

ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY

Emancipating human rights: Capitalism and the common good

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Abstract

This article begins with a study of the political economy of welfare capitalism to demonstrate how the private quest for profit was never going to be undermined by the advance of socio-economic rights. Contrary to the conventional view among human rights lawyers, capital draws power from its rights or welfarism. It is in recognizing the role that socio-economic rights play in serving capitalism that the field of international law concerned with structurally transformative human rights can begin to explore how socio-economic rights inhibit alternative forms of social organization. This work then turns to recovering property rights through a study of recent evictions and housing rights case law of the UN Committee on Economic, Social and Cultural Rights that problematizes structural inequities and calls the financialized capitalist system into question. Next this work investigates radical legal positivism in international indigenous rights jurisprudence for how it transcends the private ownership of indigenous lands and control over the means of production. The social function of property rights is then revisited and extended, drawing to a close an article that unearths how socio-economic rights might yet emancipate people from capitalist property relations, alter the underlying structure of the economy, and, in time, sever its concordance with the capitalist welfare state.

Keywords: capitalism; political economy; property; socio-economic rights; transformative international human rights law

1. Introduction

The conventional view of human rights perceives socio-economic rights as antithetical to the economic rationality of capitalism. Socio-economic rights require that the market is not left to do all the work of allocating resources and access to goods and services; instead, the distribution of resources is informed by the explicit aim of meeting needs, framed as legal entitlements. Social protection and socio-economic rights, the prevalent argument goes, counteract the power exercised by a market economy over society. On this widespread view, found both in the human rights literature as in the world of practice, socio-economic rights pose a challenge to capitalism, with its doctrines of private accumulation, competition and profit and its structure of opportunity and reward, as well as political influence, in the hands of those owning and exploiting scarce productive resources.

Largely absent from consideration among international human rights lawyers working in this area is the fact that the welfare state – of which socio-economic rights are an expression – is a *product* of capitalism. Social protection emerged as a product of capitalist organization and is designed to operate in ways that sustain capitalism and avoid undermining the fundamentals of the capitalist economy and liberal democracy. Insofar as the welfare state is meant to mitigate the

ills of capitalism, capitalism could not exist without it. This is essentially where socio-economic rights are located, not as capitalism's nemesis but as its ally.

This study draws on disciplines that have helped to understand the political economy of welfare capitalism. It then applies those insights to complicate the dominant understanding among international human rights lawyers as to the functions of socio-economic rights. It is only in recognizing the role that socio-economic rights play in serving and sustaining capitalism that this work, and the field of international law concerned with structurally transformative human rights, can begin to explore how socio-economic rights inhibit alternative forms of social organization to that of capitalism. From this vantage point we are better positioned to deploy human rights to transformative ends, and here the emancipation of international human rights law from its capitalist property relations will be seminal. In this research we home in on private property rights as the *sine qua non* of capitalism, and on the revisal of property rights, including over the means of production, in the legal practice and possibility of human rights.

Section 2 of this article draws out how the private quest for profit was never going to be undermined by the advance of socio-economic rights, quite the opposite: capital draws power from its rights or welfarism. Recovering property rights is the focus of Section 3. Here a structural turn in rights interpretation by the United Nations Committee on Economic, Social and Cultural Rights is identified whereby the Committee offers an appraisal of the rights of property owners in its recent eviction and housing rights case law that problematizes contemporary inequities and calls the financialized capitalist system into question. While pushback against the private ownership of peoples' housing by financial capital is central to our first set of cases, investigating radical legal positivism in international human rights jurisprudence that transcends the private ownership of indigenous lands and control over the means of production is central in the second set of cases. In Section 4 the social function of property rights is revisited and extended, drawing to a close an article that unearths how socio-economic rights might yet emancipate people from capitalist property relations, alter the underlying structure of the economy, and, in time, sever its concordance with the capitalist welfare state.

1.1 What is wrong with capitalism anyway?

Capitalism's structural commitment to exploitation begins with private ownership and control over the means of production through which labour is extracted and expropriated. Commodification of land, along with every conceivable resource, feed the unending expansion and profit-maximization that define its core logic. Racial domination and the domination and exploitation of women – and the two combined – are constitutive of the logic and practice of capitalism historically and in its current transnational and financialized phase.¹ 'Racial capitalism' captures the ways racism permeates the organization and development of capitalism² and helps us to see how capital's imperative for relentless accumulation is predicated on the constant and inescapable production of relations of severe inequality among human groups which has led to a fiction of differing capacities, historically race.³ Recent research has laid bare 'the qualitatively distinct ways capitalism—including in its contemporary neoliberal phase – extracts and expropriates labor, land, and resources from non-white populations, especially Black and Indigenous groups' and the disproportionate material effects of neoliberalism on these same populations.⁴

¹On racial capitalism as configuring the history and theory of capitalism and key to understanding neoliberal capitalism see S. Issar, 'Listening to Black Lives Matter: Racial Capitalism and the Critique of Neoliberalism', (2021) 20 *Contemporary Political Theory* 48; 'Silvia Federici on Women and Capitalism', *DigRadio*, 13 September 2019, available at thedigradio.com/podcast/silvia-federici-on-women-and-capitalism/?query=federici.

²C. J. Robinson, *Black Marxism: The Making of the Black Radical Tradition* (1983), 2.

³J. Melamed, 'Racial Capitalism', (2015) 1 *Critical Ethnic Studies* 76, at 77.

⁴Issar's focus is on the US but the same general claim holds in other countries and globally. See Issar, *supra* note 1, at 60–1.

Global capitalism removes geographical and regulatory barriers to maximizing profits, largely for capital from advanced economies. Poverty remains widespread – part and parcel of capitalism given also the incentive to extract profit through wage reduction – and inequality, along with the concentration of wealth and power, have reached levels that are socially, politically, and environmentally damaging. Pervasive insecurity is produced by (global) capital accumulation and market processes: the buying and selling of labour power and human exploitation, and the exploitation of land and resources upon which the competitive production and exchange relies. Efforts aimed at corporate social responsibility, at taming the market, are necessarily constrained by the constant need to maximize profits. While the need ‘to adopt maximizing strategies is a basic feature of the system and not just a function of irresponsibility or greed’,⁵ it is also a basic feature of capitalism that no one does anything for anyone without getting something in return,⁶ it is an economic system made to work on the ‘hypertrophy of selfishness’.⁷

It is often said that no other economic system can compare in terms of sheer productivity, innovation, and dynamism; here we are asked to focus on capitalism’s contribution to technology, choice, promoting certain kinds of freedom,⁸ and even poverty reduction. But this is not the whole story. Its dynamism is driven by a constant need to improve the productivity of labour, that is to exploit low paid workers in general (i.e., largely people of colour in particular) and always on the back of the unpaid contribution of women in the mutual constitution of racialized/feminized exploitation and capital accumulation. It is also driven by the need to expand commodification, globally and into new areas of activity. The ‘inner logic of capitalist production’, reflects an ‘incessant drive for economic expansion for the sake of class-based profits and accumulation’ – with the full exploitation of nature and human labour part of this process.⁹ Capitalism is premised on market actors pursuing their private interest of generating profits, creating new markets, competing over market share, driving costs down and productivity up, bringing returns on investment, and backgrounding externalities and social impacts.¹⁰ Then, in a best case scenario, the growth of the top incomes are said to be justified by the benefits the wealthy contribute to the rest of society, discounting the legally-sanctioned transnational extractivism-exploitation-immiseration-cum-accumulation that frequently makes their wealth possible.

The same market pressures that make capitalism ‘dynamic’ also leave it prone to constant fluctuations and despite its dynamism capitalism has not shown itself to be a just way of meeting human needs or allaying inequality,¹¹ with its more extreme applications exacerbating inequality

⁵... a system based on market principles will inevitably place a premium on wealth and encourage a culture of greed’. E. Meiksins Wood, ‘Capitalism and Social Rights’, (2009) 140 *Against the Current*, available at www.solidarity-us.org/atc/140/p2150/.

⁶G. A. Cohen, *Why Not Socialism?* (2009), 44.

⁷*Ibid.*, at 58. Sahlins parallels capitalism and sociopathy: ‘[I]ndividuals singularly concerned with their own welfare at the expense of other are sociopaths.’ M. Sahlins, ‘An Anthropological Manifesto or the Origins of the State’, (2015) 31 *Anthropology Today* 8, at 11.

⁸See D. Garland, ‘The Welfare State: A Fundamental Dimension of Modern Government’, (2014) 55 *European Journal of Sociology* 327, at 357; J-P. Chauffeur, *The Power of Freedom: Uniting Human Rights and Development* (2009): ‘Rights advocates must recognize economic liberty as an essential component of human rights.’

⁹J. Bellamy Foster, B. Clark and R. York, ‘Ecology: The Moment of Truth: An Introduction’, (2008) 60 *Monthly Review*, available at www.monthlyreview.org/2008/07/01/ecology-the-moment-of-truth-an-introduction/.

¹⁰See Garland, *supra* note 8, at 350.

¹¹‘The growth of average per capita income has meant a very substantial improvement in standards of living: three-quarters of the globe’s inhabitants lived close to the subsistence threshold in the eighteenth century compared with less than a fifth today ... Yet several issues bedevil the national accounts I rely on to describe the long-term trajectory of average income. Because national accounts deal with aggregates, they take no account of inequality and have been slow to incorporate data on sustainability, human capital, and natural capital ... While the progress made in the areas of health, education, and purchasing power has been real, it has masked vast inequalities and vulnerabilities.’ T. Piketty, *Capital and Ideology* (translated by A. Goldhammer, 2020), 19.

in greater measure.¹² Climate change, pollution, land degradation, the destruction of communities and culture, homelessness, deforestation, and even the associated deadly zoonotic viruses, are externalities, the costs of which are borne by particular segments of (global) society, as racial capitalism foresees. From this arrangement necessarily emerges alternative (illegal) economies of colour administered through violence and environmental and health hazards: the creation of a sector of informal poverty 'employment', included, moreover, in official statistics that celebrate the reduction of unemployment.¹³ Desperation breeds migration but the rise of industrial capitalism saw the rise of immigration restrictions. Today we have a system of extreme capital mobility and extreme labour rigidity, so that capital, if it is to be used to produce goods and services, can move to where labour is cheapest. As Meiksins Wood points out, 'there's a huge disparity between the productive capacities created by capitalism and what it actually delivers'¹⁴ and between its productive and destructive capacities.

Capitalism is a community of producers, but as Einstein lamented, 'it is a community striving to deprive each other . . . on the whole in faithful compliance with legally established rules'.¹⁵ In recognizing the welfare state as a key element in the project of capitalism, this article begins by considering the role of human rights in that dubitable endeavour before taking socio-economic rights in a new direction, one aligned with our common well-being. This is an exercise in detaching human rights from an economic model that, as Capra and Mattei put it, has us living off each other.¹⁶

2. Capitalism and the welfare state

2.1 Are socio-economic rights inimical to capitalism?

It is often highlighted how the protection of socio-economic rights (interchangeable with the term 'social rights' common in European systems) is incompatible with capitalism and liberal economic doctrine; that they reflect distinct economic rationalities. Socio-economic rights require that the market is not left to do all the work of allocating resources and access to goods and services; instead, the distribution of resources is informed by the explicit aim of meeting needs, framed as legal entitlements. To the ire of the Right, social provision and by extension social rights are viewed as an interference with private property and the political ideal of a night-watchman state or, more precisely, with harnessing the regulatory state to a vision of freedom through the market.¹⁷ Governments hostile to interference with market outcomes tend to be especially hostile to 'socialism', with socio-economic rights rejected as part of that scheme.¹⁸

¹²On 'America's exceptionally unequal, extreme neoliberal health care system' and how it puts the entire country at risk see W. N. Laster Pirtle, 'Racial Capitalism: A Fundamental Cause of Novel Coronavirus (COVID-19) Pandemic Inequities in the United States', (2020) 47 *Health Education & Behavior* 504, at 505; Piketty, *ibid.*, at 20, on the 'particularly radical form of neo-proprietary ideology' that propelled the growth in socio-economic inequality after 1980–1990 resulting in 'the revival of inequality nearly everywhere since the 1980s'.

¹³R. D. G. Kelley, 'Foreword: Why Black Marxism? Why Now?', in Robinson, *supra* note 2, at xv; A. Kadri, *Arab Development Denied: Dynamics of Accumulation by Wars of Encroachment* (2014), 189, critiquing the ILO and UNDP for counting people in the poverty-stricken informal sector as employed for purposes of unemployment figures in Algeria.

¹⁴See Meiksins Wood, *supra* note 5.

¹⁵A. Einstein, 'Why Socialism?', (1949) *Monthly Review*. 'The economic anarchy of capitalist society as it exists today is, in my opinion, the real source of the evil . . . In this respect, it is important to realize that the means of production—that is to say, the entire productive capacity that is needed for producing consumer goods as well as additional capital goods—may legally be, and for the most part are, the private property of individuals.' *Ibid.*

¹⁶F. Capra and U. Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (2015), 154.

¹⁷See Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018); I. Bruff, 'Overcoming the Allure of Neoliberalism's Market Myth', (2019) 118 *The South Atlantic Quarterly* 363.

¹⁸US Council of Economic Advisors, Executive Office of the President of the United States, *The Opportunity Cost of Socialism* (October 2018).

Liberal economic ideology sees socio-economic rights as inimical to capitalism in that they interfere with the efficiency of markets and, the argument goes, if markets were truly free, they would deliver social justice in the long run anyway. The ideological project of neoliberal capitalism might have come to terms with some form of modern social welfare, despite its indifference to economic inequality in the short run.¹⁹ But this ‘nicer’ form of capitalism can best be understood as a cynical project of upper-class enlightened self-interest under threat of social disorder: ‘give up some order to preserve more’.²⁰

Social protection and, in particular ways, socio-economic rights, can counteract the power exercised by a market economy over society. Universal public healthcare addresses the inability to pay in matters of bodily care (the right to health would require access to healthcare whether public or not); labour protection legislation, unemployment insurance, and social security benefits increase the chances of workers successfully resisting their employers and the disciplinary effects ‘of the reserve army of labour’; state-subsidized housing makes it possible for low-income groups to be housed or live in better accommodation. It is largely embraced by the Left, in the human rights literature, as in the world of human rights practice, that socio-economic rights pose a challenge to capitalism (even if imperfectly). In many quarters, socio-economic rights have replaced socialism as the main discourse for the critique of the effects of capitalism.²¹

It is the case that the very idea of a ‘right’ as opposed to a ‘need’ removes it from the realm of direct market dependence, which is capitalism’s quintessence,²² although not necessarily from the realm of commodity. Socio-economic rights offer a conception of social justice as distribution according to need and not merely because it is deserved or according to contribution; as T. H. Marshall put it, ‘social rights imply an absolute right to a certain standard of civilisation’.²³ Legal rights moreover, as Albie Sachs famously quipped, convert misfortune into injustice; just as social constitutionalism in the words of another prominent legal commentator ‘provides a measure against which suffering is experienced not as necessary, but as a wrong’.²⁴ Socio-economic rights require justification to be limited or removed and the particular requirement of ensuring a minimum core of socio-economic rights as developed by the UN Committee on Economic, Social and Cultural Rights under its ‘minimum essential levels’ of rights doctrine, critiques notwithstanding, ‘combines the consequences of immediate effect, immunity from the excuse of insufficient resources, non-retrogression, and direct applicability’.²⁵ In spectacular crises such as the global novel

¹⁹On this latter point, M. Tushnet, ‘The Globalisation of Constitutional Law as a Weakly Neo-Liberal Project’, (2019) 8 *Global Constitutionalism* 29, at 35.

²⁰As Milanovic outlines: ‘It is not because ethical leaders decided suddenly to make capitalism “nicer” but because the two world wars, the Bolshevik revolution, the growth of social-democratic and communist parties, and their links with powerful trade unions, exacted the change of course from the bourgeoisie under the looming threat of social disorder and expropriation.’ B. Milanovic, ‘Nostalgia for a Past that Never Was; Part 1 Review of Paul Collier’s “The Future of Capitalism”’, 8 August 2019, available at www.glineq.blogspot.com/2019/08/nostalgia-for-past-that-never-was-part.html.

²¹M. Freeman, ‘Beyond Capitalism and Socialism’, in J. Dine and A. Fagan (eds.), *Human Rights and Capitalism: A Multidisciplinary Perspective on Globalisation* (2006), 3, at 25.

²²As per Meiksins Wood: ‘Under the capitalist system basic goods and services are produced for and obtained from the market. But above all, it’s a system in which the main economic actors, workers and employers, are dependent on the market. Market dependence is the essence of the system . . . [P]eople have lost non-market access to the means of production and the means of subsistence.’ See Meiksins Wood, *supra* note 5.

²³Which, in Marshall’s framing, ‘is conditional only on the discharge of the general duties of citizenship’. T. H. Marshall, *Citizenship and Social Class* (1950), 26.

²⁴E. Christodoulidis, ‘Social Rights Constitutionalism: An Antagonistic Endorsement’, (2017) 44 *Journal of Law and Society* 123, at 148.

²⁵M. Scheinin, ‘Core Rights and Obligations’, in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013), 525, at 538.

Coronavirus outbreak of 2020 as much as in the everyday, socio-economic rights can make for effective and just policy-making and inculcate more egalitarian societies.²⁶

However, before we celebrate the social rights revolution or even bemoan its estrangement, as was the case for debtor states following the 2008 financial crisis, and a central force for the apocalyptic scenes in the hospitals of high-income countries during the outbreak of the COVID-19 pandemic,²⁷ there is a deep malaise with which we need to contend: the social state as imperative to capitalism. It is capitalism's commitment to private profit-maximization and constant accumulation that made social provision and socio-economic rights necessary in the first place and it is capitalism, first and ultimately, that socio-economic rights serve. First because, as liberals and Marxists agree, to be socially and politically sustainable capitalism requires welfare policy, and, ultimately, because by keeping capitalism viable, socio-economic rights serve to push transformative alternatives further out of reach.

We will shortly turn to welfare capitalism and socio-economic rights in foreclosing transformative change – in providing a concept of justice *in* the economy but not social justice *as* the economy, to invoke Macpherson's distinction²⁸ – but let us begin by disaggregating the contemporary 'welfare state' and draw out its benefits to human well-being of redistribution and social protection. In his prominent work on the subject, David Garland breaks down the welfare state into five sectors: social insurance (guaranteed coverage protecting workers and their families against loss of earnings with everyone enrolled regardless of risk profile; employees can be required to make contributions); social assistance (often referred to as welfare or safety net based on non-contributory, income-support programmes for those who lack income to meet their basic needs and funded out of general taxation); publicly-funded social services (free or subsidized access to education, healthcare, childcare, public transport, legal aid etc., also support for parks, libraries, museums, recreational facilities, and affordable housing). There is the social work and personal social services sector (children's services, social care for the elderly etc.) and lastly there is 'government of the economy' that reflects the welfare state programmes' reliance on large-scale government controls on economic life through nationalization of industry, economic planning, tax laws, minimum wage laws, labour market policies, farming and food subsidies etc.²⁹ Unless otherwise stated, this article uses the terms the 'welfare state or policy', 'social protections' or 'redistribution' to capture the core features and implications of the twentieth century resumption and expansion of the welfare state in Western Europe and the US, following the 'full-fledged' market capitalism of the nineteenth century and its counter-movement of social protections. While there is significant variation among them, Western welfare states generally rely on these same basic institutions. Esping-Andersen's well-known taxonomy differentiates among the 'liberal' welfare state, the 'corporatist regime' and the 'social-democratic' regime-types in terms of the quality of social rights and their variegated impact on the creation of egalitarian societies.³⁰

²⁶There has been much written on this in the context of the COVID pandemic. See, notably, W. Lübke, 'Corona Triage: A Commentary on the Triage Recommendations by Italian SIAARTI Medicals Regarding the Corona Crisis', *Verfassungsblog*, 16 March 2020, available at www.verfassungsblog.de/corona-triage-2/; see also I. Saiz, 'Time for A Rights-Based Global Economic Stimulus to Tackle COVID-19', *Center for Economic and Social Rights*, 27 March 2020, available at www.cesr.org/time-rights-based-global-economic-stimulus-tackle-covid-19.

²⁷On cuts to the NHS in the decade preceding the pandemic and its implications see F. Lawrence et al., 'How a Decade of Privatisation and Cuts Exposed England to Coronavirus', *Guardian*, 31 May 2020, available at www.theguardian.com/world/2020/may/31/how-a-decade-of-privatisation-and-cuts-exposed-england-to-coronavirus; on the implications for Italy's public health system of preceding cuts along with the growth in private sector health providers see 'These Are Times of Unmaskings'- A Nurse Speaks Out from the Epicenter of the Covid-19 Pandemic in Italy' V. Raimondi interviewed by P. Piccolo, *The Dreaming Machine*, 8 April 2020, available at www.thedreamingmachine.com/these-are-times-of-unmaskings-a-nurse-speaks-out-from-the-epicenter-of-the-covid-19-pandemic-in-italy-interview-by-pina-piccolo/.

²⁸C. B. Macpherson, *The Rise and Fall of Economic Justice and Other Papers* (1985), 7.

²⁹D. Garland, *The Welfare State: A Very Short Introduction* (2016), 46–50.

³⁰G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (1990), 23–9.

Differences aside, welfare state development was a universal characteristic of capitalist democracies.³¹

The heyday of the western welfare state ran from the end of the Second World War until the ‘neoliberal revolution’ of the 1970s.³² The neoliberal shift modified welfare policy everywhere, directing them towards market friendly reforms such as the partial privatization of state provision and ‘flexible’ labour markets but, commentators indicate, without dismantling its fundamental institutions.³³ Fiscal consolidation (austerity measures) of the past decade are shown to have dramatically impacted on human well-being across a range of core indicators and exacerbated inequalities. This is in line with findings more generally that show that countries with market-mediated welfare policies (favouring the private sector), such as the US, are highly stratified with great inequality. A state without welfare policy is one that furthers the authority wielded by the market. Conversely, the welfare state of widespread social support and universal, well-funded public services raises the living standards of the worse-off, fosters shared economic prosperity, as well increases the means of resistance of social groups to demand further and better protections. ‘The extension of social services is not primarily a means of equalising incomes. In some cases it may, in others it may not . . . What matters’, T. H. Marshall averred, ‘is that there is a general enrichment of the concrete substance of civilised life, a general reduction of risk and insecurity, an equalisation between the more and the less fortunate at all levels—between the healthy and the sick, the employed and the unemployed, the old and the active, the bachelor and the father of a large family’.³⁴ In these times, the COVID-19 pandemic has demonstrated the possibility of vast spending when needed for human well-being (in the global north) and the worth of well-resourced, publicly-funded and universally available social services such as healthcare. So, if welfare policy is so valuable, what is the problem?

2.2 Garland, Offe, and Marx: Social protection and the mark of capitalism

The welfare state is a product of capitalism. Social protection emerged as a product of capitalist organization, and it is designed both to sustain capitalism and to avoid undermining the fundamentals of the capitalist economy and liberal democracy.³⁵ Its social function works as an aspect of its ‘anti-social’ role reacting to and embedded in the capitalist system. Insights from the scholarly work of the liberal (socialist) thinker David Garland, the empirical and ‘indirectly normative criticism’ of the Marxist-oriented Claus Offe, and Karl Marx himself, assist us in situating social protection as key to capitalism. From there we can begin to explore the role that socio-economic rights play in serving capitalism and – contrary to their alleged neutrality and implicit ambitions – the role of socio-economic rights in inhibiting alternatives to capitalism.

Capitalism produced distinctive problems. To start, people lost non-market access to the means of production and the means of subsistence; through the market economy human society became

³¹See Garland, *supra* note 29, at 44. And despite variations in national capitalisms, each created its own welfare capitalism, and all have moved in a similar direction. J. Fulcher, *Capitalism: A Very Short Introduction* (2004), 80.

³²Streck refers to the ‘neoliberal revolution’ which began in the 1970s and abolished ‘the mixed economies’ of three post war decades. W. Streck, ‘The Politics of Public Debt: Neoliberalism, Capitalist Development and the Restructuring of the State’, (2013) 15 *German Economic Review* 143, at 144.

³³See Garland, *supra* note 29, at 112; M. Newman, *Socialism: A Very Short Introduction* (2005), 121–2; ‘Building up the Pillars of the State’, *The Economist*, 28 March 2020.

³⁴See Marshall, *supra* note 23, at 33. The five major regions of the world enjoyed a relatively egalitarian phase between 1950 and 1980 before entering the turn to a ‘neo-proprietarian ideology’ and the phase of rising inequality since then. See Piketty, *supra* note 11, at 20, 22.

³⁵P. Q. Hirst, ‘The Genesis of the Social’, (1981) *Politics and Power* 67.

‘an accessory of the economic system’:³⁶ ‘Other societies have had markets but it is under capitalism whereby dependence on the market is the fundamental condition of life’.³⁷ Invariably, there has been pushback: Mudge details how in Western politics the late 1800s saw socialist and workers movements ‘change the political landscape and generalize demands for protection’,³⁸ just as Moyn attends to how political economy came into its own in the nineteenth century bringing with it ‘the heartless attitude towards subsistence that sparked both humanitarian and radical responses to the attendant miseries of modern economic life’.³⁹ From 1919–1934, ‘Red Vienna’ was a political force ‘vital to the interwar reform project and supported by large segments of the subaltern classes that opened up a space for further changes and transformations’,⁴⁰ just as post-First World War accounts of workers’ battles for post-capitalist society – union campaigns, agricultural co-operatives, and building guilds (and their strategic decimation) are part of the history of liberal Britain, fascist Italy, as elsewhere.⁴¹

The welfare state has its origins in multiple political and economic projects, yet, as sociologists and historians have charted, it is specifically in the conditions of nineteenth century capitalism in Europe that we see emerge ‘the social question’, modern European socialism, and then the twentieth century formation of the welfare state to humanize capitalism as much as to make it resistant to socialist challenge.⁴² The American Marshall Plan for European recovery, implemented from 1948, played a major part in reviving the capitalist economies of Western Europe, and along with it came the ‘fully-fledged’ welfare state of European post-war reconstruction (notably, to the exclusion of the people in the territories of empire)⁴³ then following decades of growth, the transatlantic settled political consensus that endured until the 1970s and beyond.⁴⁴

While social rights have their own rich histories,⁴⁵ the contemporary international and institutional legal regime for securing socio-economic rights was formalized in defence of both communism (by socialist states) as well as capitalism in 1919, following the establishment of the International Labour Organization by the victorious powers of First World War in response to the

³⁶K. Polanyi, *The Great Transformations: The Political and Economic Origins of Our Time* (1944), 79.

³⁷See Meiksins Wood, *supra* note 5. ‘Traditional societies—pre-capitalist social formations—did not have distinct “economies” that were set apart and organized according to a purely economic logic of profit and loss. They did not regard “market” exchanges as transactions that ought to be governed solely by the laws of supply and demand. Nor did they separate work from the worker by treating commodified labor power as an alienable “property” distinct from the human being who labors and the social context in which that labor is undertaken. Production and exchange were instead embedded in and constrained by religious, moral, and social rules that limited exploitation and protected against starvation in times of dearth or famine.’ See Garland, *supra* note 8, at 353.

³⁸S. L. Mudge, *Leftism Reinvented: Western Parties from Socialism to Neoliberalism* (2018), 60.

³⁹S. Moyn, *Not Enough: Human Rights in an Unequal World* (2018), 26. ‘To the extent that a moral economy existed in early modern history, it had clearly broken down in the century of the “social question”, as customs and laws to meet basic needs proved as much a source of outrage for their limitations as a source of praise for the succor they provided.’ *Ibid.*, at 25.

⁴⁰See, V. Duma and H. Lichtenberger (translated by L. Balhorn), ‘Remembering Red Vienna’, *Jacobin*, 2 October 2017, available at www.jacobin.com/2017/02/red-vienna-austria-housing-urban-planning/; T. Rogan, *The Moral Economists: R.H. Tawney, Karl Polanyi, E.P. Thompson, and the Critique of Capitalism* (2017), 63.

⁴¹C. E. Mattei, *The Capital Order: How Economists Invented Austerity and Paved the Way to Fascism* (2022).

⁴²See Garland, *supra* note 29, at 42.

⁴³Moyn adds that ‘The very West European states that went furthest toward welfare were also the larger imperial states that excluded from their generosity the vast bulk of humanity in the empire’s territory’. Moyn, *supra* note 39, at 13–14.

⁴⁴T. Bottomore, *Citizenship and Social Class, Forty Years On* (1992), Part II, 58; see also Garland, *supra* note 29, at 45. Applying a longer lens, welfare capitalism in the second half of the twentieth century captures assorted visions and policies – the post war settlement but also Europe’s Third Way brand of welfarism that elevates work and personal responsibility, and the institutionalized austerity predominant in our current moment.

⁴⁵On the rights of man within the history of capitalism see S. Marks, *A False Tree of Liberty: Human Rights in Radical Thought* (2019) (beginning with sixteenth and seventeenth century England); see Moyn, *ibid.* (on human rights in relation to a history of social justice) and recently, N. Bhuta, *Recovering Social Rights*, IILJ Working Paper 2023/1 (on a history of the grammars of ‘collective natural rights ... for a fair share of political and economic order’ and the case for their prefiguring of the welfare state), available at www.iilj.org/publications/recovering-social-rights/.

menace of Bolshevism: ‘By creating the ILO, they offered organized labor participation in social and industrial reform within an accepted framework of capitalism.’⁴⁶ In 1946, the World Health Organization constitutionalized the ‘right to the highest attainable standard of health’,⁴⁷ followed by the more extensive post-Second World War codification of socio-economic rights, and then their (relatively weak) mechanisms. Their elaboration encompasses a complexity of political views – socio-economic rights as an essential part of the apparatus of market democracies, as important to democratic socialism, as a complement to the ideology of communism,⁴⁸ and as a danger to the optimal functioning of markets from the perspective of liberal economic ideology. Still, in the Universal Declaration of Human Rights’ canonization of socio-economic rights the post war democratic welfare state can be said to have been consecrated.⁴⁹ The welfare state, like socio-economic rights, reflect a process of regulating socialization and capital accumulation providing for ‘legal transfers of resources to various groups whose life chances had been damaged systematically by market exchange processes’.⁵⁰ These social fixes are central to the economic organization of modern capitalist societies.

What we are dealing with when we endorse the idea of welfare policy and social provision is a social system that emerged from, and bears – economically and morally – the mark of capitalism.⁵¹ Social provision reflects a moral economy only indirectly, and as post-capitalists would conclude, only partially. To characterize the welfare state as moral, Garland warns,

greatly simplifies the motivations involved in its creation and fails to capture the values and power relations that underpin its long-term reproduction . . . Benefits were paid to secure workers and feed their families—but they were also made to stimulate demand, to keep money circulating, and to prompt investment and sustain capitalist commerce. The welfare state has always been about economic efficiency as well as social equity, and it has always served the interests of rulers as well as the needs of the ruled.⁵²

It is misleading, then, to understand the welfare state purely as a provider of social support. The economy is ‘capitalist-controlled’, dangling the constant threat of private capital exercising its power *not* to invest – a power now wielded globally in the downward harmonization of social and environmental protections. The welfare state thus has a built-in ‘self-interest’ in giving preferential treatment to the capitalist economy because the private sector is a vital source of its economic

⁴⁶R. W. Cox, ‘Labor and Hegemony’, (1977) 31 *International Organization* 386, at 387; See also S. L. Kang, ‘The Unsettled Relationship of Economic and Social Rights and the West: A Response to Whelan and Donnelly’, (2009) 31 *Human Rights Quarterly* 1006, at 1017–1–8.

⁴⁷Moyn points out that while the inclusion of the right to health in the WHO’s constitution was significant, it was Latin American states that had most contributed prior to the Second World War ‘to the notion that modern citizens were entitled to some modicum of medical care’. Moyn, *supra* note 39, at 58–9.

⁴⁸On the social democratic commitment to basic necessities (sufficiency) and the communist commitment to egalitarianism see M. Ishay, ‘Human Rights under Attack: What Comes Next’, Review Essay of S. Moyn, *Not Enough: Human Rights in an Unequal World*, (2018) 32 *Ethics and International Affairs* 493, at 495.

⁴⁹See Moyn, *supra* note 39, at 13–14. Moyn goes on to highlight that the UDHR provided ‘a template for national welfare states’. *Ibid.*, at 57. Sally-Anne Way’s archival work has unearthed how the 1947 US proposal during the drafting of the UDHR provided the language of ‘maximum use of available resources’ (now found in ICESCR) with Keynesian demands for ‘full employment’ in mind – that is, ‘the “maximum use” of all available resources (so “men and machines” were not left idle) . . . [I]t was an exhortation for governments to spend more, to ensure the “maximum use” or “full employment” of all available unemployed resources. It was, in other words, an exhortation to avoid austerity, to avoid strict balanced budgets – in short, to adopt counter-cyclical Keynesian fiscal policies’. S-A. Way, *Human Rights from the Great Depression to the Great Recession: The United States, ‘Western’ Liberalism and the Shaping of Economic and Social Rights in International Law* (2018), PhD thesis on file, LSE, 18.

⁵⁰J. Keane, ‘Introduction’, in C. Offe, *Contradictions of the Welfare State* (1984), 11, at 13.

⁵¹See Garland, *supra* note 29.

⁵²See Garland, *supra* note 8.

growth and revenues.⁵³ If at one level capitalism generally and neoliberal capitalism in particular loathe the (idea of the) welfare state conventionally understood,⁵⁴ the work of social scientists, whether of liberal or Marxist persuasion, have shown how capitalism cannot exist without it.

Perhaps the best way to perceive the welfare state is as a compensatory mechanism; it tries to compensate for problems which are the ‘by-products of industrial growth in a private economy’.⁵⁵ The contradiction presented by ‘the logic of industrial production and the logic of human need’, which, as Offe explores, is a basic characteristic of every capitalist society, has not been resolved by the arrival of the welfare state, even in its heyday.⁵⁶ Capitalism’s basic principle – the private quest for profit – was never meant to be undermined by the welfare state; the dominance of capitalism in this scenario is made clear in that, as Garland points out, challenges to the idea and practice of welfare policy are commonplace, whereas challenges to private property would be regarded as revolutionary.⁵⁷

Central to the analysis that Marx provided in the second half of the nineteenth century is that distribution, including what one group or the other would consider fair distribution, takes place on the basis of the present-day mode of capitalist production.⁵⁸ The welfare state is still connected to a particular form of law: capitalist law.⁵⁹ The welfare state and its ‘social law’ – including where currently framed as socio-economic rights – is merely a consequence of the distribution of the conditions of production themselves; a feature of the mode of capitalist production itself.⁶⁰ Thus to take from Marx, we can recognize that a chosen programme for redistribution may be ‘fair’ relative to a certain metric, for example ensuring minimum levels of socio-economic rights determined by judicial bodies or according to a guaranteed income scheme or the fulfilment of basic physiological needs or even the aim of extensive redistribution from the rich to the poor, but it is still an evaluation of what is fair ‘in abstraction from the economic basis of society’.⁶¹ The insight that comes from Marx’s trenchant critique of the ‘vulgar socialists’ in his 1875 notes on the

⁵³See Keane, *supra* note 50. On the comparable contradiction faced by the reliance of socio-economic rights on the capitalist economy see M. E. Salomon, ‘Sustaining Neoliberal Capital through Socio-Economic Rights’, *Critical Legal Thinking*, October 2017, available at www.criticallegalthinking.com/2017/10/18/sustaining-neoliberal-capital-socio-economic-rights/. For an elaboration, J. Linarelli, M. E. Salomon and M. Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (2018), Ch. 7.

⁵⁴Although ‘... [T]he fiercest advocates of *laissez-faire* capitalism and economic individualism show marked differences between their *general* ideological outlook and their willingness to have *special* transfers, subsidies, and social security schemes abandoned from which they *personally* derive benefits.’ See Offe, *supra* note 50, at 152 (emphasis in original).

⁵⁵C. Offe, ‘Advanced Capitalism and the Welfare State’, in *Politics and Society* (1972), 479. ‘[T]he services of the welfare state are not major social accomplishments, as some commentators would have it, but, rather, are meager compensations for the price of industrial development.’ *Ibid.*, at 483; see also Offe, *supra* note 50, at 49.

⁵⁶See Offe, *supra* note 55, at 480–1.

⁵⁷See Garland, *supra* note 8, at fn. 26.

⁵⁸K. Marx, ‘Critique of the Gotha Programme’ [1891], in *Marx-Engels Collected Works*, vol. 24 (2010), 75, at 84.

⁵⁹On the socialist ideal and a just legal order see C. Sypnowich, *The Concept of Socialist Law* (1990); C. Sypnowich, ‘Law and the Socialist Ideal’, in P. O’Connell and U. Özsü (eds.), *Research Handbook on Law and Marxism* (2021), 511. See also Z. Manfredi, ‘Against “Ideological Neutrality”: On the Limits of Liberal and Neoliberal Economic and Social Human Rights’, (2020) 8 *London Review of International Law* 287.

⁶⁰... [I]t was in general a mistake [of the German Workers Party] to make a fuss about so-called *distribution* and put the principal stress on it. Any distribution whatever of the means of consumption is only a consequence of the distribution of the conditions of production themselves. The latter distribution, however, is a feature of the mode of production itself.’ See Marx, *supra* note 58, at 87.

⁶¹C. Arthur, ‘Editor’s Introduction’, in E. B. Pashukanis, *Law and Marxism: A General Theory* (tr B. Einhorn, 1978), 9 at 19 (on historical materialism). As visited below on alternatives, it is worth pointing out here that, according to Piketty’s ‘seemingly radical’ proposal, a just property regime would not do away with private property but instead – if premised on authentic power sharing and voting rights within firms (‘true social ownership’) and a strongly progressive tax on property, the proceeds of which would finance capital grants to every young adult thereby instituting a system of provisional ownership and permanent circulation of wealth – it would, Piketty argues, ‘achieve a system of ownership that has little in common with today’s private capitalism; indeed, it amounts to a genuine transcendence of capitalism’. See Piketty, *supra* note 11, at 989.

Programme of the German Workers' Party is for concentrating on the distribution of income (the means of consumption) instead of the way the consumable income was produced under capitalism.⁶² In his scathing critique of 'state aid' in particular, Marx sarcastically hails the solution to the social question whereby 'one can then build a new society as well as a new railway!'.⁶³ To extrapolate from Marx: we need to be alive to the ways in which socio-economic rights are abetting market capitalism and foreclosing the terms of transformation.

To favour the welfare state is generally to approve of the social control of economic processes but it does not imply being *against* capitalism,⁶⁴ and far from moving in the direction of abolishing capitalism it makes it socially sustainable and politically palatable.⁶⁵ Effectively, 'the state protects the capital relation from the social conditions it produces without being able to alter the status of this relationship as the dominant relationship'.⁶⁶ International human rights law in this area reflects an analogous dilemma and an argument presented here is that it will continue to do so until it emancipates people from capitalist property relations. In Section 3, property rights in the context of housing and evictions cases in Europe then indigenous lands and territories cases from Latin America and Africa are evaluated for their transformative potential. Section 4 then revisits the oppositional ideas behind the drafting of property rights as human rights in international instruments, building on those debates to extend the social function of property rights not under capitalism but independently of it.

3. Recovering property

3.1 CESCR's structural turn

During the height of the debt and austerity crisis in Spain, following on from the 2008 global financial crisis, Maribel Viviana López Albán – a Spanish national born in Ecuador – brought a case against Spain under the International Covenant on Economic, Social and Cultural Rights, also on behalf of five of her six children who were minors. López Albán's income was very limited and the author claimed that the eviction of her and her children, for failure to keep up with the rent, constituted a violation of Article 11 of the Covenant in view of the fact that she had no adequate alternative housing. In 2015, 50 percent of children with foreign parents were at risk of poverty in Spain.⁶⁷ The Committee considered whether there had been a violation of the right to adequate housing under Article 11(1) of the Covenant including protection against forced evictions and the duty of the state party to provide alternative housing to persons in need. López Albán and her children had continued living in the apartment, without the consent of the legal owner, once she had ceased paying rent owing to her low income. Notably, the property was owned by a bank.

The Committee found in favour of López Albán in that the eviction of the author and her children without an assessment of proportionality by the authorities constituted a violation of their right to adequate housing:

⁶²See Marx, *ibid.*, at 88.

⁶³*Ibid.*, at 93.

⁶⁴See Garland, *supra* note 8, at 255–6.

⁶⁵Of course, some see this as a good thing, indeed the whole point.

⁶⁶See Offe, *supra* note 50, at 49.

⁶⁷Foreclosures and unmet demand for social housing were inordinately high in Spain at the time. See Centre for Economic and Social Rights, *Spain*, Factsheet No. 17, 2018, available at www.cesr.org/sites/default/files/FACTSHEET-Spain%28EN%29-June2018-FINAL.pdf.

As Issar is at pains to point out, racial capitalism's historical analysis of the structural relations between neoliberalism and particular communities help explain why 'particular racialized populations disproportionately bear the brunt of capital flight, deindustrialization, predatory finance capital, state retrenchment of social welfare, and other neoliberal policies'. See Issar, *supra* note 1, at 51.

the Committee notes that Madrid Criminal Court No. 28 did not conduct an analysis of the proportionality of the legitimate objective of the eviction to its consequences for the persons evicted. Specifically, the court did not weigh the benefits of the measure – in this case protecting the right to property of the bank that owns the apartment – against its possible consequences for the rights of the evicted persons.⁶⁸

But then the Committee did something striking: it went on to add another dimension to the proportionality analysis under Article 4 of the Covenant on the criteria for limiting rights – it considered the *relative* needs of the owner – a bank – to recover the property. The Committee provided the following:

Analysing the proportionality of an eviction entails examining not only the consequences of the measures for the evicted persons but also the owner's need to recover possession of the property. This inevitably involves making a distinction between properties belonging to individuals who need them as a home or to provide vital income and properties belonging to financial institutions, as in the current case.⁶⁹

In *Rosario Gómez-Limón Pardo v. Spain*, decided a few months later and dealing with the forcible eviction of a tenant by the owner – a natural person in this case – the Committee drew on *López Albán* to restate the distinction that should be drawn in a proportionality analysis between natural and legal persons as owners.⁷⁰ The nod here is in the direction of transformative alternatives, to models of just ownership that dismiss, as Piketty put it, 'the quasi-religious defence of property rights as the *sine qua non* of social and political stability'.⁷¹

The case law emerging from the Committee strikes at structural problems in other ways. In *López Albán* the Committee highlighted the precarity of those who live in poverty and who occupy property without legal title and various requirements by officials when determining policy or deciding cases regarding their access to alternative housing. Notably, the Committee also remarked on the structural issues that had given rise to a lack of affordable housing, a problem 'rooted in growing inequality and housing market speculation'. Then foregrounding obligations of international assistance and co-operation under the Covenant, the Committee referred to the obligation of states parties generally 'to resolve these structural problems through appropriate, timely and coordinated responses, to the maximum of their available resources'.⁷²

In the *López Albán* case the Committee found a violation of Article 11 also on the grounds that excluding the author from the social housing programme, without taking into account her situation of necessity, perpetuated her irregular situation and led to her eviction. *López Albán* was unable to be placed on a waiting list for social housing because of a regulation that precluded applicants from registering who were occupying a property without legal title. Paradoxically, as

⁶⁸*Maribel Viviana López Albán v. Spain*, UN Committee on Economic, Social and Cultural Rights Communication No 37/2018, Views of 11 Oct. 2019, para. 11.5. Of note is that the bank had in fact been bailed out in 2012 during the financial crisis and was now 60% owned by the state (the author thus argued that her case should not be treated in the same way as a case in which the property is owned by a private individual). She also explained that ultimately the bank sold the home to an investment firm specializing in the acquisition of real estate made available through seizures and evictions, resulting in the author's eviction on 25 June 2018. *Ibid.*, para. 5.4.

⁶⁹*Ibid.*, para. 11.5.

⁷⁰*Rosario Gómez-Limón Pardo v. Spain*, UN Committee on Economic, Social and Cultural Rights Communication No 52/2018, Views of 5 Mar. 2020, para. 9.5.

⁷¹See Piketty, *supra* note 11, at 28. In his recent work *Capital and Ideology*, Piketty makes the case for social and temporary ownership as an element in transcending the current system of private ownership, revisited below. *Ibid.*, Ch. 17. See also Capra and Mattei, *supra* note 16, at 140 on their 'ecological legal order'. On the practical use of private property rights for functioning commons, see also D. Bollier, *Think Like a Commoner* (2014), 102.

⁷²See *López Albán*, *supra* note 68, para. 10.2. See also *Mohamed Ben Djazia and Naouel Bellili v. Spain*, UN Committee on Economic, Social and Cultural Rights Communication No 5/2015, Views of 20 June 2017, para. 15.3.

the Committee notes, prior to the eviction the author could not have applied for housing before the public housing bodies of the Community of Madrid.⁷³ But the key point here for our purposes of assessing the structural considerations expressed in the case law emerging from CESCR is that, as per the Committee: ‘The State party has also failed to justify the absence of other measures to reduce illegal occupations that would have a lesser impact on individuals, such as reducing the number of uninhabited homes.’⁷⁴ This was at a time when 3.5 million empty new apartments were built in Spain because of German and French speculation and 1.5 million signatures were collected resulting in the introduction in the Spanish Parliament of a bill based on the concept of ‘social rent’ whereby tenants pay for a foreclosed and empty housing unit in proportion to what they can afford.⁷⁵

In another Article 11 case filed in the wake of the financial crisis and addressing the eviction of Mohamed Ben Djazia, Naouel Bellili, and their children, an Algerian-Spanish family of low income, the Committee’s finding of a violation was informed by the fact that:

the State party has not explained to the Committee why the regional authorities in Madrid, such as the Madrid Housing Institute, sold part of the public housing stock to investment companies, thereby reducing the availability of public housing, despite the fact that the number of public housing units available annually in Madrid was significantly fewer than the demand, nor has it explained how this measure was duly justified and was the most suitable for ensuring the full realization of the rights recognized in the Covenant. For instance, in 2013, the Madrid Housing Institute sold 2,935 houses and other properties to a private company for €201 million, justifying the measure by a need to balance the budget.⁷⁶

In its case law the Committee regularly draws on its earlier General Comment on the right to housing to reaffirm that: ‘The right to housing should be ensured to all persons irrespective of income or access to economic resources.’⁷⁷ In addition to its recommendations in respect of the victims in *Djazia and Bellili*, and subsequently in *López Albán*, that an effective remedy required the state to ensure adequate housing for them and their children, the Committee issued general recommendations in which it affirmed that reparations in the context of individual communications may include guarantees of non-repetition and ‘recalls that the State party has an obligation to prevent similar violations in the future’.⁷⁸ With a little imagination that which prevention requires could be metamorphic, dismantling the current system of ownership and actually giving effect to a right to housing.

By placing the eviction of a poor, immigrant family in order to protect the property of a bank in structural context in the merits as well as regarding reparations, the Committee does not allow the focus in *López Albán* to be limited to the harms suffered by the victims as if those harms were a result of mere misfortune or negligence instead of injuries embedded in financial globalization, racial capitalism, and the nature of social relations under a regime of private property and welfare policy – welfare policy and rights, moreover, that deteriorate in the form of austerity as the state

⁷³See *López Albán*, *ibid.*, paras. 12.1–12.2. The Committee found that ‘the refusal of the author’s application for public housing without taking into account her situation of necessity and solely on the basis that she was occupying a property without legal title in itself amounts to a violation of her right to adequate housing’. *Ibid.*, para. 14.

⁷⁴*Ibid.*, para. 12.1.

⁷⁵See Capra and Mattei, *supra* note 16, at 141–2.

⁷⁶See *Djazia v. Spain*, *supra* note 72, para. 17.5. ‘In times of severe economic and financial crisis, all budgetary changes or adjustments affecting policies must be temporary, necessary, proportional and non-discriminatory. In this case, the State party has not convincingly explained why it was necessary to adopt the retrogressive measure described in the preceding paragraph, which resulted in a reduction of the amount of social housing precisely at a time when demand for it was greater owing to the economic crisis.’ *Ibid.*, para. 17.6.

⁷⁷*Ibid.*, para. 13.1; see *López Albán*, *supra* note 68, para. 8.1.

⁷⁸See *López Albán*, *supra* note 68, para. 17; *Djazia v. Spain*, *supra* note 72, para. 21.

plays off public spending against private spending in financial capitalism's drive for super profits.⁷⁹ On this structural approach, the failures of the state party when it came to its treatment of the victims is only one part of the story. The deeper matter the Committee reveals with its strategy is that the economic and social gains achieved through the author's legal victory – which at one level reasserts basic aspects of the capitalist-saving-welfare state – is not also accompanied by the gradual dissipation of the claim for fundamental alterations in the nature of social relations.⁸⁰ The opposite is the case: the Committee situates the victims within the material context that enabled the violations and then presses for structural change as part of its judicial strategy. Moving away from a prominent critique that has highlighted the tendency of rights engagement to obscure material context and instead present harms as random, accidental or arbitrary,⁸¹ CESCR's human rights findings in favour of one poor woman and her children also serve to call into question the corrosive effects of capitalism and a society of exploitation and deprivation.

The doctrine alleging the Covenant's economic 'neutrality'⁸² has given rise to concerns that it enables and perpetuates the capitalist status quo, as much as the neoliberal version thereof.⁸³ With its move towards a structural account of violations, the Committee embraces the 'neutral' position it has always alleged, precisely by shifting away from tacitly endorsing the proprietarian logic, capitalist exploitation, and compensatory mindset of welfarism. While in these cases the liberal private (corporate) property rights regime remains inscribed, the Committee testifies to life beyond it.

3.2 Private property and land revisited

How can human rights be reimagined and deployed to transform the human condition? The answer is nothing short of having them alter the underlying structure of the economy and that would require a jurisprudence that is willing to expose and renounce the terms of chronic human alienation under international human rights law. We are interested here in a human rights jurisprudence that turns its back on a model that fails entirely to action the solitary and social dimensions that make up human beings,⁸⁴ that confronts capitalist exploitation-cum-racial domination, and that rids us of a model that creates only a few winners and always at the cost of others.

The consideration provided below of international human rights decisions on culture, land and the right to property is instructive in several ways: in these cases, the right to property is interpreted as a right to common use and ownership of indigenous lands, territories and resources unsettling prevailing models of ownership and the (neo)liberal commitment to private property in land for its exchange value. Favoured instead is an acceptance of property and land for its use value for those whom way of life is tied to the land. Property is recast – not as something to own exclusively, exploit and from which to profit – but as something to share, appreciate, and protect,

⁷⁹Christodoulidis and Goldoni make the further point that states must demonstrate austerity in order to please the markets and their ruling institutions. E. Christodoulidis and M. Goldoni, 'The Political Economy of European Social Rights', in S. Civitarese Matteucci and S. Halliday (eds.), *Social Rights in Europe in an Age of Austerity* (2018), 237.

⁸⁰See P. Gabel and P. Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law', (1982–83) 11 *NYU Review of Law and Social Change* 369, at 375 fn. 12, drawing on the legal advocacy of critical legal studies lawyers.

⁸¹S. Marks, 'False Contingency', (2009) 62 *Current Legal Problems* 1; S. Marks, 'Human Rights and Root Causes', (2011) 74 *Modern Law Review* 57. See comparably the rich literature on poverty lawyering, such as: G. L. Blasi, 'What's a Theory For: Notes on Reconstructing Poverty Law Scholarship', (1994) 48 *University of Miami Law Review* 1063.

⁸²CESCR, General Comment No. 3, The Nature of States Parties' Obligations (Art 2(1)), UN Doc. E/1991/23 (1990), Ann. III, para. 8.

⁸³See Linarelli, Salomon and Sornarajah, *supra* note 53, at 258–9; and see Manfredi, *supra* note 59.

⁸⁴From Einstein's poetic description: 'Man is, at one and the same time, a solitary being and a social being. As a solitary being, he attempts to protect his own existence and that of those who are closest to him, to satisfy his personal desires, and to develop his innate abilities. As a social being, he seeks to gain the recognition and affection of his fellow human beings, to share in their pleasures, to comfort them in their sorrows, and to improve their conditions of life . . .'. See Einstein, *supra* note 15.

less a right, more a common duty. Further, and counterposed to private property, these indigenous land rights cases reconstitute the legal construct of property for personal and community development, social progress, and the sanctity of the environment. In so far as collective indigenous ownership is still excludable (indeed the point is to stop encroachment usually by powerful commercial enterprise on indigenous lands and territories), it does so based on mutual interests, new social relations, and outside the logic of appropriation. The questionable degree to which real material effects of these decisions have served to constrain, no less overturn, capitalist relations of production in situ, as much as anything else, reflects the difficulties in dislodging private property.

It was the Inter-American Court of Human Rights that in 2001 inaugurated an important interpretation of Article 21 of the American Convention of Human Rights on the ‘right of everyone to use and enjoy his property’ as a right not limited to private property in a capitalist society and as such capable of constituting communal indigenous rights to land.⁸⁵ The Court relied on an evolutionary interpretation of international human rights law that militates against a restrictive interpretation.⁸⁶ In a 2017 case against Kenya on the land rights of the Ogiek indigenous people, the African Court on Human and Peoples’ Rights observed that while the right to property in the African Charter on Human and Peoples’ Rights enshrines a right ‘recognized for individuals’, the right to property in the Charter should also apply ‘to groups and communities’.⁸⁷ The African Court then drew on the UN Declaration on the Rights of Indigenous Peoples in holding that, under Article 14 on the right to property of the African Charter read in light of their traditional forms of ownership, occupation and use, the Ogiek ‘have the right to occupy their ancestral lands, as well as use and enjoy the said lands’.⁸⁸

In an earlier indigenous land rights complaint against Kenya brought by the Endorois community before the African Commission on Human and Peoples’ Rights, the African Commission indicated that:

the first step in the protection of traditional African communities is the acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute “property” under the Charter and that special measures may have to be taken to secure such “property rights”.⁸⁹

⁸⁵Starting with the 2001 landmark *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR, Judgment of 31 August 2001 (Merits, Reparations, Costs). For IACtHR decisions protecting, *inter alia*, the communal land rights of tribal peoples under Art. 21 in the American Convention on Human Rights, see also *Moiwana Community v. Suriname*, IACtHR, Judgment of 15 June 2005. In *Yakye Axa Indigenous Community v. Paraguay*, IACtHR, Judgment of 17 June 2005 (Merits, Reparations, Costs) the Court draws on ILO Convention 169 Indigenous and Tribal Peoples Convention (which had been ratified by Paraguay), in recognizing that the right to property under the American Convention protects not only the close ties of the indigenous communities to their territories, but also the natural resources these territories contain that are connected to their culture, as well as the intangible elements derived from them. *Ibid.*, paras. 135–137 (while Paraguay recognizes the right of the indigenous peoples to communal property, in the instant case, the Court set out ‘to establish whether it has made said right effective in reality and actual practice’ (*ibid.*, para. 141) including through its interpretation of Article 21 of the American Convention). Among other cases see *Sawhoyamaya Indigenous Community v. Paraguay*, IACtHR, Judgment of 29 March 2006; *Saramaka People v. Suriname*, IACtHR, Judgment of 28 November 2007; and more recently *The Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, Judgment of 6 February 2020.

⁸⁶See *Awes Tingni*, *ibid.*, paras. 147–148.

⁸⁷*African Commission on Human and Peoples’ Rights v. Kenya*, ACtHPR, Appl No 006/2012, Judgment of 26 May 2017, para. 123 (*Ogiek* case).

⁸⁸*Ibid.*, para. 128. (Absent evidence by the Respondent state the Court took the view that the continued denial of access to and eviction from the Mau Forest of the Ogiek population cannot be necessary or proportionate to achieve the purported justification of preserving the forest’s natural ecosystem.) *Ibid.*, paras. 129–130.

⁸⁹*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, ACmHPR, Appl No 276/2003, Decision on Communication of 25 November 2009, para. 187 (*Endorois* case).

Following a sweeping review of international human rights jurisprudence, the African Commission found a violation of the right to property in that the state ‘has a duty to recognise the right to property of members of the Endorois community, within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such a right . . .’ including through granting rights of community ownership.⁹⁰ It is not unusual, moreover, to have reparations include a requirement that the respondent state grant title to the community *qua* a community.⁹¹

In the *Ogiek* case above, which was the first indigenous rights case before the African Court, a refashioned interpretation was offered also of the right of peoples to their wealth and natural resources, read as the right of indigenous peoples to their traditional food sources. On the basis of already having recognized a number of rights to their ancestral lands and their violation by Kenya under Article 14, notably, ‘the right to use (*usus*) and the right to enjoy the produce of the land (*fructus*), which presuppose the right of access to and occupation of the land’,⁹² the African Court found a violation of the right of indigenous peoples ‘to freely dispose of their wealth and resources’ given that the community was deprived by the state, through the pursuit of economic exploitation and displacement, of the right to enjoy and dispose of the ‘abundance of food produced on their ancestral lands’.⁹³

It is of course the case – as the Inter-American Court pointed out in *Saramaka People v. Suriname* – that these decisions have been based on the special relationship that members of indigenous or tribal peoples have with their territory, and on the need to protect their right to that territory in order to safeguard the peoples’ physical and cultural survival.⁹⁴ In focusing on the need to protect indigenous territory for the *purpose* of protecting indigenous culture, the Court signals an interpretation of Article 21 on the right to property that defends the collective *use* value of indigenous land, and not, or not essentially, its value as an economic asset. Here, *preserving culture* becomes an interpretative route through which the right to property in the Convention is detached from a right to a good for the purpose of its exchange value in a market setting. As Mattei, Albanese and Fisher highlight in their study on reinterpreting Article 1, Protocol 1 of the European Convention on Human Rights, the European Court of Human Rights, steeped in a tradition of individual rights protection, has long recognized that in certain circumstances unregistered family property, common lands, and the economic revenue derived from them may qualify as ‘possessions’ for the purposes of Protocol 1, Article 1, on the protection of property.⁹⁵ Yet, in so far as ‘possession’ is synonymous with economic asset value, that is, with its exchange value, there is still scope, the authors argue, to explore the full potential of an autonomous reading of the word ‘possessions’ in Article 1, Protocol 1 that recognizes the legal protection of the commons: possession beyond exclusivity and aligned with social obligations and environmental imperatives.⁹⁶ In the drafting of the ECHR it was precisely the distinction between the socialist notion of ‘personal property’ – as distinguished from ‘private property’ – that resulted in the compromise language of ‘possessions’ in the right to property provision.⁹⁷ ‘The true right to own individual property, conceived of as a fundamental human right’, remarked the French

⁹⁰*Ibid.*, para. 196.

⁹¹See, e.g., *Awas Tingni*, *supra* note 85, para. 173(4); see *Saramaka*, *supra* note 85, para. 214(5).

⁹²See *Ogiek* case, *supra* note 87, para. 201.

⁹³*Ibid.*

⁹⁴See *Saramaka*, *supra* note 85, para. 90.

⁹⁵U. Mattei, R. A. Albanese and R. J. Fisher, ‘Commons as *Possessions*: The Path to Protection of the Commons in the ECHR System’, (2018) 25 *European Law Journal* 230; *Dogan and Others v. Turkey*, ECtHR, Appl nos 8803-8811/02, 8813/02 and 8815-8819/02, Judgment of 18 November 2004, paras. 138–139.

⁹⁶See Mattei, Albanese and Fisher, *ibid.*, at 245. For an astute definition of the commons see M. Davies, ‘Persons, Property, and Community’, (2012) 2 *feminists@law* 2.

⁹⁷W. A. Schabas, ‘The Omission of the Right to Property in the International Covenants’, (1991) 4 *Hague Yearbook of International Law* 135.

representative, André Philip during the drafting of the ECHR, ‘... is the right for each of us to own as property for the owner’s personal use – truly the projection of his person – those belongings which are tied to his being’.⁹⁸

In redefining property rights there is a broader signalling that comes from these indigenous cases. The indigenous lands rights cases are also about ownership of the means of production but not for the purpose of generating surplus value through the work of hired labour. Hence, the indigenous economy resists and remains outside the logic of capitalism (and capital accumulation) while accentuating ownership of the means of production. Second, the promotion of their economic arrangements spotlights an alternative to capitalism and capitalist development and takes seriously cultural value systems that define sustainable models of development, also elevating the culturally informed alternative economies of similarly situated communities.⁹⁹ From there, the collective property interests of other disenfranchised groups seem tenable. Consider, for example, Blomley’s work on extending traditional conceptions of the commons to apply to the collective property interests of the poor.¹⁰⁰ Lastly, once the notion of collective property rights is read into international human rights instruments, and conventional models of ownership are reconfigured, varied commons conceptions and arrangements are given a strategic foothold, whether in the global north, global south, rural or urban settings.

4. Extending property’s social function

The tension between liberal and social visions of the right to property were reflected in heated drafting debates around the idea of a human right to property in international law. Commitment to the social functions of the right to property was understood not only as the taking of private property (i.e., expropriation) in the public interest and other qualifications to acquired rights given a public interest.¹⁰¹ It was also conceived of as a right directed at social progress and the development of the individual in society. For example, Chile’s proposal during the drafting of the Universal Declaration of Human Rights – drawing on the initial draft of the American Declaration of the Rights and Duties of Man that was being prepared in the same period – was that the right to property meant the state had a duty to ensure for everyone a minimum level of property necessary for decent living. The 1948 American Declaration of the Rights and Duties of Man is unique among human rights instruments in providing that ‘Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.’ The final language found in UDHR Article 17(1) provides that ‘Everyone has the right to own property alone as well as in association with others.’ Dropped was any reference to ‘private’ property – a reflection of the will of states that had abolished private property and of various European states with nationalization agendas.¹⁰²

⁹⁸Council of Europe, *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights* (1975), vol. 2, at 72.

⁹⁹See M. E. Salomon, ‘Culture as an Alternative to “Sustainable Development”’, *Third World Approaches to International Law Review*, *TWAILR: Reflections* 44/2022, available at www.twailr.com/culture-as-an-alternative-to-sustainable-development/.

¹⁰⁰N. Blomley, ‘Enclosure, Common Rights and the Property of the Poor’, (2008) 3 *Social and Legal Studies* 311.

¹⁰¹For an overview of the social function in legal and judicial practice today see L. Cotula ‘The Shifting Contours of Property: “Social Function” in the Neoliberal Era’, *Transformative Private Law Blog*, 8 December 2021, available at www.transformativprivatelaw.com/the-shifting-contours-of-property-social-function-in-the-neoliberal-era/. Further, on the problematic deployment of the social function, here regarding the alleged protection of the rural landscape balanced against the protection of the traditional rights of Travellers under Art. 8 of the ECHR (living in caravans and on their own land), see, among subsequent Traveller rights cases against the UK, *Buckley v. the United Kingdom* and dissents, ECtHR judgment, Appl. 20348/92 (1996).

¹⁰²For a review of drafting positions, including that of the USSR criticizing the vagueness of terms such as ‘decent living’ and the US arguing that the protection of merely minimum property – as meets the needs of *decent living* – was too narrow see C. Krause and G. Alfredsson, ‘Article 17’, in G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights* (1999), 359, at 363.

That everyone should, as a matter of right, own property has profound redistributive implications and can be transformative in its egalitarianism. The formulation in the American Declaration offers a conception of the social function of property rights that imbues property with a value delinked from its dominant articulation of the acquired rights of existing *owners* and is instead dedicated to the rights of (existing) *people*.¹⁰³ This formulation militates against the idea that we should take as much as we can, based instead on the premise that everyone gets what she needs. That said, the language in the American Declaration is potentially less radical than it first appears. While it does away with private property rights aimed at not depriving owners of their property and thus the critique of entrenching existing distributions, it still enshrines private property, affirming the idea of private ownership and potentially endorsing property as a legal foundation of economic ordering.¹⁰⁴ The formulation also seeks to guarantee a floor but not a ceiling. This approach can be criticized for elevating the poor while leaving the wealth of the rich intact, neglecting the fact that extreme wealth and mass impoverishment are part of the same dynamic.¹⁰⁵ The language found in subsequent human right treaties – the European Convention, American Convention, and African Charter – provided merely for the (generally) qualified protection of existing (private) property or possessions, that is, the protection of existing entitlements and the institution of (private) property.¹⁰⁶ Allen points to the logic embedded in these final articulations: ‘that property regulation is an interference with individual entitlement; the entitlement exists prior to any human rights law, rather than being constituted by State response to basic needs’.¹⁰⁷ Although due process with regards to expropriation is also a tool to reflect the social aspects of the right to property, as delegations with nationalization agendas pointed out during the drafting,¹⁰⁸ this right to protection of property takes for granted the matter of acquisition of property and provides for a right of property-holders against the government that their holdings be respected. The protection of possessions provision in protocol 1 of the European Convention, moreover, includes legal persons among the right-holders, that is corporations.¹⁰⁹

The first line of Article 14 of the African Charter on Human and Peoples’ Rights states merely that ‘the right to property shall be guaranteed’. A previous draft submitted at a preparatory

¹⁰³The devil is in the detail, however, as to its fit with alternative models of ownership based on collectively owned and governed resources and, for example, commoning practices and commons institutions. Piketty’s ‘participatory socialism’ insists that ‘The notion of permanent private ownership will need to be replaced by temporary private ownership, which will require steeply progressive taxes on large concentrations of property. The proceeds of the wealth tax will then be parcelled out to every citizen in the form of a universal capital endowment, thus ensuring permanent circulation of property and wealth.’ See Piketty, *supra* note 11, at 967.

¹⁰⁴As introduced herein, there are ways of offsetting these implications: see, for example, Capra and Mattei’s model that has the sovereign community hold full power to revoke private property that does not serve ‘a living purpose’. Capra and Mattei, *supra* note 16, at 140.

¹⁰⁵The late Peter Townsend captured it thus: ‘[t]o comprehend and explain poverty is also to comprehend and explain riches’. P. Townsend, *Poverty in the United Kingdom* (1979), 337. Sam Moyn’s critique of socio-economic rights’ focus on minimums drives the point home when he highlights how even perfectly realized rights can still be compatible with extreme inequality. See Moyn, *supra* note 39.

¹⁰⁶With some nuance, such as the compensation reference in the property provision in the Inter-American Convention on Human Rights referring to ‘just’ not ‘full’ compensation and with no reference to the right belonging also to legal persons in either the American or African provisions as per Art. 1, Protocol 1 of the ECHR.

¹⁰⁷T. Allen, ‘Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights’, (2010) 59 *International & Comparative Law Quarterly* 1055, at 1064–5.

¹⁰⁸As per France during the drafting of the Covenants which at the time had the nationalization of key industries (with compensation) written into the law. See Way, *supra* note 49, at 134. The UK Labour government, among other delegates during the drafting of the European Convention, did not want a right of property ownership reflected at all, since they were anxious to preserve national autonomy in the sphere of economic policy. D. Nicol, *The Constitutional Protection of Capitalism* (2010), 131, 134.

¹⁰⁹On the ‘right to profit’ see S. Houry and D. Whyte, ‘How Human Rights Law has been used to Guarantee Corporations a “Right to Profit”’, *The Conversation*, 17 March 2017, available at www.theconversation.com/how-human-rights-law-has-been-used-to-guarantee-corporations-a-right-to-profit-74593.

meeting in Dakar in 1979 stipulated that ‘Where the right to property is guaranteed by State legislation, it may only be encroached upon in the interest of public need or in the general interest of the community.’¹¹⁰ An initial draft of the American Convention on Human Rights had the phrase ‘[e]veryone has the right to the use and enjoyment of *private property*, but the law may subordinate its use and enjoyment to public interest’. This language was replaced by ‘[e]veryone has the right to the use and enjoyment of his *property*. The law may subordinate such use and enjoyment to the social interest’. An explicit reference to private property was dropped and replaced with ‘use and enjoyment of property’.¹¹¹ That said, while the epigraph in the English-language text to Article 21 of the American Convention reads ‘Right to Property’, the Spanish, Portuguese and French-language versions read ‘Right to Private Property’,¹¹² betraying assumptions. If there is not much that inspires radical thinking in these provisions, property law scholars remind us that contingency not durability is the defining characteristic of this complex area of law.¹¹³ As we saw above in the indigenous case law, the protection of existing property is still anti-social in so far as it gives primacy to the idea of property rights, even if its objective is often to secure untitled indigenous lands. But at the same time, it shifts the conventional private property regime towards supporting people previously without (titled) ‘property’ and, significantly, it demonstrates how the liberal formulation of property rights can serve multiple functions, such as enabling the recognition of communal land and bringing the value of community, responsibility, and environment into conversation with the language of the human right to property.

As for the drafting of the UN Covenants, the International Covenant on Civil and Political Rights never included a right to property,¹¹⁴ whereas debates during the drafting of the ESC rights Covenant saw differing views on a range of issues, including whether property was a fundamental human right, whether and how it might be included among the socio-economic rights, the function of such a right, and the standard of compensation. A slim majority of states on the UN Commission on Human Rights voted against it followed by an overwhelming majority voting to drop it indefinitely from further consideration.¹¹⁵

Responding to the state parties argument as to the right to property of the flat owner in its eviction and housing rights case law,¹¹⁶ considered above in Section 3, CESCR drew an important distinction between properties belonging to individuals who need them as a home or to provide vital income and properties belonging to financial institutions.¹¹⁷ Krause and Alfredsson were right to point out the bitter irony, that ‘from the point of view of human rights, it may be difficult, as least morally, to justify a right to property which protects only existing property rights if significant parts of the population do not possess anything at all’.¹¹⁸ This is a model that defends, as Waldron signals, ‘... a society in which some people have lots of property and many have next to none’.¹¹⁹ Stringent critiques of the European Court of Human Rights for interpreting the right to property article in the image of neoliberalism, which, as one commentator provides ‘bears little resemblance to the modest protection of

¹¹⁰See Krause and Alfredsson, *supra* note 102, at 371.

¹¹¹See *Awas Tingni*, *supra* note 85, para. 145.

¹¹²*Ibid.*, at fn 55.

¹¹³See Davies, *supra* note 96; see also K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (2019), 28.

¹¹⁴Although Schabas recounts that the right to take life in defence of property was submitted during drafting as a potential limitation to the ICCPR provision on the right to life but was rejected. See Schabas, *supra* note 97, at 157.

¹¹⁵See Way, *supra* note 49, at 36.

¹¹⁶The Committee notes that the right to private property is not a Covenant right, but recognizes that the State party has a legitimate interest in ensuring protection for all rights established in its legal system so long as this does not conflict with the rights contained in the Covenant.’ See *López Albán*, *supra* note 68, para. 11.5.

¹¹⁷*Ibid.*, para. 11.5; *Pardo v. Spain*, *supra* note 70, para. 9.5.

¹¹⁸See Krause and Alfredsson, *supra* note 102, at 378.

¹¹⁹Waldron continues: ‘The slogan that property is a human right can be deployed only disingenuously to legitimize the massive inequality that we find in modern capitalist countries.’ J. Waldron, *The Right to Private Property* (1990), 5.

property rights originally intended',¹²⁰ as much as the Inter-American and African property right cases instituting collective land rights of indigenous and tribal peoples, foregrounds the simple but significant point for our purposes: that there is scope for a radical reinterpretation of human rights. It is in the current moment of great moral reckoning that any reinterpretation points towards structural justice.

The radical legal positivism described in Section 3 is still circumscribed by the boundaries of legal positivism – the written text, the views of the judge or Committee member, the politics of (staunchly liberal) states and their influence in international relations, as well as the grip of the economic mainstream, influenced by powerful corporate entities that claim the human right to property and benefit from an economic and political order that is only now beginning to see widescale challenge to private property as an organizing principle. In the making of treaties across international economic law regimes states take as a given corporate property rights over the means of production. Their public international financial institutions – who otherwise keep human rights at arm's length – favour the right to private property, as prominently reflected in their enforcement of contracts against poor debtor states.¹²¹ But this is not the only choice and is reflective of only one set of priorities.

There have been moments not so long ago when the international community of states has articulated a vision of social progress and development that:

require the participation of all members of society in productive and socially useful labour and the establishment, in conformity with human rights and fundamental freedoms and with the principles of justice and the social function of property, of forms of ownership of land and of the means of production which preclude any kind of exploitation of man, ensure equal rights to property for all and create conditions leading to genuine equality among people.¹²²

Recently, the right to an adequate standard of living entailing facilitated access to the means of production has found expression in the UN Peasant Declaration.¹²³ Economic regimes are not ends in themselves, the right to own property is not an inherent good, they are means of providing the most favourable conditions for the development and flourishing of the human being, compatible with the carrying capacity of the natural world. Empirically, capitalism today does not meet the test. Detaching human rights from capitalism is the rational result of that finding.

5. Conclusion: After 'welfare'

This article opened with a critique of human rights for underpropping capitalism and then mined them for their structurally transformative potential. The reader was invited to imagine how the root of capitalist possibility – private property – might be fundamentally rethought as a matter for international human rights law and directed towards the common good; Capra and Mattei's model premised on 'making communities sovereign' and Piketty's comprehensive arrangement termed 'participatory socialism' provide compelling starting points, and

¹²⁰See Nicol, *supra* note 108, at 151.

¹²¹On the choice of IFIs to embrace property rights over welfare rights see M. Koskenniemi, 'Prologue', in J. P. Bohoslavsky and F. Cantamutto (guest eds.), 'The IMF and Human Rights: Interviews', (Spring 2021) *SPEAK OUT at the Laboratory for Advanced Research on the Global Economy, LSE Human Rights, LSE*, available at www.lse.ac.uk/sociology/assets/documents/human-rights/IMF-HRs-LSE-final.pdf; on the precondition for loans and investment that states in the south will recognize the right to property of private investors over the means of production see Krause and Alfredsson, *supra* note 102, at 361.

¹²²UN Declaration on Social Progress and Development, GA Res. 2542 (XXIV) (11 Dec 1969), Art. 6.

¹²³UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, GA Res. A/RES/73/165 (17 Dec 2018), Art. 16(1). On the perils and possibilities of the Peasant Declaration see M. E. Salomon, 'The Radical Ideation of Peasants, the "Pseudo-Radicalism" of International Human Rights Law, and the Revolutionary Lawyer', (2020) 8 *London Review of International Law* 425.

there are others.¹²⁴ Replacing private ownership with collective and commons institutions – as opposed to the myth of common advantage, long the dominant, unrealized exhortation – is vital if we are to do away with ‘welfare’, understood today only as welfare capitalism: a payoff and compensation for capitalism. Transformative ideas in circulation can be debated and refined but redress and mitigation of capitalism’s harms are not substitutes for systemic challenge: as has been foregrounded in the coverage above of the welfare state and socio-economic rights, amelioration can work against transformation. It is only by liberating human rights from the hold of capitalist logic in respect of property relations, as much as social life as a whole, that rights might yet transform the human condition.

¹²⁴See Capra and Mattei, *supra* note 16; Piketty, *supra* note 11, at 989.