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REVIEW SYMPOSIUM: HANOCH DAGAN'S A LIBERAL THEORY OF PROPERTY

# Individual autonomy and takings in a liberal theory of property

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## 1 Introduction

Dagan's *A Liberal Theory of Property* is an extraordinary achievement. Building on his large and influential body of scholarship, Dagan builds a normative conception of what property law should be from the ground up, from foundational principles. The book explicates with great sophistication the various considerations that any legitimate law of property must take into account. I learnt – and also relearnt – a great deal reading it (as, I am sure, will others).

Dagan sees property as a social construction – rather than as something that emanates somehow from natural law. Fundamentally, Dagan is asking what an enlightened society would choose for its conception of property. Dagan views a range of social orderings as consistent with justice. Thus, Dagan believes that there is not a single, or singular, legitimate just conception of property. There are, in fact, many. Likewise, Dagan does not see a legitimate conception of property as requiring an unchanging, non-dynamic law of property. Rather, governments can legitimately adapt their law of property to meet new understandings and needs, as long as core principles, principles any society should follow – individual autonomy, relational justice and (perhaps to a lesser extent) distributive justice (Dagan, 2021, pp. 1–10, 88–92, discussing these three concepts) – are incorporated into and reflected in substantive property law. Dagan aspires to an account of property that is both characterised by a degree of stability over time (thus avoiding the conclusion that property law is just whatever the positive law says it is at any moment in time) and is also flexible and fluid. That is a tall order, and he manages as well or better than any theorist who has waded into these muddy waters.

One way to understand Dagan's project is by situating it within contemporary property law scholarship. Dagan's work is, in part, an extended counterpoint to the 'property-as-exclusion' conception of property, which is associated with legal academics such as Tom Merrill and Henry Smith, and which has some traction in the increasingly conservative US judiciary (Dagan, 2021, pp. 182–185).[1] In this conception, property is a highly individualistic institution that is justified by efficiency (reducing transaction costs and maximising social welfare); other scholars articulate a similarly highly individualistic, 'liberal' conception of property that is justified by some mix of natural law, alleged history and libertarian political theory (Dagan, 2021, pp. 114–139). Dagan seeks to reclaim the mantel of 'liberal' for a Centre-Left/Left vision of property law. Notably, and very successfully, Dagan argues that a 'liberal' conception of property that values individual autonomy not only can but must take into account the autonomy of non-property holders. He also persuasively argues that the law of property cannot stand apart from considerations of societal justice; rather, property law must incorporate justice in terms of the relations between both property and non-property owners who interact with respect to specific assets and in terms of societal justice writ large.

Dagan also is seeking to provide a conception of property that is, at least in its emphasis, distinguishable from what has been dubbed progressive property theory (PPT) – a school of scholarship

[1]Dagan and Heller suggest this framing in their chapter on takings, explaining that their conception falls between the 'libertarian' and 'progressive' ones.

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with which Dagan himself is strongly associated and that emphasises the social obligation implicit or that should be implicit in private property ownership (Alexander, 2009; Alexander *et al*., 2009). By placing individual autonomy at the core of his liberal conception of property, Dagan suggests that he offers a conception of property that straddles the divide between property-as-exclusion on the one hand and progressive property scholarship on the other.

My principal questions after reading Dagan's superb book have to do with the utility of 'individual autonomy' as a concept to explain and guide property law and property institutions. First, I want to pose some boundary questions about what 'individual autonomy' includes and does not include. Second, by focusing on Dagan's discussion of the implications of his theory for takings doctrine, I want to suggest that 'individual autonomy' may do less to guide us in answering as-applied, real-world questions than Dagan at times seems to suggest is the case.

## 2 The limits of 'individual autonomy' as a property rationale

Dagan's basic claim about individual autonomy is that property ownership allows human beings to act autonomously, to have choice and agency in their lives, because secure control over resources is often required to be able to act with any agency. And this is certainly true on some level and in some instances: if you have a home that you 'own' in a secure way, whether that is traditional ownership or a lease or other entitlement that cannot be revoked without cause, you almost certainly are empowered to make choices about your life in a way that would not be true were you homeless or housing-insecure.

But how exactly is individual autonomy an essential value underlying 'property' with respect to very rich people? Warren Buffett certainly needs some property to exercise some meaningful degree of individual autonomy, but he does not need billions and billions of dollars. And the same for Elon Musk and Donald Trump. Of course, more property confers more autonomy, even for the very rich: Jeff Bezos's and Richard Branson's wealth allows them to exercise an extraordinary degree of autonomy – they can fly into space for no particular reason, solely for the jollies of it. But it is far from obvious that we should be concerned with the kind of autonomy vast property ownership confers on Bezos or Branson. Autonomy thus may be a justificatory principle for property, but only to a quite limited extent.

Further, a great deal of property in industrialised economies is owned by legal fictions, by the likes of Walmart and McDonalds and massive REITs (real estate investment trusts). Presumably, we do not value the autonomy of these corporations as a value in itself. Of course, the owners of such corporations – shareholders – arguably do achieve a certain autonomy by means of their investments as shareholders. But (to return to the point above) many of these shareholders are themselves wealthy. And for many, if not nearly all, of those who are not wealthy, their autonomy arguably would be as readily secured by a well-funded, secure public pension system as by individual stock investments. The autonomy rationale just does not mesh all that well with property held by large corporations and other legal persons.

Dagan certainly – indeed, emphatically – recognises that individual autonomy is not a strong rationale or compelling consideration regarding property in some contexts, with respect to some owners and some categories of property. But the fact that so much property ownership and so many property law institutions and debates have an attenuated connection to individual autonomy is problematic for any project that, as does Dagan's, posits individual autonomy as the central theoretical basis for property. As Dagan clearly acknowledges, individual autonomy is a contextual consideration and, for that reason, it seems to me that his 'liberal' theory of property might be better dubbed as a 'pluralist' theory of property. (Dagan certainly does invoke pluralism but not in the naming of his theory.) Admittedly, however, I may be only quibbling about semantics.

## 3 Does individual autonomy justify an accretion/avulsion approach to takings?

In Chapter 8 of *A Liberal Theory of Property*, Dagan, writing with Michael Heller, endorses a theory of takings wherein dramatic or drastic changes in property regulation generally require compensation,

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whereas gradual or moderate changes generally do not (*ibid*., at 261–262). Dagan and Heller point to the courts' treatment of shifting seashore boundaries as a model for their approach. As they explain:

> '[A]n owner's land remains at the shoreline boundary so long as changes happen slowly and imperceptibly. … That is "accretion." Slow additions or subtractions from ownership similarly fall within this accretive principle, ensuring both property's stability and its legitimacy. But when a sudden change occurs, called an "avulsion," the original boundary remains unchanged. The owner does not get the new chunk of land attached to the old, nor does the owner lose land that has suddenly sunk underwater.' (*ibid*., at 261)

Dagan's and Heller's accretion/avulsion approach, of course, would be difficult to implement in practice. Courts have not been coherent or convincing in explaining when a seashore shift is so drastic as to be an avulsion or so moderate as to be an accretion: more generally, the distinction between gradual and not gradual is, to a substantial degree, in the eye of the beholder (see Tarlock, 2012, p. 745, summarising the problems in practice with the accretion/avulsion approach and endorsing the view that the doctrinal distinction should be discarded).[2] But the bigger question I have with the accretion/avulsion approach is its rationale. As Dagan and Heller explain the rationale, the individual autonomy principle counsels in favour of compensation for drastic, non-gradual regulatory transitions, but against compensation for moderate, incremental ones. The reason that is so, according to Dagan and Heller, is that owners can plan to take account of gradual regulatory changes, so such changes do not impinge on their autonomy (or impinge all that much) (Dagan, 2021, p. 262). But when the government suddenly and dramatically prohibits something previously permitted, owners do not have the time to adjust and plan and thereby preserve their sphere of autonomy.

My questions about this takings argument go to both whether modest regulatory changes are less disruptive of autonomy than non-gradual ones (and vice versa) and whether (to hearken back to the discussion above) we really should gear takings doctrine around autonomy concerns when the owners in question are very wealthy individuals or corporations. As to the first point, it seems to me that, all else being equal, moderate regulatory changes (however moderate is defined) will be less disruptive to 'reasonable expectations' and the owner's reasonable ability to plan than non-moderate, non-gradual ones (however defined). But all else is never, or rarely, equal. For example, a modest regulatory change might be entirely unpredictable, whereas a non-moderate one might be quite predictable, depending on the circumstances.[3] Consider the case of someone buying seashore property in Miami today, on a spit of land that is effectively at sea level and that is part of swath of the city experts and popular commentators alike have deemed highly vulnerable to continuing, climate-change-induced sea-level rise. If the buyer buys when there are no building restrictions and then Miami finally but non-gradually imposes strict limits on new building on the site at issue, then should not the buyer have been aware and hedged by only investing money that they felt comfortable losing?[4]

[2]On the larger point, consider, for example, a regulatory limitation imposed on the use of a property right in water in order to preserve an endangered fish species. If the limitation provides that for a one-year period the owner of a water right can only access 100,000 gallons of water rather than the owner's full 200,000 gallons per year, is that gradual or drastic regulation? It is drastic in that a full 100,000 gallons in their entirety are being denied the owner. On the other hand, perhaps the regulation is gradual both because it only pertains to half the annual water entitlement and, by its terms, only limits water usage for a year, potentially allowing the owner to use full entitlement in the future (depending on the fish population). In other words, the accretion/avulsion approach depends on the framing, and multiple framings are almost always possible, as is also true with regard to the characterisations of the denominator in the parcel-as-a-whole rule. See Dana (2015, p. 617).

[3]Dagan and Heller insist that predictability (as opposed to gradualness) is irrelevant from an autonomy-preservation perspective but it is not obvious why that would be so. Dagan (2021, p. 268). But it seems to me that gradualness and predictability both are relevant to the extent to which an owner can adapt to legal transitions while maintaining their autonomy.

[4]Dagan and Heller do address investment risk as a factor relevant to the economic analysis of the effects of takings doctrine, but not (apparently) as relevant to their autonomy analysis. But given their emphasis on autonomy, they also might have considered the buyer's individual autonomy to be able to decide for themselves how risky an investment to make.

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This argument, of course, has less resonance when the buyer is a middle-class person who pours all their savings into a new beachfront condo building than when the buyer is a sophisticated billionaire developer who builds using big bank loans and a raft of liability-shielding limited liability corporations. As a general matter, wealthy individuals and (at least larger, richer) corporations do not have all that much at stake, in terms of autonomy, as regards any particular regulatory change, gradual or not. Even if (for example) Donald Trump were to lose a lot of money when a local government determined his seashore hotel development project was not environmentally sustainable and hence would not be permitted, he still has plenty of money remaining to continue whatever it is he wants to do – to continue to exercise his autonomy.

My own view is that the extent of the legitimate individual autonomy concern in a given takings dispute will depend on the full range of circumstances, and not just on (or even primarily on) the gradualness or non-gradualness of the new regulation. In other words, there is no avoiding the highly contextual nature of property disputes; there is no avoiding the fact that an 'ad hoc approach' (Dagan, 2021, pp. 279–280) (which Dagan and Heller are distinguishing from their own) is, at the end of the day, the most defensible approach when we consider the incredible heterogeneity of property disputes. In future work, Dagan and Heller may want to refine how the individual-autonomy-liberal-compact-accretion/avulsion approach to takings, as applied to actual cases, differs from the ad hoc approach they find conceptually unsatisfying.

Dagan's accomplishment is enormous, in its theoretical ambition and comprehensiveness. His book will generate engaging questions and debate for years to come.

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