

Property, Solidarity and (German) History

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In an elegant and concise article, Alexander and Peñalver argue that human beings are guided, as rational moral agents, by a normative commitment to seek lives that will allow them to flourish.¹ However, humans necessarily develop the capacities required to live well and in a distinctly human fashion in dependence upon other human beings, within a web of social relationships. As members of such social networks, Alexander and Peñalver argue, individuals have to accept their obligation to participate in and contribute to the community that allows them to develop the capabilities necessary to grow and flourish as autonomous human beings. Alexander and Peñalver present the state as a community, but not the only one. Though it is just one among many, it is endowed with coercive power, hence in their view the state is not only entitled, but obligated to implement the economic redistribution and regulation necessary to compel those who may not do so voluntarily, to make their contribution to the flourishing of others and of the social network as a whole.

In other words, since we as individuals, together with all other individuals who are part of our community, are dependent on others for our individuation and on our community for our flourishing, we owe a debt to them, which legitimizes the state's taking from us part of our property — at least inasmuch as it can be regarded as surplus, i.e., as unnecessary to ensure and further our own flourishing — in order to support those who may lack the resources they need to flourish.

The argument is presented well and in clear terms. Unavoidably, since it is only a short article, it leaves open a series of questions that this Comment will attempt to raise in short, almost telegraphic fashion, focusing on the

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¹ Gregory S. Alexander and Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127 (2009).

idea of community and its interrelations with history and solidarity, as well as property.

I. COMMUNITY AND STATE

In opposition to society and the state, the notion of community has undertones or overtones of some natural or immediate form of belonging.² But who decides on membership in communities? And what is the relationship of a community, in which I am supposed to be a member, to the state, which is empowered to interfere with my property? In other words, when Alexander and Peñalver refer to community in order to argue that the state is entitled to take part of my property to support the needy, one has to remember that community is constituted by the assumption of difference, i.e., by distinguishing people who are members from those who are denied membership, on the assumption that they differ from me and the likes of me in some significant respect. Is the state not entitled, then, to interfere with my property to support the flourishing of those who, sadly enough, have not been granted membership in my community, or is this not supposed to be a consideration, as long as they belong to the same society? If, in the last instance, the redistributing can and will take place within the broader framework of the state or society, transgressing the boundaries of the community — since the state is put in charge of redistribution — it is unclear in what sense this communitarian approach differs from the well-known social-democratic one, and why it presents itself as communitarian.

II. COMMUNITY AND PROPERTY

The relationship between community and property also deserves to be examined further. The liberal/capitalist concept of private property implies a closer relationship between a person and an object than between persons, and this primacy allows the exclusion of others from one's property. Ownership implies an exclusive right, and most capitalist theories of property even conceptualize the relationship of oneself to oneself as a property relationship.

In fact, in what can be seen as one of the primal myths of capitalist thought on property, John Locke derived the right to an exclusive ownership

² See ANDREW MASON, *COMMUNITY, SOLIDARITY AND BELONGING: LEVELS OF COMMUNITY AND THEIR NORMATIVE SIGNIFICANCE* 17-41 (2000).

of objects from one's exclusive ownership of one's own body and, hence, of one's labor.³ In this individualist ontology of the right to private property as a natural right, the individual's dominion over property is prior to community or society. He (Locke clearly meant men) enters the social contract in which he associates with other individuals as property owners, who seek to form an association that is contingent upon an agreement of mutual exclusion from property. In other words, dominion precedes exclusion, and society is at least in part a pact of mutual exclusion from individual dominion.

Jean Jacques Rousseau's *Second Discourse, On the Origins of Inequality*, provides a communitarian counter-myth on the origin of private property. Although Rousseau defends private property as necessary for individual autonomy, he presents it as originating in two acts of aggression combined into one: the enclosure of a piece of land and the declaration of dominion, i.e., ownership, over it against others. In this myth of origins, property does not lead to exclusion, but derives from it. For Rousseau, an individual's right to property is predicated on the acceptance of others to be excluded on the basis of an agreement of reciprocity.⁴

Alexander and Peñalver base their justification of governmental interference with property on communitarian premises, but they do not go far enough, since they do not complement their communitarian ontology of the individual with a communitarian ontology of property, in which community would be prior to property and therefore property would be seen primarily as the result of an act of exclusion of others and only secondarily as denoting a relationship of an individual to an object. In other words, their approach mixes a communitarian view of individuals with a liberal view of property.

III. COMMUNITY AND HISTORY

If one speaks of community, one cannot remain silent on history. Communities build on imagination; they are imagined by their members as a group sharing a common fate, history and values. However, not only are communities imagined as existing in history, but the imagination that shapes them is also historically constituted. For those who have

3 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 129 (J. M. Dent & Sons 1984) (1680-1690) (bk. 2, ch. 5 — Of Property).

4 1 JEAN-JACQUES ROUSSEAU, *Discourse on the Origin and Foundations of Inequality Among Men or Second Discourse (1755) — Part II*, in *THE DISCOURSES AND OTHER EARLY POLITICAL WRITINGS* 161 (Victor Gourevitch ed., 1997).

read some of Gregory Alexander's work, it surely is evident that at least in his case, the defense of governmental interference with private property for the sake of community may have to do with his interest in the way the right to property is articulated in the German Basic Law (*Grundgesetz*).⁵ Alexander emphasizes that property rights are not fundamental but epiphenomenal, and that they may serve multiple substantive interests, such as protecting the individual's life, integrity and private sphere against intrusion and interference by others, including government. But he also points to the difference between the German and American views on the status of property as a constitutional right in stressing that the German Constitutional Court "distinguishes between property interests whose function is primarily or even exclusively economic, especially wealth-creating, and those that serve a noneconomic interest relating to the owner's status as moral or political agent. Only the latter are protected as fundamental constitutional interests."⁶ Moreover, Alexander explains not only that German constitutional law protects property as a moral and civic right rather than on economic grounds, but also that it regards human dignity, self-governance and personality as community-centered values and interests, rather than conceptualizing them within the framework of classical individualism.⁷ Hence, when protecting human dignity, the German court seeks to protect individual autonomy and self-governance as well as the dependence and commitment of individuals to their community, in order to enable their self-realization and self-development within a broader social framework. It comes therefore as no surprise that although it is constitutionally recognized, in Germany the right to property also entails an obligation to the community. After providing a constitutional guarantee of private property, article 14(2) of the Basic Law of the German Federal Republic states: "Ownership entails obligations. Its use shall also serve the public interest [*Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen*]."⁸

To point to the importance of referring to the historical context of such

5 GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* (2006); Gregory S. Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 *CORNELL L. REV.* 733 (2003) [hereinafter Alexander, *Property as a Fundamental Constitutional Right?*].

6 Alexander, *Property as a Fundamental Constitutional Right?*, *supra* note 5, at 739.

7 *See id.* at 739-44.

8 *Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law]*, May 23, 1949, art. 14(2), available at www.gesetze-im-internet.de/bundesrecht/gg/gesamt.pdf. *See also* Alexander, *supra* note 5, at 117-18.

a constitutional approach to property, it is necessary to present a very short history of the context in which Germany introduced the social obligation clause into the constitutional guarantee of private property in 1949, which it adopted from the Weimar Constitution of 1919.⁹ As is well known, the Weimar Republic came to an end in 1933, with the ascent of Hitler to power. At that time, Germany initiated the destruction of the economic existence of the country's Jews and the step-by-step expropriation of their assets, which constituted one of the largest property transfers in recent European history.

This could be done, because at that time Jews were no longer imagined as part of the German community or *Volk*, which had come to be defined on the basis of a myth of Aryan blood. The so-called Aryanization of Jewish property, whereby Jewish property was transformed into the property of the Aryan community, took a variety of forms, among them confiscation, expropriation, coerced sales below market value, the liquidation of Jewish enterprises, forced purchases of worthless government bonds or their use in compensation. For this purpose a series of decrees was promulgated, especially in 1938, leading up to the Decree for the Elimination of the Jews from German Economic Life [*Die Verordnung zur Ausschaltung der Juden aus dem deutschen Wirtschaftsleben*]¹⁰ and an ordinance of December 1938, which forced Jews to hand over all jewelry, pearls, artwork, gold and silver to the authorities. Of course, expropriation was not the end of the story.

When in 1947 the Western military governments in Germany enacted restitution laws in the various zones under their occupation, the German justice system, which was supposed to implement these laws, often favored the present owners instead of seeking to dispense justice to those whose property had been expropriated, to their heirs, or to the Jewish community as a whole, which was represented by successor organizations that laid claim to the property of murdered German Jews. Historic justice for Jews whose holdings had been expropriated in the Third Reich, that is, for the unjust taking of their property by the National Socialist regime, was not a primary concern of the new German republic, which enacted the Basic Law that both guaranteed property and entitled the state to interfere with it in the name of the public interest.

This was so, perhaps, because the Jews still were not really regarded as part

9 Die Verfassung des Deutschen Reichs vom 11. August 1919 [The Constitution of the German Reich, 11 August 1919], available at www.dhm.de/lemo/html/dokumente/verfassung/index.html.

10 Verordnung zur Ausschaltung der Juden aus dem deutschen Wirtschaftsleben [Decree for the Elimination of Jews from German Economic Life], available at www.verfassungen.de/de/de33-45/juden38-6.htm.

of the German community, although formally they had of course regained full and equal citizenship. This sense of a German postwar community whose identity had been shaped by the common experience of the war, which excluded Jews although it included them as citizens, was exemplified in extraordinary fashion in September 1952, three years after the enactment of the Basic Law, when Germany enacted the Equalization of Burdens Law [*Das Gesetz über den Lastenausgleich in der Bundesrepublik*], which in German parlance has come to be called *Lastenausgleichsgesetz*.¹¹ This law implemented to a hitherto unknown degree the principle declared in the Basic Law, according to which property should also serve the public interest.

By that time, more than ten million ethnic Germans had been expelled from Eastern Europe, joined by those who escaped from the Soviet occupation and those who returned from captivity back to what became the German Federal Republic, a country that had lost the war and was in a shambles, seeking rapid reconstruction. The expellees' property had been expropriated; the refugees hardly possessed anything anyway. The Equalization of Burdens Law was designed by the state to make the local haves of the German community pay for the newcomers, the have-nots, much in the sense envisaged by Alexander and Peñalver, to allow all Germans to acquire the capabilities they needed to lead flourishing lives.

The law demanded that those who were still wealthy, that is, who possessed a significant amount of property, especially real estate, pay half of their property into a governmental fund. Thus the *Lastenausgleichsgesetz* established a fifty percent levy on property, payable in installments over thirty years, turning thereby into a modest property tax, while allowing the state to use rhetoric of redistribution that had a socially pacifying effect. Half of the funds raised by the *Lastenausgleichsgesetz* were devoted to integration and social support measures, and the rest was used for compensation for war losses.¹²

11 Gesetz über den Lastenausgleich [*Lastenausgleichsgesetz* — LAG] [Equalization of Burdens Act], Aug. 14, 1952, available at www.gesetze-im-internet.de/bundesrecht/lag/gesamt.pdf.

12 Michael L. Hughes, *Just Deserts: Virtue, Agency and Property in Mid-Twentieth-Century Germany*, in *TWO CULTURES OF RIGHTS: THE QUEST FOR INCLUSION AND PARTICIPATION IN MODERN AMERICA AND GERMANY 185* (Manfred Berg & Martin H. Geyer eds., 2002).

IV. COMMUNITY AND SOLIDARITY

This extremely abridged and sketchy version of events, focusing only on the intersection of community and property expropriation and redistribution, is designed to lead back to the question of the boundaries of community and membership. Why were German citizens willing to shoulder the burden of the *Lastenausgleich* in postwar Germany, just shortly after a time in which German courts were highly reluctant to implement restitution laws with reference to Jews whose property had been expropriated, and while the German government was still unwilling to legislate on restitution for such Jews?

It seems that the notion of community, as opposed to society and citizenship, offers the key to this phenomenon, thus raising some further issues that have to be placed on the agenda of a communitarian theory of the right to property. Explicitly and implicitly, after the war German citizens imagined themselves as members of a community that had fought and lost the war together. A highly significant and common historical experience provided the justification for the state's intervention, since its aim was to redistribute surplus property so as to allocate the burden of the war more equally among members of the community. Although by that time they may have been recognized as full German citizens again, and were of course also entitled to funds received through *Lastenausgleich*, Jews were not really regarded as members of the German community. As victims, targeted for destruction by the German community, they evidently did not share German war memories of shared aggression and loss; and as a cause of severe guilt, they were repressed from the German communal imaginary as much as possible. Thus the restitution of Jewish property was not something the judiciary and government could have expected people to give up their property for. But it was entirely possible to expect Germans to give up part of their property for members of their community with whom they felt solidarity.

That is the crucial point: community builds on solidarity.¹³ Although Alexander and Peñalver clearly are aware of this, they use the term only once in their article. Perhaps they do not stress solidarity because it is a sentiment. Solidarity does not arise from a rational conclusion concerning one's obligations to others, but derives from historical consciousness, that is, from the understanding that one has not only been able to flourish due

13 For extensive discussions of the concept, see SOLIDARITY (Kurt Bayertz ed., 1999).

to the presence of others and one's dependence on them, but that one's way of life and, in fact, one's fate, i.e., one's future, are also tied to that of other members of the community to which one belongs. In other words, community is unthinkable without the sentiments that are aroused by past shared experiences, imagined and real, and visions of a common journey into the future. Since solidarity is a necessary condition for mutual concern and for the compassion of the strong, wealthy, lucky and confident with the less fortunate, weak, oppressed and suffering, a shared collective identity of the kind that is indicated by the concept of community and that can provide a ground of solidarity, is crucial for the state to actually be able to interfere with the property of its citizens. As feasible as it may be for the state to demand that citizens give up part of their property to support others, if these others belong to what they imagine to be their community, the state will find it very difficult to compel citizens to agree to property transfers to people with whom they feel no solidarity and hence a diminished moral commitment only, because they do not consider them to be part of their community.

A communitarian theory of property that wishes to address the risks and dangers that will face attempts to turn it into practice, has to take note of the role of history, collective identity and attachments, and hence of collective passions and sentiments, for as Richard Rorty has stressed emphatically, solidarity is a historically contingent phenomenon.¹⁴ In contrast to social contract theories on the one hand, whose principles are formulated in abstract and rational terms, and utilitarian approaches on the other, which are presented as timeless, community is a historical construct, implying shared feelings, a common past and a common future. This historical and emotional dimension, with all the dangers and possibilities to which it points, needs to be explored further in a communitarian theory of property, which, by definition, has to be developed as a historical and hence perhaps also as an emotional theory of property.

14 RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 189-92 (1989).