

THE FIRST-YEAR PROPERTY COURSE: TRANSNATIONAL PERSPECTIVES

By:

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I. Transnational Perspectives: Their Increasing Importance in Property Law

- a. Transnational perspectives supply an important and critical perspective on U.S. law
- b. Transnational perspectives are important in identifying transnational and transcultural issues in property law and theory
- c. Thinking transnationally is important as many property issues, as an enforceable legal matter, become international in nature

II. Transnational Perspectives: The Burgeoning Availability of English-Language Materials

- a. How and where to find transnational perspectives on property issues
- b. Particular sources for general comparative information in property law

III. The First-Year Property Course: Concrete Ideas for Integrating Transnational Perspectives

- a. What *is* property? How does something *become* “property”?
 - (1) Property and the theory of conquest
 - The Principality of Sealand: www.sealand.gov.org (the creation of nation-states; the issue of unclaimed “land” in international or territorial waters)
 - www.lunarlandrush.com : “Your Lunar Real Estate Agency” (claims to extraterrestrial property; U.N. Outer Space Treaty of 1967)
 - Key Davidson, “Final Frontier for Lawyers – Property Rights in Space: Land Claims, Commercial Schemes and Dreams Have Legal

Eagles Hovering”, San Francisco Chronicle, Oct. 16, 2005
(discussing lunar claims and others)

(2) Historical claims: When honored? How long honored?

- Compare Johnson v. M’Intosh with the following case: Mabo v. Queensland, (1992) 66 ALJR 408; (1992) 175 CLR 1 (recognition of aboriginal land title in Australia); also commentary, Peter Butt, “The Mabo Case and Its Aftermath: Indigenous Land Title in Australia”, in G.E. van Maanen and A.J. van der Walt, eds., Property Law on the Threshold of the 21st Century (Maklu Publishers, 1996)
- Reunification of Germany and regime change in Eastern Europe: see, e.g., Hanri Mostert, The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany (Springer, 2002), chapter 10 (“German Reunification and the Property Order”); Michael Wines, “Latvians Can’t Escape Cold War’s Divisive Legacy”, New York Times, May 20, 2001
- Regime change in Africa: see, e.g., Jon Jeter, “Africa’s Racial Divide: Zimbabwe Confronts White Grip on Fertile Farms”, Washington Post, Feb. 21, 2000
- Cultural property issues: see, e.g., Celestine Bohlen, “Major Museums Affirm Right to Keep Long-Held Antiquities”, New York Times, Dec. 11, 2003 (problem of “stolen” antiquities in U.S. museums); Steven Lee Myers, “For Whom Will Harvard’s Bell Toll? That’s in Question”, New York Times, Jan. 5, 2004 (dispute between Moscow’s Danilov Monks and Harvard University over bells donated in the Soviet era to Harvard University)
- Treasures and Sea Wrecks: see Brendan I. Koerner, “Under the Sea, Treasure Hunters and Scientists Battle for History’s Bounty”, U S News and World Report, Oct. 4, 1999, at p. 45 (general legal and scientific issues); and compare <http://atocha1622.com/Rare/Atochacoins.htm> (selling coins from Spanish wrecks) with William J. Broad, “Court Ruling on Spanish Frigates Foils Modern-Day Treasure Hunt”, New York Times, July 31, 2000 (describing newly asserted Spanish cultural claims)

(b) What *should or should not* be property?

(1) Claims regarding DNA as “property”

- Bartha Maria Knoppers, ed., Human DNA: Law and Policy – International and Comparative Perspectives (Kluwer Law International, 1997) (includes Moe M. Litman, “The Legal Status of Genetic Material” (Canadian); Noël-Jean Mazen, “Human DNA on Trial in French Law” (French); Ruth Chadwick, “The Status of Human Genetic Material – European Approaches” (English); Sjeff Gevers and Els Osthorn-Heim, “DNA Sampling: Dutch and Other European Approaches to the Issue of Informed Consent and Confidentiality” (Dutch))
- DNA and national control: see <http://cnn.com/HEALTH/bioethics/9902/iceland.dna/template.html> (national sale by Icelandic government of exclusive research access to its population’s DNA)
- The challenges of indigenous peoples: genes, DNA, and other bodily substances cannot be “property”, “owned”, “sold”, “patented”, or otherwise objectified; they are living and sacred manifestations of previous generations. See , e.g., Aroha Te Pareake Mead, “Genealogy, Sacredness, and the Commodities Market”, 20 Cambridge Survival Quarterly 46 (1996); Jean Christie, “Whose Property, Whose Rights?”, 20 Cambridge Survival Quarterly 34 (1996); Andrea Carmen et. al., “Plant Plunder, Genes, and Sneakers”, 36 United Nations Chronicle 28 (1999).

For discussions of the furor over the patenting of DNA from the Hagahai, Guayami, and other indigenous people with the U.S. government, see Jonathan Friedlaender, “Genes, People, and Property: Furor Erupts over Genetic Research on Indigenous Groups”, 20 Cambridge Survival Quarterly 22 (1996); Amar Bhat, “The National Institutes of Health: and the Papua New Guinea Cell Line”, 20 Cultural Survival Quarterly 29 (1996); Joanne Barker, “The Human Genome Diversity Project: ‘Peoples’, ‘populations’ and the cultural politics of identification”, 18 Cultural Studies 571 (2004).

(2) Property rights in personal information

- See Breen v. Williams, 35 N.S.W.L.R. 522 (Ct. of Appeal of New

South Wales) (1994) (patient's claims to her medical records as her property)

(3) The effects of seeing relationships and questions in “property” terms

- André van der Walt, “Un-doing Things With Words: The Colonisation of the Public Sphere by Private-Property Discourse”, in Graham Bradfield and Derek van der Merwe (eds.), Meaning in Legal Interpretation (Juta & Co., 1998) (South African)

(c) The constitutional protection of property

(1) Is it necessary? Desirable?

- Not necessary or desirable – England, Canada, New Zealand, and India: see Jennifer Nedelsky, “Should Property Be Constitutionalized? A Relational and Comparative Approach”, in G.E. van Maanen and A.J. van der Walt, eds., Property Law on the Threshold of the 21st Century (Maklu, 1996) (Canadian)
- Desirable, with qualifications: A. J. van der Walt, “The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation”, in Janet McLean, ed., Property and the Constitution (Hart Publishing, 1999) (South African)
- Post-1990 Constitutions: property guarantees adopted in Argentina, Armenia, Czech Republic, Kazakhstan, Belarus, Burundi, South Africa, Ukraine, Georgia, Hungary, and others. See André van der Walt, Constitutional Property Clauses (Springer Publishers, 1999)
- The question of interpretation as critical to desirability: see André van der Walt, Constitutional Property Clauses (Springer Publishers, 1999); László Sólyom, “Introduction to the Decisions of the Constitutional Court of the Republic of Hungary”, in László Sólyom and Georg Brunner, eds., Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court (U. of Mich. Press, 2000); Laura Underkuffler, The Idea of Property: Its Meaning and Power (Oxford, 2003), chapters 12 and 14 (discussing interpretive methods used in India, Germany, and Hungary, with case and literature references)

(2) Is the meaning of “property”, for constitutional purposes, the meaning

used in private law?

- No - Germany, and South Africa: see André van der Walt, Constitutional Property Clauses (Springer Publishers, 1999); Hanri Mostert, The Constitutional Protection of and Regulation of Property and Its Influence on the Reform of Private Law and Landownership in South Africa and Germany (Springer, 2002), chapter 10 (“The Concept of Property in Constitutional and Private Law”)

(3) Comparative, substantive guarantees

- Environmental rights as a limitation on constitutional property guarantees: Czech Republic, Chile, Moldova, Belarus, Armenia, and others
- National cultural heritage claims as a limitation on constitutional property guarantees: Azerbaijan, Belarus, Georgia, and others

(4) Calculating “just compensation”

- Australia and Germany: “fairness” reflects both individual interests (market value) and community interests
- South Africa: just compensation includes consideration of current use of the property, history of the use and acquisition of the property, state subsidies in the creation of current market value of the property, and other factors

(5) Constitutional protection of property and regime change: how do we balance stability in ownership and past injustice?

- See volume 19 of Recht en Kritiek (1993), page 228 onward: discusses the question of property protection and justice in the South African transition to democracy from all points of view (writers from the African National Congress, other political movements, the academy, others)
- See Dawid van Wyk, John Dugard, et. al. eds, Rights and Constitutionalism: The New South African Legal Order (Oxford Press, 1996): essays, including extensive comparative analysis, of possible constitutional guarantees, interpretative methods, and so on – written during the debate over the form of the new South African Constitution

(6) U.S. and international comparisons

- Gregory S. Alexander, The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence (U. Chicago Press, 2006) (forthcoming)
- André van der Walt, The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996 (Juta & Co., 1997) (new edition forthcoming 2006)
- Tom Allen et. al, The Right to Property in Commonwealth Constitutions (Cambridge Series in International and Comparative Law (Cambridge U. Press, 2000)