

Property rights: an analysis of their implications for understanding land rights in Australia.

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Summary. The debate over property rights in Australia is predicated on the argument of whether these rights are natural rights or positive rights. Natural rights are those that we hold by virtue of our humanity. The rights that are usually referred to and believed to be natural rights are those rights that we morally believe to be necessary for life to be just and equitable. We justify the existence of these rights because we use reason and conscience to convince ourselves that these rights are good. These rights are inalienable.

Positive rights, on the other hand, are those that are given to us by some form of higher authority, be it a sovereign, a government, or a court. The scope of positive rights is much greater than that of natural rights as they are created to cater for social or legal issues at a particular point in time. The important thing about positive rights is that, because a human authority give them, they can also be removed by a human authority whether it be the same one that conferred them or a later version.

The category into which property rights fall has been debated over centuries and continues to be debated today. Some authorities class property rights as natural rights, some as positive rights. This paper seeks to investigate this argument and clarify the issues surrounding the debate as part of a postgraduate research training program in development

Defining 'rights'

It is necessary by way of introduction to outline what is meant by the word 'right'. A right can be defined as an entitlement or a claim. This entitlement may be to do or to attain something or may be not to be affected by what someone else is doing.

Legally, rights can be enforced by coercion or sanction or by the payment of compensation in lieu of coercion. In many cases, though, there is no need for any type of punishment as enforcement because many rights are generally accepted moral ideals.

For every right that exists there will be a correlative duty (Hohfeld, 1913). That is, if you have a right then someone else will have a duty not to infringe your right. It can also be argued that some of those things that we claim as rights are not really rights but are, in fact, privileges or liberties. You will have a liberty to engage in an action and others will not have the right to stop you (Kramer, 1998). In any sense, whether what we claim are rights privileges or liberties, they all involve relationships between people. I do not intend to discuss these aspects of the rights debate further in this paper. Such a discussion is rightly the topic of another study.

My study of the rights debate centres around the issue of whether rights are natural rights or positive rights. While I believe that a distinct separation is not necessary or desirable and, in fact, is very simplistic, the distinction between these types of rights and an outline of the development of the various theories will be explained in the following argument. I am more inclined to agree with McCoubrey (1987) and think that the two are not mutually exclusive.

Natural rights and natural law

Natural rights are those that we hold because of the fact that we are human beings living on this planet. We hold these rights by virtue of our humanity. The basic premise is that men should be equal and should be treated and considered as equals. The rights that are usually referred to and believed to be natural rights are those rights that we morally believe to be necessary for life to be just and equitable. We justify the existence of these rights because we use reason and conscience to convince ourselves that these rights are good. St Thomas Aquinas wrote that it requires a rational creature to participate in the natural law (Aquinas, 1250).

Natural rights are the rights that are frequently referred to as 'God given rights'. Whether or not you believe that some super natural being has conferred these rights upon us will depend on your religious views. Indeed, those views will also dictate which God you believe has conferred those rights upon mankind. If you don't believe that there is a supernatural being that has magnanimously given us these rights then you can say that they are the rights that humankind sees as being the basic rights necessary for man to be a moral and ethical being. It is the method legal theorists use to try to connect morals and law (Westerman, 1998).

There appears never to have been agreement on exactly which rights should be included in this category. McDonald (1949) even suggests that it may be impossible to define natural rights. At the very least the right to life is included. Various other writers and official documents may include the right to liberty, the right to the pursuit of happiness and the right to own land. Hart (1995) claims that there is only one natural right - that of freedom. All other rights are conferred by man's voluntary action.

In essence, it will depend on which society you belong to – where you were born, your colour, your religion – as to what you consider to be natural rights. This brings in the social contract theory espoused by Thomas Hobbes (1588 – 1679) and John Locke (1632 – 1704). This theory is based on man's need for protection and preservation. In order to achieve protection and preservation man enters into a contract with a sovereign or a government. He gives up his independence in return for protection from the sovereign or government. He becomes part of society and accedes to the wishes of the majority. Locke qualified this argument by noting that man has some natural rights independent of the political power in authority. These rights include the right to life, liberty and happiness¹. He also believed that the people have a right to oppose the government if it does not fulfil its role.

The important issue attached to natural rights is that they should not be taken away or adapted or adjusted or diluted. They should be sacrosanct. I do not say that they cannot be taken away, because they frequently have been taken away over the course of history and continue to be taken. For example, the right to life is continually overturned during war or when the death penalty is imposed on a criminal. The right to liberty is removed when a person is imprisoned. It would be impossible to make a mandatory ruling that these rights must stand at all costs. These rights will be and are violated, but the basic principles remain. At the very least, if these rights are taken, some form of compensation should ensue as payment for the taking.

Of course, there always remains the argument that, if these rights have been conferred by a supernatural being, or if it is morally right for them to exist, can they be taken away by a human authority? The concept of natural rights severely limits sovereigns or governments because, if these rights are inalienable, then the ruling power must recognise them and can do nothing to alter them. This is frequently politically untenable to those who are in power. This is a positive argument for the existence of natural rights. There should be limits on the power to change rights to suit the particular interests of those in power but the argument can be raised that sometimes it is necessary to alter the nature of individual rights in order to provide rights that will benefit the greater good of the overall community.

In addition, the problem of enforcement exists. If we have rights, they should presumably be enforceable. How should this be accomplished? The usual enforcement mechanism would be sanctions. Whether these sanctions be penalty or reward they must be enforced by someone; this someone would have to be a higher body. Giving control to such a higher body would then make them positive rights. They would thus be impotent! (MacDonald, 1949)

If we do not believe in a supernatural being there is still a justification for natural rights. Ronald Dworkin (1982), for example, does not express these rights as being God given. He espouses the view that they exist because it is morally right that humans are equal. In this vein, these rights cannot be abated and the State has to accept this.

This theory of natural rights became the basis for traditional natural law theory. It gives the basis for analysing how to think and how to act on legal matters (Bix 1999). To be enforceable laws must be morally just. Of course, there will frequently be occasions when a law is made that is unjust. We can look back over history and see many examples of regimes that created unjust laws. Even so, from the time of Thomas Aquinas in the thirteenth century natural law theory espoused the view that unjust laws were not true laws in the fullest sense of the word (Bix, 1999). In this regard, they only had to be obeyed if they could not be resisted without causing harm to another and if compliance was necessary to uphold an otherwise just institution.

Even modern legal theorists such as Lon Fuller and John Finnis agree that natural law considerations must be taken into account when making legal decisions. In today's society, justice is an important issue and to create justice one must have an understanding of the law. It is not possible to have such an understanding without some aspect of moral evaluation (Bix 1999).

Positive rights and positive law

Positive rights are those which have been given or allowed by some human authority. This authority can be a monarch or a government or a court [source?]. The scope of positive rights is much greater than that of natural rights as they are created to cater for social or legal issues at a particular point in time. Consideration of the human condition determines what laws will be made at a particular time. A basic premise of positive rights theory is that these rights are created not because it is morally good to do so but because society requires it.

The important thing about positive rights is that, because they are given by a human authority, they can also be removed by a human authority whether it is the same one that conferred them or a later version.

¹ The American Declaration of Independence espouses Locke's version of natural rights, as does the Bill of Rights (the first 10 amendments to the US Constitution).

The relationship between positive rights and law, then, is strong. The ruling authority prescribes the laws to enforce positive rights. In essence it commands what is right and prohibits what is wrong (Blackstone, 1874). This also brings in the issue of sanctions for breach of the rights of others. The distinctive proposition of positive law is that whether or not a law is valid depends not on its merits but on its source (Gardner, 2001).

Jeremy Bentham (1748 – 1832) is said to be the founding father of legal positivism. In response to Sir William Blackstone's *Commentaries on the Laws of England* (1745) he developed a theory which he called 'expository jurisprudence' (Bentham, 1948). He believed that the morals behind rights or laws were irrelevant. All that was required was to find and establish the formally binding rules and enforce them. These rules were the command of the political sovereign. The sovereign may accept some limitations on its conduct but, generally, its rules were there to be obeyed under threat of sanction. A sovereign will fulfil its role when its tendency to provide for the happiness of its subjects is greater than its tendency to damage it (Bentham, 1948).

Bentham's theory was further developed by his disciple John Austin (1790 – 1859). Austin declared that law is positive law and proposed the classic 'command theory'. This theory says that every law is a command and every command has a correlative duty. If a duty exists then there must have been a command signified (Austin, 2002)

More recently positive law has been defined by McCoubrey (1987) as 'that which is formally enacted or made by human institutions of state as binding prescription within a particular society, in distinction from, for example, the law of God, the laws of nature or scientific laws'.

Positive law theory has been the dominant way of thinking since the late eighteenth century in spite of a resurgence of natural law theorists such as Fuller and Finnis in the twentieth century. It should, however, be noted that the strict early interpretations and theories have been somewhat modified, especially by H.L.A. Hart (1995), with statements about freedom only being properly distributed among humans if there is some element of coercion and some element of one person making a decision on how the other should act. This is moral justification for limiting freedom.

The cross-road: which is best?

A strict interpretation of the rights issue will see that the major distinction between natural rights, and therefore natural law, and positive rights and positive law is a moral issue. Laws that serve to enforce rights are defined by reference either to the moral criteria or to a formal criteria. This strict separation is unrealistic and unnecessary as each has a role to play and a place within the legal system. It is far too simplistic to have a strict separation (McCoubrey, 1987).

There are many modern lawyers who insist that positive law is the only law that needs to be considered. Hart (1995) claims that there is only one natural right - the equal right of men to freedom - and all other rights are created or conferred by the voluntary actions of man. This attitude is that parliaments make the laws and we should live with that. While this may seem to be a valid argument on the face of it, it is difficult to believe that there is no moral basis for any of these laws or that the historical development of the law does not need to be considered when looking at the validity of these laws.

This view also does not take into account the development of the common law through the court system. If we look at the development of the common law, the historical aspects become important. The procedure in the courts allows judges, when they are attempting to make a decision that comes as close as possible to ideal justice, to take into account natural law and the rights that people naturally have. A judge's own moral beliefs will also come into play in his or her decision making (Dworkin, 1982).

The theories behind natural law have been equated to normative ethics, that is the theory of what is right or wrong (Waldron, 1995). This type of theory may be less certain and even vaguer than the theories behind positive law but there is still a need to use such a theory in any legal system (Waldron, 1995). Natural law can and should still exist, but can be supplemented with precise provisions and interpretations (i.e. positive law).

Rights and real property

Property defined

The word 'property' is frequently misunderstood and misused. Property can be defined as the legal relationship with a thing and the power that is able to be exercised over the thing - not the thing itself (*Yanner v. Eaton* 1999, HCA 53 per the majority Gleeson, CJ, Gaudron, Kirby and Hayne, JJ). The most common mistake is to equate the word to the item, not the concept. It is more correct to use the expression property in a thing (Gray and Gray, 1998).

Property rights

A clear definition of property rights is essential before any classification can be made as to the type of rights. Property rights are defined by the Industry Commission (1998) as *rights that govern the*

use and ownership of a resource. The term is most commonly associated with the use and ownership of land.

Property rights legally involve a mixture of rights, obligations and duties. This is sometimes called a “bundle of rights” (Gray 1991). Pollock (1929) refers to this as ‘*a systematic expression of the degrees and forms of control, use, and enjoyment, that are recognised and protected by law.*’

The rights include the right to possess, the right to manage, the right to receive income from and the right to be secure from interference from others, as well as the right to transfer to a chosen successor (Chambers 2001). Duties include the duty to prevent harm and the liability of having the property expropriated by the government or to pay debts (Chambers 2001).

The right to private ownership of real property

There is little reference to private property rights in the writings of early philosophers. The Greeks appeared to have a somewhat communist view with regard to land ownership. Plato (Kelly 1992) believed that land should be brought into a pool and then parcelled out in lots as equal as possible so that all citizens should have the same opportunity to use the land. The Romans developed a system of paterfamilias where the family patriarch was allotted a small parcel of land that could then be passed to other family members. This would appear to be the first indication of private property ownership.

By the twelfth century private property ownership was well established. St Thomas Aquinas asserted the right to private property through the labour theory. This theory states that, if man puts land under cultivation then he is entitled to own that land (Aquinas 1250). This theory was later developed by John Locke who said that the value of property was dependent on what man had put into it (Locke, 1680-82). If a man owns his labour then he should also own the fruits of that labour.

The High Middle Ages saw the institution of land ownership well and truly established chiefly due to the unfettered support of the Catholic Church. The Church’s reason for supporting private ownership was based on its desire for the clergy to own land.

We readily accept that a person has a right to own land but this presumptive claim has had its detractors. Pierre Joseph Proudhon questioned man’s right to expropriate large amounts of land for ownership by one person – he called this theft (Proudhon 1970). The founders of communism also viewed private ownership as a denial of the rights of the many in favour of the few.

Are land rights in Australia natural or positive rights?

Arguments over whether there should even be a right to own land have continued for centuries and it is now well established that this right exists. What is still unclear, however, is what is entailed as part of the right to own land and whether this right is a natural or positive right.

In Australia, the right to own land originally came through grants from the British government. When the British first arrived in Australia the land was declared to be ‘terra nullius’ (belonging to no-one). As such, it all came into the ownership of the British Government who could then deal with it as they saw fit. Of course, this assumption was declared by the High Court to have been inappropriate in *Mabo v. Queensland (No.2)* (1992) 175 CLR 1 but all grants made stood as being valid transactions. Government control is reinforced in New South Wales today through the *Real Property Act* (1900) which states as its object (in the long title) ‘to consolidate the Acts relating to the declaration of titles to land and the facilitation of its transfer’. Other states have similar provisions.

This would seem to imply that the right to own land in Australia is a positive right.

Aquinas’ theory also maintains that the right to own land is a positive right. Thomas Paine supported the positive right argument saying that man has a right to occupy land but not to own it (Paine 1795/6). He claimed that land ownership could not be a natural right, as the creator did not open up a land registry to record details of ownership. He also suggested that, in order for land ownership to be a natural right, every man would have to be entitled to equal access and this would be impossible (Paine 1795/6).

This simplistic argument implies that if land rights are positive rights then any government would have the right to vary land rights in any way they wished.

However, this proposition is not altogether settled. Locke (1680 –82) maintained that the right to own land was a natural right that existed before governments. Indeed, his view was that property was the source of governments and governments had no other reason to exist than the preservation of property.

This is the attitude that is espoused in the French Declaration of the Rights of Man and the Citizen, which sets out the natural, inalienable and sacred rights of man. Clause XVII states *property* as ‘being a sacred and inviolable right, nobody can be deprived of it, except when the public interest, legally defined, evidently requires it, and then on condition there is just compensation in advance’.

This implies a natural right to own property as does the provision in the United States' 14th Amendment to the Constitution: Civil Rights (1868) which says in Section 1 '...nor shall any State deprive any person of life, liberty or property, without due process of law'.

There is a correlation in the Australian Constitution in s. 51(xxxi) which provides for the acquisition of property by the Crown to be on just terms.

The potential impact of this is quite significant. If land rights are seen as natural rights then a government has no basis for taking, altering or in any way interfering with those rights. The only way that a government could vary them at all would be to offer some compensation to the owner of the land. It would also mean that aspects of morality and equality would be necessary considerations when legislation is drafted if that legislation was to impact on land rights.

A further complication would then arise in regard to the theory that land rights are a bundle of rights not merely a single right. Is it possible to classify some parts of the bundle as natural rights and some as positive rights? If even some of the bundle of rights are classified as natural rights, then considerations of whether legislative intervention in such issues as water use, native vegetation conservation and catchment management is valid should be looked at from the point of view that any rights taken should be compensable.

Section 51(xxxi) of the Australian Constitution imposes on the Crown the duty to only acquire property on just terms. This has been discussed by the High Court in terms of whether the section only applies if the whole of land is taken (that is, the whole bundle of rights) or whether it can apply when only a part of the bundle is acquired. In *Newcrest Mining (WA) Limited v. The Commonwealth* (1997) 147 ALR 42, the court decided that interests in mining leases did amount to property within the meaning of s.51(xxxi). Similarly in *Western Mining Company v. Commonwealth* (1994) 50 FCR 305 at 335, Justice Ryan of the Federal Court regarded rights under an exploration licence to be property. If individual aspects of the bundle are considered to be covered by s.51(xxxi) then compensation must be paid for their acquisition. From this it is not a large step to argue that rights such as the right to control land might also be covered.

In spite of this argument, to my mind, the right to acquire and own real property has developed to be a positive right, but there are definitely elements of natural law in the rights the landowner then has with regard to his ownership. The provisions for acquisition on just terms imply natural law principles – principles of justice and fairness – which require moral evaluation. Even if the right to own property is a positive right, that right should not be taken by a government without some due compensation.

Recent legislative attempts to regulate control of property in Australia have moved towards tradability issues (For example *Water Management Act 2000* (NSW) and *Native Vegetation Act 2003* (NSW)). This in itself is a form of compensation for limiting rights so it would appear that there is some form of recognition of the fact that land owners should receive some compensation for providing community benefits or forgoing opportunities.

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