

REVIEW SYMPOSIUM

# Distributing the costs of change: property transitions and pacts

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## 1 Introduction

In *A Liberal Theory of Property* (2021), Hanoch Dagan makes an important, thought-provoking contribution to property theory – one that unifies divergent, and at time apparently dichotomous, strands of thought in property theory and revives rich dormant ideas. Dagan persuasively centres property's justification and design on the value of autonomy and on the basic need for reciprocal recognition of the individual right to self-determination. He does so without excluding the relevance and significance of other property values, both public and private. The theory deepens existing debates within property scholarship about values such as freedom and personhood, and provides a wide-reaching analysis of how autonomy functions as property's *telos*. That *telos* is used to justify structural pluralism in property law and to delimit owners' rights. In this way, for Dagan, property's justification determines the nature and ambit of private authority over resources.

Overall, the book is highly ambitious and original in its aims and scope: reviving autonomy as a core property value; developing its content and significance; and testing its implications for property justification and design across a broad range of issues. The idea of property as an essential tool for self-authorship and individual life planning is intuitively appealing and has a rich scholarly heritage (Waldron, 1990, chapter 10). *A Liberal Theory of Property* is a stand-out contribution to that heritage. Crucially, it provides a comprehensive basis for future scholarship to address the detailed legal and broader institutional implications of property's autonomy-facilitation function.

All aspects of *A Liberal Theory of Property* merit close attention, but this comment will focus on the 'next steps' entailed by Dagan's application of his theory to property transitions in Chapter 8 (written with Michael Heller). Property transitions clearly illustrate the challenge of using autonomy as property's *telos* to provide more precise guidance for property decision-making, whether judicial or non-judicial.

## 2 Balancing stability and flexibility

Dagan argues that some, but not all, changes in property rules are compatible with its autonomy *telos*. He suggests that 'property's stability requirement, which is crucial for supporting our ability to plan, demands resistance to *constant* change but not to *any* change' (Dagan, 2021, p. 212, emphases in original). This reflects the relationship between stable expectations and autonomy that Dagan developed in previous chapters. But it raises the 'how much' or 'how far' dilemma that underpins, and at times bedevils, constitutional property law.<sup>1</sup>

Three more precise questions arise. First, is a subjective or an objective approach to be adopted in assessing how much destabilisation is acceptable? Second, is the speed of change the core concern? And third, is the extent of change – the degree of impact on an owner's expectations – also relevant?

<sup>1</sup>E.g. US Takings law centres on a context-specific determination of whether a regulatory interference with property rights goes 'too far' (see e.g. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (U.S. 1978)) while Irish constitutional property law centres on assessing whether interferences with property rights amount to an 'unjust attack' on those rights (see e.g. *Central Dublin Development Association v. Attorney General* (1975) 109 ILTR 69).

Obviously, the adverse autonomy impact(s) of property transitions will vary. Chapter 8 appears to assume an objective approach to the reasonableness of transitions. As such, the criteria that will guide such an objective assessment are key. At times, the pace of change appears to be the exclusive determinant of the legitimacy of property transitions, while in other places, pace and extent of change are blurred. For example, Dagan states that ‘moderate incremental changes are not necessarily offensive to self-determination because they do not disrupt the ability of owners to plan’, while ‘sudden and dramatic changes *are* disruptive of property’s contribution to self-authorship’ (2021, p. 213, emphasis in original).

This begs the question of what is meant by ‘moderate’ and ‘dramatic’. It raises the possibility that a substantial change (however assessed) that is introduced with plenty of notice, and even in stages, could potentially offend property’s autonomy-enhancing *telos*. Dagan envisages this ambiguity being resolved in each community through locally formulated ‘property pacts’. The ‘property pact’ shifts the focus from the *rate* of change to the *degree* of change and is defined as prescribing ‘the foundational limits of the state’s authority to revise our property rights’ (Dagan, 2021, p. 217).

### 3 Defining the ‘property pact’

How is the content of this important ‘property pact’ to be defined? Dagan argues that it should be understood in light of the whole of a community’s legal tradition and need not entail ad hoc decision-making. He contends that through the ‘property pact’, the bearing of some disproportionate burdens falling short of those imposed through ‘sudden and dramatic’ rule changes may be understood as a legitimate part of citizens’ civic responsibilities.

The idea of a ‘property pact’ – of some community-level consensus about the appropriate distribution of the costs of property rule changes – vividly captures the core dilemma that judges face in constitutional property rights adjudication. The truly ‘hard cases’, those that generally result in doctrinal ‘muddle’, are precisely those in which judges are tasked with working out the nature and scope of such a ‘property pact’ (Rose, 1984; Peterson, 1989).

Constitutional property rights guarantees that are structured in widely varying ways all ultimately ask the same foundational question: When is it fair to burden individual owners or discrete groups of owners in the interests of the common good? (Michelman, 1992, p. 99). Regardless of the express phraseology of a constitutional property rights provision, judges struggle to generate determinate or definitive ‘tests’ to address that question. Furthermore, given the distributive territory that it involves entering, judges tend not to clearly articulate reasons to explain the outcomes in ‘property pact’ cases, particularly decisions that constrain the exercise of the legislative power (Walsh, 2021).

The core doctrinal principle relied upon by Dagan to illustrate the ‘property pact’ is the ‘Armstrong’ principle, which was articulated by the US Supreme Court in interpreting the Takings Clause of the Fifth Amendment of the US Constitution.<sup>2</sup> Justice Black defined the core purpose of the Takings Clause as follows:

[t]he Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.<sup>3</sup>

While this principle has often been cited in the US Supreme Court’s takings decisions,<sup>4</sup> it has tended not to be directly employed as the basis for those decisions.<sup>5</sup> Instead, the core question of fairness – the

<sup>2</sup>The Takings Clause of the Fifth Amendment states: ‘Nor shall private property be taken for public use, without just compensation.’

<sup>3</sup>*Armstrong v. United States*, 364 U.S. 40, 49 (U.S. 1960).

<sup>4</sup>See e.g. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123–124 (U.S. 1978); *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (U.S. 2001).

<sup>5</sup>See e.g. *Pennell v. City of San Jose* 485 U.S. 1 (U.S. 1988) and *Yee v. City of Escondido* 503 U.S. 519 (U.S. 1992) for cases that appeared to be candidates for application of the Armstrong principle but where that principle was not applied.

‘property pact’ – is usually addressed through the prism of ‘rules’ that are themselves ambiguous and inconsistently applied.<sup>6</sup> Such doctrinal ambiguity can have concrete effects, for example making it difficult to dispel political and wider cultural myths about the strength of property rights (Underkuffler, 2007; Walsh, 2021). As Amnon Lehari notes, to function well, property law must ‘facilitate broad-based social understanding about the legal regime’ (2010, p. 82). This requires clarity around the content of the ‘property pact’. To date, judicial decisions have not provided such clarity.

Dagan acknowledges that recognising the existence and importance of ‘property pacts’ does not avoid the difficult distributive questions raised by constitutional property dilemmas – it does not provide ‘a precise solvent of hard cases’ (2021, p. 236). However, given that judicial decision-making has generally struggled to provide clarity on this issue, some more insight into the sources, institutions and actors that Dagan regards as appropriately influencing the content of the ‘property pact’ would be helpful.

Legislators and administrators, as well as judges, have a role to play, with judge-made law interacting with legislation and administrative decisions in arriving at a (hopefully reasonably stable) view of the appropriate rate and scale of property rule change. Less clear is the role of wider cultural views and expectations about these issues in shaping the ‘property pact’. Hard cases often emerge in which judges are called upon to bridge a gap between cultural intuitions and assumptions about property rights and appropriate transitions on the one hand and legal rules on the other. Additionally, political attitudes towards the permissible rate and degree of change may diverge from those reflected in legal rules, which can slow or even block property transitions that may be otherwise desirable from a policy perspective (Walsh, 2021, p. 102). Do political and broader cultural attitudes appropriately inform the content of the ‘property pact’, as well as the ‘whole of the legal tradition’? If so, how are such attitudes to be gauged and filtered into the formulation of the ‘property pact’? There is scope for further analysis of these fascinating questions raised by *A Liberal Theory of Property*.

#### 4 The remedy question: veto or compensation?

A final question concerns the consequences of determining that a property transition is illegitimate or unfair from an ‘autonomy facilitation’ perspective. Is the appropriate response to prevent the transition, with owners exerting a veto over legal change? Or is the appropriate response to pay compensation to adversely affected owners?

Chapter 8 of *A Liberal Theory of Property* proceeds on the latter basis, distinguishing for example between property ‘accretions’ that are capable of being accommodated in a system of liberal property without compensation and property ‘avulsions’, which ‘intrude too far too fast on our individual autonomy’ and must be compensated (Dagan, 2021, p. 213). It refers to the need to work out ‘the scope of acceptable non-compensable changes of the applicable property pact’, indicating that the property pact debate is about compensation or no compensation rather than the permissibility of legal change.

This reflects how property rights are protected in practice. Unlike most other fundamental rights, states can usually legitimise interferences with property rights through compensation. Property rights are primarily treated as fungible interests that are appropriately protected in terms of their exchange value rather than their use value (van der Walt and Walsh, 2017, pp. 212–213). However, given the situation of Dagan’s analysis of property transitions within a broader theory of property grounded in autonomy, it would be helpful in developing that theory to consider whether compensation is in fact an adequate response to a property transition that excessively disrupts owners’ expectations.

Compensation may not always solve the resulting ‘autonomy’ problem, which in at least some instances may turn on the need to retain property or to carry out particular uses of property to fulfil life plans. Margaret-Jane Radin famously argued that retention of property *in fact*, rather than simply in terms of its economic value, may be important for personal development (Radin, 1995). In legal doctrine, the application of specific performance to contracts to convey property in broad terms reflects the

<sup>6</sup>Examples include the treatment of interferences with the right to exclude as per se compensable and the use of a ‘harm/benefit’ distinction to determine what burdens can be legitimately imposed on owners.

intuition that damages are not always an adequate remedy for the destabilisation of expectations that is caused by a breach of contract in respect of a conveyance of property (Capper, 2015). Eminent domain (expropriation) law also shows how compensation may not, at least from the subjective perspective of adversely affected owners, adequately remedy the adverse autonomy impacts of compulsory acquisitions (Kochan, 1998; Alexander, 2018). This was well illustrated by the backlash to the US Supreme Court's eminent domain decision in *Kelo v. City of New London*<sup>7</sup> and the resulting wave of state legislation aimed at securing possession of privately owned property (Calfee, 2006; Merriam, 2016).

In short, further analysis of how compensation is understood by Dagan to appropriately mitigate the negative effects of 'sudden and dramatic' changes in property rules on autonomy would help to clarify the connections between the idea of the 'property pact' articulated in Chapter 8 and the broader arguments of *A Liberal Theory of Property*.

## 5 Conclusion

*A Liberal Theory of Property* does not claim to provide detailed answers to complex doctrinal questions, but rather 'fixes the broad strictures of a justifiable system of property' (Dagan, 2021, p. 214). On these terms, it is a huge success, developing a comprehensive and insightful theory that provides a fresh, illuminating lens for considering complex property debates and dilemmas.

In taking the next step of developing local, context-specific applications of the autonomy-facilitation theory, fascinating questions about the scope and direction of that theory will fall to be worked out, hopefully with Dagan's valuable input. The issue of property transitions will push scholars and lawyers to consider the concrete doctrinal and political implications of any acceptance of autonomy as property's *telos*, in particular the appropriate balance between owner and other interests in giving effect to that *telos*.

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<sup>7</sup>545 U.S. 469 (2005).