

Private property and human rights: A mismatch in the 21st century?

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This article explores the future of private property in land in the context of the United Nations' (UN) human rights framework. I examine the historical and current debate, and show why it is difficult to come to a definitive conclusion on a matter that has been so central to social and political philosophy. Among the questions that frame this investigation is the relevance of 18th century property-related human rights concepts in the 21st century, where the poor are increasingly residents of informal settlements in mega-cities. I critically assess the wording and adoption of Article 17 in the Universal Declaration of Human Rights. I further examine the formal actions of the UN to demonstrate the confusion that exists about the role of private property. Then, I argue that private property is a human right, but this does not mean that it will take the form that it does in Western societies.

Harvey M. Jacobs^{1,2}

¹ University of Wisconsin-Madison, WI, USA

² Institute for Management Research,
Radboud University Nijmegen, Netherlands

Key words: private property, human rights,
United Nations, global urbanization

Harvey M. Jacobs, Department of Urban and
Regional Planning, 925 Bascom Mall/Old
Music Hall, University of Wisconsin-Madison,
Madison, WI 53706, USA
E-mail: hmjacobs@wisc.edu

Accepted for publication March 24, 2013

Introduction

This is a period of history when there is a great deal of global discourse about private property – specifically the ownership and control of land and housing – as a social and legal institution. This discourse is truly global, occurring in developing, transition and developed countries. Some of this discourse grows out of transformative political, social, and economic events of the late 20th century; some of this discourse grows out of the explosive growth of mega-cities, primarily in the developing world, and the paths that might be available to the poor in these cities to move out of poverty, and some of this discourse is rooted in discussions that began after World War II (WWII) and continue to the present about the articulation and realization of fundamental human rights.

This article focuses on the right to private property in land and the extent to which it should be (and can be) understood as a fundamental human right. To answer this query, I explore how ownership and control of land were understood as fundamental to both the political and economic conception of human rights in the late 18th century intellectual movements that fed into the American and French revolutions. Then, I turn to the 1948 Universal Declaration of Human Rights (UDHR). Through an analysis of it and subsequent United Nations (UN) Covenants, I seek to explain the seemingly confounding irresolution over private property's place in a human rights framework. I next examine the contemporary global debate over private property. Here, I focus especially on the advocacy for private property as a vehicle to obliterate urban poverty in the growing

mega-cities of the developing world and on criticisms that this advocacy fundamentally misunderstands both what might help the urban poor to overcome poverty and what they themselves want. I close by seeking to answer the question that frames this article: is private property a match or mismatch with the 21st century conception of human rights?

In all this, my approach is both interdisciplinary and eclectic. I draw from across the social sciences to create a coherent narrative that situates the historic and current debate about private property in land. In so doing, I provide for an informed basis for my speculation as to how private property will (or will not) come to be treated, as contemporary global discourses about the meaning of human rights unfold. Ultimately, this article both answers and does not answer the question it poses. That is, I conclude by arguing that private property *is* a human right and has come to be understood as such as the global debate on human rights has evolved. However, I also conclude – in line with many others – that *exactly* what private property is or should be is contentious, because of its complex history and because it is an ever-evolving social and legal institution.

A global context

Private property is a social and legal institution that has a long history across many cultures and legal systems (Schlatter, 1951). It has come into contemporary focus because of the changing nature of the global political economy.

The fall of the Berlin Wall in the late 1980s and the dissolution of the Soviet Union in the early 1990s are what most obviously contributed to the new global interest in private property. When the Wall came down and the Soviet Union broke apart, some prominent social commentators suggested that the grand social debates of the 20th century were finished (e.g. Fukuyama, 1989). According to this line of thinking, the 20th century social, political, and economic

debates had an East–West structure focused on the relative merits of conflicting macro-political economies – socialism versus capitalism, communism versus democracy. From the perspective of the early 1990s, the new era (post-Berlin Wall, post-Soviet Union) would be one in which only one set of ideas would prevail: capitalism and democracy.¹

The new countries of Central and Eastern Europe and the former Soviet Union as well as other countries that were undergoing their own independent political changes (such as South Africa) began asking themselves and others how to become more integral to the global community. How does a country acquire the economic standing of the advanced developed countries? How does a country acquire the political legitimacy of the advanced developed countries? How does a country acquire capitalism and democracy? These became among the most pressing questions of the late 20th century.

For reasons that are explored in more depth later, an answer centered on the social and legal institution of private property in land. Private property was understood as the literal key to a market-based capitalist economy and to democratic political structures.

Over the past several decades, developing and transition countries around the world have, with the counsel of the multilateral and bilateral international aid agencies, aggressively moved to introduce the social and legal institution of private property (Deininger, 2003). This tendency has been further aided by advocacy suggesting that the creation of private property is the central variable to the alleviation of poverty in developing countries (de Soto, 2000). In this same period, there has been a rejuvenation of the social and legal debate about private property in the USA (Jacobs, 1998, 1999, 2010), and in Western Europe, decades-old institutional

¹ Huntington's (1997) notion of a "clash of civilizations" is an alternate concept to the one advanced by Fukuyama (1989).

arrangements that have structured the relationship of the individual to the state over the scope of private property have begun to shift significantly (e.g. Allen, 2010; Jacobs, 2008ab, 2012; Ploeger & Groetelaers, 2007).

In the last few years, the extent and substance of this trend has become clear. There are few countries in the world where private property is not a topic of public policy and social debate. For example, two of the few remaining communist-led countries in the world have moved to embrace private property. In the spring of 2007, China made international news through its revision of national laws that established the conditions for the ownership of private property in housing, and starting in spring 2008 and accelerating in 2011, Cuba introduced laws that will allow the private ownership of houses (Anonymous, 2008; Cave, 2011; Zhang, 2008).²

All told, this has led to heightened global discussion about private property and property rights. Leading legal scholars are noting a global debate over constitutional property (Alexander, 2006). Others suggest that the extent of private property rights protection serves as a reliable indicator of both economic strength and political freedom, leading to global rankings of private property rights robustness (Bethell, 1998; Jackson, 2011).

Private property in classical theory and formulation

Democracy and market economies are ideas that have existed for millennia, yet democracy as a form of governance and market economies as capitalism transformed from ideas into social realities in the 17th and 18th centuries. One theory for why this occurred has to do with the so-called age of discovery.

² China's efforts to create private property made it the front cover illustration of *The Economist* on March 10, 2007. The illustration showed a happy Chinese peasant atop a tractor, à la Maoist-era realist art posters, holding up a little red book (an allusion to Mao's little red book). The words on the book – "property deed."

In the period prior to the West's "discovery" of the Americas and sea routes to Asia, life in Europe was characterized by a population with access to limited natural resources. In this situation, it could be argued that a more centralized and autocratic form of governance and resource allocation made sense. If there were limited resources and a steady or growing population, it was critical that resources not be wasted so that there was access to minimal resources by all. The age of discovery and exploration changed all this. A literal explosion of resource availability, resources such as gold, silver, fur, timber, and land, transformed the economic and social reality of Europe. Life was no longer characterized by constraint but instead by unexpected and unplanned—for abundance. It is into this new material environment that new ideas about governance and markets were introduced.³

John Locke's work was particularly influential (Locke, 1988/1689). Locke proposed a relationship between landownership and citizenship, and landownership and democracy. According to Locke, the individual held a natural right to property, and one came to possess property through using it.⁴ According to Locke, freely constituted governments (i.e., democracies) existed for the protection of individual liberties, including the liberty to hold and control property.

Locke's ideas had substantial influence on the ideas of Jean-Jacques Rousseau

³ This characterization about the emergence of democracy and markets draws strongly from the exposition by Ophuls (1977).

⁴ It was this argument that provided the justification for taking land from native inhabitants in the Americas and Africa, who were not understood to be using it in the European sense of active agricultural and forest management. This argument also justified proposals for the breaking apart of large, landed estates by the wealthy and redistributing land toward the laboring and newly emerging middle classes.

Cronon (1983) is commonly cited as a pioneering study documenting the attitudes of Puritans toward the Native Americans' use of their land in the American colonial settlement period.

(1994/1754; 1997/1762; Bromley, 1998). Together, Locke and Rousseau strongly influenced then-contemporary thinking about the content of what became the American and French revolutions. As well documented, the American Revolution was as much about grievances over access and control of property as about more commonly spoken of issues such as freedom of speech, freedom of religion, freedom of the press, or freedom of assembly (Ely, 1992). Ideas about human rights and what it meant to be a citizen were developing, and they were directly tied into ideas about (private) property.

In the nascent USA, the country's founders drew from John Locke's ideas to argue that one of the principal functions of forming a government was the protection of property. In the debate over the ratification of the proposed US constitution, James Madison (who would go on to be the fourth American President) wrote that "government is instituted no less for the protection of property than of the persons of individuals" (Hamilton, Madison, & Jay, 1961/1788, p. 339). Other key contemporaries agreed. John Adams (1851/1790, p. 280) (who became the second American president) noted that "property must be secured or liberty cannot exist. The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence." Thomas Jefferson (the author of the Declaration of Independence and the third American president) linked the individual's right to own and control property with the very existence and viability of democracy. According to Jefferson, ownership of land by farmers created the very conditions that allowed democracy to exist (Bassani, 2004). When a farmer owned his own farm, he could produce food, fuel, and building materials for himself and his family. In so doing, he was obligated to no one – he was literally free to exercise his political views as a democrat.

However, this view of the relationship of property to democracy, and the fact of

asserting property's centrality, was not unchallenged. Also drawing from Locke, others saw the need for private property ownership to bow to social needs. Among American founders, these sentiments were argued most strongly by Benjamin Franklin (the colonies revolutionary-era ambassador to France and the Netherlands). For example, in the debate over the ratification of the constitution for the US state of Pennsylvania (his home state), Franklin (1907/1789, p. 59) said, "(p)roperty is a creature of society, and is subject to the calls of the society whenever its necessities require it, even to the last farthing." In other words, Franklin viewed as legitimate the public's right to create, re-create, take away, and regulate property as it best served public purposes.⁵

Private property was thus a confusing issue for America's founders. How were these disparate positions be resolved? With ambiguity. In 1776, the US Declaration of Independence (authored by Thomas Jefferson) promised each (free, white, male) American "life, liberty and the pursuit of happiness." What is telling about this phrase is that Jefferson borrowed it directly from Locke, but Locke's phrase was life, liberty, and property. This is what Jefferson wanted the Declaration to say, but Jefferson's (and Locke's) ideas did not prevail in the final debate and ratification of the document.

Eleven years later, in 1787, the US Constitution was adopted. What did it say about land-based private property? Nothing. It was

⁵ These sentiments by Franklin were not isolated. As noted by Brands (2000, p. 623): "Franklin took a striking socialistic view of property." Brands (2000, p. 623) provides these other examples of Franklin's opinions: "All property . . . seems to me to be the creature of public convention." "All the property that is necessary to a man for the conservation of the individual and propagation of the species is his natural right, . . . but all property superfluous to such purposes is the property of the public, who by their laws, have created it, and who may therefore by other laws dispose of it whenever the welfare of the public shall demand such disposition."

not until 1791 with the adoption of the Bill of Rights that the so-called “takings” (expropriation) clause appeared as the closing phrase to the Fifth Amendment to the Constitution: “. . . nor shall private property be taken for public use, without just compensation.”⁶

With the adoption of this phrase, the Constitution formally recognized four concepts: the existence of private property, an action denoted as taken, a realm of activity that is public use, and a form of payment specified as just compensation. The interrelation of these concepts is such that where private property exists, it may be taken (i.e., seized by the government without the landowner’s permission) but only for a denoted public use and when just compensation is provided. If either of these latter two conditions is not met, then a taking may not occur.

Was anything – either about property or about citizenship and property – settled by the adoption of the US Bill of Rights? Yes and no. In the new US suffrage, the right to vote was restricted to those who held landed property, and the legal protection offered under the Bill of Rights as adopted in 1791 was such that if one held property, then that property was protected from arbitrary and capricious action by government. But despite Locke and Rousseau’s rhetoric, universal access to property was not guaranteed (in spite of Jefferson advocating for it), and

citizenship was conceptualized as directly tied to property ownership.

The French Revolution occurred only 13 years after the American Revolution (in 1789), and access to and protection of rights in property were likewise central themes. When the revolutionaries sat to articulate their ideas about the social and political rights of citizens in the new France, one of the rights that emerged was directly parallel to the Takings Clause of the Fifth Amendment of the US Bill of Rights. In the Declaration of the Rights of Man and Citizen of August 1789, the final of the 17 rights states: “Property being an inviolable and sacred right, no one may be deprived of it except when public necessity, certified by law, obviously requires it, and on the condition of a just compensation in advance.”⁷

All the structural elements of the Takings Clause in the Fifth Amendment to the US constitution discussed earlier are in Right 17. The right to private property is recognized. The right of government to expropriate that property is also recognized. However, the right of government to advance against a citizen’s right noted as “inviolable and sacred” is only under the conditions of a “public necessity” that “obviously requires it” and when such action is “certified by law.” When these conditions are met, then the citizen is entitled to “the condition of a just compensation in advance.”

While the legal framework appears essentially the same, the political situation was different. Given the structural conditions of the relationship of the French aristocracy to the populace at the time of the French Revolution, the Revolution’s ideas about citizenship and property were both different than and similar to those articulated in the USA. At least in theory (although not in actual practice), the Revolution provided for universal suffrage; the right to vote was not tied to the ownership of land. However, as in the

⁶ The US Constitution does speak to private property, just not land-based private property. What the Constitution recognized was the ownership of slaves as property under Section 2 of Article IV, where it establishes the right of owners to have escaped slaves returned to them. Also under Section 2 of Article III, the Constitution establishes a procedure for how conflicting claims to state-based land grants by individuals would be resolved.

It is also worth noting that in the Fifth Amendment the phrase preceding the takings clause states “No person shall . . . be deprived of life, liberty, or property, without due process of law,” making explicit the Locke-inspired link between liberty and property.

⁷ A discussion about the property provision in the Rights of Man is contained in Jacobs (2008a).

USA, the Revolution did not provide for each citizen to possess property. What it did instead was to provide against the arbitrary action of the state if a citizen did have property.

The net result of these two events – the American and French Revolutions – was that a formulation emerged. The rights of citizens, particularly the right to vote, might or might not be tied to property, but the state was not going to guarantee citizens the right to property. Instead of promising property, the state was going to promise to protect property against arbitrary state action when the individual had independently achieved that property, and even with this promise, the swath of action that the state could engage in was broad and relatively unbounded.

At the same time, as these political arguments were being developed and adopted as key components of the emerging American and French Revolutions, a parallel economic argument was being developed. In *The Wealth of Nations*, Adam Smith (1937/1776) advanced the foundational argument for a market economy; Smith argued for an economic structure based on labor specialization and free market exchange of goods and services.

Private property is central to a market economy. When someone owns land, they have something that has the potential to return value to them. The owner has reasons to care for the land and to invest in the land (e.g. to make it more productive). Individual actions have the potential to provide direct returns to the owner. In addition, individual ownership of property becomes a key to a modern banking system. Ownership gives the owner something of value that can be invested in and borrowed against. Finally, Smith argued that the social institution of property provided one of the strongest justifications for a civil government.

Both sets of arguments for the centrality of private property – the political (for democracy) and the economic (for market economies) – have continued into the present day.

Political scientists and legal scholars continue to make arguments drawing from Locke and Rousseau and analogous to those of Jefferson (e.g. Freyfogle, 2010; Purdy, 2005), and economists continue to make arguments that draw directly from Smith.⁸

Thus, the rationale for private property is both political and economic. Drawing from political theory, the argument is that ownership insulates the owner from the arbitrary power of the state and provides the owner with the literal material conditions to exercise one's rights as a citizen in a democracy. That is, as Jefferson argued (drawing from Locke and Rousseau), (agrarian) landownership – because it allows the owner to provide food, fuel, and building materials for one's self and one's family – frees one to exercise one's political judgment without coercion. Drawing from economic theory, the argument is that private property “seeds the system by making people accountable and assets fungible, by tracking transactions, and so providing all the mechanisms required for monetary and banking system to work and for investment to function” (de Soto, 2000, p. 63).⁹ Intertwined, these two arguments provided much of the rationale for programs of land reform in the post-WWII period, as developed countries sought to foster private property (as an alternative to tribal, communal, group, and state property) in developing and then transition countries.

The UDHR

The UDHR was adopted by the UN General Assembly in December of 1948 by a vote of

⁸ See the section after “Private property in the contemporary global debate.”

⁹ While dominant, political, and economic arguments are not the only ones that are made for the focus upon private property and private property rights. Garber (2000) provide an insightful (and humorous) examination of the way property in American society becomes imbued with emotional power and comes to represent many aspects of the self in society.

48-0-8. Its emergence reflects directly the atrocities of WWII, and the broad-based interest in an explicit statement about the nature of human rights, specifying the general commitment to such in the UN Charter of 1945. While adopted by the UN General Assembly, the Declaration does not represent an official treaty of the UN and thus does not have the force of law of an international agreement. This was by design, however, and in spite of its semiformal legal status, according to the UN, it has become the most translated document in the world.

Article 17 of the Declaration states (in full): “1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property.”

The drafting of Article 17, its adoption, and the subsequent implementation of it “belies the controversy it caused” (Alfredsson, 1992, p. 255; see also Glendon, 2001, pp. 182–183 for a discussion about its development and adoption). What was and continues to be of contention is what *exactly* is being addressed in this Article. Forty years after its adoption, a 1988 UN report sought to clarify Article 17’s content. It was noted “(W)hile no one questioned the right of the individual to own property, there have been considerable differences of opinion with regard to the concept of property, its role and functions, and the restriction to which the right of property should be subjected” (United Nations, 1988, p. 7). In a recent legal analysis, Golay and Cismas (2010, p. 11), discussing Article 17 and subsequent UN treaties, came to the same conclusion: “. . . we can conclude that the general acceptance of the right to property is beyond doubt. But the definition of the right to property varies in the different legal instruments, in particular with regard to its limitations, the allowed balancing of interests and the clauses on social aspects . . . None of the universal and regional instruments discussed offers a clear-cut definition of the object of the right, i.e. property . . .”

Why this is so becomes clear when one examines the evolving history of UN action subsequent to the Universal Declaration.

Private property in subsequent UN covenants and documents

In 1954, the UN Commission on Human Rights met to work on the draft of the Covenant of Economic, Social, and Cultural Rights. The 1954 meeting followed meetings in 1951, 1952, and 1953. At these meetings, it could not be agreed upon whether to include an article related to property (United Nations, 1954). When the Commission met in 1954, “(n)o member of the Commission expressed opposition in principle . . . (h)owever, the Commission failed to adopt a unified text” (p. 7). The USA proposed incorporating the text from the Universal Declaration, but objections emerged – from representatives as varied as Chile, Egypt, India, Lebanon, Philippines, Poland, Uruguay, among others. These objections reflected the differing histories and political economies of these countries, their stages of economic, social, and cultural development, and thus their perspective on land and property, and the interplay of the rights of the individual and those of the state. Matters of when and how expropriation may occur, conformity with state laws (such as regulations) and whether a right to property meant a right to “the essential needs of decent living” were among the contentious issues (United Nations, 1954, p. 8). Ultimately, the Commission’s deliberations about incorporation of Article 17 (or some version of it) into the draft Covenant adjourned *sine die*.

The two most significant UN treaties to emerge from the Universal Declaration are the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights, both of which were adopted in 1966 (and went into force in 1976) and were signed by 160 and 167 nations, respectively (United Nations, 1966ab). However, what is notable

is that they are both “silent on the right to property” (Golay & Cismas, 2010, p. 3). As noted, going as far back as the early 1950s, “(i)n lengthy debates there was disagreement on practically every aspect of the topic . . . indeed the very inclusion of the right” (Alfredsson, 1992, p. 259).

In 1988, the UN Economic and Social Council issued a report about Article 17 titled “Respect for the right of everyone to own property alone as well as in association with others and its contribution to the economic and social development of member states.” The report:

. . . recognized that there exist in Member States many forms of legal property ownership, including private, communal, social and State forms, each of which should contribute to ensuring effective developments and utilization of human resources through the establishment of sound bases for political, economic and social justice. They have also recognized that the right to property may play an influential role in fostering widespread enjoyment of other human rights and contribute to securing the goals of economic and social development (United Nations, 1988, p. 4).

The report also:

. . . recognized that the right to property should be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and general welfare . . . no State . . . should be engaged in any activity or perform any act aimed at the destruction of . . . the right of property . . . (United Nations, 1988, pp. 4–5).

But beyond broad recognitions and then a listing of the UN Covenants and Declarations where Article 17 is obliquely addressed and regional Charters and Conventions where a

right to property is engaged in one fashion or another (such as those for Africa, Latin America, and Europe), the report does nothing to advance the discussion about property, especially private property, as a human right.

More recently, in 2008, the UN Development Programme issued a report from the Commission on Legal Empowerment of the Poor. Chapter 2 of Volume II of the Working Group Reports focused specifically on “Empowering the poor through property rights” (Albright & de Soto, 2008, chapter 2, pp. 63–128). Like the other work cited earlier, this report frames its discussion through the lens of Article 17 of the Universal Declaration. However, it extends past discussions through both its assertions and its explicitness with regard to private property.¹⁰ The chapter’s executive summary begins: “Property rights *must* be understood as a fundamental human right” and “(t)hroughout history the idea of human rights has developed in close association with the idea of *private* property rights” (emphasis added, Albright & de Soto, 2008, p. 64). The report then goes on to assert that “(l)egal access to property rights for various groups is clearly an over-arching and universal issue that should be at the centre of global efforts to empower the poor” (Albright & de Soto, 2008, p. 66). The bulk of the report engages a broad range of contemporary literature about property and gender, women’s rights (or more commonly their lack thereof) to property, customary tenure, indigenous peoples rights, lessons from past efforts at formal entitlement, and speculations on the potential role of property rights among the growing numbers of slum dwellers and small business operators in the mega-cities of the world.

¹⁰ Perhaps this extension occurs because the Commission is not reporting as an official UN body seeking consensus among nations.

The debate about property and citizenship in the latter half of the 20th century

In the middle of the 20th century, after WWII, the global community actively re-engaged matters of citizenship, property, and human rights. One version of this engagement was through the issuance of the UDHR, which addressed a wide range of issues, including those having to do with slavery (Article 4), rights before the law (e.g. Articles 6–8, 9, and 10), forced marriage (Article 16), and an adequate standard of living (Article 25), among others.

In this period, T. H. Marshall (1950) published his seminal essay on “Citizenship and Social Class.” What is significant about this essay for this exploration is that it had little, if anything, to do with land and the link of landownership to citizenship and human rights. Marshall was representative of a group of scholars and activists for whom land had become or was becoming irrelevant. In an increasingly urban world (Marshall was writing about England in the mid-20th century) and at a time of universal suffrage, it did not appear necessary to think about or comment upon what role privately owned property should or might play to one’s definition as a citizen or one’s access to human rights. Instead, for Marshall, the argument was to demonstrate how concepts of citizenship had evolved and were evolving, and that now, the focus was to be on the linkage between citizenship and social rights.

This theme was picked up in the USA a decade-plus later in a seminal article on “The New Property” by Charles A. Reich (1964). Unlike Marshall, Reich argued that property is still important for citizenship and human rights, but in Reich’s formulation, as in Marshall’s, it is about citizen access to governmental programs – welfare rights – for health care, housing, employment, and so forth. These are the new forms of property alluded to by the article’s title.

Yet at the same time that Marshall and Reich, in England and the USA, were

divorcing citizenship from property, applied policy initiatives in the developing world were all about property and citizenship. In the period after WWII, the developed countries began working in the developing countries of the so-called “third world” actively pushing programs for land reform. Analyses of the time argued that concentrated forms of landownership – forms identified as antiquated – inhibited processes of economic, social, and political development. In order to foster development in the latter part of the 20th century, what was necessary, even essential, were new forms of landownership. Throughout Latin America, Africa, and Southeast and South Asia, the USA and Europe offered technical assistance for programs of land reform whose goals were essentially the replication of the Western model of individual (private) property precisely because of the political and economic advantages such a model was believed to foster.

Another development that was about property (and tangentially about human rights) helped set the orientation of the then emerging environmental movement. Garrett Hardin, a population biologist, published a seminal article in 1968 entitled “The Tragedy of the Commons.” His goal in the article was to speak to management of human population growth, but his illustration was about the use of unmanaged natural resources – resources owned by none but used by all, such as the oceans or the atmosphere. An unanticipated result of his argument, though, was its extension to all forms of natural resources, those unowned but also those privately owned, when rational decision making by the individual does not result in rational outcomes for society at large (e.g. Sinden, 2007). While Hardin’s analysis came to undergrid the rationale for public management (i.e., regulation) of a broad range of property forms, Hardin himself argued in the article that the solution for the “tragedy” was the social and legal institution of private property (Hardin, 1968, pp. 1245, 1247).

To many, it was not clear that Hardin's analysis, while rhetorically compelling, was wholly correct. In particular two aspects are worth noting – whether commons ownership always leads to a tragedy and whether the *only* viable (though imperfect) solution for the tragedy is the social and legal institution of private property. Elinor Ostrom (1990) developed an analysis of common institutions that argued for their functionality and durability (her work led to her being awarded the 2009 Nobel Prize in Economics). She was among many who pointed out that Hardin's work focused on a very particular type of commons – open access commons – and thus should not and need not be generalized.

So the legacy of this period was ambiguous. On the one hand, in the developed countries, the link between property and citizenship seemed to fade, overtaken by urbanization, universal suffrage, and new concepts of citizenship. On the other hand, the rising concern about environmental management renewed discussions about property, particularly the social functionality of private property vis-à-vis what has come to be known as sustainability. At the same time, while the property–citizenship discourse was fading in the developed countries, these very same countries were fostering it in developing countries globally.

Private property in the contemporary global debate

The matter of property – access to it, rights over it, possession of it, appropriate mechanisms for resolving social conflicts over it – is a very contemporary global issue, and it takes many forms. In the developing world, some of these include the much discussed matter of so-called “land grabbing” (large-scale land economic concessions) for food production (e.g. De Schutter, 2011, the Special Issues of *Journal of Peasant Studies*, 38(2), 2011, pp. 206–298, and *Globalizations*, 10(1), 2013, pp. 1–209), the disenfranchisement of women in the process of land-titling

programs (Lastarria-Cornhiel, 1997), and the growth of slums in mega-cities and the long-term status of their residents (Gulyani & Bassett, 2007; United Nations Habitat, 2003). In China, protests over land issues are the most common form of “mass incidents”; a sociologist has estimated that in 2010, there were 180,000 such incidents (A. Jacobs, 2011). Most of these were about government expropriation of land for economic development. While land in China is owned by the central government, this does not appear to remove a sense of ownership on the part of farmers at the urban edge threatened with forcible removal, or the shock of more well-to-do residents in suburban enclaves likewise threatened (A. Jacobs, 2011). Taken together, this has led multilateral (and bilateral) aid organizations to begin to offer a more nuanced focus on land's role in economic development (e.g. Deininger, 2003; Deininger, Augustinus, & Enemark, 2010; United Nations Habitat, 2008). And even in the developed world, there are intensive discussions about property, especially about the appropriate extent of governmental action toward privately owned land (e.g. Jacobs, 2010, about the USA, and Allen, 2010, about Europe).

All of this focus serves to highlight some of the concerns that originally led to Article 17 of the Universal Declaration and continue to animate discussion about the property–human rights link today. But what is different today is the renewed focus upon *private* property as a property form. While some of this is attributable to the historical shifts of the last several decades (see the section “A global context” in this article), much of it is also a result of the advocacy and influence of Hernando de Soto, a Peruvian whose work has had significant impact at the World Bank (de Soto, 2000). de Soto provides a 21st century updating of Adam Smith's arguments but focuses on urban poverty in developing countries. He asks ‘Why are the poor, poor?’ To frame this question, he made this observation:

The poor . . . have things, but they lack the process to represent their property and create capital. They have houses but not titles; crops but not deeds; . . . It is the unavailability of these essential representations that explains why people who have adapted every other Western invention . . . have not been able to produce sufficient capital to make domestic capitalism work. This is the mystery of capital (de Soto, 2000, pp. 6–7).

For de Soto, the solution is about creating private property:

Property . . . is . . . a mediating device that captures and stores most of the stuff required to make a market economy run. Property seeds the system by making people accountable and assets fungible, by tracking transactions, and so providing all the mechanisms required for the monetary and banking systems to work and for investment to function. The connection between capital and modern money runs through property (de Soto, 2000, p. 63).

It is de Soto who co-chaired the UN Development Programme Commission on Legal Empowerment of the Poor and who so strongly influences the argument for linking human rights to private property (Albright & de Soto, 2008). The rapporteur for the property rights chapter, a de Soto colleague, has elsewhere written: “(T)he denial of private property rights as human rights opens the door to slavery and grave forms of exploitation” and “(T)he protection, guarantee, and respect of private property independently . . . are fundamentally useful for the promotion of individual and social wellbeing” (Cheneval, 2006, pp. 11, 16).

de Soto has become most associated with the idea that widespread land titling programs in the slums of the mega-cities of the world – providing private property title to existing residents – are a key action toward the alleviation of structural poverty. Drawing directly from Adam Smith’s logic, if the poor

have a secure title, they have something against which they can borrow to increase the quality of their residence or to use as collateral for other (business) investment.

But, de Soto’s “solution” is subject to a wide-ranging set of critiques. It is suggested that de Soto’s solution is simplistic, unrealistic, and perhaps even unwanted to those to whom it is directed. Even where the poor do have title, it is not clear that financial institutions (banks) want to lend to them. Clear title may be one component of credit worthiness, but so is demonstrable and steady income, which the poor can rarely demonstrate. And then, there is the matter of whether the banks want to (or can) repossess from the poor if a loan goes bad.

Gilbert (2002) is one of many who observed that land titling does not seem to elicit a supply of credit to new owners, and it is not clear that it contributes significantly to the emergence (beyond what exists informally) of a housing market (see also Payne, Durand-Lasserve, & Rakodi, 2009, for a broad ranging critique of the impacts of titling). Galiani and Schargrodsky (2010) are more generous toward titling programs. They argue that titling does lead to increased housing investment and a correlative set of social benefits (reduced household size and enhanced education of the household’s children), but they also noted that this is not as a result of improved access to credit.

Gulyani and Bassett (2007) are among many who wonder whether the poor actually want title. Title can have several counter-intuitive results. Titles in formerly informal settlements can make land attractive to the non-poor (the middle-class). Titles thus can lead to the displacement of the poor. When this occurs “naturally,” some may argue that it can be seen as a good thing (the poor treat their title as an asset to be converted to capital through selling it to the middle class). But even then, it can also mean that the number of informal settlements does not shrink, but only changes location. And then there are the instances where titling does not occur

naturally but where elites displace the poor in anticipation of titling, and the poor both receive no benefit from titling and must relocate. And even where displacement as a result of titling does not occur, the poor may still be ambiguous about title; with title comes obligations – for example to pay local taxes – which may eventually lead to displacement.

So what do the poor want? They appear to want many of those things normally associated with the benefits of clear title – a secure site for housing, access to clean water and human and solid waste disposal, and access to a range of social and public services such as schools and health clinics.

All in all, the provision of private property is both a very current topic in global discussion but also an ambiguous one vis-à-vis its impacts for improving the conditions of the poor in the growing mega-cities of the world. And yet the ambiguity of private property as a solution for poverty alleviation does not appear to dampen the attractiveness of de Soto's advocacy or the controversy such advocacy generates (see e.g. Granér, 2005, and Gravois, 2005, as two examples).

Private property as a human right?

Several things can be asserted about (private) property and human rights:

- property rights are central to civil and political rights and have long been recognized as such; they have long been a core part of the discourse about human rights;
- property rights (territory) are definitional for individuals and peoples (and are often the source of intense social conflict (war));
- human rights without property rights has long been understood to be an empty formulation.

But it is also true that:

- property rights (property ownership and control) correlate with the empowered and the wealthy;
- property rights regimes can impede the realization of other human rights;

- the importance of property rights can pale in comparison with other more immediate human rights and needs, especially for the very poor (such as hunger and poverty).

As one expression of the points above, Alfredsson (1992, p. 260) noted that:

... property rights have been criticized as standing in the way of progress ... The importance of property rights is often deemed to pale against the background of other problems, such as hunger, poverty and misery. Unequal distribution of wealth tends to follow the lines of sex and race, especially affecting ... groups in minority situations ... The overall concentration of most of the world's property in the hands of the comparative few ... makes property rights seem more a part of the problem than an interest entitled to protection.

As we consider the question posed by this article, it is important to keep two things in mind. First, property is a social creation, where society (the state) decides (defines) what property is – what constitutes private property, public property, or any other property form. Society also decides when and how property will be protected. That is, society decides the limits it will place upon itself. Second, people globally yearn for property. This yearning may take different forms. It might not be for “ownership” in a narrow or Western sense, but it almost always reflects the deep desire for the security and stability that property, and private property as it is understood in the West, traditionally conveys.

Is property a human right? Yes! The historical data suggests that since we began to think about human rights in the modern era (from the time of the American and French revolutions), property has been an integral part of the human rights discourse, although always a controversial one. Is *private* property a human right? Yes! It seems quite clear that for both the Americans and French, the

“property” being referenced in their respective foundational documents is largely and most significantly private property over land.

But exactly what this means or will mean in this era is unclear. In 1948, the UDHR offered a formulation that did little to advance the one articulated 250 years ago in the USA and France. Article 17 acknowledges the right to own property, and it promises that when property is owned, it should be treated respectfully by the state – that it will not be subject to arbitrary and capricious action. But Article 17 of the UDHR does not promise property, as did neither the Takings Clause of the US Bill of Rights or Right 17 of the Declaration of the Rights of Man. That is, a narrow interpretation of the right to property from these documents is that it is to be construed as a right that comes into force with obligations from the nation-state and international bodies *if* the individual has obtained property. There is no *positive* obligation of the state to provide property. What there is instead is a positive obligation to act toward property legally procured.

But there is an alternate interpretation for Article 17. As noted by Alfredsson (1992, p. 257), “Article 17 should . . . be read in conjunction with other provisions of the UDHR.” And when one does this, another view of what Article 17 means emerges. For Golay and Cismas (2010, p. 2), to use but one example (but one in which the issue is examined in depth), “The right to property, understood as a means of survival, is closely related to the realization of the right to life and of other human rights of the individual.” In fact, they go so far as to assert that “despite persisting controversies, the formal inclusion of the right to property among the panoply of human rights . . . is clearly attested . . .” (p. 3). In what ways is this true? In part, they draw their links through Article 25 of the UDHR and its assertion of a right to a standard of living, including a right to food and housing. As they note: “The link between property and housing is indeed so obvious that it requires little explanation” (p. 23).

“Unquestionably, there is an intrinsic link between property, land and food” (p. 25), and so they conclude that “The right to property is essential for the protection of human life and dignity of the right holder as it contributes to the realization of economic and social rights including the right to housing, to food and to social security” (p. 28).¹¹

Since 1948, official bodies of the UN have sought to specify a meaning for Article 17. Each time, the result is confusion and ambiguity. This is not surprising. Article 17 began as a subject of intense controversy; its very inclusion was contentious. The reason the UN study groups through the years have not succeeded in a precise articulation of the meaning of Article 17 of the UDHR is the very complexity of the subject. What property even is cannot be agreed upon. Golay and Cismas (2010, p. 11), in their review of global and regional covenants and conventions, noted that “none of the universal and regional instruments discussed offers a clear-cut definition of the object of the right, i.e. property . . .”

Within the UN today, there are strong advocates for a particular Western conception of private property who build their advocacy on the foundation of Article 17, and there are equally strong skeptics. That is, there are those who advocate for the recognition of a multiplicity of property forms as the best expression of a contemporary understanding of human rights and citizenship.

Is the social and legal institution of private property a mismatch for the realization of human rights in the 21st century? In a historical period where the world is more than 50 percent urban and becoming evermore so

¹¹ However, Golay and Cismas are quick to acknowledge, as are all commentators, that any right to property is not one that is unlimited or unbounded. Instead, a right to property can be limited and shaped by the state for various reasons [e.g. in their words, “in order to resolve social injustices and advance the economic, social and cultural rights of specific disadvantaged individuals or groups” (p. 28)].

daily, is private property a useful, even essential, component of our lives? Does private property matter to those estimated 2 billion people who will occupy urban slums in the global mega-cities? My answer to these questions is no, yes, and yes.

Davy (2012) argued that property itself is polyrational, that it requires a mult textured understanding, conceptualization, and policy approach.¹² He is correct. The challenge is that the tides of history and policy are narrowing the ability to approach property with this level of nuance. Globalization is fostering an institutional environment conducive to (even requiring) an ever-narrow definition of private property precisely because a Western conceptualization of private property furthers the interests of global market actors. At the same time, individuals actively seek secure property relations of the type that, at least theoretically, are embodied in private property.

Will private property in the 21st century only be individual ownership in the Western model? Probably not. Will it instead utilize – build upon – alternate (and often long-standing) forms of ownership, such as tribal, community, and social? Most probably. Private property in the future will likely modify these alternate forms while recognizing their prejudices (e.g. against women) and shortcomings. This will mean the need to invent new forms of ownership that integrate old ideas with the demands of new circumstances.

This should be a very reasonable and doable challenge. Property as a social and legal institution is always evolving. Even in Western societies what one can claim to own in this period of the early 21st century is significantly different than what one's grandmother or great-grandfather would have claimed as ownership.

At the beginning of the 20th century, an owner of landed property in the West could claim ownership "to the heavens above"; the invention of the airplane changed all that. So while a landowner still possesses air rights, these rights no longer extend "to the heavens above." In this same period, wives were the property of their husbands and children of their parents. The women's rights movement and the child welfare movement began a century-long process of changing that. Also in this period, domestic animals were the property of their owners, and the first wave animal rights movement (societies for the protection of cruelty to animals) changed that.

So by the beginning of this century in the developed countries, a man can no longer beat his spouse, send his children off to work in the mines or the mills, or mistreat his horse simply with the claim that "they are mine, and I will do what I want with them." Relationships that were once defined as property have reformed so that women, children, and domestic animals now all have rights independent of "ownership." None of this has been without substantial social controversy, but it illustrates that what society recognizes and is willing to defend as a claim to private property changes as technology and social values evolve.¹³

¹² Davy (2012) is one of many authors to stress the multitude of ways in which property may be "owned," managed, and secured. As noted, Ostrom (1990) argued for the viability of commons management in counterpoint to Hardin (1968). And Payne (2004) provided a typology for "owners" and their land, which ranges from pavement dweller to free-holder; he is a lead author for the report by UN Habitat arguing the need for "secure land rights for all," but where this does not have to mean private property in the Western sense (United Nations Habitat, 2008).

¹³ Ophuls (1977, p. 223) made a similar point when he reflected on the relationship between private ownership and sustainability: "... only over a century ago it was legal to treat human beings as property. Already, many people are finding our slavish treatment of nature stupid at best and morally repugnant at worst. Looking back on us as we look back on our slave-holding ancestors, our descendants will wonder why it took us so long to come to our senses."

Thus, what is recognized as private property in the future is likely to be different than what it is today. Elsewhere, I have offered the prediction that in the USA, for example, the right of exclusion commonly associated with a home is likely to remain for the foreseeable future (I was given the task to predict property's form 100 years into the future), but this was unlikely to be the case for private membership clubs or private institutions of higher education. My prediction is these will come to resemble businesses more than they do homes. That is, they will lose the right of exclusion just as commercial establishments did following the American civil rights movement of the 1960s.¹⁴ In addition, I predict that certain rights in the property bundle that can now be claimed as individual will no longer be so, including the right to clear-cut trees, or plow virgin soil, or use toxic chemicals for land management, if doing so destroys the land, and wildlife on my land will gain stronger, independent rights (analogous to those gained by domestic animals) (Jacobs, 2009).¹⁵

So one way to frame the question of private property and human rights is not to ponder whether private property will exist, or whether it will spread, or even whether it will be promoted as a solution to the needs of the urban poor in mega-cities of the world. Instead the issue becomes the precise form

private property will take. Private property *is* foundational to core ideas about both citizenship and human rights. The challenge for the 21st century is to foster forms of private property whose benefits will be realized by those most in need of them.

Acknowledgements

Foremost, I am grateful to my colleague and friend Benjamin Davy for facilitating the invitation to be part of the ZiF (*Zentrum für interdisziplinäre Forschung* in Bielefeld, Germany) Cooperation Group "The Road to Global Social Citizenship? Human Rights Approaches to Global Social Policies" in spring–summer 2011 from which this work emerges. I also want to thank his collaborators and co-project leaders, Ulrike Davy and Lutz Leisering, for so warmly welcoming me into the group. In addition, I greatly benefitted from the professional and personal collegiality of the other members of the core group – Armando Barrientos, Hartley Dean, and Sony Pellissery. And my friend and colleague August E. Røsnes of the Norwegian University of Life Sciences was very helpful in sharpening my thinking on an early version of this article when he joined us at ZiF for a workshop in summer 2012. Lastly, I want to thank the students in my winter 2013 special topic graduate seminar at the University of Wisconsin–Madison for working with me to clarify my understanding on the subject matter of this article.

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¹⁴ Before the civil rights movement, owners of commercial establishments could exclude on the basis of race, ethnicity, and religion. As a result of the civil rights movement, these owners lost this right, and they lost it absent compensation. The very idea of what was private property in commercial establishments was socially redefined.

¹⁵ Goldstein (2004) is among a group of environmentally oriented scholars working to understand how to modify the concept of private property so that it can become compatible with ecological principles. In Goldstein's terminology (and the terminology of private property), he wants to insert, or create, "green wood in the bundle of sticks."

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