THEORIES ON ORIGIN, CHARACTER AND BASIS OF PROPERTY

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Abstract

Controversy is a method and discussion a result having in mind the coordinates of property in time and space. Property is an element which begins the same time with life on earth and which determines it, we must confess it is not a fixed notion even today.

The register of controversy is one of the biggest which a social, economic or juridical reality can have. From “esse” to “non esse” human minds have crossed the swords of spirit. Anyway, against all negations, property exists, more, it is the support, life with all its individual or collective, primitive or civilized, organized or anarchic aspects leans on and at the origin of property there was considered to be natural right, occupancy, law, work, social contract, utility.

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For example, one of the spiritual founders of the French revolution, Voltaire, said: “L’esprit de propriété double la force de l’homme”\(^1\).

Another great spirit, Proudhon, launches formula in the debate: “La propriété c’est le vol”\(^2\).

A few decades away, in the same country, there may be noticed as the significance of the same notion is completely transformed, to come back later under the shape from the beginning, more or less evolved.

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Even from the beginning of his existence man felt the need to draw nearer certain things, to obtain certain objects to make his living more easy. Necessity and wish of “to have” determined man to use weapons against his peers. It is in the nature of every human this wish to feel owner of something. It is the affirmation of human genius to rule over matter, in being above it and feeling independent of circumstances and acts which if they do not terrorize him they will limit his sallies and wishes.\(^3\) This “to have” stimulated emulation between individuals, brought the progress of human society and animated the conflicts between nations along millenniums of mankind’s life.

Speaking about property, Proudhon uses exclamations which express its whole grandeur: “Property, he says, tremendous issue through interests it involves, desires it arouses, theories it develops. Property, extraordinary word through its different acceptances which our language attributes it, ambiguities which allows, nonsenses which tolerates”\(^4\).

We could say, paraphrasing Proudhon’s words that in property there is the constructive secret of mankind, as well as property contains its destructive seed.

Leaving aside the general acknowledged finding that property is a universal fact and it exists during all nations from the most remote times, natural in a shape that can be resembled with what modern society understands today, and that this notion has been applied at the beginning only

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1 Musceleanu, 1940, p. 5-6
2 Musceleanu, 1940 p. 5-6
3 Teodorescu, 1941, p. 3; Tocitu, 1946, p. 2
4 P. J. Proudhon, 1866, p. 2
to certain things following that as society developed to extend its notion to others; we agree with the doctrinarian of this issue, M. A. Thiers, that property has appeared firstly as a fact and then as an idea more or less clear after the civilization degree to which nations have reached\(^5\). But the question to be put is how was the right to ownership born and is justified?

In connection with the first aspect there must be stated from the beginning that till the recognition of the three attributes of property, usus, fructus and abusus which are mentioned in the 480 article of civil code there were necessary of a lot of concerns, sometimes social movements, the number of their beneficiaries reducing more and more as population increased.

During the evolution process of property there may be distinguished three stages: collective property stage, familiar property stage, and individual property stage\(^6\). It would be difficult, if not impossible, to determine along time when one ends and when the other begins, their development being according to a whole series of local and special considerations which have often led to their superposition. Still, we may notice that the earlier a nation knew the signs of civilization and tried to integrate into the ascending rhythm of progress, the earlier it got rid of the old forms of property to adopt the new form.

As far as movable assets are concerned theoreticians have agreed that these were held at the beginning with individual title, the formulated theories concerning property over land grouped into two tendencies.

There was a tendency of those who generalized the idea of collective property. The first who advanced this idea was Plato; he expressed severe critics and important reserves referring to private closeness and juridic means for acquiring goods. This view was supported by the fathers of Church, the Renaissance’s utopians (Thomas Morus, Thomaso Campanella) and later on by Babeuf, Bazard, Proudhon. Even more, Marx, Engels and others following them formulated virulent attacks, ideologically based, against the right to private property as being generator of man’s exploitation by man. They supported the objective necessity of goods’ comunization, especially of the production means\(^7\).

The defenders of private property, such as Aristotle, Auguste Comte or John Stuart Mill and others, underlined the advantages of private property and regarded it as an economic stimulus, as a source of riches, prosperity and social welfare, as a pledge of individual freedom\(^8\).

Fustel de Coulanges, Baden Pawel, Paul Giubaud, J. Toutain and other sustain that at the origin, private property was the first form under which people held land, and Emile de Laveleye, Henry Summer Maine, Maxim Kovalesky, the baron Haxthausen, Paul Violet and others, on the contrary, agree that at the beginning of society, land was held collectively and that only along time, as human society evolved there has been passed to a private-family property and later on to one private-individual\(^9\). The sustainers of the individualist theory base their researches on the existence of individual property in old Rome and ancient Greece, and the sustainers of collectivist theory on the existence at some primitive nations contemporaneous with modern period, of some institutions with collective character in what concerns land.

If we would have been forced to talk about property only according to the definition given by the Roman jurisconsults, meaning taking into consideration only the attributes of this notion, usus, fructus and abusus, certainly the research would be limited as space, and the task of answering the above question, made more easier. We would in this case agree with Fustel de Coulanges in saying that property was individual at its origin and that only along time it had communitarian shapes\(^10\). And maybe, even in this case we would admit, the way as a matter of fact neither this writer can contest, the coexistence at certain nations of certain agrarian communities.

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\(^5\) M. A. Thiers, 1868, p. 2
\(^6\) Luțescu, 1947, p. 237
\(^7\) Pop, 1996, p.31
\(^8\) Pop, 1996, p.32
\(^9\) Tocitu, 1946, p. 176 and the followings
\(^10\) de Coulanges, 1984, p. 65
Although, if we would take the stand of the Belgian sociologist Emile de Laveleye or the English jurisconsult Henry Summer Maine, or if we went back a few centuries ago to the German, Swiss, Russian, Serbian territorial divisions we would probably conclude just like them, that at the origin of society, the collective property\(^{11}\) was a first form of land ownership. And certainly, we would make a big mistake, trying to generalize the collectivist theory thus constituting the basis of all primary human societies as being the communitarian property. Because, the huge mistake of both the sustainers of the individualist theory and the sustainers of the collectivist theory is the attempt to generalize their theory with all primitive populations. Both of them ignored the fact that different circumstances and life conditions allowed some populations to adopt at the beginning individual property, and to others collective property, that, likewise these specific life conditions determined certain nations to pass easier from one form of property to another, while the same specific in the life style, ground’s relief, social organization, of other nations, forced them to stay for a longer period of time to one form of property.

Because of this state of facts, the uninformed researcher will hardly be able to stick to one formula and not to be drawn to another. Collective property together with all its arguments, individual property with all it disposes of, stops the law clerk, who looks for meaning, if it exists, of property itself, to find it too.

As far as the second aspect of the question is concerned, that of identifying ownership right, the given answers have been very diverse. Along time several theories have been developed to justify ownership right. There have been voices which affirmed natural right as basis of property. Occupancy, law, work, social contract have been regarded as basis of property. There were quite a few people who justified right to ownership through utility and social force it represents.

I. Natural right as basis of property

The first who mentioned this concept of property from natural right was Aristotle. He said that nature created everything for man’s existence. Nature doesn’t do anything incomplete; creating man it also gave him the possibility to live. Coming on earth man has found all strict necessary goods for his existence prepared by nature. Acquiring them, transferring them into property did not necessitate any job than the simple effort of man, that of getting them closer. Everything that exceeded the first necessity meant wealth and not property for Aristotle because the surplus of goods gives birth to exchange. In this theory on property, Aristotle thus made a distinction between things of first necessity and the others. After him, property is nothing than an instrument of existence, while wealth is a multiplicity of instruments\(^{12}\). He named property a natural acquisition, which is not made to harm the other. He explained the origin of wealth, of abusive property in commerce. He thus argued, thousands of years ago, Adam Simth’s theory which will sustain that commerce does not produce through itself a value. Aristotle explained this fact by saying with brutality of truth that virtue has the right to use till a certain point even violence, because victory supposes a superiority”. Here is how right to ownership proclaims through force its superiority.

Aristotle saw property as natural and legitim acquisition of the first necessity objects. Everything that goes further than the first necessity becomes abuse and is against nature, it is a unnatural property. By a paradox, exactly this property in protected by law nowadays.

Later, Fichte, Hegel, Kraus, Portalis, etc consider, following the road opened by Aristotle, that property is a natural right of man.

Fichte underlined that “transforming things through our own efforts is the real juridical base of property and the only one natural.”\(^{13}\)

Kraus regarded property as “a natural right and a necessary condition to freedom and individual development.”\(^{14}\)

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\(^{11}\) Tocitu, 1946, p. 176 and the followings

\(^{12}\) Musceleau, 1940, p.7

\(^{13}\) Boiangu, 1940, p. 75
After Hegel each person had to have a property. Property is a condition of life and man’s development; it is based exactly on the nature of man and must be considered as an absolute and primitive right which does not result from any exterior act as occupation, work and contract. Right to ownership is resulted from human nature itself. It is sufficient to notice that one is man to may enjoy the right to ownership also.\textsuperscript{15}

In Portalis’ view, property is the natural right which exists in ourselves and because of its character it is indispensable to all people. To Saint Thomas Aquinas ,, property is not imposed by natural right but it is conform with this right\textsuperscript{16}.

Admitting this naturalist theory on right to ownership of man, does it really mean contesting the right to existence of the other livings? Haven’t they come too on earth in the virtue of the same natural right? If all people have the same right to things which are in nature, doesn’t this mean that everyone has nothing, one’s right annihilating the other’s right?\textsuperscript{17}

\textbf{2. Occupancy as basis of property}

The occupancy’s theory concerning justification of the right to ownership is interesting; according it the first occupier of a good becomes proprietor, that who in the first place feels the need of getting it closer. This was also the Roman jurisconsults’ theory which sustained that at origin land was a “rex nullius” and the first occupier became also its proprietor. The Romans also considered as “rex nullius” the lands of the conquered nations\textsuperscript{18}. Natural occupancy of these lands and wars were supporting elements of property in Roman theory.\textsuperscript{19} This theory was resumed and debated later, among its followers Hugo Gro\textsuperscript{t}ius\textsuperscript{20} being in the first line.

The Roman view on property is more interesting as it ignores the Christian theory, a theory as beautiful as contradicted by practic reality. While the Apostles laid the foundations of this theory practicing charity, abandoning wealth and compassion, church accumulated and accumulates entitled or not great wealth. History of the pontifical state shows a reality opposite to that it preached.

Occupancy’s theory as basis of property explains property through the right of the first occupier, a consequence of a natural right. But the fact of establishing as owner the first occupier of a building what can it mean anything else than favouring violence and inequity, meaning the strongest one? Through itself, occupancy is nothing but a fact that cannot pretend more than quality of supporting the idea of possession, but not justifying the right to ownership.

Occupancy is nothing but a way of acquiring property in our legislation and the French one, and not because there would have been any merit but because the legislator admitted it this effect.

\textbf{3. Law as basis of property}

Property, civil law institution seemed to find its essence in the body of law itself. In the view of those who regard law as basis of property, law not only protected property but it gave birth to property, determining it, giving it the rank and the extend which it occupies among the citizen’s rights\textsuperscript{21}.

To the same effect, Kant considered that property does not exist before law, and if it exists it is only “Idea”. Property is what law wanted it to be, because law recognizes it, law proclaims it, law sanctions it.

\textsuperscript{14} Boiangiu, 1940, p. 75
\textsuperscript{15} *** Istoria filosofiei moderne, 1938, p. 290
\textsuperscript{16} Jinga, 1940, p. 18-19
\textsuperscript{17} Bazilescu, 1938, p.75
\textsuperscript{18} Cernea, Molcut, 1994, p. 165
\textsuperscript{19} Tociti, p. 191
\textsuperscript{20} H. Grotius underlines in Despre arta războiului that: “Holding land is a fact which force itself makes ii to be respected till society assigns the holder’s cause; then, under this social warranty, fact becomes right, this right is property”.
\textsuperscript{21} de Laveleye, 1938, p. 69
Among the sustainers of this theory we remember: Montesquieu, Bentham, Mirabeau, Tronchet, Robespierre...

"As people gave up to their natural independence to live under political rules, Montesquieu said, they gave up to the natural community of goods to live under that of civil laws. These first laws obtained freedom for them”22.

Bentham in his legislation treaty sustained that: “Property and law were born together and will die together. No property before laws, remove laws, any property will stop”23.

At the Constituent Assembly in 1789, Mirabeau declared that for him a private property is an asset acquired in the virtue of law24.

For Robespierre, right to ownership was nothing than the right of each citizen to enjoy his share of goods which is guaranteed by the law25.

Trochet, one of the French civil code’s editors underlined that the only basis of society is represented by conventional laws which all by themselves may form the source of the right to ownership26.

We cannot agree with the sustainers of this theory. Property existed a long time before law. Law hasn’t done anything than to admit a fact, to define and give it the juridic meaning. Laws, as Montesquieu underlined, “are necessary reports which derive from nature of things”27. Thus laws don’t do anything than to assign this report which exists between man and matter. Laws protect and guarantee the right to ownership against any illegal infringements. Law cannot create right, but right creates law.

If we admitted such a theory we should admit that all social inequities would be legitimate if they were assigned in positive bodies of laws. It is a dangerous theory because the limit of restrictions is led by the arbitrariness of the legislator. That is why the creative role of the legislator is reduced to the role of a referee who within the pre-established limits regulates this right. Under the conditions in which property would be an exclusively consequence of law, the base principles of property would become questionable and doubtful.

4. Work regarded as basis of property

Another theory formulated to justify the right to ownership was sustained by philosophers J. Locke, M. A. Thiers, the classic English economists foremost of whom A. Smith, D. Ricardo, de J. B. Say de Bastiat, the socialist school. Generally, for philosophers and economists, the idea of property is presented under a special aspect, property being justified by them through the idea of work, the fact that man who renders valuable raw material from nature, naturally would have the right on the product of his work, this being nothing else than a value plus which raw material earned through its exclusive work.

The economist J. B. Say de Bastiat saw in property the principle of progress and life28. Arguing Proudhon’s affirmation that finally property is a theft, he declared insisting on this idea that God who created sociable man gave him the means to fulfill his destiny too, meaning property.

The classic English economists and later on the representants of the socialist school, showing that work is not justly remunerated, that workers are inhumanly exploited by the capitalists, asked to remove private property through its socialization.

It is true that the entrepreneur, the capitalist and the one who carries on the work take part in the production process; each of them getting their share, capital receiving interest, nature being compensated by rent, work being remunerated through wage, and the entrepreneur through participation at net income. It is not slightly true that this repartition process does not develop ideally, given the inferiority in which there is one of these two factors and especially the work

22 Montesquieu, 1970
23 Block, 1884, p. 711
24 Boangiu, 1940, p. 50
25 Boangiu, 1940, p. 51
26 Boangiu, 1940, p. 52
27 Lutescu, 1947, p. 252
28 Lutescu, 1947, p. 252
factor. From here the attacks of the workers’ parties which pretended in one form or another that the production means stop in being the object of individual private property to belong to the whole community through nationalization.

If this theory can be applied to movable assets which can be regarded as a product of human effort, in what land is concerned, soil, the question is debatable. Land with all its productive capabilities is not a creation of work or human intelligence, it is a product of nature. According to this theory, man can be considered proprietor of land as he invested in it a certain capital, a certain work to make it more productive. Regarded from this point of view, Gustav Schmoller says in “Politique sociale et économie politique”, “property is today both social work and of the individual; there are groups of individuals who created it, it is not the product of a very complex common activity”.29

Supporter of this theory, Thiers considered that man thrown bare-bodied on empty earth, passes from misery to abundance through the exercise of some strong capacities which God gave them: “These capacities make a prime property inseparable from him; from their exercise a second property is given birth which consists of the this world’s goods, less adherent to his soul, but more respectable, if it is possible, because the first property comes to him from nature and the other property from his work, and even through this it is less adherent, necessitating to be normally guaranteed by society, so that man, sure that he will possess the product of his efforts, to work confidently and ardently.”30

Thiers although was a sustainer of labour theory regarding the justification of the right to ownership, also admitted the existence of natural right in what concerns the presence of certain faculties which make, as he says, the first property. He neither neglected the importance of law in maintaining and guaranteeing this right. Going further, he concluded that any property must have at origin, work, and even if it doesn’t have it, he considered that it won’t get late, with time, to find a justification in it.

But sustaining justification through work of property, Thiers admitted in fraud and violence a means of becoming proprietor. Against these means he raised his voice strongly, asking for severe laws, to stop this modality of seizing goods.

At us, Gh. Taşcă argued strongly the labour theory formulated by Smith, Ricardo, Thiers and others. He said work cannot justify individual property; on the contrary, justification through work leads to contesting the right to individual property31. According to labor’s division principle, by the essence of a modern production system, at the realization of the simplest thing participate hundreds, thousands of individuals. If a worker should be the proprietor of the object produced by his work, everybody’s works accumulating on the same object would attract successive disposessions or at least an accumulation of superposed properties on the same object. Thus the generalization of this theory wouldn’t be just32.

5. Social contract as basis of property

After Rousseau, man had at the beginning the life on an animal, limited to simple sensations, away from profiting from the gifts nature offered him and far from thinking to take them away. But, meanwhile new burdens appeared and man was obliged to surpass them. Primitive state could not last. The only way of self preservation was that people to know their forces to defeat any resistence, making them act by common consent. “Finding a form of association to defend and protect with all common force, the person and goods of each associate, and within each of them, all gathering, not to obey but to himself only, and to remain as free as before”; this was the fundamental problem of humanity considered by Rousseau, to which he found as solution the formula of social contract.

29 G. Schmoller, 1902, p. 79
30 Thiers, p. 81-82
31 Taşcă, 1927, p. 184-186
32 Taşcă, 1927, p. 184-186
33 Munteanu, 1971, p. 55
“Each of us puts in common the person and all its strength under supreme rule of general will; and each and all of us receives each member, as invisible part of the whole”, these are the terms to express synthetically the formula of Rousseau’s social pact.

The passage must be comprehended the following way: each individual gives up his rights to the community, but in the same time, each becomes member of the community and as a part of the community receives as a gift the rights of the other members, invisibly connected with the whole. The social body appears like a real person having an ego and will, but each individual finds himself in this common ego, collectivity for Rousseau not being a creature situated outside individuals.

A critique that can be brought to this theory is the following: convention cannot create a right with general character as the right to ownership is, because it has no value only when it is conform with the idea of social justice.

Or it is historically verified that societies haven’t been founded on the free will of people but through force, and that is why Rousseau’s idea of social pact cannot justify or be the real foundation of property. Thus, the theory is a redundancy.

6. The theory of social utility

There were numerous voices who tried to demonstrate the theory according which property is justified through its social function.

John Stuart Mill for example, underlined that nature makes property to be necessary and considered it as a stimulus without which any man could wish to work and wouldn’t save for himself.

In the same time there were numerous persons who sustained that property deserves and must be considered, because it is justified through its evolution, the social needs which imposed it and to which it gave full satisfaction, through utility and social force it represents, the contribution it brings beside family to unite and develop society; in all manifestations, it is an essential condition of progress and human life. Supressing it might destroy the economy and initiative spirit, the strongest stimulus of the human activities would be destroyed.

It shouldn’t be forgotten the merit of property in responding to the most elementary feeling of dignity and humanity, which pushes man towards ambition and a wish for better. Property is the right measure of capacity, of the creation and production possibilities of each, which all together converge to realization of general benefit.

This theory presents the advantage of allowing successive improving of this institution by eliminating inequities and everything that is not conform with the general interest. In fact, this theory seems to be the most solid one.

Society even if entitled claims an authority on land it couldn’t do anything better and in everybody’s interest than passing its right to all those who could extract the greatest benefit from these lands. Or till today individuals succeeded best this way and till the opposite situation, we may consider that they are the most appropriate in fulfilling this social function.

It is obvious that the notion of property evolved in its most intrinsic elements and cannot exclude the social-economic realities that mark it; it is imposed with a transformation from the individual character towards the idea of social function of correlation between the individual interest with the general one, of society. More often this idea is reflected today in the regulations of constitutional order.

Without amplifying the importance of discussions on origin and abstract fundament of property, carried on along time a thing is sure that “property is a historical and social fact, persistent, necessary and which cannot be removed, which transformed without dying and must be received as such”.

34 Munteanu, 1971, p. 57
35 Gide, 1929, p. 328
36 Hamangiu, Rosetti-Bălănescu, Băicoianu, 1997, p. 7
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Block, 1884, p. 711 – Mark Block, *Dictionnaire de la politique*, Paris, 1884.
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