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A Law-and-Community Approach to Compensation for Takings of Property under the European Convention on Human Rights

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Abstract: Studies of takings of property highlight the increasing penetration of state power into private life. Controversies regularly surround compensation provisions. Many academic analyses and decisions of the European Court of Human Rights have supported the proposition that market value offers the best approximation of just compensation. However, full market value compensation may not be guaranteed if the taking of property fulfils certain legitimate objectives of the 'public interest'. To unpack the complexity surrounding compensation provisions under the European Convention on Human Rights (ECHR), this article adopts and develops a 'law-and-community' approach – an important dimension, not previously investigated in the study of takings of property – which sees 'community' as networks of social relations, and views law as not only grounded in community but also existing to regulate communal networks. This article then identifies the limits of both Article 1, Protocol 1 of the ECHR and the current approaches to compensation in the light of this law-and-community approach. In so doing, the article makes a distinctive contribution by offering a new socio-legal interpretation of controversies surrounding compensation for takings of property beyond the

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private/public divide and by proposing an alternative framework of engaging law and regulation in wider social life.

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Introduction

The drafting of the European Convention on Human Rights ('ECHR') by the then newly formed Council of Europe in 1950 came about after a period of authoritarian rule in Europe, and marked a shift in the endeavour to constrain state power to protect human rights and fundamental freedoms.[1] At the same time, however, the Contracting States were reluctant to compromise political decisions on issues such as expropriation, in particular nationalisation, which is often carried out to pursue ambitious economic and social policies.[2] It is therefore not surprising that the Contracting States could not reach agreement on the inclusion of the protection of property rights as human rights in the Convention itself.[3] As a result, the ECHR affords some protection against expropriation, but it grants states a very wide 'margin of

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[1] C Golay and I Cismas 'Legal Opinion: The Right to Property from a Human Rights Perspective', SSRN Scholarly Paper (Rochester NY: Social Science Research Network, 2010), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635359&rec=1&srcabs=1304699&alg=1&pos=9 (accessed 9 June 2018) p 5.

[2] TRG van Banning The Human Right to Property (Antwerp: Intersentia, 2001) p 79.

[3] B Rainey, E Wicks, and C Ovey The European Convention on Human Rights (Oxford: Oxford University Press, 2014) p 492. For the difficulty of engaging property rights with human rights, see T Xu and J Allain 'Introduction: Property and Human Rights in a Global Context' in T Xu and J Allain (eds) Property and Human Rights in a Global Context (Oxford: Hart Publishing, 2015) p1.

appreciation'. The right to property was eventually included in Article 1, Protocol 1 ('A1P1'), adopted in 1952:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

This Article can be broken down into 'three distinct rules': a general right to property (the first sentence of the first paragraph); a set of principles concerning the deprivation of possessions (the second sentence of the first paragraph);[4] and a right of states to control the use of property (the second paragraph).[5] The second and third rules constitute limitations to the right to property to 'minimize the impact of [A1P1] on state power over property'.[6] These limitations speak to the Contracting States' emphasis on 'the social function of property', which allows for reasonable constraints on the use of private property in order to secure the public interest.[7]

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[4] See eg, Sporrong and Lönnroth v Sweden (1983) 5 EHRR 35, at [61]; James v United Kingdom (1986) 8 EHRR 123, at [37]; Lithgow v United Kingdom (1986) 8 EHRR 329, at [106].

[5] See eg, JA Pye (Oxford) Ltd v United Kingdom (2008) 46 EHRR 45, at [52].

[6] T Allen 'Compensation for Property under the European Convention on Human Rights' (2006-07) Mich J Int'l L 287 at 295.

[7] See eg, Art 14(2) of the Basic Law of the Federal Republic of Germany 1949 ('Property entails obligations. Its use shall also serve the public good'); Art 42(2) of the Italian Constitution 1948 ('Private ownership is recognized

In Sporrong and Lönnroth v Sweden, the European Court of Human Rights ('ECtHR') stated that it 'must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[8]

In correspondence with the three rules above, three important questions often arise in considering cases concerning takings of property. Is there a violation of A1P1? If so, does the taking constitute the 'deprivation of ownership' or simply 'state control over the use of property'? Is the applicant entitled to compensation and, if so, then what constitutes just compensation?

A1P1 itself does not specify compensation provisions. When A1P1 was drafted, the representatives of the Contracting States 'rejected every proposal that contained a reference to compensation'; they feared that the specification of compensation provisions would compromise the implementation of fundamental economic and social policies.[9] That said, A1P1 contains 'an implied right to compensation', as the 'fair balance' test set out in Sporrong and Lönnroth v Sweden entails that the state must provide compensation that is 'reasonably related to the value of the property'.[10] Many academic works in the discourses of human rights, and decisions of the European Court of Human Rights, have supported the proposition that market value offers the best approximation of just compensation.[11] However, market value

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and guaranteed by the law, which determines the manner of acquisition and enjoyment as well as its limits, in order to ensure its social function and to make it accessible to all').

[8] Sporrong and Lönnroth v Sweden, above n 4, at [69].

[9] Allen, above n 6, p 295.

[10] James v United Kingdom, above n 4, at [54]; Allen, above n6, p 288.

[11] Allen, above n 6, p 290.

compensation is not necessarily guaranteed if takings of property are for public purposes, and indeed, in the 'public interest'.

Further, the ECHR's approach to the protection of the right to property is essentially individualistic, affording only limited scope for the protection of communal rights, which are often understood to contrast with individual rights. Treating communal property rights as a fundamental human right is highly contentious.[12] The 'fair balance' test primarily concerns the conflict between individual and public interests. Takings which impact communal networks located within and beyond the boundaries of a single society or nation state have not provoked much discussion and analysis.

This article seeks to decipher the complexity of takings of property and relevant compensation provisions under the ECHR as they apply to property in general and communal property in particular. Drawing on Roger Cotterrell's law-and-community approach that sees 'community'[13] as networks of social relations, and views law as not only grounded in community but also existing to regulate social relations,[14] this article gives an innovative, socio-legal interpretation of controversies surrounding compensation for takings of property.

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[12] T Xu and W Gong 'Communal Property Rights in International Human Rights Instruments: Implications for De Facto Expropriation' in T Xu and J Allain (eds) Property and Human Rights in a Global Context (Oxford: Hart Publishing) p 225 at p 239.

[13] The term 'community' is invoked as both an abstraction and an empirical description. I use the single form of community when referring to the abstraction of its meaning and the plural form when referring to empirical examples of communities. See Section 1 for more discussion.

[14] See eg, R Cotterrell Law, Culture and Society: Legal Ideas in the Mirror of Social Theory (Aldershot: Ashgate, 2006) pp 65-78; R Cotterrell 'Community as a Legal Concept? Some Uses of a Law-and-Community Approach in Legal Theory' in R Cotterrell Living Law: Studies in Legal and Society Theory (Aldershot: Ashgate, 2008) pp 17-28.

Investigating the law-and-community approach in the context of takings of property in general, this article considers two interrelated questions: What makes a taking socially justified? What constitutes just compensation? Developing this approach in the context of takings of communal property, this article further analyses the treatment of communal networks adversely affected by takings under ECtHR jurisprudence and questions whether a compensation package should include the restoration of these communal networks. In so doing, the paper offers a comprehensive reevaluation of compensation provisions for takings of property under the ECHR and proposes an alternative framework of engaging law and regulation in wider social life.

The structure of the paper is as follows. Section 1 of this paper invokes the concept of community and offers a fresh analysis of the law-and-community approach and its relevance for studying takings of property. Sections 2 and 3 apply the law-and-community approach to examining two interrelated issues. The first is whether 'community' interests are properly taken into account in A1P1 and by the ECtHR in identifying the notion of 'possessions' (Section 2). The second is whether the importance of 'community' is appropriately taken into account by the ECtHR in evaluating issues such as fair balance and proportionality and in assessing compensation (Section 3). Section 3(c) specifically examines cases involving indigenous peoples and communal property before the ECtHR. Due to limited space, the paper focuses on A1P1 under the ECHR and takings in the UK and Europe, although it does draw some comparative perspectives from the American system.[15]

[15] I am aware that there are different approaches within the common law system, bearing in mind that the United States and the Republic of Ireland have written constitutions. For the Irish system, see eg, U. Kilkelly (ed) ECHR

1 A Law-and-Community Approach

(a) Invoking the Concept of 'Community'

As an old social science concept, there are many interpretations of what community is or should be.[16] It may be better understood with reference to some common characteristics or bonds that hold people together. Locality is important; people are often bound together via living in a common place. That said, community is not merely a geographical notion, as people may be bound together by a common interest that transcends the territorial boundaries. Community may be formed by a distinctive network of social relations or style of life (for example, the community of farmers, pastoral community, etc.).[17] Community may also be shaped by a strong sense of connection or belonging, for example, many communities have members who share a distinctive 'identity' (for example, indigenous community).[18]

The law-and-community approach developed by Roger Cotterrell sees 'community' as networks of social relations held together by a variety of bonds (eg, convergence of economic interests, shared customs and common values).[19] In this approach, the idea of community differs from our usual understanding that sees community as physical and geographical entities

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and Irish Law (Bristol: Jordan Publishing, 2nd edn, 2009). Beyond the ECHR, international law, international human rights treaties and investment and trade treaties, in particular, the Bilateral Investment Treaties (BITs), provide other sources for determining the state's obligation to property owners.

[16] See eg F Tönnies Community and Civil Society, trans. CP Loomis (Mineola, New York: Dover Publications, 2002 [1887]); B Anderson Imagined Communities: Reflections on the Origin and Spread of Nationalism (London: Verso, 1991); T Blackshaw Key Concepts in Community Studies (London: Sage, 2010).

[17] J Clarke 'Community' in DM Nonini (ed) A Companion to Urban Anthropology (London: Wiley-Blackwell, 2014) p 46 at pp 47-48.

[18] Ibid, at p 48.

[19] Cotterrell, Law, Culture and Society, at p 74.

or simple agglomerations of individuals. Instead, it suggests 'a diversity of social collectivities, commitments and systems of interests, values or beliefs, coexisting, overlapping and interpenetrating'.[20] To put it another way, community 'is not a thing but a quality of social relations'.[21] Seen through the lens of community, abstract society is disaggregated 'into many different networks of social relations in and beyond nation states'.[22]

Drawing on Weber's four ideal types of social action (traditional, affectual, instrumentally rational and value-rational),[23] Cotterrell's networks of community encompass four ideal types of community: instrumental community, traditional community, community of belief, and affective community. In this approach, one ideal type of community (eg, community of belief) is not to be equated with one empirical manifestation of community (eg, a church); rather it represents a distinctive type of 'collective involvement', and can be combined with other types of community 'in complex ways in actual group life'.[24]

Referring to the four types of community, instrumental community is mainly driven by economic and utilitarian values and interests. Traditional community is based on co-existence in the shared environment including the same locality, cultural and social tradition, historical experience, and so on. Affective community is shaped by emotion or friendship, which is often significant when dealing with issues regarding marriage and divorce, succession, and elderly

[20] Ibid, p 67.

[21] R Cotterrell 'Transnational Legal Authority: A Socio-Legal Perspective' in R Cotterrell and M Del Mar (eds) Authority in Transnational Legal Theory (Cheltenham, UK: Edward Elgar, 2016) p 253 at p 273. Italics original.

[22] Cotterrell, Law, Culture and Society, above n14, p 65.

[23] M Weber Economy and Society: An Outline of Interpretive Sociology, E Fischoff (trans) (Berkeley: University of California Press, 1978 [1921-1922]) pp 23-26.

[24] R Cotterrell 'A Legal Concept of Community' (1997) 12 Canadian Journal of Law and Society 75 at 81.

support; and community of belief focuses on aspects of social relationships defined by shared beliefs or commitment to a certain value (ethical, aesthetic, religious, and so on).[25] Taken together, traditional community, affective community, and community of belief are regarded as 'non-instrumental' in Cotterrell's characterisation.

In social reality, these types of community 'rarely exist in pure form' but often 'interact in complex ways as networks of community'.[26] A communal network can exist at the local, national, supranational, international, or transnational level; each can comprise any or all of the four types of community. As discussed above, the basis of holding community together is various bonds. People can be members of different communal networks; their memberships are often 'transient' and 'fluctuating'.[27] Communal networks can also be 'rife with conflict and power struggles'.[28] For example, a nation-state, as a national communal network, usually encompasses all four types of community. But whether a nation-state is 'imagined' by its citizens to be unified largely depends on the type of community within the nation-state they regard as the most important and the type of community that dominates the national communal

[25] Cotterrell, 'Community as a Legal Concept?', above n14, p 23; Cotterrell, Law, Culture and Society, above n 14, pp 165-166. See also T Xu 'Global Legal Transplants through the Lens of Community: Lessons for and from Chinese Property Law' in A Perry-Kessaris (ed) Socio-Legal Approaches to International Economic Law: Text, Context and Subtext (London: Routledge, 2013) p 167 at p 170.

[26] Cotterrell, 'Community as a Legal Concept?', above n14, p 17 and p 23.

[27] R Cotterrell 'Rethinking "Embeddedness": Law, Economy, Community' (2013) 40 Journal of Law and Society 49 at 56.

[28] M-L Djelic and S Quack 'Transnational Communities and Their Impact on the Governance of Business and Economic Activity' in M-L Djelic and S Quack (eds) Transnational Communities: Shaping Global Economic Governance (Cambridge: Cambridge University Press, 2010) p 377 at p 383.

network.[29] Different communal networks point to different regulatory challenges.[30] To make these relations stronger and better governed therefore requires regulation to maintain a certain degree of stability and a sense of collective belonging not only within various types of community but also between them.

(b) Developing the Law-and-Community Approach

The notion of 'law' taken in the law-and-community approach extends beyond 'the "official" legal system of the state'.[31] It includes international law, transnational law and other non-state forms of institutionalised doctrine. In this regard, the law-and-community approach shares common ground with the literature on 'legal pluralism', whose central idea concerns 'the coexistence, and sometimes conflict, of legal regimes and sources of legal authority'.[32] Moreover, a communal network, the unit of analysis in the law-and-community approach, resembles 'the semi-autonomous social field', which is a subject of anthropological study. The semi-autonomous social field 'can generate rules and customs and symbols internally, but…it

[29] R Cotterrell, "Brexit through a Community Lens," SLSABlog, 4 July 2016, Italics in original, available at http://slsablog.co.uk/blog/blog-posts/brexit-through-a-community-lens/ (accessed 9 June 2018).

[30] See also A Perry-Kessaris Global Business, Local Law: The Indian Legal System as a Communal Resource in Foreign Investment Relations (Aldershot: Ashgate Publishing, 2008); A Perry-Kessaris 'Reading the Story of Law and Embeddedness through a Community Lens: A Polanyi-Meets-Cotterrell Economic Sociology of Law?' (2011) 62 NILQ 401.

[31] Cotterrell, Law, Culture and Society, above n 14, p 1.

[32] Ibid. There is a rich literature on legal pluralism and the recognition of normative and customary rules. See eg, PS Berman 'Global Legal Pluralism: Past to Present, Local to Global' (2007) 80 Southern California Law Review 1155; B. Tamanaha 'Understanding Legal Pluralism' (2008) 30 Sydney Law Review 375; W Twining 'Normative and Legal Pluralism: A Global Perspective' (2010) 20 Duke Journal of Comparative & International Law 473.

is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded'.[33]

However, the law-and-community approach differs from pluralist views of law. To adopt the law-and-community approach does not claim any superiority or desirability of those relations of community; we live within such relations. These relations may be strong or fragile, well or poorly governed.[34] Communal networks may embody hierarchy, inequality, patriarchy and privilege. For example, women's property rights are often ignored, or even suppressed, in a communal context. Since a communal network may not be structured to ensure equality, the law that expresses and frames a communal network may be regarded as unjust and illegitimate by some of the members of the communal network. Under such circumstances, a much larger, powerful communal network and its law (eg, the state and state law) may attempt to control smaller, less powerful communal networks and 'remedy' community norms. Here 'to remedy' community norms means to bring these community norms into conformity with the norms of the more powerful communal network.

In employing the law-and-community approach to analyse takings of property, we can identify three-levels for analysis: the interaction between individuals, the communal network(s) he/she belongs to, and the local/national/supranational/international authorities with respect to the enforcement of law. The first level concerns the individual's perception of law. 'Some people may choose to emphasise one type of community [and one set of legal concerns] as important because of personal experience linked to their interest, emotional allegiances, beliefs, or sense

[33] SF Moore 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 Law and Society Review 719 at 720.

[34] Cotterrell, Law, Culture and Society, above n 14, p 77.

of their conditions of existence in their environment'.[35] The second level deals with communal networks and the law operating in each of these networks. The rules and norms generating from one network coexist, overlap, and interpenetrate with rules and norms generating from other networks. The processes through which these networks interact with each other also affect the extent to which national/supranational/international law can be accommodated in these networks it purports to regulate. The third level concerns the penetration of national/supranational/international law into less powerful communal networks, which may lead to the changes of community norms and rules generating from these networks.

Supranational/international law such as the ECHR is often closely linked to particular types of community (eg, smaller networks of law makers) and therefore has an enduring problem of securing cultural legitimacy when it tries to regulate all types of community.[36] Here cultural legitimacy refers to legitimacy of the law that each communal network creates that is 'derived directly from the cultural conditions of the network itself (from the common interests of its members, from its unifying beliefs or values, from its traditions, collective allegiances, etc.)'.[37]

Turning to the conception of property, one of the key issues in examining takings of property, the law-and-community approach further allows us to recognise a plethora of types of property rooted in various communal networks and their cultural conditions, in particular, communal forms of property, encompassing both spatial and temporal dimensions. For example, people share a sense of belonging via living in a common place, and they follow the same rules of the

[35] Cotterrell, above n 29. He argues that 'many people, reported as advocating "remain", seemed to rely on the image of the UK as a primarily economic communal network', but lacked the attention to the national environment of co-existence and threats to it.

[36] Cotterrell, above n 21.

[37] Ibid, p 274.

use of resources which may be intergenerational but not yet amount to customary. Some groups such as fisherfolk, herders and pastoralists may hold customary land rights. While the legitimacy of customary land rights derives from custom,[38] indigenous peoples' resource use is integral to their cultural identity.[39] Likewise, this approach allows us to recognise pluralist property norms derived from varied sources ranging from custom and national law to international and supranational law (eg, European Union Law and human rights law). As discussed above, international/supranational law often lacks cultural legitimacy. A review of the scope of A1P1 and current approaches to compensation for takings of property in the light of the law-and-community approach will help us decipher the complexity of the engagement of the ECHR, as a supranational legal authority, with different types of communal networks and property norms.

[38] For a definition of 'customary law', see FG Snyder 'Colonialism and Legal Form: The Creation of "Customary Law" in Senegal' (1981) 19 J. Legal Pluralism 49 at 49:

> 'The notion of "customary law" in Africa and elsewhere was specific to particular historical circumstances. It belonged to an ideology that generally accompanied and formed part of colonial domination. Both the concrete legal form and its conceptualization resulted from changes in social relations associated with the transformation of precapitalist modes of production and the sub-sumption of precapitalist social formations within the capitalist world economy'.

The formation of the notion of 'customary law' highlights the complexity involved in the three-level analysis of the interaction between individuals, communal networks, and authorities with respect to the enforcement of law discussed above.

[39] T Xu and W Gong 'The Legitimacy of Extralegal Property: Global Perspectives and China's Experience' (2016) 67 NILQ 189 at 195-196.

2 Reviewing the Notion of 'Possessions' in A1P1 and its Implications for Conceptualising Takings of Property

There are significant differences between civil law and common law approaches to the concept of property. In civil law jurisdictions, 'the idea of the "absolute" character of the domination over a thing was … closely connected with that of its "inviolability" and "sanctity" which derived its polemical pathos from the fight against feudal burdens and restrictions'.[40] Against this backdrop, the French Civil Code of 1804 gives 'an absolute right to the enjoyment and disposal of property'.[41] By contrast, 'English law did not experience the violent [reception of this idea] which occurred on the Continent' or any radical statutory intervention.[42] As a result, English law 'has preserved a large variety of rights of possession'.[43] A1P1 has an important task to minimise these differences.

The closest equivalent to the English term 'property' or 'possession' is the French word bien,[44] a term different from propriété which refers to the absolute notion of ownership in French law.[45] But this is not the perfect translation: 'while the term bien usually refers only to the object of

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[40] K Renner The Institutions of Private Law and Their Social Functions (New Brunswick, New Jersey: Transaction Publishers, 2010 [1949]) p 66.

[41] HJ Laski The Rise of European Liberalism: An Essay in Interpretation (London: Unwin Books, 1962) p 148.

[42] Renner, above n 40, p 82.

[43] Ibid, p 82. See also T Murphy, S Roberts, and T Flessas Understanding Property Law (London: Sweet & Maxwell, 2004) p 61 (arguing that 'the fulcrum of the English system of remedies is possession rather than ownership').

[44] Collins Compact French Dictionary, 2nd edition (Glasgow: HarperCollins Publishers, 2009) p 21. See also S Praduroux 'Objects of Property Rights: Old and New' in M Graziadei and L Smith (eds) Comparative Property Law: Global Perspectives (Cheltenham: Edward Elgar, 2017) p 51at p 53.

[45] Praduroux, ibid, p 54.

rights, in the common law lexicon, the term "property" indicates both property rights and the object of property rights'.[46] The British representatives observed that 'the word "possessions," used in the English text, is not a really satisfactory word…It is a word that would not be found, in a British Act of Parliament or any other document'.[47]

Some guidance on interpreting the meaning of possessions in A1P1 comes from comparative law. Some comparative property lawyers have rejected the existence of 'a watertight separation' between civil law and common law approaches to property.[48]

> Comparisons of property laws require an understanding of what is living law, governing and structuring social practice and social expectations through working rules, and what are instead the intellectual tools that jurists and lawmakers use to rationalise, structure, and represent social dynamics in legal terms.[49]

This argument can be supported and further explained by applying the law-and-community approach. It is difficult to unify the conceptions of property, especially when we consider the fact that 'the law of property in force in each jurisdiction is set out, explained, and framed by the legislature, the courts, government agencies, academic scholarship, social actors, and movements'.[50] This observation chimes with what has been emphasised in the law-and-

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[46] Ibid. Italics original.

[47] Council of Europe Collected Edition of The *"Travaux Préparatoires"* of the European Convention on Human Rights (The Hague: Martinus Nijhoff, 1975) p 88.

[48] M Graziadei 'The Structure of Property Ownership and the Common Law/Civil Law Divide' in Graziadei and Smith (eds), above n 44, p 71.

[49] Ibid, p 94.

[50] Ibid, p 73.

community approach that law has different community groundings and is created, interpreted, and enforced by various agencies. If we are going to examine the extent to which the ECHR unifies the notions of property in A1P1, we need to look at the relevant case law of the ECtHR. We also need to bear in mind that those cases have been decided by a small network of judges and that the conceptual tools that jurists and lawmakers use to represent social dynamics may be quite different from the social dynamics themselves.

In Gasus-Dosier und Fördertechnik v The Netherlands, the scope of the notion of possessions in A1P1 has expanded from ownership of physical goods to certain rights and interests.[51] The ECtHR held that the notion of possessions 'has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as "property rights", and thus "possessions" for the purposes of this provision'.[52] The autonomous meaning of possessions under the ECHR recognises that '"possessions" are created by national law, but that the Court is free to reach its own conclusion on the application of national law to the specific facts of the case'.[53] 'This represents a pragmatic solution to the problem which arises when the parties cannot agree on whether the applicant has a proprietary interest under national law'.[54] The ECtHR adopts a conservative approach to the definition of possessions, as it is wary of the creation of new proprietary interests that are not recognised under national law.

[51] Gasus-Dosier und Fördertechnik v The Netherlands (1995) 20 EHRR 403.

[52] Ibid. See also Beyeler v Italy (2001) 33 EHRR 52.

[53] T Allen 'The Autonomous Meaning of "Possessions" under the European Convention on Human Rights' in E Cooke (ed) Modern Studies in Property Law, Volume II (Oxford: Hart Publishing, 2003) p 57 at p 62.

[54] Ibid, p 62.

Apart from generally recognised real and personal property, categories of possessions now include company shares,[55] goodwill in a business,[56] intellectual property rights such as patents,[57] security rights under a retention of title clause,[58] planning permission,[59] rights of user,[60] and so on.[61] The ECtHR has also extended the scope of possessions to include 'the applicants' legitimate expectation of being able to carry out their proposed development'.[62] Further, ' "possessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right'.[63] 'A legitimate expectation must have a "sufficient basis in national law"'.[64] The court, therefore, has adopted 'an economic value approach to the notion of possessions' that include both present and future economic interests.[65]

Through adopting the economic value approach, the Convention meaning of possessions serves as a unifying concept that minimises the differences among the Contracting States in interpreting the notion of property to a certain extent. However, it is not sufficiently broad to

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[55] See eg, Company S. & T v Sweden App No 11189/84, (ECtHR 11 December 1986).

[56] See eg, Van Marle and others v Netherlands (1986) 8 EHRR 483.

[57] See eg, Smith Kline and French Laboratories v Netherlands App No 12633/87 (ECtHR 4 October 1990).

[58] See eg, Gasus-Dosier und Fördertechnik v The Netherlands, above n 51.

[59] See eg, Pine Valley Developments Ltd and others v Ireland App No 12742/87 (ECtHR 29 November 1991).

[60] See eg, X v Federal Republic of Germany App No 8363/78 (ECtHR 12 May 1980).

[61] See also D Rook Property Law and Human Rights (London: Blackstone, 2001) pp 97-99.

[62] See eg Pine Valley Developments Ltd and others v Ireland, above n 59, at [51].

[63] Fabris v France, (2013) 57 EHRR 19, at [50].

[64] Ibid. See also Kopecky v Slovakia (2005) 41 EHRR 43 ('Where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law', at [52]).

[65] Praduroux, above n 44, p 54.

include communal land, cultural resources and other communal interests. As discussed in Section 1(b), the ECHR, one kind of supranational law, is grounded in a confined communal network that is much narrower than the communal network made up of the population it is purported to regulate. Every communal network has its predominant interest, which the ECHR has not sufficiently taken into account.[66]

The limited content of possessions is closely linked to the narrow conception of the taking of property, that is, the taking of private property from its owner by the state or an authority for the public interest. There is only a very limited appreciation of the impact of takings on communal networks bound together by tradition, customs, or language. What about those instances where the exercise of regulatory power leads to the deprivation of access to land and other natural resources, or to the weakening of control over land and other natural resources by people who may hold nothing other than use rights to land and natural resources (for example, traditional possession of their lands by indigenous people)?[67] In those cases there is often a lack of informed consent and/or compensation. Should those cases be considered as takings of property? Are those people entitled to compensation? Should the compensation provisions be solely measured by the economic terms? Could the ECHR engage with wider, diverse communal networks? If so, in what way? The following section explores these questions in the light of the law-and-community approach.

[66] In anthropology of law, there is a large literature on law of social sub-groups. But a comprehensive review of the literature extends beyond the parameters of this paper. For seminal studies, see eg L Pospisil Anthropology of Law: A Comparative Theory (London: Harper & Row, 1971); Moore, above n 33.

[67] See Xu and Gong, above n12, p 225.

3 Reviewing the Current Approaches to Compensation for Takings of Property

(a) The Market Value Approach

Many disputes arising from takings of property centre on whether market value compensation should be paid.[68] The market value approach sees market value as the best approximation for justice and considers 'the nature and economic impact of the regulation and its interference with reasonable investment-backed expectations'.[69] In theory, this approach should work well if the taking primarily concerns instrumental community, whose 'scope and limits […] are usually relatively clear'. [70] Further, money seems to be the language of instrumental community, and monetary compensation is consistent with the logic of instrumental community and serves as the basic form/medium/expression of interaction. For example, the economic value approach to the notion of 'possessions' discussed in Section 2 is consistent with the market value approach to compensation.

To be sure, the market value approach to compensation is based on an understanding that all property is to be 'fungible' and 'fully interchangeable with money'.[71] However, it is not entirely incompatible with the social approach to compensation, because ultimately the market value reflects 'a community consensus' on the value of the property rather than the owner's idiosyncratic preference.[72] It should be noted, however, that community interest/community

[68] See eg, Scordino v Italy (No.1) (2007) 45 EHRR 7; see also Sporrong and Lönnroth v Sweden, above n 4.

[69] AJ van der Walt Property in the Margins (Oxford: Hart Publishing, 2009) p 192.

[70] Cotterrell, above n 14, p 24. Emphasis original.

[71] MJ Radin Reinterpreting Property (Chicago: Chicago University Press, 1993) at p 136 and p 156.

[72] R Ellickson 'Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Control' (1973) 40 U CHI L REV 681 at 736; Allen, above n 6, p 289.

consensus in the context of A1P1 is often used interchangeably with public interest/public consensus.

The 'fair balance' test discussed in the Introduction accommodates individual desires and plans with respect to one's property, but only to a certain extent. In some cases, market value compensation seems inappropriate from the property owner's point of view. For instance, 'a longtime owner of a single-family home in a stable residential area might not willingly part with his dwelling except a substantial premium over the market price'.[73] The owner would even expect a much larger amount of compensation than the market value if his/her experience of living in the property is closely linked to a non-instrumental communal network that is based on co-existence in common environment. Sometimes well-intended policies to replace slums or old terraced housing with 'rationally designed' blocks (no compensation involved in most cases) took no consideration of non-instrumental community that is essential to generate and sustain networks of dependence and mutual support.[74] Perhaps the owner is never going to be satisfied even if a compensation package is offered and much higher than the market value, for their losses can never be measured in monetary terms. These situations reflect the complexity demonstrated in the law-and-community approach that an individual belongs to any or all of the types of community; and that each community is an ideal type and the types overlap in reality. Instrumental communal networks also include non-instrumental elements.

[73] Ellickson, above n 72, p 736.

[74] For one of the earliest studies in the UK see eg M Young and P Willmott Family and Kinship in East London (London: Penguin, 2007[1957]). For relevant issues see a recent documentary film 'Uprooted – London's Housing Crisis', trailer available at https://vimeo.com/166171144 (accessed 9 June 2018).

In some cases where public interests outweigh private interests, less than reimbursement of the full market value may be awarded by the ECtHR:[75]

> A taking of property under the second sentence of the first paragraph of Article 1 without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be justified under Article 1. The provision, does not, however, guarantee a right to full compensation circumstances, since legitimate objectives of "public interest" may call for less than reimbursement of the full market value.[76]

Many issues remain largely unresolved. For example, how to calculate market value when there is a decrease in the value of the property due to state control of the property?[77] Should 'possessions' always include future profits if there had been development of the area? Moreover, whether the taking is considered by the ECtHR to constitute 'deprivation of ownership' or 'state control over the use of property' will lead to different consequences. The deprivation of ownership usually guarantees compensation (not necessarily with full market value if it is for the public interest), whereas state control of the use of property (even though the applicant had lost possessions) does not always give rise to an entitlement to compensation. Pye v United Kingdom is a seminal case highlighting this distinction, which is blurred and subject to debate.

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[75] Eg, James v United Kingdom, above n 4, at [54].

[76] Pye v United Kingdom, above n 5, at [54].

[77] See eg, Sporrong and Lönnroth v. Sweden, above n 4; Pine Valley Developments Ltd and others v Ireland, above n 59.

The ECtHR ruled that 'the applicant companies were […] affected, not by a "deprivation of possessions" within the meaning of the second sentence of the first paragraph of Article 1, but rather by a "control of use" of land within the meaning of the second paragraph of the provision'.[78] The second paragraph of A1P1 reserves to the states the right to enact such laws as they deem necessary to control the use of property according to general interest. To put it another way, states enjoy a wide margin of appreciation with regard to choosing the means of enforcement of the law and ascertaining whether such enforcement will be justified in the general interest.[79] The initial assessment of whether there exists a public interest in justifying the taking of property is often left to the national authorities.

However, the debates whether there was real public or general interest in the law on adverse possession in the case of registered land remain largely unresolved. This is due in part to the fact that the function of the property in question is interpreted in different ways. In Pye, the UK government argument was that 'land was a limited resource, and it was in the public interest that it should be used, maintained and improved'. [80] This argument seems to have focused on the economic function of the property. The applicant companies could have relied on a different argument:

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[78] Pye v United Kingdom, above n 5, at [66].

[79] Ibid, at [55].

[80] Ibid, at [47]. Cases become more complicated when private land is taken by governmental power and then transferred to another private owner to further economic development. There are some prominent and influential US cases offering comparative insights. Eg, Southwestern Illinois Development Authority v National City Environmental, LLC, (2002) 768 NE 2d 1; Kelo v New London (2005) 545 US 469. Those cases have raised questions as to whether 'public purpose' equals 'public use' or 'public interest' and where to draw the boundary between regulation and expropriation.

> [the interference with their property] shows disrespect for the legitimate rights and expectations of the registered property owners which include the possibility of keeping their property unused for development at a more appropriate time … or... maintain[ing] their property as security for their children or grandchildren.[81]

This argument seems to have emphasised the conservation function of the property in question. Again seen in the light of the law-and-community approach, the conceptions of the function of property, fair balance, and compensation provision largely depend on interactions between the individual, the communal network(s) he/she belongs to, and the wider society with respect to the property in issue. Leaving the initial assessment of whether there exists a public interest to the national authorities without considering such interactions will make some of the ECtHR's decisions controversial.

(b) **The Social Approach and Proportionality**

The social approach to compensation emphasises the social function of property, which allows for reasonable constraints on the use of private property in order to secure the public interest and even state sanctions of extinguishment of title. The 'social-function norm' of property was proposed by the French law professor Léon Duguit in the early twentieth century[82] and later appeared in several national constitutions such as the Italian Constitution 1948 and the Basic Law of the Federal Republic of Germany 1949.[83] Property in this kind of characterisation

[81] As per the dissenting opinion of Judge Loucaides joined by Judge Kovler.

[82] MC Mirow 'The Social-Obligation Norm of Property: Duguit, Hayem, and Others' (2010) 22 Fla. J. Int'l L., 191 at 191-192.

[83] See above n 7.

entails a certain number of obligations to serve the social interest.[84] For example, the landowner's rights to control exclusive access to property may be limited as a matter of the relationship between property and equality.[85] There are many categories of 'quasi-proprietary' public rights of access to private land such as the public right to use the highway, walkway agreements, and 'the right to roam' comprising the right of access to private land for recreational purposes such as hiking.[86] Property's social function restricts the extent to which private property rights can be exercised.

A1P1 recognises both rights and obligations in relation to property. This recognition echoes Roscoe Pound's argument that rights are 'interests to be secured' and that society evolves from 'individual interests' to 'social interests'.[87] People perceive justice in relation to their interests.[88] So the law regulating property needs to take account of both the interests of the individual and the interests of society in connection with the property in question.[89] For example, the key issue in the 'fair balance' test is to strike a balance between individual and

[84] K Gray and SF Gray 'The Idea of Property in Land' in S Bright and J Dewar (eds) Land Law: Themes and Perspectives (Oxford: Oxford University Press, 1998) p 15 at p 41.

[85] JW Singer 'No Right to Exclude: Public Accommodation and Private Property' (1996) 90 Northwestern University Law Review 1283; JW Singer 'Property and Equality: Public Accommodation and the Constitution in South Africa and the United States' (1997) 12 South African Journal of Public Law 53.

[86] K. Gray and S.F. Gray (eds) Elements of Land Law (Oxford: Oxford University Press, 5th edn, 2009) pp 1344-1376.

[87] R Pound 'A Theory of Social Interests' (1920) 15 Papers and Proceedings of the American Sociological Society 17, cited in R Swedberg 'The Case for an Economic Sociology of Law' (2003) 32 Theory and Society 1 at 9.

[88] Swedberg, Ibid, p 9.

[89] van Banning above n2, p 148.

social interests; this test encompasses three important aspects, namely, legitimate aim (closely linked to the 'public interest'), proportionality[90] between means and aim, and compensation relevant to proportionality.

Although many studies have critiqued the concept of proportionality,[91] they have not sufficiently explored the meaning of the 'public interest' and its implications for understanding proportionality. Often we talk about the 'public interest' as if it is unitary. In the Anglo-American tradition, for example, 'it was thought of as representing a community's collective values, transcending the interests or identified preferences of individuals and beyond the ability

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[90] The test that is now used in UK courts includes a general community interest element. See Bank Mellat v HM Treasury (No 2) [2013] UKSC 38 & 39, [2013] 3 WLR 179, 229-30, at [20], Lord Sumption:

> 'the reviewing court must enquire (i) whether [the decision or other measure's] objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether [the decision or other measure] is rationally connected to the objective; (iii) whether a less intrusive [decision or] measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community'.

Because the right to peaceful enjoyment of possessions is considered as less important rights compared to highly important rights such as the right to life, it may be argued that 'more relaxed proportionality tests should apply to those less important rights, 'which may be restricted when "in the public interest"'. See C Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 LS 1 at 10.

[91]See eg, N Lacey and H Pickard 'The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems' (2015) 78 MLR 216; N Lacey 'The Metaphor of Proportionality' (2016) 43 Journal of Law and Society 27. The former looks at the way in which the idea of proportionality has been socio-politically and culturally constructed in the context of penal theory. The latter expands the scope of the critique to a variety of spheres including private law, human rights and international law.

of individuals to achieve by acting alone'.[92] This unitary conception of the public interest hides conflicting policy considerations. The Kelo litigation, albeit a US example, exemplifies those conflicts.[93] It raises many questions that may generate fresh insights into the difficulty in determining whether a taking is required in the public interest, including: does a taking involving a third party transfer (the city delegated the taking power to the New London Development Corporation) for purposes of economic development serve the public interest? Does the public interest equal the increase in new jobs and tax revenue? Should the public interest include consideration of sustaining community life cherished by those residents who had lived in the area their entire life? Turning to cases considered by the ECtHR, the public interest goals pleaded in these cases – including the promotion of economic development or social justice – are often vague.[94] As a result, in most cases the decision of whether an interference with property rights is required in the public interest becomes a matter that falls within the margin of appreciation of the state.[95]

We also tend to ignore that an individual may feel one kind of interference brings more justice than another kind of interference because he/she sees different kinds of interference through not only her/her personal experience but also the communal network(s) he/she belongs to. Proportionality deals with the balance between individual interests and 'conflicting public

[92] M Valiante 'In Search of the "Public Interest" in Ontario Planning Decisions' in A Smit and M Valiante (eds) Public Interest, Private Property: Law and Planning Policy in Canada (Vancouver: UBC Press, 2016) p 104 at p107.

[93] See above n 80.

[94] A McHarg 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) MLR 671 at 694.

[95] Ibid.

interests'.[96] More precisely, as discussed above, proportionality deals with the balance between individual interests and conflicting and overlapping interests of different types of community.

Disaggregating the meaning of the public interest to include conflicting and overlapping interests of different types of community is important. As Snyder argues:

> [Interests] serve as analytical tools for understanding legal ideas, institutions, and processes, and as such help to define the salient features of law's social context… Thus they are indispensable to any understanding of the causes and consequences of the creation, reproduction, or transformation of law.[97]

Seen through the law-and-community approach, the interactions between individual interests and the law are mediated by the communal network(s) the individual belongs to. Applying this perspective to rethinking compensation relevant to proportionality, many questions will arise: is there a unified approach to compensation for takings of property? Or should compensation be re-evaluated in relation to different types of community? Let us imagine two scenarios: the state, for the public interest, acquires land owned by a large, powerful company and land owned by an individual living in a small, close-knit community. In the first scenario, the taking may primarily affect instrumental community, so market value compensation may be easily justified and the 'fair balance' test can also be satisfied.

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[96] K Möller 'Proportionality and Rights Inflation' (2013) 17 LSE Law, Society and Economy Working Paper Series 3 at 3. Italics added. Public authorities may present different interests, see eg, Oxfordshire County Council v Oxford City Council and another [2006] UKHL 25.

[97] FG Snyder 'Thinking about "Interests": Legislative Process in the European Community' in J Starr and JF Collier (eds) History and Power in the Study of Law: New Directions in Legal Anthropology (Ithaca and London: Cornell University Press, 1989) p 168 at p 169.

In the second scenario, the taking may affect the individual's interest grounded in non-instrumental community (traditional community, affective community, and community of belief) in additional to instrumental community. The social approach to compensation becomes less effective in this context, as it overlooks a variety of communal networks situated between individuals and society as a whole. Should considerations be given to the individual's loss of attachment to these non-instrumental types of community as part of the compensation provisions? Of course, taking real account of different types of community is difficult and may be beyond the capacity of judges. But an additional amount of compensation at least can be awarded to reflect such loss.

(c) Cases Involving Indigenous Peoples and Communal Property

The communal networks involving indigenous peoples are mainly 'non-instrumental', arising from co-existence in the same locality and shared language, culture, traditions, identity, and historical experience, etc. [98] Although these communal networks now fall within the 'jurisdiction' of some nation-state or other, the governance of such communal networks and communal resources involves the recognition of 'an additional structure of internal rules, rights, duties, and beliefs which mediates and shapes the community's relationship with its natural surroundings'.[99]

The corresponding property regime is often characterised as 'the commons' or communal property. The notion of the commons or communal property is elusive with many

[98] I am aware that some of these communal networks may prove quite open to be incorporated into the money economy through cashing in on their 'heritage' for profit-making purposes. For example, Bali is a popular tourist destination. But a further examination of such cases extends beyond the scope of this paper.

[99] The Ecologist Whose Commons Future?: Reclaiming the Commons (London: Earthscan Publications, 1993) p 9.

conceptions.[100] Here, I adopt one conception which regards communal property as resources owned, used, or governed by a group of people defined by reference to some common characteristics. This conception speaks to the law-and-community approach that sees community as networks of social relations held together by a variety of bonds such as locality, values and interests; communal property not only recognises these networks of social relations but also manifests itself in these social relations. It is difficult to apply the 'individualist' conception of 'property' or 'possessions' in this context where property carries more of a sense of entitlement and sharing, a right 'not to be excluded', and indeed an understanding of stewardship of land and other resources.[101] Moreover, some anthropological studies of the indigenous peoples' interest in land show that their interest 'is in belonging not owning'.[102]

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[100] Dietz et al define 'commons' as 'a diversity of resources or facilities as well as property institutions that involve some aspects of joint ownership or access'. See T Dietz, N Dolšak, E Ostrom, and PC Stern 'The Drama of the Commons' in E Ostrom, T Dietz, N Dolšak, PC Stern, S Stovich, and EU Weber (eds) The Drama of the Commons (Washington, DC: National Academy Press, 2002) p 18. Communal property can be understood as 'land and other resources owned and/or used and controlled by a self-interested and self-governing group of people defined by reference to some common characteristics such as kinship, locality, or common interest'. See A Clarke 'Integrating Private and Collective Land Rights: Lessons from China' (2013) 7 Journal of Comparative Law 177 at 181.

[101] The Ecologist, above n 99, p 9. See also JW Singer Entitlement: The Paradoxes of Property (New Haven: Yale University Press, 2000); W Lucy and C Mitchell 'Replacing Private Property: The Case for Stewardship' (1996) 55 CLJ 556; K Gray 'Equitable Property' (1994) 47 Current Legal Problems 157; C Rodgers 'Nature's Place? Property Rights, Property Rules and Environmental Stewardship' (2009) 68 CLJ 550.

[102] ET Durie 'Cultural Appropriation' in V Strang and M Busse (eds) Ownership and Appropriation (Oxford and New York: Berg, 2011) p 131 at p 143.

The indigenous peoples' communal relationship and perception of property have been recognised by the major development of international law, international human rights and 'soft law' instruments regarding indigenous peoples since the 1980s.[103] Key references are made to the ILO (International Labour Organisation, No. 169) Convention Concerning Indigenous and Tribal People in Independent Countries in 1989 ('ILO Convention 169'),[104] the UN General Assembly of the United Nations Declaration on the Rights of Indigenous Peoples 2007,[105] and 'the Voluntary Guidelines on the Responsible Governance of Tenure' issued by the Food and Agriculture Organisation of the United Nations in 2012. [106] Article 1.1 (a) of the ILO Convention 169 recognises the status of tribal peoples as communities 'whose status is regulated wholly or partially by their customs or traditions or by specific laws or regulations'. Article 13 of the Convention provides that 'the Convention government shall respect the special importance for the cultural and spiritual values of the peoples concerned of their relationship with the lands or territories…and in particular the collective aspects of their

[103] See T Koivurova 'Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects' (2011) 18 International Journal on Minority and Group Rights 1 at 1.

[104] Indigenous and Tribe Peoples Convention, 1989 (No. 169), adopted on 27 June 1989, entered into force on 5 September 1991.

[105] Important international treaties regarding indigenous peoples prior to the 1980s include the International Covenant on Civil and Political Rights (ICCPR), adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976. Article 27 provides:

> 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.

[106] 'The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security promote secure tenure rights and equitable access to land, fisheries and forests as a means of eradicating hunger and poverty'.

relationship'. Article 14(1) recognises 'access to land' '…to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally have access for their subsistence and traditional activities'. That those international instruments have taken into account non-instrumental community has given them some kind of cultural legitimacy.

Non-instrumental community, however, does not exist by isolating itself from other types of community. Conflicts between non-instrumental community and instrumental community may arise in instances where modern economic activities interfere with indigenous tenure and give rise to 'dispossession' and threats to accustomed security of access to communal resources. The perceptions of just takings of property within non-instrumental community may be fundamentally different from those within 'instrumental community'.

Compared to those international instruments discussed above, the evolution of the jurisprudence of the ECtHR regarding indigenous peoples is rather slow. Several cases involving indigenous peoples heard before the Court show that the ECHR is not very effective in cases involving communal relationships and communal property.[107] As discussed above, the ECHR is not rooted in all types of community, and its regulatory ambition to govern all types of community faces an enduring problem of securing legitimacy.

The protection afforded by the ECHR is mostly procedural rather than substantive, and indigenous complaints have primarily relied on Article 6 and 8 and A1P1 of the ECHR. There has been a lack of landmark cases decided by the ECtHR in favour of indigenous peoples.[108]

[107] Xu and Gong, above n 12.

[108] See Koivurova, above n 103, p 1.

Indigenous peoples have to carry the burden of proof to argue for their 'immemorial use rights' over communal resources.[109]

In Hingitaq 53 and Others v. Denmark,[110] 428 individuals from the Thule District in Greenland, together with Hingitaq 53, a group representing the interests of relocated Inughuit (the Thule Tribe) and their descendants, claimed compensation for the deprivation of their homeland and reduced hunting and fishing opportunities as a result of the establishment of an air base. The Supreme Court of Denmark argued that 'the Thule Tribe does not constitute a tribal people or a distinct indigenous people within or coexisting with the Greenlandic people'.[111] The ruling of the ECtHR supported the argument by the Supreme Court of Denmark that the Thule tribe does not 'retain some or all of its own social, economic, cultural and political institutions',[112] and therefore the Thule tribe is not a distinct indigenous people and does not fall within Article 1.1 (b) of the ILO Convention 169 and does not hold separate rights under the Convention.[113]

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[109] Ibid, p 4.

[110] App No 18584/04 (ECtHR 12 January 2006).

[111] Ibid.

[112] Ibid.

[113] Article 1.1 (b) of the ILO Convention 169 provides:

> '[This Convention applies to] peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions'.

The ruling of the ECtHR resonates to the common law's recognition of local customary rights 'only if they are ancient, certain, reasonable and continuous'. See Gray and Gray, above n93, p 1360. If the continuity is broken, local customary rights may be easily dismissed.

The ECtHR found that Danish authorities successfully struck a balance between the general interest of the community and the proprietary interests of the persons concerned and therefore there was no violation of A1P1. The ECtHR, however, did not recognise that even if we cannot assume the absolute homogeneity of the Inughuit as an indigenous people, the reduced hunting and fishing opportunities interfered with not only individual interest but also the communal networks held together by custom and tradition (traditional community) within the Greenlandic people. The ECtHR only considered whether compensation provided was appropriate to meet the interests of the individuals concerned rather than the interests of the group whose lifestyle and identity is closely related to hunting and fishing activities. The exercise of their collective rights as Inughuit had been 'reduced to just an empty shell', as argued by the applicants.[114]

In Chagos Islanders v United Kingdom,[115] the ECtHR declared the islanders' case to be inadmissible on the grounds that the applicants had previously accepted compensation from the British government and had therefore effectively renounced their right to bring any further claims.[116] The battle between the Chagos Islanders and the UK government began in the 1960s when the UK government, which owns the territory, leased Diego Garcia, the largest part of the Islands, to the US. Under pressure from the Chagossian campaigners, in 1982, the UK government offered a compensation package with a payment of £4 million [$6 million] and provision of land worth £1 million [$1.5 million] by Mauritius. However, controversy surrounding the compensation centred on the fact that many islanders did not receive

[114] Hingitaq 53 and Others v. Denmark, above n 110.

[115] Chagos Islanders v United Kingdom (2013) 56 EHRR SE15.

[116] Ibid, at [81].

compensation, and that those who did receive compensation were not aware that accepting the compensation meant 'signing away their right to return'.[117] More importantly, monetary compensation did not truly reflect the loss of the islanders. The deportation from the island adversely affected around 2000 local residents who had used the land communally over generations. Many fell into poverty and lost their sense of belonging to their old community.[118] As Allen argues:

> Exile deprived the Chagossian people of their ancestral lands and access to communal territorial resources. However, its impact goes beyond material losses. Expulsion produced experiences of "profound cultural and landscape bereavement" that have been transmitted down the generations so that they have become ingrained in the Chagossian psyche. An important manifestation of this loss is the lack of access to ancestral burial grounds. Chagossian social relations manifest a strong inter-generational dimension; traditional practices, which involved visiting, honouring and maintaining ancestral graves, remain culturally significant. However, the inability of Chagossians to perform

[117] J Wan 'Chagos Islanders Lose the European Court Battle but the Struggle Continues', Think Africa Press, 14 January 2013, available at https://www.fairobserver.com/region/europe/chagos-islanders-lose-european-court-battle-struggle-continues/ (accessed 9 June 2018). See also BBC News 'Chagos islanders cannot return home, says Supreme Court', 29 June 2016, available at http://www.bbc.co.uk/news/uk-36659976 (accessed 9 June 2018).

[118] Prior to the ECtHR ruling, several cases regarding the removal of Chagos Islanders had been heard in the UK courts, culminating with the House of Lords ruling in R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2008] UKHL 61.

such practices since expulsion reinforces the severance of wider cultural connections.[119]

The deportation had adverse social, cultural, environmental and spiritual impact on not only the islanders as individuals but also the intergenerational, relational aspect of the group as a whole. However, the compensation package did not take such losses into account. More remedial measures should be considered, for example, facilitating the restoration of solidarity of the communal networks adversely affected by takings. Here a useful comparator may be developments in environmental law regarding compensation for environmental damage: compensation should 'consist of repairing/restoring the affected natural environment "in kind" or to its natural state'.[120] For takings cases involving indigenous peoples, it seems just to allow

[119] S Allen 'Looking Beyond the Bancoult Cases: International Law and the Prospect of Resettling the Chagos Islands' (2007) Human Rights Law Review 441 at 470. Please note that in June 2017 the UK suffered a defeat in a UN vote on Chagos Islands that supported 'a Mauritian-backed resolution to seek an advisory opinion from the international court of justice (ICJ) in The Hague on the legal status of the Chagos Islands'. O Bowcott 'EU members abstain as Britain defeated in UN vote on Chagos Islands (the Guardian, 23 June 2017); available at https://www.theguardian.com/world/2017/jun/22/un-vote-backing-chagos-islands-a-blow-for-uk (accessed 9 June 2018).

[120] See, I Gonciari 'Legal Update-New Developments in French Environmental Law'; available at https://www.ukpandi.com/knowledge-publications/article/legal-update-new-developments-in-french-environmental-law-136823/ (accessed 9 June 2018). See also TH Reis Compensation for Environmental Damages under International Law: The Role of the International Judge (The Netherlands: Wolters Kluwer, 2011) pp 65-66 (arguing that 'market value or other similar economic criteria…are not so adequate for the calculation of ecological damages').

indigenous peoples 'to return to their traditional territories when the reasons for their banishment cease to exist'.[121]

Conclusion: Establishing a Law-and-community Approach to Compensation

Takings of property are an area that witnesses the increasing penetration of national/supranational/international law into both the macro and micro levels of society. Studying takings, therefore, requires a sociological analysis of the role of law in social experience and the law's interaction with vested interests and social relations. Whether takings can be socially justified is largely dependent on how law engages with different interests and social relations. This article offers a useful analytical tool for examining such engagement through applying and developing a law-and-community approach. In this approach, the abstract notion of society has been disaggregated into different types of community, coexisting, overlapping and interpenetrating. A socially justified taking requires law to not only engage in different types of community but also strengthen cooperation within and between different types of community.

It should be noted that, in practice, as national/supranational/international law is not often rooted in all the communal networks it purports to regulate, it would be potentially very difficult for the Contracting States to permit the ECtHR to engage in this kind of analysis in most cases. However, the law-and-community approach is still useful, because it allows us to re-evaluate the current approaches to compensation for taking of property under the ECHR. The amount of market value compensation is a matter that falls within the margin of appreciation of the state, subject to European supervision in the light of the proportionality principle. If a taking predominately interferes with instrumental community, the market value

[121] S Allen 'Looking Beyond the Bancoult Cases: International Law and the Prospect of Resettling the Chagos Islands' (2007) Human Rights Law Review 441 at 477. See section 3(c) for more discussion.

approach to compensation may be easily justified. But if the taking also affects types of non-instrumental community, the market value approach becomes less effective, as the market value approach often concentrates on the economic loss of individuals in takings of property and overlooks the needs to consider the loss of communal interests and identities especially in cases involving indigenous peoples. The ECtHR should not assume that market value compensation is viewed as just compensation by everyone or necessarily strikes a fair balance.[122]

The social approach to compensation is based on an understanding that property carries certain social functions and property owners bear social obligations. However, the 'public interest' that is essential for justifying this approach is too broad and vague seen through the law-and-community approach. The individual's conception of the public interest is mediated by the communal network(s) he/she belongs to. Like the market value approach, the social approach overlooks a wide range of types of community between individuals and the state and conflicting and overlapping interests of different types of community.

The limits of the current approaches to compensation for takings of property are also manifest in the ECHR's limited protection for indigenous peoples' property rights. The ECHR lacks groundings in communal networks held together by custom and tradition, and the ECtHR has an ambivalent attitude towards the recognition of communal property rights.

The law-and-community approach can remedy the shortcomings of the current approaches in at least three aspects. First, it helps recognise property rights whose legitimacy may derive from communal networks which are composed of intergenerational social relations between individuals and groups of people with respect to the land and other natural resources. These social relations are shaped and reshaped by a variety of bonds such as shared tradition and style

[122] Allen, above n 6, p 290.

of life. For cases involving indigenous peoples, if we recognise such social relations, we can argue that these groups' land rights 'extend beyond ownership rights to include possessory and use rights over lands traditionally accessed for subsistence and other purposes'.[123]

Second, when there are conflicts between different rights claims, or, indeed, conflicts between different communal networks, there needs to be at least a process of dialogue and consultation or overarching international guidelines so that one group of social interests will not easily be trumped by another kind of social interest and vice versa. The law-and-community approach to compensation rejects the simple quantification of the indigenous peoples' losses without prior consultation and consent. The law-and-community approach to compensation also rejects a one-size-fits-all solution. Compensation provisions for a taking predominately affecting instrumental community may not be suitable for a taking predominately affecting traditional community.

Finally, as communal networks transcend the boundaries of the nation-state, cutting across the local and the globe, the law-and-community approach will be useful for developing takings law from a global perspective. For example, it will be helpful to develop the jurisprudence of the ECtHR through keeping pace with the progress of international law, international human rights and 'soft law' instruments regarding indigenous peoples.[124] These instruments recognise

[123] Allen, above n 119, at 476; Article 14(1), ILO Convention No. 169.

[124] The jurisprudence of the Inter-American Court of Human Rights, for example, recognises communal property rights and establishes a much broader scope of 'possession'. See eg M Melo 'Recent Advances in the Justiciability of Indigenous Rights in the Inter-American System of Human Rights' (2006) 3 Sur, Rev. int. direitos human. 30; R Sieder 'The Judiciary and Indigenous Rights in Guatemala' (2007) 5 Int J Const Law 211; Xu and Gong, above n 12, pp 241-243.

property rights based on communal use and access of land and other resources and community members' participation in decision-making and governance of the communal resources, emphasise the economic, social, cultural, environmental and spiritual impact of takings on local and traditional communities, and are open to global participation. In this way, the wide margin of appreciation enjoyed by national authorities in justifying takings of property and deciding relevant compensation provisions may be limited and subject to international supervision.