

Property as a Fundamental Right in Modern Constitutionalism:

A proposal for an ongoing controversy

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“The nature and scope of the right to property is one of the most controversial issues of constitutional law, not only in the United States, but throughout the world.”

Bret Boyce, “Property as a Natural Right and as a Conventional Right in Constitutional Law,” 29 Loy. L.A. Int’l & Comp. L. Rev. 201 (2007), p. 201
(available at: <http://digitalcommons.lmu.edu/ilr/vol29/iss2/2>)

Is there any connection between

i) the nature of the right to property
and

ii) the current controversial issue
concerning the **attempts to take
from the state the constitutional
responsibility of guaranteeing
property rights?**

Is there any connection between

- i) the nature of the right to property and
- ii) the current attempts to **privatize the public land registration system** (e.g. New Zealand) or to **replace it with technological companies implementing the blockchain system?**

ELRA Statement

“Land registration systems reflect the legal traditions of the territory in which they operate and therefore vary from place to place (...).

However in every jurisdiction the land registry is the official organisation responsible for operating the land registration system on behalf of the state. There can only be one official land registry for each territory.”

Will this statement be accurate in a few years?

It's hard to predict what will happen but at least I can try to explain the historical and philosophical reasons by virtue of which property rights could eventually fall outside of the state responsibility.

The Main Question

If the right to property was at the core of modern constitutionalism, so ‘Declaration of rights’ and state constitutions conferred sovereign states the duty of its protection, **what historical and philosophical reasons might explain why property rights are now left somehow unprotected by constitutional states?**

Structure of my Presentation

- 1) The philosophical foundations of the right to property in the origins of modern constitutionalism
- 2) The Lockean doctrine of the right to property and its current influence
- 3) My proposal: property and wealth at the service of an integral human development

Philosophical foundations of the right to property in the origins of modern constitutionalism

Declaration of Rights of Virginia (1776)

SECTION I. **That all men** are by nature equally free and independent and **have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property,** and pursuing and obtaining happiness and safety.

Philosophical foundations of the right to property in the origins of modern constitutionalism

V Amendment of the US Constitution (1789)

No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense; nor shall be compelled to be a witness against himself; nor be **deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without just compensation....**[E]xcept in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service, in time of war or public danger...in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary....

Philosophical foundations of the right to property in the origins of modern constitutionalism

Declaration of the Rights of Man and of Citizen (1789)

2. The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, **property**, security, and resistance to oppression
16. Any society in which **the guarantee of the rights is not secured**, or the separation of powers is not determined, has no constitution at all.
17. **Property being a sacred and inviolable right**, no one can be deprived of it, unless a legally established public necessity demands it, under the condition of a just and prior indemnity.

Philosophical foundations of the right to property in the origins of modern constitutionalism

French Constitution (3 Sept. 1791 = 1795)

TITLE I: FUNDAMENTAL PROVISIONS GUARANTEED BY THE
CONSTITUTION

The Constitution guarantees the inviolability of
property, or a just and previous indemnity for that
of which a legally established public necessity
requires the sacrifice.

Philosophical foundations of the right to property in the origins of modern constitutionalism

French Constitution (3 Sept. 1793)

Preface

1. The aim of society is the general welfare.

Government is instituted to guarantee man the enjoyment of his natural and inalienable rights.

2. These rights are equality, liberty, security, and **property**

8. Security consists of the protection accorded by society to each one of its members for the **preservation of his person, his rights, and his property.**

16. The right of property is the right appertaining to every citizen to enjoy and dispose at will of his goods, his income, and the product of his labor and skill.

18. Every man may contract his services or his time; but he may not sell himself or be sold; his person is not an alienable property. The law does not recognize the status of servant; only a bond of solicitude and acknowledgment may exist between the employee and his employer.

19. No one may be deprived of the least portion of his property without his consent, unless a legally established public necessity requires it, and upon condition of a just and previous indemnity

Philosophical foundations of the right to property in the origins of modern constitutionalism

Is Property in Modern Constitutionalism...

A **Natural Right**

or

A **Conventional Right?**

Is this question really relevant regarding the constitutional duty of sovereign states to protect property rights?

The Lockean doctrine of the right to property and its current influence

Aristotle understood ‘nature’ teleologically, so property is natural because

Thomas of Aquinas thought that property was natural as dictated by natural reason because it is beneficial.

Bartolus: Property is “the right of complete control over a physical object, to the extent not prohibited by law.”

Bartolus’ definition was repeated by many lawyers, including Domat, Pothier, art. 544 of the French civil code (1804) and included in many other European Civil Codes.

Grotius and Pufendorf: property rights are not absolute and not natural in the strong sense of being compelled by natural law, but rather in the weaker sense of being consistent with rational human nature under conditions of scarcity.

The Lockean doctrine of the right to property and its current influence

Second Treatise of Government (1690)

John Locke Right to property as a pre-political right

- His justification of property rights is central to his entire political theory: the right to property is not just one right among many, but the paradigm right and a metaphor for rights in general.

- The preservation of property in the broad sense is the essential function of the state:

“The great and *chief end*, therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property.*”

The Lockean doctrine of the right to property and its current influence

John Locke Right to property as a pre-political right

- He “placed the right to property on a much firmer foundation than his predecessors, a foundation that was prior to and independent of any social contract.”
- “Every Man has a *Property* in his own *Person*”, concluding that man therefore has a property right to his labor and its fruits. In doing so, he “attempted to ground the right to property in labor in order to demonstrate that it was prior to, and thus, superior to the claims of the state itself.”

(Bret Boyce, “Property as a Natural Right and as a Conventional Right in Constitutional Law,” 29 Loy. L.A. Int'l & Comp. L. Rev. 201 (2007))

Hannah Arendt's reading of Locke's doctrine

The Human Condition (1958)

See the recent reading by:

Alfonso Ballesteros, “Hannah Arendt: from Property to Capital... And Back?”, *Archiv für Rechts- und Sozialphilosophie* 104, 2018/2, 184-201, p. 197.

Property, Human Nature and Human Dignity

Aniceto Masferrer, “Taking Human Dignity more Humanely: A Historical Contribution to the Ethical Foundations of the Constitutional Democracy”, *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives* (Aniceto Masferrer & Emilio García-Sánchez, eds.), Dordrecht-Heidelberg-London-New York, Springer (Collection ‘*Ius Gentium: Comparative Perspectives on Law and Justice*’), 2016, pp. 221-256.

My proposal: property and wealth at the service of an integral human development

Property and human dignity: the 1949 German Constitution

- It “created not only a *Rechtstaat* (state governed by the rule of law) but, equally important, a *Sozialstaat* (social welfare state)”
- “The function of Article 14 is not primarily to prevent the taking of property without compensation (...) but rather to secure existing property in the hands of its owner” (*German Constitutional Court, 24 BVerfGE*).
- In some cases, the German Constitutional Court has made it clear that **the core purpose of property as a basic constitutional right is not economic but personal and moral.**”

(Alexander, Gregory S., “Property as a Fundamental Constitutional Right? The German Example” (2003). Cornell Law Faculty Working Papers. Paper 4).

My proposal: property and wealth at the service of an integral human development

- We should somehow go back to the republican tradition (from Aristotle to Kant) whereby the ownership of property was regarded as the condition for responsible participation in government but in an egalitarian way, defending the property of every human being.
- Besides housing, a more egalitarian to the means of livelihood is also essential (wealth). Property and wealth are supposed to coexist “because property can only make freedom possible if it is followed by someone's access to a means of subsistence or wealth.”
- (Alfonso Ballesteros, “Hannah Arendt: from Property to Capital... And Back?”, *Archiv für Rechts- und Sozialphilosophie* 104, 2018/2, 184-201, p. 197)

Final Conclusion

- Sovereign states must not resign its political and constitutional responsibility to guarantee the exercise of property rights that are so crucial to enable human beings to live and develop both individually and as a real community.
- This will be possible only if the core purpose of property as a basic constitutional right is not economic but personal and moral.

Thank you!

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