

*Research article***Examining the dispossession concept through market inalienability:
Mabo v Queensland (No 2)**

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Abstract: This article presents a critique of the contemporary capitalist system, which promotes to trade every single item in accordance with the desire of people independent of the transferability of items by scrutinizing Radin's market inalienability perspective to prevent dispossession. The applicability of the market inalienability argument in the context of the land law is argued in theory. The legal struggle of Aborigines has been considered by the Mabo case by enucleating the relationship between land and people from the historical and philosophical point of view in theory.

Keywords: Land rights, Dispossession, Market-inalienability

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“Successful theft thus presupposes a system of principles of ownership while also violating that system of principles of ownership. Therefore, thefts are incoherent expressions of freedom.”

Georg Wilhelm Friedrich HEGEL (Beiser, 1993, p. 249)

1. Introduction

This article aims to investigate the influence of the market-inalienability theory by Margaret Radin (1987) on the perception of preventing dispossession by considering the Mabo v Queensland (No 2) case (1992). A considerable amount of literature has been published on the concept of dispossession to draw a frame for several controversial issues in terms of law, economics, sociology, and philosophy. However, this study investigates the dispossession concept under general theories about land law such as Marx's primitive accumulation, Harvey's accumulation by dispossession, and Locke's labor theory of property. After defining crucial terms for a better understanding of the matter, this study will subsequently continue with a critical summary of Radin's market-inalienability concept to establish a connection with the concept of dispossession.

Radin alleges that universal commodification is playing a key role in society up to some extent with respect to market-inalienability by inspecting the essential merchantable items. This study exhaustively discusses what would have happened if land properties were not the subject of the common market. This debate is still controversial and much disputed like timeless songs. However, there has been little discussion between the acquisition of land and dispossession under market inalienability theory. The relationship between people and their rights on their lands varies across the culture of the society. One of the most well-known but unorthodox examples regarding dispossession and the lack of the land title is the Mabo Case, which addressed a truly specific connection with the

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land from the perspectives of Aboriginal and Torres Strait Islander people. Using the theory of market-inalienability might offer a solution to prevent dispossession by accepting the property as a nonmarket item under some circumstances.

Since people adopted a sedentary life, land has always been one of the main reasons for many significant events in history such as wars and poverty (Johnson & Toft, 2017). To date, there has been very little agreement on the relationship between men and land. Machiavelli accordingly gave one of the most stunning examples in his masterpiece, *The Prince*, to define the relation between the people and the property. He displayed the vague relationship between man and his property in the 16th century and he demonstrated the importance of the land for people by advising the Prince with the following sentence: "... If it is necessary to execute anyone, this should be done only if there is a proper justification and obvious reason. But, above all, he must not touch the property of others, because men forget sooner the killing of a father than the loss of their patrimony..." (Machiavelli, 1998, p. 59). From a different angle, it is safe to say that every human being has a connection with the property because they have to be at somewhere physically. Starting from this point of view, it can be established a link between dispossession and market-inalienability by considering the exigency of land. It would accordingly not be wrong to say that dispossession would likely harm both previous and existing landowners because it happens in the absence of law. In another saying, more precisely, the law as an assurance of the protection of property would likely be wangled to form a basis for dispossession practice (Fraleay, 2017, pp. 517-38; Sabri, 2012, pp. 2678-81).

2. Definitions for most visited concepts: Commodification, inalienability, and dispossession

There is a need for making clear definitions concerning the repeated terms throughout this paper regarding the terms of commodification, inalienability, and dispossession. First, the term commodification, in the simplest terms, has come to be used to refer to the transforming process of something into a commodity. It has also known as 'exchanges through which something "human" or "inalienable" becomes valued for its commodity exchange value in a market (Oliver & Robison, 2017, p. 1317).' Whereas commodification refers to the transformation process making things marketable, inalienability is a conception making unable to sell, buy or transfer things. Hence, commodification and inalienability are poles apart from each other (Block, 1999, p. 37).

The above-mentioned definitions are close to those of Radin who defined the concept of inalienability as the right the selling or transferring property by the proprietor. She accordingly defined universal commodification as a free-market exchange conducted by people's own volition (Radin, 1987, pp. 1849-1937). In this regard, Block gave a stunning example to show the danger of universal commodification by compelling people to think whether and to what extent justice is an alienable object. The richer side of the case and can judge can bargain in this context for appraising the justice (Block, 1999, p. 42). However, the main weakness of this example is the failure to address that nobody can trade anything in the absence of justice. In spite of the fact that one can easily disconfirm Block's example, it would likely be wrong to turn a deaf ear to the rationale behind his example, which is attaching blindly to the exercise of universal commodification would most probably bring along detrimental impacts.

Finally, dispossession can be defined as "what happens when populations lose their land, their citizenship, their means of livelihood, and become subject to military and legal violence (Butler & Athanasiou, 2013, p. 3)." Throughout this paper, the term dispossession in its simplest form will refer to an action of debarring people from their properties. The issue of dispossession has received considerable critical attention by the expansionist policies of governments. This was one of the significant reasons to force indigenous people in Australia to leave their land, which is the central thesis of this paper.

3. The Market-Inalienability Theory of Radin

The notion of universal commodification and market-inalienability have been scrutinized together with their contingent damages on the development of humanity by Radin to demonstrate under which circumstances universal commodification can be adopted. She accordingly stated that universal commodification would be accepted as long as all necessary conditions to protect personhood are provided by not commodifying things, which matter for humanity's development (Radin, 1987). To concretize the issue, she defined two types of property that are personal and fungible according to the characteristic of properties. Personal property exists if it has a personal attachment, and consequently, it is impossible to detach this property by not harming the personhood. As to the non-personal properties, they are fungible properties, which are enabled to be commodified.

Whether and to what extent land is a fungible object raises an issue in the literature and this paper. For example, Park defines that land as a fungible commodity in terms of dispossession in colonial America (Park, 2016, pp. 1006-35). However, on the other hand, the Mabo case shows that land is not always a fungible property. Chicago school lines up with the universal commodification by finding any legal interventions into the laissez-faire markets will be inconvenient and *prima facie* bad.² Many other prominent scholars from the Chicago school such as Posner and Becker accordingly highlighted that putting inalienable properties on the market would likely cause more market failures (Block, 1999, p. 41). Overall, in the literature on dispossession, the relative importance of the market-inalienability concept would presumably be subject to considerable demand.

Market-inalienability brings with a double bind. On the one hand, employing market inalienability theory would most likely hinder poor and oppressed people to reach food, shelter, and health care. However, on the other side of the coin, the lack of market-inalienability would cause oppression by entailing a competitive environment to disturb the whole balance between destitute and wealthy people. An incomplete commodification suggested by Radin would likely be one of the most persuasive solutions to this double bind. According to her pluralist view, if things are important to personhood, they should not be commodified and subjected to the market (Murray, 1987, pp. 30-38; Radin, 1987, pp. 1855-58). She examined the concept of personhood under three titles namely freedom, identity, and contextuality (Radin, 1987, pp. 1903-09). These titles which will be commented on in the following section, are necessary to develop a better understanding of what rights are required to bestow people to reflect their free wills into nature.

4. Critiques

The comments regarding the definition of the property concept have radically differed several times by now. A considerable amount of literature has been published on the property. Proudhon describes the concept of property as a robbery (Proudhon, 1947, p. 11), whereas Russell defines property as a must for security and freedom (Russell, 2004). Throughout this process, the meaning of the relationship between man and nature and between man and man have both deepened and eroded. However, in any case, access to nature by property rights should be regarded as both a physical and social need for people. That is why almost all countries secure property rights by their constitutional charters. This is also regulated by Article 1 of *Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms* as:

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.

² Chicago school, as a vigorous advocate of neoliberalism, asserts that there is a need to determine a market price for every commodifiable thing. See, Ertman & Williams (2005, pp. 10-11).

In fact, since the concept of property is multifaceted, it is very difficult to make an agreed standard definition. It is consequently significant to point out the historical development process of the property. The first serious discussion and analysis of the concept of property emerged in the 17th century by Lock, who pioneered the philosophy of property. Before Locke and his property theory, the general belief about the property was to be created by states. In contrast to this widespread belief, Locke claimed that property is the source of the state, and consequently, the state aims to protect property to protect itself (Locke, 1690, pp. 106-12). This argument particularly illustrates that the existence of property rights did not supervene upon the formation of states.

According to Locke, people will have the right on the property as long as they use the land by contributing their labor. He accordingly argues why people should take their share of common property for three reasons. First, as food and shelter are required to meet the right to life, people are required to have land to access food and shelter as a natural result of the right to life. Secondly, when somebody takes common property, it does not mean that the land is dispossessed because the property will become waste if it is not available for human use as people are naturally unproductive. Locke also added that the yield of a property is low for common property. To sum up, labor is the provision to have property rights on the land. Therefore, Locke removed all borders regarding property rights to secure the unlimited accumulation of the capital by emphasizing the labor on the property.

While Locke has tried to legitimize the concept of private property, Marx (2003, p 82, pp. 713-15) antithetically described private property as the most characteristic feature of capitalist society and the basic reason for alienation and restriction. The existence of the private property phenomenon is the basis of social conflict and class contradictions. From the Marxist angle, property rights bestow owners to usufructuary rights (Erdem, 2018, p. 450). When a property is an inseparable part of a person's life, it should not be put into the market issue (Sichel, 1972, pp. 355-60). Here, market-inalienability might be used to prevent dispossession to prevent commodity fetishism, which turns properties into human spiritless objects (Maurer, 1999, pp. 365-85).

The liberal economy makes it possible to earn large amounts of money to stir up people's interests in belongings. These interests are also designed by the market because again, the market decides the types of products and their prices, not customers or producers. Hence, one can assume that market dependence would obstruct freedom. This conjecture is the mainstay of Marx's opinion. Primitive accumulation began with the forced seizure of labor. It happened when the masses of the people are expelled with dispossession that results in a continuous accumulation, which is necessary to turn the wheels of capitalism (Marx, 2003, pp. 667-725).

From another perspective, Hegel defines property as a precondition for being a person who acts freely. Therefore, the property should be an alienable object on the understanding that it must be external (Maurer, 1999, pp. 365-85). As maintained by Kant, the subjective condition to use the external object of our will is property. Hence, prohibition of using land would equivalent to the restriction of freedom. It can be fairly said that Hegel and Kant both adopted a separatist strategy that includes that all detachable things from a person should be alienable.³ To sum up, the property should be regarded as a prerequisite for fulfilling the personality and representing people's will to nature.⁴

³ Kant also rejected the liberal motto of "laissez-faire et laissez-passer" by driving forward the moral rules in this regard. For further information, see Byrd and Hruschka (2006 cited by Ashgate, 2006).

⁴ The source of respect to people is the property, which is also the source of self-fulfillment. This approach is close to thoughts of Hegel, who define property as following sentences: "The rationale of property is to be found not in the satisfaction of needs but in the supersession of the pure subjectivity of personality. In his property a person exists for the first time as reason. Even if my freedom is here realized first of all in an external thing, and so falsely realized, nevertheless abstract personality in its immediacy can have no other embodiment save one characterized by immediacy." It would not be wrong to say that the term of market-inalienability is the reflection of Hegelian philosophy because the notion of personhood is put in the center of property right in either case. For further reading, see Hegel (2008, p. 58).

The ownership of the land may change in time but the acreage of the land will always remain the same. The land is not a structure that can be produced by people, but the human-made market is. The notion of the free market economy becomes increasingly charming each passing day. People would likely desire to buy and sell everything in the absence of paternalism and this would badly affect human flourishing by fostering prostitution or baby-selling practices as exemplified by Radin. Overall, basic dimensions of life should not be a part of the market by considering the market-inalienability concept. Hence, some properties should be regarded as inalienable because they may legitimize and quote a price to slavery, prostitution so on, and so forth.⁵

Polanyi (1957) identified labor, land, and money are fictitious commodities by mentioning that these cannot be commodified. However, commodification for this triad would likely be the only way to organize their supply. These three figures must be saleable and alienable to maintain continuous production as the requirement of capitalism. Lefebvre (1976) also asserted that capitalism survives through space production. Furthermore, lands were commodified because of this reason in our current system. People are even commodified and become commercial objects, for example, insurance companies insure parts of the human body and they set prices for them. Harvey's theory of accumulation by dispossession also states that capitalism constantly demolishes and creates itself as it can bring more profit (Harvey, 2005). Overall, capitalism consequently needs dispossession for accumulation.⁶

To establish the concepts of dispossession and market-inalienability, it would probably be useful to examine the process of acquiring the land. It is futile to discuss dispossession on land where has not been acquired by someone. Historically, legal ways to colonize territory throughout the 1700s are conquest, cession, and settlement.⁷ As an example, indigenous people who occupied Australia at least 50,000 years ago (Bergström et al., 2016) have a closed economic system and their relationship with the land is completely different from the European perspective because Aborigines do not need to build a house and cultivate the land. Therefore, British colonies thought that Aborigines have no sense of ownership and in this context, they confiscated the land without any payment or agreement. Afterward, they declared that Australia was nobody's land and took the land. In other words, when British invaders settled in Australia, they captured indigenous' lands by claiming the terra-nullius. Then, most of the indigenous people were dispossessed.

The land has been repeatedly occupied in this way. To iron this dilemma out, the Torrens system was used in Australia to create a clean title on land using curtains, mirrors, and insurance principles (Keenan, 2017, pp. 87-108). It provides a clean, but artificial title. Regarding the mirror principle, what has been registered as an official is undeniable for people. To put it differently, the written thing is trusted. As to the curtain principle, the current owner is protected by applying the curtain principle. Previously entitled people no longer claim a right on the land. British invaders used this source for acquiring land from Australian indigenous. Hence, applying a curtain principle means dispossession for previous owners. As to the insurance principle, the damage caused by unintended consequences is taken under protection with this principle. Under the Torrens system, the land title was to follow the ownership model applied to vessels. Through registration, moveable and landed properties could be made autonomous of their previous owners, drawing their "legal legitimacy, and

⁵ On the other side of the coin, even if slavery or prostitution would not be respectable for human flourishing, they would be efficient and acceptable in market methodology because in theory, they would likely be a chance for poor people who may suffer from starvation. From this point of view, it might be logical to allow people to sell their properties because their right of usufruct contains a right to sell.

⁶ Chakravarty and Silva cited Harvey's theory of accumulation by dispossession that neoliberal thoughts are new territories acquisition. See, Chakravarty and Ferreira da Silva 'Accumulation, Dispossession, and Debt: The Racial Logic of Global Capitalism – An Introduction' (2012).

⁷ According to Whitmore, there are five legal ways to colonialize territory that is known as the doctrine of the acquisition of territory: occupation, conquest, prescription, cession and accretion are the ways to acquire the land. See, Whitmore (1896).

thus their marketability, from the singular act of registration (Keenan, 2017).” The writing was fortified as the origin of law, including the law of property (Vismann, 2008, pp. 1-39).

The most prominent issue in the violation of indigenous people’s rights brought to the UN Human Rights Committee is the violation of the rights on the land (Ksentini, 1994). In this regard, Mabo Case will also benefit from making a brief statement for indigenous people’s rights on their lands. In 1770, British Captain Cook declared the current Australian territory as a territory belonging to the United Kingdom. It was subsequently decided to establish a colony in this new port zone as a penal colony. As a result of this, most of the indigenous people were removed from their living areas for long ages. Despite the fact that legal ties between England and Australia came to an end, indigenous people were victimized until 1992. Mabo's decision in 1992 made it possible to claim land ownership for indigenous people if they prove their historical and tribal traditional ties with their lands. Although it looks instrumental, it always contains a risk that there is a kind of recognition (Watson, 2002, pp. 253-69).⁸

If market-inalienability is accepted in terms of indigenous people’s lands, the same problems would likely be avoided in advance. As indigenous people do not properly use the concept of money, it is unfair to think that they require making payments for their land. Under this circumstance, market-inalienability might be useful to protect indigenous people’s rights on their properties. On the other hand, formal title breathes life into dead assets and transforms them into capital. This approach eschews a substantive role for the state in implementing redistribution of land and related resources, restricting the state’s role simply to that of a facilitator of transactions between willing sellers and willing buyers (Musambi, 2007, pp. 1457-78). In the opinion of Soto, if a formal property system is applied for assets, this becomes more effective and secure for the capitalist system. For capital accumulation, the relation between capital and the land must be continuous and expanded. The increase of private property relations may be a solution for underdeveloped countries by making money with this transaction (Home, 2004). From another perspective, fictitious ownership of land is just about the manipulation of paper (Pottage, 1994, p. 361). People cannot be sure of a place in which has already been taken because a title is not the legal basis of possession.

On the contrary, possession is the legal basis of title. Thus, the title would be seen as relative and unreliable. From another perspective, Park (2016, pp. 1006-35) defines that land is a fungible commodity in terms of dispossession in colonial America. In fact, by considering Locke’s labor theory based on agricultural production, dispossessions against indigenous people in the United States and Australia would probably be acceptable (Davies, 2007). They used their lands with their resources but in the perspective of Locke, they used their lands inefficiently. Hence, it can be considered that colonial powers have the right to settle for establishing plantations.

5. Conclusion

This article critically discussed the market inalienability approach of Radin and its correlation with the property. To get straight to the point, being a man of property is always risky because the value and the recognition of property are constantly changing based on numerous parameters. In this context, while the States are on the side of providing the right of property, citizens are on the side of benefiting from this right. In fact, the main aim of all legal systems is firstly to provide this assurance to establish and protect their authorities because, at the end of the day, States and their citizens share the same fate.

Land as a humanitarian need is in the essence of confusion between people and property. Even if the property right is constitutionally provided to every single citizen, walking in thorny ways is required to reach this right. Therefore, it is requisite to level the playing field to the citizens

⁸ The concept of property right is fully alienable and consequently, everybody has right to have property by using, selling or leasing it. However, having a right to property is entirely complex. It is problematic whether it is enough to put in a claim on the land by using this property or having a warranty deed.

concerning the property rights by States to ensure the development of personhood by either adopting market inalienability or another policy. Although it is hopeful to see the return of Aborigines to their lands, it seems not possible to deny the reality of the current dispossession threats imposed by the current economic system.

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