*International Journal of Law in Context* (2022), **18**, 241–244

§

REVIEW SYMPOSIUM

# Review of Hanoch Dagan, *A Liberal Theory of Property*

Reviewed by Cathy Sherry

UNSW Law and Justice, Australia
Corresponding author. E-mail: c.sherry@unsw.edu.au

doi:10.1017/S1744552321000707

I read *A Liberal Theory of Property* through the lens of my own area of expertise – multi-owned housing – and I felt my heart lift as many of Dagan's arguments unfolded. Dagan's three-pillared liberal theory of property creates a profound and practical tool for ensuring that multi-owned properties manifest as their best, not worst, selves. In this review, I accept Dagan's invitation to use his book 'to examine the performance of existing property systems' against his liberal theory, with a view to accurately identifying the source of problems and finding a clear path to reform (Dagan, 2021, p. 68).

The rise of multi-owned properties is the most significant change in modern property landscapes in a century. I do not necessarily mean US-style common-interest communities, which, while important, have limited popularity in countries that lack a strong tradition of small-group autonomy and/or segregation. I mean condominiums. While people have long lived in apartment buildings, without modern engineering, those buildings were human-scale; load-bearing walls cannot go higher than twelve storeys. The invention of steel frames and curtain walls revolutionised our use of land, allowing owners to exploit vast tracts of airspace. High-rise residential buildings now soar 150 storeys into the air; include complex plant, equipment and facilities; and house hundreds of residents.

Not only are modern buildings of a scale unknown in human history; the relationships between residents has radically altered. In the past, buildings were typically owned by a single landlord and occupied by tenants. The dominant legal relationship was vertical, and although clearly open to the interpersonal domination that Dagan rightly identifies as inherent to property, the landlord–tenant relationship is relatively easy to regulate with the right political will and/or is inherently limited if its conception is based on Dagan's third pillar of relational justice.

However, in the post-World War II period, countries around the world recognised that (1) increasing numbers of citizens were going to live in medium- or high-rise buildings, (2) that it was ideal for citizens to own their own home and so (3) legal mechanisms would be needed to facilitate this. In most of the common law world – with the notable exception of the US, Israel and Scotland – positive obligations (or 'real covenants') on freehold land are still impermissible. This is a fundamental impediment to creating freehold fee-simple titles to apartments, because those titles must be coupled with a necessary positive obligation to maintain the building. As a result, many jurisdictions needed legislation to overcome this prohibition. That legislation is variously called strata title, unit title, sectional title, community title, commonhold or condominiums. It can subdivide buildings or land, creating high- or low-rise communities, and its fundamental purpose is to create fees simple coupled with positive obligations and restrictions. It is the legal equivalent of US condominiums and common-interest communities.

Regardless of jurisdiction, all these legal structures radically change the legal relations inside a building. Whereas tenants have minimal control over each other through nuisance law or enforcement of the covenant for quiet enjoyment against a common landlord, a condominium structure grants private citizens enormous power over their neighbours' lives. Control is exerted not simply over collectively owned spaces, but also over privately owned homes. Further, the creation of a separate governing body corporate or association, initially controlled by the developer, creates the potential

for further legal relationships between owners and third parties, not negotiated by the owners themselves. The end result is an astoundingly complex set of property relationships, which could in theory represent 'a true social contract' (Ellickson, 1981–1982, p. 1527) but in reality represent a compromised set of relationships determined by developer profit-seeking, group-think boilerplate terms and the efforts of lay-association members constrained by majoritarian vote. These legal relationships are a prime example of what Dagan calls the law of 'interpersonal (horizontal) relationships' that 'form and sustain [or fail to sustain] the variety of frameworks necessary for our ability to lead our chosen conception of life' (Dagan, 2021, p. 39).

In a world in which urbanisation is the single most significant driving force in property development, these legal relations will eventually affect tens of millions of people. Already, in cities like Sydney and Vancouver, almost one-third of the population live in condominiums. This is where Dagan's liberal theory of property comes in. It offers a deep, but workable ideal against which to judge the complex relationships created by condominium structures. So what insights does Dagan's liberal theory of property offer?

The first relates to Dagan's animating principle for liberal property: self-determination, or 'the possibility of writing and rewriting our own stories'. This obviously has profound importance for condominiums that are overwhelmingly homes – in Radin's words, 'the scene of one's history and future, one's life and growth' (Radin, 1981–1982, p. 992). For many people, condominiums are also the *only* possibility for a home. Here, I probably have less enthusiasm than Dagan in his support for multiple property types on the grounds that the choice they offer facilitates self-determination (Dagan, 2021, pp. 163–170) because it seems to me that, in real markets, genuine choice is frequently not possible. If you live in many high-density cities, you will live in a condominium; if you live in the US Sun Belt states, you will live in a homeowner association. Like McKenzie (1994), I think the existence of these property types has more to do with land economics, neoliberalism and the physical reality of high-rise buildings than any positive desire on the part of residents to live in collectively regulated buildings/communities or the evolution of property law to facilitate multiple versions of the good life. However, the involuntary nature of much condominium residence only increases the power of Dagan's central point: that the animating principle for property must be self-determination, and that all homeowners, whether living in freestanding houses or high-density condominiums, must be accorded the ability to live their lives consistently with their own values.

The dominion theory of property that takes independence as its animating principle could provide condominium residents with an appropriate level of autonomy, but it cannot adequately deal with the ability of residents of high-density buildings to affect each other (and it should be noted that the dominion theory has little traction outside the US). In contrast, the first pillar of Dagan's theory insists that private authority must be circumscribed so that it ensures *everyone's* self-determination. At first glance, this deals with the relatively simple problem of people using their own property in ways that disturb others, but it has a deeper, more significant benefit for condominium law. Most condominium owners are alive to the idea that a man's home might be his castle but 'his sovereign fiat to use his property as he pleases must yield' in a condominium.[1] The result is that overreach in regulation of others' homes is a greater problem than uses of homes that disturb others (French, 1992, cited in Dagan, 2021, p. 144). In Australia, condominium rules frequently ban all pets or pets over a certain weight and/or implement rules that run to pages requiring people to carry dogs across common property or place them on trolleys if they are too heavy to lift! Pet ownership is a significant part of people's life stories (90 per cent of Australian households have had a pet at some point) and, not surprisingly, the unjustifiable regulation of pets has led to much distress and dispute. Associations, lawyers and tribunals turn themselves in knots trying to negotiate the morass of nonsensical privately created rules.

Dagan's insistence that, in a liberal property regime, private owner authority does not include the right to undermine others' self-determination and that 'no private authority can be claimed in excess of what is required for owners' self-determination' cuts through this morass (Dagan, 2021, p. 4). It

[1] *Sterling Village Condominium, Inc v. Breitenbach*, 251, So.2d 285 (Fla. 4th DCA 1971).

https://doi.org/10.1017/S1744552321000707 Published online by Cambridge University Press

provides a clear answer to many questions about the power of some owners to regulate the property and lives of their neighbours. Crucially, Dagan's argument is that property is *inherently* circumscribed. In the condominium context, where people have been encouraged to believe they have a legitimate right to control their neighbours' homes, Dagan's theory does not take away a 'right' they had; it clarifies that they never had the right in the first place.

Second, Dagan's theory provides guidance beyond privately created rules and extends to legislation. As noted above, most common law jurisdictions rely on legislation to support condominiums and common-interest communities, and this legislation bears out Dagan's argument that both legislatures and judges have a role to play in making property law. The first New South Wales strata title act was drafted by a committee convened, supervised and paid by a consortium of property developers. Sure, it was considered and passed by a legislature, but this demonstrates the point that Dagan makes about interest-group dominance and variable legislator quality (Dagan, 2021, pp. 156, 158). The New South Wales strata legislation is not a minor aberration in an island at the end of the Earth – it has been adopted by jurisdictions all over the common law world, including Canadian provinces, the UK, New Zealand, Singapore, parts of the Caribbean and Dubai.

While there are many positive elements to the legislation that are testament to legislatures' capacity to create complex regulatory schemes, it also contains serious flaws. The most notable is the long absence of any general statutory limit on the power of private communities to write their own rules. Because these developments do not rely on the common law, there is no touch-and-concern doctrine, and an arguably excessive deference to the legislature has prevented the emergence of a judicially crafted rule of 'reasonableness'. Australia has no Bill of Rights at federal and most state levels, and the application of discrimination law to private communities is unclear. If this all sounds extremely surprising, it is because the making of this new category of property occurred with little to no understanding on the part of politicians and property developers of the values at stake. Recent court decisions indicate that judges are becoming aware of this problem and have begun to read the values of liberal property law back into the legislation.[2] This demonstrates Dagan's argument that adjudication can be an appropriate method for refining property law because it is always situated in a specific human context, allowing 'judges' normative and empirical horizons [to be] constantly challenged by the participating parties' conflicting perspectives' (Dagan, 2021, p. 157). In support of Dagan's preference for some judicial law-making, I would bluntly add that judges are often more knowledgeable and objective than elected representatives and the stakeholder groups who 'co-author' legislation, particularly in relation to the multiple values embedded in property.

Finally, Dagan's third pillar – relational justice – provides a powerful argument for invalidating or at least radically circumscribing one of the most problematic uses of property ownership in multi-owned housing: the practice of developer-made contracts binding associations that must be paid for by ultimate homeowners. While this practice no longer seems to be a problem in the US, it plagues multi-owned developments around the globe. In Australia, for example, developers sell the right to manage buildings to companies. The developer and the management company write the contract, and the longer it lasts and the more it allows the management company to charge the association, the more the company is prepared to pay the developer. The justification for this practice is that the developer owns and has paid for the building that needs to be managed and so the profit is theirs to take. Of course, purchasers ultimately pay for the building and it becomes their home. They are justifiably frustrated by contracts that have not been negotiated for their benefit. Similar problems exist in the UK where long-term-lease law is being used to achieve the same ends. As above, Dagan's liberal theory of property cuts through confused and unsatisfactory arguments around these practices. The theory would hold that reciprocal respect for self-determination is an inherent part of liberal property and, as a result, developers or ground landlords, as original owners, have no power to infringe subsequent owners' right to determine their own lives and the management of their homes. Dagan's inclusion of the concept of personhood in his liberal theory allows greater

[2]*Cooper v. The Owners – Strata Plan No 58068* [2020] NSWCA 250.

https://doi.org/10.1017/S1744552321000707 Published online by Cambridge University Press

weight to be given to the 'safe haven' interests of homeowners than the utility interest of developers or ground landlords.

If I have one reservation about Dagan's book, it is that I am not sure that his support for common-interest communities as a happy extension of property types and a means of contracting out values recommended by the state is sufficiently robust (Dagan, 2021, pp. 92–93). First, I think that the birth of these communities was a result of flashes of judicial creativity, perhaps not sufficiently thought through. I suspect that if Judges Hare and Lehman, the architects of US real covenants (Reichman, 1981, p. 1213; Dagan, 2021, pp. 163–168), were transported forward in time to a contemporary, 10,000-resident homeowner association to see how their ideas have played out in real land markets, they might think: 'Oh dear, what have we done?' Second, while Dagan's liberal theory of property certainly confronts the most egregious abuses of these communities, such as racial discrimination, I am not sure that it adequately tackles the trickier questions. For example, can communities require religious dress of all residents or COVID-19 vaccinations as a condition for the use of facilities or even occupation? It may be that the answer to these questions is necessarily culturally specific – an aspect of the legitimacy of property law that Dagan acknowledges. In countries like Australia and the UK, these complex questions do not routinely arise. In contrast, in Israel and the US, small-group autonomy is a continual, live issue (Lehavi, 2016). Writing from Australia, where 'difficult' questions of small-group autonomy include 'Can the association ban G-strings by the pool?', I'm not sure I am qualified to offer any solutions, but I would certainly be interested to hear more from Dagan on these questions.

**Conflicts of Interest.** None

**Acknowledgements.** None

## References

**Dagan H** (2021) *A Liberal Theory of Property*. Cambridge: Cambridge University Press.

**Ellickson R** (1981–1982) Cities and homeowner associations. *University of Pennsylvania Law Review* **130**, 1519–1580.

**French S** (1992) The constitution of a private residential government should include a Bill of Rights. *Wake Forest Law Review* **27**, 345–352.

**Lehavi A** (2016) Residential communities in a heterogeneous society: the case of Israel. In Lehavi A (ed.), *Private Communities and Urban Governance: Theoretical and Comparative Perspectives*. New York: Springer, pp. 95–125

**McKenzie E** (1994) *Privatopia: Homeowner Associations and the Rise of Residential Private Government*. New Haven: Yale University Press.

**Radin MJ** (1981–1982) Property and personhood. *Stanford Law Review* **34**, pp. 957–1015.

**Reichman U** (1981) Toward a unified concept of servitudes. *Southern California Law Review* **55**, 1177–1260.

**Cite this article:** Sherry C (2022). Review of Hanoch Dagan, *A Liberal Theory of Property*. *International Journal of Law in Context* **18**, 241–244. https://doi.org/10.1017/S1744552321000707