

Property Rights for a New World: Adapting to an Ethic of Sustainability

Key words: property rights, sustainability, land ethic, tenure review

SUMMARY

This paper reviews some of the standard conceptions of property, acknowledging that western property regimes have served the requirements for productive land and resource use, enabled economic growth, and provided a focus on individual rights. Balanced against this, a review of the emerging concept of sustainability suggests that environmental integrity, social equity and a responsibility for the common good are necessary requirements for continued existence on this earth.

The paper then contextualises the discussion to the New Zealand tenure review programme implemented during the last decade to reassign property rights in the South Island high country. The goals of the programme include the more effective management of the land, protection and restoration of land, and provision of public access. These goals seem to correlate with aspects of the sustainability goals, but in fact there has been much concern that it is reinforcing and expanding the property rights of previous leaseholders, who obtain freehold title freed from most management constraints, and are therefore able to profit from new uses and development opportunities, higher valuations, while also being able to significantly alter the iconic landscapes.

In particular, two recent court decisions have similarly reinforced property rights by denying public access rights over pastoral lease land and by dismissing the common goods of stunning views, iconic landscape, and high ecological value from the lease valuations.

Finally, examples and models of an entirely new paradigm are considered, including the application of a land ethic, the adoption of the Earth Charter, and accepting a new covenant with the earth. In spite of the apparent power of the current discourse on sustainability it seems that in New Zealand, constitutional, statutory and judicial law is maintaining strong protections for individual property rights and making little effort to address the common good.

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1. INTRODUCTION

Before the establishment of a property regime, land was common to all humankind, and when there seems to be plenty to share without causing conflict between users (e.g. hunters, gatherers, pastoralists, and settled home makers) the land can remain as part of the global commons. But as society develops, the demands for individual and private access to property increases. It has been argued that the commons may not provide a satisfactory place or institutional arrangements upon which to base sustainable production (Hardin 1962). Private property has developed to provide benefits to individuals and also to serve the common good. The current property regime has successfully supported the economic growth of the past 200 years of capitalism and colonialism, and as an institution it still holds considerable power. But responses to the environmental losses we are now seeing require institutions to support sustainability; to restore ecosystems, to enhance social and cultural wellbeing, and to adapt to a world of limited resources.

While there are multiple global statements, protocols and agreements promoting sustainability, and in New Zealand, specific legislation, the Resource Management Act, that requires all decision makers to consider the sustainable management of natural and physical resources, the protections of private property stand firm against infringement. Recent New Zealand court cases questioning the nature of property rights in pastoral leases, provided an opportunity to assert a public benefit over a private right, but the decisions followed a conventional property rights perspective and further entrenched the exclusive nature private property.

The following discussion examines some of the philosophy of property; how it has successfully supported economic growth, but how it may fail in the future dealing with environmental sustainability and social equity. The paper concludes by suggesting alternative paradigms that could take us forward into changing environmental and social conditions.

2. PROPERTY RIGHTS

There is nothing inherently prescribed in a property regime. Property regimes develop merely to suit the needs of society. The concept of property is always subject to reinterpretation, and open to change, dependent on the social, economic and environmental conditions of the time. The institution of private property is a social arrangement that has been established to allow for the protection of a bundle of rights that we choose to attach to property. As a part of the public infrastructure of a society, the institution should promote the welfare or common good of society. The institution imposes some costs on society in the form of legislation and regulations, in the establishment of cadastral infrastructure (the public record of these property rights), in the restrictions imposed on the wider public when private rights are asserted, and in the inequality arising from property held by some to the exclusion of others (Rousseau 1755a;34). Society would only initiate such a property regime if the benefits outweighed the costs, so a private property institution must necessarily provide significant benefits to society. The benefits may

include the incentive to use and manage property productively (to add value and increase cash flow from production), to allow for capital gains through a land market, to allow private owners to reap the rewards of investment in land, and generally to contribute to economic growth. Social benefits accrue when individuals have a place of retreat: to seek seclusion and privacy within their exclusive property (Freyfogle 2009;16). Individual freedom is an ideal that is highly valued in western society, and property ownership enhances a sense of freedom.¹ It has also been asserted that property is required to support democracy – the necessary dispersal of power from a central government to a populace empowered by having authority over land and property (Freyfogle 2009;15-16). Land owners have some autonomy from the absolute power of the state. However, other writers recognise that “Private property, far from enhancing democratic institutions, can skew them in favour of the wealthy, and so can undermine the realization of equal participation in the political process” (Ziff 2000;22).

Many philosophers have written about the nature of property, but the influence of John Locke (1690) echoes through the records of colonial and capitalist expansion throughout the new world. Locke asserted that originally the earth was provided by God for all mankind - it was an open commons whereby all people had access to all the land and resources available to them. The land could produce food, shelter and essential needs to simple people living in a state of nature. The land could however be appropriated into private possession by the application of labour. Man [sic] could claim individual (and exclusive) property in as much as he could till, improve, cultivate and use, subject to a limit; he should only take what he needs and not so much as will spoil (Locke 1690;132). This benefited all mankind because the land could be vastly more productive as a result of individual labour, and such additional productivity could allow for the development of a civil society. So private property came into being by individuals working the land, and the value in land was almost completely to be gained from the labour applied to the land, not from the land itself:

what is owing to Nature and what to labour – we shall find that in most of them ninety-nine hundredths are wholly to be put on the account of labour. ... the nations of the Americans ... are rich in land and poor in the comforts of life; whom Nature, having furnished as liberally as any other people with the materials of plenty – i.e., a fruitful soil, apt to produce in abundance what might serve as food, raiment, and delight; yet, for want of improving it by labour, have not one hundredth part of the conveniences we enjoy, and a king of a large and fruitful territory there feeds, lodges and is clad worse than a day labourer in England. (Locke 1690;136 para 40-41).

¹ “Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference. It is as if property shifted the burden of proof; outside, the individual has the burden; inside, the burden is on government to demonstrate that something the owner wishes to do should not be done. Thus, property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owners.” (Reich 1978;180).

Locke's justification for property asserts the right in property, but also expresses the duty to cultivate and produce on the land. This was supposedly the law of Nature – God's law – and inherently valid. The labour theory of property was applied in the minds of many colonial writers to justify the wastelands doctrine:

Who has the right to most land? He who has cultivated it. This is God's law, and all the chatter about rights of the natives to land, which they have let lie idle and unused for so many centuries, cannot do away with the fact that according to this, God's law, they have established their right to a very small portion of these lands.

Land should no more be considered property of the uncivilised human beings who find themselves upon it, but cannot use or improve it, than of the wild animals of a lower order who roam over it for food or prey, with as much but scarce more ignorance of its beneficial capabilities, and equal inability to turn them to use. (Nelson Examiner 1843).

Many other writers have developed arguments for a theory of property rights. For example, Tom Paine (1795) similarly recognised that originally the earth should be held in common by all people, but that appropriation into private ownership was justified because it promoted the common good. Private property facilitated increased productivity providing sustenance well beyond the owner, increased private and public wealth, and contributed to economic development. Interestingly, Paine recognised that the appropriation of land into private ownership produced social inequality between those who held land and those who did not - the claims for exclusive private property implicitly dispossessed others who were not owners. Property is about power and exclusion (Cohen 1927;158) and this clearly leads to inequality. Whether this is just or not depends on the public benefits that may be gained by the property regime. But Rousseau (1754) warns in his assault on private property:

The first man, who having fenced in a piece of land, said "This is mine," and found people naïve enough to believe him, that man was the founder of civil society. From how many crimes, wars, and murders, from how many horrors and misfortunes might not any one have saved mankind, by pulling up the stakes, or filling up the ditch, and crying to his fellows: Beware of listening to this impostor; you are undone if you once forget that the fruits of the earth belong to us all, and the earth itself to nobody. (Rousseau 1755b)

3. INDIGENOUS PROPERTY

Tribal societies also developed systems of land use, management and allocation of rights in land, and many had very sophisticated property arrangements that supported the common good. Most however, did not aggregate these property rights into private property as known to western law (Freyfogle 2009;6). The land had special characteristics that emphasised the close relationship between the people and the land. The land was often conceived of as an ancestor, a mother, a part of the wider family of animate and inanimate beings. The relationship was evidenced by the responsibilities and duties that the people had towards the land. The land had inherent value; not because it could provide goods and services to humankind, but because the

land was more literally a gift from God - part of God's creation. There were rights that attached to the land, but the land relationship was about the responsibilities that arise from occupation and from being part of that indigenous community. The attachment to the land was also illustrated by the responsibility to apply work to the land to enhance the connections to, and the wellbeing of family and community. In a general sense, this enabled the land to be used sustainably.

Most societies have at some stage realised the importance of living on this Earth sustainably - although many have collapsed before they have been able to adapt to the inevitable changes brought by human carelessness of the Earth - a fate that has befallen some indigenous societies as well - Rapanui (Easter Island) for example.

4. COLONIAL EXPANSION

The drivers promoting the colonisation of the new world included the push factor; the desire to escape from the increasingly industrialised, crowded and polluted urban centres of Britain, and the corresponding pull factor; the incentives to own property, to assert the dignified independence of production from ones own property. The Europeans came to settle and to tame new lands, and the legal, social and political institutions developed to support the rights attaching to private property. Private property was easily justified and a regime of rights was established that encouraged colonisation into the new world and enabled capitalism to thrive. Western tenure emphasised rights but relegated responsibility to an optional category.

5. SUSTAINABILITY

The classic definition of sustainable development² suggests a concern for meeting the basic needs of people now and into the future, within the carrying capacity of the Earth. Along with maintaining ecological integrity, avoiding over-exploitation of resources, and ensuring that our emissions into the air, water and land (what may be seen as the global commons) do not exceed the absorptive capacity of the Earth, there is fundamentally within the concept of sustainability a concern for global equity. How can the disparity in access to the resources of this Earth be justified, where relatively few people are in control of the majority of resources, and relatively many are excluded from these resources necessary for the maintenance of even a basic level of needs?

Sustainability, therefore, implies achieving a level of equity such that all people have access to a basic level of resources, and that we use the land responsibly. That implies that we need to reduce our consumption, and abandon our focus on the exclusive nature of rights in individual property. It must refocus our institutions on the common good, and move us away from self-serving behaviour.

² see Brundtland - Our Common Future 1987. "Meeting the needs of the present generation without compromising the ability of the future generations to meet their own needs."

6. HIGH COUNTRY AS CROWN LAND

In New Zealand, the South Island high country is roughly defined as the land of the eastern foothills and high plateaus of the Southern Alps stretching from Southland, through Central Otago, inland Canterbury, and the Marlborough ranges, incorporating about 2.3 million hectares of leasehold land. Although much of this area (at least below a certain altitude) was originally forested, clearances (mostly by fire) have changed the land cover to open tussock land that is well suited to pastoral farming. The high country landscape is displayed as a fundamental image of New Zealand – the tussock sheep country against the backdrop of the snowy Southern Alps. It is also the land area now generally regarded as the home of the iconic New Zealand pioneer where those attributes of resourcefulness and independence are born. The land is primarily the home of the New Zealand merino (fine wool) industry. Merino sheep thrive in the extensive open and high altitude tussock lands, and this high country allows for high altitude summer grazing and winter pasturage in the lower valleys and river and lakeside plains - in other words, land and stock management requires the full range of high mountain tops and lower altitude land.

The high country is, and has always been, a fragile land, as indeed human existence and useful production has been fragile and vulnerable there. It was fundamentally for that reason that upon the settlement of new lands, this high country was retained in Crown ownership and control, so that limits on land use could be maintained by clearly constrained pastoral leases. The land could best be looked after by allowing only low density grazing. The land is still very susceptible to erosion, aggravated by over-grazing. It is also susceptible to rabbit infestation, exotic and invasive weed species, and extreme climatic hardships. The high country leaseholders have mostly farmed these lands with at least some consideration of their stewardship role on the land. Many of the pastoral leases have been passed down through several generations and, like property owners generally, the lessees have protected their investment by caring for the land. The leases are generally for 33 years and are then perpetually renewable, so the sale and purchase value of these leasehold properties appears to match the value of similar freehold properties – often selling for tens of millions of dollars.³

New demands for more land to be added to New Zealand's conservation estate, for more diverse productive land uses (especially vineyards, but also for example, vehicle testing grounds), and for different recreational opportunities (adventure tourism, skiing, and the more traditional golf, hunting and fishing), have put more pressure on this high country, and more value can be extracted by non-pastoral uses.

A tenure review programme has been initiated by legislation⁴ to allow for the voluntary freeholding of productive lands, the return of lands of significant inherent value to the Crown's

³ for example, the 78,000ha St James Station was sold to the Crown for \$40m in 2008.

⁴ Crown Pastoral Land Act 1998. section 24 objectives: sec 24 "To promote the management of the land in a way that is ecologically sustainable, To enable land capable of economic use to be freed from the management constraints resulting from its tenure (as pastoral leasehold), To enable the protection of significant inherent values of land by (i) creation of protective mechanisms, (ii) the restoration of the land concerned to full Crown ownership

conservation estate, and some lands to be retained under lease or some other control regime⁵ to regulate land use. This process has allowed for the removal of the Crown's lease restrictions in favour of the management processes under the Resource Management Act (RMA) administered by local and regional authorities. This has not necessarily enhanced the sustainable management of these lands. The Parliamentary Commissioner for the Environment states: "Tenure review seeks to remove management constraints from productive land, taking for granted that any adverse environmental effects will be controlled by RMA authorities. ... but regional and local plans as they stand may not be able to adequately manage land use intensification in practice." (PCE 2009;77).

The process of tenure review has usually resulted in the high altitude lands reverting to Crown ownership to be added to the conservation estate, and the lower land converted to freehold ownership to be available for new production and unconstrained land use. While this transfer of property rights has often limited the farmers' opportunities to continue pastoral farming, it has allowed them to capture high additional value in development rights. These windfall benefits accruing to former leaseholders by gaining freehold property could have been granted to the community if there had been a will to prioritise sustainability or the common good ahead of private property rights. As Freyfogle has suggested, we should "get rid of any presumed right for landowners to initiate new land uses" (2009;22). The community should benefit from the increased value of the new tenure and development opportunities.

7. HIGH COUNTRY AS PRIVATE LAND

The South Island high country has been held under some form of lease or pastoral license since the 1860s. The Crown holds the underlying title and the farmers lease the unimproved land for pastoral farming. The farmers then occupy, improve and manage the land for their purposes and retain ownership of all improvements and the means of production. The farmers therefore use and occupy the lease land in exactly the same way as if they were freehold owners, and have been well enculturated into the belief that they have a complete bundle of rights in the land (except for some legislative land use constraints).

This has enabled leaseholders to benefit from their investments in the land and the means of production, and to make sensible management decisions to care for their land. The objectives of the High Country Accord are "to convince the New Zealand government and the people that private ownership and stewardship is the best way to protect the environment, economy and cultural heritage of the South Island high country." (High Country Accord 2009). Indeed it would be difficult to argue against the proposition that the high country that is so highly valued for how it is, is in fact that way because of the specific management practices used for the last

and control, and Subject to the above, to make easier (i) the securing of public access to and enjoyment of the land, and (ii) the freehold disposal of land."

⁵ for example, conservation covenants

150 years.⁶ Perhaps those practices, facilitated by exclusive rights of possession, are enhancing the sustainability of those lands.

8. RECENT CASE LAW QUESTIONING PROPERTY RIGHTS.

8.1 The New Zealand Fish and Game Council v Attorney-General 2009

In 2009 the New Zealand High Court was called upon to examine the nature of the property right held by high country lessees particularly in respect to the right of public access on and over these lands. The argument therefore was very directly about the excluding power of the leaseholder over his or her lands. The Plaintiff was the New Zealand Fish and Game Council, a statutory body established (inter alia) to represent the public's interests in fishing and hunting. The case, therefore, at least implicitly, was brought to claim the rights of the general public to access pastoral lease land; in other words, the common good against the continued protections of the exclusive interests of private property. The respondents were the Commissioner of Crown Lands and Trustees of the High Country Accord; representing the Crown as the underlying owners of the land, and the lessees as the current occupiers and perpetual possessors of the land.

The High Court began its analysis by stating that “The law generally provides that people who occupy property pursuant to a lease enjoy ‘exclusive possession’.” (NZ F&G para 1). There was at least some uncertainty about the law in this respect. In Australia, the *Wik* decision⁷ acknowledged that pastoral leases did not necessarily grant exclusive occupancy, and especially that the indigenous people had continuing rights of access to their lands and natural and cultural resources that had not been extinguished by the issue of a pastoral lease there. Various New Zealand critics of the government's high country tenure review process picked up on this distinction and advocated for a similar interpretation about the non-exclusive nature of New Zealand pastoral leases.

The High Court examined and analysed several Australian cases, and although the *Wik* case found in favour of non-exclusive rights attaching to pastoral leases,⁸ other cases⁹ “emphasised that exclusive possession was synonymous with legal possession, and brings the right to exclude others...”¹⁰ and “The legal right of exclusive possession represents an interest in the land, and is protected by what is commonly referred to as the right to quiet enjoyment.” (NZ F&G para 8).

It was clearly argued that in order for the pastoral lessees to undertake pastoral farming effectively, which was the purpose of their lease, they needed the ability to exclude. Essentially

⁶ even in spite of the obvious failures of those practices: erosion caused by inappropriate over-grazing, rabbit infestations and exotic weed colonisation.

⁷ *Wik Peoples v Queensland* [1996] HCA 187 CLR 1

⁸ essentially because the leases were a creature of statute (not like common law leases), they did not expressly state that the lessee obtains exclusive possession, and the number and nature of the limits on the property mean that exclusive possession is not given. (NZ F&G para 14)

⁹ for example *Western Australia v Ward* (2002) 213 CLR 1 (- the quote here is actually summarising McHugh's dissenting opinion), and *Wilson v Anderson* (2002) 213 CLR 401,

¹⁰ (NZ F&G para 8)

it was found that “the lease was very similar to, if not identical with, a grant of the fee simple” (*NZ F&G* para 42). The leases are perpetually renewable, the lessee has an obligation to occupy, improve and use the land productively, so in essence they encompass similar rights to an estate in fee simple, except for some restrictions on use; the need to pay an annual lease fee, and then to necessarily negotiate the terms of the lease renewals.

The decision was a clear statement of support for the property rights of a lessee. The property rights approach is obviously well entrenched in New Zealand property law. The argument for, and consideration of a wider public interest supporting the common good was dismissed, and there was little indication that the privileges and responsibilities of property could be promoted. The court could have viewed ownership of land (the exclusive appropriation of it into private property) as a privilege, and as Mill has stated: “The privilege, or monopoly, is only defensible as a necessary evil; it becomes an injustice when carried to any point to which the compensating good does not follow it. ... For instance, the exclusive right to the land for the purpose of cultivation does not imply an exclusive right to it for purposes of access; and no such right ought to be recognised, except to the extent necessary to protect the produce against damage, and the owner’s privacy against invasion” (J S Mill 1848;98).

8.2 Crown Lands v Minaret Station ltd 2009

The second case involving the high country is a case brought to the Land Valuation Tribunal relating to the annual rental fees charged on these leases.¹¹ Since the creation of these leases, the rent fees have been set at 2% of the unimproved value of the land. It was assumed that this broadly related to the productive and economic potential of pastoral farming incomes. In 2007 the government proposed that a fair rent should include the other intrinsic and amenity values of the land - those public and common good values - spectacular locations and views of mountains and lakes. The increased rent would increase the government’s income from these leases, decrease the ability of pastoral lessees to cover the costs of land management, and (as was suggested was the real reason for the proposed valuation policy) would force lessees into the tenure review process. In another victory for the pastoral lessees and for property rights,¹² the Crown’s policy was ruled invalid and rentals should be based on the economic return available within the limits of the lease restrictions of land use.¹³

These issues, brought to the New Zealand courts, provide an opportunity to re-examine the place of property in the law. The decisions show that the law is remaining firm on finding for the continued observance of the powers and rights attaching to property. The alternative arguments supporting the duties and responsibilities attaching to property were not brought to the court,

¹¹ *Crown Lands v Minaret Station ltd*. DC DUN LVP2/05 [31 July 2009]

¹² The headlines read “Minaret Station a victory for property rights” August 2009. (Federated Farmers 2009).

¹³ The farmers were on a roll with these decisions supporting their private property rights, and are tempted to take these issues further: “the High Country is not the only area in which the government need to focus its attention. Indeed, the Resource Management Act is crying out for compensation provisions to establish the right of lawful users to receive compensation should a property right be extinguished,” Mr. Nicholson - President (Federated Farmers 2009).

probably because there is little legal precedent to support that view. Leadership supporting a new philosophy of property is required from the academy and politicians to promote social and political change. The courts necessarily over-simplify the conflicts by showing them as battles against a single landowner and the state, so a full understanding of the property rights debate is obscured. To incorporate the ethics of sustainability, the debates should include more characters: other landowners, landless people, adjoining communities, other life forms, natural ecosystems, future generations.

It may reasonably be expected that the Crown should actually be siding with the public in this democratic system, looking to sustainability in all its guises as a guiding objective. In fact, there is still a very strong advocacy from government (and, as we have seen in the cases presented here, from our common law courts) for the protections inherent in the property regime that has been the backbone of the capitalist growth of New Zealand since colonisation. There is little indication that this paradigm will be easily overturned by the demands of sustainability, of a new land ethic, or of a new covenant with the earth.

9. CONSTITUTIONAL CHANGE

While most countries have a written constitution to guide the balance of power between the various branches of government and the people, and many countries have a specific provision in that constitution for the protection of private property, New Zealand currently has no written constitution and no explicit or entrenched protections of property. A proposal several years ago was introduced to parliament to extend the New Zealand Bill of Rights with a property right protection clause. At the time it was set aside, but it could potentially be reintroduced at any time. At the same time, several countries are proposing constitutional amendments in the opposite direction. Germany is looking at a proposal that states: “Property imposes duties. Its use should also serve the public well-being and the sustainability of natural conditions of life” (Bosselmann 2009;11). In a similar vein, Brazil’s constitution defines property rights to include environmental responsibility.

10. A LAND ETHIC

In 1949 Aldo Leopold wrote of a new way of perceiving our relationship with the earth. His Land Ethic has become a classic – illustrating how land must be viewed as a “community to which we belong” (Leopold 1949;xviii) in order to care for the land. This ethic emphasises the moral responsibility all humankind has towards the land, and redirects us strongly away from asserting rights over our land as possession or commodity or property. Leopold understood that this may be an idealistic goal and, like sustainability, it is one that must be aimed at. “We shall never achieve harmony with land, any more than we shall achieve justice or liberty for people. In these higher aspirations the important thing is not to achieve, but to strive.” (Leopold 1949).

The law and political policy do not account for love and respect for the land, so it may be expecting too much that court decisions reach beyond the precedent of centuries of increasing enforcement of property rights. Neither the land ethic nor even the principles of sustainability have made significant inroads on the legal standing of property rights.

11. THE EARTH CHARTER

The Earth Charter is another relatively recent initiative to bring nations and their institutions to a new agreement about protecting land for the common good. The charter represents a new vision for the Earth; incorporating respect and care for the community of life, ecological integrity, social and economic justice, and democracy, nonviolence, and peace. It makes a passionate plea for sustainability: “Let ours be a time remembered for the awakening of a new reverence for life, the firm resolve to achieve sustainability, the quickening of the struggle for justice and peace, and the joyful celebration of life.” (The Earth Charter).

12. A NEW COVENANT WITH THE EARTH

A new covenant with earth requires the confirmations and assurances that come from knowing that we share a common human condition and that there are ways we can help one another accept and live by it. We require not only individual, but collective acceptance of the reality and rules with which we must abide if life in abundance is to continue to flourish on the finite planet. We need to promise to one another and to all cohabitants of Earth, present and future, that we will accept the same risks, and the same burdens we expect them to accept, and that we do this for their sakes as much or more than for our own. (Engel 2009).

13. CONCLUSIONS

Private property has served the capitalist and colonial systems well. Property has facilitated the investment in production and access to and exploitation of resources. Private property is at the heart of capitalism; it allows for the means to create and accumulate wealth and promote economic growth. Property produced the concept of land as a commodity. When the earth supported a relatively low population, and seemingly held unlimited resources, parts of the earth flourished and provided a very comfortable, safe and healthy life for some societies – a reasonable goal for all people. But now whatever is left of the gift from God of all the earth to all the people is diminishing rapidly. It is evident that property ultimately degrades the common good. People are excluded, land accumulates in hands of the wealthy few, ecosystems are degraded, community interests are overridden. Private property allows for disproportionate and unequal possession of the earth that may increasingly cause conflict.

The environmental crisis will eventually force a change from this position. It is now widely recognised that the Earth is reaching its carrying capacity (if it has not already reached it), and the ideal of sustainability is being discussed widely and incorporated into international agreements and national legislation. Property has continued to provide for individual rights but it has often ceased to provide for the common good. The ethics of sustainability will require a change from an insistence to protect individual property to a concern for communal (i.e. humans within our limited ecosystem) welfare.

For the last 150 years, the common good has been generally interpreted as the economic good flowing from property to support our capitalist society and economic growth. Increasingly now, the common good is being reinterpreted as the retention of environmental integrity. Property

needs to be re-evaluated to incorporate this new goal. There are several models that could guide a reconsideration of the land, and indeed the whole earth, as part of the common heritage of all humankind. Much could be gained by adopting a more indigenous perspective on the land, by applying the land ethic, and by adopting the Earth Charter.

However, the institutions of property cannot be overturned unilaterally or rapidly. There is strong evidence that property will be strenuously defended by those who hold it, and they must be encouraged to withdraw their defence of property, by understanding a new ethic of sustainability. Property “needs a good degree of stability over time” (Freyfogle 2009;19) so any re-formulation of the role expected of private property towards this land ethic or covenant must develop in some controlled way. Land owners should not expect an unchanging institution, but they should be given adequate notice of the necessary switch from a rights-based regime to a responsibility-based regime.¹⁴

In the conflict between property rights and sustainability, current institutions are still favouring private property rights over the wider common good. A new formulation about the limits of property needs to be developed, to address the needs of a world in crisis. And a view of the earth as described below, may help us take that path towards the common good:

Alone in space, alone in its life-supporting systems, powered by inconceivable energies, mediating them to us through the most delicate adjustments, wayward, unlikely, unpredictable, but nourishing, enlivening and enriching in the largest degree – is this not a precious home for all of us earthlings? Is it not worth our love? Does it not deserve all the inventiveness and courage and generosity of which we are capable to preserve it from degradation and destruction and, by doing so, to secure our own survival (Ward & Dubos 1972).

¹⁴ and if it comes to conflict over the removal of land rights, then compensation should only be paid if it is in the best interests of the community (Freyfogle 2009;21).

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