

INTRODUCTION: SOME THESES ON PROPERTY

ALICE ERH-SOON TAY*
EUGENE KAMENKA**

I. THE CONCEPT OF PROPERTY

1. *Property is that which is owned.* Ownership is the *prima facie* ultimate power and right to use, control, enjoy and exclude others. It is a relationship both to the item owned and to other people. There is no ownership where it is impossible, in logic or in fact, to reduce something to possession and control. What Marxists and others have seen as the ever-increasing reduction of the world and everything in it to private property rests on the constant extension of the possibility of ownership as a result of scientific, technological and economic capacity to use.

2. *States extend their possessions in the same way as individuals; so do tribes and communities.* The treasures of the earth and of the seabed, land, air and water, and even heavenly bodies, are now susceptible of ownership in a way and on a scale not known in most of human history. Socialist and Marxist-socialist states exercise their claims to sovereignty and the ownership it involves in ways and by means which are in no manner different from those pursued by states that recognise as central to their social systems the possibility of both 'private' and 'public' ownership of the means of production, distribution and exchange. They do so in relation to other countries and in relation to their own citizens. Their interest in ownership and control is the same as anybody else's: the exploitation of a resource for defence, for production, for wealth, or prestige. These are *infra-jural* facts — a useful reminder that the world is not simply the product of ideology or of law.

*Barrister-at-Law, Lincoln's Inn; Barrister, NSW Supreme Court; Ph.D. (ANU); Challis Professor of Jurisprudence, University of Sydney; FASSA.

**B.A. (Sydney); Ph.D. (ANU); Professor of the History of Ideas, Australian National University; FASSA; FAHA.

3. *The distinction between private ownership and public ownership is not central or even important for a general theory of ownership, or for a discussion of many of its social effects.* Nor is it central to a general theory of law or to the overcoming of so-called economic 'contradictions', of the fact that resources have to be allocated between alternative uses without meeting all possible demands or treating everyone equally.

4. *All ownership, and therefore all property, is in an important sense private or privatising.* It divides those who have the power and the right to exclude from, to control and dispose of a particular item of property from those who do not, who have no privileged connection with it. In that respect, 'public' ownership is the same ownership as 'private', individual or corporation ownership; state ownership the same as community ownership; clan ownership the same as that of persons. 'Private' does not mean individual, just as 'owner' does not and need not mean a single person or even a human being at all. In Ancient Sumeria, the temple and the associated workshops belonged to the god of the temple, in whose name and on whose behalf the temple manager — the *ensi* — issued commands that did not simply reflect the manager's will. To say *anyone* may use, control or dispose of without let or hindrance is to say this is not, or this is no longer, owned. A 'common' is a true common if and only if anyone has access for any purpose at any time and no one is excluded. Historically, that has not been the meaning of 'a common'.

5. In discussing the core meaning of the concept of ownership or of property, *it is not useful to import differences between types of owners or changes in some of the social functions and importance of property into the core concept of ownership itself.* We should not convert material differences into logical or conceptual differences, confuse a legal concept with its role and effects, whether in society or the law. The meaning of a concept is not simply its use; something about it determines how and where it can be used.

6. *In all societies, there are things that are owned, that constitute property that is in our sense private, and things that are not.* Communist constitutions protect personal property. Many Utopian constitutions, like monastic orders, professed not to, but protected state or community property. Even in comparatively undifferentiated societies with no ranks or classes and no, or little, agricultural use of land, there will be sacred things, symbols of authority, objects used in ritual, wives and other personal possessions for which some people are owners or custodians and from which some or all others are excluded. Nothing indicates the role of property in such societies more clearly than the social importance of the formalised exchange of gifts in such societies. Concepts of ownership may be very weakly developed, unimportant in the wider context of conceptions of the inherently sacred and powerful, or of the claims of the tribe or group, but they exist. For the tribal infant 'promised in marriage', they are very important indeed. Some things

— such as air or water or even land — may be seen by particular societies as physically or morally incapable of being owned, as more powerful than human beings. The same or other items may be specifically excluded from ownership by custom or law.

7. *There are no natural eternal necessities in the matter of the scope of ownership, though the physical capacity to control may vary over time as a result of both technological and political change.* The territorial claims of countries can contract and expand, advances in science and technology producing some striking expansions. A cadaver may be incapable of being owned for non-material reasons — until it becomes a source of valuable products: soap for the Nazis, organs for those needing a transplant. Then decent societies and lawyers cogitate, while the Hitlers and the Himmlers simply cut the Gordian Knot.

8. *There are and there have been no enduring social owners or rulers whose power over their property is logically absolute.* The sixteenth-century Ottoman Sultan Suleiman (The Magnificent, The Educator, the pattern for Max Weber's conception of sultanism as arbitrary personal power to rule) was subject to the laws of Islam. He had to recognise, for instance, quite different forms of tenure for conquered lands, for traditional Muslim lands, for Mecca and Medina, for Muslims and for infidels. His claim to ownership of land conquered from infidels was based on Islamic law. In China, a renewed attempt to introduce state distribution and control of land on different terms for different purposes was inaugurated by the Northern Wei from 485 A.D. and applied more universally under the Sui and the Tang; it became inoperable because the landholdings of officials and of Buddhist monasteries retained their independence. In England after the Conquest, the King had ultimate ownership of all land; in European monarchies the sovereign had not but could be subject as Holy Roman Emperor or Prince to the Court in Vienna in respect of complaints by subject or prince. Neither the crown nor its power was indivisible. Further, the power ascribed to ownership, like all other social power, is distributed along a continuum which ranges in principle from utter impotence to absolute irresistibility, but in fact rarely reaches either end. Nor are the most common forms of interference with ownership necessarily based on competing claims to ownership; people are deprived of their lands and possessions for specific reasons — rebellion, felony, the requirements of war or *raison d'état*. They may be forced, as a matter of social policy, to recognise the claims of heirs and dependants, of wider social concerns, of the King, the Church and of the Social Plan.

9. *In law and social life, ownership is a burden as well as a privilege, a responsibility as well as an advantage.* The need to make someone ultimately responsible for the care and control of property and for harm that flows from it is the reason that the concept of property has not been excised from any modern socialist or Marxist-socialist legal system. State and 'collective'

property and delegated operational management remain central to economies that reject — or rejected until recently — ‘private’ property in the means of production, distribution and exchange. ‘Collective’ ownership does not mean ownership by all the people. Ownership will continue to remain central to some aspects of social control, as it remained in the utopian fantasies of the past and in Babeuf’s and Saint-Simon’s projects for the future. There it was concealed under such phrases as ‘the social fund’ that constitutes the material wealth of a society and the administrators who will decide on its allocation. To make property a public function — the favourite slogan of the socialist Saint-Simonians gathered around *Le Globe* — is not to abolish the concept or to universalise effective power and control. It is to shift the practical focus from ownership to authorised administrative control.

10. The rights and powers conferred by ownership are not and never have been indefeasible or unlimited, in law or in administrative reality. The respect accorded to the rights of the property owner including even the state can change, and has changed, dramatically. So can and do the respect and importance ascribed to different types of property and to different types of property owners. Neither the concept of property nor the social and legal importance of that concept in the abstract need be affected by that.

The distinction between the kinds of items owned and the different uses they are put to is crucial in considering the controls and limitations that may properly be put upon ownership rights. Such distinctions have been made throughout history and continue to be made as differences between the character and economic uses of property multiply. There are limitations, too, on the scale of ownership in certain areas, on concentration of ownership, on ownership in politically or socially sensitive areas.

11. Ownership, even in its core meaning, is not a logical simple. Its various components — for ownership is a bundle of rights and powers — are differentiable both as rights and as realities. They can and do come apart. There are degrees of enjoyment, of capacity to use, of control, of power to alienate. Formal ownership and actual control can and do part company, especially conspicuously in modern times as they did in feudal times. Further, the sort of rights that owners and others claim and exercise need not always be derived from or justified by the concept of ownership, though the Common Law did, for a long period, feel most comfortable with those rights against property — such as easements — which were themselves attached to property. There are traditional rights to use temporarily or at will sacred sites, to gather fruits of the field or wood from the forest, to cross boundaries in search of pasture, to have peaceful enjoyment, *etc.* Not the abstract rights of ownership but new economic uses, population pressures, conquest, *etc.* provide the motive power that most frequently creates or destroys such rights. Socially, ownership is not the be-all and end-all of human relationships to things or persons that can be owned. Slaves, in Rome and elsewhere,

commanded Caesar's household and the free or freed men who served in it. Paradoxically, slavery was a legal concept but not an economic one. Similarly, there are grades and gradations between property and the *res nullius* — not all relationships to land or objects can be forced into one of these two pigeonholes. Law has more than one principle and more than one set of classifications. We do no service to law or to humanity in the long run by seeking to vindicate rights we seek or approve of by attaching them to the nearest sacred cow — whether it be property, or the right over one's body, or privacy or the freedom of speech. Constitutions can come and go; rights are not all derivable from one right. Lists of rights are not, by their nature, finite or uncriticisable. Advocacy is not the same as thinking about law or society. Property is not and never has been the foundation of all rights, of all social power, or of all social evils. It has been a significant bulwark against political, governmental and religious power, not by standing in principle opposed to them but by fragmenting or helping to fragment and balance competing claims of King, baron, church and corporations, of state and citizens, of bureaucracies and those whom they administer. For ownership, as we have said, privatises — though only within limits. Exploitation can be based on proprietorial power; the worst forms of exploitation known to history were not. Neither were the theory of so-called bourgeois democracy, or of nineteenth-century liberalism, confined to the defence of property or derived from it. A history of modern Europe that reduces Protestantism, the Enlightenment and the French Revolution to the defence of 'bourgeois' private property and the free market is bad history and worse social theory.

II. CHANGES IN THE NATURE AND POWER OF OWNERSHIP

1. The concepts of ownership and possession tempt us, as they tempted Blackstone, to begin with the primary model of a relationship between a human owner or possessor and a corporeal thing that is owned or possessed. English law, unlike Roman law, recognised early the ownership or possession of incorporeal hereditaments and even of rights not necessarily connected with land, *e.g.* a chose in action. The advantages and disadvantages of following the English course cannot be elucidated by inspecting the core concept of ownership: to follow one course or another is not to make a mistake about the meaning of ownership. It is to construct a legal system along one of several possible lines. It is only in relation to the implications for the systematic development of law, or at least for a branch of law, that one can decide whether people should simply have rights or own them — be, as they once were, seised of them. The contemporary interest in treating welfare rights, pension rights *etc.* as forms of property, or as deserving the protection given to property rights, derives partly from a specifically American constitutional guarantee; but it also reflects the attempt to confer on dependants the dignity of ownership and on claimants its security.

2. No one can look at legal or economic history over the last few centuries without recognising the extent to which tangible, material possession and control have given way to indicia of title and of power to control, to buy, to hold and sustain. In part, such powers are conferred by law and not simply recognised by it. In a predominantly agricultural society, the household and the land worked by it — the property — were not only the focus of everyday economic activity, but to a considerable extent the base and organising principle of social duties and relationships, of the order of labour, of social welfare, *etc.* Of course, this was never the whole story. There were duties to King or prince, to the church, to the (external) Law. Nevertheless, for much of the population, property — tangible, material property — or holding and the relations that sprang from it seemed the centre and basis of their lives that would continue to be the centre and basis of their children's lives.

3. The commercialisation of society, or of significant parts of it, did not begin with the sixteenth and seventeenth-century development of a conscious European urban bourgeoisie. Contracts and exchange, the registration of deeds and covenants, were well-known to the Mesopotamians and the Egyptians two thousand years before Christ. The private law of the Romans was the law first of a great commercial city full of strangers and then of a great commercial empire full of nations. The basic principles, procedures and forms of so-called bourgeois law may have been used but they were certainly not created by the bourgeoisie. Neither were the power and independence of money, as Octavian-Augustus was well aware while using his privy purse — the revenues of Egypt — against the Senate.

4. A host of modern developments from the eighteenth century onward have nevertheless fatally undermined, in many areas, the paradigm of ownership as direct possession and control of a tangible material thing allegedly fused with one's own labour or a concretisation of individual will. We are now more conscious than ever that ownership consists of a bundle of rights and powers, none of which are absolute in practice and any one of which can be separated or dealt with individually. Professor A.M. Honoré, in his essay on Ownership in the first (1961) *Oxford Essays in Jurisprudence*, saw 'full' (or the 'liberal' concept of) ownership as involving eleven elements or legal incidents: the right to possess — *i.e.*, to exclusive physical control, literally or metaphorically; the right to use; the right to manage; the right to the income; the right to the capital — *i.e.* the power to alienate, consume, waste, modify or destroy; the right to security; the power to transmit, to devise or bequeath; the absence of a term to one's ownership rights; responsibility for harmful use; liability to execution; and that there will be rules governing the reversion of lapsed ownership rights. These elements of full legal ownership, Professor Honoré argued, are found in all 'mature' legal systems, though each of them is susceptible of varying definitions that affect emphasis and practical consequences. But in all such systems, the practical

separability of these elements is also recognised. In England, the eighteenth-century movement toward creating certainty and security of title, accompanied by a most sophisticated recognition of simultaneous variety of interests in a single piece of land, facilitated their mortgageability and made possible much of the economic leap forward in the latter part of that century. The commercial share did even more to separate, physically, interests in property from actual physical contact with it or awareness of it; it assumed an incorporeal life of its own. Money and investments produced interest, dividends; at the same time, in relation to material property — to factories, mines, banks — they fragmented ownership, even more so as pension funds, trusts and holding companies came to own more and more shares. Finance capitalism, as the Marxists call it, was not based on or suited to the paradigm of the mill owner directly exercising authority over his mill and the workers employed in it.

At the same time, as Karl Renner stressed at the beginning of the century, more and more 'private' property depended economically on its public functions. The bank and the railway station invite all and sundry to enter; so do the department store and the petrol pump proprietor. The distinction between private property and public property, between the bank and the post office, the toll road and the ordinary road becomes more and more blurred, while the owners — whoever they may be — become increasingly invisible. When they do appear, they appear in the guise and through the authority of managers or of financial manipulators. Further, as the state takes on more and more active economic roles, private enterprise of any significant size becomes more and more dependent on state backing and support.

The scale of property has become so vast, as we have written elsewhere, the sources from which it draws its wealth so multifarious and pervasive and its social effects and ramifications so great, that modern men and women are having increasing difficulty thinking of property as private, as the concretisation of an individual will reifying itself in land or objects, as a walled-in area into which others may not enter. There is, in other words, a shift of attention from the property whose paradigm is the household, the fenced-in or marked-off piece of land, the specific bales that make up a cargo or consignment, to the corporation, the hospital, the defence establishment, the transport or power utility whose 'property' spreads throughout the society and whose existence is dependent upon subsidies, state protection, public provision of facilities, *etc.* In these circumstances, a view of society and a view of property as a collection of isolated and isolatable windowless monads that come into collision only externally and as a departure from the norm become untenable. Much property becomes social in the sense that its base and its effects can no longer be contained within the framework of the traditional picture. The major sphere of social life passes from the private to the public, not merely in the sense that more and more activity is state activity, but in the sense that more and more 'private' property becomes public in its scale and its effect, in the sense that the oil company is felt to

be as 'public' as the state electricity utility, the private hospital and the private school, with their growing need for massive state subsidies, as public as the municipal hospital and the state school. In these areas, respect for the sanctity of private property and the right of the 'owner' to do as he or she wills, have gone.

The shift in public attention and social preponderance has been from a quasi-individualistic, quasi-*Gemeinschaft* concept of property typified in its *Gemeinschaft* aspects by the household as the locus of rights and duties and in its individualistic aspects by property directly used and/or consumed, through a *Gesellschaft* concept typified by the commercial share as an *indicium* of title and power to alienate without let or hindrance, to a bureaucratic-administrative concept of operational management linked with the growing scale of complexity of production, ever-increasing social interdependence and the consequent growth in power and scope of state activity. The development or the problems this poses can not be dealt with adequately by simply contrasting social property with private property and pleading for a return to a feudal sense of public obligation and accountability or by extending the concept of private property to include new, non-proprietary claims to use and benefit based on a politically-recognised social status by saying that property was long seen as a right to a revenue. It was always more than that for anyone but the placemen and the stockjobbers who were treated with contempt. The concept of property, the way in which it is legally defined and the extent to which it is legally, socially and politically protected, raise immediately the most fundamental problems of political philosophy and social life.

This, then, accounts for the sharply declining significance ascribed by people at large to the distinction between private and public ownership. Radicals, indeed, have increasingly shifted, in the West, from attacks on ownership as such to demands for participation and public supervision, in both private and public sectors. They form hit teams rather than colleges of administrators. Leaders of communist countries, on the other hand, increasingly extol the advantages of private enterprise, participation in profit and responsiveness to market demands. The debate between left and right can no longer plausibly counterpose public purposes and private profit and it no longer centres on ownership or on the concept of property. As Lawrence Becker puts it in his excellent book *Property Rights: Philosophic Foundations* (1977) at page 3:

The riskiness of writing about property has largely disappeared. The problem now is whether there is any longer any point in doing so. The main lines of argument for the general justification of property have long since been laid down; the vulnerable areas in those justifications have been identified; alternatives to private ownership have been proposed; weaknesses in those proposals have been explored. It seems unlikely that any new discussion could make a significant contribution to theory. And it seems even less likely that it could have significant practical consequences. The changes in property rights which have occurred in the last six or seven decades — and those which will doubtless occur in the next six or seven — are startling, to say the least. But they have not — nor are they likely to begin to — come about as the result of a clear and comprehensive

new theory of property. The modern industrial state is so complex, its basic institutions so entrenched and interdependent, that basic changes come about more by the accidental confluence of particular interests than by design. The action guidance moral philosophy might provide thus seems a bit beside the point.

So one might add are the traditional individualist justifications of property as containing the owner's labour, being a reification of his will, *etc.* The defence of private property lies not in its origin but in its pluralist social consequences and in the nature of that which seeks totally to replace it.

The loss of interest in the question of ownership as the primary social question is linked with a steady diminution in the power of ownership. *Laissez-faire* capitalism, never as pervasive a reality as its critics often claim, is dead. Owners today are constrained — whether sufficiently or not — in virtually everything they do by interventionist state legislation and regulation, by publicity and special interest watchdog groups, by the increasing sophistication and assertiveness of their employees and their customers who have ready access to publicity. There are great and important differences in respect of these matters between some areas of enterprise and economic life and others; the difference between private and public ownership, of a hospital, a factory or an airline, is not significant once adequate restraints are imposed on all operations and operators within an industry. Nor can the right to intervene, protest, participate be treated at all plausibly as a rival property right. Property increasingly functions in society and in law as one of many possibly competing and conflicting rights. So far as the liberty of the citizen is concerned and the citizen's power to affect and control his/her life, the abolition of non-public ownership in means of production, distribution and exchange has led to no significant liberation or overcoming of alienation; on the contrary.

Social critics are right in seeing that the nature and social function of property in important areas of property holding have undergone the kind of changes described by Karl Renner and later by Berle and Means and in a very simplified version by C.B. Macpherson. This has both undermined socialism and in some ways strengthened it by undermining respect for the private as much as it has undermined, more recently, respect for state or public ownership. Other factors, however, have worked in a contrary direction. Enormous increases in purchasing power by the mass of the population, in home- and car-ownership, in the spread of consumer durables have universalised, or at least greatly expanded, personal property and the ordinary person's interest in seeing it safeguarded. If it was ever true that the workers had nothing to lose but their chains, that they were a propertyless class and therefore capable of ushering in the society without property, it is certainly not true now.

Modern, post-industrial society in the West, as Daniel Bell has argued, has lost the coherent dominant ideology that appeared to characterise the Victorian age with its elevation of the rights and duties of the property-holder. There is now, in the West, a sharp 'contradiction' between an economic ideology based on efficiency and the 'rational' use of resources, a political

ideology that increasingly elevates equality and a culture that puts more and more weight on self-expression, instant gratification and moral relativism. Both confusion and the disgust expressed in violence are the result, though much increased tolerance and a greater appreciation of the possibility of balancing competing and conflicting outlooks and concerns is another.

At the general level of social and legal ideology, much the same must be recognised of the rights of and to property. As the creation of objects becomes less arduous and the cost of labour continues to rise, the value placed on human life has risen sharply in relation to that placed on property — though it has not done so in those countries where labour is cheap and the standard of living is low. In our own society, though, one has to recognise the importance of property as part of reasonable living conditions and standards. It is, on the positive side, a guarantee for the individual of space to develop capacities and live as he or she wishes to and as a basis for the enterprise, responsibility and involvement that a society needs in its economic activities, in encouraging production and in sheeting home responsibility for harm. Simply to pass over in silence the right to property that was incorporated in the Universal Declaration of Human Rights and then drop it in subsequent UN Covenants is preposterous. At the same time, property rights, like many other rights, are defeasible. In specific social contexts, they can and do compete and conflict with other rights, they can bear savagely on those who do not own or control. They are no longer and never should have been trumps in the game of life. Deciding when and how and to what extent, they should be limited, interfered with, modified, supervised and controlled, by law, by regulation, by administrative discretion, is a matter that requires care and consideration, rather than trumpet blasts and emotive advocacy. It is, in short, a moral question, for which no handbook provides simple and timeless answers. In so far as it is also a legal question, the trend — here as in relation to other fundamental legal concepts — is increasingly practical, fragmenting, geared to particular problems or areas. Property for the purposes of the Family Law Court parts company from property for the purposes of probate or trust. Today more than ever, we focus on consequences, on remedies, rather than conceptual foundations and theoretical coherence. In law, as in ideology, we have gone beyond the simple-minded stage of being for or against property.