The Case for an Inclusive Human Right to Property: Social Importance and Individual Self-Realization

Laura Dehaibi

University of McGill, laura.dehaibi@mail.mcgill.ca
The Case for an Inclusive Human Right to Property: Social Importance and Individual Self-Realization

Abstract
Using a historical and analytical approach, this paper explores the dual nature of the human right to property, which is protected in Article 17 of the Universal Declaration of Human Rights (UDHR). I argue that to approach property as a mere individual and negative right—the dominant view in Western legal practice—leads to obscuring the social dimension of property, which has been repeatedly affirmed in legal, political, and economic theory, as well as in historical practice. The contemporary omission of this social function in legal discourses tends to undermine the fulfillment of core needs of the community through property, which is in tension with individual and exclusionary rights of ownership. I argue property has been a tool of political and economic domination throughout several historical events, such as agricultural land enclosures, colonialism, and industrialisation—property for power—that progressively silenced the social function of property—property for use.

Rather than confirming this trend, human rights law should frame property as a means to achieve positive freedom by acknowledging the dual nature of property and asserting that only property for use should be viewed as a human right. Canadian Scholar John P. Humphrey had suggested this during the drafting process of the UDHR to incorporate the notion of “personal property,” which is limited to ownership of such things that ensure subsistence, self-realization, and agency. This paper argues that the right to property, defined as a social right, can have a broader reach than a limited Western conception of property.

Keywords
Human Rights, Social Rights, Locke, Philosophy, Radin, Property, Gould, UDHR, Article 17, Universal Declaration of Human Rights, Property Rights, Drafting Process, Liberal Theory, Humphrey, Tragedy of the Commons, Bundle of the Rights, Power, One Percent
THE CASE FOR AN INCLUSIVE HUMAN RIGHT TO PROPERTY: SOCIAL IMPORTANCE AND INDIVIDUAL SELF-REALIZATION

LAURA DEHAIBI*

INTRODUCTION

From the preamble to the Universal Declaration of Human Rights, it appears that human rights are meant to protect “all members of the human family” by providing them with equal and inalienable rights. This inclusivity is echoed in the first two articles of the UDHR. Although this goal has yet to be accomplished, international human rights standards exist to propel the global community towards the goals of equality and freedom. The provisions of the UDHR should therefore be understood as an attempt to advance this objective by helping vulnerable sectors of society.

It is within the context of the UDHR that a discussion of the human right to property becomes relevant. Property rights in Western societies are traditionally framed as negative and individual rights—their central feature is the right to exclude. This normative framework is influenced by liberal theory, which privileges individual liberties and free market ideology. Rather than serving everyone equally, property rights reinforce social inequalities by providing greater protection to entitlements for a small and privileged group of individuals. Absolute and exclusionary property rights

Copyright © 2015 by LAURA DEHAIBI.

* Laura Dehaibi (LLB 2006, LLM 2012 Université de Montréal; Québec Bar 2007) is a Doctor of Civil Law candidate at McGill University. Her research interest is in international human rights law with a focus on the enforcement of social rights. This paper is part of a larger project investigating the impact of the right to property on social life. She would like to thank her supervisor, Professor Kirsten Anker, for her insightful comments throughout the writing of this paper.

1 GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 at Preamble [UDHR].

2 Ibid; Article 1: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”; Article 2: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. […]”.


4 Margaret Jane Radin, Reinterpreting Property (Chicago: University of Chicago Press, 1993) at 121 [Radin]. The seventeenth century English Philosopher, John Locke, is overwhelmingly cited as the precursor of liberal theory of property. See John Locke, Two Treatises of Government (London: Awnsham Churchill, 1689) [Locke].
help secure the entitlements of the “one percent”: an exclusive group of individuals who possess and control a disproportionate amount of global wealth.5

Article 17 of the UDHR guarantees that “everyone has the right to own property.”6 This raises the question of whether this Article should be interpreted as protecting only the entitlements of a few. Since the human right to property lacks a proper definition at the international level, the conventional Western conception of property rights, such as exclusion, are often included in human rights discourse.7 These property rights were traditionally treated as a bundle of rights, ultimately favouring those with property. A human right to property falls outside of this traditional scope of property rights and should be viewed from a social rights perspective: a tool for positive freedom meant to satisfy basic needs and expectations of human beings.8 This would not mean that all individuals are automatically entitled to property. Rather, it suggests that the accumulation of property, beyond what is necessary to attain self-realization, would not be justified by human rights standards and is therefore not protected by them.

This paper will argue two points in order to align the interpretation of Article 17 of the UDHR with its inclusive goal to “serve all members of the human family.”9 First, the conception of the right to property as a social right is commensurable from liberal theory, even though private property is often classified as an absolute individual right. Second, assessing the social function is relevant and necessary for the right to property to be considered a true human right. I focus my analysis on a Western conception of property, since it is generally associated with individual rights. By examining Western theories, I argue that the social dimension of property is not limited to communal or socialist regimes. The use of the term “property” in this paper refers to the colloquial meaning rather than the specific legal terminology, which refers to the bundle of rights and not the land itself.10

Part One of this paper will look at the classical liberal conception of private property to demonstrate how the individualization of rights ultimately carries a social

---

5 The “one percent” became a popular expression during the Occupy Wall Street Movement, after it was revealed that one percent of Americans possessed over forty percent of the country’s financial wealth. Since then, it is often used to describe the growing social inequalities and wealth gap around the world. See Joseph Stiglitz “Of the 1%, by the 1%, for the 1%” (May 2011), Vanity Fair News, online: <http://www.vanityfair.com/news/2011/05/top-one-percent-201105>.

6 UDHR, supra note 1 at Article 17.

7 See Theo RG van Banning, The Human Right to Property (Antwerpen: Intersentia, 2002) at 36 [van Banning]. The author’s survey of the European Court of Human Rights case law on the right to property illustrates how conventional rules of property of member states, which often entrench a liberal conception of property, are used in order to decide cases of violation of the right to property.


9 UDHR, supra note 1 at Preamble.

purpose. Part Two looks at the framing of property rights during the revolutions in France and America and at property relations during the Industrial Revolution. This section demonstrates that property as a tool of power clashes with its social function. Part Three examines the drafting of Article 17 of the UDHR to show the tension between the individual and social. The result is a vague definition of the human right to property. The preparatory works to the UDHR\(^\text{11}\) illustrate how the drafters agreed that not all property entitlements should be considered a human right. With ideological tensions from the Cold War permeating these discussions, the drafters preserved the ambiguity surrounding the definition of the human right to property. In Part Four, building on the conception of personal property introduced by John P. Humphrey’s initial draft of Article 17 (then Article 22),\(^\text{12}\) I illustrate how the right to property can be social while simultaneously promoting individual self-realization. I refer to the works of Carol C. Gould\(^\text{13}\) and Margaret Jane Radin,\(^\text{14}\) which attempt to offer a clear and inclusive definition of the human right to property. Gould defines personal property as a means to attain positive freedom,\(^\text{15}\) while Radin discusses personal property as constitutive of identity.\(^\text{16}\) Part Five concludes by arguing that for a right to property to be coherent within the framework of international human rights, its interpretation must emphasize the social dimension in order to protect a greater portion of the global population. Rather than viewing property as an end, it should be understood as a means of attaining positive freedom.

I. A LIBERAL THEORY OF PRIVATE PROPERTY: THE INDIVIDUAL WORKING FOR THE COMMON GOOD

According to human rights fieldworker Theo R.G. van Banning, the United Nations has systematically avoided defining the ambiguous human right to property since the failure to include it in the International Covenants on Human Rights.\(^\text{17}\) The


\(^{13}\) Supra note 8.

\(^{14}\) Supra note 4.

\(^{15}\) Supra note 8.

\(^{16}\) Supra note 4.

\(^{17}\) van Banning, supra note 7. The most recent attempt to define the right to property at the UN involved the American submission of a resolution at the 41st session of the General Assembly (1986) to emphasize the individual right to property. The Resolution that was adopted requested that further reports be made on the right to property. While offering substantial compilations of data on the matter, subsequent reports were mostly descriptive and offered little guidance on essential characteristics of the human right to property; Radin, supra note 4 at 52; International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 221 (entered into force 23 March 1976, accession by Canada 19 May 1976), online: Office of the High Commissioner for Human Rights <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>
tension between individual and social interests in property rights has been a continued focus for liberal legal theorists. The overarching question is whether property as an individual right serves the individual alone or the broader community.

The “tragedy of the commons” is largely accepted in liberal theory as a justification for the necessity of property. Given the scarcity of resources, land must be divided and allocated to individuals to maximize its production and offer greater benefits for the general public. The rationale behind the tragedy of the commons is that, without the exclusivity of possession that comes with private ownership, there is no incentive for individuals to maximize resources; self-interest, in a common property regime, is detrimental for the group. Under this justification, while property is an individual right, its purported objective is social. It follows from this that entitlements are clearly defined through a regime of private property: resources can expand, waste is minimized, and trade is favoured. Although resources are limited in quantity, their qualitative value is not and can be infinitely expanded. The tragedy of the commons is embedded in liberal theory and is an important foundation for market-based economies.

This conception of private property, although economically utilitarian, aligns with initial accounts of a natural right to property. Aristotle drew his idea of private property from the natural tendency of man to care for what he possessed but saw it as having a social function. This is an optimistic vision of human nature since he believed that virtue should lead individuals to share the benefits of their property with the group. The fact that property is held privately, and exercised individually, does not prevent it from ultimately having a social purpose; private property does not necessarily equate to absolute self-interest.

John Locke’s theory is also based on the tragedy of the commons. Locke contends that private property is necessary to ensure maximum productivity of natural resources, implying that land cannot remain uncultivated. According to Locke, since the bodies and actions of individuals are considered property, the land to which they

18 Garrett Hardin, “The Tragedy of the Commons” (1968) 162:3859 Science 1243 [Hardin]. This utilitarian argument is based on the presumption that, to be productive, scarce resources must be held individually. The expression was originally used by Garrett Hardin in 1968, in reference to the issue of the growth of the human population and the use of large resources.
19 Adam Smith, The Wealth of Nations (London: W Strahan and T Cadell, 1776) [Smith]; Waldron, supra note 10 at 31-32; Mattei, supra note 3 at 2.
20 Rose, supra note 3 at 54.
21 Waldron, supra note 10 at 6-7; Richard Schlatter, Private Property: The History of an Idea (New Jersey: Rutgers University Press, 1951) at 11 [Schlatter].
22 Locke, supra note 4.
23 Ibid, Book II at paras 26, 34.
apply physical labour becomes their entitlement.\textsuperscript{24} This provides labourers with an exclusive right to their laboured goods.\textsuperscript{25} It follows that private property is a natural right since it arises from the natural property within individuals. Property rights, therefore, precede the creation of states, since it is labour itself that establishes the right, not formal titling.\textsuperscript{26} Locke’s conception of property is an individually exercised right, since consent from others is unnecessary to appropriate unclaimed goods from the Earth.\textsuperscript{27} This is a liberal argument since it emphasizes individual freedom over the community.

Locke emphasized the human drive for self-preservation, which has led many to view his theory as predominantly individualistic.\textsuperscript{28} According to Locke, this natural tendency does not mean that individuals should ignore the common good. Locke believed that ownership of land could not give power to one individual over the life and security of another:\textsuperscript{29} the natural right to property cannot justify the accumulation of goods in cases where they would be necessary to assist those in need. If it could, individuals would gain power over each other, which is inconsistent with the idea that the Earth should benefit all of mankind, rather than just some. Locke contrasts justice, which “gives every Man a Title to the product of his honest industry,”\textsuperscript{30} with charity, which “gives every Man a Title to so much of another’s Plenty, as will keep him from extream [sic] want, where he has no means to subsist otherwise.”\textsuperscript{31} In practice, justice is often favoured over charity.

Locke accepts social inequalities as the inevitable result of organized societies,\textsuperscript{32} which paves the way for free market ideology.\textsuperscript{33} Locke interprets the social inequalities that arise from the accumulation of property as a result of agreed-upon conventional rules, including a system of currency. He further distinguishes that it is private property’s assigned conventional value that gives rise to capitalism, rather than its natural right: men “by Compact and Agreement, settled the Property which Labour and

\textsuperscript{24} \textit{Ibid}, Book II at paras 27, 35. See also Waldron, \textit{supra} note 10 at 140, 177. This conception of useful labour was adopted in the common law elaboration of acts of possession that are necessary to establish a title of private property, as seen in American law (Rose, \textit{supra} note 3 at 16).

\textsuperscript{25} Locke, \textit{supra} note 4, Book II, at para 32.

\textsuperscript{26} \textit{Ibid} at para 30.

\textsuperscript{27} \textit{Ibid} at para 28.

\textsuperscript{28} Waldron, \textit{supra} note 10 at 157.

\textsuperscript{29} Locke, \textit{supra} note 4, Book I at para 42; “But we know God hath not left one Man so to the Mercy of another, that he may starve him if he please: God […] has given no one of his Children such a Property, in his peculiar Portion of the things of this World, but that he has given his needy Brother a Right to the Surplussage of his Goods; so that it cannot justly be denied him, when his pressing Wants call for it. And therefore no Man could ever have a just Power over the Life of another, by Right of Property in Land or Possessions” (\textit{ibid}, Book II at para 31).

\textsuperscript{30} \textit{Ibid}, Book I at para 42.

\textsuperscript{31} \textit{Ibid}.

\textsuperscript{32} \textit{Ibid}, Book II at paras 45-47.

\textsuperscript{33} Schlatter, \textit{supra} note 21 at 151.
Industry began.”  

The accumulation of wealth could not arise from a natural right to property since, according to Locke, this goes against God’s will. Accordingly, some authors interpret Locke’s conception of natural property as an inclusive and communal right with the purpose of preserving mankind.

The contradiction within Locke’s theory illustrates the tension between the foundation and operation of the right to property: although the natural right to property must align with God’s will to ensure that all of mankind benefits from the Earth, states cannot intervene with its application because it is a natural right. Accordingly, individuals can exercise their free will over property, which includes entering into conventional agreements to facilitate the accumulation of property. The state may formalize these conventions but may not regulate the distribution of property. Despite the existence of both a natural right to individual property and a natural obligation towards the community, only the first may be enforced. Even with this inherent contradiction, Locke’s conception of property had a considerable impact on modern economic theories.

Liberal theory has retained the idea of an open market economy, such that states should not intervene with property rights, but it ignores the moral responsibility of individuals to share the Earth’s benefits—a significant part of Locke’s theory.

II. THE POWER OF PROPERTY

If ownership were limited to personal use, then Locke’s statement of a moral obligation to share the Earth’s benefits would not pose a significant issue. It would, however, deny the economic and political power that property rights can confer. These powers push individuals to accumulate property beyond what is necessary for survival and well-being. This section examines contemporary historical events, demonstrating how the use of property as a tool of economic and political power has progressively silenced the social aspect in favour of individual advancement and self-interest. This emphasis on the individual has been sanctioned through both constitutional and conventional rules, and it has provided moral and legal legitimacy to the resulting social inequalities.

The idea of property operating for the common good is based on the idea that property (such as food, shelter, and tools) is necessary for survival and ownership is

34 Locke, supra note 4, Book II at para 45.
36 James Tully, A Discourse on Property: John Locke and his Adversaries (Cambridge: Cambridge University Press, 1980) at 61 [Tully]. Waldron believes that Locke’s conception of property involves the individual first, and communal by default. See Waldron, supra note 10 at 157.
37 Waldron, supra note 10 at 191.
necessary to the extent that it provides these basic needs. Carol Rose uses the term “propriety” to describe the notion of property that was prevalent in the seventeenth and eighteenth centuries. This referred to the proper use of land, which meant serving the commonwealth and maintaining its good order. The value assigned to property increased with the growth in commercial trade. Rather than satisfying mere personal consumption (property for use), property became a tool of exchange and domination (property for power, which can be both economic and political).

**Money and Power**

The economic efficiency of communal exploitation of land was questioned as early as the fifteenth century, when the enclosure movement sparked an agrarian revolution in England. This involved the systematic appropriation of land held in common by the lords, who fenced in, or enclosed, these properties in order to maximize their productivity. The lords gained exclusive rights to these lands, and their rights superseded those of commoners. Progressively, land became concentrated in the hands of a few, altering the value assigned to property. The emergence of large estates shifted individual interests from a subsistence focus to a commercial one, transforming land into an object of wealth and trade.

This shift towards a more capital-centered economy did not completely negate the relationship between property and the common good in liberal theory. Liberal theorists believe that the institution of private property stabilizes general welfare by maximizing the value of scarce resources. In practice, however, the economic and commercial potential of property favours the individual over the collective.

---

39 Rose, supra note 3 at 58.
40 Philbrick, supra note 38 at 697.
41 Gilles Fumey, L’agriculture dans la nouvelle économie mondiale, Collection Major (Paris: Presses universitaires de France, 1997) at 21 [Fumey]. See generally Jean-Michel Chevet, La Terre et les Paysans en France et en Grande-Bretagne: du début du XVIIe siècle à la fin du XVIIIe siècle, vol 1: Les hommes et les structures foncières (Paris: Éditions Messene, 1998); Jean-Pierre Poussou, La terre et les paysans en France et en Grande-Bretagne aux XVIIe et XVIIIe siècles (Paris: CNED-SEDES, 1999); Joan Thirsk, ed, The Agrarian History of England and Wales, vol 2 (Cambridge: Cambridge University Press, 1985) [Thirsk]. Prior to the enclosure movement, English agriculture was based on a communitarian system where rights of usage of an “openfield” were shared by members of an agrarian community, e.g. between the husbandmen (small farmers) and yeomen (big farmers). Although “enclosure” refers mainly to the act of fencing or physically delimitating a territory, it was considered a movement in England for its systematic use in a short period of time.
42 Thirsk, supra note 41 at 174.
43 See Philbrick, supra note 38 at 711 (Adam Smith’s laissez-faire theory); 19 at 168-169 (Sir William Blackstone’s works).
44 Smith, supra note 19 (this contention is central to Smith’s economic theory).
The operation of the right to property as a tool of economic power is illustrated through the ownership of labour, whether directly (owning the labourer) or indirectly (owning the results of the labourer’s efforts, known as ownership of the means of production). Both French and American societies, prior to their respective revolutions, relied heavily on agriculture in their economies. They both progressively shifted to a system of large and privately owned plantations, resulting in the increased reliance on slavery to maximize resources. Large plantations demanded a sizeable workforce, and American cotton planters in the nineteenth century succumbed to the convenience and profitability of using people as objects of property. What is unique to slave exploitation following colonial expansion is its integration within the capitalist economy, which further commodified humans as objects of property.

Private property as a natural right sanctioned slavery in two ways. First, the right to hold property in land, and to accumulate it, was protected. This facilitates the capacity for a large workforce of exploited labour to maximize the value of the land. Paul Gordon Lauren wrote that, “some of the most successful businesses of all time profited enormously from treating human beings as property.” Second, natural rights theory provided slaveholders with stronger moral arguments against the state, since the underlying principle of a natural right to property is that the state may not unjustifiably interfere with its exercise.

When Locke wrote his Two Treatises of Government, which arguably contributed to the justification of slavery, land was the primary source of wealth. While the pressure to abolish slavery grew throughout the nineteenth century, there was a dramatic shift in economic production and efficiency. Industrialization, as a

49 Margaret Davies, Property: Meanings, Histories and Theories (Abingdon, New York: Routledge-Cavendish, 2007) at 78 [Davies] (Davies argues that the intersections of slavery, racism and capitalism from the fifteenth century onwards created conditions for the worst abuses of slaves in history).
50 Lauren, supra note 45 at 30: For Lauren, what truly brought an end to slavery was the “transformations of power brought about by war and revolution” (ibid at 44), and in particular, the economical impoverishment of slave owning states in the US after the Civil war. However, civil activist movements shed light on the atrocities of slavery and put pressure on states to first abolish the international trade of slaves, and subsequently the practice in its entirety.
52 Ibid. Many scholars, including Davies, have argued that Locke’s natural right was a justification for colonial possession. She believes that Locke’s Two Treatises of Government should be read in light of his personal political ideas and affiliations, which link him to colonial expansion.
mechanism of capital-maximization, revolutionized the economic landscape and raised concerns about the relationship between private property and the common good.\textsuperscript{54} A central presumption of the utilitarian justification of private property is that exclusivity is socially desirable: since land that is individually exploited is more productive than land exploited communally, all members of a society benefit from individual exploitation. Therefore, proponents of preference-maximization argue for a “laissez-faire” attitude, rejecting the idea that the institution of private property should be burdened with obligations that favour the common good.\textsuperscript{55} According to Rose, however, the “laissez-faire” attitude applied in the nineteenth century ignored the promotion of general welfare and, instead, “political thinkers systematically argued against generosity to the poor because of potential wealth-dissipating incentives and effects.”\textsuperscript{56}

The changes in the modes of production in the nineteenth century brought about a general increase in social inequalities.\textsuperscript{57} Those who owned the industrial means of production had the power to suppress others. Workers’ struggles against exploitation in the nineteenth century were often framed as charges involving property rights. England witnessed the rise of the Chartist movement of the working-class following the adoption of the \textit{People’s Charter of 1838}.\textsuperscript{58} The \textit{People’s Charter} necessitated the recognition of many rights that are common to Western societies today: universal suffrage—providing the right of industrial workers to vote—and the elimination of property as a precondition to hold office.\textsuperscript{59} The socialist school of thought, led by thinkers such as Louis Blanc in France and Karl Marx and Friedrich Engels in Germany, emerged in the nineteenth century. Marx and Engels, in particular, condemned the use of private property entitlements as a tool of suppression by the bourgeoisie.

\textbf{All Proprietors are Created Equal}

Based on economic and commercial motives, England’s agrarian revolution during the Middle Ages had redesigned property relations to the detriment of the community. Meanwhile, the circumstances in continental Europe that led to the undermining of the social function of property were less associated with economic efficiency and more with the struggles against overbearing governments. According to Ugo Mattei, the rejection of the feudal economy was a landmark event that helped transition society towards the modern conception of property rights.\textsuperscript{60} Although

\textsuperscript{54} Marx, \textit{supra} note 46.
\textsuperscript{55} Waldron, \textit{supra} note 10 at 74.
\textsuperscript{56} Rose, \textit{supra} note 3 at 62.
\textsuperscript{58} “The People’s Charter” in Norman Gash, \textit{The Age of Peel} (London: Edward Arnold, 1973)
\textsuperscript{59} Lauren, \textit{supra} note 45 at 56.
\textsuperscript{60} Mattei, \textit{supra} note 3 at 83.
feudalism was communal in nature, its central feature remained an institutionalized hierarchy that undermined individual freedoms, such as the management of property. During the seventeenth and eighteenth centuries, while absolutist governments faced increasing distrust, natural rights theories generally, and Locke’s theory specifically, asserted that states cannot violate the individual right to property. This furthered the interests of a rising middle class. Exclusionary private property was viewed as a weapon against tyranny because it symbolized individual freedom.

At the end of the eighteenth century, America and French revolutionaries focused on individual freedoms, including the right to property. In the American colonies, there was a strong sentiment that property provided independence and that, consequently, everyone should be equally entitled to ownership. Thomas Jefferson was particularly aware of the philosophical debates surrounding natural rights, which were later reflected in the founding instruments of the United States of America. The First Continental Congress in America enacted the Bill of Rights in 1774, which included entitlements to life, liberty, and property. The American Declaration of Independence of 1776 identifies only life, liberty, and the pursuit of happiness as inalienable and natural rights of men. However, both the fifth and fourteenth amendments in the Bill of Rights of the United States Constitution (1789) place property alongside life and liberty as matters protected in criminal proceedings (seen in the due process clause). Furthermore, many American states adopted constitutions that guaranteed the natural, inherent, and inalienable right to acquire, possess, and protect property.

When the French citizens rose up against King Louis XVI’s monarchy in 1789, they demanded the freedom to exercise their will over the land that they physically laboured. The French Revolution resulted in the adoption of the Déclaration des
droits de l’homme et du citoyen de 1789. This document was both novel and provocative since it entrenched principles of natural rights. It continues to be one of the most influential formulations of the rights of individuals. Article 2 of the Déclaration lists four natural and inalienable rights: liberty, property, security, and resistance to oppression. Article 17 further states that property is a sacred and protected right, from which no one can be deprived, other than in cases of public necessity. Ownership became associated with individual freedom in post-revolutionary France, and this “equation […] became commonplace in legal, economic, and social theory.” During the French Revolution, as Mattei states, “[t]he natural law idea of property was developed as a corollary to the notion of individual freedom.” Formal declarations of rights further sanctioned private property as an individual and exclusionary right.

The French and American declarations stated that owning property is a necessary condition to attain dignity; however, they conceptualized property as an end of acquiring dignity, rather than as a means to do so. Locke’s work was furthered by entrenching the concept of private property within formal instruments of rights. While Locke identified private property as a natural right in theory, the declarations retroactively transformed it into a natural right. The drafters sought to increase the moral value of this set of rights by claiming that they were always a part of human nature, not artificial creations by legal systems. In this sense, as suggested by Jacques Derrida, the act of declaring rights is not simply descriptive but also performative, transforming an “ought” into an “is.”

This performative act of entrenching a natural right to private property occurred at a time when significant inequalities existed between proprietors and non-proprietors. Throughout the revolutions, the right to property provided significant political power to proprietors. In Locke’s account, property is not natural simply because humans are born with it but rather because its validity does not depend on positive law. This supposes that those who hold, or will come to hold, property cannot be deprived of this exclusive right to their entitlements: it is not a right for all men but,
rather, for all proprietors. This is evident in both France and the US, where “We, the people” and “le citoyen” referred to owners rather than the general public. As Philbrick notes, “the [American] Constitution was primarily originated and carried through by propertied groups that desired security, and [...] it was based upon the concept that property should be beyond the reach of popular majorities.” The revolutions created a distinction between active (proprietors) and passive (the landless, women, and children) citizens. Since active citizens paid taxes and contributed to national advancement, it was thought that they should hold governance. As a result, American voting rights were denied to those without property, making property a preliminary condition for exercising civil rights. The revolutions were intended to liberate communities from oppressive governments; however, this was achieved by over-emphasizing the individual freedoms of a few privileged proprietors while ignoring the social function of property.

III. DRAFTING A RIGHT TO PROPERTY DURING THE COLD WAR: ARTICLE 17 OF THE UDHR

The revolutionary struggles in the United States and France, and their resulting definitions of the natural rights of individuals, sparked the human rights movement that ultimately resulted in the adoption of the Universal Declaration of Human Rights in 1948. Article 17 of the UDHR guarantees the right to property and, after examining its drafting process, it is evident that the surrounding theoretical and historical tensions continue to be relevant. In the post-Second World War context, these struggles have translated into a political debate between liberal and communist ideologies.

It is important to examine the drafting process for multiple reasons. First, the UDHR, although not binding in international law, remains a pivotal document. It is often cited in international treaties and national constitutions, and its widespread acceptance by the global community leads many to conclude that its content is of customary nature. Second, the UDHR does not offer a comprehensive definition of the human right to property, which is described in Article 17:

---

79 Waldron, supra note 10 at 20.
80 Hunt, supra note 51 at 18 and 148; Schlatter, supra note 21 at 192; Rose, supra note 3 at 61.
81 Philbrick, supra note 38 at 723.
82 Hunt, supra note 51 at 149.
83 Lauren, supra note 45 at 31. See also Hunt, supra note 51 at 149 (in Delaware, voting was restricted to men owning a minimum of fifty acres of land, and France extended in 1792 voting to all men, except servants and the unemployed).
84 UDHR, supra note 1; see also Lauren, supra note 45 at 210; Stephen P Marks, “From the ‘Single Confused Page’ to the ‘Decalogue for Five Billion Persons’: The Roots of the Universal Declaration of Human Rights in the French Revolution” (1998) 20:3 Hum Rights Q 459.
Article 17
(1) Everyone has the right to own property alone as well as in association with others.
(2) No one shall be arbitrarily deprived of his property. 86

This short article does little to define a right to property. In international law, when the ordinary meaning of a treaty provision is obscure or “leads to a result which is manifestly absurd or unreasonable,” 87 it is useful to refer to the “preparatory work of the treaty and the circumstances of its conclusion” 88 to discern its meaning. Although the UDHR is not a formal treaty, this rule of interpretation may be useful by offering a clearer understanding of the human right to property, especially since the United Nations has not offered a further definition of this right. 89 Many delegates at the Commission on Human Rights expressed concerns throughout the drafting process about the article on property. Of particular concern was that it could lead to the entrenchment of the means of production in a human right to property, resulting in absurd consequences. 90 This view was not limited to delegates from the Communist Bloc.

Rejecting the inclusion of human rights provisions in the United Nations Charter, the General Assembly mandated that the Commission on Human Rights draft an international bill of rights. 91 The initial draft submitted by Canadian scholar John P. Humphrey drew from various sources, including drafts by other countries and private institutions. 92 According to Johannes Morsink, the drafts submitted by Panama and Chile were particularly influential 93 because they introduced a right to property that was resolutely social. At the time of drafting, many national constitutions in Latin America had already provided protection for social rights, departing from the Western tradition of prioritizing individual rights. 94 The social doctrine of the Holy See, with the encyclical Rerum Novarum as its foundation, significantly influenced the framing of

---

86 Supra note 1.
88 Ibid.
89 van Banning, supra note 7 at 51.
90 Morsink, supra note 11 at 139.
91 John P Humphrey, Human Rights & the United Nations: A Great Adventure (Dobbs Ferry: Transnational Publishers, 1984) at 17 [Humphrey] (the Commission held its first session at the beginning of 1947 and created a drafting committee, where Canadian scholar John Humphrey was mandated to submit the first compilation of rights).
92 Ibid at 31-32.
93 Morsink, supra note 11 at 131 (the draft submitted by Panama was prepared by the American Law Institute, and the one by Chile was prepared by the Inter-American Juridical Committee of the Organization of American States).
human rights in Latin American countries in the early twentieth century. The Holy See emphasized the importance of family, community, and protection of vulnerable groups.95 Humphrey, a strong proponent of social rights, maintained relations with his Latin American counterparts throughout the war and drew from Latin American sources, resulting in the inclusion of social rights in the UDHR.96

Drafting Article 17 was an arduous task that revealed the various philosophical understandings of the controversial right to property. According to Morsink, “[t]he discussions involved were some of the most openly philosophical ones in which the drafters engaged.”97 Some states expressed that the article on property should be struck from the text. Both the United Kingdom and Australia expressed that property was subject to different rules depending on the jurisdiction and therefore believed that an article related to this subject would be meaningless.98 Many representatives from Latin American countries, led by Chile, believed that only a right to personal property—a right to a minimum standard of property for personal use—could be viewed as a human right.99 Humphrey’s initial draft retained this idea of a right to personal property as a human right.100

The draft prepared by the Inter-American Juridical Committee, and submitted by the Chilean delegation in January 1947 (Chilean draft) at the Economic and Social Council, framed the right to property in substantial detail as follows:

Article VIII - Right to own property

Every person has the right to own property.

The state has the duty to cooperate in assisting the individual to attain a minimum standard of private ownership of property based upon the essential material needs of a decent life, looking to the maintenance of the dignity of the human person and the sanctity of home life.

The state may determine by general laws the limitations which may be placed upon ownership of property, looking to the maintenance of social justice and to the promotion of the common interest of the community.

95 Ibid at 35-36.
96 Morsink, supra note 11 at 131-133.
97 Ibid at 140.
98 Ibid at 143; Albert Verdoordt, Naissance et signification de la Déclaration universelle des droits de l’Homme (Louvain: Société d’études morales, sociales et juridiques, 1964) at 172.
99 Morsink, supra note 11 at 139-140.
100 Ibid at 139.
The right to private property includes the right to the free disposal of property, subject, however, to limitations imposed by the state in the interest of maintaining the family patrimony.

The right to private property is subject to the right of the state to expropriate property in pursuance of public policy, just compensation being made to the owner.\(^{101}\)

The Chilean draft is explicit about the effects of a human right to property. Property is framed as a positive right that creates duties for the state. The draft clearly states that private property is not an absolute right and may be subject to requirements of social justice and public interest. In this sense, the Chilean draft is philosophically aligned with the thoughts of Saint Thomas Aquinas because it conceptualizes property as working in favour of the common good.\(^{102}\) The definition of property in this draft aims to protect property for use, rather than for power, striking down the possibility of the UDHR protecting the ownership of the means of production.\(^{103}\)

Drawing from the Chilean draft,\(^{104}\) Humphrey’s more succinct draft of Article 17 (then Article 22) reads as follows:

**Article 22**  
Every one has a right to own personal property.  
His right to share in the ownership of industrial, commercial and other profit-making enterprises is governed by the law of the state within which such enterprises are situated.  
The state may regulate the acquisition and use of private property and determine those things that are susceptible of private appropriation.  
No one shall be deprived of his property without just compensation.\(^{105}\)

The first sentence of this draft clearly intends to protect property for use, rather than for power, by outlining a right to *personal* property. Humphrey sought to distance his version of the right to property from the Western conception of it as an individual

\(^{101}\) Draft Declaration of the International Rights and Duties of Man Formulated by the Inter-American Juridical Committee, ECOSOC, UN Doc, E/CN4/2, 8 January 1947 [Draft Declaration by the Inter-American Juridical Committee].  
\(^{103}\) Morsink, *supra* note 11 at 140.  
\(^{104}\) *Ibid.*  
\(^{105}\) *Draft Outline of International Bill of Rights, supra* note 12.
right. According to Morsink, Humphrey discussed personal property in the first paragraph to distinguish it from other rights to property. While the right to personal property is framed in absolute terms (“everyone has the right to”), Humphrey submits other types of property to state interventionism. He further discusses the ownership of industrial enterprises in the second paragraph, referring to the ownership of the means of production. Morsink adds that “we can read the paragraphs of Humphrey’s main article on property [...] in a descending order of moral strength for human rights,” interpreting personal property as more morally valid than property of the means of protection.

The introduction of the concept of personal property was discussed during the drafting meetings, referring to the Chilean idea of “property based upon the essential material needs of a decent life.” Many existing national constitutions included a right to personal property, particularly in Latin American and Communist countries. Other countries, however, expressed concerns with this notion, and some opposition was based on technical concerns. For the US delegation, the inclusion of the term “personal” was considered inadequate because of the confusion with the meaning given to the expression “personal property” in the common law tradition. In opposition, the delegate from the USSR stated that leaving “property” without a corresponding adjective might lead to the protection of the ownership of the means of production. Other concerns were associated with the reach assigned to a human right to property. Communist and Latin-American countries maintained that only a right to personal property should be considered a human right; however, others found this definition too narrow since it failed to include other forms of property. The debates also addressed the issue of recognizing different property systems beyond the institution of private property. The USSR, for example, favoured an article emphasizing that rules of property are dependent on national legislation, rejecting any framing of an absolute right to private property.

The delegates at the commission did not contest the distinction between property for use and property for power, nor did they question the moral value assigned to each category that was introduced by the concept of personal property. Lebanese delegate

---

106 Morsink, supra note 11 at 139.
107 Ibid at 140.
108 Ibid.
109 Ibid at 141.
110 Ibid.
111 Draft Declaration by the Inter-American Juridical Committee, supra note 101 at art VIII.
112 Morsink, supra note 11 at 140.
113 Ibid at 143.
114 Ibid.
115 Ibid at 144-146.
116 Ibid at 143-144.
117 Ibid at 144.
Charles Malik stated that the right to personal property was self-evident and essential.\textsuperscript{118} The debate largely focused on the extent to which private property constitutes a human right. Morsink noted that, “the great majority of the drafters did not believe in unlimited property rights. They only disagreed on where to place those limits.”\textsuperscript{119} Santa Cruz, the delegate from Chile, noted that a draft that protected personal property “did not limit the right to own property; it merely established to what extent it was to become an essential right, and each country would be free to determine reasonable limits in that connexion.”\textsuperscript{120} The Chilean proposal did not involve any judgment or favouring of one system over another; yet, political ideologies dominated philosophical debates. Despite agreeing with the idea of personal property, the main opposition came from the Soviet Union, which wanted an article that permitted the state to regulate ownership.\textsuperscript{121} By emphasizing this point in the debate, the USSR contributed to the confusion between conventional rules of property and human rights.

To end the debates, a drafting subcommittee was assembled,\textsuperscript{122} resulting in the short text of Article 17 that recognizes a form of an absolute right to property (“everyone has the right to own property”),\textsuperscript{123} which can be exercised by both individuals and groups. The limits on the right to property are vague, stating that no one can be arbitrarily deprived of his or her property. All references to the social utility, or purpose, of property were removed, despite the lack of state opposition from a philosophical standpoint.\textsuperscript{124} The goal was for delegates to “find a minimum common denominator”\textsuperscript{125} as to what constitutes a fundamental right to property. The lack of consensus on this matter led to a concise article, which is considered by many to be devoid of substance.\textsuperscript{126}

According to Humphrey, political tensions permeated the debates at the Commission on Human Rights, but played a secondary role in the drafting of the \textit{UDHR}.\textsuperscript{127} He asserted that the delegates perceived their role as that of individual experts,\textsuperscript{128} and many authors view the drafting process as a genuine work of philosophical inquiry.\textsuperscript{129} Looking at the specific context surrounding the drafting of

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{118} \textit{Ibid} at 142.  
\item\textsuperscript{119} \textit{Ibid} at 146.  
\item\textsuperscript{120} \textit{Ibid} at 144.  
\item\textsuperscript{121} \textit{Ibid} at 145.  
\item\textsuperscript{122} \textit{Ibid} at 148-149; the subcommittee was comprised of the UK, France, USSR and the United States.  
\item\textsuperscript{123} \textit{UDHR, supra} note 1 at Article 17.  
\item\textsuperscript{124} Morsink, \textit{supra} note 11 at 154; some delegates opposed placing limits on the right to property in Article 17 since Article 29 of the \textit{UDHR} (which states a duty of individuals towards the community and a right to legal interventionism for the “just requirements of morality, public order and the general welfare in a democratic society”) offered sufficient and appropriate external limits (\textit{ibid} at 155).  
\item\textsuperscript{125} \textit{Ibid} at 144 (in the words of Santa Cruz, the Chilean delegate).  
\item\textsuperscript{126} van Banning, \textit{supra} note 7 at 40-41.  
\item\textsuperscript{127} Humphrey, \textit{supra} note 91 at 24.  
\item\textsuperscript{128} \textit{Ibid} at 17-18.  
\item\textsuperscript{129} Lauren, \textit{supra} note 45 at 212.  
\end{enumerate}
\end{footnotesize}
Article 17, it is hard to ignore that political tensions greatly influenced the outcome. By progressively eliminating any substantial meaning from the original draft, the outcome was reduced to a vague statement of principle. It is clear that there is no consensus on whether property is simply an individual and negative right. When attempting to define or apply the human right to property, it is therefore important to consider this drafting history, which involves the rejection of the liberal institution of private property as the sole basis of this human right.

IV. BUILDING ON A HUMAN RIGHT TO PERSONAL PROPERTY

Since the introduction of a human right to personal property in Humphrey’s draft of Article 17, many authors have discussed this idea. Assessing the relationship between property and freedom, Gould argues that both socialist and liberal views on property work to impede democracy, despite their claim to promote it. Rejecting both of these approaches for causing social dominance and other detrimental effects, she suggests that we should focus on property as a means to achieve agency. The relationship between individuals and objects should be based on an ontology of humans in relation to society while preserving their individual identities, known as the social individual or “individual-in-relation.” Gould explains this concept by stating that, “property may be generally understood as the set of legal rights that specify the relations of social individuals to the conditions of their production or agency and to the products of this agency.” She contrasts this with both liberal theory—where individuals are viewed as external to social relations and as interacting in a purely self-interested, adversarial manner—and with socialist thinking—where individual interests are absorbed into those of the group.

Gould bases her approach on the idea that property should be interpreted as a means to achieve positive freedom, which is “freedom as self-realization of individuals.” By contrast, the American and French revolutionaries sought the freedom to use and exploit property without legal or political constraint. This liberal conception of property, according to Gould, sanctions the use of property as a means of domination, undermining freedom and democracy: “it can be seen that such equal freedom remains merely formal, because it is compatible with domination and exploitation which lead to real or concrete inequalities in the freedom of individuals.”

A socialist theory of property would be equally harmful: individual needs are defined

---

130 Gould, supra note 8 at 716.
131 Ibid at 722.
132 Ibid at 723.
133 Ibid at 722.
134 Ibid at 720.
135 Ibid at 721.
136 Ibid at 722.
137 Ibid at 719.
by their relationship with the community, denying space for personal identity. Just as private entities control the lives of others through the ownership of the means of production in liberal theory, the socialist state controls the lives of its constituents as the sole owner.\textsuperscript{138} For Gould, property should be understood as promoting positive freedom in the sense that it favours self-realization.\textsuperscript{139} This implies that the conditions to achieve agency should be made available to individuals, which includes a right to personal property.\textsuperscript{140}

While Gould’s idea of personal property refers to subsistence and self-realization, Radin discusses the reach of a right to personal property. Radin believes that we must distinguish between personal property, associated with personhood and identity, and fungible property, which is easily replaceable and held for its monetary value.\textsuperscript{141} Consequently, property for personhood is fundamentally subjective\textsuperscript{142} and individuals should have more freedom of control over those objects because of the constitutive nature of personal property. It is important to note that such freedom does not depend on the act of possession itself but rather on the importance of an object for one’s self-realization.\textsuperscript{143}

Two ideas must be retained from these authors who offer important insights to further our understanding of the human right to property. First, not all property rights deserve protection through human rights mechanisms. Second, property should not be viewed as an end in itself but rather as a means to attain more fundamental ends, which include subsistence, self-realization, and agency.

Both Radin and Gould distinguish between “good” and “bad” property, and the corresponding level of protection that each deserves. Neither author rejects the importance of property rights, but both reject a unilateral approach to property that would result in the unreasonable protection of property as a means to control others. This is the distinction that Humphrey, unsuccessfully, sought to incorporate in his draft of Article 17. Property is inherently ambivalent, and this ambiguity certainly should not

\textsuperscript{138} Ibid at 720-721.
\textsuperscript{139} Ibid at 723.
\textsuperscript{140} Ibid; Radin derives two forms of property rights from this foundational freedom: personal property (“a right to those things which are required for the individual’s own subsistence and self-realization”) and social property (“a right to those things which are required by individuals in common in order to realize their joint purposes”) (ibid at 724). Her conception combines the liberal and socialist theories around the notion of “social individuals;” without denying individuality, she favours common property for goods that lead to social benefits.
\textsuperscript{141} Radin, supra note 4 at 2-3; Property associated with personhood refers to objects that are necessary for an individual’s self-development and autonomy. These objects become inseparable from one’s identity, and are therefore constitutive of it. Radin provides the example of a wedding ring, which, beyond its monetary value, may possess a deeper psychological and sentimental meaning for its owner. In this sense, Radin does not limit the definition of personal property to mere objects of subsistence, but extends it to include objects that define individual identity (ibid at 36-37).
\textsuperscript{142} Ibid at 38.
\textsuperscript{143} Ibid at 37.
be endorsed in the field of human rights, at the risk of creating confusion about the
reach of property and, ultimately, at the risk of permitting abuses that affect global
welfare.

CONCLUSION

Simply interpreting property as an individual right omits important theoretical
trends and historical facts: even in Locke’s paradigm, which is central to liberal theory,
the social value of property plays a large role. The drafting history of Article 17
demonstrates that the dual nature of property was acknowledged well into the twentieth
century, despite the controversy over how to address it. I suggest three implications of
this dual nature of property. First, any future definition of a human right to property
must address this duality to avoid recreating past failures. Second, to be coherent in the
context of international human rights, the right to property must be interpreted as
favouring conditions of positive freedom rather than reinforcing existing social
inequalities. Understanding Article 17 as guaranteeing a right to “personal property” fits
with the general context of the UDHR, which aims to promote the inherent dignity of
humans. Third, when assessing a right to personal property, one should be aware that
property is a means of achieving positive freedom, not an end in itself. Otherwise, this
perpetuates a false sense of security that threatens the goal of self-realization, which is
implicit in human rights discourse. Although French and American revolutionaries
sought to define property as an end, this does not serve the interests of the “human
family”144 but instead serves only the interests of proprietors.

Viewing property as an individual and negative right may have served the
interests of the rising middle class historically, but it does not reflect a consensus on the
meaning of a right to property. Even within the UDHR, the right to property holds an
ambiguous position. Drawing on the International Covenants on Human Rights, the
classic categorization of international human rights distinguishes civil and political
rights from economic, social, and cultural rights.145 The UDHR begins by listing the
former and ends with the latter, making it appear that economic, social, and cultural
rights are of lesser importance than civil and political rights. The laconic Article 17 falls
somewhere in between. Even when discussing the inclusion of the right to property in

144 UDHR, supra note 1 at Preamble.
145 See Jean-François & Gaudreault-DesBiens, “Les hiérarchies passagères, ou de la contingence dans
l’équilibrage entre droits fondamentaux” (2012) 4 Revue Québécoise de droit constitutionnel 7. This
distinction is not only based on the two International Covenants on Human Rights, but also on
philosophical dissentions on the nature of these two categories: while civil and political rights have been
traditionally defined as individual rights that are enforceable, economic, social and cultural right are
rather viewed as rights of the community and as being of programmatic nature.
the International Covenants, states could not agree on whether to classify it as a civil and political right or as an economic, social, and cultural right.  

The philosophical discussions throughout the drafting process of Article 17 demonstrate that, beyond ideological debates, the majority of delegates agreed that there were different types of property deserving different levels of human rights protection. The individual-community relationship discussed in Parts One and Two of this paper were present throughout the drafting process. This gives rise to the following questions: Should property serve the individual alone or the community as whole? Should property for power be excluded from the reach of human rights protection? Throughout modern history, it has been acknowledged that there are different moral values associated with different forms of property.

Humphrey sought to distinguish between “good” and “bad” property in his draft. Aware of recent economic history, he tried to acquire state scrutiny for property related to the means of production, while framing the right to personal property as an absolute right. The right to personal property is a social right in two respects. Firstly, it is based on the idea that a right to property should serve the common good. Secondly and normatively, it guarantees a minimum standard of property that must be respected, protected, and if need be, fulfilled by the state. Humphrey’s conception furthers the natural right to property: although Locke’s idea of property was social in that it emerged out of social utility, it did not permit state interventionism. Humphrey’s right to personal property, in contrast, has both a social foundation and mode of operation.

When addressing the inherent duality in the right to property, the conventional rules of property adopted at the domestic level must not be confused with the notion of a human right to property. Although attributes of a conventional right to property and of a human right to property may overlap, an automatic correlation should not be implied. Governments, for instance, may decide to entrench a purely individualistic conception of property or to offer constitutional protection to property over the means of production. This does not mean that these legal frameworks should be integrated in human rights instruments. The negative impact that such conventional rules have had on social justice should be sufficient to prove that they were not intended to promote the inherent dignity of “all members of the human family.”

Any inquiry into human rights should begin by identifying the fundamental ends of human life as well as the tools without which these could not be achieved. Applying

---

146 van Banning, supra note 7 at 43; the right to property did not make the final cut in either Covenants.
147 Radin, supra note 4 at 48; Locke, supra note 4, Book II at para 45 (Locke contrasted property acquired through labour (natural property) with conventionally acquired property); Radin, supra note 4 at 48-49; Marx distinguished between property acquired through one’s own labour and property acquired through the labour of others.
148 Locke, supra note 4, Book II, at paras 28-30.
149 UDHR, supra note 1 at Preamble.
this to Franklin Roosevelt’s “Four Freedoms,”\textsuperscript{150} property, when framed as a human right, helps to achieve “freedom from want”\textsuperscript{151} by providing favourable economic conditions for a peaceful life. It is worth noting that this is not the only tool available to achieve this end. Social rights in general aim to achieve “freedom from want.” Closer to a social conception of property, the right to an adequate standard of living, including the right to food and shelter,\textsuperscript{152} can equally achieve freedom, subsistence, security, and identity. The question remains as to which path to freedom involves the least resistance, keeping in mind that the objective of human rights is to serve all, not simply a few.

\textsuperscript{150} Our Documents, “ Transcription of President Franklin Roosevelt’s Annual Message (Four Freedoms) to Congress (1941),” Our Documents, online: <http://www.ourdocuments.gov/doc.php?doc=70&page=transcript> (the four fundamental human freedoms include: freedom of speech and expression, freedom of religion, freedom from want, and freedom from fear).

\textsuperscript{151} Ibid (“[t]he third [freedom] is freedom from want-which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants-everywhere in the world”).

\textsuperscript{152} UDHR, supra note 1 at Article 24.