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## CAN JUSTICE BE DISTRIBUTED? INSOLUBLE DEBATE BETWEEN LIBERTARIANISM AND EGALITARIANISM OVER PROPERTY RIGHTS

### Introduction

The right to property is a highly controversial issue. Although it is one of the three basic natural rights according to John Locke (Locke, 1823, p. 107), it is not adequately protected by the international law. Right to property is not included in either *International Covenant on Economic, Social and Cultural rights* or in the *International Covenant on Civil and Political Rights*. In the international law, it is included in the *Universal Declaration of Human Rights*.<sup>1</sup> In the European law, it exists in the Protocol No. 1 of the *European Convention on Human Rights*.<sup>2</sup> It is not included in the Conven-

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1 Universal Declaration of Human Rights. Accessed April 04, 2011. <http://www.udhr.org/udhr/default.htm>

2 European Court of Human Rights. European Convention on Human Rights. Accessed April 5, 2011. [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG\\_CONV.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf)

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tion itself because the states could not reach an agreement on it at the time it was drafted.<sup>3</sup>

What is so controversial about the right to property? Roughly, the answer to this question is that throughout history there were major disputes on what private property is, and how it should be protected. Fundamental debate on private property precedes all legal disputes and belongs in the domain of ethics. The key issue related to that of property is justice. Different opinions on private property are dependent on what is considered to be just. Although there are many approaches to this problem that can be divided in different ways, I will mainly focus on the dichotomy between egalitarianism and libertarianism. The latter justifies right to private property through right to liberty and is based on individualism and self-interest. The former favours equality over liberty and recommends sacrificing private property for the sake of justice for all.

Libertarian argument that private property is inalienable is based on self-interest and can be traced back to the social contract theorists. They justified the right to private property through labour, even though it is only one of the three ways of its acquisition (there is also inheritance and purchase). Crucial argument is that no one can be deprived of possessions he acquired through his own work. On the other hand, for Hegel, property plays a role in the constitution of personality. According to him, possession of property is constitutive for liberty. Furthermore, liberty is not a matter of rational choice but is a necessity. More recently, Robert Nozick follows Locke's argument, but goes further and claims that any interference with one's property, whether it is achieved through labour, inheritance or purchase, is considered to be a theft. His individualism is harsh and immune to sympathy and solidarity. It justifies the darkest side of capitalism and basically protects only those members of society who are wealthy, talented and lucky, forgetting those who are worse off. Nozick's justice is narrowed down to non-interference with private property. It does not include positive side of the right - opportunity to acquire property.

In response to libertarian individualistic approach, thinkers like John Rawls tried to develop egalitarian theory of justice. In his opinion, equality is more valuable than liberty. In order to secure justice for those who are worse off in the society, he is willing to partly sacrifice the right to private property. For Rawls, justice is achieved through fair distribution. Accord-

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3 Council of Europe, *Human Rights Handbook, No 10, The Right to Property Under the European Convention on Human Rights*.

ing to him, society should make sure that nobody is left with nothing and that accumulated property is redistributed from the rich to the poor. But it is precisely this distributive justice that violates the right to private property in a sense of non-interference.

I will argue that neither libertarianism nor egalitarianism guarantee justice, but inevitably lead to violation of human rights. That might be one of the reasons why the debate on whether the right to property should have been included in one of the covenants is in a permanent deadlock. Furthermore, I will argue that the solution might be reached only if we find the right balance between liberty and equality, which means to break away with the rigid concept of equality in the sense of sameness.

### 1. Private property: pro et contra

Primary dilemma concerning private property is whether it should exist at all, or should there only be communal property instead. Constructing the ideal state, Plato suggests that property should be a common good, as well as women, while children should be raised by the community and not by the family<sup>4</sup>. He claims that there should not be any sort of private property. Because of this, his polity was often characterised as communism (Garnsey, 2007). In contrast to this, Aristotle advocated for private property (Aristotle, 1959). His argument that the citizen is an exclusive owner of property is essentially utilitarian because he believes that individuals are primarily interested in their own possessions rather than in those belonging to the community, even though a man is in his nature *zoon politicon*. For Aristotle the most important aspect of property is its use, because value is expressed through utilisation. Plato's system of moral values stems from his metaphysic teaching according to which material world should resemble the perfect world of ideas. On the contrary, Aristotle's ethics is concerned with human good rather than with transcendental good. Aristotle found concept of common property problematic and extensively criticised Plato (Aristotle, 1959). He doubted that Plato's system of common property could survive because the most probable outcome would be that no one would take responsibility for the land, but would instead leave it to others. However, Aristotle only partly disagreed with Plato. He was in favour of

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4 In *The Republic* (book III and V) Plato claims that a special class of the society – the guards – should share the common property as well as wives. In the dialogue *Laws*, which is one of his last writings, he suggests that there should not be anything called “private” whatsoever: Bk. V, p. 363.

communal use of resources, while thought that land should be owned by individuals (Aristotle, 1959).

John Locke advocated for private property because he was “anxious to establish that the royal government of Stuart England – and indeed *any* government – had a duty to respect existing property rights” (Waldron, 1990). He considers it as one of the three inalienable rights along with right to life and liberty that are assured by natural law, namely, the law of reason. Locke’s starting point is the fact that god gave world to Adam and his posterity. Consequently, the whole of land would be left in a possession of monarchs, unless there are three legitimate ways of acquisition of property: labour, purchase and inheritance. The first one is the most important because it is constitutive for the right to property. Key argument is that a man owns his own labour, and consequently the land he has been working on, as well as the fruits of labour. In its minimal meaning, right to property is negative and means simply non-interference with somebody’s possession. Locke defends only this weak form of right to property. He does not suggest that everyone has right to possess property and “there is no cause for moral concern if anybody happens not to have acquired any resources as his own private property” (Garnsey, 2007). For him, right to property is not some kind of natural right in a sense that it is given by birth. Even though Locke claims that god gave world to Adam and his posterity, and appointed men to take care of the land, this does not mean that everyone is entitled to land *a priori*. Property is something that is deserved and legitimately obtained. Accordingly, right to property just protects what is already acquired. Legitimacy of this demand of non-interference comes from the argument that what is achieved through labour cannot be alienated.<sup>5</sup>

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5 “But the chief matter of property being now not the fruits of the earth and the beasts that subsist on it, but the earth itself, as that which takes in and carries with it all the rest, I think it is plain that property in that too is acquired as the former. As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common. Nor will it invalidate his right to say everybody else has an equal title to it, and therefore he cannot appropriate, he cannot enclose, without the con-sent of all his fellow-commoners, all mankind. God, when He gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of him. God and his reason commanded him to subdue the earth—i.e., improve it for the benefit of life and therein lay out something upon it that was his own, his labour. He that, in obedience to this command of God, subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him”.

Locke, J. (1823). *Two Treatises of Government in The works of John Locke*, Vol. 5. London, p. 107.p. 115.

One of the Locke's motivations is, as Macpherson claims, to defend unlimited property (Macpherson, 1978). Moreover, he justified modern capitalism and accumulation of capital. There are two difficulties with Locke's argumentation. First one is purely logical: since right to property is formulated only in a negative form of non-interference, there is a problem of excess accumulation as a consequence. If property is a subject to uncontrolled accumulation, logical implication is inability to accumulate once the resources are depleted. Second difficulty is ethical: even though accumulation is morally justified by efficiency argument (argument based on labour), Locke promises only partial justice, leaving those unable to accumulate helpless.

In contrast to Locke, Rousseau was profoundly against accumulation of property because it leaves many people with nothing. He believed that everyone is entitled to have as much as they need and not more than that (Rousseau, 2002). Right to private property for Rousseau consists of two elements. The first one is positive and refers to the right to possessions according to needs. The second one is concerned with the protection of those possessions. In order to determine private property, Rousseau used the criteria of "first occupancy" (Rousseau, 2002). He claimed that there is an inalienable right of the first occupant, namely, the person who first came into possession of a property.<sup>6</sup>

David Hume takes into consideration some of Locke's and Rousseau's conclusions and reinterprets them. For Hume, the problem with property begins with scarcity. Because of the scarcity, possession of property needs to be protected by law (Hume, 1960). Hume stressed that right to property is not natural, but socially constructed. To defend it is a moral problem. He claims that ownership is essentially internal and not an external relation between objects and therefore it imposes duty of abstaining from the possession of others. This abstinence he calls justice, and justice he defines as: "constant and perpetual will of giving everyone his due", and he says that there are four ways of acquisition of property: occupation, prescription, accession and succession (Hume, 1960). Occupation refers to the first possession or first occupancy. Unlike Rousseau, Hume does not think that this

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6 There are also three conditions under which property can be claimed under the criterion of first occupancy: "first, the land must not yet be inhabited by any one; secondly, a man must occupy only the area required for his subsistence; thirdly, he must take possession of it, not by ceremonial statements, but by labor and cultivation, the only mark of ownership which, in the absence of legal title, ought to be respected by others". See *Social Contract*, p. 168.

is the only criterion for determining private property. He adds prescription, which refers to possession over long time, accession which legitimises possession of all objects connected with the ones that are already one's property and succession which amounts to inheritance. Criterion of accession is related to labour, but, unlike Locke, Hume does not give any preference to labour over other criterions.

Individual is the starting point for both Hume and social contract theorists, and right to property for them is always protecting individuals rather than the whole society. All of them are, therefore, defenders of private property, but from different perspectives. According to them, foundation of justice is the reason itself, but it is only in favour of self-interest. Hobbes's approach to this problem is slightly different, since his ethical argumentation on private property stems from his political philosophy and obedience doctrine. Although he claims that there is a moral obligation for the protection of private property, it is in power of the sovereign (Hobbes, 1651). Citizens are permitted to own only if it is allowed by the sovereign.

Kant's starting point is also individualistic, but his defence of private property is grounded in his moral philosophy. Underlying argument is the categorical imperative which imposes duty to behave in accordance with the moral law (Kant, 2002). One of the implications of the moral law is respect for interests of other people. And private property always concerns other people. Apart from the moral law, Kant also highlights superiority of civil law. He insists that any right, which is considered to be natural must be ratified by laws of the civil society.

Hegel goes much further with individualistic and self-interest oriented justification of private property. In *Philosophy of Mind* he claims that property is a constitutive element of personality. Act of appropriation is at the same time importing personal will into the external object (Hegel, 2006). Since will is abstract and empty, it needs external things to be fulfilled. Property therefore makes subjective will objective (Hegel, 2001). But property is not just constituting the personality in this metaphysical sense, it is also necessary for the existence of legal personality, namely, the citizen. Hegel claims that everyone must have property insofar as it is a rational necessity. He is pleading for private property and harshly criticising Plato and other Greek philosophers for insisting on common property and common goods (Hegel, 2001).

Marx, on the other hand, went much further in developing the idea of common property than his Greek predecessors. Unlike social contract theorists as well as Hume, Kant and Hegel, Marx did not start with an individual, but with collective and social, advocating against private ownership.

In a certain sense, Marx's view of right to property is egalitarian in contrast to the libertarian approach of philosophers like Locke and Hegel. The cardinal difference is the fact that Marx is defending collective liberty and emancipation<sup>7</sup>, while Locke and Hegel are concerned only with individual freedom.

## 2. Radical Individualism

Following Locke's argumentation about private property, Robert Nozick develops extreme libertarian theory of self-interest. He is defending right to property in a weaker sense of non-interference and advocates against equal opportunities of property acquisition. For him, private property is inalienable and any interference with somebody's possessions he considers as a theft. Nozick builds his argumentation on the idea of self-ownership. His starting point is an individual who owns himself along with his talents and possessions. Therefore, nobody is entitled to deprive him of his life, liberty or property. The principle of self-ownership is the basis upon which the slavery was abolished, for the slaveholders "were considered man - stealers, and their 'rights' over the chattel slaves considered invalid, precisely because they violated the slaves' self-ownership" (O'Keeffe, 1992). Self-ownership therefore means that an individual owns not just his body, but also his powers. A man is the owner of his talents and therefore of his labour as well as the fruits of his labour. Further implication is possession of the property as a result of "the proper exercise of self-owned personal powers" (O'Keeffe, 1992).

Right to private property in its weaker form is simply a part of right to liberty. Furthermore, it is one of the conditions for freedom: an individual is free if he has absolute power over his possessions. Nozick's defence of private property based on self-ownership is not just inspired by Locke, but also by Hegel. Nozick argued that the owner must be able to choose what to do with his property because otherwise he is not a free individual and therefore has no dignity. In this sense, private property is constitutive for liberty according to both Hegel and Nozick.

The essence of Nozick's libertarianism is his defence of an individual against the community. Equality is completely unacceptable for him. It cannot be a criterion for justice because "there is no moral outweighing of one of our lives by others so as to lead to a greater overall *social good*" (Nozick,

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7 According to Marx, emancipation is always emancipation of a group and not of an individual.

1999). In contrast to theorists of utilitarianism, such as John Stuart Mill and Jeremy Bentham, Nozick does not believe in pursuit of overall good or happiness. He also strongly opposes to Kant's argument that individual will must obey moral law. For him, there can be no justification of sacrifice. The only moral restraint Nozick proposes is "libertarian constraint" that prohibits aggression of one individual against another. Therefore it can be said that Nozick accepts only "negative freedom" (absence of obstacles) and rejects "positive freedom" (possibility to act and have control over life) according to Isaiah Berlin's classification.<sup>8</sup>

As a consequence, Nozick justifies right to property in a narrow sense, but strongly opposes the positive side of this right. Nozick was, as well as Locke, willing to allow endless accumulation of property and radical inequality, rather than to give up some of the individual freedom. For him, to enable everyone to acquire property means to restrain liberty. Therefore, if private property is inalienable and any kind of interference with it is forbidden, redistribution of property in order to eliminate poverty is prohibited as well. Arguing against redistribution, Nozick considers the point of view of a person who is in a position to give away his property. In his opinion, it is not just to impose such a rule according to which those who accumulated property should sacrifice their possessions (Nozick, 1999). In his opinion, theoreticians that advocated "distributive justice" and preferred equality over liberty never considered this point of view. They focused solely on the recipient side. This leads to the conclusion that even if it is just that everyone has right to be able to acquire property, redistribution is not a just way to achieve this justice. But it is not that Nozick does not approve any kind of redistribution. He is simply against its coercive mode. If there should be any redistribution, both giving and receiving side should be willing to undergo this procedure. As a consequence, Nozick is disapproving taxation and allows only charity, even though he admits that this is not enough to achieve equality.

Nozick believes only in self-interest and not in goodness and altruism. Libertarianism of Ayn Rand is of the same kind, but even more radical. Contrary to common beliefs, she claims that altruism is evil and that selfishness is a virtue. According to her, traditional equalisation of selfishness and evil is a prejudice. She stresses out that selfishness simply means "concern with one's own interests" and it free from moral evaluation (Rand,

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8 According to Berlin, positive freedom is primarily associated to a collective, while negative is related to an individual. Berlin, I. (2002). *Liberty*. Henry Hardy ed. Oxford: Oxford University Press, pp. 169 – 181.



1964). She calls her ethical teaching objectivism because it advocates rational selfishness which is based solely on reason. Her defence of right to private property stems from this ethical teaching. If selfishness is a virtue, private property is inalienable. Following Locke, she puts special emphasis on right to property as one of the basic rights that constitute all others. In her opinion, without right to property it is impossible to practise other rights.<sup>9</sup> Furthermore, she uses this argument to justify capitalism:

Capitalism is a social system based on the recognition of individual rights, including property rights, in which all property is privately owned. The recognition of individual rights entails the banishment of physical force from human relationships: basically, right can be violated only by means of force. In a capitalist society, no man or group may initiate the use of physical force against others. The only function of the government, in such a society, is the task of protecting man's rights (Rand, 2011).

Pure libertarianism, in the way Nozick and Rand formulated it, can be used as a defence of capitalist society where property is owned by free individuals who are freely competing using their self-owned powers. In this sense, libertarianism is opposed to communist ideology that promotes common ownership. But egalitarian approach to the problem of property is not necessarily communism oriented. Far from being apologetic to communism, John Rawls developed a theory of justice that in fact deals with problems of capitalism.

### 3. Justice as Distribution

Rawls's theory of justice is an attempt to solve the problem of endless accumulation of property, which is a logical consequence of Locke's argument. He is defending right to property in its stronger form, which includes providing opportunities for achieving property. His starting point is self-interest in Kantian rather than in Nozickian sense: he also begins with an individual, but adds that human beings are social. It is a rational choice theory because the agreement made in the *original position*, under the *veil*

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9 "Man has to work and produce in order to support his life. He has to support his life by his own effort and by the guidance of his own mind. If he cannot dispose of the product of his effort, he cannot dispose of his effort; if he cannot dispose of his effort, he cannot dispose of his life. Without property rights, no other rights can be practiced." Rand, A. *Capitalism: The Unknown Ideal*. Accessed April 18, 2011. <http://tfasinternational.org/ila/WhatIsCapitalism.pdf>

of ignorance, is simply reasonable. This agreement is Rawls's version of a social contract. According to his theory, in the state of nature, individuals are not aware of their position in the society (this is the meaning of the veil of ignorance), and they are deciding upon rules under which they are going to live (Rawls, 2003). Since the probability of ending up as being the worst off, the only rational decision that can be made is to secure that nobody is to be left with nothing. Rawls calculates the odds and decides to minimise the gambling factor. Instead of bearing the risk of ending up being poor, he chooses a fair society in which resources will be justly distributed.

He establishes two principles of justice. The first is that each person has an equal right to the most extensive basic liberty, which is compatible to the liberty of others. The second is that social and economic inequalities are to satisfy two conditions: equality of opportunity and greatest advantage of the least advantaged (Rawls, 2003). Rawls is therefore concerned with those who are the worse off in the society rather than with the overall good. That is his crucial argument against utilitarianism: it is not the sum of happiness he is aiming to achieve, but assurance that each individual is provided with the minimum. On the other hand, his position is not strict egalitarianism because he advocates for equality of opportunities instead of equality as the sameness. That is why for Rawls liberty and equality are not entirely opposite, but overlapping. In fact, Rawls understands freedom as "positive liberty".<sup>10</sup> His theory of justice is therefore based on rational choices that individuals make in order to ensure control over life. Rawls' concept equality of opportunity was revolutionary and deeply influenced political thought. The reason why it seemed so convincing was that it ensures that people's fate is determined by choices, rather than specific circumstances: "If I am pursuing some personal ambition in a society that has *equality of opportunity*, then my success or failure will be determined by my performance, not by my race or class or sex" (Kymlicka, 2002). Rawls' approach is in fact very human rights oriented.

According to Rawls, justice within a society is realised through just procedures. Rawls relied solely on the rule of law. Unlike Plato who considered the rule of philosophers as superior and therefore advocated for substantial justice, Rawls believed in procedures designed to minimise injustice. Consequently, he claimed that political institutions are entirely responsible for just economic and property relations: "The institution of property is

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10 Here I refer to the classification of Isaiah Berlin from the "Five Essays on Liberty". Berlin, I. (2002). *Liberty*. Edited by Henry Hardy. Oxford: Oxford University Press, pp. 169 – 181

justly ordered when it is part of a social and economic system that specifies property relations so as to make the worst-off class better off" (Freeman, 2003). This implies that even though Rawls considers right to private property as one of the basic rights (Rawls, 2003), he does not treat it in the way Locke and the libertarians do. He refutes their argument based on labour by claiming that individual talents and powers are inherited. While Nozick, for example, thinks that each person should be rewarded according to his effort, Rawls thinks this is not just because not everyone has the same capabilities. This is the main reason why Rawls thinks that private property is not entirely inalienable, but undergoes the process of just redistribution when needed in order to achieve equality of opportunity. This is how Rawls merged liberty and equality in a single theory and defined right to property in both negative and positive way.

In his version of egalitarian theory, Cohen attacked libertarianism from a slightly different angle. He adopted Nozick's notion of self-ownership in order to show that it does not necessarily lead to the justification of inequality (Cohen, 1995). Unlike Locke and Nozick, Cohen did not think that private property is a prerequisite for freedom. By introducing the notion of world-ownership, he tried to "divorce self-ownership from private ownership" (O'Keffe, 1992). According to him, self-ownership does not imply ownership over external things. He debunked the myth about initial appropriation of property by suggesting a possibility that original privatisation was a theft of something that should have been held in common (O'Keffe, 1992). Consequently, his solution was to accept libertarian concept of self-ownership as a starting point and combine it with equality of resources. The result he achieves by developing this argument is equality of conditions, which is an equivalent to Rawls' equality of opportunities.<sup>11</sup>

Ronald Dworkin also thought that pure egalitarianism is not sufficient and therefore adopted some libertarian arguments. His main contribution to egalitarian theory is however, the fact that he fragmented the phenomenon of equality. He recognised ambiguity of the notion and tried to grasp its different meanings<sup>12</sup>. In the first place, he distinguished equality of wel-

11 Steps of Cohen's argument are the following: "I seek an economic constitution which (1) upholds the principle of self-ownership but (2) enforces equality of raw worldly resources and, thereby, (3) preserves equality of final condition" Cohen. G.A. (1995). *Self – Ownership, Freedom and Equality*. Cambridge: Cambridge University Press, p. 71.

12 In his latest book *Justice for Hedgehogs*, Dworkin repeats his old argument of initial auction and insurance but he also develops some fresh ideas. He equalises positive liberty with democracy and then proposes "partnership conception" instead of majoritarian

fare from the equality of resources in such a way that resources are means for welfare (Dworkin, 2002). Distributive justice is for him only the first step on his way to justify positive form of the right to private property. For him, there is no doubt whether the resources should be redistributed or not, he begins with investigating what is the just way to distribute them. He proposes a solution which is highly unlikely to be realised:

I imagine an initial auction of all the available resources in which each person has the same number of bidding chips and the bidding is conducted so that in the end nobody envies anybody else's bundle of resources. If he did, he could have bid to have them. The auction may take a long time, but that is the result. And then, a further auction takes place of insurance in which people make their own choices over risks of various kinds by deciding what insurance to buy I agree that that is an extremely artificial construction. But I spend a good deal of time, not just in this book but in other books, in showing how we can use that kind of a model, with emphasis on the insurance aspect, as converting brute bad luck into a kind of choice luck (Dworkin, 2010).

With this argumentation, Dworkin went further in developing egalitarian doctrine and challenged libertarian theory, but as he himself pointed out, the main difficulty with distribution argument is its practical implementation.

#### 4. Partial Justice and its Consequences

##### 4.1 Failure of Egalitarian Attempt to Justify Distribution of Property

In my opinion, egalitarian theory failed to refute libertarian argument on private property. Even though the concept of distributive justice is rational and convincing, there are several problems related to it. One of them is, as Nozick pointed out, that egalitarian approach focuses solely on the recipient side of the distribution. From the point of view of the giving

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democracy as a system that offers real representation and political equality. However, one of the most intriguing ideas from this book is the concept of interpretation. He proposes some kind of moral hermeneutics as a solution to perplexing and repeating ethical dilemmas. He suggests that notions such as justice and equality should be carefully interpreted. This interpretation should be conducted within a multidisciplinary approach rather than keeping it in the domain of philosophy. In this way, all the moral arguments can be tested. Dworkin, R. (2010) *Justice for Hedgehogs*. Boston: Boston University Law review, Vol. 90, pp. 469 – 477.

side, distribution is a violation of human rights. Most importantly it is a violation of right to self-determination. Moreover, to deprive someone of the right to make decisions for himself means to restrain his liberty in an unacceptable way. Therefore right to private property cannot be properly justified without the concept of self-ownership which Rawls and Dworkin denied. Once the idea of self-ownership is admitted, it is hard to avoid the consequence that the private property is inalienable and in that case there is no room left for the concept of distribution.

The main reason why egalitarian argument seems even frightening is that there are numerous cases in which Rawls' just distribution is simply unjust. One of the examples Nozick gives is the eye transplantation (Nozick, 1991). He asks whether, given that it is possible to easily transplant eyes, would be just to deprive someone of one of his eyes in order to help a blind person. By giving this example, Nozick bluntly explained why it might not be such a good idea to be born in Rawls' world. Furthermore, Dworkin himself showed how difficult it is to find satisfying formula of just distribution. Rawls' idea of procedural justice sounds comforting, but it is hard to realise it in practise.

Nevertheless, if the egalitarian demand for equality and positive side of the right to property is completely abandoned, what is left is bare selfishness. Once we are left with negative liberty alone, we are back to square one again because libertarian solution is not sufficient either. Pure absence of restraints leads to inequality and another kind of violation of human rights. Unlimited accumulation of property leaves many individuals without basic necessities. This is a negative consequence of capitalism for social, economic and cultural rights. Accumulation without just redistribution leaves little space for exercising those rights. In fact, one of the main arguments which explain why laws on economic and social rights are not properly implemented is that they are costly. Unlike civil and political rights that are negative and justiciable, economic, social and cultural rights are positive and unjusticiable. In order to provide everyone with basic necessities, some kind of just distribution is needed. It seems that this a difficult task to accomplish.

#### **4. 2 Judicial Dispute: Unclear Status of Property Rights**

In its nature, right to private property should perhaps be categorised as one of the economic rights, at least if it is formulated in both positive and negative way. If it is defined only in a negative way, it may also be classified as one of the civil and political rights. Nevertheless, it is not included in either the *International Covenant on Economic, Social and Cultural Rights*,

or in the *International Covenant on Civil and Political Rights*. Therefore, it is not officially proclaimed to be part of either of the two groups of rights.

However, the right to property is included in the *European Convention on Human Rights* and in the *Universal Declaration of Human Rights*. The two documents have significantly different formulations. In the article 17 of the *Universal Declaration of Human Rights*, which is divided into two parts, it is stated that everyone has right to own property and that nobody can be arbitrarily deprived of his property. Statement that “everyone has right to own property” refers to the positive aspect of the right. However, it does not specify that everyone should necessarily be provided with property that fulfils minimal standards. According to Waldron’s analysis, right to property as formulated in UDHR is simply right not to be excluded from the class of potential property owners. Consequently it is not guaranteed that anyone will actually get to become the owner (Waldron, 1990). It is only the *American Declaration of the Rights and Duties of Man* that ensures subsistence: “Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home”. Under the *European Convention on Human Rights*, right to property is protected by the Protocol No. 1 which is limited to the negative aspect of the right and allows deprivation of property if that is in public interest or if prescribed by law.<sup>13</sup> When this article is dismembered, it is visible that there are four constitutive elements bound together: peaceful enjoyment of property, protection against deprivation of property except in certain cases, entitlement of the state to control the use of property and entitlement of the state to impose taxes and penalties (Council of Europe, 1992). It may be concluded that the *European Convention on Human Rights* not only focuses on the negative side of the right, but also makes considerable restrictions to the exercise of this right. It is leaving all the power to restrain the right to private property to a particular state in a rather Hobbesian manner.

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13 “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”. European Court of Human Rights. *European Convention on Human Rights*. Accessed: April 21, 2011. [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG\\_CONV.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf)

In a nutshell, according to international and European law, the right to private property is considered to be mostly a negative right. Therefore both the *European Convention on Human Rights* and the *Universal Declaration of Human Rights* are inclining to libertarian perspective, ensuring only non-interference criterion, but with considerable restrains.

### Conclusion

Libertarian understanding of right to private property, considering only its negative aspect, leaves us with irreparable inequality, while egalitarian approach severely restrains liberty. Both theories analysed separately provide us with only weak solutions that are leading to violations of human rights. It seems that they are constantly undermining each other, and every attempt to make a fruitful compromise between them ends up in failure. Crucial problem is of a philosophical nature. Concepts of liberty and equality are standing on opposite sides restraining one another. It is extremely difficult to bind them together.

If formulated negatively, right to private property seems to be too loose, but if we are to accept its positive aspect, it is extremely hard to avoid the consequence of violation of liberty. Egalitarian theory of just distribution seems to be patchy, offering no sufficient alternative to libertarian arguments. However, contemporary world is in desperate need of a democratic solution of this perplexing debate. Both positive and negative side of the right to property should be protected. In my opinion, there is no doubt that its negative aspect must stay intact. The question is then, how to save the positive aspect, which is, according to Hegel with whom I must agree, constitutive for personality. Perhaps the solution can be found if we break away from the concept of equality and search elsewhere.

## Abstract

Fundamental debate on private property, which precedes all legal disputes, is in the domain of ethics and starts with the beginnings of western philosophy. The key issue related to that of property is justice. Different opinions on private property are dependent on what is considered to be just. Although there are many approaches to this problem that can be divided in different ways, I will mainly focus on the dichotomy between egalitarianism and libertarianism. The latter justifies the right to private property through the right to liberty and is based on individualism and self-interest. The former favours equality over liberty and recommends sacrificing of private property for the sake of justice for all.

I will argue that neither libertarianism nor egalitarianism guarantee justice, but are inevitably leading to violation of human rights. In my opinion, both positive and negative side of the right to property should be protected, and perhaps the solution can be found if we break away from the concept of equality.

## Резиме

Фундаменталната дебата за приватната сопственост, која им претходи на сите правни спорови, е во доменот на етиката и започнува со почетоците на западната филозофија. Клучното прашање поврзано со сопственоста е правдата. Различните мислења за приватната сопственост зависат од тоа што се смета за праведно. Иако според авторката постојат повеќе пристапи за овој проблем што може да се поделат на повеќе начини, трудот главно се фокусира на дихотомијата меѓу егалитаризмот и либертаријанизмот. Вториот пристап го оправдува правото на приватна сопственост со правото на слобода и се заснова на индивидуализмот и личниот интерес. Првиот пристап ја фаворизира еднаквоста за сметка на слободата и препорачува жртвување на приватната сопственост поради правда за сите.

Трудот нуди аргументи дека ниту либертаријанизмот ниту егалитаризмот не гарантираат правда, туку дека неизбежно доведуваат до повреда на човековите права. Според авторката, и позитивната и негативната страна на правото на сопственост треба да бидат заштитени, а која аргументира дека решението можеби постои надвор од концептот на еднаквост.



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