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Towards a New Language of 'Property'

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Towards a New Language of 'Property'

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Abstract

The paper starts out from the diagnosis that our language of property is impoverished and does not reflect the diversity of forms of appropriation. I adopt this term from Max Weber and argue that we must distinguish between different modes of appropriation. I substantiate this claim by discussing indigenous peoples' claims on land which are widely seen as being orthogonal to hegemonic legal traditions. Building on earlier contributions by critical students of 'property', I distinguish between the two fundamental modes of subordinative control, going back to the Roman conception of *dominium*, and of identity-forming belonging, which is a logical relationship of part-whole, and is manifest in indigenous conceptions. The paper unfolds these arguments in adding the mode of possession, referring to the materiality of appropriation. As a result, three different modes of appropriation are identified, property – *holding*, ownership – *belonging*, and possession – *using*. The paper concludes with an outlook about the often radical consequences of this new framework, such as the extension of law to including animal rights, the recognition of employee rights in corporate governance, or the redesign of intellectual property.

Key words

Terms of 'property'; modes of appropriation; ownership as relational appropriation; property and alienation;

1. Introduction¹

As Ludwig Wittgenstein once remarked, philosophy is all about running against the walls of our language.² This is particularly true when it comes to ‘property’. In this contribution, I will explore the language of property in terms of basic notions, with a focus on law and economics (taken separately, not as ‘law & economics’, although I will also refer to this subdiscipline of economics). Writing as a philosopher of economics, I am not an expert on law. However, when considering both transdisciplinary valid terminologies of property and ordinary language uses, legal developments over millennia have deeply influenced our modern language of ‘property’ as employed in the ‘Western’ world, but via diffusion (both by force and by imitation) also globally. I am using quotation marks³ here to indicate the troubles: On the one hand, the concept of ‘property’ is what we must overcome by critical thinking, but which other concept can we use to distance ourselves from ‘property’ analytically? Our language is impoverished, and thereby transports whole ontologies and axiologies of ‘property’.⁴

When talking about ‘property’ critically, we just re-use the same term, but strive to point to different referents, while remaining trapped in our language. This also creates tensions in transdisciplinary reasoning, since we have ordinary language uses, which mostly also prevail in fields such as philosophy and the social sciences, and the technical language of some disciplines, foremostly, law. Here, we meet the additional trouble that there is no universal legal terminology referring to ‘property’, but the terminologies of different, mostly national, laws and their legal interpretation, starting from the level of the broader legal traditions, such as common law versus continental law. Writing in a specific language and using the respective terms immediately creates specific contextualisation in terms of respective legal language. Similarly, when using a specific disciplinary notion of ‘property’, such as ‘property rights’ in economics, there is the risk of seriously distorting notions of ‘property’ in historical times and in other cultural contexts, such as investigating ‘property’ in ancient Greece. This may falsely suggest a universalist understanding of ‘property’, even the idea of a unified evolutionary trajectory binding the past and the present together in one line of descent.

¹ This paper was presented at an MWK colloquium where I gratefully received inspiring comments from participants, especially Bettina Hollstein, Urs Lindner and Hannah Werner. I also appreciate the stimulating debates in the SFB Max Weber working group, Lydia von der Weth, Verena Wolf, Dirk Schuck, and Markus Vinzent. Jan Dirk Harke and Verena Wolf reviewed the paper and gave inspiring comments.

² Wittgenstein (1958: No. 119).

³ The convention in this paper is as follows. I use inverted commas as in ‘property’ as referring to the general underlying notion of appropriating an object, for which, however, as I claim, we are lacking a neutral term. When referring to specific linguistic expressions, such as “Eigentum” in German, I use double quotes. Later, when having clarified the exact meaning of “property”, I refer to ‘property’ without quotation marks, which I do no longer use as generic term.

⁴ Graziadei (2017: 81).

The roots of the problem lie deep in European history. Europe is the key because via colonialism and legal transplants both European common law and civil law have been shaping most legal systems in the world.⁵ A notable exception is Islamic law, which I cannot deal with in this paper, but which would be a key comparison for checking the arguments presented here. Important regions which were not fully colonized include East Asia, where the Japanese directly imported European law and then transferred this transplant to their own colonies, and where Republican China combined Japanese and own efforts in transferring European law. Hence, we can say that almost the entire conceptual frame of 'property' in modern societies emerged from Europe. However, to this we must add the observation that legal pluralism often prevailed in the European colonies, mostly conceptualized as the co-existence of colonial law and customary law.⁶ Customary law remains alive today in countries such as India, and mostly appears in the form of religious law even recognized by common law courts. This is significant in the context of 'property', as religious law typically regulates 'property' in the family, for example in inheritance, often in tension with national law.

In this paper, I refer to the case of indigenous notions of 'property', especially land ownership, where the difference with European traditions is well reflected in the ongoing legal disputes about indigenous land in recent decades. This comparison highlights the key point of my argument on impoverished semantics: I claim that our language of 'property' blanks out a distinct relationship between people and things that amounts to shared identities. In modern legal thought, this notion of 'property' is associated with Hegel who argued that on the one hand, property is indispensable for expressing the subjective spirit in objects, while on the other hand this expression also shapes this spirit, hence creates a dynamic form of self-actualization.⁷ Hegel's view is often rejected as treating 'property' as a mere relationship between individuals and things, hence ignoring the fundamental role of property in regulating relationships between people.⁸ However, this critique overlooks the fundamental role of recognition in Hegel's system, so that we can take Hegel as a reference for the following, yet with a caveat.

This caveat is that Hegel referred to 'property' staying in the tradition of Roman law, which at his time was being re-discovered as one foundational stone of the newly designed civil laws. Indeed, Hegel treated 'property' as a category of civil society, which means to focus

⁵ Acemoglu et al. (2001).

⁶ Legal pluralism is an important concept in SFB project C01, because even for the case of China, that was never fully colonized, customary law remains important until today, and was also alive in the British colony of Hong Kong. On legal pluralism and China, see Ho (2022).

⁷ For a concise summary of Hegel's notion of property, see Schnädelbach (2000: 205ff.)

⁸ Dagan (2021: 29f). In common law scholarship, this relational view associates with Hohfeld's influential 'bundle of rights' theory.

on the economic relations among citizens, or, more precisely, economic exchange (hence, he coined the specific term of “Privateigentum”). For Hegel, civil society is the actualization of objective spirit, but also manifests essential dysfunctions which must be healed by transcending to ‘ethical life’ (“Sittlichkeit”), hence embedding the civil relationships in fundamental forms of sociality, family, corporations and the state. But as the young Marx later pinpointed, there is a deep tension between Hegel’s ideas about ‘property’ as self-realization and ‘property’ as a key category in exchange, resulting in alienation as a universal phenomenon of capitalism aka civil society.⁹ Obviously, those without ‘property’ lack self-realization in their relationship with the objects of their work: Hence, the Hegelian notion can in turn become pathological in a society where property is distributed unequally.

In fact, there is an even deeper tension between property as a category in Hegelian civil society and property as medium of self-actualization. Exchange means alienation, hence in a sense breaking self-actualization. Accordingly, ‘alienation’ has an ambiguous, though theoretically productive meaning: One is “Enfremdung” as disruption of self-actualization, the other is “Veräußerung”, that is, entering property in market exchange. As we will see, this is the key issue in comparing indigenous notions of land with European notions. This problem goes back to Roman law which established the two major building blocks of modern legal notions of property, one is the absolute *dominium* over a thing (including people, in Roman times, such as slaves) and the notion of entering things into commercial relationships, thus also regulating property transactions. However, an important feature of Roman law, as famously systematized by Gaius in his ‘Institutiones’, is the distinction between things (*res*) which are subject to transactions and those ones which are exempted.¹⁰ The former are subject to human law, the latter to divine law, hence are sacred. Sacred things (such as a temple devoted to a god) are beyond human actions of alienation as “Veräußerung”, yet the question is whether they are ‘owned’ by the god to whom they are dedicated. The relationship between god and thing may appear to come close to ‘property’, but that would contradict the original meaning of ‘sacred’. Hence, we meet an instance of a relationship of shared identity. Here, alienation as “Veräußerung” would also imply “Entfremdung” as collapsing shared identity.

Now, Roman law never added further detail to the question of how this kind of sacred relationship should be dealt with legally, apparently since legal process is a human domain. So, one alternative strand of conceptualizing relations between people and things was languishing in European intellectual and legal history, ‘property’ as a

⁹ For a lucid analysis, see Taylor (1979: 138ff).

¹⁰ Bloch (2006).

relationship of identity that is exempt of alienation by human action.¹¹ This was further reinforced by the civil laws of the 19th century. As we will see, medieval times had a conception of 'property' that recognized 'property' as identity in the framework of shared and divided feudal 'property'.

The paper unfolds the argument as follows. In the second section, I sketch the main issues in property semantics, focusing on the distinction between the reified notion of 'property' and the underlying actions, which I summarily refer to as 'appropriation'. I show how our current language fails to cover the complexity of appropriation. Section three discusses indigenous notions of land staying in fundamental tension with established Western notions. However, section four shows that in fact related notions have always been present in the Western tradition. Section five develops this systematically in terms of two distinct modes of appropriation, ownership (imbued with a new meaning) as relational mode and property as a subordinative mode. Section six proceeds to discuss possession in relation to ideas about biological origins of 'property'. Section seven presents the full picture of three modes of appropriation, including a proposal of terminology. Section eight overviews the radical consequences of putting this new language of 'property' into action. Section nine concludes.

2. The semantic poverty of 'property'

Let us briefly overview some of the issues in the linguistic analysis of property, which loom large when considering translations of terms across European languages. These are messy because European languages minimally distinguish between 'property' and 'possession', going back to Roman law, and related distinctions in feudal law.

One important issue is that 'property' is often used in a structural sense, which is salient when the object and the relationship to it are conflated: In English, "property" can refer to the real estate, but sometimes also the right in it. In legal translations, "property" is used for "bien" in French, which is the object of property ("Gut" in German, also in the meaning of "estate", as in English), and the French "propriété" is translated as "ownership", which matches with the legal understanding in English law where "property" is mostly referred to the object and "ownership" to the relationship with the object.¹² However, this understanding is not universal in English language including American English, where also legal scholars refer "property" to the institution, hence including the relationship.¹³ These

¹¹ This relates to Rosa's (2020) notion of "Unverfügbarkeit", hence pointing to an apparent paradox: There is a kind of 'property' that is "unverfügbar", yet we lack a term for it.

¹² Allard (2005), cited in Praduroux (2017).

¹³ As an example, Dagan (2021).

conceptual muddles reveal that the existing language of property has a strong bias towards reification which hides the fact that 'property' is also and perhaps foremostly an activity, in two senses.

The first sense becomes salient when considering the various verbs in the language of 'property', which are often even more impoverished than the structural terms. For example, in English the verb "own" relates with both "ownership" and "property", which suggests the conflation of both. For 'possession', many languages have separate terms (e.g., "possess" in English) which highlights the distinctive meaning of that status (in English common law, there are more specific terms, such as "seisin"). However, there are other verbs that are being used in ordinary language, but have no legal meaning, such as the German "gehören" or the English "belong". This raises the question why the full range of existing verbs indicating a relationship between a subject and an object of 'property' is not activated in legal language, which is often even deflationary, eventually also affecting ordinary language: For example, there is no specific verb corresponding to "Eigentum" in German; the English "own" is translated as "besitzen", thus conflating the references to "Eigentum" and "Besitz". At the same time, there is a lack of a generic term that would cover the all those various aspects of 'property': In English, "have" has been proposed as such a term, but this is not generally followed, for obvious reasons: It is used in the formula "have a right", which raises the tricky issue whether having a right is identical with having the object of that right, which is obviously false.¹⁴ Another interesting variation of this theme is the German verb "zustehen" which is a mediopassive form that does not make the subject explicit. In English, this means "being entitled": Entitlements are not 'property' in the sense of absolute individual rights *erga omnes* but emanate from certain legal frames such a constitutions or social legislation. Therefore, someone can be entitled to holding property (a slave is disenfranchised) as a generic right, which does not imply the concrete relationship of 'property': The landless peasant may be entitled to the right of holding land, but factually does not own land.¹⁵

One deeper reason for this semantic impoverishment seems to be that we do not sufficiently reflect the way how 'property' is enacted. Even the verbs tend towards a structural meaning, indicating a state, although in law actions count much when resolving disputes. For example, 'possess' seems to indicate the status of 'possession', but in case of conflicts the issue looms large by which actions this status is enacted and sustained, and which ones must be recognized as legally valid. In sum, we need to consider in much

¹⁴ For example, in his influential article Honoré (1961) argues that 'have' should be confined to holding a right, such that one does not 'have' the object but 'owns' it.

¹⁵ In Germany, this is reflected in the legal discussion about the question whether rights to pensions are "Eigentum" in the sense of the German constitution, while these are not "Eigentum" in civil law, for example, cannot be alienated or used as collateral, see Adam (2009).

more detail how the language of 'property' can reflect the many ways of enacting property, including the most generic form covering all these different ways. My candidate is 'appropriate', in German "aneignen", in French "(s)appropriier".¹⁶

The term "appropriation" was used by Max Weber as more general term than "Eigentum" and has an explicit meaning as a type of action.¹⁷ Weber defined "Rechte" as "approprierte Chancen" and "Eigentum" as "approprierte Chancen" that are inherited across generations of individuals, communities or even entire societies (Weber 1922: 23).¹⁸ This is a much narrower conception of "Eigentum" than used today and is close to the French "patrimoine". Interestingly, and most significantly, this implies that Weberian 'property' as "Eigentum" would be much closer to 'wealth' ("Vermögen", in French also "les biens"), which Hannah Arendt neatly distinguishes from 'property': For her, "property" is a category that defines civic status and personhood as in the classical *polis*, whereas 'property' as "wealth" refers to the expansionary and acquisitive forms of appropriation in capitalist modernity.¹⁹ For Weber, 'wealth' in this sense is indeed 'capital', and his notion of "Eigentum" would cover both modern and pre-modern forms, such as in feudalism (Weber 1922: 46ff). As we see, these terminological issues have deep historical, philosophical and analytical meanings. In my unfolding argument, I reverse Arendt's usage while keeping the substance of the meaning: I will relate "wealth" to property, and suggest a new terminology for her "property". What transpires again in this discussion is the key role of alienation as "Veräußerung": alienating Arendt's "property" would mean becoming a slave or outcast.

The semantic mess of the verbs in our language of 'property' relates to a more fundamental philosophical aspect, which is the second sense of approaching 'property' as activity. 'Property' is certainly one of the most fundamental institutional forms in society and economy, and accordingly we should mobilize powerful analytical instruments for understanding how 'property' is enacted. The key notion is performativity, such as in the context of John Searle's theory of institutions.²⁰ Searle's concept of the 'status function' allows to approach the relationship between subject and object as transformative: Something is treated as something else, such as a paper slip being recognized as 'money'. Employing the same conceptual frame on 'property', we immediately realize that 'property' is special because, in principle, any kind of object can be treated as 'property'.

¹⁶ This has also been suggested by anthropologists, Busse and Strang (2011).

¹⁷ Weber (1922: 23f, 69ff).

¹⁸ Recent research confirms this view in the sense that the conceptual genealogy of 'property' is closely related to the institution of inheritance, Harke (2020).

¹⁹ Arendt (2018).

²⁰ Searle (1995, 2010).

If we dig deeper, there is a relationship with money, as also emphasized by Arendt in relation to wealth. Money is a complex object in the sense that it is not universally recognized legally as an object of ‘property’, since it is a generic claim that is independent from the concrete coins that we keep in our wallet: Bank deposits cannot be ‘owned’, hence are only personal claims against the bank.²¹ At the same time, ‘property’ also relates to monetary valuation, which is most salient in the French term of “patrimoine”, which in its extended meaning corresponds to “Vermögen” in German, as said.²² In this meaning, ‘property’ is not mainly referred to the single objects, but to their monetary value as part of an aggregate.²³ In Searle’s conceptual framework, this would imply that the transformative act of ‘propertizing’ an object is tantamount to making it susceptible to monetary valuation, as part of the patrimony. The corresponding social changes have been well documented by Piketty in his seminal work on inequality and capital, showing how monetary valuations became essential in the European institution of inheritance.²⁴ However, we can also observe similar transformations in earlier times, even ancient Greece, Arendt’s reference: With the rapid monetization of the Greek economy a transition took place from ‘property’ as an entitlement of the citizen of the polis to an object that could be used, in particular, as a collateral in loans. As I will argue later, hence the emergence of credit was a powerful force of making objects of ‘property’ alienable, so that a creditor could redeem his loan via selling the collateral or making other profitable use of it.²⁵

In addition, Searle emphasizes the materiality of the status function (Searle 1995: 79ff). This points to the fact that if an object is transformed into ‘property’, there is also a reflexive role of the material object becoming the sign of ‘property’ (Rose 2019: 267ff). Although it seems awkward on first sight, this is the deeper significance of the fact that all legal systems treat possession as a strong indicator of ‘property’, even to the degree that in ‘adverse possession’ a legal claim can be recognized against a formal right of another person.²⁶ This refers to the role of technical appropriability in the emergence of property rights, such as claiming ‘property rights’ on wind in renewable energy: If wind

²¹ Van Vliet (2017: 153).

²² Gretton (2007: 823f). The narrower meaning of “patrimoine” is the wealth that is inherited, hence close to Weber’s concept of “Eigentum”.

²³ This is implied in the French notion of “bien” which has an economic value, especially in the plural (whereas in the singular also notions such as ‘common good’ can be covered by “bien”). Interestingly, in the EU there is a need to define generic terms that apply across all member languages. The European Convention of Human Rights (protocol, Art. 1; <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=009>) uses the term “possessions” which is not familiar in English in this sense; it is translated as “bien” in French and as “Eigentum” in German. The European Court of Human Rights has adopted the economic meaning of “bien” in referring to “possessions” mainly as economic interests, which is close to Max Weber’s notion of “Chance”.

²⁴ Piketty (2013).

²⁵ Economou and Kyriaziz (2017).

²⁶ Serkin (2016: 56ff).

cannot be appropriated technologically, then possession cannot become indicator of 'property', also in the sense of the original creation of respective 'property rights'.

The final observation about the messy semantics of property relates to the role of property in adjudication. It is interesting to notice that in Roman law valuable objects were transferred by means of two rituals, one of which directly performing a court decision (the 'in iure cessio').²⁷ Indeed, we can say that property may only become manifest in resolving disputes about the recognition of relations between people and things. Any kind of exchange may be followed by conflicts over the result: A simplest example is if someone hands over a gift to someone else, and later changes mind and demands for returning it. Such a conflict needs to be resolved, perhaps by the help of others, again in simplest way as witnesses (who are essential in the Roman ritual of 'mancipatio'). A more formal way is recognizing the right to keep the gift, which establishes 'property'. We can generalize this in the sense that the reification of property hides the underlying role in resolving disputes, such that property only emerges from judicial action as a formalization ('decision'). As long as the status quo is recognized, property is 'sleeping' and is manifest in the actions of people, as 'lived property', perhaps.²⁸

Subsequently, I further explore these complex issues. My point of entry is to refer to notions of 'property' which are completely independent from the long history of the language of 'property' in the Western and colonized world, and which are still alive today. This is the relationship between indigenous people and their land. I take reference to land as the red thread of this paper. Land is certainly much more complex than treating my chair as 'property', but at the same time land has been the most significant form of 'property' over many centuries, and remains a key element of wealth today, together with real estate. Further, land rights stood at the centre of legal developments until the 19th century, and they loom large again in the context of our contemporary ecological challenges. Last, but not least, legal constructs of landed 'property' still stay at the centre of the global financial system today.²⁹

3. Indigenous peoples' claims on land: The white³⁰ spot in the language of property

Let us consider the relationship between indigenous people and their land. As mentioned, western notions of 'property' have been shaped over two millennia, by Roman law and

²⁷ For an overview, see Harke (2016: 241ff).

²⁸ The role of adjudication is emphasized in phenomenological approaches to law, see Hamrick (1987).

²⁹ Pistor (2019).

³⁰ Pun intended. 'male' should be added.

its transmutations in continental Europe, and feudal law in England, resulting in two dominant legal frameworks that have spread over the globe, civil law, and common law. Although they retain many distinctive features, the diffusion of capitalism as an economic system has also been a strong force of convergence between the two. When it comes to indigenous conceptions of 'property', we must also recognize that in important cases, most conspicuously, the Americas, the contemporary views have been shaped by close interaction with colonial and later national authorities and their legal conceptions in the ongoing efforts to protect the native claims in the interest of establishing sovereign rule over them.³¹ This required translations on both sides, which, most significantly, also influenced the colonial accounts of what constituted the primordial indigenous conceptions in the first place (and we mostly know about historical conditions via that intermediation). In other words, adequately understanding the nature of indigenous conceptions is easily trapped in the language games of established legal and theoretical views on 'property'.

Today, indigenous rights to land are mostly recognized on the international level, and in many jurisdictions.³² The legal discourse has clearly shown that these 'rights' are fundamentally different from what the hegemonic legal traditions treat as 'property'. If we speak of indigenous 'rights', this means that the hegemonic legal system of a jurisdiction recognizes and protects the claims of the indigenous communities, hence giving them a legal status within these systems.³³ But this does not imply that the original claims become 'rights' in this sense as well, which often explicitly denied by representatives of indigenous people. What is the difference?

Scholars have identified two essential features that are shared by almost all indigenous claims on land.³⁴ First, the land is *inalienable* because it is sacred. Second, it *belongs to the community*, and not any individual member, hence it is *inclusive*, and not exclusive. The modern hegemonic concept of 'property' is exactly the opposite: It is an exclusive right of individuals (including legal persons), and it is alienable. As we see, the indigenous notion bears many resemblances with the Roman notion of 'sacred things'. Another important parallel is the distinct forms of communal property in medieval Europe which

³¹ On this important point, see Greer (2017)

³² Lenzerini (2017). A key document is the United Nations Declaration on the Rights of Indigenous Peoples, especially Art. 25 (https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf). Indeed, their distinct relationship to land is even a key criterion of identifying 'indigenous people'.

³³ McNeil (2017). I add that there are certainly important differences across the jurisdictions. For example, in the US the treaties between Federal government and the tribes, both conceptualized as 'nations' matter essentially, a construct that is absent in Australia.

³⁴ Lenzerini (2017: 402f).

involved an essential role of women in enacting those claims.³⁵ Therefore, let us render the indigenous notion in more abstract terms.

As has been argued in the literature, this notion builds on a different type of relationality.³⁶ The difference is especially stark when considering the Roman notion of *dominium* which has much later inspired the Code Napoléon with its famous absolute conception of 'property': This is a relationship of subordinative control between an individual and an object, with all implications and the whole gamut of distinct 'property rights'. When it comes to land, ideal-typically that means that the controlling individual can exclude anyone (*erga omnes*) from access to land, can change anything on it, or alienate it without constraint. In contrast, the indigenous conception defines a relationship of part and whole: The individual is part of the larger cosmological frame embodied in the sacred land. This part-whole relationship can be conceived as 'belonging', which I introduce here as a first step in transforming the language of 'property'. The individual *belongs* to the land, and the land *belongs* to the individual. However, as we have seen, reference to the individual is weak in indigenous views but centres on the community. At this point, it is essential to include the temporal dimension, since reference to the community is ultimately grounded in the idea that the land belongs to the genealogical lineage of the local inhabitants, handed over from generation to generation.

There is another, more fundamental aspect that has been elaborated in Povinelli's work on 'geontopower':³⁷ The indigenous conceptions draw a different borderline between the 'living' and the 'non-living', since what is regarded as mere physical objects in the Western science-based view is approached as being part and parcel of assemblages of living entities. This is significant as in the former view the objects can be also conceived as being subject to human control and manipulation. Hence, the Western view suggests extending human *dominium* aka 'property' over all nature, a stance projected onto living beings in general with the Cartesian turn separating mind and matter and envisaging organisms as mere mechanisms. This is reflected in all modern philosophies of 'property', such as Locke assuming that via the application of human labour, nature can be appropriated, and most importantly, Hegel's approach that treats nature as mere medium of human self-actualization, via the grand metaphysical scheme of spirit enacting itself via human action. In contrast, indigenous views reject the ontological separation between humans as

³⁵ Federici (2004).

³⁶ Keenan (2015).

³⁷ Povinelli (2016).

subjects and nature as objects, thus anticipating recent developments in philosophy and social thought that recognize non-anthropocentric notions of agency.³⁸

4. Belonging: The white spot reconsidered in Western notions of property

We notice that the indigenous concept has an abstract and generic meaning. But we are lacking a term that denotes this kind of 'property'. Before I suggest a term, let us briefly consider in which Western contexts 'belonging' matters. This is suggested by the term 'personal belongings', which mostly refers to movable 'property'. In common law, this corresponds to "chattels", in Civil Law to "movables", and we have noticed that in ordinary language 'property' is often equated with real estate, that is immovable 'property', thus reflecting the feudal origins of common law. If we refer 'belongings' to the notion of 'belonging' as emerging from indigenous cosmologies of land, I suggest that we define this relationship in terms of 'identity': The subject identifies with the object, and the object identifies the subject. My sister identifies with her precious wristwatch, and if I see it on the table, my sister jumps to my mind. This is narrower than the modern use of 'belongings' but catches an aspect that often applies for our belongings: Many items are what we appreciate as belonging to us, in the sense of a personal relationship, such as especially fitting our personal tastes, or being given to me as a gift, or serving expressive purposes. Indeed, many movables in indigenous societies are also considered as 'belongings' in this narrower sense, such as precious weapons.³⁹

Now, if we move beyond the indigenous people reference, we must recognize that the type of 'belonging' that defines a relationship of identity between the subject and object of property is by no means strange to the modern economy: The foremost example is family business, where the family identifies with the company in many ways, such as attachment to the original estate, commitment to the specific industry and products, or close relationship with the community in which the family business is located.⁴⁰ The ideal-typical family business understanding of 'property' retains the two key elements of indigenous worldviews: First, the business is seen as belonging to the family as cross-generational concern, with current individual owners only seen as stewards, and second, the family business is seen as inalienable (though parts of it can be). Both premises may be ideals which must be eschewed in times of troubles. Yet, family business research has even developed specific analytical frames to deal with this specificity of family business,

³⁸ See, for example, De Landa (2006), Bennett (2010), or Braidotti (2018).

³⁹ This is a universal condition in earlier stages of 'property' evolution, Earle (2017).

⁴⁰ Zellweger (2017). Family business was seen as being almost atavistic after World War II, and academic interest was only gaining ground since the 1980s. One reason was that the specific type of 'property' was regarded as inefficient. However, in countries such as Germany family business remains a backbone of the economy.

notably the concept of 'socio-economic wealth' that catches the inherent valuation of the company beyond market valuations on part of the family.⁴¹ This is a special case of the general notion of 'subjective value' that is often invoked recognizing belonging in adjudication, such as when estates would need to be divided in inheritance procedures.⁴²

There is another important correspondence to indigenous claims on land in the Western history of 'property', the 'commons' ('Allmenden'). Commons were a special institution in the context of feudal law, which was rooted in customary law, which should be seen as separate. Customary law was widely recognized in Europe as a separate source of local institutions, hence independent from the 'ius commune', and was enforced by courts which often treated it as default reference in a setting which effectively manifested legal pluralism that was maintained by the complex constellations of political power under feudal rule.⁴³ Customary law refers to historically handed down claims of communities in the context of and even against the feudal overlord, who would otherwise be seen as the owner of the land. However, in feudal law even his claims were only derivative of the ultimate powers of the king at the vertex of the feudal hierarchy. In principle, historical commons have many features of indigenous claims on land. A commons was seen as belonging to a local community over many generations, and is even a defining feature of what constitutes this community in terms of membership.⁴⁴ Further, the commons is inalienable. As is well known, the latter feature stood at the centre of the European wide enclosure movement between the 17th and 19th century, resulting in the almost complete destruction of this form of 'property'.

The crusade against the commons was one important aspect of the general movement against feudal law, which explains why the French revolution ended in attacking both the commons and aristocratic privilege. Both were seen as two faces of the same feudal system that had to be overthrown, because the commons were also associated with despised anti-rationalist worldviews, and because, after all, they were seen as a kind of feudal 'property' by the landless *sans-culottes*. Among the aristocratic privileges, we notice another correspondence to indigenous claims on land, namely the *fidei commissum* of aristocratic estates, going back to Roman Law.⁴⁵ This construct protects the estate against any claims of creditors directed at its current possessor, such that it is preserved across generations and becomes inalienable even in parts. Hence, we meet the same features of community and inalienability.

⁴¹ Gomez-Mejia et al. (2011).

⁴² Serkin (2016: 94ff).

⁴³ Padoa-Schioppa (2017: 55ff, 177ff).

⁴⁴ De Moor (2015).

⁴⁵ The *fidei commissum* was also targeted by many acts of legal reforms, though less aggressively than commons, see Padoa-Schioppa (2017) for various references.

In both cases, what were the reasons why the civil law projects of the 19th century vehemently acted against these forms of 'property'? Ultimately, these boil down to making valuable objects as accessible as possible to markets.⁴⁶ This is most obvious when it comes to abrogating inalienability, since, after all, alienability is the key condition of making markets work. Regarding the community aspect, what counts is the reduction of the number of possible claimants on partial property rights or rights to partake in decisions about alienation. In modern law, this has resulted in the *numerus clausus* principle of property law, that is keeping the number of possible forms of 'property' as small and as simple as possible. This does not necessarily mean that there are no longer plural claims on objects such as land, but, for example, a tenant would not be treated as holding 'property', even though in specific cases a buyer of the land would have to accept continuation of the tenancy contract. Yet, the difference is that the tenancy is a mere contract, and not a title on the land with *erga omnes* force.

The reasoning against feudal forms of property is proto-Coasean, in the sense (apart from the political project of down tearing the social position of the aristocracy) that the new civil codes aimed at lowering transaction and information costs of markets, while expanding their scope as far as possible. This is grounded in the belief, maintained in economics until today, that markets are creators of wealth, reflected in market pricing, thus establishing the conceptual connection to the notion of patrimony. Since the physiocrats, economists have also maintained that this does not only refer to individual wealth, but, after all, to the 'wealth of nations'.

It is illuminating to compare these wider claims with the practices in the commons. In fact, commons were also managed to create wealth for the community, but in terms of current and future means of livelihood. European commons were often sophisticated arrangements which did not simply assert community rights over individual rights.⁴⁷ To the contrary, commons were complex systems of shaping individual rights of access to and use of the land, including exploitation of resources for market-oriented activities. For example, access to forests for logging to sell wood on the marketplace was subject to quotas, aiming at containing the pull of market profits, potentially driving over-exploitation of resources. In other words, the communal rights were an integral part of a system that kept individual rights sustainable over generations. Commons evolved into an institutional form that regulated the use of the most valuable resource of the time, land, in relation to the expanding market system.

⁴⁶ Padoa-Schioppa (2017: 444ff); in general, Graziadei (2017: 87f).

⁴⁷ De Moor (2015), Hübner (2020).

It is time to lean back and answer the question what all this implies for the language of 'property'. On first sight, we might think of 'commons' as a distinct form. However, treating indigenous claims on land as 'commons' in the European sense would be misleading. Further, the economic analysis of commons employs the conventional language of property rights, implying that the commons are not a distinct form of 'property' but remain in its conceptual scope.⁴⁸

5. Ownership and property as distinct modes of appropriation

I suggest that we move to the most abstract level and come back to the original distinction between the two basic analytical frames of approaching property, the subordinative control form, and the part-whole form.⁴⁹ We referred the latter to the notion of 'belonging'. How shall we refer to this 'belonging' type of 'property'? I suggest that we denote that as 'ownership' (fig. 1).

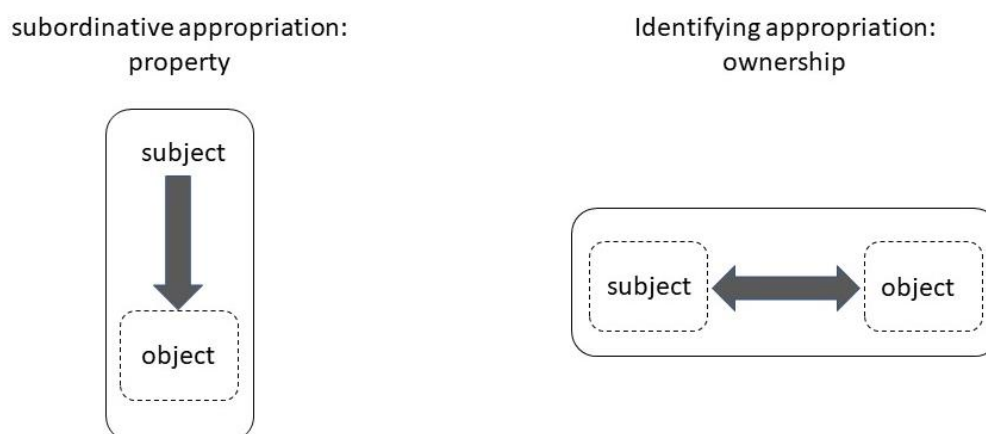


Figure 1: Two modes of appropriation

This may appear problematic. The relationship between 'ownership' and 'property' is complex, especially when considering the terminologies in translating across legal systems. In influential English uses, 'ownership' is seen as the most complete form of property, that is, in Blackstonian terms even.⁵⁰ However, this is not even universal in common law: In the United States, "ownership" is often avoided as a legal term, and only property rights is used, and even derogated as "primitive, pre-legal concept".⁵¹ As we saw,

⁴⁸ As in Schlager and Ostrom (1992).

⁴⁹ This builds on previous contributions such as Radin (1982).

⁵⁰ Honoré (1961).

⁵¹ Gresson (2001: 829). This stands in the 'bundle of rights' tradition established by Hohfeld, see Dagan (2021: 26ff).

in translations, “ownership” often refers to the French notion of absolute property (“propriété”), while “property” refers to the objects (“bien”).⁵² Overall, “ownership” and “property” are often used indiscriminately, especially in economics, where only “property” is the scientific term in the theory, yet “ownership” is used, for example, to characterize systems of ‘property’, such as state ownership.⁵³ Interestingly, exceptions include the theory of the commons, where ‘ownership’ may refer to the ultimate owner of the commons, different from property rights of limited access and use.⁵⁴ In many legal systems, such as the German, there is simply no third term apart from ‘property’ and ‘possession’, which results in the phenomenon that civil law and constitutional law apply different conceptions of ‘Eigentum’ with the latter clearly including relations of belonging, such as treating tenancy as ‘Eigentum’, in contrast to German civil law.⁵⁵

Given such terminological muddles, I deem it legitimate to suggest a new definition of ‘ownership’ as distinct from ‘property’: ‘Ownership’ refers to part-whole belonging. Hence, indigenous people are ‘owners’, but not ‘proprietors’ of their land. This covers many ordinary language uses of ‘ownership’, such as when we say that students may ‘own’ a university if they get involved in its larger concerns, administration, via participatory mechanisms. Nobody would say, they become ‘proprietors’. In fact, this is also how indigenous rights are mostly conceptualized: They are seen as ‘owning’ the land, but not as ‘proprietors’.⁵⁶

What is then the key difference between ‘ownership’ and ‘property’? This transpires when we consider the long-run evolution of these institutions in Europe. As said previously, ‘property’, as being classically defined in the Code Napoléon, is explicitly designed to enable market valuation and market transactions. Whereas ownership tends towards inalienability, property endorses and eases alienability. This matches with Polanyi’s classical discussion of land law and enclosures, which argues that this development disembedded the objects of ‘property’ from other social relations, such as claims of kin and family.⁵⁷ However, we may also say that ‘property’ re-embeds ownership in markets.

In this context, it is important to recognize that property – we now can use the term without quotation marks, as we refer to property in our definition – is essentially related

⁵² Praduoroux (2017).

⁵³ Alchian (2008). However, this is also debated, following Honoré (1961), see Hodgson (2015). The terminology remains fuzzy, for example, Wilson (2022) distinguishes ‘property’ from ‘property rights’ with ‘property’ referring to customary ideational constructs that are close to ‘ownership’.

⁵⁴ Schader and Ostrom (1992).

⁵⁵ Ibler (1997). This results in intricate differences between US and German conceptions of ‘property’ as a basic right, see Alexander (2003).

⁵⁶ The UN Declaration (see footnote 13) speaks of ‘traditionally owned’ apart from occupation and use. Common law jurisprudence seems to avoid reference to ‘ownership’ and mainly speaks of ‘possession’, see McNeil (2017).

⁵⁷ Polanyi (1944: 187ff).

to the state because the state promulgates the law and enforces it via its judicial system.⁵⁸ This is salient when considering the colonization of the Americas, where the colonizing states systematically reinstated native ownership claims against settler appropriation as manifestation of sovereign claims on the land which legitimized native property by the duty to pay taxes, originally framed as feudal obligations towards the sovereign lord.⁵⁹ In institutional economics, the distinction is often made between 'economic property rights' and 'legal property rights' or 'de facto rights' and 'de jure rights', thus highlighting the role of the state in enforcing property rights.⁶⁰ However, this does not pay due attention to the role of customary law and other forms of non-state property rules and bodies which also enforce property, such as in customary mediation as separate from formal court proceedings, even including as geared towards market transactions.⁶¹ Indeed, we might even say that until the advent of the modern nation state, market transactions were often decoupled from the state jurisdiction, or, the latter paid respect to non-state rules. One key fact about the development of European law since Roman times was the emergence of a European legal scholarship that was partly autonomous to the many and various political bodies existing in Europe, and which created the phenomenon of the *ius commune*, including a widely accepted, but also debated language of 'property'.⁶² Codification by the state was emerging as an ex-post systematization, eventually coinciding with the revolutionary movements that resulted in the modern nation states. At the same time, however, apart from the *ius commune*, customary law persisted over a long time span and was widely recognized, such in the case of the commons.

That means, 'marketization' of objects of property does not necessarily presuppose the state in its modern form, but in European emergent capitalism this state assumed the leading role in marketization. When it comes to land, the difference comes to the fore when we consider non-European cases, such as China. The Chinese Imperial state was also active in developing land law, but in an entirely different context. Two aspects loom large. The first is that over millennia a leitmotif of Chinese statecraft was to contain the accumulation of large landholdings via market transactions.⁶³ The second was to sustain an institutional link between property and taxation. The formalization of property was tied to the tax duty, and thereby gave the right to partake in the Imperial examinations. That is, property was not mainly geared towards the market, but to sustaining the political order of the Empire. Yet, there was a vibrant market in land rights: This was governed by

⁵⁸ Cai et al. (2020).

⁵⁹ Greer (2017).

⁶⁰ Barzel (2002).

⁶¹ To the contrary, Hodgson (2015) explicitly argues that genuine property rights cannot be established by mere 'habit', as this does not have the full force of law.

⁶² Padoa-Schioppa (2017: 193ff).

⁶³ Glahn (2016), Zanasi (2020).

customary law and can be best qualified as being contract based.⁶⁴ These contracts typically included the community dimension in various senses, such as requiring consent of relatives and potential inheritors, or relying on the witness of concerned parties: In other words, contractual property entailed a strong component of ownership in safeguarding community interests and constraining alienability in market transactions.⁶⁵

This brief discussion shows that the distinction between economic property rights and legal property rights is far too superficial. I suggest distinguishing between 'statist property' and 'contractual property'. In the European case, statist property was geared towards marketization, whereas in the Chinese case it was geared towards sustaining the political order. That being said, we also recognize that the market, as transpiring in Hegel's understanding of civil society, became a foundational aspect of the political order of Western societies as 'capitalist'. In contrast, in China the market was conceived as an instrument of governing the commonwealth.⁶⁶ In Europe, property law is therefore clearly distinct from the law of contract, with the former establishing claims *erga omnes*, and the latter against contractual partners only. In China, the contract approaches a claim *erga omnes* in explicitly including the consent of the community.

Summarizing this complex discussion, there seem to be three fundamental dimensions in shaping the language of 'property'. One is the distinction between subordinative and relational modes of appropriation, which I suggest catching with the distinction between property and ownership. Another is the distinction between forms of alienation, with a focus on marketization: Modern conceptions of property as distinct from ownership centre on marketization. Finally, there is the distinction between state and non-state enforced appropriation, which is often defined along the lines of demarcating customary law from sovereign law, but in modern times we must add distinct forms of the globalization of law, as enabled by common law jurisdictions reaching beyond the scope of national governments.⁶⁷

6. Possession: The materiality and natural history of appropriation

So far, we have not yet discussed possession. It is a universal feature of all legal systems to approach possession as distinct from property, which is a claim that is primarily based on a formal right, though at the same time positing that such a right can emanate from possession. The variations of that theme relate back to the famous controversy between

⁶⁴ Myers (1982)

⁶⁵ Hase (2013).

⁶⁶ Herrmann-Pillath and Zhao (2023).

⁶⁷ Pistor (2019).

Savigny and Jhering about the relative weight of two concepts of *corpus* and *animus* in Roman law.⁶⁸ Exclusive emphasis on *corpus* would mean that in judging possession, the mere fact of controlling a thing is what matters, such as staying on a parcel of land and harvesting its fruits or building a shelter on it. *Animus* requires the intention to possess and even public declarations of it, which comes close to claiming a right to possess.

This discussion is important in an entirely different context. The *corpus* theory would clearly justify to approach animals and even plants as possessors of land and other resources because it refers to the objective fact of using it, without reference to human forms of intentionality. Indeed, scholars have argued for long that human 'property' may have biological roots, in case of land specifically in terms of the phenomenon of territoriality.⁶⁹ Many animals manifest behavioural patterns by which they establish claims on a territory, such as defending it against intruders. But this seems to define territoriality beyond mere *corpus*. The animal stays in a territory for a longer time and might even come back after longer leaves, and enjoys its fruits, yet, this is not the full meaning of 'territoriality', as this includes behaviour that displays claims on the territory.⁷⁰ Most interestingly, these patterns often go beyond mere acts of defence in being ritualized, hence are mainly communicative in nature, often also serving the goal to reduce costs of conflicts over territory, such as ritual displays of strength.

I come back on the question of animal rights in section 8. What is important at present is that human possession is indeed close to territoriality as described, including both *corpus* and *animus*. As I mentioned previously, this leads us to consider the performative nature of possession: Possessive behaviour is a communicative act by which appropriation is performed and becomes a social fact via the recognition by other actors.⁷¹ This corresponds to animal rituals that perform territoriality.

Performativity has the important implication that we can no longer explain 'property' by instrumental reasoning alone, which is the standard approach in the economic theory of property rights, that focuses on transaction costs and relative scarcities of the resources that are objects of property rights.⁷² There is even the position that economic property rights as opposed to legal rights are the only rights that count, which results in conflating property and possession.⁷³ This approach claims to be 'objective' in the sense that these determinants could be determined by an external observer. Tellingly, the same view underlies the application of economic models in biology that explain territoriality via the

⁶⁸ Emerich (2017).

⁶⁹ Bradshaw (2020: 45ff).

⁷⁰ Davis et al. (2012).

⁷¹ Rose (2018).

⁷² Alchian (2008).

⁷³ See the discussion between Hodgson (2015) and Allen (2015).

costs and benefits of the corresponding behaviour. In fact, this concurrence reveals that there are two different methodological movements: One is transferring economic analysis to biology, eventually suggesting that animals follow a logic of choice displayed by humans, however conceived in an abstract form as 'rational agents'; the other is arguing that human 'property' grounds in the biological phenomenon of territoriality. The latter claim, however, is only about evolutionary origins, as human law is conceived as transcending biology. But this judgement fails to adequately deal with the phenomenon of animal ritual as communication.⁷⁴

Indeed, the same failure inheres the economics of property rights. The argument is straightforward: Transaction costs are endogenously determined by the communication and its recognition. There is no external objective measure of transaction costs.⁷⁵ In economics, this transpires in observations such as that cost of law are determined by the degree of social trust or commitment to the law. If we take the case of possession, the question is how far certain possessive behaviours are recognized as legitimate (not: legal). In most general terms, this is determined by 'custom', from which the notion of 'customary law' follows. At this point, the Hayekian argument may be raised that over long time spans, custom may have been subject to evolutionary forces, such that most efficient customs would have emerged. But this Panglossian reasoning has been refuted by many scholars by convincing arguments that I do not want to repeat here.⁷⁶

The performativity of possession implies that there is no way to 'objectively' identify forces that drive the evolution of property rights. The case in point is the commons: The crusade against the commons was often justified by efficiency reasoning, that was later also enshrined in Whiggish economics accounts about the 'tragedy of the commons' requiring their privatization. However, detailed historical research has shown that these arguments cannot be substantiated empirically.⁷⁷ That means, 'efficiency' is endogenously determined. But the same applies for animal territoriality, where 'efficiency' essentially depends on the context of evolved ritualized communication.

Possession does not logically preclude alienation. However, there is an important special case that also relates to biology, namely the human possession of the body and its parts. As early as in ancient Greece, law often excludes the possibility of alienating the body,

⁷⁴ Despret (2019).

⁷⁵ Herrmann-Pillath and Hederer (2023: 227ff).

⁷⁶ Elster (2015: 205ff).

⁷⁷ The case against the efficiency reasoning about enclosures is has been settled already decades ago, see, for example, Fenoaltea (1990). Allen (2009: 57ff) summarizes this literature and reverses causation: It was the industrial growth in the cities that drove institutional change in agriculture, and not the latter inciting productivity growth in agriculture and releasing peasants to join the urban proletariat.

even if slavery is existing.⁷⁸ The need to introduce legal distinctions here arose from the growth of the monetary economy and hence the ubiquity of credit: Until today, the phenomenon of bonded labour resulting from the inability to redeem loans is widespread in many societies. However, as in ancient Greece, laws mostly prohibit this for the body of full citizens of the polity. To some extent, this means to constrain rights to property for the ultimate source of property in the Lockean sense: In extending these developments to the abstract level of human rights, this means that we apparently only possess our bodies excluding the right to alienation. This is a disputed issue in many areas, and is highly gendered, as, for example, in the public and legal controversies about prostitution: If women possess their bodies, why shouldn't they exploit this on the marketplace, i.e., claiming property as well? In fact, this legal distinction between possession and property in case of the body is highly ambivalent. On the one hand, the women are constrained in exerting certain property rights to their bodies, which could protect them against abuse by others, or even abusing themselves. On the other hand, another aspect of this distinction is the abstraction of the notion of 'labour power' from the body, with widespread ramifications, such as transforming the domestic and reproductive sphere into a source of value extraction without compensation, parallel, but distinct from the extraction of value by exploiting wage labour.⁷⁹ Max Weber has argued that this disembodiment of labour, combined with separated appropriation of means of production, is an essential requirement for expanding capitalist rational calculation on the market.⁸⁰ From that point of view, the legal exclusion of the body from alienation as property has actually the function from exploiting its services on the market.

7. The three modes of appropriation

The relationship between possession and property plays an important role in the intellectual history of Western 'property', comparing Locke, who is mostly cited as the key author, with Hume, who is mostly marginalized (Waldron 2020). Locke explained the emergence of property via human labour: As labour is what is clearly belonging to the person, exerting labour on an object appropriates that object. Labour is also the source of value: For example, land that lies idle is *terra nullius* because no one 'added value' to it. This is what labour achieves, and hence the land is appropriated legitimately. This theory may even justify, for example, the emergence of rights from adverse possession, such as the rights of squatters who make valuable use of idle property.⁸¹ However, the

⁷⁸ Economou and Kyriaziz (2017).

⁷⁹ Federici (2004).

⁸⁰ Weber (1922: 62ff).

⁸¹ Keenan (2015: 86).

key question is what constitutes 'value': As we have seen, with the rise of capitalism this was increasingly interpreted as 'economic value' in terms of market-priced wealth creation. At the same time, the colonial appropriation of land was also justified by the argument that white farmers create value, although indigenous people were obviously also using the land productively by labour: Even foraging berries is labour, without any doubt. Still, Locke's theory is instrumental and, in a general sense, fits with the economics of property rights, especially in the Coasean sense: The Coase theorem states that absent transaction costs, initial assignments of property rights do not matter because market exchange will reshuffle the allocation until the most efficient, hence wealth generating allocation will be attained.

Hume's theory differs in substantial ways as it emphasizes cognitive aspects apart from instrumental ones.⁸² Hume's theory seems to touch upon the whole-part relationship as he argues that there are strong cognitive forces that result into assignments of objects to people, both from their own standpoint and in the view of others. However, this is not devoid from instrumentalist reasoning, but refers to the pacifying effects of such cognitive operations: Recognizing possession, independent from whether this is economically expedient, certainly avoids the costs of conflicts over the objects. Therefore, Hume emphasizes the customary roots of possession.

Obviously, Hume's theory also makes sense in the context of animal territoriality: Animal rituals seems to play the same role as custom, and mainly have the function to avoid lethal conflicts. Even though economists might be tempted to cast this into the language of costs and benefits, even the eminent institutional economist Douglass North has changed his mind with regard to this fundamental question. His new theory of property rights conceives them as emerging in equilibria of conflict over valuable resources, as a sort of institutionalized armistice.⁸³

This view makes much historical sense, especially when considering land. Feudal land law is only one example for the universal phenomenon that possession of land was never strictly individualized before the emergence of capitalist property. The reason is that even though adding value to land, that is, the Locke theory, was often possible by individual or family work, defense of land never was. Therefore, both laborers and defenders of land were regarded as possessing the land, and therefore were assigned property rights.

⁸² Schlicht (1998: 151ff).

⁸³ North et al. (2009).

Accordingly, the archetypical form of appropriation was never the purely individualized form.⁸⁴

How far does this argument carry? I think, a long way, if we approach 'defence' as only one form of collective action necessary to sustain the value of and access to a resource. The most important example is indeed the commons, where this sort of action includes all collective efforts to keep the commons sustainable. Hence, the primordial form of possession is not individual, but group based.

In fact, this is still the case on the deeper level of modern legal systems which treat property and possession as distinct, to the degree that property might not even include the right to possess.⁸⁵ The archetypical form was the *fidei commissum*, where the owners, that is the heirs of an estate, would not possess it, but only the designated steward, who, however, would also not be the proprietor, especially in terms of the right to alienate the estate. Such constructs exist in modern law as well, foremostly the common law conception of trust (though blocking perpetuities), but also civil law constructs of funds and endowments. Indeed, I argue that the entire institutional architecture of modern finance builds on the institutional separation between possession and property, which serves the aim to limit liability of investors, eventually resulting in a construct where the 'group' morphs into an abstract entity, that is the capital jointly invested.⁸⁶ This creates another apparently paradoxical constellation, as in the case of the body: In exploiting a legal form that constrains alienation, the object is created that can become a stable source of exerting rights of possession, especially, as in the case of labour, rights to profitable uses. In the case of the body, a movement of disembodiment happens, in the case of capital, a legal movement of reification.⁸⁷

What is the relationship between possession and ownership? Hume points at the observation that possession has a self-reinforcing cognitive dynamic, which is recognized by all modern legal systems: There is always the initial assumption that a possessor also has the right to possess, even to the degree that possession by a thief may be recognized unless the holder of an ultimate right to property reclaims possession. Interestingly, this is also recognized in biology, where game theoretic analysis was applied even before economics for explaining why often incumbents prevail in ritualized conflicts of territory.

⁸⁴ Earle (2017). On the general background in terms of the evolutionary theory of group selection, see Bowles and Gintis (2011).

⁸⁵ Emerich (2017: 180).

⁸⁶ Pistor (2019). Pistor shows in detail how the modern legal construct of 'capital' emerged from the feudal law of the land. Whereas instruments such as the *fidei commissum* became obsolete during the process of rendering land fully alienable, similar legal tools are applied until today to transform wealth into a durable entity where the beneficiaries are the investors who are not the possessors.

⁸⁷ In the recent literature on financialization, this is referred to as 'assetization' see Tellmann (2022).

This has been aptly christened the ‘strategy of bourgeois’. If we look for the underlying motivational forces, the endowment effect is most prominent which is one of the key insights of modern behavioural economics.⁸⁸ The endowment effect is the fact that possessors of an object value the same object more than if they are not possessors, which drives a wedge in exchange activities among possessors and non-possessors, because reservation prices cannot match, resulting in a lower total amount of trades. In other words, the endowment effect is an inherent psychological barrier against alienation.⁸⁹

Obviously, this corresponds to the notion of ownership as expounded here. Possession establishes a relationship of belonging which ‘adds value’ to an object. Tellingly, experimental economics has shown that the endowment effect evaporates once the subjects are framed as being ‘traders’, that is, explicitly assume that they are only given an object with the purpose to give it away again.⁹⁰ Modern law recognizes this ‘value added’ in paying respect to ‘subjective value’ in specific contexts.⁹¹

Let me now fix our results in suggesting a complete terminology. The new language of property distinguishes the three modes of appropriation: ownership, property, and possession. I suggest three verbs that match with these: ownership – *belonging*; property – *holding*; and possession – *using*. Hence, I avoid the verbs that express the semantic impoverishment of the established language, since they have ambiguous meanings, such as ‘own’. I treat the verbs suggested here as technical terms, therefore written in italics.

- *Belonging* refers to the identify-forming essence of ownership, i.e., the part-whole relationship in appropriating an object.
- *Holding* is inspired by the use in ‘holding a right’, hence reflecting the key fact that property is a legal form that renders an object alienable and valuable in market terms.
- *Using* refers to the physical interaction between subject and object resulting in desired outcomes.

⁸⁸ Thaler (2015).

⁸⁹ Indeed, Apicella et al. (2014) claim to show that the endowment effect is not genetically determined but only emerges in human groups that live in close contact to markets.

⁹⁰ Kahneman (2011).

⁹¹ Serkin (2016: 56ff, 94ff).

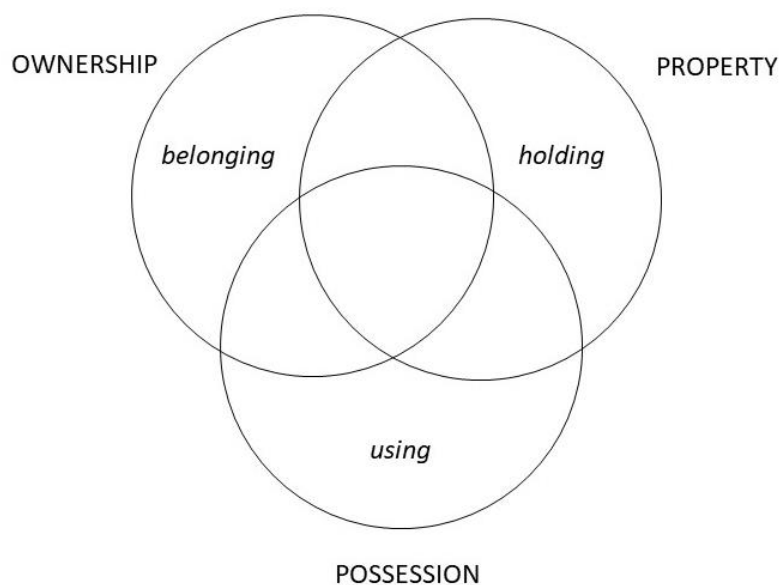


Figure 2: The complete framework: the three modes of appropriation

It is important to recognize that the three modes are independent from each other, as indicated by using a Venn diagram to show the conceptual relation. For example, the estate of my family for generations may belong to me, but my parents still hold the property title until the event of inheritance. Meanwhile, the estate is rented out to a tenant for use to earn the income necessary to keep it intact. Differently, a real estate company only holds an estate and rents it out to another company for use. And so forth. The seven areas of the Venn diagram correspond different combinations of the modes which can be employed to analyse real-world constellations of appropriation and to design forms of assigning and using objects to people.

Beyond these three modes of appropriation, we can add the aspect of political economy in the distinction between statist and contractual modes, which relates to the form of recognition of a specific status of appropriation. This is especially important when considering the constellation of legal pluralism prevalent in many societies where state law and various other forms of law coexist.

It is important to acknowledge that both possession and property imply the subject/object duality, different from ownership. This is clearly reflected in the Western legal tradition beginning with Roman law where both are recognized as legal forms of appropriation. Accordingly, one important difference between ownership and the other

two modes is that the former implies a relationship of care, which can be completely absent from the subject / object relationship where ‘use’ can imply all kinds of abuse. I have already pointed to the idea long prevailing in mainstream Western thinking, namely that humans are entitled to possess nature and hence exploit it for human ends.

8. Consequences for the institutional design of appropriation

Let me turn to the consequences of our new language of property. I do not go in much detail here; my main aim is to demonstrate that consequences are rich and reach over a wide range of domains.

The first radical consequence is that appropriation is not exclusive to human subjects. As we have seen, all living beings can be conceived as using a resource in the sense of possession. There is a distinction, though, between mere exploitation and possession in the sense that the latter is manifest in behaviour that expresses a claim on the resource. Further, we may also ask whether certain forms of claiming a resource also manifest ownership. Property is different, as other living beings do not use the law in claiming a resource. Yet, this does not preclude that humans may assign property to animals, analogous to maintaining and protecting the rights of humans who are impaired for some reason and cannot claim or even understand their rights. Even more, and analogous to the legal relationship between indigenous ownership and Western property, we can envisage treating non-human ownership and possession as customary law in a regime of legal pluralism.⁹²

Indeed, assigning property is one of the essential performative functions of the law, epitomized in the notion of ‘legal person’. Accordingly, there are no principled constraints in creating new subjects and objects of property, which continues with the tradition of European law. But we must notice that property is geared towards the market. Hence the question must always be why and how a new subject may benefit from obtaining property. The most difficult question here is that of representation since property assigned to non-humans implies that humans must represent the property interest in the human context.⁹³ This means that property must be designed in a way such that the humans cannot exploit the non-humans, such as, say, selling a territory possessed by animals to other humans for profit, even if that profit is kept by the non-humans and may be used for relocating the animals to other territory. As I have argued elsewhere in much

⁹² Vanuxem (2018).

⁹³ Hadley (2015).

detail, one way is to create commons as a form of inalienable ecosystem ownership, with family resemblances to indigenous claims on land and the medieval commons.⁹⁴

This discussion shows that there is great need to rethinking the *numerus clausus* of property law in order to adapt to constellations in other modes. With regard to animal property, the common law trust has been suggested as an adequate regime, provided that it would not be subject to limitations of perpetuities.⁹⁵ The same argument may apply for other concerns, as transpires in recent debates about the company. The shared aspect is that assigning property may be desirable for reasons such regulating exclusion and access legally, yet alienability should be constrained for protecting the underlying interests from market forces. In case of the company, this refers to the recent debate about 'purpose', that is sustaining a certain key concern of the company over long time spans, akin to protecting the interests of a family in an estate over generations.⁹⁶ This can be achieved by certain types of endowments in civil law, or, again, the trust in common law. The resulting form of corporate governance would be radically different from the reigning Anglo-Saxon model of capital-market based governance, which puts investors at the centre ('shareholder value') for whom alienability is the essential aspect of property.

Indeed, one of the essential consequences of the new language of 'property' is that the law is explicitly detached from the market as frame of reference, which, as we have seen, was the core of the civil law codifications of the 19th century. Legal design as drafted in the new language of 'property' would distinguish between the three modes of appropriation and treat them as separate, like today in distinguishing between property and possession. The most radical departure would be the recognition of ownership. However, this is less revolutionary than it seems since several legal systems factually include this aspect, and most importantly, the courts. A foremost case is the clear distinction between meanings of 'Eigentum' in German civil law versus constitutional law, with the latter factually recognizing the mode of ownership.⁹⁷

Alienability has different dimensions. We could distinguish between voluntary and involuntary alienability. The former is pursued by the interests of the proprietor, the latter is mostly the case of enforcing a creditors' claim, which, as we have seen, was a powerful driving force in the emergence of property already in ancient times, and became dominant in the 19th century, for example, in developing land registers. Accordingly, in our new language of property we could distinguish between property that can be

⁹⁴ Herrmann-Pillath (2023).

⁹⁵ Bradshaw (2020).

⁹⁶ Henderson and Van den Steen (2015). In Germany, this a key topic in initiatives for creating the new legal form of 'Verantwortungseigentum', translated as 'steward-ownership', <https://purpose-economy.org/de/whats-steward-ownership/>.

⁹⁷ Ibler (1997).

forfeited and ownership which is excluded. Accordingly, all possessions that are legally protected from forfeiture might count as ownership, even if they could be voluntarily alienated. As argued, this is the difference to the body, which cannot be voluntarily alienated and hence cannot be offered as collateral in modern legal systems. I conclude that the legal design of the relationship between ownership and property is a key issue on which political and societal consensus must be achieved.

One important domain where ownership is highly relevant for legal innovations is the company, again. As long as only property is recognized as frame, the 'shareholder value' model is the necessary outcome. Possession focuses on the phenomenon of managerial capitalism, which the emphasis on shareholder values attacks. In terms of modes of appropriation, managerial control is a legitimate form of appropriation and cannot be just denounced as 'inefficient'. Indeed, as the previous discussion showed, there are constellations where property holders may be deliberately blocked from possession.

The other very significant aspect is employee ownership, which is mostly interpreted as employees holding shares, hence property. In our new language, ownership is a distinct mode that can co-exist with property in a company, with obvious implications for management and corporate governance. Again, there is less radicalism here as it seems, as the famous model of the 'J-firm', i.e., the Japanese corporation, refers to that distinction in spirit.⁹⁸ In this model, lifetime employment is a key element, combined with consensual forms of management. The corresponding feature are the infamous (in the eyes of mainstream economics) constraints on alienating the capital of the company via capital market transactions. In our framework, this construct has its own rationale and can therefore also serve as a template for designing corporate governance in general, with reference to the employees.

A most general consequence of the new language is that 'propertisation'. i.e., the expansion of the domain of property, is not a panacea for achieving welfare gains in the economic sense. In concert with the other modes, propertisation must be always weighed against alternatives. Again, less revolutionary as it seems: A good example is the expansion of intellectual property rights, which clearly aims at gaining advantage on the market. One alternative is strengthening ownership.⁹⁹ The case in point is authorship in literature and science: The latter does not assign property to authorship but recognizes ownership.

As final example, I give the issue of land rights, with which we began our journey. Indigenous claims are ownership claims. We saw that the commons is also a combination

⁹⁸ Aoki (2010).

⁹⁹ Boldrin and Levine (2008).

of ownership and property: The latter may refer to the ultimate owner of the land of a commons or to distinct partial rights of use and access. This allows considering a wide range of alternatives to private property of land, which has been questioned by many, though still a minority of economists for long. For example, the ultimate holder of land may be the government or a local community, whereas all other individuals obtain rights of possession which could even be property, such as when a user of a parcel of land assigned by the ultimate holder would sell this use right to another person. In practice, we know many models of similar kind, including even capitalist Hong Kong, where under British rule the land was held by the Crown and only leased to private actors. In contrast, most models of commons combine possession with a strong ownership component, as seen, relating to the local community of possessors of land.

In sum, the new language of modes of appropriation creates a very rich array of opportunities for new forms of performing the relationship between subjects and objects of appropriation, and we have seen that this is not an utopia difficult to reach, but has already been explored in many forms. The problem is that the old language of 'property' does not adequately deal with these forms.

9. Conclusion

The core issue in rethinking 'property' is alienability. Expanding alienability of valuable objects was the central goal of the civil law codifications of the 19th century. Yet, there is a paradox here: The more alienable property becomes, the less stable it might be. The ultimate consequence would be the withering away of property, as in the 'radical markets' model developed by Posner and Weyl: Here, a universal system of auctions would make all property disposable while the market would steer allocation to the most efficient use.¹⁰⁰ This shows that there is an inherent tension between markets and property: Indeed, property can be seen as a sort of 'monopoly', which clearly transpires when considering the notion of intellectual property. Accordingly, one pivotal legal characteristic of modern capitalism is the construct of almost perfectly tradable capital, while keeping property interests to profit flows intact: As Katharina Pistor has shown, this legal construct, again paradoxically, builds on the feudal law of the land, the legacy of which is still alive in Common Law. This explains why on global capital markets financial centres dominate that locate in the legal domain of common law (Wall Street and The City).

¹⁰⁰ Posner and Weyl (2018).

I argue that this conundrum can only be resolved when adopting a new language of 'property' that recognizes distinct and autonomous forms of appropriation. In particular, we need to distinguish between the two different forms of subordinative control and identity-forming belonging, hence property and ownership. Ownership is not about alienation since this would jeopardize the relationship of belonging. Hence, for resolving the inherent paradoxes of property it is necessary to design institutional forms that balance these two modes, as exemplarily realized in the model of the commons. This allows to redraw the battle lines in the ideological conflicts over property, personified in the contrast between Hegel and Marx: Marx, in recognizing the pitfalls of Hegel's reasoning, believed that abolishing private property is the solution to all social ills. In the new language of 'property', containing property and recognizing ownership is a third way. As argued, ownership is often recognized, yet not 'named', such as in two very different ideas of "Eigentum" in German civil and constitutional law. Strengthening the role of ownership can heal many dysfunctional workings of markets aka capitalism, which strives to expand the reach of alienability as far as possible. Recognizing tenants and workers as owners of the place where they live and work cures social ills of unfettered markets. Perhaps an essential difference between the Anglo-American version of capitalism and the continental European forms of 'social market economy' is this hidden power of ownership.

References

- Acemoglu, D., S. Johnson, and J. A. Robinson (2001): The Colonial Origins of Comparative Development: An Empirical Investigation. *American Economic Review*, 91:5, pp. 1369–1401
- Adam, J. (2009): Eigentumsschutz in der gesetzlichen Rentenversicherung. *Schriften zum Öffentlichen Recht (SÖR)*, Band 1151, Berlin: Duncker & Humblot.
- Alchian, A. A. (2008); Property Rights, in: Palgrave Macmillan (ed.): *The New Palgrave Dictionary of Economics*. London: Palgrave Macmillan.
- Alexander, G. S. (2003): Property as a Fundamental Constitutional Right - The German Example. *Cornell Law Review* 88, pp. 733–778.
- Allard, F. (2005): Entre le droit civil et la common law : la propriété and quête de sens, in : J.-CF. Gémard and N. Kasirer (eds.) : *Jurilinguistique : entre langue et droit / Jurilinguistics: Between Law and Language*. Brussels, Bruylant, and Montréal: Thémis.

- Allen, D. W. (2015): On Hodgson on Property Rights. *Journal of Institutional Economics* 11:4, pp. 711–17.
- Allen, R. C. (2009): *The British Industrial Revolution in Global Perspective*. Cambridge, New York: Cambridge University Press.
- Apicella, C. L., E. M. Azevedo, N. A. Christakis, and J. H. Fowler (2014): Evolutionary Origins of the Endowment Effect: Evidence from Hunter-Gatherers. *American Economic Review* 104:6, pp. 1793–1805.
- Aoki, M. (2010): *Corporations in Evolving Diversity. Cognition, Governance, and Institutions*. Oxford: Oxford University Press.
- Arendt, H. (2018): *The Human Condition. Second Edition*, Chicago, London: The University of Chicago Press.
- Barzel, Y. (2002): *A Theory of the State: Economic Rights, Legal Rights, and the Scope of the State*. Cambridge: Cambridge University Press.
- Bennett, J. (2010): *Vibrant Matter: A Political Ecology of Things*. Durham: Duke University Press.
- Bloch, D. J. (2006): *Res sanctae* in Gaius and the Founding of the City. *Roman Legal Tradition* 3, pp. 48–62.
- Boldrin, M., D. K. Levine (2008): *Against Intellectual Monopoly*. Cambridge: Cambridge University Press.
- Bowles, S., H.t Gintis (2011): *A Cooperative Species: Human Reciprocity and its Evolution*. Princeton: Princeton University Press.
- Bradshaw, K. (2020): *Wildlife as Property Owners: A New Conception of Animal Rights*. Chicago: University of Chicago Press, 2020.
- Braidotti, R. (2019): *Posthuman Knowledge*. Medford, MA: Polity.
- Busse, M., and V. Strang (2011): Introduction: Ownership and Appropriation, in: Strang, V., M. Busse (eds.): *Ownership and Appropriation*. Oxford: Berg pp. 1–21.
- Cai, M., I. Murtazashvili, and J. Murtazashvili (2020): The Politics of Land Property Rights. *Journal of Institutional Economics* 16:2, pp. 151–67.
- Davies, N. B., J. R. Krebs, and S. A. West (2012): *An Introduction to Behavioural Ecology*. 4. Ed., Oxford: Wiley-Blackwell.
- De Landa, M.I (2006): *A New Philosophy of Society: Assemblage Theory and Social Complexity*. London, New York: Continuum.

- De Moor, T. (2015): *The Dilemma of the Commoners: Understanding the Use of Common-Pool Resources in Long-Term Perspective*. Cambridge: Cambridge University Press.
- Despret, V. (2019) : *Habiter en oiseau*. Arles : Actes Sud.
- Earle, T. (2017): Property in Prehistory, in: Graziadei, M., L. Smith (eds.). *Comparative Property Law: Global Perspectives*. Cheltenham, Northampton: Edward Elgar, pp. 3–25.
- Economou, E., Kyriaziz, N. (2017): The Emergence and the Evolution of Property Rights in Ancient Greece. *Journal of Institutional Economics*, 13:1, pp. 53–77.
- Elster, J. (2015): *Explaining Social Behaviour: More Nuts and Bolts for the Social Sciences*. Revised Edition, Cambridge, UK: Cambridge University Press.
- Emerich, Y. (2017): Possession, in: Graziadei, M., L. Smith (eds.): *Comparative Property Law: Global Perspectives*. Cheltenham, Northampton: Edward Elgar, pp. 3–25.
- Federici, S. (2004): *Caliban and the Witch. Women, the Body and Primitive Accumulation*. London: Penguin (2021).
- Fenoaltea, S. (1990): Transaction Costs, Whig History, and the Common Fields, in: Gustafsson, Bo (ed.): *Power and Economic Institutions: Reinterpretations in Economic History*. Aldershot: Edward Elgar, pp. 107–169.
- Glahn, R. von (2016): *The Economic History of China: From Antiquity to the Nineteenth Century*. Cambridge, UK: Cambridge University Press.
- Gomez-Mejia, L. R., Cruz, C., Berrone, P., and J. De Castro (2011): The Bind That Ties: Socioemotional Wealth Preservation in Family Firms. *The Academy of Management Annals*, 5:1, pp. 653–707.
- Graziadei, M. (2017): The Structure of Property Ownership and the Common Law/Civil Law Divide, in: Graziadei, M., L. Smith (eds.): *Comparative Property Law: Global Perspectives*. Cheltenham, Northampton: Edward Elgar, pp. 71–99.
- Greer, A. (2017): *Property and Dispossession: Natives, Empires and Land in Early Modern North America*. Cambridge, New York, NY: Cambridge University Press.
- Gretton, G. L. (2007): Ownership and its Objects. *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 71, pp. 803–851.
- Hadley, J. (2015): *Animal Property Rights: A Theory of Habitat Rights for Wild Animals*. Lanham: Lexington Books.

- Hamrick, W. S. (1987): *An Existential Phenomenology of Law: Maurice Merleau-Ponty*. Dordrecht: Springer Netherlands.
- Harke, J. D. (2016): *Römisches Recht*. München: C.H. Beck.
- Harke, J. D. (2020): Eigentum und Erbrecht. *Rechtsgeschichte, Privat- und Verfassungsrecht. Der Staat* 59, pp. 397–420.
- Hase, P. H. (2013): *Custom, Law and Livelihood in Rural South China. The Traditional Land Law of Hong Kong's New Territories, 1750–1950*. Hong Kong: Hong Kong University Press.
- Henderson, R., and E. Van den Steen (2015): Why Do Firms Have "Purpose"? The Firm's Role as a Carrier of Identity and Reputation. *American Economic Review* 105:5, pp. 326–30.
- Herrmann-Pillath, C. (2023): The Universal Commons: An Economic Theory of Ecosystem Ownership. *Ecological Economics* 208: 107822. <https://doi.org/10.1016/j.ecolecon.2023.107822>.
- Herrmann-Pillath, C., and C. Hederer (2023): *A New Principles of Economics: The Science of Markets*. Abingdon, Oxon, New York, NY: Routledge.
- Herrmann-Pillath, C., and Q. Zhao (2023): The Cultural Meaning of 'Market' in China and the Western Tradition: Worlds Apart?, forthcoming, B. Hollstein, H. Rosa, J. Rüpke (eds.): "Weltbeziehung". *The Study of our Relationship to the World*, Frankfurt and New York: Campus.
- Ho, P. (2022): Debunking the Chinese Unitary State via Legal Pluralism: Historical, Indigenous and Customary Rights in China (1949–Present). *World Development* 151: 105752. <https://doi.org/10.1016/j.worlddev.2021.105752>.
- Hodgson, G. y M. (2015): Much of the 'Economics of Property Rights' Devalues Property and Legal Rights. *Journal of Institutional Economics* 11:4, pp. 683–709.
- Honoré, A. M. (1961): Ownership, in: A. G. Guest (ed.): *Oxford Essays in Jurisprudence*. Oxford: Oxford University Press, pp. 107–147. Reprinted in *Journal of Institutional Economics* (2013), 9:2, pp. 223–255.
- Hübner, J. (2020): *Gemein und ungleich: ländliches Gemeingut und ständische Gesellschaft in einem frühneuzeitlichen Markenverband: die Essener Mark bei Osnabrück*. *Veröffentlichungen der Historischen Kommission für Niedersachsen und Bremen* 307. Göttingen: Wallstein Verlag.

- Ibler, M. (1997): Die Eigentumsdogmatik und die Inhalts- und Schrankenbestimmungen i.S.v. Art. 14 Abs. 1 S. 2 GG im Mietrecht. *Archiv für die civilistische Praxis* 197:6, pp. 565–588.
- Kahneman, D. (2011): *Thinking, Fast and Slow*. London: Penguin Books.
- Keenan, S. (2015): *Subversive Property: Law and the Production of Spaces of Belonging*. Abingdon, New York, NY: Routledge.
- Lenzerini, F. (2017): The Land Rights of Indigenous Peoples under International Law, in: Graziadei, M., L. Smith (eds.): *Comparative Property Law: Global Perspectives*. Cheltenham, Northampton: Edward Elgar, pp. 393–411.
- McNeil, K. (2017): Indigenous Territorial Rights in the Common Law, in: Graziadei, M., L. Smith (eds.): *Comparative Property Law: Global Perspectives*. Cheltenham, Northampton: Edward Elgar, pp. 412–434.
- Myers, R. H. (1982): Customary Law, Markets, and Resource Transactions in Late Imperial China, in: Roger L. Ransom, Sutch, Richard, and Walton, Gary M. (eds.): *Explorations in the New Economic History*. New York: Academic Press, pp. 273–298.
- North, D. C., Wallis, J. J., and Weingast, B. R. (2009): *Violence and Social Orders. A Conceptual Framework for Interpreting Recorded Human History*. Cambridge: Cambridge University Press.
- Padoa-Schioppa, A. (2017): *A History of Law in Europe. From the Early Middle Ages to the Twentieth Century*. Cambridge: Cambridge University Press.
- Piketty, T. (2013) : *Le capital au XXIe siècle*. Paris : Éditions du Seuil.
- Pistor, K. (2019): *The Code of Capital: How the Law Creates Wealth and Inequality*. Princeton: Princeton University Press.
- Posner, E. A., E. Glen Weyl (2018): *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*. Princeton: Princeton University Press.
- Povinelli, E. A. (2016): *Geontologies: A Requiem to Late Liberalism*. Durham: Duke University Press.
- Praduroux, S. (2017): Objects of Property Rights: Old and New, in: M. Graziasei, L. Smith (eds.): *Comparative Property Law: Global Perspectives*. Cheltenham, Northampton: Edward Elgar, pp. 51–70.
- Radin, M. J. (1982): Property and Personhood. *Stanford Law Review* 34, pp. 957–1015. <https://doi.org/10.2307/1228541>

- Rosa, H. (2020): Unverfügbarkeit. Berlin: Suhrkamp.
- Rose, C. M. (2019): Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership. <https://www.taylorfrancis.com/books/e/9780429303227>.
- Schlager, E., and E. Ostrom (1992): Property-Rights Regimes and Natural Resources: A Conceptual Analysis. *Land Economics* 68:3, pp. 249–262.
- Schlicht, E. (1998): On Custom in the Economy. Oxford: Clarendon.
- Schnädelbach, H. (2000): Hegels praktische Philosophie: Ein Kommentar der Texte in der Reihenfolge ihrer Entstehung. Frankfurt am Main: Suhrkamp.
- Searle, J. R. (1995): The Construction of Social Reality. New York: Free Press.
- Searle, J. R. (2010): Making the Social World: The Structure of Human Civilization. Oxford: Oxford University Press.
- Serkin, C. (2016): The Law of Property. Second Edition. St. Paul: Foundation Press.
- Taylor, C. (1979): Hegel and Modern Society. Cambridge Philosophy Classics Edition, Cambridge, UK: Cambridge University Press, 2015.
- Tellmann, U. (2022): The Politics of Assetization: From Devices of Calculation to Devices of Obligation. *Distinktion: Journal of Social Theory* 23:1, pp. 33–54.
- Thaler, R. H. (2015): Misbehaving: The Making of Behavioural Economics. New York, London: W. W. Norton & Company.
- Van Vliet, L. (2017): Transfer of Property *Inter Vivos*, in: M. Graziasei, L. Smith (eds.): Comparative Property Law: Global Perspectives. Cheltenham, Northampton: Edward Elgar, pp. 150–170.
- Vanuxem, S. (2018) : La propriété de la terre. Marseille : Wildproject.
- Waldron, J. (2020): Property and Ownership, in: Edward N. Zalta (ed.): The Stanford Encyclopedia of Philosophy. Summer 2020 Edition, <https://plato.stanford.edu/archives/sum2020/entries/property/>.
- Weber, M. (1922): Wirtschaft und Gesellschaft. Studienausgabe, 8. Auflage, 1985, Tübingen.
- Wilson, B. J. (2022): The Primacy of Property; or, the Subordination of Property Rights. *Journal of Institutional Economics*, <https://doi.org/10.1017/S1744137422000212>.
- Wittgenstein, L. (1958): Philosophical Investigations. Oxford: Basil Blackwell.
- Zanasi, M. (2020): Economic Thought in Modern China. New York: Cambridge University Press.

Zellweger, T. M. (2017): *Managing the Family Business: Theory and Practice*.
Cheltenham, UK, Northampton, MA: Edward Elgar.

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STRUKTURWANDEL DES EIGENTUMS

The paper starts out from the diagnosis that our language of property is impoverished and does not reflect the diversity of forms of appropriation. I adopt this term from Max Weber and argue that we must distinguish between different modes of appropriation. I substantiate this claim by discussing indigenous peoples' claims on land which are widely seen as being orthogonal to hegemonic legal traditions. Building on earlier contributions by critical students of 'property', I distinguish between the two fundamental modes of subordinative control, going back to the Roman conception of dominium, and of identity-forming belonging, which is a logical relationship of part-whole, and is manifest in indigenous conceptions.

The paper unfolds these arguments in adding the mode of possession, referring to the materiality of appropriation. As a result, three different modes of appropriation are identified, property – holding, ownership – belonging, and possession – using. The paper concludes with an outlook about the often radical consequences of this new framework, such as the extension of law to including animal rights, the recognition of employee rights in corporate governance, or the redesign of intellectual property.



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