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6-8-2022

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Citation Details

Douglas C Harris, "*A Liberal Theory of Property in condominium*" (2022) 18:2 Int'l J L Context 245.

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Review Symposium

A Liberal Theory of Property in condominium

Douglas C. Harris

The building engineer's report on the low-rise condominium apartment building details the scope of work required. The roof is leaking, the elevator requires seismic upgrading, the windows and exterior siding are failing, and the heating system needs rebuilding. Although the owners of the individual apartments have been paying monthly fees in anticipation of these common property expenses, each owner faces a substantial special levy to cover the expected costs.

The land developer's offer to purchase the complex is eye-popping. Anticipating that the city will permit it to demolish the existing building and construct a high-rise condominium apartment tower on the site, the developer has offered owners a significant premium to induce their collective sale. If they were to accept the offer, owners would receive approximately twice the assessed value of their units based on individual sale.

This scenario – the need for extensive and expensive renovations and an attractive purchase offer – is increasingly common as condominium buildings age and as cities change and grow. In some developments, it produces conflict between those owners who want to sell and those who wish to retain their individual apartments. In turn, the conflict raises important questions about the appropriate threshold for owner consent: should the dissolution of condominium and the resulting termination of private property interests require the unanimous consent of owners, or is a majority or super-majority vote sufficient?

Hanoch Dagan's *A Liberal Theory of Property* (2021) builds a justification for private property from the core value of autonomy. Property, and private property in particular, is justified, argues Dagan, for its capacity to foster and promote individual self-determination. The rules of property, and the power they confer to owners, are legitimate to the extent that they follow "property's autonomy-enhancing function" (Dagan, 2021, p. 3). Dagan builds this autonomy-enhancing theory for property on three pillars: first, the private authority that flows from property, and which promotes individual self-determination, must be carefully delineated such that the power of owners over others extends only so far as is necessary for their self-determination; second, the "profound heterogeneity of property types" (Dagan, 2021, p. 6) reveals an essential and desirable structural pluralism that offers a range of meaningful choices in support of self-determination; and finally, property's autonomy-enhancing role is premised on a mutual or reciprocal respect for self-determination that extends to owners and non-owners and that guides interpersonal relations under a principle of relational justice.

How might Dagan's liberal theory of property, rooted in and sustaining individual autonomy, help us to navigate the scenario set out above where the goals of owners within condominium collide? In this case, the stakes are high. To require

unanimous consent to dissolve condominium would enable a single owner or small group of owners to frustrate the interests of the many in realizing the value of their property interests. Conversely, to allow a majority of owners to push through dissolution, and thus terminate the private property interests of all owners, is to enable a form of private taking; those owners opposed to the sale will be compensated, and handsomely so in this scenario given the developer's premium, but the transfer will not be voluntary.

Perhaps most importantly, Dagan's liberal theory of property creates space for engaging with conflicts between owners, not just between an owner and everyone else. Condominium—a form of common interest community which Dagan and Michael Heller (Dagan and Heller, 2001) have described elsewhere as an example of a liberal commons—is a relatively recent addition to the range of available property institutions. It packages a private interest to an individual unit in a multi-unit development with an undivided share of the common property and a right to participate in governing the whole. This combination embeds relations between owners into the fabric of the property interest it creates. To engage with this property institution is to recognize, as Dagan insists, that property law is not only “about vindicating the rights of autonomous excluders,” but also “about creating governance institutions that manage potential conflicts of interest among individuals who are stakeholders” (Dagan, 2021, p. 82). The “internal life of property” requires attention, argues Dagan, not just “its foreign affairs” (Dagan, 2021, p. 82), and nowhere is this clearer than in condominium.

What, then, of the conflict between owners over the dissolution of condominium? The characterization of non-consensual dissolution as a taking of property may seem to determine the outcome. How could the involuntary termination of private interests in land, precipitated by neighbouring owners, conform with Dagan's guiding principle of reciprocal respect for self-determination? Particularly where residential property is concerned, a rule of property that allows for the private taking of home seems to strike at the core of the autonomy-enhancing work of property. Even so, over the last two decades an increasing number of jurisdictions have shifted from a presumption that a collective sale (and thus the termination of private interests within condominium) requires the consent of all owners, to a presumption that it may proceed on the strength of a super-majority vote.

Dagan suggests an explanation in his observation that among the variety of common interest communities, owners with condominium tend to combine for utilitarian rather than social reasons (Dagan, 2021, p. 85); the legal form is used primarily to facilitate private ownership, not to build intentional community. As a result, a presumption that dissolution may proceed with a super-majority vote, and thus would be in the best interests of most owners, fits this utilitarian calculus. However, that calculus is not always determinative. A justification for property founded in autonomy requires more than a cost-benefit analysis and more than simple reciprocity. Dagan insists that “[r]espect for others' self-determination is

hollow without *some* attention to their predicament” (Dagan, 2021, p. 114, emphasis in original).

This attention to the predicament or the circumstance of others is crucial. Whether the property rule requires unanimous consent or a super-majority vote to dissolve condominium, Dagan’s liberal theory of property requires an opportunity for opposing voices to be heard. In considering these voices, it will and should matter within an autonomy-enhancing framework whether the property interest in question is protecting investor expectation or home. This does not mean that protection of home will always prevail, but it does require attention to the impact of a property rule on the capacity of owners to be self-determining. Dagan’s liberal theory insists that the autonomy-enhancing justification of property law is also its yardstick.

Can autonomy—the right to be self-determining—shoulder the burden that Dagan has placed on it? That burden includes accounting for the diversity of property while establishing its animating principle, providing a justification for private authority while delineating its boundaries. Some will seek to spread that load among a broader set of values, others will find that he is overreaching the precinct of property. At a minimum, Dagan has provided a descriptively rich and normatively appealing theory of property for a liberal society, and a useful framework for engaging with difficult conflicts within it.

References

- Dagan H (2021) *A Liberal Theory of Property*. Cambridge: Cambridge University Press.
Dagan H and Heller M (2001) The liberal commons. *Yale Law Journal* 110, 549–623.