

# A TRUE 'HUMAN RIGHT'

WHY PROPERTY RIGHTS  
ARE INDISPENSABLE

**TERENCE CORRIGAN**

WITH CONTRIBUTIONS FROM NICHOLAS LORIMER  
AND HERMANN PRETORIUS

*Occasional Report*  
*October 2021*

 **IRR**  
South African Institute of Race Relations  
*The power of ideas*



**October 2021**

Published by the South African Institute of Race Relations (IRR)  
P O Box 291722, Melville, Johannesburg, 2109 South Africa  
Telephone: (011) 482-7221  
© South African Institute of Race Relations

ISSN: 2311-7591

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Editor-in-chief: Frans Cronje

Author: Terence Corrigan

With contributions from Nicholas Lorimer and Hermann Pretorius

Typesetter: Martin Matsokotere

Cover design by Alex Weiss

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# A TRUE ‘HUMAN RIGHT’: WHY PROPERTY RIGHTS ARE INDISPENSABLE

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## Background

‘We are going to take land, and when we take land, we are going to take it without compensation.’ President Cyril Ramaphosa.<sup>1</sup>

Since the beginning of 2018, a central issue in South Africa’s politics has been the drive by the government and the ruling African National Congress (ANC) to institute a policy of expropriation without compensation (EWC). Promoted as a measure to advance land reform and phrased in a vocabulary of redress for historical injustices, it is arguably one of the most important policy developments undertaken since the country’s Constitution was adopted in 1996. Its consequences, meanwhile, stand to go far beyond the farming sector and land ownership – and to manifest in ways that are not always immediately understood.

This policy drive has been one of the signature initiatives of President Ramaphosa’s tenure in office. EWC has generated an enormous debate in South Africa, which has tended to focus on whether it will in fact assist in getting land reform on track, and on the economic consequences of seizing property without compensation.

These are profoundly important issues. Given South Africa’s difficult economic circumstances, vigorous debate is to be expected on anything that threatens (or for that matter expands) its prospects. Indeed, it already has had such an impact. Respected economist Azar Jammine said in a 2019 interview that it was ‘without a doubt’ a significant reason for South Africa’s failure to capitalise on the ascension to office of President Ramaphosa in the form of a ‘Ramaphoria dividend’.<sup>2</sup> Busi Mavuso, CEO of Business Leadership South Africa, said that ‘despite the debate over land reform being much needed, we have undermined confidence in property rights. Nobody makes investments in assets they can’t trust will still be theirs in future’.<sup>3</sup>

Mavuso puts a finger on the larger principle at issue: the principle of property rights.

Property rights may be understood as a legal authority and social sanction to own and use assets. This may be exercised by private interests (individuals, companies and so on), or by public ones (governments and associated entities).<sup>4</sup> It is important to understand that property is distinct from mere possessions. It is possible to exercise control over an asset – be it a shoe, a parcel of land or a company – without legal authority and without the legitimation that societal acceptance confers. As one commentary put it: ‘Strictly speaking, “property” is a general term for the rules that govern people’s access to and control of things like land, natural resources, the means of production, manufactured goods, and also (on some accounts) texts, ideas, inventions, and other intellectual products.’<sup>5</sup>

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1 Quintal, G, ‘“We are going to take land without compensation,” Cyril Ramaphosa says at launch of ANC campaign’, *Business Day*, 18 May 2018.

2 Grootes, S, ‘How land expropriation could work in SA without destroying the economy’, *Financial Mail*, 31 January 2019. <https://www.businesslive.co.za/fm/features/cover-story/2019-01-31-how-land-expropriation-could-work-in-sa-without-destroying-the-economy/>.

3 Mavuso, B, ‘BLSA CEO’s weekly – 15 June’, BLSA, 15 June 2020. <https://hub.blsa.org.za/covid-19/blsa-ceos-weekly-15-june/>.

4 Alchian, AA, ‘Property rights’, *The Library of Economics and Liberty*, undated. <https://www.econlib.org/library/Enc/PropertyRights.html>.

5 Waldron, J, ‘Property and ownership’, in Zalta, EN, *The Stanford Encyclopaedia of Philosophy* (Summer 2020 Edition). <https://plato.stanford.edu/entries/property/>.

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Or, as Zurich University philosopher Professor Francis Cheneval has put it: ‘The property right is the common recognition of a bundle of relations of persons and things. Mutual recognition is a common spiritual act, a “common knowledge” of human beings. It establishes specific relations among people with regard to the allocation of material or intellectual things.’<sup>6</sup>

Property rights have a meaning that goes beyond the economic and material. By invoking the very idea of a ‘right’, there is a suggestion of a firm, inherent entitlement that goes beyond a privilege that those in power might extend at their discretion. They are, therefore, a species of human rights.

This study examines these issues. As South Africa contemplates a major abridgement of property rights, it is important to understand what is at stake. How do property rights interact with other elements of a human rights environment? How do they align with civil liberties and political freedom? This is not a set of considerations unique to South Africa. The African continent as a whole is grappling with these issues. In what follows, the importance of property rights as a human right and as a support for a human rights system is argued.

### Thinking about ‘rights’

The right to hold property is a recognised human right, and is found in international human rights instruments, such as the United Nations’ Universal Declaration of Human Rights. Article 17 of this document reads:<sup>7</sup>

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

The African Charter on Human and People’s Rights includes similar provisions. Article 14 states:<sup>8</sup>

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

In addition, property rights are given some protection in the 1948 American Declaration of the Rights and Duties of Man,<sup>9</sup> and in the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>10</sup> They are also mentioned in the Convention on Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child.<sup>11</sup>

On the face of it, this should be logical and uncontroversial. Property rights protect the owners of property from arbitrary interference in the hold on their assets. They establish property ownership as a natural and positive part of being human. Much of this reflects a largely universal moral injunction against theft. To be secure – as a matter of law and practicality – in the hold one has over one’s assets is a logical condition for individual freedom and in resisting abuse by the more powerful in society.

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6 Cheneval F, “Property rights as human rights” in Cheneval, F and De Soto H, *Realizing Property Rights*, Zürich: Rüegger & Rub, pp. 13-14.

7 United Nations, *Universal Declaration of Human Rights*, 1948. <https://www.un.org/en/universal-declaration-human-rights/>.

8 African Union, *African Charter on Human and People’s Rights*, 1981. <https://www.achpr.org/legalinstruments/detail?id=49#:~:text=The%20African%20Charter%20on%20Human, freedoms%20in%20the%20African%20continent>.

9 Organisation of American States, *American Declaration of the Rights and Duties of Man*, 1948. [https://www.oas.org/dil/access\\_to\\_information\\_human\\_right\\_American\\_Declaration\\_of\\_the\\_Rights\\_and\\_Duties\\_of\\_Man.pdf](https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf).

10 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950. [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

11 Howard-Hassmann, RE, ‘Reconsidering the right to own property’, *Journal of Human Rights*, Vol 12, No 2, 2013, p. 181.

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Indeed, the assertion of property rights as an intrinsic part of the human condition draws on a great deal of philosophy and theology.

Aristotle, for example, wrestled with the question of property, who should own it and to what purposes – with reference to how this contributed to happiness, virtue and the political organisation of society.<sup>12</sup> St Thomas Aquinas, a towering figure in Medieval Catholicism, wrote that while all creation was gifted to humanity by God (and thus on the face of it, private ownership of property was not a natural right), private property was nevertheless defensible on both pragmatic and moral grounds. ‘The individual holding of possessions is not, therefore, contrary to the natural law; it is what rational beings conclude as an addition to the natural law.’<sup>13</sup> The Protestant theologian and reformer John Calvin argued that property and prosperity represented a good that people should receive in gratitude and use wisely.<sup>14</sup> The English philosopher John Locke linked the idea of property to the state of nature, and rights over their ‘persons’, with a corresponding obligation on the part of a government to protect it.<sup>15</sup>

But even within the traditions espoused by these thinkers there is some ambiguity. Religious arguments have typically stressed the moral obligations to God, to society and to the environment that come with property rights (today, this is often rendered as ‘stewardship’). John Locke, often held up as a particularly important defender of property rights, nevertheless saw limits to ownership on the grounds that it was only acceptable to accumulate as much as could be used before it spoiled, and that ‘enough and as good’ needed to remain for others.<sup>16</sup>

Others have gone much further, seeing property and property rights as the core of social systems or, perhaps, better understood as the determinant of social power. Karl Marx’s critique of capitalism rests largely on his view of private property. The *Communist Manifesto* put it thus:<sup>17</sup>

The distinguishing feature of Communism is not the abolition of property generally, but the abolition of bourgeois property. But modern bourgeois private property is the final and most complete expression of the system of producing and appropriating products, that is based on class antagonisms, on the exploitation of the many by the few. In this sense, the theory of the Communists may be summed up in the single sentence: Abolition of private property.

It is notable that property is not presented merely as ownership and assets, but as an expression of social relationships, whose removal is necessary to bring about the millenarian promise of a communist society. It is not necessary to be a doctrinaire Marxist to take from this the kernel of an argument that because ownership of property influences the distribution of wealth and therefore (at least potentially) the quality of people’s livelihoods that it can contribute to injustice. Seen from this perspective, property rights might be regarded less as human rights than potential (or probable) impediments to the attainment of justice – indeed, a hindrance to other human rights.

Nothing less than the property rights provisions in the Universal Declaration of Human Rights were the subject of extensive debate. John Peters Humphrey, the socialist Canadian legal academic who wrote

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12 Miller, FD, ‘Aristotle on property rights’, *The Society for Ancient Greek Philosophy Newsletter*, 1986, 317, 1986. <https://orb.binghamton.edu/cgi/viewcontent.cgi?article=1316&context=sagp>.

13 St. Thomas Aquinas, *Summa theologiae*, The second part of the second part, Question 66, Article 2 (3), 485. <http://www.angelfire.com/ego/staples009/images/18.htm>.

14 Freudenberg, M, ‘Economic and social ethics in the work of John Calvin’, *HTS Theological Studies*, Vol 65, No 1, January 2009. [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S0259-94222009000100072](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0259-94222009000100072).

15 Locke, J, *Two Treatises of Government*, 1690, pp 141, 163. <https://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf>.

16 See Macpherson, CB, *The Political Theory of Possessive Individualism: Hobbes to Locke*, Oxford: Clarendon Press, 1962.

17 Marx, K, and Engels, F, *Manifesto of the Communist Party*, 1848. <http://activistmanifesto.org/assets/original-communist-manifesto.pdf>.

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the first draft of the declaration, was keenly interested in securing the rights of workers to share in the profits and ownership of industry and enterprises. The Latin American delegations wanted property rights qualified by the need to maintain minimum standards of material wellbeing. The Soviet delegation sought to ensure that the notion of ‘property’ would be consistent with its economic system, in which private property was not really possible at all. Hence, at various points, proposals were made to protect ‘personal’ property (for some, drawing a distinction from private property, and for others a minimum for a dignified life that would be afforded heightened guarantees), and for the protection of property to be explicitly linked to the laws of individual countries.<sup>18</sup> The result, reproduced above, was a compromise that recognised the principle of property rights, but allowed for wide interpretation.

In a similar manner, property rights were a central point of contention in South Africa’s constitutional journey. Various interest groups, such as the erstwhile National Land Committee – a body pushing for agrarian reform – demanded the exclusion of property rights from the Constitution altogether. To include them would be to entrench the ‘racially discriminatory results of colonial conquest and apartheid land laws and policies’.<sup>19</sup> To the extent that property would be protected, it would be through ordinary law – though not with a specific constitutional endorsement, and, presumably, not as a human right.

The African National Congress (ANC) was also deeply conflicted about a property clause, and ultimately saw a clause adopted that provided protection from arbitrary deprivation, but was hedged with numerous qualifications that would grant the state a relatively free hand to pursue redistributive policies. These would include, but were explicitly not limited to, land reform, and enjoined the government to pay ‘just and equitable’ compensation when taking property. This logic has come to play a key role in a seminal policy and constitutional debate: the drive towards EWC.

Statist economic development models (a very popular option in some quarters in view of the apparent achievements of the East Asian ‘developmental states’) or the creation of extensive welfare entitlements might posit the need for enhanced latitude for the state to dictate the ownership or use of privately owned assets. There is, the reasoning would go, a higher obligation to ensure societal prosperity, or to ensure a decent standard of living for all, than to protect the property of the affluent. Indeed, the understanding of human rights is an evolving one. Where the idea of human rights might once have been understood to focus primarily on civil liberties and freedoms (so-called first-generation rights), it has increasingly become applicable to socio-economic and environmental matters too (second- and third-generation rights). As these do not always fit seamlessly with one another, it is quite possible to argue for downgrading of property rights (in extreme cases, even their abrogation) in the interests of fulfilling other rights, these being more pressing and more relevant.

From this has flowed the argument that property rights – in the sense of protection from seizure, and a freedom to use one’s assets – should either be redefined to encompass a positive entitlement (reflecting some of the debate around the UNDHR, or the socio-economic rights in South Africa’s Constitution),<sup>20</sup> or that they are not human rights at all.<sup>21</sup>

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18 Morsink, J, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, Philadelphia: University of Pennsylvania Press, 1999, pp. 139-156.

19 Spitz, R, and Chaskalson, M, *The Politics of Transition: A Hidden History of South Africa’s negotiated settlement*, Johannesburg: Witwatersrand University Press, 2000, p. 319.

20 See Mchangama, J, ‘The right to property in global human rights law’, *Cato Policy Report*, Vol. XXXIII, No. 3, May/June 2011. <https://www.cato.org/sites/cato.org/files/serials/files/policy-report/2011/5/cprv33n3-1.pdf>.

21 Hayward, T, *Human Rights vs Property Rights*, Just World Institute Working Paper, No 2013/04, October 2013. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2461207](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2461207).

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Indeed, even though property rights are included in major international human rights instruments, the idea that property rights are dispensable has entered mainstream thinking, including that of international organisations, who have presented it as just the sort of hindrance to the attainment of other rights and entitlements as is outlined above. Stated differently: ‘That the human right to own property is still not deeply entrenched in international human rights law is perhaps because many people see it as a right of the rich.’<sup>22</sup>

One discussion of the question of property rights begins with a succinct and thought-provoking exposition:<sup>23</sup>

One of the more controversial and complex human rights is the right to property. The right is controversial because the very right which is seen by some as central to the human rights concept is considered by others to be an instrument for abuse, a right that protects the ‘haves’ against the ‘have-nots’. It is complex, because no other human right is subject to more qualifications and limitations and, consequently, no other right has resulted in more complex case-law of, for instance, the supervisory bodies of the European Court of Human Rights. It is complex also because it is generally regarded as a civil right, and by some even as an integrity right. At the same time, it clearly has characteristics of social rights with significant implications for the distribution of social goods and wealth. Moreover, the right to property has major implications for several important social and economic rights such as the right to work, the right to enjoy the benefits of scientific progress, the right to education and the right to adequate housing.

### Property rights in Africa

If the conception of property rights is complicated, their operation in Africa is doubly so. While one should be cautious of generalising across the continent’s 54 countries, a number of commonly recurrent issues can fairly be identified.<sup>24</sup>

The first is that most analyses of property rights in Africa are framed around land issues. This is unsurprising given that much of the continent’s population is dependent on agriculture for its livelihood. But land is also a major reference point in a country like South Africa, where the population is close to two-thirds urbanised and where agriculture accounts for only 2% of GDP – as was indicated earlier.<sup>25</sup> This may partly be explained by the social and ideological significance of land: beyond being an economic resource, it plays an important role in culture, and is a powerful signifier of a great deal of the continent’s political heritage.<sup>26</sup> Property rights in general, and rights in property other than land, are underexplored.

The second is that Africa’s countries have multiple institutions and systems governing property holding.<sup>27</sup> Landholding in different parts of a country may be based on Western law introduced by colonial

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22 Howard-Hassmann, op. cit., p. 183.

23 ‘The right to property’, Icelandic Human Rights Centre, undated. <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-property>.

24 This draws on research previously undertaken by the author and published as Corrigan, T, *Space, Soil and Status: Insights from the APRM into the Governance of Land in Africa*, South African Institute of International Affairs, Occasional Paper 229, April 2016.

25 Stats SA, *South Africa: Urbanization from 2009 to 2019*, 13 July 2020. <https://www.statista.com/statistics/455931/urbanization-in-south-africa/>. Stats SA, *Gross Domestic Product*, 1st quarter 2020, 30 June 2020. [http://www.statssa.gov.za/publications/P0441/GDP%202020%20Q1%20\(Media%20presentation\).pdf](http://www.statssa.gov.za/publications/P0441/GDP%202020%20Q1%20(Media%20presentation).pdf).

26 As an illustration of this, South Africa’s 2011 *Green Paper on Land Reform* made the bald assertion that: ‘All anti-colonial struggles are, at the core, about two things: repossession of land lost through force or deceit; and, restoring the centrality of indigenous culture.’ This forms the normative justification for the document’s proposals.

27 Cotula E (ed), *Changes in ‘Customary’ Land Tenure Systems in Africa*, London & Rome: International Institute for Environment and Development & Food and Agriculture Organisation, 2007.



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administrations and subsequently adapted through formal political and legal systems; customary systems, based on established practice, tradition and social mores; and even religious (typically Islamic) law. In many countries, these institutions – particularly formal ones – are weak and ineffective, or politicised. Obtaining documentation, registering property ownership or asserting a right before a court is time-consuming and burdensome, while corruption and general inefficiencies in these systems aggravate the problem.

The third – related to the second – is that Africa’s indigenous systems have been invoked to justify contemporary approaches to economics and property systems. A number of figures in the continent’s first-generation post-independence did so to justify socialist or statist approaches. Julius Nyerere memorably said that Africans were ‘natural socialists’.<sup>28</sup> Similar ideas were invoked by Kwame Nkrumah in Ghana, Kenneth Kaunda in Zambia, and Mobutu Sese Seko in then Zaire. This is a questionable interpretation of African culture. Dr George Ayittey, a renowned Ghanaian economist, has argued convincingly that indigenous African cultures did in fact respect property (in livestock and goods, and in the produce of their labour), and the economic opportunities that this made possible.<sup>29</sup>

Furthermore, a key and very visible failing concerns the ability of women to exercise and enjoy property rights. An extensive body of research and commentary exists on the discriminatory treatment accorded women in property holding. This is often the case even in situations where women are guaranteed formal equality. Entrenched assumptions about gender roles, elements of customary law and a lack of understanding of their rights keeps women in a subordinate position and depriving them of the opportunity to take control of and to benefit from property. (This subject is specifically addressed in separate paper, *@Liberty - Property Rights Belong To All: Women and Property Rights in Sub-Saharan Africa*, published in November 2020.)

The desirability of improved property rights in Africa has been widely recognised, and a respectable body of research and commentary exists on this.<sup>30</sup> It includes a number of reports issued through the African Union’s African Peer Review Mechanism.<sup>31</sup> The concern here is largely pragmatic, following the idea that property rights are useful for driving economic growth and incentivising development. Valuable though this is, understanding property rights as human rights needs to go further.

One way to look at this is to try to understand the relationship between property rights and other elements of a human rights culture. The assumption is that there would be a supporting relationship between them – what might be termed a ‘web of association’.<sup>32</sup>

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28 See Aminzade, R, ‘African Socialism: The challenges of nation-building’, in Aminzade, R, *Race, Nation, and Citizenship in Postcolonial Africa: The Case of Tanzania*, Cambridge: Cambridge University Press, 2013, pp. 135-170.

29 Ayittey, G, *Indigenous African Institutions*, Adrsley-on-Hudson: Transnational Publishers, 1991.

30 For example, Cross, E, ‘The importance of property rights in Africa’, 16 January 2018. <https://www.politicsweb.co.za/opinion/the-importance-of-land-rights-for-africa>; Guest R, *The Shackled Continent: Africa’s Past, Present and Future*, London: Pan, 2005, pp. 73–86.; Lohi, J, ‘Property rights and economic development: the case of Sub-Saharan African countries’, in: Hall, J and Harper, S, (eds) *Economic and Political Institutions and Development*, Cham: Springer, 2019, pp. 61-74; O’Sullivan, M, *Gender and property rights in Sub-Saharan Africa : A review of constraints and effective interventions*, *Policy Research Working Paper*, No. 8250, World Bank, 2017. <https://openknowledge.worldbank.org/handle/10986/28911>.

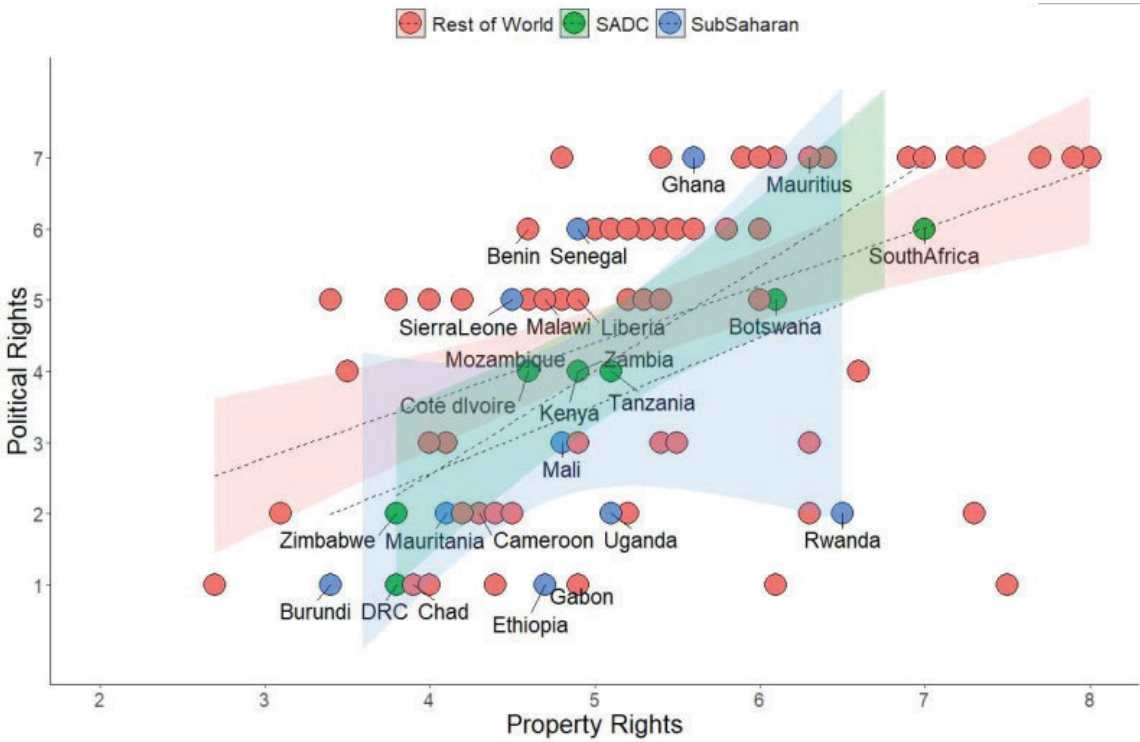
31 The report on Zambia, for example, says: ‘Formal property titles help promote the transfer of land, encourage investment and give entrepreneurs access to formal credit markets. But a large share of property in developing economies is not formally registered. Informal titles cannot be used as security in obtaining loans, which limits financing opportunities for businesses. Many governments have recognised this and started extensive property titling programs. But bringing assets into the formal sector is only part of the story. The more difficult and costly it is to formally transfer property; the greater the chances that formalised titles will quickly become informal again.’ Panel of Eminent Persons, APRM, *Country Review Report of the Republic of Zambia*, APRM Secretariat, January 2013, p. 192.

32 This phrasing is borrowed from Johannes Fedderke, J, and Klitgaard, R, ‘Economic growth and social indicators: An exploratory analysis’, *Journal of Comparative Policy Analysis: Research and Practice*, Vol 8, No, 3, 2006, pp. 283-303.

To probe this, indices representing property rights and important markers of human rights – political rights and civil liberties, chosen as broad proxies for democracy, social and civic freedom<sup>33</sup> – were selected and correlated with one another, globally and specifically in the African and southern African context. The goal was to determine whether such correlations exist, and if so, how significant they might be. This would highlight whether a possible relationship existed. If so, how can it be explained? This analysis is the purpose of the discussions that follow.

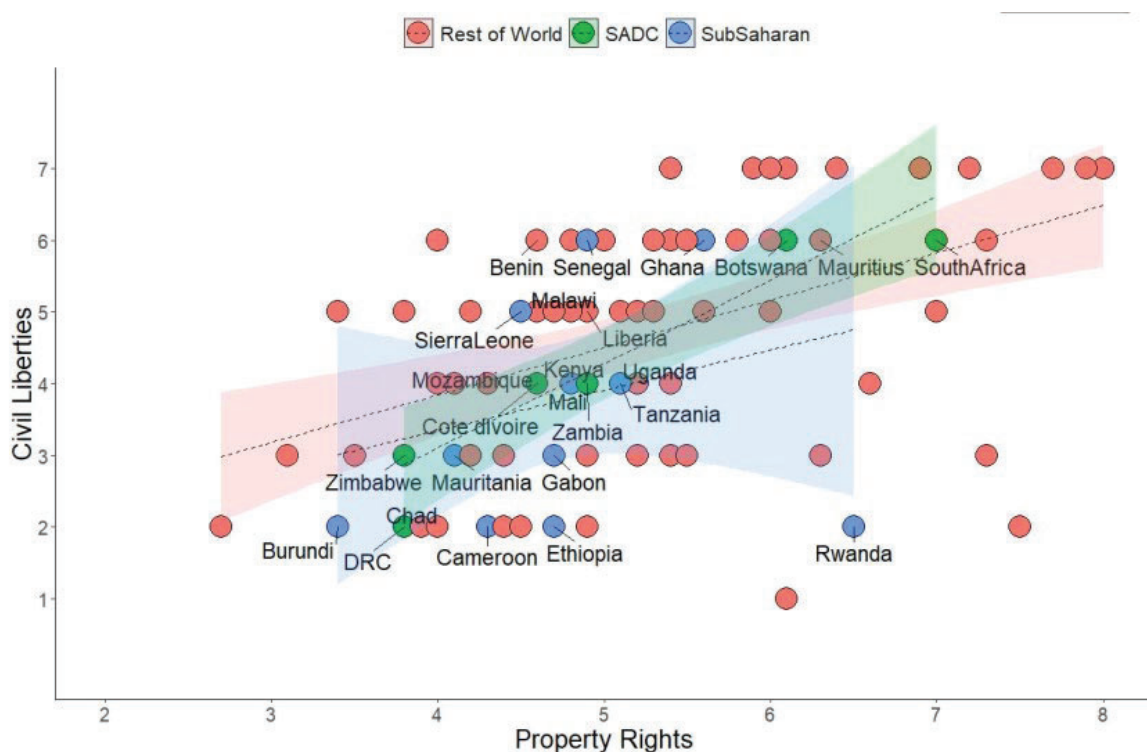
**Property rights, political rights and civil liberties**

Do property rights have a relationship to democracy, as has long been assumed in liberal political thinking? Statistical correlations were sought using data on property rights (the International Property Rights Index) and civil liberties and political rights (both from Freedom House). Correlations were done for the world as a whole, for Sub-Saharan Africa and for the countries of the Southern African Development Community (SADC), although information for some countries was not available, and the small size of the SADC sample made it difficult to draw statistically reliable conclusions. All data used was from 2017, the latest at the time of writing. The results are shown in the scattergraphs below.



In respect of political rights, the correlation for the world as a whole sits at 0.59 and for Sub-Saharan Africa at 0.57. A correlation of between 0.3 and 0.6 is considered moderate, while a score of more than 0.6 is considered strong. In other words, it is possible to infer a generally robust relationship between the two ideas.

33 This exercise was undertaken by Dr Vaughan Dutton.



In respect of civil liberties, the correlation was of the order of 0.61 for the world as a whole, and 0.55 for Sub-Saharan Africa. As with civil liberties, a relationship with property rights appears to exist – globally, a little stronger than is the case for political rights, but for Africa, slightly weaker.

Note that across both of these sets of correlations, an interesting outlier presents itself. This is Rwanda, which performs very well on property rights, but poorly on political rights and civil liberties.

It is important to bear in mind a caveat: statistical correlation does not necessarily indicate causation. Determining that a relationship exists does not explain its nature. One obvious approach to this question is to ask how the deprivation of property rights harms the broader human rights environment, why and how this is done.

### Degrading property rights

A first explanation is essentially pragmatic, in that depriving people or groups of their property is an effective means of repression. Property and the ability to benefit from it are foundational for economic activity – whether this is a plot of land for subsistence agriculture or the ability to run a business. Seizing the assets of troublesome individuals, reducing their ability to support themselves, and threatening impoverishment of their families and communities raises the costs of opposition. Beyond the purely economic realm, threatening the ownership or control of assets may be useful to exercise political control over a population, for example, by interfering in the ownership or operations of media platforms. Freedom of speech, for example, is severely limited if a country’s media is beholden to its government, and opposition groups are prevented from establishing media of their own. Or it may target cultural and religious assets to intimidate those associated with them.

Closely associated with the pragmatic driver is a second, ideological, one. In practice, these will likely be closely related. The impulse to ‘remake’ societies has been a strong one throughout history, and

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particularly so since the Enlightenment. As has already been noted, the Marxist tradition has a hostile view of property and property rights, while nationalist or identarian movements might link property rights to membership of a favoured community.

A third driver is, of course, rank opportunism. Political power can be leveraged to confiscate attractive assets and to pass them on to others. This might be done to reward existing or potential supporters, and to build a support network, or perhaps to disguise deteriorating economic conditions by plundering and redistributing existing assets.

Each of these drivers helps explain why property rights might be limited or abolished, or simply ignored where they exist. (Note, too, that these drivers are not necessarily separate from one another in practice, but often flow into one another). They render property holding less a right than a conditional privilege; confiscating property, or disregarding moral and legal claims on property, is a logical (even justifiable) policy and administrative consequence. It should be borne in mind that the circumstances in which such actions are taken are often marked by severe social ills and injustices, with property seizures being justified in one way or another as a necessary restorative for the presumed greater good.

Historically, this was illustrated by the communist regimes in the 20th century. Typically taking power in societies in which deep-seated and legitimate grievances existed, and after tumultuous traumas (the First and Second World Wars, and the Chinese Civil War), these regimes promised to reorganise society: this was a fundamentally ideological project, and manifested itself in taking landholdings or nationalising industries. Since these regimes also felt themselves entitled to rule as a matter of justice and historical inevitability, and since most felt themselves under some manner of threat (with varying degrees of justification), the taking of property could also be seen as a means of punishing enemies and forestalling resistance. Here would be the pragmatic driver.

In the case of the Soviet Union (and to varying extents its Eastern European satellites), established elites were dispossessed, followed later by the dispossession through collectivisation of its peasantry. In the Soviet Union, the latter took the form of ‘dekulakisation’ – kulaks being a more prosperous and productive class of farmers, who were distrusted by Soviet authorities as politically unreliable – among whose consequences was a widespread famine accompanied by violent state action (remembered in the Ukraine as the *Holodomor*), which claimed millions of lives.<sup>34</sup> Josef Stalin, Soviet leader at the time, expressed the combination of ideology and savage pragmatism thus: ‘We have an opportunity to carry out a resolute offensive against the kulaks, break their resistance, eliminate them as a class and replace their production with the production of *kolkhozes* and *sovkhozes* [collective farms]... Now dekulakisation in the areas of total collectivisation is not just a simple administrative measure. Now dekulakisation is an integral part of the creation and development of collective farms. When the head is cut off, no one wastes tears on the hair.’<sup>35</sup>

What remained of the private sector would be subject to ongoing harassment – in common with other dissenters, against whom eviction, economic and career sanctions could be directed (one analysis mentions that Czech dissidents had typewriters confiscated).<sup>36</sup> Meanwhile, while prospects for personal wealth were limited, material advantages could be had by those holding political and administrative

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34 See Conquest, R, *The Harvest of Sorrow: Soviet Collectivization and the Terror-famine*, New York: Oxford University Press, 1986.

35 Service R, *Stalin: a Biography*, Cambridge (Massachusetts): Belknap Press of Harvard University Press, 2005, pp. 266-267.

36 Sharlet, R, ‘Dissent and repression in the Soviet Union and Eastern Europe: changing patterns since Khrushchev’, *International Journal*, 33, no. 4, 1978, pp. 763-95.

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power, not least opportunities for corruption. As one contemporaneous account put it: ‘There is no escaping the fact that a new ruling stratum has replaced the old ruling classes.’<sup>37</sup>

In the case of Maoist China, initial programmes of moderate land reform gave way to one that prioritised politics over economics. To achieve this, class identities were accorded to rural dwellers, and ‘landlords’ were targeted for ritualised abuse and murder, the numbers of the latter being estimated at one to two million.<sup>38</sup> Shortly thereafter, independent peasants found themselves under attack, their lands forcibly and often violently collectivised, private farming prohibited and cultural practices banned.<sup>39</sup>

On the other end of the ideological spectrum, in Nazi Germany, the persecution of the Jewish population was integrally linked to an assault on their property. As with its communist counterpart, this blended ideology and a pragmatism (at least within its own worldview, seeing Jews as constituting an internal threat). The goal was an ‘Aryanised’ economy servicing a racially pure society, free from corrupting alien influences. Moreover, the confiscation of Jewish property – whether through bureaucratic means or later as a by-product of genocide – provided both the state and various individuals and institutions (including, at times, non-Jewish local populations under German occupation) with material rewards – this being a prime example of the opportunistic and venal driver of deprivation.<sup>40</sup>

This brief discussion is intended to demonstrate how the violation of property rights contributes to an overall violation of political rights and civil liberties. These are prominent historical examples, well attested to by a prodigious record and volume of scholarship. Similar observations are possible in Africa.

The journalist and ‘popular historian’ Paul Johnson has argued that both Africa’s colonial regimes and the independent states that followed freely practiced social engineering in the belief that societies could be organised around political visions.<sup>41</sup> This inevitably led to monstrous abuses and helps to explain the stances towards property.

One of the most obvious examples on the continent was the truncation of the property rights of black people in South Africa. For the present purposes, South Africa’s actions have the advantage of having been interpreted explicitly as the human rights violations they were. This took the form, for example, of restrictions on the ability to purchase landholdings (through the Land Acts) and evictions of black people in accordance with ideologically-driven segregated planning. The latter produced some of the most visible abuses of the apartheid system, such as ‘forced removals’ or the clearance of so-called ‘black spots’. A report in the early 1980s estimated that some 3.5 million people had been so moved up to that point.<sup>42</sup> A minister of the then government admitted to 2 million removals – although he stated that only around a quarter of these were for ‘ideological reasons’.<sup>43</sup> At times, this created opportunities for business or residential opportunities for private beneficiaries from which black people – and certainly the former owners – were excluded. Connected with this was the maze of legal discrimination that closed

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37 Wegs, JR, *Europe since 1945: a Concise History* (2nd edition), London and Basingstoke: MacMillan, 1984, p. 214.

38 Tiewes, FC, ‘Establishment and consolidation of the new regime’, in MacFarquhar, R and Fairbank, JK, *Cambridge History of China, Vol 14, The Peoples’ Republic Part 1: the Emergence of Revolutionary China 1949-1965*, Cambridge: Cambridge University Press, 1987, pp. 86-87.

39 For an account of this see, Thaxton, RA, *Catastrophe and Contention in Rural China: Mao’s Great Leap Forward and the Righteous Resistance in Da Fo Village*, Cambridge: Cambridge University Press, 2008.

40 See Bajohr, F, ‘Aryanisation’ in *Hamburg: The Economic Exclusion of Jews and the Confiscation of their Property in Nazi Germany*, New York and Oxford: Berghahn Books, 2002; Dean, M, *Robbing the Jews: The Confiscation of Jewish Property in the Holocaust, 1933-1945*, New York: Cambridge University Press, 2008.

41 Johnson, P, *A History of the Modern World: from 1917 to the 1990s* (revised edition), London: Weidenfeld and Nicolson, 1991, pp. 519-520.

42 Surplus People Project, *Forced Removals in South Africa*, Cape Town: Surplus People Project, 1983.

43 Leach, G, *South Africa: No Easy Path to Peace*, London: Methuen, 1987, p. 86.

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careers, trades or business opportunities to black people, or sought to prevent or limit their presence in certain areas. These (and other) hindrances undermined the ability of black people to generate the resources to acquire property.<sup>44</sup>

On another level, African people in South Africa have often found themselves denied the opportunity to own fixed property, even in those parts where they were permitted to reside. In urban townships, homes tended to be provided and owned by the local authority (freehold ownership for the most part was only introduced in 1986),<sup>45</sup> for which residents were expected to pay rents. This gave the authorities enormous control over residents' lives. In the country's rural parts, particularly the 'reserves' or 'homelands' – which were set aside for the various African ethnic groups – land was held on a customary basis. This in practice meant that it was under the control of a traditional authority. To an extent this reflected the ideological views of the incumbent white governments, that Africans should live under a culturally specific form of landholding; it also passed considerable powers onto a narrow caste of people to oversee the administration of these parts.<sup>46</sup>

Across the border, in Zimbabwe, land had long been a regularly referenced political issue, specifically the large portion in the hand of white farmers. It appears, though, that whatever role legitimate grievances about land ownership played, the decision to seize farming operations – nominally for redistribution – followed close to two decades of unquestioned control of the state by the ruling ZANU-PF, which has developed a strongly authoritarian streak. It also coincided with a growing crisis among the country's ruling elites, linked to involvement in the civil war in the DRC, long-term economic challenges, and above all the emergence of a substantial political challenge in the form of the Movement for Democratic Change (MDC).<sup>47</sup> The sense that this challenge was supported and financed by white farmers, was seized on to propel ZANU-PF's racial-nationalist narrative. Video footage showing white farmers handing over cheques to the MDC was used for a ZANU-PF advert declaring: 'You have seen who his masters are. Vote wisely. Zimbabwe will never be a colony again.'<sup>48</sup>

The seizure of farms could function as a redistributive endeavour of sorts, as a means to stir up racial nationalist fervour, as political punishment for ZANU-PF's opponents and as a means of sustaining patronage through distribution of the assets so seized. Targeted were not only white farm owners, but also farm workers.<sup>49</sup> This proceeded in tandem with other repressive measures, such as assaults on MDC activists and on the media and a disregard for the country's courts.<sup>50</sup> It also spread from an initial focus on land to other assets, such as funds in bank accounts.<sup>51</sup> The government also turned its attention on ur-

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44 Asmal K, Asmal L and Roberts RS, *Reconciliation through Truth: a Reckoning of Apartheid's criminal governance*, Cape Town and Johannesburg: David Philip Publishers and Cape Town: Mayibuye Books, University of the Western Cape, 1996, pp. 131-142.

45 Olivier, N, 'Property rights in urban areas'. *SA Publikereg/SA Public Law*, Vol 3, Issue 1, Jan 1988, p. 23-33.

46 Du Plessis, WJ, *An Overview of Land Use Management and the Role of Traditional Leaders in terms of SPLUMA*, draft of the paper that was delivered at the 'Traditional leadership and authority versus local government' KAS/NWU conference, Potchefstroom on 13 - 14 September 2018. <http://law.nwu.ac.za/sites/law.nwu.ac.za/files/files/Elmien%20du%20Plessis%20SPLUMA%20and%20TL.pdf>.

47 Hill, G, *The Battle for Zimbabwe: the Final Countdown*, Cape Town, 2003.

48 Willems, W, 'Peasant demonstrators, violent invaders: representations of land in the Zimbabwean press', *LSE Online Research*, 2004, p. 3.

49 Human Rights Watch, *Fast track land reform in Zimbabwe*, Human Rights Watch, March 2002.

50 'Tsvangarai detained in hospital,' Al Jazeera, 13 March 2007. <https://www.aljazeera.com/news/africa/2007/03/200852513203770758.html>; "'Our hands are tied' – erosion of the rule of law in Zimbabwe", Human Rights Watch, 8 November 2008. <https://www.hrw.org/report/2008/11/08/our-hands-are-tied/erosion-rule-law-zimbabwe>.

51 'Zimbabwe banks under threat', *Zimbabwe Independent*, 1 November 2103. <https://www.theindependent.co.zw/2013/11/01/zimbabwe-banks-threat/>.

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ban centres – which were opposition-inclined – forcibly removing households and destroying informal sources of sustenance.<sup>52</sup>

Uganda under Idi Amin, Egypt under Gamal Abdel Nasser and erstwhile Zaire under Mobutu Sese Seko provide further examples. In all three cases, the country's leaders justified their actions in terms of transferring economic control from alien elements to the country's 'indigenous' population – its 'rightful' owners, in an ideological sense. In Uganda, this culminated in the 1972 mass expulsion of the Asian population, and the confiscation of its property. Disparities between the Asian and African populations had been a source of friction, and attempts had previously been made to reduce these, with limited impact. For example, Asian traders had been restricted from operating in the countryside, although they remained competitive enough that urban-based businesses could attract rural custom.<sup>53</sup> However, it should also not be forgotten that under Milton Obote, Amin's predecessor, the government had taken an increasingly interventionist role in the economy, effectively nationalising 60% of the 'means of production' in 1970.<sup>54</sup>

It has also been argued convincingly that Amin's actions stemmed less from economic envy than from a virulent ethno-nationalism. Indeed, the move against the Asian population had been preceded by a comparable move on the Baganda minority in the mid-1960s. The Buganda and Asians in Uganda were not only resented and envied, but fundamentally seen by Amin as outsiders without the (even nominal) protection afforded by the membership of the country's national community. As one scholar has written: 'In such a perception of citizenship, the Ugandan state's policies of Ugandization and Africanization, which antedated the expulsion of the Asians from Uganda, should be looked at as processes of indirect exclusion of the Asian minority on the basis of ethnic discrimination.'<sup>55</sup> Idi Amin and Milton Obote are meanwhile remembered for both their incompetence in government and extraordinary brutality towards their populations.

Egypt – admittedly, not a sub-Saharan African country, but a very revealing case nonetheless – had seen a growing tide of ethnic nationalism since the 1920s, with the country's Jewish minority (composed of Egyptian citizens, foreign nationals and a large number of stateless individuals, consisting of some 80 000 people by the late 1940s) becoming an increasing target of hostility. This was heightened by the foundation of Israel in 1948, and the Suez crisis of 1956. Jews were effectively endorsed out of Egyptian society, with a number of measures that stripped them of legal protections. Among the measures taken were detention, the revocation of citizenship (for those holding Egyptian citizenship), and the seizure of their property and exclusion from the economy.

Commenting on an infamous directive, the Military Proclamation No.4 of 1956, historian Michael Laskier wrote: 'The persons and firms affected by this measure represented the bulk of the economic substance of Egyptian Jewry, the largest and most important enterprises, and the main sustenance, through voluntary contributions, of the Jewish religious, educational, social and welfare institutions in Egypt. The resulting paralysis of these institutions substantially aggravated the uprooting effect of the government's anti-Jewish policies and greatly intensified the pressure for Jews to leave the country.'<sup>56</sup>

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52 'Zimbabwe: "Operation Murambatsvina" – an overview and summary', 18 June 2005. <https://reliefweb.int/report/zimbabwe/zimbabwe-operation-murambatsvina-overview-and-summary>.

53 Jamal, V, 'Asians in Uganda, 1880-1972: inequality and expulsion', *The Economic History Review* Vol 29, No. 4, 1976, p. 613.

54 Mutibwa, PM, *Uganda Since Independence: A Story of Unfulfilled Hopes*, London: Hurst and Company, 1992, p. 70.

55 Amor, M, 'Violent Ethnocentrism: Revisiting the Economic Interpretation of the Expulsion of Ugandan Asians', *Identity: an International Journal Of Theory And Research*, Vol 3, No 1, 2003, p. 60.

56 Laskier, MM, 'Egyptian Jewry under the Nasser Regime, 1956-70', *Middle Eastern Studies*, Vol 31, No 3, 1995, p. 580. pp. 573-619.

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While this measure was rescinded, and some properties taken under it restored, official harassment, encroachment on the civil rights of the Jewish population and further seizures of property (including large-scale nationalisation as part of a programme for socialism in Egypt – this hit both what remained of Egyptian Jewry as well as other minority communities hard) took their toll. By the early 1970s, the Jewish community remaining in Egypt numbered only around 300.<sup>57</sup> (In an echo of this, in 1970, the remnant of Libya’s Jewish community – as well as its Italian community – was stripped of its property.)<sup>58</sup>

In Zaire, a drive to remake the economy in the interests of ‘authenticity’ and ‘zairianisation’ was pursued from the mid-1960s – ‘in an effort to rebuild the economy, Mobutu initiated several laws redefining property rights’, in the words of one commentary.<sup>59</sup> This involved nationalising land, and confiscating foreign-owned businesses, with the latter going to politically-connected insiders. Such compensation as was offered, was generally not honoured. The recipients of this largesse were typically unable to run these enterprises effectively, and they fell into ruin.<sup>60</sup>

Zaire became a byword for venality in government, as Mobutu consolidated his power. Constitutional changes institutionalised a one-party system and a cult of personality built around Mobutu. Even churches were to proclaim it. The security services were vastly expanded, but often left to their own devices to plunder from the population.<sup>61</sup> In the post-Mobutu era, it has been reported that many of these pathologies continue.<sup>62</sup>

In Tanzania, an effort was made to build a socialist society, based on the philosophy of *Ujamaa*, variously described as ‘familyhood’ or ‘African socialism’. The driving force behind this was the ideological vision of its president and founding father, Julius Nyerere. A formidable intellectual and respected statesman – and, in comparison to many of the autocrats of the 20th century, a relatively bloodless and (personally) scrupulously honest one – he nonetheless maintained a firm grip on his country and tolerated little opposition.

The flagship of the programme was the collectivisation of agriculture, in what was termed ‘villagisation’. Initially this was to be achieved by persuasion, but in the early 1970s, the government turned to force to achieve this. The scale at which people were moved, which was accompanied at times by the destruction of households’ property, almost certainly exceeded in scale even the forced removals in South Africa.

Says one study: ‘The villagisation process and rural development approach, *ujamaa*, was implemented with such unclear goals, haste, and at some point violent coercion that it was unlikely to bring short-term improvements in the rural economy. In fact, the villagisation settlement policies were highly criticized and blamed for undermining the economic progress of newly created communities. The reform however marked a shift on the land tenure system in the new villages as customary land rights were extinguished.’<sup>63</sup>

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57 Laskier, *Ibid*, pp. 573-619.

58 ‘Property of Italians and Jews confiscated by Libyan regime’, *New York Times*, 22 July 1970. <https://www.nytimes.com/1970/07/22/archives/property-of-italians-and-jews-confiscated-by-libyan-regime.html>.

59 Emizet, KNF, *Zaire after Mobutu: a case of a humanitarian emergency*, *Research for Action* 32, World Institute for Development Economics Research, 1997, p. 9.

60 Wrong, M, *In the footsteps of Mr Kurtz: living on the brink of disaster in Mobutu’s Congo*, New York: Harper Collins, 2000, pp. 96-99.

61 Emizet, *op. cit.*, pp. 28-30.

62 *Mail and Guardian*, ‘Mobutu’s looters get looted by Kabila’, *reliefweb*, 26 November 1997. <https://reliefweb.int/report/democratic-republic-congo/mobutus-looters-get-looted-kabila>.

63 Makamu, F, ‘Land Reform, Property Rights and Private Investment: Evidence from a Planned Settlement in Rural Tanzania’, November 2016. <https://ideas.repec.org/jmp/2017/pma2460.pdf>.



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Nor were the concerns confined to the process of population removals. A comparative study of villagisation processes – in Ethiopia, Mozambique and Tanzania, each of them motivated in some way by ideology – is revealing in this regard. Not only was a significant degree of coercion used in enforcing population movements (although this varied both among and within the countries), but the lack of planning imposed considerable hardships on those so moved. The process caused considerable resentment by depriving people of lands and housing that had previously been regarded as ‘theirs’ – both from the point of view of those who were relocated, and those onto whose previous holdings these movements were effected. Furthermore, in each of these cases, the village structures operated as a means of control and monitoring of the population – and, in the case of Ethiopia, even for conscripting soldiers. In Mozambique, the similarities between the village schemes and those used by the Portuguese as a means for combating the colonial-era insurgencies were politically embarrassing.<sup>64</sup>

The political use (and abuse) of property as pressure points is visible in many other contexts. In Ghana in the later 1970s, the vibrant market culture came under attack by the country’s military government, with allegations that the traders – the country’s ‘market women’ – were responsible for the country’s dire economic circumstances. Thus scapegoated, they were evicted, the markets destroyed and some of them subjected to harsh and degrading punishments.<sup>65</sup> Recent research into state approaches towards informal trading in Accra in Ghana, Dakar in Senegal and Lusaka in Zambia – particularly what drives ‘crack-downs’ – argues that it is motivated in large measure by political considerations and power balances at a given point.<sup>66</sup> In some places, such as Burundi<sup>67</sup> and Egypt,<sup>68</sup> the confiscation of property has functioned as a penalty for political opponents. And confiscation of property and the limitations of rights to it has been used to harass cultural minorities, as in the seizure of properties owned by Christian churches in Sudan (the bodies responsible for this have been abolished since the fall of President Omar al-Bashir)<sup>69</sup> or restrictions on the building and maintenance of churches in Egypt, something that is widely viewed as a means of humiliating the country’s Coptic Christian minority.<sup>70</sup>

While the above examples illustrate how venal, ideologically fixated or otherwise intrusive governments have abused the property rights of people under their jurisdiction, it should be borne in mind that millions of Africans are vulnerable to such abuses because they lack actionable property rights to their holdings.

Ironically, an example of this is post-apartheid South Africa. Despite the transition to democracy, and South Africa’s generally strong property rights protections, elements of the pre-democratic area thinking remain. State provision of housing has often been done without the transfer of ownership. Recipients

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64 Lorgen, CC, *The Experience of Villagisation: Lessons from Ethiopia, Mozambique, and Tanzania*, Oxfam-GB, January 1999. [https://pdfs.semanticscholar.org/fbca/e2ef1f80e7511699d06acc3e7e450d1dfe7d.pdf?\\_ga=2.68745681.1535215810.1596534450-1012757248.1593247209](https://pdfs.semanticscholar.org/fbca/e2ef1f80e7511699d06acc3e7e450d1dfe7d.pdf?_ga=2.68745681.1535215810.1596534450-1012757248.1593247209).

65 Harrell-Bond, B, *Women and the 1979 Ghana Revolution*, American Universities Field Staff Reports, No 4, 1980. <http://www.icwa.org/wp-content/uploads/2015/09/BHB-13.pdf>; Yeebo, Y, ‘Ghana’s market women were once so powerful that they were targeted by the military’, *The World*, 5 January 2016. <https://www.pri.org/stories/2016-01-05/ghana-s-market-women-were-once-so-powerful-they-were-targeted-coup>.

66 Resnick, D, ‘The politics of crackdowns on Africa’s informal vendors’, *Comparative Politics*, Vol 52, No 1, October 2019, pp. 21-51.

67 ‘Burundi to seize property of government critics’, *Africanews*, 17 May 2019. <https://www.africanews.com/2019/05/17/burundi-to-seize-property-of-govt-critics/>.

68 Khalid, M, ‘Egypt’s emboldened military courts’, Carnegie Endowment for International Peace, 23 June 2020. <https://carnegieendowment.org/sada/82146>.

69 Smith, S, ‘Sudan abolishes Islamist committees formed to confiscate church properties’, *Christian Post*, 19 March 2020. <https://www.christianpost.com/news/sudan-abolishes-government-committees-that-confiscated-church-properties.html>.

70 ‘Egypt: new church law discriminates against Christians’, Human Rights Watch, 15 September 2016. <https://www.hrw.org/news/2016/09/15/egypt-new-church-law-discriminates-against-christians>.

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acquire shelter, but not property. It also creates the conditions for corruption. In the erstwhile homelands, change has been even more conspicuously absent, with freehold ownership generally not possible. This impacts millions of people. Indeed, the largest single landholder in the country is the Ingonyama Trust, which incorporates the territory of the erstwhile KwaZulu homeland and under the trusteeship of the Zulu monarch. It has attracted unfavourable public attention for the lack of transparency of its operations, the paucity of benefits it gives to its tenants and the sometimes abusive behaviour of those in authority.<sup>71</sup>

There seems little prospect of this being altered anytime soon. Proposed legislation – the derisively nicknamed ‘Bantustan Bills’ – would see the powers of traditional leaders affirmed.<sup>72</sup> This is clearly in deference to the power they wield, which the ruling party would find uncomfortable to contend with.<sup>73</sup> Government itself is committed to a statist view of property holding in its land policies. While some recognition has been given to the desirability of individual freehold (although mostly in a non-committal manner), the government’s land redistribution plan calls for state ownership of landholdings, with a possible option to purchase being available for those farming on a substantial commercial basis, and then only after an extended period of effective probation.<sup>74</sup> Investigations into the functioning of such schemes have revealed collusion between officials and business interests, and the exclusion of the schemes’ nominal beneficiaries from meaningful property rights.<sup>75</sup>

Indeed, a highly publicised court case saw a black commercial farmer, David Rakgase, taking the government to court to compel it to honour an agreement to sell him the farm he was working. Government’s papers declared boldly that its policy was based on the ‘principle that black farming households and communities may obtain 30-year leases, renewable for a further 20 years, before the state will consider transferring ownership to them.’<sup>76</sup>

It might further be noted that one possible outcome of the EWC drive in South Africa is the effective nationalisation of all land, making the state ‘custodian’.<sup>77</sup>

Finally, there is the question of land grabs. The seizure of land from households or communities with long-standing attachments (often meaning the loss of homes and goods as well) is a burning issue, with particularly adverse consequences for the poorer members of affected communities. This is typically justified by a variant of the ‘public interest’ argument – usually for developmental or investment

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71 Hopkins, R, ‘How communities are defying the Ingonyama Trust’s land grab’, *Financial Mail*, 7 November 2019. <https://www.businesslive.co.za/fm/features/cover-story/2019-11-07-how-communities-are-defying-the-ingonyama-trusts-land-grab/>.

72 Claasens, A, “‘Bantustan bills’ trample on the rights of rural people’, *Daily Maverick*, 4 November 2019; <https://www.dailymaverick.co.za/article/2019-11-04-bantustan-bills-trample-on-the-rights-of-rural-people/#gsc.tab=0>. Mthembu, Z, ‘Bantustan act threatens hard-won property rights for rural dwellers’, Free Market Foundation, 17 January 2020. <https://www.freemarketfoundation.com/Article-View/bantustan-act-threatens-hard-won-property-rights-for-rural-dwellers>.

73 Friedman, S, ‘Traditional leadership bill an ANC Trojan Horse’, *biznews*, 9 November 2017. <https://www.biznews.com/thought-leaders/2017/11/09/traditional-leadership-bill-anc>.

74 Department of Rural Development and Land Reform, ‘Green Paper on Land Reform’, *Government Gazette* No 34607, 16 September 2011. [https://www.gov.za/sites/default/files/gcis\\_document/201409/34607gen6390.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/34607gen6390.pdf). While the paper proposed an effective 50 year period before transfer could be considered, this has reportedly been reduced to five years – although without the latter change having been publicised. (Mtero, F, Gumede, F, and Ramantsina, K, *Elite Capture in Land Redistribution in South Africa*, PLAAS, Research Report 55, p. 14.)

75 Hall, R and Keep, T, ‘Elite capture and state neglect: new evidence on South Africa’s land reform’, *Review of African Political Economy*, Vol 44, Issue 151, 2017, pp. 122-130.

76 Maughan, K, ‘Rakgase case exposes state’s incoherent land redistribution policy’, *Businesslive*, 30 April 2019.

77 See Masondo, D, ‘A case for uncompensated land expropriation – lessons from history’, *News24*, 31 August 2018. <https://www.news24.com/news24/columnists/guestcolumn/a-case-for-uncompensated-land-expropriation-lessons-from-history-20180831>.

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purposes. Studies of the issue show how these eviction processes often utilise colonial-era legal and administrative tools, arise from the failure of developmental initiatives and are propelled by corruption.<sup>78</sup>

As has been noted previously, administrative systems are weak, and gaining ownership – particularly formal, titled ownership of land – is in many countries an insufferably difficult task.<sup>79</sup> The seizure of the land of people without wealth or influence is frequently abetted by elites who are able to profit from their positions (essentially the phenomenon of ‘elite capture’), or who use seizures to reward supporters and punish dissidents. In a well-known case in South Africa, at Xolobeni in the Eastern Cape, a proposed mining development (in which a traditional leader was reportedly involved) was vigorously rejected by much of the local community. The contestation ground on for years, with a number of deaths attributed to it. Revealingly, when in 2018 the Pretoria High Court ruled that the minister of mineral resources needed to obtain ‘full and formal consent’ from the community before issuing a mining right to a company, the minister indicated that he intended to challenge the judgment on the grounds that it would undermine the authority of the state – the custodian of mineral resources in South Africa – to issue licences.<sup>80</sup>

For example, a study of the phenomenon in Sierra Leone indicated that displacement in the course of rutile mining operations caused severe losses and socio-economic dislocation, although traditional leaders (especially the more senior among them) benefited from payments from mining companies and from resettlement land allocations. Political standing appeared to have trumped considerations of equitable treatment for losses suffered.<sup>81</sup>

All of this is, in some way, a matter of property rights, whether they exist – and in what form – whether they can be asserted and whether they are respected. Too often, this has not been the case in Africa.

### So why property rights?

The abuses outlined above provide a stark warning against downplaying the importance of property rights. If the deprivation of property rights has proven to be damaging to the overall human rights environment, what can be said of the positive case for them? It has already been shown that a fairly strong correlation exists between democracy and civil rights and property rights – but how can this be explained?

One answer is simply that countries and regimes with a recognition of the importance of democracy and human rights invariably see property as being part of an overall governance and administrative structure. Crucially, such societies and the political orders that prevail will recognise limits to the reach of the state. People may exist and conduct their affairs in what have been described as ‘zones of freedom and autonomy’,<sup>82</sup> which implies relative freedom from the control of the state and other interests, and

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78 Ocheje, PD, “‘In the public interest’: forced evictions, land rights and human development in Africa”, *Journal of African Law*, Vol 51, No 2, 2007, pp. 173-214; Schoneveld, GC, ‘Host country governance and the African land rush: 7 reasons why large-scale farmland investments fail to contribute to sustainable development’, *Geoforum*, Vol 83, July 2017, pp. 119-132.

79 Corrigan, op. cit., pp. 22-30.

80 Magubane, K, ‘Mantashe: Government appealing Xolobeni ruling to prevent ‘chaos’ in mine licensing’, *Fin24*, 4 February 2019. <https://www.news24.com/fin24/Special-Reports/Mining-Indaba/mantashe-government-appealing-xolobeni-ruling-to-prevent-chaos-in-mine-licensing-20190204>; Claasens, A, ‘Xolobeni community being coerced into giving up land rights’, *Businesslive*, 27 February 2019. <https://www.businesslive.co.za/bd/opinion/2019-02-27-xolobeni-community-being-coerced-into-giving-up-land-rights/>; Ledwaba, L, “‘We will not give up’: Tension rises as Xolobeni community vows to fight mining”, *City Press*, 9 April 2019. <https://www.news24.com/citypress/news/we-will-not-give-up-tension-rises-as-xolobeni-community-vows-to-fight-mining-20190409>.

81 Wilson, SA, ‘Mining-induced displacement and resettlement: The case of rutile mining communities in Sierra Leone’, *Journal of Sustainable Mining*, 19, 2019, pp. 67-76.

82 Barros, DB, ‘Freedom and property’, *New York University Journal of Law and Liberty*, Vol 4, No 36, pp. 36-69.

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that when they intrude, they need proper justification for doing so. Seen from this perspective, property rights are valuable as they construct such as zone; to quote Professor Cheneval again: ‘The general right to property is based on the idea of self-responsibility and autonomy of the human being.’<sup>83</sup> Indeed, it has been argued that property rights enable people to express fully their very personhood.<sup>84</sup> Such an order would also acknowledge that at times the people under the authority of the state may require protection from its own excesses. The large-scale social engineering and abuses described above would be incompatible with this thinking.

Related to this is the question of democratic bargaining between the state and those subject to it. If revenue is raised by taxation, so this line of thought goes, citizens can be empowered to demand better and more accountable governance, while the state will be more inclined to concede this – certainly more than it would be if it was drawing its revenue primarily from resource rents or from foreign aid. Statistical analysis published by the UK-based Overseas Development Institute, looking at 47 countries in sub-Saharan Africa, identified such a linkage – although cautioning that it was not the case for every country.<sup>85</sup>

To the extent that property rights encourage private wealth creation, and protect the assets in which this is invested, they assist in creating an environment within which taxes are not only a desirable source of revenue for governments, but one which is accessible only with the consent of their holders.

It may well be no coincidence that another analysis of the possible impact of taxation on governance in Africa focused on the case of Mauritius – which has ‘learned how to tax long ago and over time, built a “virtuous circle” weaving together taxation, capacity, representation, and accountability.’<sup>86</sup> Mauritius, as is illustrated above, performs well in respect of property rights, political rights and civil liberties.

Canadian social scientist Rhoda Howard-Hassmann has argued for recognising property rights as human rights on two interrelated grounds. Her words are worth quoting: ‘My own preliminary defense of the human right to own property is grounded in the strategic and intrinsic values of the right. Strategically, the right to own property helps people to realize their economic human rights, such as freedom from hunger, and also assists in development. Intrinsically, everyone needs the right to own property in order to preserve their human dignity.’<sup>87</sup>

Thus, property rights are valuable for the rights they help sustain – echoing the idea of a ‘web of association’ – as well as in their own right for what they protect and why they do so. She goes on to illustrate this by reference to the consequences of attacks on property rights in Zimbabwe and Venezuela. The concerns match those raised in this paper, and of Africa’s experience.

### ***A looming challenge?***

Having discussed the importance of property rights for Africa, mention should be made of the case of Rwanda. Widely held up as a continental success story,<sup>88</sup> it has worked to diversify and modernise its economy, encouraged investment and entrepreneurship, invested heavily in infrastructure and made

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83 Cheneval, op. cit., p. 14.

84 Radin, MJ, ‘Property and personhood’, *Stanford Law Review*, Vol 34, No 5, May 1982), pp. 957-1015.

85 Dom, R, *Taxation and accountability in Sub-Saharan Africa: new evidence for a governance dividend*, ODI Working Paper 544, December 2018. <https://www.odi.org/sites/odi.org.uk/files/resource-documents/12568.pdf>.

86 Bräutigam, D, *Building Leviathan: Revenue, State Capacity and Governance*, IDS Bulletin, Vol 33, No 3, 2002, p. 18.

87 Howard-Hassmann, op. cit., p. 183.

88 See, for example, Ruhumuliza, GN, ‘Kagame’s Rwanda is still Africa’s most inspiring success story’, Aljazeera, 21 October 2019. <https://www.aljazeera.com/indepth/opinion/kagame-rwanda-africa-inspiring-success-story-191021095141166.html>.

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great progress in reforming its business environment. Among the latter has been a large-scale land tenure reform and registration programme, which observers have praised for its execution and outcomes in enhancing tenure.<sup>89</sup> The results of this have delivered an annual growth rate that has generally exceeded 5% since 2000.<sup>90</sup>

In addition, Rwanda has put a great deal of effort into legislating and promoting gender equality, particularly with regard to land and property ownership. This too has been commended, even if the impact of these measures remains limited.<sup>91</sup>

The upshot is that in terms of the property rights offered, Rwanda performs extremely well within the continental context and competitively within the global context.

Its environment from a human rights perspective is less positive. Freedom House ranks Rwanda as ‘not free’, and its 2019 report contains a litany of disturbing claims of media suppression, political repression and even the assassination of opponents.<sup>92</sup>

The point to be realised here is that while property rights are a human right, they are also useful as economic instruments. Authoritarian states have realised that coercion is not a durable overall governance strategy, even if it remains an option. Rather, it is necessary to encourage the acquiescence of the population, and where developmental issues are at stake, there is no better strategy than facilitating personal and societal prosperity. This has been termed ‘performance legitimacy’.<sup>93</sup> Enhancing property rights as an economic enabler, while attempting to delink them from their political implications, would be an obvious strategy.

Internationally, this is illustrated by China. In 2016, the Central Committee of the Communist Party of China and the State Council announced measures that were to be introduced to enhance property rights. The effect would be to ‘raise people’s sense of wealth security, boost social confidence, foster positive expectations and raise the impetus for entrepreneurship and innovation by various economic entities.’<sup>94</sup> This responded to very real grievances felt by Chinese people and firms operating in the country. But it came as China, under President Xi Jinping, was tightening up repressive measures in the country.<sup>95</sup> China has even used the destruction of property as a political show of force – as in demolishing churches and shrines as part of a strategy to ‘sinicise’ Christianity in the country and neutralise it as a possible locus of opposition.<sup>96</sup>

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89 African Natural Resources Center and African Development Bank, *Land Tenure Regularization in Rwanda: Good Practices in Land Reform*, Abidjan: African Development Bank, 2016. [https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/anrc/AfDB\\_RwandaLandReform\\_FA.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/anrc/AfDB_RwandaLandReform_FA.pdf).

90 World Bank, *GDP growth (annual %) – Rwanda*, undated (accessed 6 August 2020). <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=RW>.

91 Bayisenge, J, Höjer, S, and Espling, M, ‘Women’s land rights in the context of the land tenure reform in Rwanda – the experiences of policy implementers’, *Journal of Eastern African Studies*, Vol 9, No 1, 2015, pp. 74-90.

92 Freedom House, *Freedom of the World 2020 – Rwanda*, undated. <https://freedomhouse.org/country/rwanda/freedom-world/2020>.

93 Zhu, Y, ‘“Performance legitimacy” and China’s political adaptation strategy’, *Journal of Chinese Political Science*, Vol 16, 2011, pp. 123-140.

94 Hsu, S, ‘China is finally improving property rights protections’, *Forbes*, 30 November 2016. <https://www.forbes.com/sites/sarahhsu/2016/11/30/china-improving-property-rights-protections/#592af4626e5c>.

95 Campbell, C, ‘Five Ways China Has Become More Repressive Under President Xi Jinping’, *Time*, 6 October 2016. <https://time.com/4519160/china-xi-jinping-cecc-human-rights-rule-of-law/>.

96 Catholic News Agency, ‘Chinese Catholic Church demolition is latest in series of church bulldozings’, *Crux*, 5 August 2018. <https://cruxnow.com/global-church/2018/08/chinese-catholic-church-demolition-is-latest-in-series-of-church-bulldozings/>; Kuo, L, ‘In China, they’re closing churches, jailing pastors – and even rewriting scripture’, *The Guardian*, 13 January 2019. <https://www.theguardian.com/world/2019/jan/13/china-christians-religious-persecution-translation-bible>.

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## Concluding observations – reorienting the conversation

In a book published in 1996, Professor Kader Asmal – a long-time political activist, legal academic and then minister in the country’s first democratically elected government – together with two co-authors, wrote that ‘the deprivation of property rights is a form of serious human rights abuse.’<sup>97</sup> This is correct. Prof Asmal’s concern would have been with the deprivation of property rights under apartheid; they are no less serious a matter under a democratically- or constitutionally-constituted government. Property rights are a human right, and an important part of a human rights culture.

Property rights deserve assertion and protection. This study has shown just how the abuse or disregard of property rights cause suffering and are related to the violation of any number of other rights. It should be a matter of concern to all who are concerned about human rights and democracy that their status as such is often questioned. In line with the arguments presented here, Jacob Mchangama, a prominent Danish human rights academic and lawyer, crisply provides an answer (albeit one germane in substance to 2011):<sup>98</sup>

The hostile approach to private property among human-rights defenders is a major hindrance toward securing respect for the fundamental rights and freedoms set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as for ameliorating poverty. The intimate relationship between the right to property and freedom and prosperity is well supported by various studies. All but one of the countries ranked in the top 10 of the 2010 International Property Rights Index also rank as ‘free’ (with the best possible score) in Freedom House’s 2010 ‘Freedom of the World’ survey of civil and political freedom. Conversely, of the countries ranked in the bottom 10 of the IPRI, none rank as ‘free.’ Seven are ranked as ‘partly free’ (including countries with widespread human-rights violations such as Venezuela, Bolivia, and Bangladesh). And three are ranked as ‘not free’ (Zimbabwe, Chad, and Cote D’Ivoire).

Property rights are abandoned at the peril of the overall rights culture. This is a recognition that is all too often absent when property rights are discussed. There is a pressing need for those concerned about property rights to reorient the discussion from a purely economic perspective – important though this is – to one which encompasses rights-based thinking, and the socio-political dimensions of property rights. Those who recognise the importance of property rights would do well to devote attention to these aspects.

From this would also flow the argument that property rights are not mere defenders of present – and unjust – endowments. Nor are they for the affluent alone. The African experience demonstrates that it is frequently the small-scale property of the less affluent that is seized where property rights protections are weak. The loss of a few acres of land, a few head of livestock and so on may be devastating to those who have suffered it. This is paralleled elsewhere in the world.<sup>99</sup> Properly conceived, property rights can help fortify the weak against the strong. The case for property rights is one that needs to be taken to the public and aggressively pushed.

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97 Asmal et al, p. 142.

98 Mchangama, op. cit., p. 7. <https://www.cato.org/sites/cato.org/files/serials/files/policy-report/2011/5/cpv33n3-1.pdf>.

99 For example, in preparation for the 2014 FIFA World Cup in Brazil, expropriations targeted low-income and informal settlements, apparently with little regard for the interests of those affected; one report noted that this was very different from what might happen with more affluent communities: ‘This situation is in contrast to what happens when middle class properties are expropriated, and all legal procedures are followed, including proper individual notifications, possibility for negotiation of compensation values, and formalization of agreements.’ (Report from the National Coalition of Local Committees for a People’s World Cup and Olympics, *Mega-Events and Human Rights Violations in Brazil*, June 2012, p. 25. <http://rioonwatch.org/wp-content/uploads/2013/05/2012-World-Cup-Olympics-Dossier-English.pdf>.)

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That being said, arguments for property rights are unlikely to be convincing unless they can demonstrate just how they might benefit each person individually, particularly those who feel themselves excluded from it. It is, after all, in the name of such people ('the poor', the 'poorest of the poor') that opponents of property rights phrase their appeals. This has, for example, been a large part of the argument in favour of the South African government's EWC drive.

A concern for property rights, if it is to be politically convincing, must also express an interest in the material wellbeing and the opportunity for others to acquire it. So, concern for the circumstances of the less affluent, their prospects for mobility and their ability to acquire property is an important part of the conversation. So is recognition of past injustices. Redistribution and (where appropriate) restitutionary processes may be supported – on the merits of any given case – on both moral and pragmatic grounds, but they should be geared at producing better property rights. This has often not been the case. The denial of property rights in the name of social justice to empower the state is a danger that must be resisted. Indeed, who might have thought at the dawn of South Africa's democracy, that a democratically elected government would take to the courts to deny a black farmer title to land he had been using proficiently? Unfortunately, faith in the benevolence of that state has been central to much of the EWC debate in South Africa; the Institute of Race Relations' response has been to propose alternatives that are friendly to property rights.<sup>100</sup>

The latter point also reminds one that property rights are linked to other rights and circumstances. These include education, movement and trade. They and the extent to which they can be acted upon must be borne in mind too.

It is furthermore crucial to recognise that while property rights are valuable in their own right, authoritarians have seen their value, and have attempted to co-opt them. Property rights may be viewed as one pillar among several in a human rights culture; and for this reason, other elements of that culture must be supported as well.

Finally, what then for property rights in Africa?

Upgrading and fortifying property rights should be a central concern for the continent and its people, and not just as a means of spurring development. This will be no easy task.

The question of land rights is at the forefront of this. While the idea of formalisation of title is appealing, it is a long-term goal given the administrative shortcomings in many states. The importance of rights established through the passage of time ('customary', 'accumulated', 'traditional' and so on) has come to be increasingly recognised. So has the importance of the informal market in land. These include measures such as the issuing of Customary Landholding Certificates in Zambia or *petits papiers* in Madagascar.<sup>101</sup> Though positive developments in safeguarding the rights of those who enjoy them, there is a great deal of evidence that the protection they offer is far from complete, or indeed satisfactory.

Besides, whether one is talking specifically about property rights or about the human rights culture as a whole, legal provisions alone will in all likelihood not decisively alter the continent's day-to-day realities. In Zimbabwe, as an illustration, the government simply ignored court orders and the judgment

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100 Jeffery, A, *Reaching the Promised Land: An Alternative to the Report of the Presidential Advisory Panel On Land Reform And Agriculture*, @Liberty, Issue 44, September 2019. <https://irr.org.za/reports/atLiberty/files/liberty-issue-44-reaching-the-promised-land-18-09-2019.pdf>.

101 Corrigan, op. cit., pp. 23-31.

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from the Tribunal of the Southern African Development Community when its stance on land invasions was challenged.<sup>102</sup> It was effectively supported in its position by the other regional governments when the SADC Tribunal was limited to hearing disputes between states, and shortly thereafter disbanded.<sup>103</sup>

A distinct change in the posture of many of Africa's governments, states and the overall political culture would be necessary. Writing on the issue of evictions, Professor Paul Ocheje has argued:<sup>104</sup>

Changing the law alone is not an assurance for social change; rather the environment which has legitimised the inequitable treatment of the poor in Africa's urban and rural areas must be changed as well. Authoritarian laws, opaque and exclusive systems of administration, and the associated corruption are all part of the political environment in which inappropriate planning laws have found accommodation.

In other words, the challenge is to shift legislation, policy and attitudes around the question of property rights, recognising them as a core part of a human rights environment, and a defence against unwarranted state intrusion. This will only be possible through sustained argument and activism, and making the case repeatedly, sometimes to sceptical audiences – but probably more often to those who would agree on the basis of their own life experience. It is a principle that should not be surrendered.

Where threats loom, as in the case of South Africa's pending EWC regime, it is imperative to resist. When South Africa's president says that 'when we take land, we are going to take it without compensation', he is speaking within the framework of a grave historical wrong. But what he proposes echoes similar measures undertaken across the world and across history, and which brought disaster with them. The consequences of doing so would be severe indeed, and these would extend far beyond the economy.

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102 Hill, op. cit., p. 109; *Mike Campbell and Others v. Republic of Zimbabwe*, SADC (T) No. 2/2007. <https://www.escri-net.org/caselaw/2010/mike-campbell-and-others-v-republic-zimbabwe-sadc-t-no-22007>.

103 Nathan, L, 'The disbanding of the SADC Tribunal: a cautionary tale', *Human Rights Quarterly*, Vol 35, No 4, November 2013, pp. 870-892.

104 Ocheje, op.cit., p. 212.





South African Institute of Race Relations  
*The power of ideas*

(011) 482 7221  
[info@irr.org.za](mailto:info@irr.org.za)  
[www.irr.org.za](http://www.irr.org.za)