Préface des éditeurs

L'Association Suisse de Philosophie du Droit et de Philosophie sociale a discuté la problématique des limites de la propriété, lors d'un colloque organisé le 26 septembre 2015, à l'Université de Genève.

La propriété est l'une des pierres angulaires de notre ordre juridique et ce, depuis la Rome antique. Ce sont pourtant les Modernes qui l'ont élevée au rang de principe supérieur. Ainsi Jean-Etienne-Marie de Portalis, père du Code civil français, l'a qualifiée « [d]'âme universelle de toute la législation »[1]. Depuis, la propriété a été confrontée à diverses limitations significatives. En effet, un siècle plus tard, Eugen Huber, auteur du Code civil suisse, plaçait non plus la propriété au centre de l'ordre juridique, mais la personne, allant jusqu'à déclarer « l'on peut dire que la personnalité est aussi bien le point de départ que l'objectif final du droit »[2]. Le droit civil n'a pourtant pas été le seul à limiter la portée de la propriété ; en effet, le droit public a amplement participé à l'affaiblissement du pouvoir de disposition des propriétaires. Ce colloque avait donc pour thème de décrire certaines de ces innombrables limites et de les analyser.

Le choix du colloque a plus précisément porté sur quatre angles, apparus essentiels aux organisateurs : le développement historique des limitations de la propriété; les droits de l'homme qui, depuis le XVIII^e^ siècle, connaissent un essor impressionnant ; l'influence des *res communes* – soit toute chose n'étant juridiquement assignée à personne – dont l'importance ne fait qu'amplifier, phénomène dû notamment aux développements techniques du XIX^e^ siècle; l'emprise fiscale de l'Etat sur la propriété privée, allant en augmentant depuis la mondialisation.

Après chacune des quatre interventions énoncées ci-dessus, de jeunes philosophes du droit ont introduit, par des remarques critiques, une discussion sur le sujet traité. Les commentaires de Dr. Julia Hänni, qui répondait à la conférence du Prof. Peter Garnsey, sont retranscrits dans le présent ouvrage. En outre, les éditeurs voulaient offrir aux participants du colloque, la possibilité d'exposer leurs points de vue. Nous reprenons ici deux contributions, relatives aux droits des investissements internationaux (Prof. Makane Moïse Mbengue et Elise Ruggeri Abonnat) et au droit naturel (Dr. Shelly Hiller Marguerat), enrichissant encore la qualité de ce livre.

1 Corps législatif et exposé des motifs par Jean-Étienne-Marie Portalis, 26 nivôse an XII – 17 Janvier 1804, in: Jean-Guillaume Locré, *Législation civile, commerciale et criminelle*, t. 4, Bruxelles 1836, 75ss.

2 Eugen Huber, Die Persönlichkeit, in: *Zehn Vorträge über ausgewählte Gebiete des neuen Rechts gehalten im Grossratssaale in Bern, im Winter 1910–1911*, Berne 1911, 3ss.

Le colloque a été financé par le Fonds national suisse, l'Université de Genève, la Faculté de droit de Genève, ainsi que par le Département d'histoire du droit et des doctrines juridiques et politiques (JUPO). Qu'ils soient remerciés pour leur générosité. Nous nous savons également gré aux auteurs pour leur travail intensif et précis, nous permettant de mener à bien ce projet. Nous saluons aussi la précieuse collaboration des Editions Steiner Verlag. Enfin, notre reconnaissance va à nos collaboratrices et assistantes, ainsi qu'à notre secrétaire Kathy Steffen, qui nous ont permis l'organisation de ce colloque ainsi que la publication de ce livre.

Zurich, Genève, automne 2015.

Matthias Mahlmann
Bénédict Winiger
Sophie Clément
Anne Kühler

Vorwort der Herausgeber

Am 26. September 2015 veranstaltete die Schweizerische Vereinigung für Rechts- und Sozialphilosophie an der Universität Genf ein Kolloquium über „Das Eigentum und seine Grenzen". Das Eigentum ist seit der römischen Antike ein zentraler Baustein unserer Rechtsordnungen. Es ist aber die Moderne, die es zum obersten Prinzip erhoben hat. So nannte Jean-Etienne-Marie Portalis, der Vater des französischen Zivilgesetzbuches, es vor dem Corps législatif, dem damaligen Gesetzgeber „l'âme universelle de toute la législation".[1]

Inzwischen hat das Eigentum in ganz Europa bedeutende Einschränkungen erfahren. Ein Jahrhundert später stellte Eugen Huber, der Vater des Schweizerischen Zivilgesetzbuches, nicht das Eigentum, sondern die Person in den Vordergrund: „ … Man kann wohl sagen, dass die Persönlichkeit sowohl Ausgangspunkt als auch Endziel des Rechts ist".[2] Aber nicht nur das Zivilrecht, sondern vielmehr das öffentliche Recht beschränkt seither den Eigentümer zusehends in seiner Verfügungsgewalt. Das Kolloquium hatte zum Thema gewisse dieser zahlreichen Beschränkungen zu beschreiben und analysieren.

Die Wahl fiel dabei auf vier Themenkreise, die den Organisatoren besonders wichtig erschienen: Die historische Entwicklung der Einschränkungen; die Menschenrechte, die sich seit dem 18. Jahrhundert in beeindruckender Weise ausdehnen; der Einfluss der *res communes*, also jener Dinge, die rechtlich Niemandem zugeordnet sind und deren Bedeutung vor allem mit den technischen Entwicklungen seit dem 19. Jahrhundert ansteigt, sowie der fiskalische Zugriff des Staates auf das Privateigentum, der mit der Globalisierung zusehends ins Rampenlicht geraten ist.

Nach jedem der vier Referate führten junge Rechtsphilosophinnen und Rechtsphilosophen in einem kurzen Beitrag kritisch in die Diskussion ein. Einer dieser Beiträge, jener von Frau Dr. Julia Hänni zu Prof. Peter Garnseys historischer Einführung, ist im vorliegenden Band abgedruckt. Ferner wollten die Herausgeber auch Teilnehmern am Kolloquium die Gelegenheit bieten ihre Gesichtspunkte dazulegen. So wurde der Band durch zwei Beiträge zum internationalen Investitionsrecht (Prof. Makane Moïse Mbengue und Elise Ruggeri Abonnat) und zum Naturrecht (Dr. Shelly Hiller Marguerat) bereichert.

1 Corps législatif et exposé des motifs par Jean-Étienne-Marie Portalis, 26 nivôse an XII – 17 Janvier 1804, in: Jean-Guillaume Locré, *Législation civile, commerciale et criminelle*, t. 4, Brüssel 1836, 75 f.

2 Eugen Huber, Die Persönlichkeit, in: *Zehn Vorträge über ausgewählte Gebiete des neuen Rechts gehalten im Grossratssaale in Bern, im Winter 1910–1911*, Bern 1911, 3 f.

Das Kolloquium wurde finanziell unterstützt vom Schweizerischen Nationalfonds, der Universität Genf, der Genfer Rechtsfakultät sowie deren Département d'histoire du droit et des doctrines juridiques et politiques (JUPO). Für die grosszügige Unterstützung sei herzlich gedankt. Unser Dank geht auch an die Autorinnen und Autoren für ihre intensive Vorbereitung der Vorträge und die sorgfältige Ausarbeitung ihrer Manuskripte. Ebenso danken wir dem Steiner Verlag für die angenehme und effiziente Zusammenarbeit und unseren Mitarbeitenden und Assistierenden sowie Frau Kathy Steffen, ohne deren entscheidende Mithilfe das Kolloquium nicht stattgefunden hätte und der Tagungsband nicht hätte veröffentlicht werden können.

Zürich/Genf, im Herbst 2015

Matthias Mahlmann
Bénédict Winiger
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Property and its limits: historical analysis

PETER GARNSEY, CAMBRIDGE

Introduction 14
I. Property, ownership, absolute ownership 15
II. Limitations to property 21
1. Negative limitations 21
2. Limiting inequality 22
a) Preliminaries 22
b) Models of distribution from Plato to Rousseau, and Christian charity 25
§ 1. Plato and Aristotle 25
§ 2. James Harrington 26
§ 3. Jean-Jacques Rousseau 27
§ 4 Christianity and the right to subsistence 27
3. Redistribution 30
4. Transmission of property 33
5. Redistributive taxation 35

Introduction

The legitimacy of private property or ownership has been an object of contention from antiquity to the age of revolution and beyond, among philosophers, religious leaders, jurists, economists and politicians.[1] In this paper I explore an issue which has received just as much attention, over as long a period of time, and has proved equally controversial. Given that private property is a standard feature of societies that have reached a certain level of civilization and complexity, what limits, if any, should be placed on it, in what circumstances and with what justification? In addressing the 'why' question, I will be particularly interested in examining a criticism of property which runs parallel to the legitimacy issue, that the unequal distribution of property has negative social and political consequences. Property has been seen not only as suspect, but also as *dangerous*.

My methodology is similar to that employed in *Thinking About Property*: I trace the history of thought on property, drawing on key texts that extend over more than two millennia. I have selected these texts because they have been particularly influential, or because they are illuminating illustrations of an important line of thought. Greco-Roman antiquity once again plays a significant role in raising questions and providing exempla which feature in later debate. Of course thought-leaders emerged in later periods too, for example, in the medieval and early modern periods, Thomas Aquinas, John Locke, Montesquieu, Jean-Jacques Rousseau, Adam Smith, among others, while the American and French Revolutions changed the terms of the debate. The dangers of my approach are obvious enough: one can too easily talk of continuities which are not there, or slip into the error of supposing that concepts or ideas are fixed and unchanging. In a brief discussion such as this, I might easily give the impression that I am falling into these traps.

An example of a concept that has not remained the same is property itself.[2] The traditional meaning of property as denoting things immoveable (basically, land) or moveable (chattels, money, etc.) has been extended in modern times to encompass things that are not tangible, in particular, rights, including rights that are claimed over things.[3] I use 'property', for the most part, in the traditional sense of the term, which dominates the discourse in the period that comes within my purview.[4]

1 This was the subject of Peter Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution,* Cambridge 2007 (transl. with corrections and updated bibliography, *Penser la propriété, de l'Antiquité jusqu'à l'ère des révolutions*, Paris 2013). I am most grateful to Raymond Geuss for his invaluable comments on an earlier draft of this paper, and also to Marguerite Hirt, Shelly Hiller Marguerat and Michael Sonensher for their generous assistance.

2 There is a distinction to be made between the 'extension' (denotation) of a concept and its 'connotation' (meaning). In the case of property we are dealing with change in the former sense.

3 Alison Clarke and Paul Kohler, *Property Law: Commentary and Materials,* Cambridge 2009, 17–34; Roger J. Smith, *Property Law*, 8th ed., Harlow UK 2014, 3 ff.

4 Note that John Locke uses 'property' in three senses: first, as any characteristic of something ('proprietas'); second, as ownership of land and other tangibles; and third, in a broad sense, as embracing also life and liberty – as in 2nd Treatise 123; also 87, 171, 173, 222. See Rolf Sartorius, Persons and Property, in: *Utility and Rights,* ed. Raymond G. Frey, Minneapolis 1984, 196–214; A. John Simmons, *The Lockean Theory of*

A second key concept, 'ownership', is closely connected with property; in fact the two terms are often treated as synonymous. It is better to say that ownership points to a particular, and particularly extensive, kind of interest in property, as distinct from more restricted interests in property, which are also available under mature legal systems.

I. Property, ownership, absolute ownership

The prime ingredients of ownership, as defined in the standard account of Anthony M. Honoré, boil down to the following six rights: right to possess, use, and manage the thing; right to the income of the thing and to the capital; and right of transmissibility.[5] For our purposes, two of these items are particularly worth underlining. First, the right to possess (in the account of Anthony M. Honoré) is an exclusive right, in that only the owner has physical control of the thing. Secondly, the right to capital entails the right to deal with the thing in any way the owner chooses, whether to sell it, give it away, bequeath it, or to consume, damage and even destroy it.

If the various constituent parts of ownership, thus outlined, are assembled, then we have something recognisable as absolute or exclusive ownership. It is this concept which appears in definitions of ownership, or property, from the early modern period onward, such as that composed by the English jurist William Blackstone, in 1766: '[Property is] that sole and despotic dominion which one man claims and exercises over the external things of this world, in total exclusion of the right of any other individual in the universe'.[6] This notion has long dominated the field. For example, a clause in the *Code Napoléon* reads: 'La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements'.[7] In our own day, a leader in the Financial Times of June 24, 2015, carried the following pronouncement: 'Our economy and our confidence in our legal system (and hence our politicians) rests on the idea that land can be owned absolutely'. This was a nervous response to the recently published Land Bill of the Scottish government.

Ancient Rome served as the incubator of the notion of exclusive or absolute ownership, for which the preferred term was *dominium*. From Roman law and political philosophy, the concept, or doctrine, passed down into other legal systems, and was taken up by jurists, philosophers and politicians, who in their various ways, and for their various reasons, were concerned to defend property and the *status quo*.

Rights, Princeton 1992, 226–231. John Locke's argument for a non-social, pre-political justification of right to individual property depends on unexpressed sliding between these senses.

5 Anthony M. Honoré, Ownership, in: *Making Law Bind*, ed. Anthony M. Honoré, Oxford 1987; A. John Simmons (Fn.4), 229, justly characterizes Anthony M. Honoré's account of ownership as 'the liberal concept of "full ownership"'. See also György Diósdi, *Ownership in Ancient and Preclassical Roman Law,* Budapest 1970; Alan Rodger, *Owners and Neighbours in Roman Law*, Oxford 1972.

6 William Blackstone, *Commentaries on the Laws of England in Four Books*, Vol. 2, Oxford 1766, 2. Note that William Blackstone, unlike Bartolus (see below) and the Code Civil, does not expressly limit property to what the law allows.

7 *Code Napoléon*, art. 544.

It is worth asking how it was that the Romans came to conceive and implement exclusive property rights.[8] A comprehensive answer to this question – which is beyond the scope of this paper – would revolve around two factors acting in conjunction, imperialism and slavery. Imperialism Roman-style involved the year-in, year-out conscription of peasants on a scale not reached again in European history until the French Revolution and the Napoleonic Empire. There was a trade-off for returning veterans: as Rome expanded at the expense of other communities, part of the conquered land was handed over to the soldiers who had won it, together with proprietal rights – and citizenship. Rights over property were central to the *ius Quiritium,* citizen rights. The logic was simple: farmers, having good reason to defend their land, and with it the territory of their homeland, would make good soldiers.[9] Property was a qualification, the prime qualification, for legionary service in Rome. As to slavery: slavery, along with the recycling of peasant-soldiers, was a feature of Roman society from an early stage and a product of Rome's expansion at the expense of other peoples. In the hands of Roman jurists it became a paradigm of absolute ownership over things.[10]

We are confronted with a paradox. The Romans invented a concept for which they appear to have provided no definition. 'It is well known that no ancient legal text contains a Roman definition of ownership'.[11] So wrote a modern Roman lawyer, and few members of the juristic fraternity would disagree with him. The definitional breakthrough is thought to have come about in the 14th century, when the jurist Bartolus declared that ownership (*dominium*) is the 'ius de re corporali perfecte disponendi nisi lege prohibeatur'.[12]

We have seen that this formula provides the basis for later definitions of ownership, including that spelled out in the French Civil Code. Napoleon, who saw himself as a second Justinian, and his jurists, were in no doubt that they were reproducing authentic

8 The origins of private property in Rome are lost in the mists of time and legend. The institution was certainly in place by the time of the Twelve Tables (trad. mid-5th cent. BC), and was further refined in the context of Rome's imperialist expansion and constitutional development. See Max Kaser, *Eigentum und Besitz in älteren römischen Recht*, 2nd ed., Cologne 1956; ibid., Über "relatives Eigentum" im altrömischen Recht, *ZSS* 102 (1985), 1–39; Luigi Capogrossi Colognesi, La proprietà in Roma dalla fine del Sistema patriarchale alla fioritura dell' ordinamento schiavistico, in: *La Terra in Roma antica: forme di proprietà e rapporti produttivi*, ed. Luigi Capogrossi Colognesi, vol.1, Rome 1981, 135–169. For a recent summary account of Roman property, see Paul J. Du Plessis, Property, in: *The Cambridge Companion to Roman Law*, ed. David Johnston, Cambridge 2015, 175–198.

9 Niccolò Macchiavelli, in the context of the civic Republicanism of the Italian Renaissance, favoured an army of citizen-soldier-landowners over one made up of mercenaries. For bibl., see Peter Garnsey, (Fn.1), 193, Fn. 47. The superiority of a citizen soldiery is similarly asserted by Jean-Jacques Rousseau, Considérations sur le gouvernement de Pologne, in: *Oeuvres Complètes*, ed. Bernard Gagnebin / Marcel Raymond, vol. 3, Paris 1964, chapter XII, 1012–1020, with special reference to Rome and Switzerland.

10 See Orlando Patterson, *Slavery and Social Death. A Comparative Study,* Cambridge MA 1982, 30–31.

11 Alan Rodger, (Fn.5), 1; see Peter Birks, The Roman Law Concept of Dominium and the Idea of Absolute Ownership, *Acta Juridica* (1985), 1–37.

12 '[Ownership is] the right of full disposal over a corporeal thing, except in so far as this is prohibited in law': Bartolus on *Dig.* 41.2.17.1, where Paulus is drawing a distinction between *dominium* and *possessio*. On Bartolus, see Peter Garnsey, (Fn.1), 197–203, with bibl.

Roman law. The fact that no definition of ownership is to be found in Roman juristic writing does not prove that they were wrong.

I do not find problematic the supposed absence of a definition of ownership in Roman law. We often fail to find nominal phrases in Roman legal works where we would expect to do so. Another example is *res nullius,* things that nobody owns, a phrase that appears regularly in juristic writings from the medieval period on, and allegedly not in Roman law. In fact it does make an appearance in the (post-classical) *Institutes* of Justinian, and we are close to it in a few texts of classical Roman law.[13] It is beyond doubt that the classical Roman jurists possessed this concept.[14] What we are dealing with there, as with the apparent absence of a definition of *dominium*, ownership, may be no more than juristic or classical style, as the eminent Roman lawyer David Daube used to say.[15]

Bartolus' dictum is actually a brisk summary of what can be put together from scattered references in Roman public documents from the late Republic (that is, statutes and magisterial decisions), and from juristic texts from the classical period of Roman law.[16] It is no coincidence that the documents in question surface in the decades following the Gracchan agrarian laws (see below), a time when public land (*ager publicus*) was being transferred into private ownership in highly controversial circumstances, and when the distinction between *dominium* and *possessio* was being confirmed and sharpened.

And Cicero has yet to be introduced into the discussion. Legal definitions are even less to be expected in his writings than in the juristic literature. It should not surprise that a statement such as that of Blackstone (cited above) does not appear in any of his works. Cicero did however make the following declaration, behind which lies the understanding or doctrine that a Roman citizen proprietor had exclusive ownership of his property: 'The men who administer public affairs must first of all see that everyone holds on to what is his, and that private men are never deprived of their goods by public acts… Political communities and citizenships were constituted especially so that men could hold on to what is theirs' (*de officiis.* 2.73). What is mine is mine exclusively. As Cicero writes elsewhere: 'Each man should hold onto whatever has fallen to him. If anyone should seek any of it for himself, he will be violating the law of human fellowship' (*de officiis* 1.22).

Cicero is giving voice not to juristic definitions or rules, but to statements of political and, in his view, moral principle. In making his case, he draws on the Greek doctrine of distributive justice, but has drained it of its original moral content, and harnessed it in defence of existing property arrangements.[17] His assertion has to be seen in the Roman

13 A text in the *Institutes* of Justinian reads: 'res nullius in bonis sit'. It is unclear how classical this is. Gaius in *Dig.* 41.1.7.3 has 'quod … nullius est', and in 41.1.7.7 has 'nullius esse'.

14 For a different view, see: Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500–2000,* Cambridge 2014.

15 Personal Communication, David Ibbetson.

16 Key Republican texts include two inscriptions, a *lex agraria* of 111 BC and a magisterial judgement of 115 BC. See Peter Garnsey, (Fn.1), 194.

17 Peter Garnsey, Cicero on Property, in: *Agricoltura e Scambi nell'Italia tardo-repubblicana*, eds. Jesper Carlsen / Elio Lo Cascio, Bari 2009, 157–166.

context. The rights of Roman proprietors had been established and defined by the political and legal authorities over the centuries, and their successors in the Ciceronian age had every reason to expect that they would be protected by those same authorities. If Cicero's tone was particularly shrill, this was because of the immediate background. The Republic was falling apart, the supremacy of the traditional aristocracy (of which Cicero was a recently co-opted member) and their power base in the land were under threat from two forces within their ranks, breakaway generals and populist tribunes. Moreover, not long before, Cicero had himself suffered the expropriation and destruction of his residence in the centre of the city of Rome.

Cicero's *de officiis* gave comfort and counsel to likeminded philosophers, jurists and statesmen through the centuries, in their reaction to the reality, or suspected imminence, of civil strife, or the predatory claims of absolute monarchs and other kinds of interventionist governments. Among those who followed in his ideological footsteps and conveyed a similar message were, to name but a few, Jean Calvin in the 16th century, John Locke at the end of the 17th, the Physiocrats, David Hume, Adam Smith, Adam Ferguson, Edmund Burke, and Jeremy Bentham,[18] in the 18th century; from there the baton passed to liberals, neoliberals and libertarians of the 19th and 20th centuries and the present day, in the Old World and the New. To a man, they were (and are) much more concerned to remind governments of their duty to safeguard property, as part of a broader advocacy of an individualistic law of unrestricted ownership, than to produce Blackstone-style definitions.[19] This is true even of John Locke, for whom 'Tully's Offices' had almost biblical authority, and who faithfully repeated Cicero's maxims and prejudices and was a leading advocate of exclusive property rights. Locke does not offer a substantive definition of property or ownership in his *Second Treatise of Government* (where we might expect to find it), or in any other of his writings. Its essential constituents have to be assembled piecemeal from his analysis, by a process not dissimilar from that required to unearth the same concept in classical Roman laws and legal treatises.[20]

Historically, liberalism has not had everything its own way: in modern time socialism, communism, and the welfare state have stood in the way of its dominance. The

18 See e. g. John Locke: 'the great and chief end… of men's uniting into commonwealths and putting themselves under government is the preservation of their property'. 2nd Treatise 124; cf. 87, 134, 222. See Jeremy Bentham, *The Theory of Legislation*, ed. Charles Kay Ogden, London 1931 (orig. 1802, in French): 'He [sc. the legislator] ought to maintain the distribution as it is presently established. It is this which under the name of justice is regarded as his first duty. This is a general and simple rule, which applies itself to all states'. Bentham contrived to combine this position with a utilitarian structure. Edmund Burke was particularly close to Cicero in his convictions and in the passion with which he aired them. In *Reflections on the Revolution in France*, London 1790, he mounted a furious and sustained attack on the confiscation of ecclesiastical property by the revolutionaries in France.

19 The extreme severity with which property offences were punished by the judicial authorities in Britain and European countries in the early modern and modern periods shows how assiduously governments did their 'duty' in protecting property. In England and Wales, e. g. between 1816 and 1835, more than 100 executions per annum were carried out for property offences, often quite minor. See Richard J. Evans, *Rituals of Retribution: Capital Punishment in Germany, 1600–1987,* Oxford 1996, 228–229.

20 See A. John Simmons, (Fn.4), 230–231; cf. 227: 'The only definition of property offered by John Locke and the only one that is consistent with all his claims about property is that which one has a right to'.

German experience is particularly interesting in this regard. The idea emerged in political circles in 19th century in Prussia, more particularly among so-called 'social conservatives', that property entails obligation and must serve the public interest.[21] This was a direct challenge to liberalism, and provided an ideological basis for the authoritarian welfare state of Otto von Bismarck. The same doctrine survived the turmoils of the first half of the 20th century to gain a place in the constitution of the Weimar Republic of 1919 and in the Basic Law of Germany of 1949. The clause is unique in the Constitutions of Nations:

> 'Eigentum verpflichtet. Sein Gebrauch soll zugleich Dienst sein für das Gemeine Beste' (*Weimarer Verfassung*, 1919, Art. 153.2).
>
> 'Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen.' (*Grundgesetz für die Bundesrepublik Deutschland*, 1949, Art. 14.2)[22]

The origins of this and associated ideas, which in one way or another encroached on the sovereignty of the interests of the individual, lie deep in the past, in the first place in classical Greek political theory, and secondly, in the thinking of the Church Fathers, and those writing under their influence.

Thus, in Plato's vision, ownership ultimately lay with the polis rather than with the individual:

> 'And let the apportionment be made with this intention, – that the man who receives the portion *should still regard it as common property of the whole state*, and should tend the land, which is his fatherland, more diligently than a mother tends her children.
> I as Lawgiver make this ruling – that both you yourself and this your property are not your own, but belong to the whole of your race, both past and future, and that still more truly does all your race and its property belong to the polis'.[23]

Aristotle is well-known as a strong advocate of private property. If we look closely, however, we find that he steers a course between private property and common property: his individual proprietors hold land as their own, but make it available for common usage.[24]

Early Christian writers, beginning with Augustine, in promoting almsgiving, argued that the rich should remember that they were merely tenants and managers of property,

21 Key spokesmen for this viewpoint, to which they came from different angles and backgrounds, include von Radowitz, Rodbertus, Stahl, von Gerlach and Wagener, the last of whom was adviser to Bismarck on Social Policy in the 1860s and 1870s. Hermann Wagener, *Die Lösung der sozialen Frage vom Standpunkt der Wirklichkeit und Praxis. Von einem praktischen Staatsmanne*, Bielefeld/Leipzig 1878, is a classic text; in general, see Hermann Beck, *The Origins of the Authoritarian Welfare State in Prussia: Conservatives, Bureaucracy, and the Social Question, 1815–70*, Ann Arbor 1995.

22 In each case there is a preceding clause which guarantees individual property rights.

23 Plato, *Laws*, 740a; 923a.

24 Aristotle, *Pol*. 1263a 25 – b 14, 1329b 40–1330a 3. His account makes room for public as well as private property. The former will support religion and public meals, the latter will be open to common usage. See Jill Frank, *A Democracy of Distinction: Aristotle and the Work of Politics,* Chicago 2005.

not owners, for *dominium* lay with God alone. Wealth carries obligations for the owner, who must not enjoy it for its own sake, but use it for the cause of justice.[25]

Among those operating within the thought-world of Christianity, and receiving and transmitting ideas such as these, is to be counted the high priest of liberalism, John Locke. He asserted that we are stewards and trustees of property, which is exclusively God's,[26] and, furthermore, that God has commanded us to pursue the social good, or the common good, which ultimately means, the preservation of all mankind, as well as our own self-interest.[27]

It seems obvious that the 'general Good' does not always coincide with the interest of the individual, and John Locke's arguments for reconciling the two do not stand up to close scrutiny. That is not to say that they were not influential: on the contrary, they have been hailed (by one of his modern interpreters) as a 'stunning success'.[28]

John Locke got into difficulties because he was intent on constructing a morality based on the rights of individuals. His 'achievement', which helps to explain his popularity among later liberal thinkers, was to collapse the public good into private interest. That is not to say that there no inconsistencies and ambiguities in the positions taken up by, say, Plato and Aristotle. However, they made a more serious attempt to accommodate an other – regarding morality within a private property regime.[29] We shall see later that a number of commentators who countenanced the imposing of limits on property as a way of averting or resolving problems arising out of economic inequality – and who sought guidance in this from ancient exempla – are found straddling apparently conflicting positions.

25 See Don J. McQueen, St. Augustine's concept of property ownership, *Rech. Aug.* 8 (1972) 187–229; Peter Garnsey, (Fn.1), 93–94.

26 See e. g., 1st Treatise I, 39: 'In respect of one another, men may be allowed to have propriety in their distinct portions… yet in respect of God the Maker of heaven and earth, who is sole Lord and proprietor of the whole world, man's propriety… is nothing but the liberty to use… which God has permitted'.

27 See e. g. A. John Simmons, (Fn.4), Chapter V; Steven Forde, Natural Law, Theology and Morality in Locke, *AJPS* 45 (2001) 396–409; Shelly H. Marguerat, *The Origins of Property Rights: A Comparison on the Basis of John Locke's Concept of Property and his Natural Law Limits based on Reason*, Thèse de Doctorat, Geneva 2014. Christian origins have been detected behind Locke's trademark thesis that labour establishes right to ownership. On the other hand, Locke was rather less committed to charity than early and medieval Church Fathers had been. Charity makes one appearance in the First Treatise (at 42) and is absent from the Second Treatise. 'Venditio' is a brief essay on the subject: see John Dunn, Justice and the Interpretation of Locke's Political Theory, *Political Studies* 16 (1968) 68–87. For Locke on charity (and in general on the influence of Christianity on his thought), see also Jeremy Waldron, *God, Locke, and Equality*, Cambridge 2002, 177–187.

28 Steven Forde, (Fn.27), 402.

29 See also Jean-Jacques Rousseau, Projet de constitution pour la Corse, in: *Oeuvres Complètes*, ed. Bernard Gagnebin / Marcel Raymond, vol. 3, Paris 1964, 951. His agrarian law included measures to increase public property at the expense of private, on the grounds that the latter should always be subordinated to 'le bien public'. Cited p. 27 below.