

# What is a Property Right?

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# What Is A Property Right?

*„Etwas muss er sein eigen nennen, oder der Mensch wird morden und brennen.“  
“Something he must call his own, or man will murder and plunder.”*

Friedrich Schiller

Thinking about property rights in the context of cultural property is like planning to travel to the moon without having ever developed a rocket. That is why we should begin by asking basic questions such as why we should think about property rights in the first place. What is a property right? Are there different types of property rights? What type of property rights should be attached to what type of goods? Who should hold a right? We can clarify some of these questions, but it is by no means easy to give a conclusive answer to what type of property right is the best for cultural goods. If we ask, for example, should traditional culture stay within the public domain or should it be privatized, we will have to consider extremely diverse circumstances under which traditional culture is maintained, developed and created. But the concept of property rights provides a useful concept to begin thinking about different regimes of rights as alternatives.

## EVOLUTIONARY BASIS OF PROPERTY RIGHTS

Individuals display a significant endowment effect, if they own something. Herbert Gintis (2007) interprets property as a basic function of this endowment effect, which means we attach things to ourselves, and whatever belongs to us is valued higher than something with the same characteristics which does not belong to us. This endowment effect makes us want to keep something which we feel attached to. That is why an institution was created which we call property: If something is my property, I have the right to keep it to myself and to exclude others from it. Usually I also have the right to use the property. If it is a piece of land, I can sit on it and enjoy my

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self. I could gain some income from it by letting other people sit there and demanding a price for doing so. If my piece of land is not attractive enough for people to want to sit there, I can decide to grow potatoes – ploughing the land and changing its surface. And if I am sick of growing potatoes, I can also sell the land to someone else. All these rights are part of the concept of property.

Property serves as a means to provide security. In his history of property, Ludwig Felix 1883 remarks that in earlier times humankind depended in all aspects on nature to sustain it. Property, in his view, allowed us to gain more independence from nature. Let us imagine for a moment a very simple world with two individuals and one good, say potatoes. Imagine further, that there is no other way to avoid hunger than to plough the land and to plant and harvest potatoes. As one of the individuals you can either plant and harvest or you can take a sunbath and wait for an opportunity to steal the other one's potatoes. My wording suggests that private property rights are already in place, if taking available potatoes is 'stealing'. But of course it is also possible to hold a property right jointly as a group, a collective property right. Economists traditionally argue that private property is better than a collective right because each individual will have sufficient incentives to work enough in their potato fields in order to avoid hunger. Within a group there is always some danger that one is freeriding the others, i.e. is sunbathing while the other ones work in the field. The acceptance of private property then provides security for each individual and incentives to invest labor.

## EFFICIENCY OF PROPERTY RIGHTS

Property rights technically may include doing whatever you want with something you own: As mentioned above you can modify it. You can reap the benefits. You can also allow someone else to do so by renting or leasing something. And you can sell it to someone else. All these characteristics can be provided by the formal title you have over your property. In most cases we transfer ownership in quite casual ways. Buying a coffee to go in a café works without a formal exchange of ownership. But even in this case there is a receipt which provides some proof of payment and therefore ownership. Land titles by contrast are in many countries very formalized ways to secure ownership. But in all cases we should always ask what rights are included. In all countries, I believe, you may own even a big part of land but you cannot prohibit others from using the airspace above. And if the police are suspecting a crime or imminent danger you have to accept that they search your woods or fields or even house. You own a title, but the property right is limited in certain respects by the law.

Of course, we could also imagine that both individuals decide to work together in the potato field. In some cases, it might be much better to act together. For example, if we imagine living in a bigger group of twenty individuals and add to our simple world a

mammoth. Such a mammoth provide a lot of meat, which is especially valuable if the only other food is potatoes. But mammoths are hard to hunt. It is practically impossible to do so alone successfully. If our twenty individuals decide to hunt together they have to agree on how to share the meat. There are plenty of possible models of benefit sharing, but the crucial problem will be to avoid free riding on the part of one of the hunters who might not put all his energy in hunting the mammoth. By limiting his effort, his individual chance of survival might be higher, because he will save his energy, but he will also endanger the collective objective. If all individuals would do so, there is no chance to get the mammoth. Because of such free riding, many economists argue that private property will be more efficient than collective property rights.

However, you cannot hunt a mammoth by yourself. In this case, the group must find some mechanism to organize the hunt so that everybody's effort can be observed by the others. If this is possible with little effort, group activities can be very successful and a division of labor might even increase efficiency of the group. Everybody in the group can live more easily than alone. Collective rights and institutions ensure that comparable efforts are made by each individual.

Such a simplified world can only provide limited insights. But it shows two main property regimes: individually ("private") and collectively owned property rights. Both may be possible and under certain circumstances the best choice. There is no easy way to decide which one is the best choice under given circumstances. Two criteria might help: If no one can be excluded from consumption for technical reasons or because it is prohibitively expensive to do so ("non-excludability"), and if the good can be consumed by many at the same time (such as the judicial system providing security and justice for all) ("non-rivalry in consumption"), then it is called a public good which must be taken care of collectively. Anything else will be inefficient. If everyone else can be excluded from consuming the good and if there is rivalry, then private property rights will be most efficient. The potatoes in our simple world are a private good. Consumption by me excludes you from consuming the potato. But if our small world were inhabited by many potato farmers, they could agree to hire a watchman to police the potato fields at night to avoid theft. In this way, they create a public good, security, from which an individual farmer is not excludable. The watchman would walk the fields and discourage any potato thieves no matter whether one farmer said that he did not need a watchman. If all agree on the watchman, they also have to pay for him to provide his service. An individual farmer, then, has a strong incentive to quit participating: he wouldn't have to pay but still profit from the watchman walking the fields. In such a case, each farmer has the same incentive to free ride the collective decision and there will be no watchman in the end as no one wants to pay his share. The result is inefficient. Our potato farmer society needs a collective choice mechanism from which no one can defect.

Such a mechanism can be a political representation connected with a mandatory tax system which provides the funds for financing the public goods, in other words: a communal government or, if we consider many villages and towns, a state.

### CREATING PROPERTY: THE COMPETITION OF STATES FOR BETTER INSTITUTIONS

States offer certain systems of political representation and regimes of property rights including a judicial system, police and so forth. All these are institutions in the sense of rules which govern the society. The set of rules states offer to firms and individuals can be more or less attractive. Firms and individuals choose whether they prefer the rules of one country over the rules of another. In theory, firms and individuals are 'voting by foot' which institutions are best suited. Of course, for an individual it is not easy to move to another country or even to know all the relevant institutions of alternative countries. But many people move from one country to another because they prefer the freedom of one over the social security provided by another. Their moves are a 'voting by foot' even if not all individuals may have the same capability to select the country of their choice but rather stay where they were born and raised. Perhaps it is easier to imagine that firms move their location according to such a decision over the best set of institutions. The current debate in Western Europe and the US over firms moving their production to East Europe, China or India is spurred by fear of losing jobs. Firms relocate their production to such countries because labor is cheaper there than in the Western hemisphere. Wage bargaining differs significantly across countries and is part of the set of institutions of a country.

Another set of institutions are norms which govern intellectual property rights. Some firms are even moving back from China because their production processes are copied by local firms, and they feel that they will lose their competitive edge if they let others in on their innovations. Their innovations are, in other words, not protected effectively by institutions, and they bring back their production sites to their home countries because they offer the better institutions to protect their property rights. Within economics this gave rise to the idea that countries compete with each other over firms and individuals, especially the high potentials. This competition should bring countries to improve their institutions in order to attract more firms and high-potential individuals. In order to do so, countries must take informed decisions over alternative institutional settings.

### WHY CULTURAL PROPERTY RIGHTS?

Cultural property is diverse in its forms and functions. It is also diverse with respect to property designs. Currently some cultural property is protected by traditional property rights, for example, by a land title if a historic site is concerned. Others are protected by copyright, because a book, a film or a recording of music is concerned. But there are many forms such as traditional cultural expressions which are not covered by copyright or any other form of individual property right. For example, traditional cultural expressions are within the public domain that is free for everybody to use.

In the case of other individualized intellectual property rights, such as patents, it is argued that a limited monopoly on a specified invention is providing a substantial incentive to create more innovations. For this reason, society grants a patent running over twenty years. The overall increase in innovations compensates the entire society for the higher monopoly prices. If nothing would protect the innovator from being copied, he would be less innovative. Similarly, the argument runs with copyright: Because authors can reap benefits from their creation as no one else may sell their text, film or music, they will be more creative.

The same could be true for cultural property such as traditional cultural expressions: They could be valued so highly that people who take care to maintain dances, rituals, recipes and so forth would have the exclusive rights to practice them. Such an incentive could enhance the attraction of many traditional cultural expressions which otherwise might be lost entirely. Certain groups could gain income from practicing them. But of course, there are many issues to be considered first. Who values the traditional cultural expressions so highly that they require additional effort? And would it not be easier to provide subsidies to those who maintain them rather than creating a new form of cultural property right? Also, who should own the right of traditional cultural expression? Usually, entire clans or societies practice the traditional cultural expressions. Should all of them own the right with each one having veto power? How should one determine who belongs to the group and who doesn't? In addition, it is important to clarify the duration of the property right: With traditional cultural expressions a limited duration makes little sense. But should an unlimited duration be granted?

At the moment there are more questions than answers in connection with cultural property rights – and more should be added to the list. ■

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