

I *Introduction*

As a property theorist, Hanoch Dagan stands out for his relentless insistence on the plurality of values underpinning the law of property as well as for his focus on the contextual specificity of property institutions. Despite this welcome championing of pluralism and context and his many insights, I want to suggest that Dagan is not sufficiently attentive to either questions of institutional context or the deep challenges of pluralism. The problem lies with the ‘legal realism’ that underpins his theoretical framework. This leads him to reject the critical resources that legal doctrine provides for evaluating institutions and responding to value pluralism.

Let me begin with a case. In 1948, the Ontario Court of Appeal upheld the validity of a covenant attaching to a cottage property, prohibiting the owner from selling the cottage to ‘any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood.’¹ Although four years earlier a lower Ontario court had declared a similar covenant void on public policy grounds, the Ontario Court of Appeal refused to follow this decision. Some judges distinguished the case; others claimed it had been wrongly decided.² Before a further appeal was heard before the Supreme Court of Canada, the Ontario Legislature responded to the public outcry and passed legislation prospectively banning the creation of such discriminatory covenants.³ The way the story is often told to first year property students is that, when the Supreme Court heard the case, it lacked the courage to face the public policy question squarely and instead invalidated the covenant on the basis of some doctrinal ‘technicalities’ in property law: the covenant failed to conform to the ‘touch

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1 *Re Noble and Wolf*, [1949] OR 503 (CA) [*Re Noble and Wolf*].

2 The previous decision was *Re Drummond Wren*, [1945] OR 778.

3 The current version is *Conveyancing and Law of Property Act*, RSO 1990, c 34, s 22.

and concern the land' requirement for a valid restrictive covenant; that is, the covenant was not about the land itself or a mode of its use.⁴

What is so attractive about Dagan's 'inside' property strategy is that he would reject this dismissal of the Supreme Court's approach. Dagan thinks that the law of property should have the internal resources to invalidate such covenants without turning to external, public law ideals. Indeed, Dagan takes *Noble and Wolf's* US analogue – *Shelley v Kraemer* – as a central example that his account needs to be able to explain.⁵ For Dagan, such an explanation needs to refer to the particular values, or combination of values, that serve to define the property institution at issue. In the context of housing, he views the important value to be autonomy. Racially based restrictive covenants, he argues, operate as restraints on alienation by reducing the pool of potential buyers for a property and are 'practically tantamount to a substantial limit on exit.'⁶ Exit is important because it facilitates mobility and enhances 'people's capacity for a self-directed life.'⁷ The autonomy of non-owners is also at stake, for such restraints limit the ability of some people to purchase property in some locations, limiting their mobility.

One problem with Dagan's autonomy reasons is that they are indeterminate in the face of the facts of *Noble and Wolf*. While Dagan is correct that this amounts to a restraint on alienation, the common law has always tolerated partial restraints; the important legal question turns on whether something is an 'unreasonable' restraint on alienation. Dominant among concerns here is whether the seller would have to sell below market value – but there was no suggestion in this case of any such market effects.⁸ Similarly, there is no factual basis for assuming that the pool of buyers was substantially reduced, limiting the owner's 'exit' options.⁹ Finally, it is not clear that the arguments about access to ownership and its effects on mobility apply as sharply in the context of a summer cottage.¹⁰ In other words, Dagan would have difficulty arguing that the Ontario Court of Appeal's decision was clearly wrong.

But I think that the deeper problem here is that Dagan's framework leaves him without important critical resources for illuminating what is most salient about the Ontario Court of Appeal's failure to invalidate the covenant. These resources, I argue, are legal doctrine and the institutional

4 *Noble and Wolf v Alley et al*, [1951] SCR 64 [*Noble and Wolf*].

5 Hanoch Dagan, 'Inside Property' (2013) 63 UTLJ 1 at 11 [present issue] [Dagan, 'Inside'].

6 Hanoch Dagan, *Property: Values and Institutions* (New York: Oxford University Press, 2011) at 53.

7 *Ibid.*

8 See e.g. *Re Rosher*, (1884) 26 Ch D 801.

9 *Re Noble and Wolf*, supra note 1 at para 22, Robertson CJO.

10 *Ibid* at para 28, Robertson CJO.

structures of law. In the section that follows, I elaborate upon this and then suggest why Dagan's position on this also poses a problem in relation to law's accommodation of, or relationship to, pluralism.

II *Inside out?*

Dagan's starting point is to understand the idea of property already implicit in its 'doctrinal and institutional arrangements.'¹¹ But this is a very strange starting point for Dagan. First, he is an avowed legal realist and he cites the methodological starting point of Canada's most avowed formalist, who would deny any place in the private law for the ends-based reasoning Dagan defends and deploys. Second, given his legal realist commitments, it is not clear what resources he actually has for making sense of either doctrine or institutional arrangements.

In his other writings, Dagan denies that the predictability of law can come from doctrine itself. Doctrine, he argues, suffers from a multiplicity of sources and so judges always have a choice with respect to which authorities to apply.¹² This renders various forms of doctrinal analysis 'hopelessly malleable and thus indeterminate.'¹³ Instead, Dagan argues that '[l]egal realists insist that legal reasoning should be oriented towards the human ends served by law; that a jurisprudence of rules be substituted by a jurisprudence of ends.'¹⁴ These ends are the particular balance of values served by the property institution in question. One might say, therefore, that for Dagan there is an inside to property institutions but there is no inside to law.¹⁵

Despite his dismissal of doctrinal reasoning, Dagan does not think that legal decision making is *in fact* hopelessly indeterminate.¹⁶ He agrees that considerations like the rule of law require that law operate in a rule-like fashion. How does a 'jurisprudence of ends' accomplish this? Presumably, it is these ends that give judges a sense of the 'flavour and fitness' of case law that he, following Karl Llewellyn, claims is part of the realist understanding of the determinacy of the law.¹⁷ He further claims

11 Dagan, "Inside," supra note 5 at 2; citing Ernest J Weinrib, 'Private Law and Public Rights' (2011) UTLJ 191 at 193.

12 Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 UTLJ 607 at 615 [Dagan, 'Realist'].

13 Dagan, 'Inside,' supra note 5 at 18.

14 Dagan, 'Realist,' supra note 12 at 631.

15 Frederick Schauer, 'The Limited Domain of the Law' (2004) 90 Va L Rev 1909 [Schauer], makes this point about legal realism generally.

16 Dagan, 'Inside,' supra note 5 at 18.

17 Dagan, 'Realist,' supra note 12 at 654.

that ‘the (limited) stability of rules at any given moment relies on – and is thus contingent upon – a convergence of lawyers’ background understandings . . . and not upon the determinacy of the doctrine as such.’¹⁸ Thus the determinacy and stability of the law arises from the ends of the property institutions and the social contexts they are embedded within rather than legal doctrine.

This position regarding the sources of determinacy makes it difficult for Dagan to address law’s failures, like the Ontario Court of Appeal decision in *Re Noble and Wolf*. If doctrine itself is hopelessly indeterminate, as Dagan claims, then the way to argue that this case was wrongly decided is through ends-based reasoning. However, as I have already pointed out, Dagan’s autonomy arguments regarding restrictive covenants fail to establish this. If we think instead that doctrinal analysis has something to offer, then we can look more critically at the reasoning of the case. The judges variously framed the issue in terms of the ‘sanctity of contract’ and the absolute freedom of association in a democracy. What was *not* discussed was that *there was no contract at issue here*. Noble, the owner, did originally have a contract with the Frank S Salter Company. However, by 1948, that company had ceased to carry on business. It was the other cottage owners in the Beach O’Pines Estate who wanted the covenant enforced – but they were not parties to the original agreement. They could only enforce the covenant if the burden Noble had agreed to ‘ran with the land.’ This is a question of property law, not contract law.¹⁹ In other words, this was not a failure to adapt the law to serve the ends of property (Dagan’s account); this was a failure to *apply* the law. The shared ‘background understandings’ of the judges might, indeed, provide a window of insight into this failure, suggesting clearly racist attitudes. However, if anything, such a possibility should sound a cautionary note: that the determinacy of the law rests upon shared social understandings of legal participants should not lead us to champion the role of appellate judges (as Dagan does), but rather to raise difficult questions about the representativeness of the bench and the lack of access most ordinary people have to our courts.

Resting the determinacy of legal decision making on either ends-based reasoning or the shared social understandings of legal participants is not just a problem for Dagan’s claim to account for cases like *Re Noble and Wolf* from ‘inside’ property. In the following section, I argue that it impedes his ability to accept important versions of pluralism.

¹⁸ Ibid at 647.

¹⁹ Carol Rose makes a similar point in the American context; see Carol M Rose, ‘*Shelley v Kramer* through the Lens of Property’ in Andrew Morriss and Gerald Korngold, eds, *Property Stories* (New York: Foundation Press, 2004).

Meeting the pluralist challenge from within the law

Dagan is a pluralist in two different senses. To begin with, he advocates a focus on plural property institutions rather than a single organizing idea as underpinning ‘property.’ In this he follows his legal realist roots in holding that there are multiple factors at work in any given area of law and that the level of analysis needs to be closer to the ground and the lived experience of the law than to broad abstractions like ‘property.’ In this sense, ‘pluralism’ is a pluralism of context, an idea that there are many things (property institutions) rather than one thing (property) to account for. As well, Dagan argues for pluralism in the sense of a pluralism of values – that is, that the values animating the law of property are multiple: liberty, utility, labour, personhood, community, and distributive justice are all in play.²⁰ These two senses of pluralism come together to provide Dagan with the basis for advocating a focus on property institutions rather than property more generally, where a different balancing of values will be appropriate in the context of different social relationships and different objects of property. This tailoring of plural values to plural contexts is what gives shape and determinacy to Dagan’s property institutions.

There is another kind of pluralism, however, and one that has traditionally worried liberal theorists: different individuals having a plurality of views (including values) about the *same* thing. This is worrisome because it is the source of some of our most intransigent social conflicts – whether between individuals or between groups – in contemporary liberal democracies. Dagan does not address this kind of plurality, nor do the legal realists he relies upon for his theoretical framework.²¹

Take Dagan’s examples relating to marital property. His form of pluralism emphasizes that property rules must take into account the specific context of marital relations in order to get a specific property institution of marital property. But the pluralist challenge I am outlining asks what the law should do where there are plural views of marriage itself. Moreover, it is not just that different individuals have different views but that individuals are part of different communities with very different views on the nature of marriage, views that are, in turn, deeply bound up with ideas of group identity; witness the many debates in Canadian society in its recent past regarding *Shari’a* law, polygamy, same sex marriage, and the legacy of the former marrying-out rules of the federal *Indian Act*.

²⁰ Dagan, ‘Inside,’ *supra* note 5 at 19.

²¹ See Jeremy Waldron, “‘Transcendental Nonsense’ and System in the Law” (2000) 100 *Colum L Rev* 16 at 45, for a critique to this effect.

In the face of *this* kind of plurality, many questions appear that Dagan never addresses. Let me outline two. First, there may be great value in seeking a thin convergence on ‘public’ values, defined as much through what this leaves out (our deep disagreements) as for what it includes. But this would mean recognizing that law is, in some sense, a limited domain.²² Second, in the face of deep plurality, the question of institutional legitimacy looms large – how should the state navigate plural normative systems and with what legitimacy are any particular norms imposed on those who do not share them? One cannot simply champion the expressive role of law in providing models of ideal relationships²³ without addressing these questions.

One way to meet the pluralist challenge is to embrace a strategy that is methodologically off-limits to Dagan: to take seriously the idea that doctrine itself exhibits organizing principles that are not reducible to the kind of ends-based reasoning he espouses. There are a variety of forms such a strategy might take but the key move is to pull apart the two things that Dagan collapses into one: the reasons why we have private property (its ends or the values served) and what private property is as a legal practice (its doctrinal ‘interior’). This would open up the possibility of agreeing on the practice of private property despite deep normative disagreements regarding the reasons we want private property.

Here is a simple example of how people can agree on a particular norm while not agreeing at all on why they endorse that particular norm. Suppose I join a group of people who have all decided to give up owning and using a car within the city. We might have very different reasons for making such a decision – I might hate driving; you might be an ardent environmentalist; another might simply be frugal; still another might be an anti-technology anarchist. I may find others’ reasons strange, inaccessible to me, or even repulsive. Our reasons need not overlap – they may occupy completely different terrain. But we can all agree on the action item that the reasons point to: give up the car. We can also organize our activities in light of this agreement by sharing information and strategies and even organizing advocacy projects to make the city more friendly to people who would like to make the same decision. We can do all of these things despite our disagreements regarding our deepest normative commitments.

Charles Taylor argues for something like this view when proposing the basis for ‘a genuine, unforced international consensus on human rights.’

²² See e.g. Schauer, *supra* note 15.

²³ Dagan, ‘Inside,’ *supra* note 5 at 9.

Indicating its affinity with Rawls's idea of an overlapping consensus, Taylor describes it in these terms:

Different groups, countries, religious communities, and civilizations, although holding incompatible fundamental views on theology, metaphysics, human nature, and so on, would come to an agreement on certain norms that ought to govern human behavior. Each would have its own way of justifying this from out of its profound background conception. We would agree on the norms while disagreeing on why they were the right norms, and we would be content to live in this consensus, undisturbed by the differences of profound underlying belief.²⁴

In other words, Taylor argues that one way to deal with what I have called the pluralist challenge is to seek to pull apart the norms we agree on from the underlying beliefs that motivate this agreement. In terms of property law, this strategy suggests that we keep separate the idea of private property and the values that private property serves and so may figure in its justification. There may be many ways to implement such a strategy, but all would need to take seriously the idea that law is a limited domain and that some kinds of considerations are off limits to the judges deciding cases from 'inside' the law.²⁵

Let me illustrate this by returning to the example of racially based restrictive covenants. The Supreme Court of Canada held that such covenants are not valid because they are not about the *use* of the land and therefore fail the 'touch and concern the land' requirement. We can understand this in relation to the structure of private property rather than the ends it serves. On this view of property law, for example, exclusion is not a value or end of property law but is one of its organizing principles. Exclusive control of an object of property puts the owner in a particular kind of relation with non-owners, one that has several key characteristics. One of these is 'impersonality' or the idea that *who* the particular owner is does not matter to the basic structure of property law.²⁶ Within this framework, we can understand restrictive covenants as agreements between owners *as owners* or, as the Supreme Court put it, 'a

²⁴ Charles Taylor, 'Conditions of an Unforced Consensus on Human Rights' in *Dilemmas and Connections: Selected Essays* (Cambridge, MA: Harvard University Press, 2011) 105 at 105.

²⁵ There are many potentially different versions of this. Formalism is one. For other expressions of this idea, see John Gardner, 'The Purity and Priority of Private Law' (1996) 46 UTLJ 459 at 463–4.

²⁶ James Penner stresses this in his account of property as do Henry Smith and Thomas W Merrill. See e.g. James E Penner, *The Idea of Property in Law* (Oxford: Clarendon Press, 1997); Thomas W Merrill & Henry E Smith, 'What Happened to Property in Law and Economics' (2001) 111 Yale LJ 357.

relation between parcels' of land.²⁷ The requirement that a valid covenant 'touch and concern the land' is one of a set of requirements that seeks to ensure that the relation is one between owners (whoever they happen to be) rather than between particular individuals with particular interests²⁸ (in which case the agreement lies in contract and could not bind subsequent individuals). It might be that the other cottagers in the Beach O'Pines property development cared deeply about *who* the other owners were, but this is just not a concern that can be accommodated within the structure of private ownership. To say this is not to say that previous precedents made this result a foregone conclusion or that this was an easy case. To say that exclusion is an organizing idea and that impersonality is one of its hallmark features is to say that courts have available a set of resources for reasoning through property problems that are indeed 'internal' to the law.

²⁷ *Noble and Wolf*, supra note 4 at 69, Rand J.

²⁸ For a fuller discussion of ownership along these lines, including the example of servitudes, see Lisa M Austin, 'Possession and the Distractions of Philosophy' in JE Penner and HE Smith, eds, *The Philosophical Foundations of Property Law* (Oxford: Oxford University Press) [forthcoming]; Christopher Essert, 'The Office of Ownership' UTLJ [forthcoming].