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Article

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Innovative Property for Innovative Land Policy: Four Normative Principles

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Abstract

Innovative land policy does not yield to the pressure of short-term capital exploitation. Rather, innovative land policy establishes a fair balance between the interests of landowners and the public interest. As a keystone of land policy, property – particularly if open to innovation – plays a vital role in achieving this balance. This commentary explains four normative principles that help design innovative property. Since the four principles derive from long-standing ideas about property in land, the commentary uses a distinctly conservative approach. This approach, however, is quite innovative in the face of the reductionist view of property as a right that only serves the purposes of its owners. According to the first principle, innovative land policy must pay attention to the nexus between private and common property. Under the second principle, property in land must account for the government's positive duty to provide for adequate land uses for all. The third principle distinguishes between property rights of natural and legal persons: personal property guarantees individual liberty, but corporate property is a social function, not a right at all. The fourth principle reminds of the inseparable bond between property in land and land ethics.

Keywords: Land ethics ■ Land policy ■ Property ■ Social function ■ Individual rights

Innovatives Bodeneigentum für innovative Bodenpolitik: Vier normative Grundsätze

Zusammenfassung

Innovative Bodenpolitik gibt nicht dem Druck kurzfristiger Kapitalverwertung nach. Stattdessen stellt innovative Bodenpolitik einen gerechten Ausgleich zwischen den Interessen der Bodeneigentümer:innen und dem öffentlichen Interesse her. Als Grundlage aller Bodenpolitik kommt dem Eigentum – vor allem wenn es bereit zur Innovation ist – eine außergewöhnlich wichtige Rolle für die Herstellung dieses Ausgleichs zu. Dieser Kommentar erklärt anhand von vier normativen Grundsätzen die Ausgestaltung von innovativem Eigentum. Da die vier Grundsätze aus Ideen über Bodeneigentum gewonnen werden, die bereits vor längerer Zeit entwickelt wurden, verfolgt der Kommentar einen ausgesprochen konservativen Ansatz. Dieser Ansatz beansprucht indes innovativ zu sein, da er den verkürzenden Blick auf Eigentum als subjektives Recht zurückweist, das nur den Eigentümerinnen und Eigentümern dient. Der erste Grundsatz verpflichtet innovative Bodenpolitik zur sorgfältigen Beachtung des Wechselspiels zwischen Privateigentum und Gemeineigentum. Der zweite Grundsatz unterstreicht die staatliche Handlungspflicht zur Gewährleistung angemessener Bodennutzungen für jeden Menschen. Der dritte Grundsatz unterscheidet zwischen dem Eigentum natürlicher und juristischer Personen: Während das Eigentumsrecht von Menschen dem Schutz ihrer Freiheit dient, ist das Eigentum juristischer Personen als soziale Funktion und nicht als Recht anzusehen. Der vierte Grundsatz erinnert an den untrennbaren Zusammenhang zwischen Bodeneigentum und Bodenethik.

Bodenethik ■ Bodenpolitik ■ Eigentum ■ Soziale Funktion ■ Subjektive Rechte

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1 Land policy and property

Land policy is the result of the choices and actions of planners and other policymakers, who contemplate land uses, public interests, and rights (Davy 2016: 31). In most countries, land policy is not a distinct field of public policy but cuts across various fields of public policy. In this sense, land policy can be part of agrarian policy, housing policy, tax policy, environmental policy, and many other policy fields. Land policy often overlaps with spatial planning, but it also affects the real estate industry, banking and finance, food security, climate protection, land ethics, or environmental justice.

Despite its fragmentation, land policy has one common theme: it always concerns the relationship between land uses, public interventions, and private or common property relations. Consequently, in many legal systems, constitutional property is the baseline of land policy. Constitutional property¹ defines, guarantees, and limits the protection of individual rights in land through the highest courts.² Constitutional property is specified by private or common law, administrative law, public investments, the tax system, land use planning, and economic development. In whatever fashion planners and other policymakers wish to influence land uses, ultimately their choices and actions are shaped by constitutional property (van der Walt 2010). It is well worth considering innovative property as a prerequisite of innovative land policy.

What does “innovative property” mean? Above all, innovative property rejects the orthodox narrative of property. The orthodox narrative of property renders an exaggerated image of property as an individual right protected against government interference (Epstein 1985; Posner 2007). Sometimes, this exaggerated image is even presented as a “human right”. Consider for example the case of Northern Rock, a bank nationalized by the United Kingdom in 2008. Northern Rock was one of the high-risk investors that caused the financial crisis which almost top-

pled the Euro currency. Nevertheless, the bank and its shareholders demanded protection of their property rights under Article 1 of the 1st Protocol to the European Convention on Human Rights and Fundamental Freedoms. Compensation was denied to them only because Northern Rock was highly in debt and at the time of its nationalization had no economic value.³ But what if an accountant had found even £1 of active assets? It is obscene that antisocial capitalism should benefit from the human right to property at all (Davy 2017: 5).

Innovative land policy prefers an innovative concept of property that balances public and individual interests in the use of land. Innovative land policy contextualizes individual rights with collective rationality and social obligations, and listens to many voices (Davy 2016: 63–65; Hartmann/Jehling 2019). The orthodox narrative of property is founded in libertarian ideology, but other ideologies are available that have a higher social value. Bernoulli (1946), Marshall (1950), Duguit (1920), and Leopold (1966) offer valuable ideas for a conversation on property and land policy. From their ideas, four normative principles emerge that guide innovative property for innovative land policy.

2 Four normative principles

2.1 Innovative land policy must pay attention to the nexus between private and common property

Bernoulli (1946) examined the effect of different property relations on the value of urban land. Bernoulli complained about the unfair distribution of economic values between the private owners of building plots, who receive an annual revenue from using their land, and the municipal owners of public streets, who receive no revenue from the general public’s use of public streets. What Bernoulli described, in fact, was the nexus between private and common property as a foundation of successful urban land use. The most basic example of this nexus is the access to a network of public streets which connects each private plot to the rest of the city. Other examples are ambient air, rain, and sunlight – spatial common goods without which a private plot of land cannot be used – or infrastructure (e.g., water and sewage, broadband internet) that links private property to urban commons.

All land uses are either restricted to proprietors (landown-

¹ Examples of constitutional property are Article 1 of the 1st Protocol to the European Convention on Human Rights and Fundamental Freedoms (for member states of the Council of Europe), Article 17 of the EU Charter of Fundamental Rights (for member states of the European Union), Articles 14 and 15 *Grundgesetz* (Germany), the 5th Amendment to the US Constitution, or Article 25 of the Constitution of South Africa.

² Examples of supreme courts include the European Court of Human Rights (litigation concerning the European Convention on Human Rights and Fundamental Freedom), the European Court of Justice (litigation concerning EU law), the *Bundesverfassungsgericht* (constitutional court cases in Germany), the US Supreme Court (constitutional court cases in the US), or the Constitutional Court of South Africa.

³ European Court of Human Rights (Fourth Section), Decision 10 July 2012, Dennis Grainger and others against the United Kingdom, Application no. 34940/10.

ers) or shared by members of a use community. Restricted uses are regulated by private property, shared uses by common property relations. Paradigmatically, a private home is designated for restricted use by an occupant and their family, a public street enables the general public to share in the use of the street. Well-balanced spatial patterns always combine restricted and shared uses, private and common property relations. Property theory must account for this combination. Neither a focus on private properties (typical of a private law perspective) nor a one-sided fondness for public spaces (typical of urban sociology) helps understand and shape spatial patterns.

Ignoring either private or common property relations creates imbalanced and unproductive spatial patterns. The awareness for the nexus between private and common property is essential for innovative land policy (Davy 2016: 233).

2.2 Property in land must account for the government's positive duty to provide for adequate land uses for all

Marshall (1950) concerned himself with three types of citizenship: civil, political, and social. In the aftermath of two world wars, he was looking for an adequate response to the social question: How can the state make sure that nobody is left behind completely, even if it is impossible to turn "every man into a gentleman" (Marshall 1950: 27). The answer: social citizenship. Marshall embraced inequality as long as everybody receives a social modicum.

Orthodox property theory is wrong in assuming that property rights only protect those who already have (by whatever means) acquired property (Posner 2007). Constitutional property initially was directed against the encroachment on private property by despotic governments (Epstein 1985). But the development of property law did not stop at property as a civil right and added property as a social right. Above all, Article 11 of the International Covenant on Social, Cultural and Economic Rights (1966) considers housing, food security, and other vital land uses as elements of an adequate standard of living (Davy 2016: 169–174). Property as a social right, following Marshall, provides access to vital land uses that are indispensable for social citizenship. Innovative land policy helps governments to fulfill their positive duty to provide an adequate standard of land use for everyone.

In the light of social citizenship, property guarantees each individual, who does not enjoy minimal land rights, the access to land needed to lead a life in dignity.

2.3 The property rights of natural persons guarantee their liberty; the property rights of legal persons are a convenient instrument of social justice and social well-being

With respect to the world of things, the freedom of every human being depends on the protection of their private and common property in land (personal property). The privacy of their homes, their access to public streets and green infrastructure, their opportunities for social and political exchange in public places, their protection against slavery, bonded labour, or forced marriage, and their safe and unhampered use of land for work and generating income are necessary to provide all women, men, and children with the freedom to lead their own lives according to their needs and aspirations. The use of property in land by natural persons may sometimes be economically inefficient; it must still be acknowledged as a manifestation of individual freedom.

With respect to property in land owned by legal persons (corporate property), however, property is a social function and serves as a convenient instrument of social justice and social well-being (Duguit 1920). Owning one apartment or even a house secures the liberty of one family. But there is a huge difference between owning one apartment or house and owning 10,000 apartments or houses. The ownership of a huge stock of valuable assets lends the owner political, economic, and social power. This power is not a manifestation of individual liberty, but results from the agglomeration of capital. Although potentially a source of general welfare, the agglomeration of capital poses a threat to liberty. In order to protect individual liberty, the power of the owners of large holdings must be harnessed. Orthodox property theory, however, treats the ownership of one apartment or house just like the ownership of 10,000 apartments or houses: the fallacy of property as a formal right. Property as a social function (Duguit 1920) rejects the fallacy of property as merely a formal right without regard to its political, economic, and social impacts.

Property as a social function demands that rights to land be protected only in so far as the corporate landowners fulfill their duties regarding social justice and social well-being.

2.4 Property in land must always derive from land ethics

Property is not only a social, it is also an ecological function. The ownership of the world of things, segregated into private and common property relations, is hugely important for the use of land and other natural resources. After all, the decisions of landowners and the members of use

communities decide whether land is depleted quickly and completely or granted a period of rest to restore its original powers. Much too often property is considered as the right to occupy and use land arbitrarily. The consequences of arbitrary and unbalanced land uses are well known: floods, wildfires, avalanches, desertification, loss of biodiversity, global warming. What is less well known is the enormous power that landowners hold over the protection or destruction of the environment.

Land ethics is not about being a good person, it is about survival. As Leopold (1966: 97–99) pointed out in “Thinking like a mountain”, human interference in natural life creates a huge responsibility to restore balance. Leopold considered humans not as the conquerors of the land, but as members of the land community. He attributed great importance to the existence value of the land (as opposed to its economic value). Leopold’s land ethic, first published in 1949, is captured by a simple principle: “A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise” (Leopold 1966: 173). Leopold’s principle also applies to private and common property relations. Unless property fulfills its ecological function, it is “wrong” from the perspective of land ethics: it threatens the survival of humans and other members of the land community.

3 Innovative property improves innovative land policy

Why would implementing the four principles of innovative property improve land policy? I have four answers:

- Bernoulli (1946) complained that private landowners reap the benefits of land uses, but municipalities always have to pay for maintaining the profitless urban commons. Innovative land policy must not accept Bernoulli’s verdict but rather insists on the equal worth of private and public spaces. Spreading the knowledge that everybody benefits from paying attention to private and common land helps introduce benefit sharing. It is unlikely that raising land taxes will increase a widespread responsibility for public space. Rather, the quality of the commons will be enhanced through awareness campaigns, community initiatives, citizen sponsorship, or negotiated service fees. Planners have to stop thinking that they can do all of the heavy lifting by themselves. They have to trust responsible citizens and they have to explain to them why the public sphere is value enhancing in the urban context.
- The government has a positive duty to provide for adequate land uses for all as an essential element of “social citizenship” (Marshall 1950). In times of crisis, the

homeless suffer most. The humanitarian crises involving refugees, COVID-19, the energy crisis, and escalating inflation emphasize the importance of land uses for achieving an adequate standard of living. Adequate housing, food security, and the right to work are human rights. In welfare states with inflated social services (like in Germany), even professionals often assume that poverty is best addressed through monthly payments of social assistance. This is a mistake that legitimizes the exclusion of poor people from adequate land uses, frequently by defining their existence as a threat to public safety. Land policy that proactively considers the spatial needs of landless individuals never resorts to repressive instruments in order to control the spatial consequences of poverty. Rather, an innovative, pro-poor land policy considers land uses as possible sources of income and of achieving an adequate standard of living.

- Nobody has the “human right” to corporate capitalism. Harvesting the profits from renting 10,000 apartments is not the same as enjoying one’s home. Land policy must liberate itself from the orthodox fallacy claiming that the same property rules apply to owning one apartment as well as to owning 10,000 apartments. Land policy that distinguishes between personal and corporate property in land can apply instruments appropriate for the size and volume of regular and XXXL landholdings. Rules that are appropriate for over-sized landholdings are rules defining property as a social function (Duguit 1920), not a form of expropriation or taking of property. Consequently, issuing such rules does not trigger a duty to compensate the corporate owner of XXXL landholdings.
- Climate change, soil erosion, the loss of biodiversity, vast wildfires and floods, and pandemics do not merely coincide with human disrespect for the natural environment. Above all, the harm caused by natural disasters correlates with dysfunctional property relations. The absurd notion that individual landowners may legitimately use their land as they deem fit stands in stark contrast to the vulnerability of the ecosystem. Consider, for example, Germany where the Federal Constitutional Court has ruled on the government’s constitutional duty to take climate action.⁴ Despite this clear and unambiguous ruling, Germany still launched the police against climate activists protesting against fossil capitalism in Lützerath (North Rhine-Westphalia) in early 2023. Under the direction of the provincial government, the police protected the private property in land of a huge energy company, RWE. The company had obtained “their” property through compulsory purchases

⁴ *Bundesverfassungsgericht*, Order of the First Senate of 24 March 2021, 1 BvR 2656/18.

and expropriation. The land in question was abused for an open pit coal mine allegedly necessary to keep German living rooms warm during the winter of 2022/2023, while Russia waged war against Ukraine. But this was another unethical violation of the Earth. This is just a single event, but the total sum of unethical violations of the land have created a disasterscape that ultimately threatens the existence of humans and other animals on Planet Earth. In contrast, innovative land policy that takes into account “the integrity, stability, and beauty of the biotic community” (Leopold 1966: 262) is responsive to natural hazards and the vulnerability of human land uses.

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