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Expanding the Categories of Negative Easements – Time for Change?

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I. INTRODUCTION

The Supreme Court decision in *Fearn v Board of Trustees of the Tate Gallery*,[1] that the Tate Gallery was liable in private nuisance to the owners of neighbouring flats due to substantial interference with the claimants' ordinary use and enjoyment of their properties, also has significance for the law of negative easements. The reason is that the decision in *Fearn*, decided by a majority of three to two with the leading judgment delivered by Lord Leggatt, will apply only in fairly rare circumstances[2] where the defendant's use of land cannot be regarded as a common or ordinary use of the land and the visual intrusion on a neighbouring property is of sufficient duration and intensity to be actionable as a nuisance. The decision in *Fearn* will also not apply to a claimant's building where the design or construction of a building is abnormal or unusual.[3] The judgment therefore means that it is an opportune time to consider the criteria that should be used to expand the category of negative easements not only generally, but also specifically whether it should include a right to privacy by not being overlooked from neighbouring land in circumstances which arise outside the factual matrix of *Fearn*.

Lord Leggatt agreed with the Court of Appeal that liability in nuisance does not extend to 'overlooking',[4] but the activities complained of included that 'a very significant number of the roughly half a million people who visit the Tate's viewing gallery each year peer into the claimants' flats and take photographs of them',[5] which are sometimes posted on social media. The glass walls of the

*I am very grateful to Professor Alison Clarke for discussions on this topic and also for very helpful suggestions from participants in the MSPL conference. The usual disclaimers apply.

[1] *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4.

[2] ibid [103].

[3] ibid [76]–[80].

[4] ibid [90].

[5] ibid [92].

claimants' flats were not unusual, 'either in the context of modern high-rise blocks of flats generally or in the particular locality'.[6] On the issue of invasion of privacy, Lord Leggatt decided that applying the common law of nuisance to the activity would not require an extension of the law and that no new privacy laws are needed to deal with this complaint, since 'The concepts of invasion of privacy and damage to interests in property are not mutually exclusive.'[7] This is equally important for the law of negative easements where the 'amenity value of real property'[8] should be evaluated in a wider context.

There has always been an innate reluctance of the courts to recognise negative easements, because they give the owners of the dominant land the right to prevent the owners subject to the easement from engaging in otherwise permissible acts on their own property. Overcoming the common law's disinclination to recognise negative easements is analysed by reference to Dagan's *A Liberal Theory of Property*.[9] The law has traditionally acknowledged the following kinds of negative easements: the right to the flow of water through an artificial channel, so that the water cannot be blocked from entering the dominant land; the right to the servient land's support for buildings on the dominant land, so that the support structure cannot be removed; and the right to a flow of air and the flow of light through a defined channel or aperture, so that the servient owner cannot do or allow anything on their land that obstructs or substantially diminishes that flow of air or light.

The same effect could be achieved through the use of restrictive covenants, but historically these rights have been granted as easements, and it is clear that they can be acquired through prescription. Since restrictive covenants cannot be acquired by prescription, that may be why the law acknowledges only this limited class of negative easements.[10] *Gale on Easements* has suggested that it is thought that the class of negative easements is now closed, because only these rights appear to have been accepted as an easement.[11] By restraining the owners' freedom in the occupation and use of their property, negative easements are an anomaly in the law and the law is prudent about not extending them beyond the categories which are well known.[12]

Other negative easements would therefore be anomalous easements like the right to light.[13] They may be *ejusdem generis* the existing categories and likewise merit protection. The corollary of a right not to be overlooked could be considered to be the right to a view which would be the right not to have a view

[6] ibid [79].
[7] ibid [112].
[8] ibid.
[9] H Dagan, *A Liberal Theory of Property* (Cambridge, Cambridge University Press, 2021) 7.
[10] Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327, 2011) [2.19] and fn 19.
[11] J Gaunt and P Morgan, *Gale on Easements*, 21st edn (London, Sweet and Maxwell, 2020) [1–62].
[12] *Hunter v Canary Wharf Ltd* [1997] AC 655, 726 (Lord Hope).
[13] ibid 709 (Lord Hoffmann), citing *Webb v Bird* (1861) 10 CB(NS) 268, 285 (Willes J).

blocked. Additional categories of negative easements that should be recognised are solar and wind easements which are analogous to the traditional common law easements of light and air. Solar easements will become important with the increasing significance of green energy necessitating rights to ensure adequate access to direct sunlight for solar energy systems. Express easements could set out the specifications and dimensions of the easement, possibly including specific vertical and horizontal angles that must remain open to sunlight, or maximum heights and widths of trees, structures and buildings close to the property to prevent shade which will inhibit solar production and could also specify the hours and months during which direct sunlight to a specified building or structure may not be obstructed. Numerous states in the US have passed statutes recognising and protecting solar easements.[14]

The Law Commission did not make any recommendation that allows the creation of easements that benefit solar panels.[15] Their view was that:

> It is not clear how the existing law on rights to light, which is founded on the sufficiency of light passing through windows and into the rooms beyond, but not upon photovoltaic surfaces, can accommodate solar panels. Consequently, we do not think that solar panels can benefit from rights to light as presently understood.[16]

The Law Commission was right to acknowledge that the acquisition of an easement by prescription takes 20 years, but noted that

> consultees appeared to be arguing for protection for solar panels to arise as soon as they are installed. The effect of this would be to give an owner a wholly novel right over another's land, restricting the use of a neighbour's land without first giving its owner any opportunity to avoid that happening.[17]

The Law Commission's suggested solution was that impact on solar panels should be factored into the circumstances in which planning permission should be granted.[18] It will, however, become increasingly important for the law of easements to evolve, since solar panels on roofs are likely to be one of the main sources of renewable energy in future and people who have invested money in roof panels should know that this investment has some legal protection.[19]

Wind easements are currently only endorsed by legislation in a few states in the US.[20] Wind easements will also increase in importance in England due to the ever-increasing need for new sources of energy. These easements protect the

[14] SC Bronin, 'Solar Rights in the United States' in RJ Heffron and GFM Little (eds), *Delivering Energy Policy in the EU and US* (Edinburgh, Edinburgh University Press, 2016) ch 16.
[15] Law Commission, *Rights to Light* (Law Com No 356, 2014) [2.83].
[16] ibid [2.79].
[17] ibid [2.79].
[18] ibid [2.82].
[19] ibid [2.77] quoting the contribution of the Ceredigion Green Party to the Consultation Paper.
[20] YR Lifshitz, 'Winds of Change: Drawing on Water Law Doctrines to Establish Wind Law' (2015) 23 *NYU Environmental Law Journal* 434.

property owner's ability to install a wind turbine without worrying about a tall building being constructed in the upwind direction that could block the wind. Such easements can ensure the viability of investment in the development of wind energy production and preserve the continuous flow of air.

If negative easements, such as solar or wind easements, are not created expressly, the difficulty with negative easements will arise with easements claimed by prescription where the owner of the servient land is having limitations imposed on the land without even being aware that the owner of the dominant land has acquired an easement. The Law Commission had considered whether to abolish prescription for negative easements only and decided in 2011 not to recommend its abolition for negative easements.[21] The Law Commission then provisionally proposed the abolition of prescription for rights to light in its Consultation Paper in 2013 on *Rights to Light*.[22] However, they considered the responses of consultees to the proposal and reached the conclusion that prescription should not be abolished as a means of acquiring rights to light.[23] There was considerably stronger support for retaining prescription than for abolishing it and 'it was clear that many consultees value not just rights to light themselves, but having a strong and effective mechanism by which they can arise'.[24] The Law Commission's recommendation of a statutory notice procedure[25] that would allow landowners to require their neighbours to tell them, within a specified time, if they intend to seek an injunction to protect their right to light, or to lose the potential for that remedy to be granted, and an updated version of the procedure that allows landowners to prevent their neighbours from acquiring rights to light by prescription, would go some way to meeting objections and could be applied to other negative easements as well.

II. APPLYING DAGAN'S ANALYSIS TO NEGATIVE EASEMENTS

Expanding the category of negative easements is analysed by examining Dagan's autonomy-based theory of property which is founded on three pillars of carefully delineated private authority, structural pluralism, and relational justice. He advocates judges of appellate cases using new cases and social developments as triggers for the ongoing refinement of the law, as opportunities for revisiting the normative viability of its current understandings and for paradigm shifts in the law in order to enable constructive change and reflexive internal critique.[26]

[21] Law Commission, *Making Land Work* (n 10) [3.81].
[22] Law Commission, *Rights to Light: A Consultation Paper* (Law Com No 210, 2013) [3.48].
[23] Law Commission, *Rights to Light* (n 15) [2.64].
[24] ibid [2.62].
[25] ibid [6.1].
[26] Dagan (n 9) 34–37.

A. Role for Individual Autonomy

An examination of individual autonomy, self-determination, and self-authorship, as envisaged by Dagan, may provide justification for proprietary rights to extend the categories of negative easements. Dagan argues that self-determination is absent from property theory today and, that also applies in circumstances where *Fearn* would not apply, for example, because the defendant's use of land is common or ordinary. Liberal property should be an empowering device in the service of people's self-determination and support for people's autonomy. The expansion of property necessarily limits non-owner's liberty and broadening the types of negative easements will inevitably limit owners of neighbouring property as well. Nevertheless, property's private authority is delineated, so that owners' interpersonal, horizontal power is necessary for their self-determination. Property empowers self-determining individuals to pursue their conception of the good, and this autonomy-enhancing *telos* legitimises property and shapes its legal contours.[27]

i. Application to Negative Easements?

There are difficulties applying Dagan's theory to determining the legal contours of negative easements. Although a liberal polity constructs its property law so as to serve the self-determination of owners while constantly remaining attentive to property's possible threat to the autonomy of others,[28] easements create particular difficulties due to the need to balance the rights of two neighbouring owners with conflicting interests. If a dominant owner is given the right not to be overlooked, a duty is necessarily imposed on the servient owner not to do or allow anything to be done that will interfere with that right. Dagan's principle governing how individuals must relate to each other is sometimes phrased that each individual must 'respect' each other's self-determination, but 'respect' could have variable meanings and sometimes refers to duties of 'accommodation'.[29] One person may be obliged to take some positive steps to help other people realise their aims as long as this does not too greatly diminish their own. An autonomy calculus needs to be conducted to evaluate the self-determination of the person being accommodated against the interests of the person doing the accommodating. An unqualified right to exclude others from one's property might be needed to protect the autonomy of a homeowner,

[27] This is reflective of a Razian account of autonomy – see A Nair, 'Property and Autonomy in the Marketplace: Freedom to Sell as Freedom of Exit' (2022) 33 *King's Law Journal* 34. For a contrast with the theory of Kant, see N Sage, 'Liberalism and Common Callings' (2022) 33 *King's Law Journal* 43. For a comparison with Rawls, see K Wells, 'Crucial Options: Dagan on Self-determination and Structural Pluralism' (2022) 33 *King's Law Journal* 53.

[28] MR Cohen, 'Property and Sovereignty' (1927) 13 *Cornell Law Quarterly* 8, 12–13 discussed in Dagan (n 9) 61–62.

[29] Sage (n 27) 45.

since a person's home is bound up with their sense of personhood. As Cohen has suggested, the interpersonal implications of the power that owners enjoy vis-à-vis others are not easily defensible because, potentially, property poses a normative threat to others.[30]

Such a strong emphasis on individual autonomy is too complex conceptually for negative easements. Sage has argued that Dagan should set aside his commitment to individual autonomy and instead develop further his conceptions of 'community' and 'structural pluralism', although as he admits, 'the resulting account would no longer be, at least in Dagan's sense of the term, a *Liberal* Theory'.[31] McFarlane, in critiquing Dagan's analysis, has raised concerns arising, inter alia, from the prioritising of the autonomy-enhancing aspects of property in relation to the continuity between property law and private law more generally, and questions whether Dagan's account recognises sufficiently the distinctiveness of property.[32] Applied to easements, it could be argued that the diversity of legal relations recognised by private law means that the autonomy-enhancing effects of the power to create negative easements are qualitative rather than quantitative, which can be problematic in this context.

Dagan's insistence on autonomy is due to the fact that the range of heterogeneous property types is to give each individual an extensive range of options to choose from when making their life plans. In evaluating negative easements, the constraint on self-determination of the owner of the servient tenement may seem relatively small compared to the sacrifice that would be required of the owner of the dominant land who may have daily and regular impositions of, for example, being overlooked, whereas the limitations imposed on the servient owner's ability to build is a negative obligation preventing extending the property in a way that would interfere with the dominant owner's property.

In the case of *Fearn*, depriving members of the public from the extension to the Tate's viewing gallery would seem a relatively minor inconvenience in the scheme of life. Lord Leggatt analysed the difficulties of reconciling the different public and private interests involved and resolved this by stating that, 'where significant considerations of public interest are raised', these are relevant, 'not in determining liability, but, where liability is established, in deciding whether to grant an injunction or to award damages'.[33] With easements, as with covenants, there are two autonomous owners with a right to self-determination. Lord Leggatt explained that there is no obligation on occupants where there is an actionable nuisance to take remedial steps, such as installing blinds, privacy film or net curtains, because that places the responsibility 'entirely on the victim rather than on the person who carries out the activity'.[34] The same principles

[30] Cohen (n 28) 12–14.
[31] Sage (n 27) 44.
[32] B McFarlane, 'Property: Duties, Diversity, and Limits' (2022) 33 *King's Law Journal* 23, 27.
[33] *Fearn* (n 1) [120].
[34] *Fearn* (n 1) [83].

should be applicable to negative easements in considering their validity ex ante, as opposed to ex post controls, which will be examined later.

ii. Historical Perspective – Lack of Individual Autonomy of Owner of Dominant Land

The legal system in England and Wales does not give people or homes a general right to natural light[35] or a natural right to prospect or privacy.[36] Foster has examined how, under early common law, access to light and air was looked upon as a natural right, 'incident to the ownership of land'.[37] By the end of the sixteenth century, however, English courts no longer classified light and air as natural rights, but as negative easements. Though the courts made little mention of the right to view during this period, it appears that view may also have constituted a natural right up until the time of *William Aldred's Case*[38] in 1610, when the court expressly held that an action in nuisance would not lie for the stopping of prospect. It was held that a right to a 'prospect' or good view could not exist as an easement, because it 'is a matter only of delight, and not of necessity, no action lies'.[39] This opinion was correctly dismissed in *Dalton v Angus*[40] as 'more quaint than satisfactory'. The court in *Dalton* cited as 'a much better reason'[41] that of Lord Hardwicke in *Attorney-General v Doughty*,[42] whose opinion was such a right should not be acquired by prescription and should only be created by actual agreement, because otherwise 'there could be no great towns'.

Nevertheless, Lord Hardwicke did raise quite clearly the possibility of individual views being protected by 'a particular right'.[43] He did not specify the nature of that right, but it is at least possible that he envisaged an easement. Poulsom contests the argument that easements of prospect would unduly hinder urban development, because public law can be rigorous and effective in protecting views in 'great towns' in England and Wales.[44] Nevertheless,

[35] Law Commission, *Rights to Light* (n 15) [2.62].

[36] Gaunt and Morgan (n 11) 1-64, citing *Tapling v Jones* (1865) 11 HLC 290, 305, considered in *Fearn* (n 1) [97]; *Fishmongers' Co v East India Co* (1752) Dick 163; *Potts v Smith* [1868) LR 6 Eq 311, [318]; *Campbell v Paddington Corp* [1911] 1 KB 869, 878, 879; *Hurdman v North Eastern Railway Co* (1878) 3 CPD 168, 174. See also *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* [1937] 58 CLR 479, 507, discussed in *Fearn* (n 1) [99].

[37] TJ Foster, 'Securing a Right to View: Broadening the Scope of Negative Easements' (1988) 6 *Pace Environmental Law Review* 269, 275.

[38] *William Aldred's Case* (1610) 9 Coke Reports 57b, 77 ER 816.

[39] ibid. During this same period, the English judiciary created the Doctrine of Ancient Lights, based on prescription of unobstructed flow of light and air onto property, provided the owner has enjoyed this right for a period of 20 years.

[40] *Dalton v Angus & Co* [1881] 6 App Cas 740, 824.

[41] ibid.

[42] *Attorney-General v Doughty* (1778) 2 Ves Sen 453, 454.

[43] ibid.

[44] MW Poulsom, 'Taking a View: The Protection of Prospects in England and Wales' [2018] *Conv* 133, 136–137.

Lord Leggatt in *Fearn*, having considered the decision in *Hunter v Canary Wharf Ltd*,[45] explained that the reason why no claim lies for interference with a view or prospect is that 'anyone may build what they like on their land, unless this violates an agreement not to do so or an acquired right to light or to a flow of air through a defined aperture'.[46] There was, nevertheless, a caveat to this that 'interference resulting from construction (or demolition) works will not be actionable … in so far as all reasonable and proper steps are taken to ensure that no undue inconvenience is caused to neighbours'.[47] This caveat can be particularly significant for the law of negative easements.

Historically, the objection has been that negative easements are insufficiently certain. In *Harris v De Pinna*,[48] Bowen LJ compared a claim to the passage of undefined air over the premises to an 'amenity of prospect, a subject-matter which is incapable of definition'.[49] As Poulsom highlights,[50] the strong belief that, with regard to easements, this is an inescapable feature of a view is much less evident in relation to covenants and public law. The difficulty is the preventative action needed to stop a negative easement arising and the extent of the burden on the servient owner. The same arguments that apply to rights of light and support are also relevant to other negative easements. There is inevitably a difference between only the neighbouring servient land being affected and a range of neighbouring properties. The further those tenements are from the potential dominant tenement, the less likely it is that their owners will appreciate, and guard against, the risk of an easement being claimed.[51]

Any property interests, including easements, need to be clearly defined, so that the servient owner is aware of the limitations of what they can do on their land. No right to privacy was established in *Browne v Flower*[52] in 1911 where Parker J was of the view that the law does not recognise 'any easement of prospect or privacy'.[53] Rights to a view and rights to privacy were notably treated as interchangeable by Parker J in *Browne*. Parker J was of the view that 'Either they have less privacy, or if they secure their privacy by curtains they have less light.'[54] This raises the issue of what steps a landowner can be expected to take to protect their privacy which was tackled in *Fearn*.

It is evident that policy decisions are underlying the restrictive nature of the current law. In *Hunter v Canary Wharf*,[55] Pill LJ regarded the analogy between a right to receive a television signal and the 'loss of prospect to be compelling.

[45] *Hunter* (n 12).
[46] *Fearn* (n 1) [36].
[47] ibid [37] referring to *Andreae v Selfridge & Co Ltd* [1938] Ch 1.
[48] *Harris v De Pinna* [1886] 33 Ch D 238.
[49] ibid 262.
[50] Poulsom (n 44) 135.
[51] ibid 137.
[52] *Browne v Flower* [1911] 1 Ch 219.
[53] ibid 225.
[54] ibid 227.
[55] *Hunter* (n 12).

The loss of a view, which may be of the greatest importance to many householders, is not actionable and neither is the mere presence of a building in the sight line to the television transmitter.'[56] The problems were explained well by Lord Hope that the radio and television signals:

> may come from various directions over a wide area as they cross the developer's property … Their passage from one point to another is invisible. It would be difficult, if not impossible, for the developer to become aware of their existence before he puts up the new building. If he were to be restricted by an easement from putting up a building which interfered with these signals, he might not be able to put up any substantial structures at all.[57]

The House of Lords differentiated a restriction, which has been constituted by express grant or by agreement in which case some flexibility in the recognised categories may be permitted from the acquisition of an easement by prescription. Their view was that:

> Where the easement is of a purely negative character, requiring no action to be taken by the other proprietor and effecting no change on the owner's property which might reveal its existence, it is important to keep to the recognised categories. A very strong case would require to be made out if they were to be extended.[58]

It would create immense difficulties if courts were now to take the same view in relation to broadband and mobile signals being blocked and one would hope for a more contemporary approach to reflect the realities of the age in which we live and the technical advances that have been made.

In analysing policy, Lord Leggatt did not seem concerned that there may be difficulties in deciding where to draw the line in resolving whether the objective test of nuisance had been met.[59] Likewise, the fear of the floodgates opening should not in appropriate cases fetter the law of easements. It is arguable that a restrictive policy to land rights should have no place in the twenty-first century and it is the parameters to this self-determination which will be critical. There was a significant distinction drawn by Lord Blackburn in *Dalton v Angus and Co*[60] between a right to light, which could only impose a burden on land very near the house and which should be protected when it had been enjoyed for 20 years, and a right of prospect, which would impose a burden on a very large and indefinite area and should not be allowed to be created except by actual agreement. Such a differentiation between express easements and those created by prescription is welcome, if it thereby facilitates the recognition by the law of negative easements, but there is still a need for the law to recognise negative easements created by prescription. A grant will not be presumed when the grantor

[56] ibid 666.
[57] ibid 727.
[58] ibid 726.
[59] *Fearn* (n 1) [106]–[108].
[60] *Dalton* (n 40) 824.

could not have reasonably prevented the enjoyment of the subject of the grant,[61] but this does not prevent easements arising by prescription as acknowledged in *Dalton*.

B. Structurally Pluralistic

Dagan's second pillar of a liberal property law is structural pluralism, which provides concrete support for innovative types of land rights. This theory of property recognises the profound heterogeneity of property types which causes difficulties for monistic, more traditional theories that look for the structural core of property, which Dagan considers to be misguided. As Dagan rightly points out, the internal life of property is structured through sophisticated governance mechanisms that facilitate various forms of interpersonal relationships which would not be possible without an enabling legal infrastructure which applies in, for example, easements, covenants, leaseholds, commonholds and trusts.[62]

This plurality of types enables property law to offer varying balances between the different values that property can serve – independence, personhood, community, and utility in diverse social settings and respecting a variety of resources. When the law's menu of property types is sufficiently rich for each major sphere of human action, it offers people a range of meaningful choices for resource governance and co-governance that supports self-determination. Dagan is of the view that a significant part of property law is not about vindicating the rights of autonomous excluders, but rather about creating governance institutions that manage potential conflicts of interest among individuals who are all stakeholders in one resource or in a given set of resources. These dramas of property law occur, literally, within property; they deal with the internal life of property rather than with its foreign affairs.[63] Dagan describes colourfully that property need not be confined

> to a tragic choice between the Hohfeldian Scylla of unprincipled multiplicity and the Blackstonian Charybdis of unacceptable uniformity. There is a principled midway position between these disappointing poles: the autonomy-based conception of property, which is structurally pluralistic.[64]

The balancing of interests is, as already explained, complex in relation to negative easements due to the need to deal with conflicts between adjacent landowners caused by the limiting effect of negative easements on the servient owner.

[61] *Fearn* (n 1) [39], [44]; Gaunt and Morgan (n 11) [1–63], citing *Chasemore v Richards* (1859) 7 HL Cas 349, 370 (Wightman J); *Dalton* ibid 776; *Chastey v Ackland* [1895] 2 Ch 389, 397 (Lopes LJ).
[62] Dagan (n 9) 6.
[63] ibid 82.
[64] ibid 88.

Property governance regimes will need to determine the fine balance between competing interests.

i. Numerus Clausus – Influence on Negative Easements?

Dagan's understanding of property's plurality and support for innovative types rejects the *numerus clausus* principle's canonical understanding.[65] It also requires a refinement of the *numerus clausus* principle so that, alongside this inventory of state-sponsored property types, property law will also include a residual property type that can be privately designed while properly ensuring the interest of third parties to not be subject to non-transparent arrangements which would rule out negative easements that would be too broad for being acquired by prescription.

For law to consolidate people's expectations in compliance with the prescriptions of both structural pluralism and the rule of law, it must recognise a necessarily limited number of categories of relationships and resources. The conventional understanding of the *numerus clausus* principle, however, goes further. It stands for the proposition that property rights exist only in a fixed number of forms, so that private arrangements can enjoy the status of property only if they are pigeonholed into the delimited menu of state-recognised property forms. But even the most sophisticated attempts to justify this dimension of the *numerus clausus* principle are not fully persuasive.[66]

Therefore, though law's traditional facilitation of standardised property types along structural pluralistic lines is laudable, Dagan's view is that a liberal property regime should reconsider the hostility of *numerus clausus* toward tailor-made property rights.[67] He is right that liberal property law is perfectly justified in proscribing idiosyncratic arrangements insofar as they entail negative external effects, both social (for example, segregation) and economic (for example, fragmentation), or as they impinge on individual rights (either those of the parties themselves or of third parties).[68] People should thus be able to create their own idiosyncratic frameworks of interpersonal interactions and not merely idiosyncratically adjust state-sponsored frameworks. This does not mean that property law must adopt a *numerus apertus* (open list) principle, allowing 'bizarre rights' to be registered or recorded on par with law's standardised types.[69]

As Dagan argues, in the liberal conception of property, the creation and modification of property types often is, or at least should be, triggered by

[65] ibid 11.
[66] ibid 101.
[67] ibid 149, discussing TW Merrill and HE Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 *Yale Law Journal* 1, 26–34, 56–68.
[68] ibid 112.
[69] ibid.

challenges bearing on the desirability of the normative underpinnings of property types, their responsiveness to their social context, or their effectiveness in promoting their contextually examined normative goals.[70] Inherent dynamism, triggered in moments of property law's 'paradigm shifts', represents a perennial quest 'for better and best law' – a relentless 're-examination and reworking of the heritage'. Judges have a 'duty to justice and adjustment' which means the 'on-going production and improvement of rules'.[71] This is clearly lacking in the law of negative easements.

Nevertheless, *numerus clausus* may not be helpful in common law systems. There is no explicit recognition of the *numerus clausus* in common law, which naturally renders the status of the doctrine somewhat insecure.[72] Given basic differences between civil law systems and common law systems, it is not surprising that the *numerus clausus* is expressly recognised in the former but not the latter. In common law systems, there is no inherent reason why existing forms of property should not be subject to judicial revision and supplementation. Nevertheless, common law courts often behave toward property rights very much like civil law courts do. They treat previously recognised forms of property as a closed list which Merrill and Smith describe as a norm of judicial self-governance. Jurisprudentially speaking, the *numerus clausus* functions in the common law much like a canon of interpretation, albeit a canon that applies to common-law decision-making rather than statutory interpretation or like a strong default rule in the interpretation of property rights.[73] If one observes what lawyers and judges do, it is clear that the *numerus clausus* exerts a powerful hold on the system of property rights. The chances of persuading a court to create a new type of property in any particular case are too remote to be taken seriously.[74]

Nevertheless, a liberal approach to property seems to have been adopted by the Supreme Court in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* without reference to *numerus clausus*.[75] The recognition of rights to use indoor and outdoor recreational facilities as easements by the Supreme Court broke new ground by expanding the scope of easements. As Lord Briggs stated in *Regency Villas*, easements have acquired 'an independent jurisprudence of their own'[76] indicating that they are now independent of the Roman law of servitudes which gives them greater scope to form their own identity. Novel forms of easements were recognised to reflect changes in society and the case went further

[70] ibid 152.
[71] ibid 153 discussing KN Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston, Little, Brown and Co, 1960) 36, 38, 190–91, 217, 222–23; KN Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (1940) 49 *Yale Law Journal* 1355, 1385.
[72] Merrill and Smith (n 67) 9.
[73] ibid 10–11.
[74] ibid 23.
[75] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57, [2019] AC 553.
[76] ibid [2].

than *Re Ellenborough Park*.[77] This represented an important shift in recognising the validity of new types of easements. Lord Briggs was clear 'that the common law should, as far as possible, accommodate itself to new types of property ownership and new ways of enjoying the use of land'.[78]

Restricting the rights of the owners of the servient land to a considerable extent is therefore not without precedent in the law of easements as shown in *Regency Villas*, where burdens of maintenance, which could only be voluntary, were placed on the owners of the servient land. Although *Regency Villas* concerned positive easements, such a broad-minded approach could arguably be extended to negative easements. It is extraordinary that the Supreme Court thought it important that freehold timeshare arrangements should be made to work when timeshare has nearly disappeared as a legal mechanism. It is therefore arguable, a fortiori, that the rights of a homeowner should be respected by law with room for manoeuvre to accommodate negative easements.

ii. Influence of the Rule of Law

One implication of the aspirational nature of liberal property is that the various property types are subject to ongoing normative re-evaluation and possible reconfiguration.[79] The question is whether that complies with the rule of law despite its multiplicity and dynamism. As Dagan states, Smith argues that it does not and that it cannot.[80] A structurally pluralistic conception of property, Smith claims, can hardly be distinguished from the bundle understanding of property and both irreparably undermine stability. Rejecting the dominion conception of property, Smith therefore suggests, might substitute rigidity with 'near-chaos'.[81] Only the presumption of exclusion, Smith concludes, can assure that we keep the bundles 'lumpy' and 'opaque' and avoid 'hard-to-predict ripple effects through the entire system'.[82] Dagan rejects Smith's criticisms by arguing that because property types are supposed to consolidate expectations and express ideal types of interpersonal relationships, an autonomy-based property regime supports, even requires, that our property types be relatively stable and internally coherent and adhere to the rule of law.[83] Extending the category of negative easements would, therefore, comply with the rule of law.

[77] *Re Ellenborough Park* [1956] Ch 131.
[78] *Regency Villas* (n 75) [76].
[79] Dagan (n 9) 159.
[80] HE Smith, 'Property Is Not Just a Bundle of Rights' (2011) 8 *Econ Journal Watch* 279, 287; HE Smith, 'Property as the Law of Things' (2012) 125 *Harvard Law Review* 1691, 1705–06 discussed by Dagan (n 9) 159.
[81] HE Smith, 'On the Economy of Concepts in Property' (2012) 160 *University of Pennsylvania Law Review* 2097, 2113 discussed by Dagan (n 9) 160.
[82] Smith ibid 2116.
[83] Dagan (n 9) 161.

iii. ut res magis valeat quam pereat in the Framework of Structural Pluralism

The validating principle *ut res magis valeat quam pereat*, which Dagan does not discuss, is now analysed within the framework of structural pluralism. This principle of validating construction means that, where possible, a construction should be preferred which results in the relevant claim being treated as valid rather than be void. The principle is well established as applied to the construction of contracts and subordinate legislation. As Lord Briggs stated in *Regency Villas*:

> the parties intended to confer upon the facilities grant the status of a property right in the nature of an easement, rather than a purely personal right … That being the manifest common intention, the court should apply the validation principle ('ut res magis valeat quam pereat') to give effect to it, if it properly can.[84]

This principle should be applied to negative easements, and it is helpful to ascertain how the Supreme Court, Privy Council and House of Lords have treated it in a few other property law cases. In *Enka Insaat ve Sanayi AS v OOO 'Insurance Company Chubb'*[85] in 2020, the Supreme Court supported application of the 'validation principle' to assist in preventing parties from circumventing their arbitration agreements. However, the Supreme Court declined to apply it in *Generics UK Ltd (t/a Mylan) v Warner-Lambert Co LLC*[86] (published interestingly on the same day as *Regency Villas* on 14 November 2018) in an intellectual property and patents case. Lord Briggs stated in *Generics UK Ltd*, 'in my opinion, validating construction will not usually have a significant place in modern patent law'.[87] The Privy Council quoted the validating principle approvingly in *Rolle Family and Co Ltd v Rolle*[88] in 2017 on the issue of escrow, though the case failed on other arguments and grounds.

The validating principle was implicit, though not explicit, in *Moncrieff v Jamieson*[89] in 2007 and *Lawrence v Fen Tigers Ltd*[90] in 2015. *Moncrieff* broke new ground with Lord Scott stating obiter that very extensive use of the servient land may be an easement as long as the servient owner retained possession and control,[91] although recent authority prefers the narrower reasonable use test.[92] A change in the historically cautious approach in not recognising easements that may not be sufficiently certain is evident in *Lawrence*.[93] In *Lawrence*,

[84] *Regency Villas* (n 75) [25].
[85] *Enka Insaat ve Sanayi AS v OOO 'Insurance Company Chubb'* [2020] UKSC 38, [2020] 1 WLR 4117 [95] (Lord Hamblen and Lord Leggatt), [127] (Lord Sales).
[86] *Generics UK Ltd (t/a Mylan) v Warner-Lambert Co LLC* [2018] UKSC 56, [2019] Bus LR 360.
[87] ibid [95].
[88] *Rolle Family & Co Ltd v Rolle* [2017] UKPC 35, [2018] AC 205.
[89] *Moncrieff v Jamieson* [2007] UKHL 42, [2007] 1 WLR 2620.
[90] *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] AC 822.
[91] *Moncrieff* (n 89) [55].
[92] See, eg, *Virdi v Chana* [2008] EWHC 2901, [2008] NPC 130; *Kettel v Bloomfold Ltd* [2012] EWHC 1422, [2012] L & TR 30; *De La Cuona v Big Apple Marketing Ltd* [2017] EWHC 3783.
[93] *Lawrence* (n 90) was approved in *Fearn* (n 1) [18], [46], [109], [110], [119], [120], [129].

it was acknowledged that it may be possible to acquire by prescription an easement to carry on an activity which resulted in noise that would otherwise cause an actionable nuisance, provided that such noise nuisance had been emitted for 20 years, albeit not necessarily continuously.[94] Lord Neuberger was of the view that the right 'may be too indeterminate to be an easement, but it can still be the subject of a perfectly valid grant',[95] although he did not analyse what precise form that grant would take or what type of interest it would create. His view was that a right to emit noise could be an easement, describing it as 'the right to transmit sound waves over the servient land'.[96] As he acknowledged, the precise extent of a right to transmit sound waves obtained by prescription must be highly fact-sensitive, and may often depend not only on the amount and frequency of the noise emitted, but also on other factors including the character of the neighbourhood and the give and take.[97] Such judicial flexibility on the subject matter of a grant may allow the recognition of negative easements in appropriate circumstances.

C. Relational Justice

i. Complex Balancing of Horizontal, Interpersonal Interactions

The third pillar of liberal property, relational justice, is the dimension of justice that focuses on the terms of our interactions as private individuals rather than as citizens or as subjects of state institutions. The impact of interpersonal contacts on self-determination affirms and vindicates the claims of people to mutual respect for self-determination.[98] A genuinely liberal private law casts our horizontal, interpersonal relationships as interactions between free and equal individuals, respecting one another as the persons they actually are. This inevitably poses difficulties in relation to negative easements because, as discussed, of the conflicting interests of the owners of the dominant and servient lands.

Recognition of negative easements is also complex under Blackstone's conception of property as 'sole and despotic dominion'[99] as the regulative idea of private property with the right to exclude as the most defining feature of property law with the rival interests of two neighbouring owners. In Dagan's view, this renewed orthodoxy of property as a stronghold of interpersonal independence fails both descriptively and normatively, because the dominion understanding of property unduly disregards property's structural pluralism

[94] ibid.
[95] ibid [32]. See also Poulsom (n 44) 135.
[96] ibid [41].
[97] ibid [38] referring to *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 299 (Lord Goff), discussed in *Fearn* (n 1) [29]–[33].
[98] Dagan (n 9) 8.
[99] ibid 9, referring to W Blackstone, *Commentaries on the Laws of England*, Vol 2 1765–1769 (Chicago, University of Chicago, 1979).

and property's compliance with relational justice.[100] In relation to negative easements, Blackstone's conception of property is too blunt a tool to deal effectively with the nuanced approach needed to deal with the complexities inherent within negative easements.

The tensions generated between the owners of the dominant and servient lands are exacerbated by the servient owner being prevented from acting in an otherwise lawful way on their land. The existence of potential protective measures that could be taken by the owner of the dominant land to prevent privacy being invaded, such as installing net curtains, privacy film or solar blinds, which Lord Leggatt in *Fearn* made clear are not required as remedial steps in a nuisance claim,[101] should arguably not be a reason to refuse to recognise easements of privacy not to be overlooked ex ante applying the *Re Ellenborough Park*[102] criteria. These considerations in easements should apply to ex post and not ex ante controls.

Ex ante restrictive controls, in prioritising security and stability of land rights, are justified insofar as they limit the rights which can burden properties perpetually by controlling the freedom of landowners to create new land burdens that will bind successive owners, which might result in inefficient fragmentation. Stricter ex ante regulation of easements also minimises the dangers of idiosyncratic burdens on land. Nevertheless, negative easements may be of such importance to the enjoyment and security of the owner of the dominant land that, as Van der Walt has argued, the traditional ex ante strategies of preventing fragmentation are becoming increasingly more unsuitable and ex post strategies are more suitable to the dynamic economy of the twenty-first century.[103] In his view, both common law and civil law jurisdictions are gradually shifting away from 'an ex ante (common-law rule) preventing the creation of "atypical property arrangements" to ex post (statutory and judicial intervention) remedying the negative effects of such arrangements'.[104]

Prioritising the interests of the owner of the dominant land to claim negative easements may sit uncomfortably with notions of relational justice. Dagan argues that an autonomy-enhancing conception of property requires precisely the kind of accommodative structure that the dominion conception of property precludes.[105] This accommodative structure would surely require the owner of the dominant land to take mitigating steps to prevent a breach of privacy. It would be far too cumbersome to introduce a proportionality test into the ex ante recognition of easements. Van der Walt and van Staden suggest a proportionality test to be incorporated in balancing two prominent common

[100] ibid.
[101] *Fearn* (n 1) [81]–[88].
[102] *Re Ellenborough Park* (n 77).
[103] AJ van der Walt, 'The Continued Relevance of Servitudes' (2013) 3 *Property Law Review* 3, 21–22.
[104] ibid 22.
[105] Dagan (n 9) 127.

law principles, namely, that the servitude holder has all the rights necessary for the effective exercise of their servitude, and that the servitude must be exercised *civiliter modo*, so as to impose the least possible burden on the servient land.[106]

The extent to which restrictions can be imposed on the servient owner is a very important factor in analysing relational justice. Recognising, for example, a right to privacy by not being overlooked, will restrict development on the servient land, but the Supreme Court in *Regency Villas* in relation to recreational easements seemed unconcerned about the impositions on the servient owner on the facts of that case. Different considerations inevitably apply in restricting developments on the servient land. Easements are a governance property arrangement that should encourage the flourishing of the owners of the dominant tenement.[107] The rivalrous nature of property is highlighted in particular by negative easements and balancing the interests of the owners of the dominant and servient tenements, and this may be too complex an issue for governance property. There are overlaps between Dagan's liberal theory of property and Alexander's analysis of governance property that aims at achieving certain values, including autonomy, aggregate welfare, and the Aristotelian idea of human flourishing. Human flourishing is a pluralistic moral value comprising multiple values, including individual autonomy and freedom, social welfare, community and sharing, and personhood and self-realisation.[108]

There are also similarities with the analysis by Blandy, Bright and Nield of enduring property relationships in land which has particular resonance in the context of negative easements due to the need to avoid conflicts in using land in order for the negative easements to benefit the dominant land.[109] The authors apply to property relationships the key idea from relational contract theory that parties to contracts are 'embedded in complex relations',[110] which is particularly pertinent to negative easements and Dagan's notions of relational justice. The continuing nature of the relationship is an important feature, affecting the way in which the governing norms are articulated at the outset, and accommodating the possibility that these may need to evolve and be adjusted over time to reflect the dynamics of the relationship between right-holders.[111] As the relationship

[106] AJ van der Walt and S van Staden, '"Progressive" Judicial Interpretation of Servitudes and Ancillary Servitude Entitlements – *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson*' (2016) 79 *Journal of Contemporary Roman-Dutch Law* 671, 675–76; discussed in S Pascoe, 'Re-evaluating Recreational Easements – New Norms for the Twenty-First Century?' in B McFarlane and S Agnew (eds), *Modern Studies in Property Law*, vol 10 (Oxford, Hart Publishing, 2019) 167, 181.

[107] See GS Alexander, 'Governance Property' (2012) 160 *University of Pennsylvania Law Review* 1853.

[108] ibid 1875. See further R Walsh, 'Property, Human Flourishing and St Thomas Aquinas: Assessing a Contemporary Revival' (2018) 31 *Canadian Journal of Law and Jurisprudence* 197.

[109] S Blandy, S Bright and S Nield, 'The Dynamics of Enduring Property Relationships in Land' (2018) 81 *MLR* 85, 85–86.

[110] ibid 87, citing R Macneil, 'Relational Contract Theory: Unanswered Questions' (2000) 94 *Northwestern University Law Review* 877, 881.

[111] ibid 88.

is sustained through time, there may be a degree of 'give and take, live and let live'[112] which was stressed numerous times by Lord Leggatt in *Fearn*. This approach is needed to accommodate changes in the use of land, in the identity of the rights-holders, in external regulatory and economic forces, as well as in the parties' preferences for rigidity or flux.[113] Applying this to negative easements, in a dispute between neighbouring owners, it may be necessary to resolve not only the disputed property relationship, but also the personal relationship between the parties.[114]

ii. Effect of Human Rights on Relational Justice?

In Dagan's view, the autonomy-based foundation of property also implies that liberal property is a human right that bounds the power of judges and legislators and provides standing against governments and private parties.[115] Relational justice rejects the conventional division between public and private law. Dagan argues that property's horizontal dimension governing our interactions with others must inevitably require the recognition of some core mandatory norms of interpersonal human rights.[116] This involves the reinterpretation of the human right to property as one that is operative horizontally and not only vertically, and is undermined not only by failing to protect property rights but also by failing to recognise such rights.[117] Lord Leggatt in *Fearn* was correct that 'There is no need or justification for invoking human rights law when the common law has already developed tried and tested principles which determine when liability arises for the type of legal wrong of which the claimants complain.'[118] Likewise, the common law should recognise the validity of negative easements without recourse to Article 8, which is not appropriate in this situation, because allowing an interplay of the common law of easements with Article 8 would significantly overcomplicate the law of easements.[119]

iii. Freehold Covenants?

Within the realms of relational justice, it also needs to be considered what other areas of law a landowner should be using to assert their claims. Gray and Gray set out 'the historic view' that 'common law recognised, for instance, no such right as a prescriptive (or any other) easement to preserve a good view over an

[112] *Fearn* (n 1) [28], [34], [63], [91], [124].
[113] Macneil (n 110) 88.
[114] ibid 89 and discussed also by Pascoe (n 106) 178.
[115] Dagan (n 9) 11.
[116] ibid 176.
[117] ibid 246.
[118] *Fearn* (n 1) [113]. See also D Nolan, 'Nuisance and Privacy' (2021) 137 *LQR* 1, 3–4.
[119] Compare the approach taken in *McDonald v McDonald* [2016] UKSC 28, [2017] AC 273 [43] in relation to landlords and tenants.

adjacent landscape' and state explicitly that 'such a right may be acquired only [by] a restrictive covenant which precludes the owner of neighbouring land from building [so] as to obstruct the view which it is desired to protect'.[120]

While protecting views using easements appears to be limited and uncertain, the same cannot be said of protection using covenants. In analysing whether rights differ in their content depending on whether they are negative easements or restrictive covenants, if the claimants in *Fearn* had the benefit of a restrictive covenant, they would have been in a much stronger position than if they had a negative easement. A restrictive covenant would impose specific restrictions and obligations on the owners of the Tate Gallery not to overlook the flat owners whereas a negative easement would be more imprecise in being able to determine the scope and parameters of the right of the flat owners to prevent the Tate from engaging in certain activities.

Having excluded the possibility of an easement of prospect in *Phipps v Pears*,[121] Lord Denning's view was that freehold covenants need to be used to protect the view from one's property. Underpinning the decision is that the right could not be acquired by prescription and could not pass under section 62 of the Law of Property Act 1925, because the right was not known to the law. There is an underlying tension in relation to prescription imposing rights on landowners of which they may have not been aware and the concern that they should be created expressly. The difficulty is that, in many cases, the possibility of freehold covenants may be unrealistic, because a landowner cannot anticipate what developments there will be in the future and many landowners will not want to enter agreements with their neighbours restricting their activity on their own land. Nevertheless, most buyers of new build houses and flats enter covenants restricting activity on their land and the same applies to the vast majority of units in estate developments since the late nineteenth century.

Freehold covenants also have the significant advantage over easements of the jurisdiction under section 84 Law of Property Act 1925 to discharge or modify covenants, which is used very extensively. It is notable that the Supreme Court in the landmark case of *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd*,[122] when analysing the public interest ground in section 84,[123] demonstrated Dagan's pluralistic approach to determining land rights in balancing the interests of those provided with affordable housing with those of terminally ill children in a hospice. The court dismissed the appeal and refused the application for the restrictive covenants to be modified due to the cynical

[120] K Gray and SF Gray, *Elements of Land Law*, 5th edn (Oxford, Oxford University Press, 2009) 615 and see Poulsom (n 44) 138–139.

[121] *Phipps v Pears* [1965] 1 QB 76.

[122] *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd* [2020] UKSC 45, [2020] 1 WLR 4783. See further T Sutton, 'LPA 1925 s.84 and cynical breaches: Alexander Devine Children's Cancer Trust v Housing Solutions Ltd' [2021] *Conv* 213.

[123] Law of Property Act 1925, s 84(1)(aa) and (1A)(b).

and deliberate breach of covenant by the developers with a view to making a profit. The decision thereby protected the right of the children's hospice not to have their grounds overlooked. Covenants can be very effective devices in these particular contexts, preventing neighbours spoiling views or overlooking property.

There were specific covenants in *Gilbert v Spoor*[124] and *Davies v Dennis*[125] that enabled views to be protected, but there are inherent limitations of covenants,[126] such as the requirements that the burden of a freehold restrictive covenant can only run in equity and that a covenant requiring steps to be taken, if construed as positive, will not run at all. Unlike easements, covenants in England and Wales are not legal interests in land under the Law of Property Act 1925, or interests which override under the Land Registration Act 2002.[127] Freehold covenants are therefore not a panacea, and the law of easements needs to fill the void in suitable cases.

It has been acknowledged that a right to a view may be created by express grant or covenant and that 'the enforcement by a court of a covenant not to build so as to obstruct a view has been described as an extension in equity of the doctrine of negative easements'.[128] This is a clear and powerful indication that equity prefers to extend the law using the medium of covenants rather than extending the scope of negative easements. Nevertheless, the effects of limitations with covenants can be seen in other cases. One of the underlying problems in *Regency Villas* was non-enforceability of positive freehold covenants which was a factor in leading the Supreme Court to recognise recreational and sporting easements. There are, however, significant difficulties giving a freehold owner a right to use physical facilities (recreational or otherwise) which require regular management and maintenance when there is no satisfactory legal mechanism for enforcing duties to manage and maintain them which highlights the need for reform of the law of freehold covenants.

iv. Planning Permission as a Tool for Relational Justice?

Reconciling the conflicts between public and private interests is brought to the fore with consideration of whether planning permission and planning laws are sufficient to protect landowners from invasions of privacy. It is clear that they are not, because planning permission was given, for example, in *Fearn*,[129]

[124] *Gilbert v Spoor* [1983] Ch 27.
[125] *Davies v Dennis* [2010] 1 P & CR DG13 at D33.
[126] Poulsom (n 44) 139.
[127] ibid 142.
[128] See Foster (n 37) 277 fn 70 citing CJ Gale, *A Treatise on the Law of Easements* 305, 9th edn (London, Sweet and Maxwell, 1916).
[129] *Fearn* (n 1).

Gilbert[130] and *Davies*.[131] As Lord Leggatt stated explicitly in *Fearn*, 'the planning system does not have as its object preventing or compensating violations of private rights in the use of land. Its purpose is to control the development of land in the public interest'.[132] It can also be problematic that not every development requires planning permission. If planning guidance can define privacy principles, that may facilitate the recognition of easements of privacy not to be overlooked.[133] The guidance could state that a right not to be overlooked could not arise from a property exceeding a particular distance, calculated by reference to size, nature and locality of the dominant property.[134] An alternative could be statutory restrictions on building above a certain height within a certain distance of another's land, defined by geometric principles, just as the Party Wall etc. Act 1996 defines works on or close to boundaries. Rights capable of prescriptive acquisition might be restricted to those which confer 'practical benefits of substantial value or advantage',[135] or which increases significantly (for example more than *x* %) the value of the property.[136] The Law Commission identified the difficulty of calculating the amenity value of light which would also apply to a right not to be overlooked and in particular, the absence of a 'one size fits all' approach.[137]

However, in the National Planning Policy Framework published by the Ministry of Housing, Communities and Local Government in July 2021, there is no reference to or acknowledgment of privacy concerns, so this is clearly not forthcoming in the near future. A grant of planning permission does not authorise the infringement of private rights to light. Guidance in the Framework states, 'when considering applications for housing, authorities should take a flexible approach in applying policies or guidance relating to daylight and sunlight, where they would otherwise inhibit making efficient use of a site'.[138] Building Regulations prohibit putting transparent windows in a new or altered building within a specified distance of neighbouring buildings. It would be considered contrary to the public interest to allow a building that would invade the privacy of others, such as providing a view into a public lavatory or changing rooms in shops, theatres, or sports facilities. Private property should be considered in the same way.

[130] *Gilbert* (n 124).
[131] *Davies* (n 125).
[132] *Fearn* (n 1) [109].
[133] Poulsom (n 44) 143 in relation to protecting a view.
[134] ibid.
[135] ibid, using wording from the Law of Property Act 1925, s 84(1A)(a).
[136] ibid.
[137] Law Commission, *Rights to Light* (n 15) [8.84]–[8.86], discussed in ibid.
[138] Ministry of Housing, Communities and Local Government, *National Planning Policy Framework* (2021) para 125(c).

III. CONCLUDING REMARKS

The governing norms in contextual property relationships need to be adjusted to broaden the parameters of negative easements to reflect the realities of twenty-first century living to include not only the right to privacy by not being overlooked and the right to a view in pertinent cases, but also to recognise solar and wind easements, rights to receive broadband and mobile signals and other negative easements as further technological advances are made. There are numerous complexities, especially in relation to prescription as has been demonstrated, and the factual matrix will inevitably be important in determining whether there is an easement, but a planning process is needed that is specifically alert to protecting these kinds of rights. As has been demonstrated, even applying Dagan's theory of liberal property to negative easements is fraught with difficulties. However, as Dagan is keen to emphasise, an understanding of property's plurality would provide opportunities for the expansion of the law through support for innovative types of easements.

Following a structurally pluralistic architecture, land law needs to pay close attention to the governance regimes. All types of land rights that affect the interests of neighbouring owners face the challenge of shaping the governance regime that is needed to facilitate co-operation.[139] Rules of governance dealing with the *inter se* rights of such owners need to be treated as an integral part of land law.[140] Dagan's theory of liberal property can be used in the critical assessment of specific property regimes and in establishing suitably contextualised schemes as is done here with negative easements. Where a landowner is claiming, for example, an easement of privacy not to be overlooked in circumstances not covered by the criteria governing nuisance in *Fearn*, protective measures to mitigate the invasion would need to be evaluated, but should not prevent a right arising. Such mitigating steps would inevitably be much more complicated with other types of negative easements, thus potentially strengthening the arguments for their validity, which would represent an important milestone in the development of land law.

[139] H Dagan, 'Liberal Property: Clarifications and Refinements' [2022] *King's Law Journal* 3, 21.
[140] See ibid 22.