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Property Theory: What is it and why teach it

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The real estate and property industry implicitly stands on the current Western institution of private property, however, systematic investigation into the nature and problems of that institution is seldom found as a core topic in property education.

This paper reviews the history and issues that surround the theory of property, its relevance to contemporary issues and its place in property education at a university level. The paper concludes that students will only be able to respond rationally to issues that challenge the current institution if they have a sound understanding of the theory of property.

Keywords: *property theory; property education; realism and property; history of property*

BACKGROUND

The purpose of this paper is to explore the importance of property theory in real estate education. Currently, real estate education tends to be limited to the current Western system of property, with its characteristic property institution. Within this paradigm there is no need to study property *per se*, as it is taken as an understood given. Several pressures exist in the current environment that challenge this complacency. There is evidence that the current institution has changed in the last few decades. There is also evidence of pressures for far greater changes.

To understand and respond to these changes, real estate professionals need to be aware of how the current institution of property came about and how it is supported. The literature on the theory of property is extensive and the debate on how property is theoretically grounded has a long and deep history. Despite this, few real estate professionals are even aware that there is such a study as property theory, or that there may be other solutions to the problem of

property beyond the simplistic dichotomy of Western versus socialist polarities.

This paper is not an attempt to exhaustively deal with this large issue, but rather a summary of some of the broad issues that inform the debate with a view to demonstrating the importance of studying property theory as part of property education. It may serve as an introduction to the field for some, but for a deeper investigation into the issues readers should consult the references.

RECENT CHALLENGES

Standing at the base of economic theory is trade, and trade assumes the exchange of property. The nature of property lies at the heart of all economics, yet it is seldom critically examined in property education. This would not be an issue if the matter were completely resolved; however, in the last few decades there have been several major developments that are best understood by reference to the limitations and peculiarities of the current Western institution of property. Over that time, the institution of property has actually been significantly altered. In addition, there are

other forces that are yet to be fully worked out in policy and practice.

About three quarters through the twentieth century Australian freehold property was significantly changed through the resumption of much of the owner's right to choose what sort of use to make of land property. If property ownership is considered to mean ownership to a bundle of rights, then the state resumption of some of those rights constitutes a fundamental change to what property is. The arguments surrounding the justification of tighter planning controls are complex, and there is certainly a benefit to all from an ordered urban form, but this still left owners with a different type of property. Today, some developers operate profitably by buying land, obtaining development approval for it and then on-selling it. This niche in the property industry is a creature of the recent planning statutes; it is the direct result of the changing nature of property.

The benefits of planning may be justified on the basis of eventual personal profits to landowners as a result of an ordered urban structure. Without this, it would appear that some compensation would have been warranted in line with the Australian constitutional protection of property from resumption by the state. Another group of statutory changes to the Australian institution of property are currently in the process of development.

The last three decades have also seen the massive success of a movement that has been described as *the greatest political movement since Marx challenged liberal capitalism* (Whelan 1989). That movement asserts that the reckless exploitation of property is unjust as it denies future persons their *natural right* to the material resources that compose our world. This claim infers that ownership of property does not confer despotic right of control; it runs counter to the institution as it has existed in Western practice for centuries. This movement is the environmental movement. It is popular to the point of being an ideology and has already achieved extraordinary success. The limitations that have been imposed due to the speculative concerns of environmental activists have had substantial effects on real property and development. They have been achieved by changing the institution of private property.

Environmental activists would appear in favour of greater constraints on property in the future. The changes would strip further rights from private ownership, supposedly in order to achieve some kind of inter-generational equity. It is argued on the basis of justice and implies that the current property institution is not just. It seeks to force a sense of obligation towards future persons on present landowners.

The institution of property is also under another current threat. In Australia at present, there are over five hundred applications for recognition of customary title. These are in addition to the successfully processed claims and the great many other instances where indigenous people believe that the laws of white Australia have stolen a major part of their cultural identity in the form of their land property. While many white Australians may not share their view, the fact that they hold it, and that the two hundred year old legal principle, *terra nullius*, has been recently overthrown, suggest that the issue merits attention. At present, the matter of customary title tends to be dealt with on a legal level, remaining within the current legal institution, even though the matter fundamentally exists outside of that institution.

Recognition of native title forces a re-evaluation of the validity of white Australian law and its principles and this infers the recourse to a higher system of understanding, one that is capable of judging the applicability of a particular legal regime (Sheehan 2000). Exploration of the question of property lies in this higher order, an order where justice, rights and obligations are fashioned and from which legal structures can be designed. The question of customary title is not a peculiarly Australian phenomenon; it is being discussed worldwide. Australia is well advanced in its treatment of the issue, and this leadership is good reason for Australians involved in property, especially as academics, to consider the matter very carefully. It necessitates leaving one's cultural loyalties to consider the matter impartially, without provincialism.

These issues have no simple answer, and most people accept some aspects of the erosion of property, but reject others. The essential question is how can the rights and obligations of property be understood.

THE HISTORY OF PROPERTY (OWNERSHIP AND OBLIGATION)

The current Western institution of property is only about two centuries old. It is the product of a gradual development that appears to have roots that go back about a thousand years. An institution similar to it operated at the end of both the Greek and Roman empires, though each of these cultures came to greatness under very different property institutions. Most ancient cultures upheld personal property, but real property tended to come with various community obligations. Often these were to the family, clan or tribe, though they were frequently to the state. The family or clan were accepted as the owners of real property in early Greece and early Rome. The ancient Germanic tribe possessed property by tribe. The Mosaic law of the ancient Hebrew allowed for trade in land property but caused it to return to its family owners on the Jubilee every fifty years, making private title appear more like leasehold with reversion to permanent family owners (Small 1997). The Egyptians owned land as families, but paid substantial land taxes.

These ancient cultures displayed a range of cultural resolutions of the property problem that all had one common characteristic, they all recognised that property ownership was connected with obligations, either to the immediate family, tribal group, or to the state. These cultures are significant in that they form the basis of what has developed into Western culture. Other ancient cultures evidenced similar deference to the obligations of property. The Chinese and Indian cultures practiced systems of land property that are quite evidently feudal. The occurrence of feudal property structures in diverse situations is a curious feature of the anthropology of property.

The late Roman period saw the development of large estates. Where these occurred in the remote parts of the empire, such as Britain, they resembled feudal manors, though the feudal hierarchies of the later periods were yet to come. The fall of the empire disrupted law and order at all levels, though the owners of the estates tended to continue by family succession. Medieval feudalism developed as a result of the offer by Germanic chieftains to protect the estates in return for formal title to the land. This

set in place a system of rental obligations that funded security and the germ of civilization. The Germans modelled feudal obligations on systems operating within their culture, and the result was an upward flow of rents in return for a downward flow of services, mainly military protection. The concept was elegant in its balance, though it was often subverted by corrupt incumbents at the various levels of authority. The system resulted in the re-civilisation of Europe and was symbolically completed with the crowning of Charlemagne in 800, that ended the dark ages. The Chinese and Japanese empires also adopted feudal land property with similar results. Under just rulers the system returned peace, prosperity and cultural development, but under greedy lords the lower classes were exploited (Hewes 1955; Dore 1959; Sansom 1962; Waswo 1977).

The feudal system was based on an institution of property that stressed obligations. In the West those obligations worked in several ways. Land rights, or titles, were held on the understanding that they involved substantial obligations to the community. Lords were understood to be responsible for protecting and ordering the communities within their control. This equates to the governmental functions of defence and law. They also were responsible for the provision of what civil infrastructure existed, roads for example. The Church developed as a landowner for a number of complex reasons with monasteries developing as the destination of substantial land rents (Belloc 1937 rpt 1973). It was significant, not only because it formed a separate order, but because the monasteries provided substantial services to the community. Of these, education was the most important, though health care (as hospitals) and care of the poor, were also critical in the lives of the ordinary people. Like the secular lords, the abbots were occasionally less than exemplary, though in the balance of history, their performance was very positive.

A second obligation pertained to the relationship of the ordinary people to the land. To the extent that the feudal estates had developed out of the Roman estates, the ordinary working people had developed out of the Roman slaves (Chesterton 1917). The slaves had few rights, but the feudal serfs had one right that was especially significant among the many that they enjoyed above that of their forebears. They had a right to access to the

land. This was realised in the institution of the commons. The commons were available free to any one, which meant that anyone who did not have an alternative means of income could use them to obtain subsistence. Implicitly, the commons prevented unemployment and provided a floor to wages.

The balance of rights and obligations that composed the feudal system was disturbed by the granting of land titles that did not carry feudal obligations. Land without obligations meant that the entire rental income could be privately enjoyed. William I granted a small amount of this type of title. Once alienated from the feudal system, that source of social income was permanently lost to the community (Peace 1933). Over time more land was converted from feudal obligations to freehold and eventually necessitated the introduction of taxation to replace the lost land rental for public funding. The Magna Charter followed and was largely championed by the beneficiaries of rental incomes who recognised that any taxation would erode their privilege, either directly or indirectly.

In addition to the dissolution of the rental obligations of the feudal system, the commons, and the whole structure of feudal land allocation was progressively replaced through the process of enclosure. These changes were introduced gradually and only completed about a century ago. Although there was never socialist-style property historically, the current modern institution is also an historical novelty.

Three points are evident in the history of property:

- 1) The current institution is historically recent and novel
- 2) Property ownership is commonly associated with obligation
- 3) The popular dichotomy of liberal capitalist versus socialist property perspectives is artificially limited and not historically valid.

PROPERTY IN NON-WESTERN CULTURES

Some ancient cultures have already been introduced. Today, most non-Western cultures either have adopted the Western institution, or cling to property institutions that are clustered into what are now referred to as *customary title* systems.

These may be grouped into three general types. The first is simple tribal land ownership, such as is practiced by most Australian aboriginals. The second is composed of various systems of family allocation, such as practiced in the Cooke Islands. Typically, these have land allocated for personal, or family use, on a limited tenure from the tribe with tribal reversion (Crocombe 1964). The third is the most complex and usually resembles pre-modern feudalism. This is found in many of the more populous non-Western cultures across the world, including many parts of Asia and even remote Pacific Islands.

The common feature of customary title systems is the absence of personal gain from property and this is associated with the absence of personal title of the freehold type. The absence of freehold property has proven to be a difficulty for modern financing and prohibits the formation of property markets (Ezizbalike 1994).

Several parallels exist between contemporary customary tenure systems and ancient approaches to property. Both reject personal profit from property, though none are socialist. Both frequently locate ownership with the collective and reject commerce in land. The frequent occurrence of recognisably feudal systems is also curious, even though these systems are often abused by those in power.

THE THEORY OF PROPERTY

There are more theories of property than there are systems. Many theories have been attempts to justify existing systems (e.g. Locke), sometimes in the face of the facts. Some theories have been developed as instruments for social change (e.g. Proudhon and the socialists). It is a common modern misconception that property exists without a backdrop of theory. Schlatter (1951)

chronicled the history of the idea of property, showing the rich variety of theories that have enjoyed currency through history. Within that array, there are certain recurrent themes, and the interpretation of these has proven to be an arena for considerable debate.

Property in land, and hence in things that have a content based on raw materials, that is, all products, is a difficult thing to justify. Property in one's self, or even in the fruits of one's own labour is easy and obviously natural. People have no natural link to the land, especially to defined tracts of it. Property of that sort is always conventional, the product of social organisation. When people appropriate land, usually it is by way of purchase, gift or inheritance. While this may justify the current owner, it could only be on the basis of the licit title of the previous owner. The regress of title cannot be infinite and will always end at some point where an individual or group has simply appropriated as private, what was formerly common to all.

Small (2000) demonstrated that human nature inferred a fundamental universal common title over land to all humanity, a position that has been implicit in the work of many theorists. This is not to deny private ownership. Aristotle was the first to recognise that ideally property should be a balance of private ownership *and* common use (Aristotle 1976). His position was echoed later by Aquinas (1981) and most recently Ederer (1995) showed how this line of thought has continued to the present day. The tenure of the Cooke Islands illustrates this dual aspect of property. Families have private title to specific tracts of land, but the use of the land is permanently available to the whole people through re-allocation with changing circumstances (Croccombe 1964). It is also evident in feudal structures.

Reeve (1986) outlined the way that property up to the eighteenth century was seen as a package of rights and responsibilities, whereas now it is viewed more as the thing possessed. Possessing the thing infers total command over it, what Lord Blackstone referred to *despotic ownership*. While the popular understanding of property today is more the thing than the system of rights and responsibilities, technically the bundle of rights theory of property has been developed in recent times. The important characteristic of this theory

is that it tends to ignore the bundle of responsibilities, or obligations, that non-moderns generally include in the notion of property.

The modern theory of property developed at first as an attempt to validate liberal ownership as natural. Locke (1924/1962) suggested that when a person applied labour to natural resources, the resultant product naturally belonged to that person. This is very reasonable, as title to one's labour has never been in question, and Locke argued that that natural title would be violated if the producer did not have title to the product. To be accurate, Locke's approach did justify partial title, but tended to entrain appropriation of the common aspect without justification. The test of this was the actual amount of labour that was required to appropriate the whole. On Locke's criteria, it could be quite minimal and he claimed that it could even be the labour of servants or one's animals that brought private title about.

Smith simplified the matter by adopting a Humean approach. Private property without obligation was a fact of the culture he was in. Simply put Smith concluded that private property stood on two foundations, the fact of possession and the existence of a legal institution that supported it. This simple theory was empirically satisfactory and it represents the basic arguments that have been used since. It suits a liberal democratic society by respecting the right of any society to create its own property institution. The criteria for acceptance then becomes primarily its democratic acceptance and secondly the belief that the particular institutional structure best achieves the goals of the society. Few democratic states have adopted property institutions that differ from the basic modern system that Smith outlined. Theorists such as Friedman (1980) and Novak (1984) have argued in support of the achievements of liberal property.

The close of the eighteenth century stood out as a watershed for property theory. As the ink was drying on Smith's defence of property found within his wider discussion on political economy, the evidence was mounting against it. The nineteenth century began with massive numbers of people impoverished by an economics grounded on modern private property. That century proved to be the fertile ground for a novel and eventually highly disruptive theory of property. Socialism grew in that century from a

popular rejection of liberal property by working people. It is methodologically linked to the modern theory of property in that it is modern in construction, but differs in that it rejects the positive institution. The structure of the socialist rejection of property is complex. It almost uses a justice argument, but formally rejects the rigorous moral methodology that would be necessary for such a position. It could be best described as a passionate argument based on the objective fact of the misery of the working class, informed by a curious development of the loosely spiritual metaphysics of Hegel. Somehow, the socialist view of property was, and still is, very attractive to huge numbers of people. While it can be shown to be deficient in many key respects, the fact of its popularity demands that it be taken seriously.

At the very least, it should alert theorists to the possibility that liberal property is not embraced by all Western people. The failure of socialism as an economic and political system may be sufficient to discredit its integrity as a theory of society, but is certainly not sufficient to disprove all critiques of liberal capitalism. Socialism gained its popular support predominantly in the nineteenth century as a result of massive imbalance in economic distribution that attended liberal capitalism. Since liberal capitalism requires, and is largely supported by, liberal Western property, the social failure of the former around the end of the eighteenth century serves as a potent challenge to the latter's uncritical adoption. This is not to suggest the acceptance of socialism, but rather to acknowledge that neither system represent ideal solutions to the economic problem.

The middle ground would appear to where many non-Western cultures operate. While both socialist and capitalist apologists have claimed historical antecedents for their respective systems, the more balanced view is that neither capitalism nor socialism can be found in antiquity. Late Rome and late Greece come closest to the capitalist model, but that is no solace since those periods marked the beginning of their respective demise. Socialists have been creative in finding socialism in the writings of Aristotle, some Greek states and even the early Christian communities. On closer examination, none of these claims stand.

Non-Western peoples can also be said to hold theories of property. These often rest on religious beliefs regarding the origin of the world. Accepting that premise, they can be seen to lead to a logical defence of their systems. Amongst these, the Moslem writings on economics appear to be the best developed and contain themes that are found in many other cultures regarding the ownership and obligations of property. Simply put, God made the world and gives it to His people, usually on the expectation that they will use it to prosper and do His will. God's will includes the care of those who cannot care for themselves. This simple formula is found repeated in the beliefs of many customary peoples, regardless of their specific conceptions the nature of God. While these positions may appear to be theological, their operation is genuinely economic, though resting on theological premises. The congruence between their prescriptions and those of the pure philosophy of Aristotle deserves notes.

One can therefore conclude that there is a richness in the history and diversity of property theory. Early theory was based on either moral or metaphysical foundations and led to something like Aristotle's dual theory of property. Later theories have shown a progression away from these strong theoretical constructions towards more pragmatic or utilitarian ones. The socialist approach falls within this latter group despite its implicit appeal to justice.

WHY TEACH PROPERTY THEORY?

Exploration of the basis for the current Western property institution of property is not necessary for day to day practice as a land economist. For this reason it has no place in the technical training of staff who will not be expected to be able to respond to change or to controversies over its future direction. Also, if the modern, Western, institution of property represents the most evolved form of the institution, and the pinnacle of all possibilities for property, then merely understanding how to operate within it is sufficient.

On the other hand, if university courses are intended to educate students in the background

issues that underlie particular practices, thereby equipping them for future change and controversy, then some familiarity with the rich background of the current institution is appropriate to a balanced education. Likewise, if there do exist significant challenges to the claim that the modern Western institution is the best possible solution to the problem of property, then the university should be a forum where these issues are not only kept alive, but developed and debated.

The alternative possibility is for the understanding of the problem of property to be lost from modern culture. The provincialism implicit in this prospect should be obvious, but to some extent, it is already the case. In the USA the virtues of modern property tend to be identified with the very fabric of the US culture, often referred to as *Americanism*. Weaver (1948) claimed that the American institution of property represented the “*last metaphysical right*” and implied that it must be defended in order to avert further cultural decay. It is not uncommon to find US political scientists debating the question of the success of the “American Experiment”. Hidden in this debate are complex issues regarding the efficacy of the so-called Enlightenment and its expression in the constitution of the USA.

History tends to be a very impartial arbitrator and cultures that believe that they have the ultimate answers to major questions are usually at the brink of their own demise. When Fukuyama (1992) proclaimed that history ended with the evolution of democratic capitalism, even many supporters of that position recognised that the assertion came close to being its own refutation. Its detractors asked why an author should need to defend what his argument claimed to be evident. Powelson and Stock (1987) analysed both capitalist and socialist regimes in the third world and concluded that neither delivered reasonable treatment to the majority of the populace. Bethell (1998) on the other hand would suggest that development would be best achieved under a property institution as close as possible to the American model. The theory of property is intimately connected with this very live debate.

CONCLUSION

The practice of real estate stands on the institution of property, which in turn stands on the theory of property. Property theory is a study with a very long and colourful history. It has considerable depth and has been argued with great subtlety by some of the greatest thinkers in history. Today the dominant theory of property is being challenged by issues such as the recognition of customary title and environmentalism, but is defended by the supporters of democratic capitalism and, more generally, Americanism.

Persons engaged in the practice of real estate could be expected to be the experts in the debate over property, especially as many now graduate as bachelors of Property. For this reason, property theory should occupy an important place in the education of property professionals and research into its nature should be maintained as an important part of the research agenda for the property discipline. Unfortunately, the theory of property is a study that lies well behind the day-to-day needs of property practice. For this reason it does not attract students on the basis of providing useful job skills. Also, research in the area tends to be carried out in the wider discourse of economics, or even political science. For this reason, many persons who come to teaching in the property area do not have a background understanding of the topic. Despite these shortcomings, it would appear timely for property programmes to seriously consider adding property theory to their subject offering.

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