



Property as a human right and property as a special title. Rediscussing private ownership of land



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ABSTRACT

The issue of land ownership is central to any discussion on planning and land use policies. What is surprising is that, in the contemporary debate, there are those who argue that property rights are the solution, while others maintain that they are the problem. For some commentators, property rights are indispensable for protecting the most vulnerable sections of society; for others, they are the main cause of the marginalization of the disadvantaged. Some see them as natural rights; others as socially created ones. This probably depends on the fact that the right to property is one of the most misunderstood of basic rights. One aspect in particular seems to have created confusion also in the debate on land use policies and planning practices: the overlap between the 'general right to hold private property' and 'specific property titles' (in part this is due to the fact that the term 'rights' is often used interchangeably in both cases). This article dwells on this aspect in particular. It considers the main theoretical and practical implications of clearer recognition of the difference between the right to hold private property and specific property titles.

1. Introduction: back to basics

As Ellickson (1993: 1317) aptly observes: because human beings live on the surface of the Earth, the pattern of entitlements to use land is a crucial part of economic and social organization. The issue of land ownership is central and decisive for any discussion on planning and land use policies (Popper, 1979; Krueckeberg, 1995; Siegan, 1997; Slaev, 2014, 2015). Today, the question of land ownership has assumed great significance amid a number of pressing problems.

There follow five main examples (which are drawn from a review of articles in this journal): the introduction of property rights in the transition from socialist economies to market ones (Zhang, 1997; Weixin and Dongsong, 1990; Lai, 1995; Bogaerts et al., 2002; Ding, 2003; Ho and Spoor, 2006; Lerman and Shagaida, 2007; Hartvigsen, 2014; Havel, 2014); the problems of formalization of land rights in developing economies (Lemel, 1988; Palmer, 1998; Feder and Nishio, 1999; Gould, 2006; Benjaminsen et al., 2008; Bromley, 2008; Sjaastad and Cousins, 2008; Meinzen-Dick and Mwangi, 2008; Toulmin, 2009; Van Leeuwen, 2014); the so-called problem of 'land grabbing', i.e.

large-scale land acquisitions in developing countries (Nolte, 2014; Obidzinski et al., 2013; Osabuohien, 2014; Rudi et al., 2014; Antonelli et al., 2015; Exner et al., 2015; Jiao et al., 2015; Suhardiman et al., 2015); the extensive privatizations ongoing in various Western countries (Gould et al., 2006; Luers et al., 2006; Borsdorf and Hidalgo, 2008); the presumed new forms of ownership represented by so-called 'commons' (Short, 2000; Bryden and Geisler, 2007; Barnes, 2009; Bennett et al., 2010; Kitamura and Clapp, 2013; Lopes et al., 2013; Van Gils et al., 2014).

The European Court of Human Rights has brought the issue of private property to the fore through several much-debated judgements.¹

What is surprising is that, in the contemporary debate on planning and land use policies, there are those who argue that property rights are the solution, while others maintain that they are the problem. For some commentators, property rights are indispensable for protecting the most vulnerable sections of society; for others, they are the main cause of the marginalization of the disadvantaged. Some see them as natural rights; others as socially created ones.

Unfortunately, as Shaffer (2009: 5) stresses, there is no chasm so

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¹ Among the important judgements of the European Court in this regard are the following: *Sporrong and Lönnrot vs. Sweden*, 1982; *Erkner and Hofauer vs. Austria*, 1987; *Carbonara and Ventura vs. Italy*, 2000; *Belvedere vs. Italy*, 2000; *Platakou vs. Greece*, 2001; *Scordino vs. Italy*, 2004; *Guiso-Gallissay vs. Italy*, 2009 (Mengoli, 2014).

	<i>Right to hold private property</i>	<i>Property title</i>
<i>Feature 1: rank</i>	First-order right (Human right)	Second-order right (Entitlement)
<i>Feature 2: nature</i>	Abstract	Concrete
<i>Feature 3: dominion</i>	Universal	Individual
<i>Feature 4: variability</i>	Invariable	Variable
<i>Feature 5: alienability</i>	Inalienable	Alienable

Fig. 1. property rights vs. property titles.

wide as that which separates the interest in and attention to property and our conceptual understanding of it. We can agree with Hospers (2007: 61) that the right to property is without doubt the most misunderstood of basic rights. Even John Rawls – the most important political philosopher of the twentieth century and one of the most influential thinkers also in the policy and planning literature – devotes only brief and ambiguous discussion to the matter (Taylor, 2006).²

One aspect in particular seems to have created confusion also in the debate on land use policies and planning practices: that is, the confusion between *the general right to hold private property* and *specific property titles* (in part this is due to the fact that the term ‘rights’ is often used interchangeably in both cases, just as are analogous terms in other languages) (Fig. 1). This article dwells on this aspect. In particular: Section 2 clarifies the distinction between the right to hold private property and concrete property titles; Section 3 evidences the different kinds of justifications involved in the case of abstract rights and concrete titles, and shows how we can avoid misplaced criticisms of property once we take this distinction seriously; Section 4 is devoted to the main implications of the suggested distinction for institutional design and land use policies; Section 5 briefly concludes.

The idea underlying this article is that, also to address very specific problems in particular fields (land-use policies, environmental planning, etc.), it is essential to resume serious consideration of certain background questions. Accordingly, the article will also seek to show that the tradition of classical liberalism was very different from some contemporary ‘neo-liberal’ simplifications and radicalizations.

2. Focus: two different items distinguishable on the basis of five characteristics

When discussing property, it is essential to distinguish between two items that are not always kept clearly separate:

- (i) the right of each individual to hold private property; that is, the formal possibility of *each* individual to become the owner of “things” (for instance, tracts of land or buildings), having personal control on them; in this sense, this is the *general claim* not to be ruled out of the class or category of individuals who may own

property; that is, the right not to be excluded from the class or category of potential property-owners (Waldron, 1988: 21).

- (ii) the property title (property holding) of *someone* to something; that is, the entitlement of a specific individual – say A – to a specific thing X; in this sense, it is the *concrete claim* to determine the disposition of a particular asset.

We shall consider five crucial differences between the two items: rank, nature, domain, variability, alienability.³

The first difference pertains to ‘rank’. The right to hold private property is the right to become an owner of something. Note that in the *Universal Declaration of Human Rights* of 1948 the right to property was stipulated as follows (emphasis added): “Everyone has the right to *own property*”. This is – for instance in a classical liberal perspective – a human right (Rothbard, 1970; Boaz, 1997; Hospers, 2007); that is, a moral right, a basic right. Human rights are rights of individuals: to say that W is a human right means that each individual has this right. As a human right, the right to hold private property must be recognized in the constitution. It is a *first-order right*. By contrast, the property title to X is a specific and substantive property title to a particular thing. This title will be legitimate if it has been obtained through legitimate processes: for example, the property title of A to X may be legitimately acquired (i) by purchasing it voluntarily and freely from B, (ii) inheriting it from C, (iii) receiving it as a gift from D (where B, C and D have obviously in their turn obtained X by legitimate means). This is a typical *second-order right*. Observe that transfer cannot be exclusively one way: the recipient A must consent to the transfer by B, C or D; even if X is a pure gift, A may refuse it (Narveson, 2001: 94).

The second difference concerns the ‘nature’ of the right or title. The right to hold private property is *abstract*; it regards, not a particular instance, but all possible instances. The property title on a specific object is *concrete*; it regards a specific item and only that item.

The third difference concerns ‘dominion’, i.e. *who* possesses *what* right or title. The right to hold private property is a right that – if we agree to recognize it as a basic right – must pertain to all individuals in equal form and to an equal extent: it is a *universal right*. By contrast, ownership as title pertains to some individuals, who will possess it to an extent that all the others are excluded: this is a *singular title*. A property title is the possibility to use a specific thing in a manner such that it becomes in some way a component or ingredient of one’s actions. Property titles define someone’s sphere of freedom of action in regard to certain objects. Precise property titles have meaning only when conflicting claims on scarce resources among numerous individuals are at stake (Underkuffler, 2003: 12).

The fourth difference concerns ‘variability’ or ‘non-variability’. In

² In short: “Rawls is never explicit about what is entailed by the right to hold personal property” (Howard, 1985: 42). Especially because of its vague treatment of the issue of private property, Rawls’ theory of justice (as acknowledged by Rawls himself: see 1971: 273–274 and 2001: 138–139) is unable to choose between *property-owning democracy* and *market socialism*. In other words: “Justice as fairness is officially agnostic between two ... regimes: property-owning democracy ... and liberal socialism” (Taylor, 2004: 437). As Hart (1973: 538) observes in this regard: “Rawls in his book simply lists without argument the right to hold personal property, but not property in the means of production, as one of the basic liberties, though ... he does this at some cost to the coherence of his theory”.

³ Here I mainly follow Ferrajoli (2001), although I reach partially different conclusions.

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