

Introduction

Sovereignty and property are often invoked as conveying unique rights of exclusion and control. Conventional theories suggest strong similarities between the two concepts: both seek to justify and delimit the right to exclude, identify the right-holders' scope of authority and/or immunity vis-à-vis others, and share certain assumptions about the relations between society on one hand and an owner or sovereign on the other, which in turn shape those relations. The analogy between property and sovereignty, however, marginalizes other perspectives on the relations between the two concepts.

The articles collected in this issue offer an opportunity to rethink the concepts of sovereignty and property and their relation to one another. They do so along three dimensions: origin, analogy, and competition. *Origin* addresses a classic question in political philosophy and property theory: is property a limit on or the product of sovereignty? This question preoccupied the debate between natural lawyers and positivists. It deserves to be revisited in our era, where property is considered a human right, yet many of its expressions (intellectual property law, share ownership, etc.) result from legal or regulatory regimes. *Analogy* refers to the use of private law concepts to explain sovereignty, and the conceptual use of sovereignty to explain private ownership. Grotius, for example, employed an absolutist understanding of property and analogized it to sovereignty. Pluralist conceptions of property offer alternatives. More radical departures from the property/sovereignty analogy invoke other private law concepts, such as trust law and the fiduciary responsibilities associated with it as the conceptual source for theorizing about sovereignty. Finally, *competition* stands for the confrontation between property and sovereignty. Owners and sovereigns have always clashed over the allocation of critical assets. Historically, this has happened primarily within the territory of a single sovereign. In today's world, sovereigns have agreed to allow private investors from a contracting party to challenge their sovereign actions based on international rather than domestic law. This has pitched owners and sovereigns against each other in ways that challenge sovereignty even where it is based on law and democratically legitimated. All the articles in this issue tackle various aspects of these dimensions.

Mainly, they do so by revealing the complex relations between sovereignty and property. The authors do not ignore the many similarities between the two concepts, such as the authority and agenda-setting power both entail, the limits

set on this power, and the responsibility towards others, which is inherent to both sovereignty and private property. At the same time, the authors also highlight the differences between sovereignty and property: while sovereignty is essentially public, property is usually private; while property rights are transferable at an owner's discretion, sovereignty is usually a nontransferable office; and so forth. In other words, as all authors show, while sovereignty and property are not synonyms, they are also not rivals in a zero-sum game, as implied in Morris Cohen's seminal essay, *Property and Sovereignty*.¹ Rather, they sometimes collide with and sometimes conjoin each other, sometimes enhance and sometimes limit each other. They constantly and inherently correlate to each other and depend on each other. This complexity and many of its aspects are discussed in the articles gathered in this issue.

The first four articles explore the complex relations between sovereignty and property by conducting conceptual philosophical discussions: they delve into and challenge prevailing perceptions of the relationships between sovereignty and property, and suggest new conceptualizations. The next four articles focus on more specific aspects and implications of the complex relations between sovereignty and property, such as the nature of the right to private property, the communicative role of property, the political processes through which property rights are set, and the use of private property for strengthening public sovereignty. The last four articles tackle sovereignty, property and the relations between them through concrete examples, namely immigration, same-sex marriage, monetary sovereignty, and the sovereignty of the corporate religious. Brought together, the articles in this issue complicate prevailing assumptions on the relations between property and sovereignty, and both offer innovative conceptual frameworks for those relations and address their practical implications.

Arthur Ripstein opens this issue by acknowledging that property and sovereignty are inherently connected, and that a conceptual framework for this connection is needed. However, he argues that the prevailing analogy between them is not as useful as it may seem, as there are quite significant differences between the two. For example, while sovereignty is strongly restricted by internal norms, property is defined by a lack thereof. In addition, property is exercised for private, discretionary purposes, while sovereignty must be exercised for public, mandatory, nondiscretionary purposes. Therefore, Ripstein contends that the proper way to combine the concepts of property and sovereignty is not to classify property as a small model of sovereignty, or vice versa. Rather, we should focus on the limits that property places on sovereignty and at the same time discuss the need for a public legal order

1 Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

to maintain enforceable property rights — a public order achieved through sovereignty.

Sergio Dellavalle examines three possible patterns of the interconnection between sovereignty and property. First, he points out that although they are traditionally thought of as belonging to two opposite spheres — the public and the private — in fact, both are based on the centrality of individuality. In addition, both share a similar historical development, mainly in the context of the transition to the Modern Ages. After setting this baseline, Dellavalle turns to exploring the three possible patterns of the interconnection between property and sovereignty: sovereignty as property, property as sovereignty, and the synergy between them. As Dellavalle shows, the first two patterns cannot serve as an appropriate framework for the interconnection between the two concepts, as they undermine their essential characteristics, namely sovereignty's public essence and property's private essence. Contrarily, the third, synergic pattern can maintain both concepts' core characteristics by promoting a social order that balances between the public and the private without negating either. *Inter alia*, according to Dellavalle's account, sovereignty is considered legitimate only if it is willingly and freely accepted by private individuals, and private ownership is considered legitimate only if it is restricted by public power in a manner that maintains social equality.

Larissa Katz uses the concept of sovereignty to distinguish between two dimensions of ownership rights: sovereignty and accession. The first dimension — sovereignty — entails owners' position of authority with respect to their property and their power to make decisions and set the agendas regarding their property. Although the state holds the power to limit the scope of the decisions that can be made by owners (e.g., by zoning laws), this does not infringe owners' sovereignty, as it leaves them with a sufficient scope of decision-making power. The second dimension of ownership rights — accession — entails the burdens and responsibilities attached to the office of ownership, as well as owners' ability to enjoy the fruits of their property. This dimension is inherently formulated and controlled by the state, which collects taxes, requires owners to attend to the public space adjacent to their property, etc. This power of the state as well, according to Katz, does not infringe owners' sovereignty, as it concerns accession rather than sovereignty. Katz concludes that while the limits set on owners' *sovereignty* should be minimal, as this is the essence and core of ownership, a state's intervention with regard to *accession* rights is usually justified.

Laura S. Underkuffler tackles the interrelation between sovereignty and property by delving into the prevailing assumption that government forbearance and noninterference with private property necessarily entails a restriction of its sovereignty. Specifically, she explores the conventional justifications

for government forbearance, such as the public need to encourage owners to invest in their property, thus contributing to social stability, as well as the need to maintain individuals' reliance on their rights being protected. Those justifications are considered as justifying not only government forbearance itself, but also the restriction on sovereignty embedded in such forbearance. Nonetheless, Underkuffler argues that these justifications are flawed and partial and cannot serve as a profound and broad enough basis for justifying government forbearance and the restriction of its sovereignty. She therefore suggests an alternative justification: government's fiduciary duty. According to this justification, the government should be cautious when infringing property rights and entitlements due to its fiduciary duty towards its citizens. This is, as the author argues, the essence of the relationship between the sovereign state and the individual. However, the fiduciary justification might also dictate government *nonforbearance*, as the fiduciary duty of the state is also towards non-owners. In this regard, Underkuffler's analysis underscores a crucial aspect of the complex relations between property and sovereignty.

Martti Koskenniemi opens the second part of this issue and describes the relationship between sovereignty and property in the context of the expansion of the British Empire. He does so through a discussion on the changing emphasis that was put on sovereignty and property in English legal languages (civil law, common law, natural law, *jus gentium*) during the sixteenth, seventeenth and eighteenth centuries. Koskenniemi also explores the political events and political philosophy that finally led to the creation of the "empire of free trade." Strikingly, he shows that despite the common perception of sovereignty and property as two distinct terms — one being essentially public and the other essentially private — they are in fact intertwined. Mainly, as shown in the article, private property and privatization, which were vigorously promoted by British law, served as a major means for the expansion of Britain's public power and sovereignty.

Hanoch Dagan and Avihay Dorfman explore the relations between sovereignty and property by developing a liberal conception of the right to private property. Dagan and Dorfman's account is based on the notion of private property and ownership as being crucial to people's personal autonomy and their relational equality. Thus, the right to private property not only entails forbearance by the state; it is also founded on a horizontal requirement of reciprocal respect and recognition among self-determining persons. In this regard, the authors argue, the right to private property is essentially political, but not necessarily statist. This account has several implications, two of which are introduced by Dagan and Dorfman. First, at the domestic level, private law should offer property institutions that facilitate various kinds of interpersonal relationships and promote mutual respect through pluralism

and accommodation. This is inherently the sovereign's task. Second, at the transnational level, the authors point to the fact that private international law views the parties almost exclusively as citizens of their countries and fails to provide mandatory norms of interpersonal human rights. The liberal account of the right to private property, as offered by Dagan and Dorfman, serves as a preliminary basis for amending such flaws.

Thomas Merrill examines the communicative aspect of the interrelations between sovereignty and property. His starting point is Morris Cohen's abovementioned seminal essay, and while he agrees with Cohen's observation that private property and political sovereignty are two ways to enforce governance, he rejects Cohen's contention that the enhancement of one necessarily weakens the other. Rather, according to Merrill, the relationship between sovereignty and property is far more complex. Merrill establishes this argument by addressing four different types of audiences of property (strangers, transactors, neighbors and sharers). Through these examples, he demonstrates how private property supporters (typically libertarians) and political governance advocates (typically communitarians) would not necessarily endorse or object to dialing political governance and private property up or down as a whole. Both libertarians and communitarians attribute different correlations to property and sovereignty with regard to each audience and context. An individual thus might be in favor of dialing up political governance with regard to one audience, and object to it with regard to another. Moreover, in some contexts public sovereignty serves as a means to enhance private property, while in others it is conceived as a means to diminish private authority. Such complexity, according to Merrill, is missing from Cohen's account.

Eyal Benvenisti explores the tension between property and sovereignty by analyzing the tension between economic and political global markets. He explains that one may compete in these markets by engaging in "high-visibility politics," which is predominantly employed by diffuse property owners, or "low-visibility politics," which is utilized mostly by smaller groups of owners. In the era of globalization, according to Benvenisti, power is increasingly gathered through low-visibility politics, thus weakening the ability of states to determine property rights and diminishing the ability of diffuse property owners to participate in democratic decision-making processes. Benvenisti shows that this is the result of international agreements, organizations and other products of globalization, responding to low politics in a few powerful states. Some attempts can be discerned, which are aimed at re-strengthening high-visibility politics, but counterattempts are also apparent, such as the "Mega Regional" agreements between the United States and other countries, which might diminish the possibility of reclaiming the space for "high politics" by national regulators and courts. The trends in both directions are discussed by

Benvenisti, who concludes that these tensions may ultimately be balanced, thus enabling the promotion of fairer property rights regimes.

Jeremy Waldron opens the third part of this issue. Waldron highlights the differences between sovereignty and property in the context of immigration by analyzing the property analogy often used to justify prohibiting migrants from entering sovereign states. Waldron endeavors to debunk the assumption of Sovereign Ownership in this regard, i.e., the assumption that the justification for such prohibition is based on states' proprietary rights over their land. Waldron shows that ownership and the derivative right to exclude are not embedded in the concept of sovereignty and that each term — sovereignty and property — should be accounted for on its own. Ultimately, Waldron argues that our failure to forgo the concept of Sovereign Ownership makes it difficult for society to profoundly justify restrictions on immigration. He concludes that the conflation of the two concepts thereby hinders a more nuanced discussion regarding the rights of individuals within the territories that they find themselves in, and that alternative justifications for the right to prevent immigration need to be found.

Katharina Pistor focuses on what she terms “monetary sovereignty,” i.e., the role of money in the sovereignty of states. While sovereignty is commonly related to the control over territories, Pistor shows that today it is money that determines the extent of states' sovereignty. Specifically, in the age of globalization, a massive portion of both sovereign borrowing and private business is being conducted in foreign currency. As a result, a new “monetary sovereignty” has arisen: the sovereignty of many states has effectively shifted to agents who control their ultimate money supply, a supranational or foreign currency on which they depend for accessing global lending markets. Consequently, a form of hierarchy has emerged with some countries (which Pistor terms “financial leaders”) at the top, while others are at the periphery. This hierarchy is determined, *inter alia*, by countries' control over the currency they use, the law under which they issue their sovereign debt, and the currency in which it is denominated. Pistor defines this new form of sovereignty, explains how it endangers traditional state sovereignty as we know it, and suggests how the legal system should respond to it.

Joseph William Singer examines the imbrication of private property and public sovereignty through the case of discrimination against same-sex couples in public accommodation on religious grounds. According to Singer, it is commonly believed that property and sovereignty are a threat to each other: libertarians view public sovereignty as a threat to private property, while liberals view property as a threat to sovereignty. Contrarily, Singer shows that sovereignty and property are in fact imbricated and correlated: one cannot exist without the other, and both are essential for exercising liberty

and rights. The discussion on the discrimination against same-sex couples serves to establish this perception. Singer first goes back to the history of race and public accommodation laws. He shows that the various regimes that existed in the context of public accommodation and race (slavery, laissez-faire, economic segregation, civil rights, etc.) reveal various possible relationships between property and sovereignty. He then turns to addressing the forms those regimes take in the context of same-sex marriage, and concludes that sovereign public accommodation laws should not infringe legitimate property rights, but at the same time the sovereign should define property in a manner that ensures the treatment of all individuals as free and equal.

Jean L. Cohen closes this issue by analyzing the major challenge to state sovereignty posed by the reemergence of claims by non-state *nomos* groups for jurisdictional and political pluralism. Cohen shows that sovereignty is often associated with political rule and jurisdiction over a certain territory, and that ideas of democratic constitutionalism constitute the exercise of sovereign power. However, a postmodern conception of sovereignty attempts to justify the independent sovereign authority of the corporate religious. Cohen criticizes this trend by revealing the separation between the concept of sovereignty and publicly accountable power: unlike liberal democratic public power, corporate religious are not subject to public scrutiny and their accountability is rather weak. Furthermore, Cohen proposes to formulate a postmodern federal conception that aims at preventing the attribution of sovereignty to private corporate entities and preserving the achievements of democratic constitutionalism.

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