOND (Martin O'Neil & Thad Williamson eds., 2012).

69 See JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 115-17, 423, 425-27, 430-39, 444-45 (1988) [hereinafter WALDRON, RIGHT]; JEREMY WALDRON, *Homelessness and the Issue of Freedom*, in LIBERAL RIGHTS 309 (1993); see also, e.g., Joseph William Singer & Jack M. Beermann, *The Social Origins of Property*, 6 CAN. J.L. & JURIS. 217, 228, 242-45 (1993).

70 See WALDRON, RIGHT, *supra* note 69, at 444.

ownership, rather than merely Waldron's reference to "some conception" of private property.⁷¹

B. Transnational Implications: Beyond the Distributive Paradigm of Global (or Statist) Justice

The question whether — and if so, to what extent — these distributive obligations carry over to the global plane is a matter of lively scholarly (and public) discussion. Our analysis has no direct implications as to the debated question, namely, whether the scope of *distributive* justice is statist or cosmopolitan. But it exposes the hidden presupposition of both sides to this debate and offers a fresh avenue for exploring our transnational obligations.

As Thomas Nagel famously argued, the statist (which he termed political) conception of justice insists that, unlike humanitarian duties, demands of distributive justice stop at the border, because only within the state — the "collectively imposed collective authority"⁷² — each member plays a dual role "both as one of society's subjects and as one in whose name its authority is exercised."⁷³ Indeed, for Nagel "the special presumption against arbitrary inequalities in our treatment by the system" is premised on and justified by the fact "that we are both putative joint authors of the coercively imposed system, and subject to its norms, i.e., expected to accept their authority even when the collective decision diverges from our personal preferences."⁷⁴ The state is special because it "makes unique demands on the will of its members — or the members make unique demands on one another *through the state* — and those exceptional demands bring with them exceptional obligations, the positive obligations of [distributive] justice."⁷⁵

Nagel's claims have been criticized not only by cosmopolitans who argue that the concern for the fair distribution of resources is universal in scope. One important line of argument, forcefully articulated by Joshua Cohen and Charles Sabel, is to dispute the exclusivity of the state as a locus in which "individuals are both subjects to law's empire and citizens in law's republic."⁷⁶ Contemporary global politics triggers, on this view, intermediate

71 See Avihay Dorfman, *The Normativity of the Private Ownership Form*, 75 *MOD. L. REV.* 981, 1008 (2012).

72 Thomas Nagel, *The Problem of Global Justice*, 33 *PHIL. & PUB. AFF.* 114, 140 (2005).

73 *Id.* at 128.

74 *Id.* at 128-29.

75 *Id.* at 130 (emphasis added).

76 Joshua Cohen & Charles Sabel, *Extra Rempublicam Nilla Justitia?*, 34 *PHIL. & PUB. AFF.* 147, 148 (2006).

stages between the robust demands of distributive justice and the minimal duties of humanitarianism, because they are typified by “a direct rule-making relationship between the global bodies and the citizens of different states,” as well as by “conditions of interdependence, cooperation, and institutional responsibility.”⁷⁷ This criticism disputes Nagel’s sharp privilege of the state, but it implicitly shares his assumption that some sort of vertical institutional mediation constitutes, rather than merely facilitates, demands of justice.

Iris Marion Young’s critique, by contrast, does not accept this assumption, and is thus closer to our intervention. “[P]eople have obligations of justice to one another,” she claims, not due to these institutions; in fact, these institutions are only “instruments” in the service of discharging our interpersonal obligations, which are premised on the “social connections of civil society.”⁷⁸ Specifically, Young identifies cases of “structural injustice” generated by “social processes,” which “put large categories of persons under a systematic threat of domination or deprivation” while enabling others “to dominate or have a wide range of opportunities.”⁷⁹ Although in these cases there is no “direct relationship between an action of an identifiable person or group and a harm,” the producers of and participants in these structures “are implicated” in such injustices given their contribution to them, and are thus jointly responsible to “organize collective action to reform [these] unjust structures.”⁸⁰

Our analysis suggests that there is another dimension to the inquiry as to our transnational obligations, one that supplements (rather than supplants) whatever obligations we have on the global level from either humanitarianism or distributive justice. This dimension turns neither on our role as co-participants in global institutions nor on our involvement in unjust structures. This dimension is profoundly relational. It is rooted in our unmediated demands for justice as *persons* whose interpersonal transnational interactions should be governed by reciprocal respect, which, in turn, aspires to inform the entitlements that (*ex ante*) determine the terms of these interactions, rather than merely respond to their (*ex post*) aggregate effects. We thus argue that in an era typified by extensive transnational interpersonal interdependence we can no longer analyze these relationships solely through the prism of private international law. The problem with this traditional body of law is that it views the parties solely as citizens of their respective polities and, so, fails to make sufficient normative space for their status as persons as well. This is why these choice-of-law rules

77 *Id.* at 169.

78 Iris Marion Young, *Responsibility and Global Justice: A Social Connection Model*, 23 SOC. PHIL. & POL’Y 102, 105 (2006).

79 *Id.* at 114.

80 *Id.* at 115, 118-23.

must be supplemented with this more foundational layer of mandatory norms of interpersonal human rights.⁸¹

This is obviously a broad claim that we cannot develop here.⁸² For now, it suffices to identify, rather than pursue, its possible implications insofar as the human right to private property is concerned. Consider the recent predicament of members of numerous rural communities, especially in developing countries, whose reliance on access to land is threatened by transfers of land they do not hold formal title to. As one report documents, in many of these large-scale land acquisitions — the so-called land rush (or green rush) — “those who are selling or leasing land are not the ones who are actually using it,” a situation often generating displacements.⁸³ The formal legal regime in the developing transnational markets where these transfers take place allows potential buyers to accept as a given, and indeed rely on, the property rights as they are prescribed by the host country, because the conflicts-of-law rule pertinent to land points to the *lex situs*; namely, it provides that title will be determined according to the law of the jurisdiction in which the property is situated.⁸⁴ There is, to be sure, an exception to this rule, dealing with grave infringements of human rights that the courts of other countries would refuse to sanction. But the rare cases in which this exception was invoked dealt with deprivations of hitherto recognized property rights, such as a Nazi statute that purported to strip fleeing German Jews of their rights by annulling their German citizenship.⁸⁵

81 We do not advocate the substitution of private international law with a full-blown body of international private law in recognition of the justifiably local features of our private-law doctrines, which derive from their dependence on contextual considerations, both internal to the particular social practices in which they are situated and external to them, including the liberal state’s commitments to distributive justice and democratic citizenship. See Dagan & Dorfman, *supra* note 43; cf. Amnon Lehavi, *Land Law in the Age of Globalization and Land Grabbing*, in *COMPARATIVE PROPERTY LAW: GLOBAL PERSPECTIVES* 290 (Michele Graziadei & Lionel Smith eds., 2017) (emphasizing the enduring local dimension of land law). This limitation does not undermine the significance of our claim, because by focusing on the human right to private property our thesis is limited to the prescriptions of the minimal requirements of property systems.

82 See Dagan & Dorfman, *supra* note 59.

83 See WARD ANSEEUW ET AL., *TRANSNATIONAL LAND DEALS FOR AGRICULTURE IN THE GLOBAL SOUTH: ANALYTICAL REPORT BASED ON THE LAND MATRIX DATABASE* 39, 41 (2012).

84 See, e.g., PETER HAY ET AL., *CONFLICT OF LAWS* 1231 (5th ed. 2010).

85 See *Oppenheimer v. Cattermole*, [1976] AC 249 (HL); see also LEIF WENAR, *BLOOD OIL: TYRANTS, VIOLENCE, AND THE RULES THAT RUN THE WORLD* 102 (2016) (criticizing the sparse use of this exception). Wenar’s comprehensive treatment

At this point, our account of the human right to private property does not offer a quick formula for resolving the new challenging encounters between sovereignty and property as exemplified by the global land rush. But it does allow us to see the inadequacy of traditional private international law and the main ways in which it needs to be revised. The required reform has two aspects: substantive and structural. Substantively, our account entails a different understanding of the concept of “grave infringements” of the human right to private property; structurally, it implies that the obligation to respect this right is not only vertical, but also horizontal.⁸⁶

We begin with the structural aspect, which is particularly important in the land rush context that is often typified by unrepresentative, indeed unaccountable, governments.⁸⁷ Because the significance of the human right to private property is not limited to people’s relationships in their capacity as citizens, the demand to respect the property claims of members of these rural communities is not directed merely to their governments or to courts of other jurisdictions. The legality of the vertical interactions between the buyer and the state and between the state and the displaced person cannot render redundant the horizontal dimension of interaction between the buyer and the displaced person. Part of the value of the human right to private property, we argue, lies in its horizontal dimension — a dimension which is non-statist and thus does not turn on the mediation of choice-of-law rules. This means that the human right to private property commands the direct — viz., unmediated — respect of other participants in the transnational practice of private property. Insofar as the global land rush involves violations of the

of the so-called resource curse reduces the law that governs private property to national property law. See WENAR, *supra*, *passim*. In that, his analysis overlooks the transnational dimension that arises in connection with the human right to private property. This shortcoming is unfortunate since a human right to private property can alleviate some of the injustices that national systems of property law (and the national-based regime of private international law) allow to stand. See Dagan & Dorfman, *supra* note 59.

- 86 We acknowledge, of course, that the structural reform may also be more difficult to implement because this would require an institutional and procedural framework, which, in turn, may place constraints on the content of the human right to private property. (To fully understand *legal* — as opposed to moral — rights, one indeed must attend to their institutional instantiations.) Studying these dimensions, however, is beyond the scope of this Essay. For our purposes, it suffices to add that even if they are unlikely to develop, a revision of the choice-of-law exception along the lines of the substantive reform can serve as a “second-best” solution.
- 87 See Olivier DeSchutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT’L L.J. 504, 528 (2011).

human right to private property, “buyers” are participants in, and not merely implicated beneficiaries of, these infringements. The buyer who fails to respect the displaced person in connection with the latter’s entitlement to control the purchased land commits an international private wrong.

But how could these land transactions constitute violations of the right in question? They may not count as rights’ violations as long as traditional private international law defers to domestic property rules, save for outrageous cases of expropriations mentioned above. This traditional regime is, however, inadequate both because it fails to respect (as we have just mentioned) the horizontal dimension of the human right to private property, and also because this right is attacked not only in cases of exercise of excessive deprivation of recognized property rights. Quite to the contrary, the human right to private property is also undermined if a state’s system of property fails to recognize people’s claims to private property in ways that are flatly inconsistent with the normative foundations of that human right. More specifically to the cases at hand, by limiting the scope of putative infringements of the human right to private property to expropriations (outrageous or not), the traditional approach improperly subscribes to a private-law libertarian understanding of property, thus marginalizing — or maybe even eradicating — its liberal premises of self-determination and relational equality. Substituting this conception with the liberal conception of property we developed above implies that the human right to private property can also be violated by omission, namely, by a failure to recognize such a right even where both self-determination and relational equality mandate such recognition. This means, as argued elsewhere, that there may well be cases — such as, possibly, those of the rural communities affected by the land rush — where although land users lack formal title, their claims are sufficiently backed by these foundational property values that they must be recognized and secured before any other measure of economic development is adopted.⁸⁸ A failure to do so should be deemed an arbitrary deprivation of their human right to property, properly conceived.

88 See Hanoch Dagan, *Property Theory, Essential Resources, and the Global Land Rush*, in *GOVERNING ACCESS TO ESSENTIAL RESOURCES* 81 (Olivier DeSchutter & Katharina Pistor eds., 2015). For some support in the emerging international soft law on these issues, see *FOOD & AGRIC. ORG. OF THE UNITED NATIONS, VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY* §§ 7.1, 7.3, 10.1, 16.1-2, 16.8-9 (2012).

IV. CONCLUDING REMARKS

For private property to be legitimately recognized as a universal human right, its meaning should pass the test of self-imposability by an end. Because the private-law libertarian understanding of private property cannot plausibly meet this demanding standard, it must be rejected notwithstanding its long use (and abuse). The liberal conception of private property, as articulated in these pages, has a much better prospect of meeting property's justificatory challenge. This alternative conception is grounded in our rights to self-determination and relational equality and thus has both vertical and horizontal significance, which means that it is thoroughly political but not necessarily statist. The liberal conception of the human right to property implies that some property rights should be subject to strong constitutional protection. But it also implies that state law should facilitate other types of private and non-private property institutions, that these property institutions may well be subject to non-owners' claims to access, and (most significantly) that everyone must have the unusual authority typical of full-blown private ownership.

Taking the human right to private property (in this liberal interpretation) seriously entails a new equilibrium between property and sovereignty. On the one hand, it disavows the broad deference of traditional international law to states' schemes of property rights, deepening the intrusion to their sovereignty in the name of the human right to private property beyond the existing category of outrageous expropriations.⁸⁹ But on the other hand, our proposed interpretation of that right also upsets the quick association of every diminution of an owner's estate with an infringement of her human right to property. It may thus supply the necessary normative underpinning to some recent voices for revising this view that overly interferes with states' sovereignty.⁹⁰

By reclaiming the importance of the horizontal dimension of private property for the human rights discourse, we have sought to take the first step toward re-conceptualizing the place of private law in this discourse. The next step of this ambition will be to develop the far more radical claim, namely, that private law, rather than merely private property, gives effect to some of the major human rights that govern the horizontal dimension of our practical affairs *qua* individual persons (such as the right to bodily security, to our good names, et alia).

89 It should, however, be noted that breach of international law has already been used to justify such an intervention. See *Kuwait Airways Corp. v. Iraqi Airways Co.*, [2002] 3 All E.R. 209 (H.L.).

90 For these voices, see Arato, *supra* note 5, at 263-64.