Property as a human right and property as a special title. Rediscussing private ownership of land

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The issue of land ownership is central to any discussion on planning and land use policies. What is surprising is that, in the contemporary debate, there are those who argue that property rights are the solution, while others maintain that they are the problem. For some commentators, property rights are indispensable for protecting the most vulnerable sections of society; for others, they are the main cause of the marginalization of the dis-advantaged. Some see them as natural rights; others as socially created ones. This probably depends on the fact that the right to property is one of the most misunderstood of basic rights. One aspect in particular seems to have created confusion also in the debate on land use policies and planning practices: the overlap between the 'general right to hold private property' and 'specific property titles' (in part this is due to the fact that the term 'rights' is often used interchangeably in both cases). This article dwells on this aspect in particular. It considers the main theoretical and practical implications of clearer recognition of the difference between the right to hold private property and specific property titles.

Keywords: Property rights, Land ownership, Classical liberalism, Ccommons, Land grabbing

1. Introduction: back to basics

As Ellickson (1993: 1317) aptly observes: because human beings live on the surface of the Earth, the pattern of entitlements to use land is a crucial part of economic and social organization. The issue of land ownership is central and decisive for any discussion on planning and land use policies (Popper, 1979; Krueckeberg, 1995; Siegan, 1997; Slaev, 2014, 2015). Today, the question of land ownership has assumed great significance amid a number of pressing problems.

There follow five main examples (which are drawn from a review of articles in this journal): the introduction of property rights in the transition from socialist economies to market ones (Zhang, 1997; Weixin and Dongsong, 1990; Lai, 1995; Bogaerts et al., 2002; Ding, 2003; Ho and Spoor, 2006; Lerman and Shagaida, 2007; Hartvigsen, 2014; Havel, 2014); the problems of formalization of land rights in developing economies (Lemel, 1988; Palmer, 1998; Feder and Nishio, 1999; Gould, 2006; Benjaminsen et al., 2008; Bromley, 2008; Sjaastad and Cousins, 2008; Meinzen-Dick and Mwangi, 2008; Toulmin, 2009; Van Leeuwen, 2014); the so-called problem of 'land grabbing', i.e. large-scale land acquisitions in developing countries (Nolte, 2014; Obidzinski et al., 2013; Osabuohien, 2014; Rudi et al., 2014; Antonelli et al., 2015; Exner et al., 2015; Jiao et al., 2015; Suhardiman et al., 2015); the extensive privatizations ongoing in various Western countries (Gould et al., 2006; Luers et al., 2006; Borsdorf and Hidalgo, 2008); the presumed new forms of ownership represented by so-called 'commons' (Short, 2000; Bryden and Geisler, 2007; Barnes, 2009; Bennett et al., 2010; Kitamura and Clapp, 2013; Lopes et al., 2013; Van Gils et al., 2014).

The European Court of Human Rights has brought the issue of private property to the fore through several much-debated judgements.[1]

What is surprising is that, in the contemporary debate on planning and land use policies, there are those who argue that property rights are the solution, while others maintain that they are the problem. For some commentators, property rights are indispensable for protecting the most vulnerable sections of society; for others, they are the main cause of the marginalization of the disadvantaged. Some see them as natural rights; others as socially created ones.

Unfortunately, as Shaffer (2009: 5) stresses, there is no chasm so

Received 27 March 2017;
Received in revised form 9 October 2017;
Accepted 20 October 2017

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[1] Among the important judgements of the European Court in this regard are the following: *Sporrong and Lönnrot vs. Sweden*, 1982; *Erkner and Hofauer vs. Austria*, 1987; *Carbonara and Ventura vs. Italy*, 2000; *Belvedere vs. Italy*, 2000; *Platakou vs. Greece*, 2001; *Scordino vs. Italy*, 2004; *Guiso-Gallisay vs. Italy*, 2009 (Mengoli, 2014).

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Published Journal Article available at http://dx.doi.org/10.1016/j.landusepol.2017.10.037

	Right to hold private property	*Property title*
Feature 1: rank	First-order right (Human right)	Second-order right (Entitlement)
Feature 2: nature	Abstract	Concrete
Feature 3: dominion	Universal	Individual
Feature 4: variability	Invariable	Variable
Feature 5: alienability	Inalienable	Alienable

Fig. 1. property rights vs. property titles.

wide as that which separates the interest in and attention to property and our conceptual understanding of it. We can agree with Hospers (2007: 61) that the right to property is without doubt the most misunderstood of basic rights. Even John Rawls – the most important political philosopher of the twentieth century and one of the most influential thinkers also in the policy and planning literature – devotes only brief and ambiguous discussion to the matter (Taylor, 2006).[2]

One aspect in particular seems to have created confusion also in the debate on land use policies and planning practices: that is, the confusion between *the general right to hold private property* and *specific property titles* (in part this is due to the fact that the term 'rights' is often used interchangeably in both cases, just as are analogous terms in other languages) (Fig. 1). This article dwells on this aspect. In particular: Section 2 clarifies the distinction between the right to hold private property and concrete property titles; Section 3 evidences the different kinds of justifications involved in the case of abstract rights and concrete titles, and shows how we can avoid misplaced criticisms of property once we take this distinction seriously; Section 4 is devoted to the main implications of the suggested distinction for institutional design and land use policies; Section 5 briefly concludes.

The idea underlying this article is that, also to address very specific problems in particular fields (land-use policies, environmental planning, etc.), it is essential to resume serious consideration of certain background questions. Accordingly, the article will also seek to show that the tradition of classical liberalism was very different from some contemporary 'neo-liberal' simplifications and radicalizations.

2. Focus: two different items distinguishable on the basis of five characteristics

When discussing property, it is essential to distinguish between two items that are not always kept clearly separate:

(i) the right of each individual to hold private property; that is, the formal possibility of *each* individual to become the owner of "things" (for instance, tracts of land or buildings), having personal control on them; in this sense, this is the *general claim* not to be ruled out of the class or category of individuals who may own property; that is, the right not to be excluded from the class or category of potential property-owners (Waldron, 1988: 21).

(ii) the property title (property holding) of *someone* to something; that is, the entitlement of a specific individual – say A – to a specific thing X; in this sense, it is the *concrete claim* to determine the disposition of a particular asset.

We shall consider five crucial differences between the two items: rank, nature, domain, variability, alienability.[3]

The first difference pertains to 'rank'. The right to hold private property is the right to become an owner of something. Note that in the *Universal Declaration of Human Rights* of 1948 the right to property was stipulated as follows (emphasis added): "Everyone has the right *to own property*". This is – for instance in a classical liberal perspective – a human right (Rothbard, 1970; Boaz, 1997; Hospers, 2007); that is, a moral right, a basic right. Human rights are rights of individuals: to say that W is a human right means that each individual has this right. As a human right, the right to hold private property must be recognized in the constitution. It is a *first-order right*. By contrast, the property title to X is a specific and substantive property title to a particular thing. This title will be legitimate if it has been obtained through legitimate processes: for example, the property title of A to X may be legitimately acquired (i) by purchasing it voluntarily and freely from B, (ii) inheriting it from C, (iii) receiving it as a gift from D (where B, C and D have obviously in their turn obtained X by legitimate means). This is a typical *second-order right*. Observe that transfer cannot be exclusively one way: the recipient A must consent to the transfer by B, C or D; even if X is a pure gift, A may refuse it (Narveson, 2001: 94).

The second difference concerns the 'nature' of the right or title. The right to hold private property is *abstract*; it regards, not a particular instance, but all possible instances. The property title on a specific object is *concrete;* it regards a specific item and only that item.

The third difference concerns 'dominion', i.e. *who* possesses *what* right or title. The right to hold private property is a right that – if we agree to recognize it as a basic right – must pertain to all individuals in equal form and to an equal extent: it is a *universal right*. By contrast, ownership as title pertains to some individuals, who will possess it to an extent that all the others are excluded: this is a *singular title*. A property title is the possibility to use a specific thing in a manner such that it becomes in some way a component or ingredient of one's actions. Property titles define someone's sphere of freedom of action in regard to certain objects. Precise property titles have meaning only when conflicting claims on scarce resources among numerous individuals are at stake (Underkuffler, 2003: 12).

The fourth difference concerns 'variability' or 'non-variability'. In

[2] In short: "Rawls is never explicit about what is entailed by the right to hold personal property" (Howard, 1985: 42). Especially because of its vague treatment of the issue of private property, Rawls' theory of justice (as acknowledged by Rawls himself: see 1971: 273–274 and 2001: 138–139) is unable to choose between *property-owning democracy* and *market socialism*. In other words: "Justice as fairness is officially agnostic between two … regimes: property-owning democracy … and liberal socialism" (Taylor, 2004: 437). As Hart (1973: 538) observes in this regard: "Rawls in his book simply lists without argument the right to hold personal property, but not property in the means of production, as one of the basic liberties, though … he does this at some cost to the coherence of his theory".

[3] Here I mainly follow Ferrajoli (2001), although I reach partially different conclusions.

the case of the universal right to hold private property the right itself remains invariant: one cannot become 'more a holder' than others of the fundamental right to property. Specific property titles, however, may vary: obviously, as time passes, one may become the owner of more things (houses, plots of land, cars) or fewer things. In short: while the right to hold private property is in a sense *timeless*, property titles are inherently *time-dependent*.

The fifth difference concerns 'alienability' or 'inalienability'. The right to property as a basic right is *inalienable* (and imprescriptible, indefeasible): that is, it cannot be voluntarily transferred or renounced. By contrast, the title to property is intrinsically disposable and *alienable*: I can freely sell land Y, which until now has been my property, to F. In fact, (market) exchanges can occur only with alienable goods – be they tangible commodities or intangible services (Rothbard, 1962). In short: the possession of a basic human right to property must be sharply distinguished from exchangeable property. As Freeman (2001: 110) writes: "The idea of basic liberties also includes their inalienability: a person cannot contractually transfer basic liberties or give them up voluntarily. No liberal government would enforce a contract or agreement in which one or more persons tried to sell themselves into slavery or indentured servitude, or agreed to give up liberty of conscience and freedom of association by making themselves permanent members of some religious sect. Because people cannot voluntarily transfer basic liberties, such liberties are not like property rights in particular things".

To sum up, we can say that having the basic right to hold private property means having the *basic right* to acquire *concrete titles* in relation to things. There is no redundancy here, and the two levels are clearly separate. Observe that the difference is not between *moral rights* and *legal rights*: both the right to hold private property and property titles can have 'moral relevance' and 'legal capacity' (the right to hold private property may obtain at constitutional level; the property title to something at post-constitutional level).

3. Discussion: two different kinds of problems (and what classical liberalism actually states)

The distinction considered makes it clear that the right to hold private property can be regarded as a human right of the same rank and level as others like the right to free speech, the right to free association, etc. (there are no substantial differences between them – contrary to the belief of those who superimpose the right to hold private property on specific property titles). Individuals have a right to property because they are human beings; they have it *qua* human beings. By contrast, property titles are historically and contingently determined. Not all individuals, but only some of them, possess property titles as a result of historically determined events.

The frequent overlap and confusion between property as an 'abstract basic right' and property as a 'concrete title' has generated numerous misunderstandings, also in planning theory and policy science. Most of the criticisms of the system of private land ownership – for example, the idea that it benefits only the owners *at the expense of the others* – are due to precisely this kind of confusion.

On drawing this distinction clearly, it is evidently the former – i.e. the right to hold private property – that classical liberals (Mises, 1927; Hayek, 1960; Friedman, 1962; Epstein, 2003) have always defended as one of the fundamental individual rights. The fact that such a right exists is decisive for *everyone*, property owners and non-owners. Suffice it to consider the ancient feudal regimes, where only the king had certain rights (e.g. the right to own land) (McClaughry, 1976), and the totalitarian regimes of the twentieth century, which, by abolishing private property (in land as well), created social and environmental disasters (Pipes, 2000).

Feudalism was the system of land ownership where all lands were ultimately owned by the king: he alone had the right to hold this kind of property. Under the system promoted in particular by William the Conqueror (who came to the English throne in 1066) "all land was held to belong to the King as sovereign. The King granted a fief of land to his tenants in chief, nobles who had provided support for the King's defense, or adventures" (McClaughry, 1976: 488). In this case, land was a resource, but not also a commodity. The feudal regime guaranteed that this resource would be devoted to meeting the overriding aims of the feudal system: in this situation, property was not individual; individuals were merely users, "but they lacked the rights to use, convey, and exclude as they saw fit" (McClaughry, 1976: 488). In the feudal age, therefore, peasants and freemen were subject to the arbitrary confiscation of assets and things by the king or his vassals.[4] The feudal system "frustrated and discouraged trade, commerce, mobility and individual freedom. By creating a hierarchical economic, military and political order under the King, feudalism invited the abuse associated with centralized power" (McClaughry, 1976: 489). As well known, the situation began to change in Europe, and especially in England, with the Magna Carta (which was originally known as the Charter of Liberties: Siegan, 2001), with unquestionable advantages especially for the weakest subjects (Schmidtz and Brennan, 2010).[5]

In Soviet Russia all forms of private property were nationalized between 1917 and 1920–apart from modest personal effects; a decree in 1917 in particular abolished private property in land – except for some communal land. In 1920 industrial production in Soviet Russia fell by 82 percent, compared to 1913; grain production declined by 40% (Pipes, 2000: 211, 212). It has been estimated that "had it not been for the black market in food, Russia's cities in the years 1918-192 would have starved" (Pipes, 2000: 213).

Defence of the right to hold private property is therefore not in favour of the effective owners of property tiles Y or W at time t_n, but in favour of all. As Hayek (1982: 121) put it, the recurrent attacks on the system of private property created a widespread belief that the socio-economic order created under this system is one which serves particular interests. "But the justification of the system of several property is not the interest of the property holders. It serves as much the interest of those who at the moment own no property as that of those who do, since the development of the whole order of actions on which modern civilization depends was made possible only by the institution of property".[6] See also Hayek (1988: 77): "The institution of several property is not selfish, nor it was, nor could it have been 'invented' to impose the will of property-owners upon the rest. Rather, it is generally beneficial in that it transfers the guidance of production from the hands of a few individuals who, whatever they may pretend, have limited knowledge, to a process, the extended order, that makes maximum use of the knowledge of all, thereby benefiting those who do not own property nearly as much as those who do".

[4] See Needham (2006: 32): "In feudal times a law-abiding citizen could be sitting peacefully in his garden, which is suddenly invaded by the local lord and his friends on horseback hunting foxes. The citizen has no redress in law, for the local lord has the right to do that. Later, the citizen shoots a wild pig which is rooting in his garden, only to find himself charged with theft, for the local lord has the right to that game also. It is no surprise that in the sixteenth and seventeenth centuries many people emigrated to the United States, in order to acquire land under conditions which gave them more certainty than the feudal land laws gave".

[5] To be noted is that the nationalisation of development rights, which has remained typical of the Great Britain system (and has been widely regarded as a positive aspect), has its roots in the feudal system. "Although modern property rights in Britain are not far short of the kind of rights that are enjoyed by other Europeans, the concept of tenure … is still based on the feudal understanding that there is only one absolute owner of property and that is the sovereign" (Booth, 2002: 131). For a critique of the nationalisation of land-development rights in the United Kingdom, see Corkindale (1998, 1999, 2004).

[6] The same point is stressed by von Mises (1927/; 1985: 30): "In order to determine whether an institutional arrangement is to be regarded as the special privilege of an individual or of a class, the question one should ask is not whether it benefits this or that individual or class, but only whether it is beneficial to the general public. If we reach the conclusion that only private ownership of the means of production makes possible the prosperous development of human society, it is clear that this is tantamount to saying that private property is not a privilege of the property owner, but a social institution for the good and benefit of all, even though it may at the same time be especially agreeable and advantageous to some".

Current naive notions of property descend from ancient forms of social organization in which individual rights – primarily that to property – were by no means universal, and the market did not exist in anything like a complete form. As observed by Heath (1957: 123–124), people usually enjoy the benefits of the existence of the *institute of private property*

> "although their traditional and emotional concept of property in general and of property in land in particular, is as a privilege or personal indulgence from which mankind in general are disinherited and none but the fortunate owner can enjoy. It is as though all property and wealth were personal goods owned only to be consumed or destroyed in self-gratification or sinister and anti-social designs. This is the persistent heritage of the modern mentality from its ancient and totalitarian past, when there was no free exchange economy and few if any free men".

It is quite another matter to question *certain specific property titles* (e.g. on certain plots of land). This can be done, for example, in the following cases (Goldsmith, 1979: 583–588; Wolff, 1991: 83–88). First, because a certain transaction has not been completely voluntary (e.g. it has been forced in some way) or completely transparent (e.g. it is based on misinterpretations due to fraud). Second, because whoever has acquired certain property titles has as a consequence obtained a position of (unjustified and unjustifiable) monopoly.[7] Third, because the transaction has had effects (unwanted and undesirable) on third parties.[8]

4. Implications: questioning the right to hold private property or questioning specific property titles?

To sum up: what matters is recognizing that there is a substantial difference between:

(i) justifying/defending the right to hold private property; that is, providing an answer to the following question: "Why should anyone own anything"?
(ii) justifying/defending specific titles on single items; that is, providing an answer to the following question: "Why should certain individuals own certain specific things?".[9]

In the first case, what may be emphasised are the benefits for all of living in a socio-economic system in which the right to hold private property (including land) exists. The justification in this case is *not* based on the occurrence of contingent events (e.g. specific transactions). In the second case, one may instead argue as to whether A or B have legitimately become owners of X or Y (e.g. certain plots of land). And this can be done by considering whether the process by which they gained possession was legitimate. In this case, the justification is strictly linked to the occurrence of contingent events; that is, specific actions and transactions. (Note that the much-discussed *entitlement theory* of Nozick, 1974, deals almost solely with this latter aspect).[10]

4.1. Three general issues

Taking the above distinction seriously entails adopting a different perspective also in terms of land use theory and land use policies. It is first useful to clarify three general issues that have important implications in terms of institutional design and public policies.

Firstly, let us consider the recurrent debate as to whether property rights are 'natural' or 'social'. Arguing that the right to hold private property is not natural may mean that it is logically impossible to derive its value *directly* from descriptive premises on human nature *as such*. It should be stressed, however, that defining the right to hold private property as 'natural' often simply refers, in the tradition of classical liberalism, to a *universal* right of a *moral* nature. In this sense, human beings are entitled to advance certain claims merely by virtue of their common humanity. Arguing that it is the task of the state to guarantee this and other rights to everyone logically implies that their existence precedes the state's existence. Here 'natural' is not the opposite of 'social' but of 'institutionally generated', 'politically created'. In short, the conceptual sequence is not from *positive law* to *individual rights*, but from *individual rights* to *positive law*. As Gaus (1996: 204–205) observes: "The liberal theory … endorses the idea of substantive moral principles that bind the umpire [the public authority]. Given that the umpire is only empowered to make determinations about what is justified – particularly about our justified rights – … it undoubtedly follows that the umpire's authority … is limited.… The umpire itself is constrained by a law that is morally prior to its authority and its ruling". To return to the central point: property titles cannot, instead, be called 'natural' *in any sense* because they are, by definition, strictly dependent on contingent socio-economic processes. In conclusion: the right to hold private property is generated by a moral assumption – and the concomitant inclusion of this right in a constitution; property titles are instead generated by voluntary agreements – for instance, special transactions between individuals (Hart, 1955).

Secondly, the above-mentioned distinction between the right to hold private property and specific property titles helps also to clarify that the constitution and the law do not allocate or assign particular things (e.g. plots of land, buildings) to particular individuals; they merely provide the framework and formulas by which it is possible to ascertain, once particular facts are known (e.g. exchanges made, transactions performed, etc.), to whom particular things belong (Hayek, 1982, vol. I: 108). The constitution and the law state the general legal conditions under which any individual can acquire or relinquish (titles to) particular things; by themselves, they do not definitively determine the particular property situation in which all individual will find themselves (Hayek, 1982, vol. II: 37, 123). The constitution and the law, therefore, do not have a *directly* allocative effect. Therefore, they can not be devised, or reformed, with allocative intentions: this would be to distort the meaning of the constitution and the law (without achieving the desired goals). This is a particularly important point to be borne in mind especially for countries experiencing a difficult transition to liberal-democratic systems. The transition to a liberal-constitutional democracy, in fact, implies acceptance of the idea that the *basic structure of society* (Rawls, 1971) does not have – and cannot have – directly allocative ends.

Thirdly, neither the right to hold private property, nor specific property titles, can be *absolute*. In the former case, this is impossible because, at least, the right to hold private property must be *co-possible* with other basic fundamental rights. In the latter case, it is impossible because both the transfer and the use of the property must be such that no damage is caused to others, owners or non-owners. One can therefore safely agree with those who emphasize that private ownership "is not the same as absolute ownership" (Christman, 1994: 17).[11] But – differently from what is generally believed – this was already implicit in

[7] The so-called *Lockean proviso* was already an example in this regard (see in particular Locke, 1690/; Locke, 1690 2002: 130).

[8] A further problem regarding property titles is whether their 'original acquisition' was legitimate (in this case, they were acquired at a time when there were no owners from whom to purchase them or obtain them as a gift or inheritance). I will not dwell on this problem here; for the debate on the subject see e.g. Lyons (1977), Wenar (1998), Van der Vossen (2009).

[9] A partially similar distinction can be found in Becker (1977: 23) who, in regard to property, distinguishes between the problem of *general justification* and the problem of *particular justifications*.

[10] By contrast, in Nozick certain individual rights – including the right to hold private property – are simply assumed *a priori* with no argument or specific justification in their regard.

[11] See also Freyfogle (2007: 20–24) and Meyer (2009).

the classical liberal idea of property. This latter was certainly not an idea of absolute, despotic, unconditioned dominion (Wolfe, 2006: 145).[12] This is true even for John Locke.[13] Observe that, to have a market, we need to restrain property rights appropriately. See what the classical liberal Vanberg (2001: 25) writes in this regard:

> "The private property rights that constitute markets are inevitably 'restricted' rights in the sense that they define socially sanctioned limits to what the owner of an asset is entitled to do, and which uses of his property are prohibited in order to protect the interest of other players in the game of catallaxy. In other words, the question of the desirability of regulation cannot be an issue of unrestricted versus restricted rights because a market based on literally unrestricted rights is unimaginable. It can only be an issue of which *kinds* of restrictions are overall more beneficial, i.e. that promise to make the game of catallaxy a more attractive game for all players involved".

From a classical liberal perspective, property rights must first of all be regulated to avoid reciprocal harms. A classical liberal like Siegan (1997: 141), for instance, observes that the existence of a nuisance is "a justifiable reason for restricting property use, because the restriction itself upholds the principle of property rights". As writes another classical liberal, Epstein (2014: 352): "No system of private property lets a person do whatever he will with his land … Any system of private property necessarily restrains the commission of nuisances – usually non-trespassory invasions of waste, pollution, noise, and odors – that emanate from one person's land onto another's. The principle of long-run reciprocal advantage is best satisfied if all owners are presumptively prohibited from engaging in these activities". In short: Individuals should be free to do whatever they like with their own legitimately acquired resources provided that their use of them does not directly and tangibly interfere with other individuals' use of their resources (Barnett, 1998: 74).

Of interest in this regard is that a liberal like Hayek (1960: 340–357), when discussing urban problems, recognized the need for restrictions on the use of lands to avoid negative externalities.[14] An important point to emphasize is that, in a classical liberal perspective centred on individual rights, 'negative externalities' are *not* those that reduce collective welfare (as maintained by orthodox welfare economics) but those that violate legitimate individual situations. Avoiding negative externalities is therefore necessary above all to foster peaceful coexistence (e.g. in places with high concentrations of people and activities like cities). This is a crucial point because it changes the focus of institutional design and urban policies with respect to certain more traditional approaches. Economic efficiency in the traditional sense thus gives way to the minimization of conflicts in the use of resources (Cordato, 1980, 1994, 2007). Note that, on this view, pollution is considered undesirable because it is a violation of the right of non-aggression (e.g. it is a violatio against people's bodies and property).

4.2. Three more specific issues

The proposed distinction can be useful in determining whether criticisms of certain phenomena (e.g. land grabbing or privatization) and doubts about the success of certain measures (e.g. the regularization of informal property situations in certain developing countries) are directed against the right to hold private property *in se* (a position that would be incompatible with the approach of classical liberalism and would suggest different perspectives), or concern how certain property titles are formalized, acquired or distributed (a position which instead could be perfectly compatible with a classical liberal approach). The distinction may be likewise helpful in understanding whether the positive reception of other phenomena (*commons*, for example) is such that they are considered to supersede the individual right to hold private property (in this case there would be incompatibility with classical liberalism and the adoption of a different perspective), or because it is deemed merely a rediscovery of diverse ways to organize property titles (in which case it would be a return to a crucial, and often forgotten, aspect of classical liberalism: Lottieri, 2010; Moroni, 2014).

It is obviously not possible to discuss all these aspects in the space of an article. However, here it is useful to examine some crucial issues. In particular, the following three points can be underlined.

Firstly, defending the right to hold private property (for example, opposing the unacceptable fact that, in some developing countries, women are excluded – totally or partially – from the category of potential owners of land[15]) is different from defending specific titles to specific plots of land. The two problems are at different levels of discourse. Recognizing the crucial importance of granting the right to hold private property (also in developing countries) does not entail acceptance that *any* existing property title is just: the justice of certain property titles, in fact, depends on the correctness of the procedures followed to acquire them, and on the new circumstances of their acquirer with respect to others, and vice versa. According to some commentators, the problem of land grabbing, for example, does not concern the right to hold private property *in se*. Instead, it concerns the not always correct and legitimate ways in which certain lands are acquired and used in certain developing countries: in particular, when acquisitions occur within a public legal framework (governing land issues) that is unclear and unstable; are not based on prior, informed and free consent from the original owners; do not derive from transparent contracts (that clearly specify all terms and reciprocal commitments); take place with the illegitimate assistance of, often corrupt, local authorities (which unlawfully facilitate or even force certain private transactions)[16]; give rise to new forms of unjustifiable monopoly; are destined for activities that have harmful environmental impacts (on people and other properties). The issue of so-called 'land grabbing' is obviously very complex. What is important to point out here is simply that there is a fundamental difference between, on the one hand, those who consider the right to hold private property as the real problem in this case (as in others) because it would imply an extensive and undesirable 'commodification'; and on the other, those who do not see it as the problem but nevertheless consider transactions, acquisitions, and the use of property titles as possible sources of danger if they do not occur in certain ways and according to certain procedures. (Perhaps this latter line of thought can help avoid a dichotomic approach to the problem of land grabbing – between those who see it only as a win–win situation and those who see only social and environmental disasters – and instead favour a more nuanced analysis, as advocated by White et al., 2012).

Secondly, to be noted is that the right to hold private property is a strictly individual right; but property titles are not necessarily connected with a single individual. Indeed, there are diverse forms of collective or semi-collective *private* property arrangements: homeowners' associations, cohousing complexes, residential cooperatives, common pool resources, etc. (Foldvary, 1994; Nelson, 2005). These various forms of 'collective property' do not constitute a *different* kind of property, an *alternative* to public or private property (as usually considered since the well-known work of Ostrom, 1990). This seems true only if we consider private property as the property of a single item

[12] See also Freeman (2011: 20): "Freedom of contract and rights of property are not absolute for classical liberals".

[13] Locke has been traditionally understood as meaning that individual rights are absolute. "But nowhere does Locke say this. … Even the right to property – indeed, that special form of it which is upheld more zealously than any other right in the *Second Treatise* … – could not be unconditional" (Vlastos, 1984: 46).

[14] On this point in particular, see Lai (1999, 2002).

[15] On this issue, see for instance Kalabamu (2006), Mitchell et al. (2008), Unruh (2009).

[16] Note that certain states sometimes *directly* cede land owned *by the state* – or appropriated by the state so that it can be sold (Holmén, 2015: 464–465).

always owned by a single individual for his or her sole use. But it is surely not so: private titles can take many different forms, including several kinds of collective private property. In short: the issue is not to contrast 'private property titles' with 'common property titles' – as usually happens – but to distinguish, *within* private property, the case of 'individual property titles' from that of 'group property titles' (Moroni, 2014). In terms of public policy, therefore, we can favour the formation of 'contractual communities' which accept variegated forms of collective property titles, without thereby questioning (or modifying) the individual constitutional right to hold private property.[17] Policies to foster the desirable formation of various kinds of contractual communities can be, for example, the following (Brunetta and Moroni, 2012): (i) liberalize the forms of residential aggregation and of other types (which are currently rigidly regulated in many countries: in Italy, for example, any residential organization must be a condominium; moreover, the Italian legislation dictates all organizational rules for condominiums in detail); (ii) introduce tax rebates for residential or other aggregations that self-supply certain services (relieving local administrations of certain tasks and expenses).[18]

Thirdly, the proposed distinction highlights that criticisms of particular distributions of property titles – for example, criticisms of excessive concentration into a few hands – must not immediately call the constitutional right to hold private property into question. Rather, we should propose policies that leave the right to hold private property intact and favour a wider distribution of property titles. Hayek (1988: 29–30, 50, 86) speaks in this regard of the desirability of the 'several property' system; an expression that he uses to emphasize that property titles should be numerous and distributed in many hands. The use of this terminology is also suggested by Barnett (1998: 65): the term several property makes it clear "that jurisdiction to use resources is dispersed among the 'several' … persons and associations that comprise a society". In an interesting article, Imbroscio (2013) observes that expressly redistributive policies – both people-based and place-based – have proved ineffectual in improving living standards (they are simply "after-the-fact" and often counterproductive methods). According to Imbroscio, the best results would be obtained through policies aimed at broadening ownership in the urban realm. This can be done in terms of both access to home ownership and the start-up of new businesses. Access to home ownership can be particularly favoured by avoiding planning policies that are inordinately complex and restrictive, overdemanding, and too discretional, and radically changing land-use regulations in the direction of greater simplicity, abstractness, uniformity and certainty of the prescriptions (Moroni, 2010, 2015).[19] In short, housing should not be subsidized; rather, it should be easier to produce different types of housing.[20]

5. Final remarks: an analytical distinction relevant for – but independent from – the classical liberal view

In conclusion, if the distinction proposed here is accepted, both empirical inquiries and analytical discussions in land ownership issues should become more differentiated.

For instance, as we have seen, it is one thing to investigate what effects stem from a certain concrete distribution of land ownership titles (one can, for example, enquire as to the advantages of a more precise regularization, or greater fragmentation, of property titles at time *t2* compared with that at time *t1*). It is quite another thing to investigate the effects exerted by the existence of the abstract and general right to own property. While in the former case it is possible to assess *concrete impacts* on specific social realities, involved in the latter case is meta-assessment of the *possible advantages* of an indefinite number of unknown individuals with unknown preferences

It is hoped that the analytical distinction drawn in this article – between the right to hold private property and specific property titles – can also prove useful for those who do not accept the normative stance of classical liberalism.

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[17] Observe that contractual communities do not imply any privatization of public space, in contrast to what many authors mistakenly suggest. Actually, contractual communities do not take public space away from urban realms; they merely organize a space that is already private in ways that are different from more traditional ones (Brunetta and Moroni, 2012; Moroni, 2014). What effectively occurs in the creation of – for instance – a homeowners association, is simply that a privately owned space is subdivided into spaces that continue to remain private, but some of which will be open to all the members of the association. Hence homeowners associations merely organize previously private spaces in a way that is less fragmented than the traditional pattern, allowing the members of a certain association to use spaces in common. As Glasze et al. (2006b, p. 2) write: "The value of 'public space' and its endangerment through 'privatisation' is a frequently cited topos within the critique of contemporary urbanism. . [But] many master-planned private settlements simply involve the subdivision of a piece of land formerly under single private ownership into many titles under shared ownership. . A piece of land under single private ownership may become co-owned by many residents". This does not therefore mean superseding the right to hold private property, but simply exploring many possible forms of property titles arrangements.

[18] Tax rebates are indispensable measures if we want individuals from classes other than the rich to be able to organise into contractual communities. In fact, only the rich can be subjected to the so-called "double taxation"— the situation in which a member of a contractual community has to pay both the traditional taxes levied by local public administrations and the fees required by the association itself (Foldvary, 2006; Nelson, 2009).

[19] Reports by the US Department of Housing and Urban Development (1991, 2005) show that restrictive and complex regulations and barriers can raise development costs by as much as 35%.

(*footnote continued*)

[20] As Glaeser and Gyourko (2003: 23) observe, the question of guaranteeing the affordability of housing should include reforms of orthodox zoning and building standards, and not just public construction programs or subsidized alternatives. While building a small number of public or subsidized units has a minimal impact on average housing prices (Glaeser and Gyourko 2003: 35), the reduction of regulatory barriers could have a significant impact on the reduction of housing prices.

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