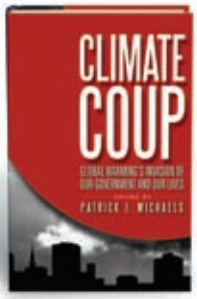
SEN. RAND PAUL
Talks policy and politics at Cato Benefactor Summit
PAGE 4

GARRY KASPAROV
Chess champion and freedom activist visits Cato
PAGE 5



CLIMATE COUP
Exposing alarmism's reach
PAGE 17

Cato Policy Report

May/June 2011 Vol. XXXIII No. 3

The Right to Property in Global Human Rights Law

BY JACOB MCHANGAMA

"Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property." So declares article 17 of the 1948 Universal Declaration of Human Rights. However, the right to property was seen as extremely controversial by several of the states that drafted the UDHR. The controversy reflected the ideological divide of the Cold War, between democratic and capitalist countries on one side, and non-democratic socialist states, as well as certain developing states, on the other.

Unfortunately, suspicions about private property as a fundamental human right survive to this day, to the detriment of the coherence of human rights as a guiding political concept, and of fundamental freedoms and prosperity.

The first draft of the UDHR, prepared by the Canadian lawyer (and socialist) John Humphrey, prioritized collective ownership over individual property rights and only referred to the right to "own personal property." According to Humphrey's draft, ownership of industrial, commercial, or other profit-making enterprises was to be governed by national law—and the state could regulate the acquisition and use of private property. This wording was inspired and supported by communist and Latin American countries whose constitutions only protected personal property and left the state free to regulate the means of production. Later drafts—and the final version—accommodated Western objections. But whereas Western states succeeded in obtaining a protection of private property in the legally non-binding UDHR, they failed in this endeavor when the General Assembly adopted the legally binding International Covenant on Civil and Political Rights in 1966.

A number of subsequent "core" interna-

Continued on page 6

JACOB MCHANGAMA is the director of legal affairs at the Danish Center for Political Studies and external lecturer on international human-rights law at the University of Copenhagen.

More than 600 Cato Sponsors and friends turned out in Naples, Florida, in April to hear Florida governor RICK SCOTT summarize his plans for reforming government, reducing spending, and boosting the economy.

Continued from page 1

tional human rights conventions include clauses that prohibit discrimination on the basis of property or in relation to property based on a person's sex, race, religion, or similar categories. But none of these conventions include a free-standing right to private property.

Even the European Convention on Human Rights, adopted by Western liberal democracies in 1950, added the right to property (defined rather weakly as the peaceful enjoyment of possessions) only as an additional protocol. The ECHR affords some protection against expropriation, but it allows states a very wide "margin of appreciation." Both the American Convention on Human Rights and the African Charter on Human and Peoples' Rights protect private property, but as is the case with the ECHR, their protections against expropriation and regulatory takings are weak.

THE INTERPRETATION OF COURTS AND ACADEMICS

Despite the end of the Cold War and the collapse of socialism, much of mainstream human rights thinking is still skeptical of—if not outright hostile to—the notion of private property as a human right in its classical sense of protecting against expropriation and intrusive regulation. In fact, leading human rights scholars have reinterpreted the right to property to encompass an entitlement to be provided property by government through redistribution. The following quote is from the widely cited *Economic, Social and Cultural Rights: A Textbook*:

> In order for the right to property to be fulfilled and for everyone to really enjoy the right to property, every individual should enjoy a certain minimum of property needed for living a life in dignity, including social security and social assistance.

The so-called positive obligation to fulfill the right to property was reiterated in a 2010 "Legal Opinion on the Right to Property from a Human Rights Perspective," authored by the Geneva Academy of International Humanitarian Law and Human Rights and cited in a report from the UN Special Rapporteur on the Right to Food, as noted below. This line of argument is not limited to academics, but has also been internalized by human rights officials, organizations, and courts.

> "Much of mainstream human rights thinking is still skeptical of—if not outright hostile to—the notion of private property as a human right."

In a report from October 2010, the UN Special Rapporteur on the Right to Food asserted that the unequal distribution of land threatens the right to food. As a remedy, the Special Rapporteur proposed that states should encourage "communal ownership systems" rather than focus on "strengthening the rights of landowners" through a "Western concept of property rights." And according to the Special Rapporteur, realizing the right to food may also entail an obligation on the state to secure access to land "through redistributive programmes that may in turn result in restrictions on others' right to property."

The UN Committee on Economic, Social, and Cultural Rights has already criticized several states for privatizing land, housing, health care, and water—suggesting that such steps may lead to violations of the International Covenant on Economic, Social, and Cultural Rights, which, among others, seeks to protect the right to work, social security, and an adequate standard of living.

In a case from 2009, the European Court of Human Rights interpreted the right to property as including pre-retirement benefits (the Inter-American Court of Human Rights has adopted a comparable interpretation of the right to property in the American Convention). This prompted a scathing comment from the president of the Belgian Constitutional Court to the effect that the judges in Strasbourg had achieved something that not even Karl Marx had been able to do. The European Court of Human Rights determined that full compensation based on market value would normally be required for expropriations to comply with the ECHR. However, compensations of less than the full market value may be sufficient if the taking of property pursues "measures of economic reform" or "social justice." These categories are obviously very broad and lack any meaningful definition, conferring a worrying degree of discretion on governments while diluting the protection of property owners from arbitrary, ideologically justified seizures.

THE FUNDAMENTAL IMPORTANCE OF THE RIGHT TO PROPERTY

This development is a stark indicator of how far the concept of human rights has traveled since the United States became the first country to be founded on the idea that all men possess inalienable rights.

The Virginia Declaration of Rights from 1776 (which inspired the U.S. Bill of Rights) declared property an inherent right of all men, and the right to property is protected by the Fifth Amendment to the U.S. Constitution. That the right to property was considered a precondition for individual rights is clear from James Madison's essay on property from 1792, in which he wrote:

> Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.

But the emphasis on property as an inalienable human right was not particular to the American Founders at the time. The (first) French Declaration of the Rights of Man from 1789 states that "property is an inviolable and sacred right." Most constitutions of European liberal democracies include bills of rights—often inspired by the American and French ones—that protect the right to private property.

The American Founders and the early European proponents of liberal democracy understood that the legal protection of private property against arbitrary interference creates a sphere of inviolability that is necessary for the enjoyments of other freedoms—such as privacy and the freedoms of expression, association, and religion. Were all housing, media outlets, organizations, and religious institutions state-owned, the government would be able to control most parts of its citizens' lives, direct their productive capacities, and quell dissent.

This classical understanding of the right to property primarily entails a "negative" obligation that protects against arbitrary expropriation and regulation of private property. To the extent that the classical understanding of the right to property includes a positive obligation, it is limited to adopting the appropriate legal framework and protecting against the transgressions of third parties. The right to property provides opportunities and agency, but it does not guarantee results. It does not include a positive obligation to "fulfill" the right to property through the compulsory transfer of property from one individual to another. Such a human-rights obligation would make the protective sphere of the right to property largely illusory and would undermine, rather than strengthen, human dignity. Moreover, a positive duty to fulfill the right to property would make the application of this right wholly arbitrary and incompatible with the requirements of legal clarity and foreseeabilty on which respect for the rule of law depends.

THE POSITIVE EFFECTS OF PRIVATE PROPERTY ARE WELL DOCUMENTED

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 UDHR and the ICCPR, 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). All the countries in the top 10 of the IPRI are developed countries with a high GDP per capita. On average, countries in the top quintile of the IPRI enjoy a per capita income eight times higher than the countries in the bottom quintile of the IPRI. The link between poverty and the absence or insufficient protection of property rights is also made clear in the World Bank's 2009 Country Performance and Institutional Assessments. Of the more than 70 developing countries surveyed in 2009, only five had property rights and rule-based governance scores of 4, and none scored higher (where 1 equals the lowest score and 6 equals the highest score).

> "The Special Rapporteur on Food's proposal to undermine private property rights for communal ownership is thus a recipe for both poverty and disaster."

History provides many stark lessons on the importance of respecting private property and the potential disasters that follow from the systematic violation of this right. In apartheid South Africa, the right to property of millions of blacks was systematically violated through forced relocations intended to ensure white rule. The forced collectivization of land in the Soviet Union in the 1930s and in China during the Great Leap Forward of 1958–61 resulted in famines claiming millions of lives.

UNDERMINING THE RIGHT TO PRIVATE PROPERTY AS A RECIPE FOR DISASTER

The Special Rapporteur on Food's proposal to undermine private property rights for communal ownership is thus a recipe for both poverty and disaster. When the government becomes responsible for producing and distributing food, the result is not only less efficient production and distribution, but also a potentially lethal concentration of power over the lives of the many in the hands of the few. The government's monopoly on food may thus become a weapon that can be deployed against recalcitrant parts of the population—as has been the case in Bashir's Sudan, in Mugabe's Zimbabwe, and in North Korea during the famine in the 1990s (which may have caused millions of deaths). Dictators and their cronies rarely starve.

In market economies with well-defined property rights, very few depend on the government for satisfying their basic needs, such as nutrition. Food is provided by private actors operating in the market who offer choice, quality, and affordability that would have been unimaginable in the old socialist countries where citizens had to queue in order to get the most basic foods.

The conflict between economic, social, and cultural rights (ESC rights) and respect for private property can also be demonstrated with more recent examples. In 1999, Venezuela adopted a new constitution committed to "social justice," which includes a wide range of (justiciable) ESC rights that require government interference with property rights. Under Venezuela's constitution, the widespread and arbitrary nationalization of supermarket chains, telecommunications, electricity, oil companies, and land ownership carried out by the Chávez administration is thus in conformity with the underlying principles of ESC rights, rather than a violation of property rights. Moreover, the continuous concentration of power in the executive, including the right to rule by decree, has eroded the freedom of Venezuelans, including the freedom of expression: media are required to air pro-government speeches and those critical of the gov-

ernment risk losing their licenses.

The situation in Venezuela is approaching the eerie scenario envisaged by an expert working group of UNESCO when debating how to realize the ESC rights proclaimed in the UDHR:

> If the new declaration of the rights of man is to include provision for social services, for maintenance in childhood, in old age, in incapacity or in unemployment, it becomes clear that *no society can guarantee the enjoyment of such rights unless it in turn has the right to call upon and direct the productive capacities of the individuals enjoying them.*

The danger of letting the state be solely responsible for achieving ESC rights was not lost on a majority of the Commission on Human Rights when they drafted what would become the ICESCR. In 1951, a minority proposed that the responsibility for achieving the rights in the ICESCR should rest solely with the state. This was rejected by a majority of the Commission, which "fully recognized the importance of private as well as governmental action for the achievement of these rights." Unfortunately, the recognition of the importance of the private sector, and thus for private property, seems lost on current mainstream human-rights thinkers.

STRENGTHENING THE HUMAN RIGHT TO PRIVATE PROPERTY

While human-rights experts and organs of the UN are often hostile to private property in its classical sense, the fundamental importance of this right has been recognized by other authorities. In 2008, the Commission on the Legal Empowerment of the Poor, a working group under the UNDP co-chaired by former U.S. Secretary of State Madeleine Albright and Peruvian economist Hernando De Soto, a winner of the Milton Friedman Prize for Advancing Liberty, published a report entitled "Making the Law Work for Everyone." The report concludes that the right to property must be understood as a "fundamental human right" essential for the integrity of the individual. The report adopts a classical understanding of the right to property as intrinsically linked to individual freedom, stating that "the body and mind are the first and most immediate property of persons." In addition, the report stresses the importance of property rights for economic development:

> In the absence of generalized and equitable property rights systems much of economic activity does not develop its full potential even for powerful actors; there is a high likelihood of social unrest; there may be under-accumulation of human capital resulting in a low-quality labor force, and little demand for credit resulting in underdeveloped financial institutions and ultimately hindered growth. There is also less foreign investment or flight of capital when property rights are not guaranteed.

The report also points to the lack of property rights as a factor in civil armed conflict around the world. Importantly, the report shows that limiting state ownership of land and resources is essential in order to effectively promote and implement property rights, since a government's large-scale ownership of land provides it with the ability to arbitrarily impose planning restrictions and expropriate—without compensation—to the detriment of tenure security. The Commission's thorough report maps out an entirely different understanding of property rights and their importance than the above-mentioned report by the Special Rapporteur for Food and the CESCR, which effectively recommends weakening property rights.

> "Those who believe that human rights are essential for freedom and prosperity should urgently focus their efforts on strengthening the protection of the right to property under international human rights law."

Based on empirical evidence showing the strong link between property rights, freedom, and prosperity, there can be little doubt that strengthening classical private-property rights should be an urgent priority of the human-rights movement, as well as a cornerstone of human-rights policies of developed states, including the United States.

For instance, developed countries and development nongovernmental organizations should help developing countries implement the legal and administrative framework necessary for making property rights effective, rather than focusing on the redistributive element of ESC rights, which undermines the right to property. Such a development strategy has recently been initiated by the Danish government. The new strategy, "Freedom from Poverty—Freedom to Change," emphasizes the role of "economic growth based on free markets and private property benefiting the poor" as well as "respect for human rights."

It is indisputable that there are obvious and systemic shortcomings in the UN's human-rights protection system—particularly in those organs that are dominated by member states such as the Human Rights Council and the General Assembly. Despite these shortcomings, it should be made a priority to remedy the fatal flaw of the ICCPR by adopting an optional protocol with a robust protection of the right to property against arbitrary expropriation and regulatory takings. For countries with strong protection of property rights, such as the United States, and most Western countries, the proposed optional protocol would most likely not require substantial changes of national legislation (even if the United States, has not incorporated the ICCPR into national law and does not recognize individual complaints to the Human Rights Committee). However, an optional protocol could be a useful tool in promoting the right to property as a human right, par-

Continued on page 19

ority any time soon." And with India worried about the threat of its nuclear neighbors, China and Pakistan, "any commitments India is likely to make on nuclear force reductions will be linked to both of these states doing the same." Before the United States places disarmament at the center of its nuclear diplomacy, it needs to also be aware of the move's opportunity costs, for there is "the risk that the United States will offer much with respect to nuclear disarmament and get little in return."

Fannie and Freddie's Subprime Disaster

"By most accounts, the subprime mortgage market played a key role in the recent financial crisis. Yet there remains considerable debate over what drove that market," writes Mark Calabria, director of financial regulation studies at the Cato Institute, in **"Fannie, Freddie, and the Subprime Mortgage Market"** (Briefing Paper no. 120). But after carefully examining and presenting the evidence, he finds a clear culprit: "Fannie Mae and Freddie Mac were not only the largest players in the subprime mortgage market, they were drivers of that market." Nearly one-third of Fannie and Freddie's direct purchases were subprime, while during the height of the housing bubble, almost 40 percent of newly issued private-label subprime securities were purchased by Fannie Mae and Freddie Mac. Calabria argues that the failure of Fannie and Freddie and their precipitation of the housing crisis offer a strong rebuke to government attempts to engineer the housing market. "Ultimately taxpayers and the broader economy will only be protected from future bailouts by a full withdrawal of the federal government from housing policy," he writes. Calabria concludes, "Our financial system would become considerably more stable were Washington to abandon its attempts to direct capital to politically favored segments of the economy." ■

Continued from page 8

ticularly in poor developing countries with questionable human-rights records.

An optional protocol on the right to property would also counterbalance the recently adopted optional protocol to the ICESCR, which allows individuals to complain that their ESC rights have been violated. That protocol is likely to result in decisions that further undermine property rights by reason of the so-called duty to fulfill, which, as discussed above, involves compulsory redistribution of property.

This development has potentially grave consequences for the right to private property around the world as NGOs, international organizations, governments, and courts are influenced by contemporary human-rights standards. Even in the United States, where the reference to international human-rights conventions is very limited at the federal court level, some courts in states such as New Hampshire, West Virginia, and California have referred to international human rights standards—including the ICESCR and the UDHR—when deciding claims related to adoption, education, and general relief.

An optional protocol affording private property human rights protection would create a line of defense against expropriations based on human-rights claims under the ICESCR. Moreover, the obligations arising out of the ICESCR are much less well defined than those under the ICCPR. The rights in the ICESCR have to be achieved progressively over time, and complaints generally have to show a "clear disadvantage" in order to be admissible. States have a wide margin of discretion in their implementation based on a standard of "reasonableness," taking into account a "range of possible policy measures." When it comes to the ICCPR, on the other hand, states are under an immediate obligation to "respect and to ensure" the rights therein, as well as provide an effective remedy for their violation. Taking into account the clear and immediate nature of the obligations under the ICCPR, it would be possible to argue that from the outset the right to property under ICCPR trumps claims involving the infringements of private property arising out of the ICESCR.

Mainstream human-rights thinking is increasingly hostile to the protection of private property and receptive to the ideas of ESC rights that often conflict with the right to property. Accordingly, those who believe that human rights are essential for freedom and prosperity and that the right to property is an essential human right should urgently focus their efforts on strengthening the protection of the right to property under international human rights law. ■

Continued from page 11

point of view.

Another big risk is that we'll end up with more people in the exchanges—because employers can do arithmetic. They understand that there is so much taxpayer money on the table in those exchanges that it is entirely possible for them to drop their coverage, particularly for anyone under 300 percent of the federal poverty line. It is a no-brainer to drop the coverage, pay the penalty, give the worker a raise, and allow the worker to take the post-tax wage plus the subsidies and buy insurance at the exchanges that is just as good or better. If you take the population that's eligible for that kind of bargain, and assume that not even all of them do it, you can double the $1 trillion cost easily over the first 10 years, or triple it.

I would have loved to have stood here on the first anniversary of a bipartisan health care bill that took care of the costs problems and enhanced the prospect for coverage in the United States. Instead, we're celebrating the anniversary of something which represents another missed opportunity in health care reform in the United States, a dangerous step from an economic and budgetary policy point of view, and something that really cannot survive. And regardless of what we call it—repeal, replace, or simply throw up our hands and pray—it will not be this way in the future. ■