Land and property rights: some remarks on basic concepts and general perspectives

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Abstract

The institution of real property in private ownership has become universal by replacing the regime of common property largely for functional reasons. Being related to an individual owner and his limited life span, private ownership is insensitive to long-term effects. It needs complementary devices to become long lasting, especially with respect to the environment and natural resources. The juridical system is about to evolve towards this perspective. It is supported by the concept of 'property rights'. This decomposes the compact command over resources into a bundle of rights and duties and liaises it with institutional precautions at various levels, local, national and global. The competing concept of centralized planning and nationalized land has failed in this respect. In the countries of the South, specific variants of land management have to be conceived, introduced and routinized which should learn from universal ideas. Likewise, a process of social adaptation in response to the particular cultural identities is indispensable. The various slum legalization and regularization ventures under way are examples of this internalization. Their smallness reflects an evolutionary strategy. It suffices that some ventures succeed to change the course of subsequent development. © 2000 Elsevier Science Ltd. All rights reserved.

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Introduction

Jean-Jacques Rousseau once found that the one who first put a fence around a piece of land which was bigger than what he needed, committed a robbery because he grabbed and declared as his own what used to be common property. History and ethnology may put the very act more subtly, but its essence is valid: the invention of the institution of private ownership in land as ‘real

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property’ may be understood as a formalization of an illegitimate act. However, once committed and passed unexpiated, it cannot be made undone.

A new instance of this kind of robbery is happening at present: TV-Companies are ‘buying’ events that are of interest to the masses, such as soccer matches or the entire Olympic games. Subsequently, they make the viewers pay for the broadcast. A field that used to be common, becomes fenced once and for all. It suffices that some money changes hands. Subsequently, the buyer feels free to act as gatekeeper to ‘his’ field, which allows him to draw easy profit. More important for the people in the South, and really dangerous not only for them are the efforts of Northern investors to seize biological knowledge or facts which hitherto were accessible for everybody, i.e. ‘common’. The companies try to fence them off, often for genetic or other manipulation to make money with them, arguing: ‘What we paid for is our property, consequently it is legal and legitimate to exclude everybody else’.

In this paper, my concern is neither TV nor patents of any kind. My concern is land and access to natural resources. I shall try to shed more light on the societal mechanisms which go with it. The parties involved are the general public, its representatives and those who (by chance or by force) are the gatekeepers of access to whatever resource is in question. Yet, the constellation is skewed and biased: the politicians, as the public’s representatives mandated to defend its interests, often belong to the gatekeepers’ party. That makes them fight fiercely for private property.

The individual right to property in land (‘real property’, ‘propriété foncière’, ‘propiedad privada’, ‘Grundeigentum’) and the corresponding allocation procedures offer certain advantages over the traditional collective land-holding regimes. However, the concept of individual property does not provide for resource conservation and sustainability. It does not, consequently, relate to long-term perspectives of survival in a given habitat. Consequently, the concept of full ownership in land needs additional provisions for environmental control. The ‘property rights approach’ seems to offer the base for complementary instruments of resource management which take into account the public interest in permanency and sustainability.

The world without formal property rights

For 200,000 generations, mankind lived as gatherers and hunters. We know from those cultures which happen to have survived until today (Pygmies, Bushmen, Amazonas Red Indians, etc.), how they use their environment and adapt to a given habitat. They dispose of vaguely delimited territories that they use groupwise and exploit as ‘commons’, but only partly in order to leave enough for future generations. Anthropological evidence confirms that they live without severe conflicts about land in a state of relative abundance (Sahlins, 1974).

For the last 200 generations only, the majority of mankind lived in sedentary agrarian societies. These were able to use land and its resources much more intensively, allowing for a rise in population per area by a factor of 10 or more. They are typically organised in communities on a territory which is regarded as common property. The right of access to and the use of a particular piece of land on this territory, and its fruits are symbolically vested in the leaders of the community, be it the king at the summit of a feudal hierarchy or a multitude of household-heads in a segmented society. Usually there is little discrimination as to the types of power, since legislation, jurisdiction and arbitration, exercise and leadership in ritual and routine activities complement each other in
producing the necessary group coherence. The access to land and natural resources is subject to considerable differentiation in detail, but all the respective rules and provisions may be understood as serving one purpose only: to keep the community alive and together for survival (Weber, 1928/1964; Polanyi et al., 1957; Klee, 1980). With respect to land and resources the typical characteristics of the agrarian land regime are:

- First, sharply and definitely fixed boundaries do not exist. An agrarian collectivity is exposed to constant changes concerning its population and nature. Consequently, access to land and resources has to be constantly reallocated. This happens by means of dispute and internal conflict. Whatever rules of heritage exist, succession must remain negotiable. By necessity, agrarian societies are quarrelsome ones.
- Second, claims are related to the survival of the respective sub-groups. Attention is centred on the actual or possible fruits and benefits from cultivation and land use. A focus merely on land would be counterproductive.
- Third, the emphasis on the fruits of a given piece of land seen against the continuous fluctuation and external disturbances is dealt with through piecemeal arbitration. Without necessity and in default of the tools for standardization, land and natural resources are not fully marketable.

Many of these features and their inherent logic persist in areas called ‘backward areas’ by development sociologists qualifying them as rather inefficient. Anthropologists, on the other hand, hold that their logic is highly functional, especially in view of an equitable and ecologically stable use of the given resources. Especially, the studies on nomadic people are convincing in this respect. Therefore, it is natural that those people who have lived the traditional way, but come to settle in towns are at pains to accept rules which are not only new, but also incomprehensible to them. Yet there is raison d’être for an urban, more formal land regime having been unfolded and improved over the centuries.

The invention of ‘real property’ and its consequences

The ancient Romans, guided by their predominantly urban (i.e. literally petrified) perspective on the one hand and by their ability of and positive experience in keeping written records on the other hand, started to make land holding a subject of systematic formalisation and documentation. As rulers of a vast territory populated by people of very different traditions, they welcomed any streamlining of civil administration including that of property as a suitable complement to military rule (Altheim, 1962). The solution, based on ancient Egyptian and Greek concepts, consisted in publicly delimiting land and registering it as an object controlled by mortal individuals and not by

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1 On law and land law, see Maine (1987/1997); Weber (1928/1964); Le Roy and Le Bris (1982) and Münkner (1984). For general case studies on the ecologic efficiency of agrarian societies, see Dalton (1967). For Asian examples, see: Theodorsen (1961); English (1966); and Jensen and Lok (1994). For Africa material, see Meillassoux (1964); Gluckmann (1967); and Diop (1981). Finally, on nomads, see Vincent (1975) and Tubiana (1977).
immortal families. No distinction was made with respect to benefits (‘fruits’), access to them and the soil itself. In the sequel, the continuous struggling and arbitration disappears, heritage and succession become transparent. Transactions on the model of a contract between private parties, facilitated by surveyors, notaries, etc., make land a commercial good. The concept excludes the dimension of time and, consequently, offers no room for ecological considerations. In fact, the degradation of the Mediterranean which happened in the Roman era, was propelled by profit-seeking private mine, forest and land owners. The focus on individual property separated the ‘haves’ from the ‘have-nots’. Enormous disparities became apparent. In Rome, the role of the ‘landlord’ emerged. These changes resulted in social unrest. Rome was plagued with it from then on (Kaser, 1989; Kränzlein, 1963; Carcopino, 1956; Rostostzeff, 1955; Mumford, 1966). But from the point of view of the ruling class the innovation proved — and still proves — very handy.

Neighbouring cultures borrowed generally from Roman concepts what they reckoned advantageous for them. Thus, the Roman land regime proliferated, too, usually being married with features of indigenous institutions and modified as the need arose. One branch of heritage, the Islamic property right, includes religious elements (United Nations, 1973a). Another, the English ‘Common Law’, retains from the Anglo-Saxon feudal concept the idea that the individual cannot own land as such, but hold ‘a bundle of distinct rights over it’ (United Nations, 1973b, p. 25; Maine, 1887/1997). Elsewhere in Europe, the evolution of the property law vacillated between the interests of the more or less autonomous urban citizenries whose lawyers argued in favour of an unrestricted ownership by mortal individuals and the jurists of the princely states who defended the dual concept of immortal overlordship. The lord’s sovereignty included the right to pass (restricted) property rights to ‘his’ subjects. Both stands argued with specific interpretations of Ancient Roman provisos. In the course of this discussion the idea of absolute ownership as ‘usus, fructus, abusus’ consolidated. The American and the French revolutions finally declared the individual, the mortal citizen to be the source and the owner of all thinkable rights. Sovereign not only in the political sense, the individual now became also a sovereign over his property. The ‘Droit de l’homme et du citoyen du 28 août 1789’, therefore, called in its Article 4, the individual right to property ‘inviolable et sacré’.

The evolution of real property regimes in the north

These ideas became consolidated in the various European constitutions. They fused with the logic of market economies to make real property a freely tradable good. This seduced many owners of large estates in rural areas to instigate the eviction of a considerable part of its population. In consequence, the people migrated to the places of industry, which brought about the familiar urbanization pattern. In Europe, however, the capital tended to accumulate through production and trade and went only marginally into land speculation. Also, the European cultures react to the

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2 On the development of the concept of property in Europe, see Häberle (1984); Harbrecht (1984); Mayer-Maly (1984); and Comby (1995).
skewness in the resulting distribution of riches as well as to the pressures of justifying or ironing out some of the discrepancies in different ways. The Anglo-Saxon public opinion tolerates large discrepancies in wealth, executive power and resource-exploiting, and selfish practices. The continental consensus leans towards more equality and control of selfishness. It tends to accept higher taxes to put up with this which makes possible a superior level of infrastructure and public services and more communality, but entails more restrictions for economic activities, more regulations on investment and (some people claim) more inertia.\(^3\)

Such regulations regarded often as impinging on real property, are less put into question, if they are related to the local level and call for personal solidarity. Local competencies for exercising control of local resources in the name of solidarity and sustainability vary considerably from country to country. Cadastral registers have been kept for the last two hundred years only. Their keeping ranges from uniform governmental procedures at central level based on national sovereignty to diversified piecemeal records of property transactions. An ideal instrument in this respect seems to be a property register kept at the local court. The low-tech, but highly practicable Prussian ‘Grundbuch’ could be easily extended to serve as a resource cadastr. Its proliferation is hampered, however, by the inertia of legal traditions, British and French alike, and the suspicion of the economically powerful toward public institutions, especially if they are low-level and low-key.

In contemporary Europe, the ecological implications of the industrial activities become apparent and increasingly felt economically, too. This results in general pressure for change in the judicial system of land management. As a response to this, a corpus of laws concerning air emissions, the water circuit, the treatment of waste, the protection of biotopes, etc., evolve which comprises all tiers of the jurisdiction, local, national and global. What used to be an uncoordinated development separately in each country, becomes a stepwise coherent corpus of environmental laws for the entire European Union restricting the exercise of ownership especially with respect to land and natural resources.\(^4\)

The rationale behind this is economic considerations that evolved as a critique of mainstream economics. They always had a problem with societal institutions in general and with the institution of property in particular, especially with land. While rural property could be directly related to agricultural production and the corresponding economic benefits, urban land represents in addition to its (potential) productive value, a locational one. It could carry a kind of prime for the monopoly of occupying a particular location in the context of a geographical and socio-cultural constellation at a given point of time. The corresponding potentials or restrictions could be capitalized on, ignored or purposely neglected, dependent on a mutual interference of various owners and their decisions.

The property rights paradigm

This problem is tackled by the ‘property-rights school’ of economists. This school of thought takes as point of departure the Anglo-Saxon notion of property as ‘a bundle of rights to capitalize

\(^3\) The different ‘cultures’ of economic behaviour are discussed under ‘ethics of economy’, e.g. in Ulrich (1990).

\(^4\) For background on the evolution of ecological considerations, see Einem (1980); Teubner (1994); and Epiney (1997).
on economic potentials. It postulates that a parcel of land is but the carrier of profits seen against a set of duties, charges, fees and restrictions of all kinds. Characteristics, such as the exposure to pollution emitted from a neighbour or the emission from one’s own property, and the costs to avoid them have to be taken into account. Furthermore, the existence or the lack of infrastructure and services and their costs and socio-political restrictions, like a rent ceiling or prescribed types of use, have to be considered as well as intangibles such as a prestigious or a pleasant site, injunctions from planning or a shared system of values, etc. The concept allows for politico-cultural properties, like the stability and reliability of a political system, the know-how and flexibility of builders or future employees, of their life style, of natural risks and so on, ad infinitum.

This view was introduced into economics as ‘the problem of social costs’ or ‘the problem of public goods’ and soon gave rise to the hypothesis that the economically most efficient way of dealing with it would be to leave every element of the bundle to the bargaining process of the individual economic units affected. On the other hand, it became clear that the bargaining process itself constituted a cost element, for example in the form of judicial procedures (originally, the problem had been defined on the basis of court hearings in the ‘Common Law’ tradition). An influential fraction of economists, the neo-liberal transaction-cost critics, argue that the costs of the bargaining process should be reduced to a minimum, so that changes towards a relatively better and, finally, the economically most efficient use, would be facilitated. Another fraction, the ‘institutionalists’, hold that the costs of whatever transactions take place will never and even should not fall short of a certain ratio.

Recently, Sabine Mayer has published a stimulating essay on the relevance of the property concept for physical planning (Mayer, 1996, 1997). Planning, she argues, unavoidably interferes in any free bargaining process through defining and assigning certain property rights to the parcels affected. But this can be used to channel also the occurrence of externalities of an envisaged use through injunctions on it. The property rights concept allows us to deal with planning and its repercussions more rationally, because it combines economic and institutional reasoning. Planning in this sense supports the position of the institutionalists. She quotes the famous German town-planner of the 1930s, Fritz Schumacher, who used to distinguish two fundamentally contradictory views on land and property. The one, he said, sees land as given by God for putting it to the most profitable use. Each restriction would be, according to this logic, evil deprivation. The other, he continued, sees land as it happens to be: forest, grassland, field — the base for an ‘ecosystem’ as we would say today. It is up to mankind as its caretaker, or to a given community as representative of mankind, to assume responsibility for ‘its’ — i.e. necessarily local — ecosystem. Planners are trained to use the holistic perspective. They regard land as being the social space for a bundle of territorial and economic rights and the physical space for a territorially defined ecosystem. They must prefer to work at the local level, because only here can the necessary diversity be guaranteed. Consequently, they must defend local autonomy in local land and resource management, and the ‘Grundbuch’ complemented with an environment cadastre would be a key instrument for this.

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5 This is the standard phrase used by, for example, James Buchanan and Geoffrey Payne among others.
6 On property rights, see Alchian and Demsetz (1973). See also the work of ‘institutionalists’, such as Buchanan (1984) and Bromley (1991).
Towards new variants of property regimes in the countries in the south

Under colonisation, most countries in the South experienced two systems of land regime side-by-side, the traditional one on agrarian principles and, in areas specified by the rulers, the British or French one. After the Second World War when most colonies became independent, the new leaders had to think of a unified, all-embracing model of land management. Many governments became attracted by the perspective of comprehensive command as offered by the model of the socialist state economy. The latter states, guided by the ideas sketched in the “Communist Manifest” had resumed control of all means of production, land and natural resources in their entirety. But the bureaucracy they had to build for this end became a huge machinery of resource destruction\(^7\). (Marx himself had mentioned, in passing, that the concept of unrestricted command over property, when applied to land, tends to be insensitive towards environmental effects and could, therefore, destroy the natural resources which provide its base). Many experts, young and theoretical-minded as they were, still took the nationalisation of land as a panacea for streamlined development\(^8\) failing, in addition, to see that the new bureaucracies were unprepared and utterly incompetent for the task, and encouraged the new Southern leaders to introduce nationalization of land and resources. The failure was inevitable.

The non-socialist, often less centralized young governments were not necessarily better off. Without any answer for reconciling the traditional concepts of command over land and resources that the people were used to, with the requirements of modern economics the situation remained impenetrable. The powerful political and economic actors were not unhappy with it. Instead of responsibly searching for elements of a system of accountability they set off to draw the maximum of personal gains out of it. They started to accumulate land and access to whatever resources seemed profitable while excluding, at the same time, the masses from access to land and resources. Landlordship and speculation in land and buildings, like in ancient Rome, widened the gap between the haves and the have-nots. In addition, it caused the ecological degradation to accelerate through the haves spoiling water and air when they squeeze out of their property what they can get and through the have-nots when they scrape their paltry necessities from the overexploited fields for mere survival.

The notorious transition from rural to urban in Africa, Asia and Latin America took the form of mega-cities as agglomerations of people of hitherto unknown numbers. These turn out, at a closer view, as a differentiated fabric of squatter and other settlements each with its own identity and as a very specific mixture of formal and informal economies. Each agglomeration has its own policy of dealing with these phenomena, thus constituting a culture and an identity of its own. Whatever eviction of squatters and suppression of petty trades occurs, they are rather an expression of authoritarian government style than a consequence of the prevailing property rights. The other

\(^7\) For considerations of the ecological degradation in the former USSR and China, see McAuslan (1976); Hahn (1983); and Comby (1995).

\(^8\) Most of the contributions in the special issue of Habitat International on land policy, 4:4–6 (Habitat International, 1980) were largely favourable to nationalization of land. More critical was Le Roy (1985).
side of the coin is that each agglomeration has its own mechanics leaving room for improving its patterns of internal government of which land management is one part.\(^9\)

In response to the declarations of Vancouver and istanbul and under the influence of the World Bank and other aid agencies, slum legalization and regularization schemes were instigated.\(^{10}\) Since in most cases there was no consistent body of land management rules, they had to follow a trial and error approach. In some African countries the World Bank instigated 25- or 30-years occupancy licenses as a low key formular for establishing shelter security. However, the registration remained centralized and the whole matter, consequently, time consuming and open to corruption. A method of decentralizing the registration by authorizing, say the local court to keep the record like with the German “Grundbuch”, has not been tried. Trials and experience are indispensable. Only practical work on the ground, often unspectacular in scope, provides the necessary freedom for the constant fine tuning of principles, concepts and routines in order to replace agrarian style land management aimed at immortal families by urban property management of mortal individuals, and to establish public or, better, community control of property as needed for sustainable development. The corner stone is community responsibility, the logic is evolutionary: Of many small-scale tests, some may turn out adequate and spread. The reasoning on “community property rights” may help to protect these ventures from aggressive gatekeepers of the international economy or from some national politician who may be bought by them.

Conclusions

The Roman land regime of 2000 Years ago became universal, because it proved advantageous. Today, in view of the environmental problems, elements of the Western economic theory that help to understand the situation are about to become universal, too. If handled under the property-rights approach, land management can be made responsive to the emerging needs — locally and globally. It brings the private — and mortal — owner back into the framework of long-term public management.

The robbery of property rights in lands of long ago cannot be undone. But the thieves cannot completely get away with their prey. We, the public, are called upon to make them behave responsibly: ‘Property obliges’, as the German constitution says.

References


\(^{10}\) A sample of the literature from different cultural settings includes Steinberg (1989); Khudori (1996); Mohandas (1987); Bakhteari (1987); Akbar (1990); Ouedraogo (1976); Oestereich (1987); Sachs (1987); Laue (1995); Peattie (1968); Fadda (1987).


