Chapter 5

Property Rights Viewed from Emerging Relational Perspectives

Peter Horsley*

The market and property rights are human constructs, creatures of social invention that have assumed enormous cultural and economic power. Our current property law regimes emerged under 18th century thinking and a very different social and ecological reality. As growing ecological pressures mount, these regimes are now under critical scrutiny. There is compelling evidence that private property regimes can contribute to the destruction of plants and animals as well as ecosystems with their webs of complex dynamic interactions that extend beyond individual localities into the flows of the biosphere.

A critique of existing property rights regimes is offered using a spectrum of relational lenses that reflect the evolving ecological world view. These lenses are useful not only for sharpening the necessary critique, but also for suggesting foundation points for new thinking about property law and property rights. While the analysis is generalized and wide-ranging, the message is clear. The current world view is undergoing a dramatic transformation. Property rights and their underpinning social structures are at odds with emerging insights and will need to be redesigned by society if we are to live a “good life” with both the Earth and human communities in mind.

1. Historical background and world views

World views comprise the shared values and assumptions on which customs, norms, and institutions are based. They lie at the heart of culture, touching and strongly influencing every aspect of social life.

Ralph Metzner notes that we are living in an era of tumultuous cultural upheaval in which the dominant Western world view, variously called “scientific,”

* Peter Horsley is a research fellow and senior lecturer in environmental law at Massey University’s Resource and Environmental Planning Program. He combines working on community-based sustainability projects in New Zealand and the South Pacific, with teaching U.S. students in a Boston-based study abroad program.
“modern,” or “industrial” is undergoing a profound reappraisal. This world view was shaped by the scientific revolution of the 16th and 17th centuries and the industrial revolution of the 18th and 19th centuries.

Newton, Galileo, and Descartes revolutionized science by devising quantitative, mechanical models of physical processes using mathematical and analogical approaches to explain the universe. These models encompassed a narrow empiricism and rationalism that were characteristic of the Enlightenment and still dominate mainstream knowledge systems, particularly science.

Our democratic traditions and legal system share this Enlightenment-era philosophy centered on reason and positivist approaches. The concept of the nation state, sovereignty, and centralized hierarchical authority emerged out of the monarchic, feudal, and ecclesiastical forms of the medieval period. Democracy coevolved with the nation state and the rise of mercantilism and the market economy in 18th and 19th centuries along with a focus on the individual, property rights, the private accumulation of capital, and its protection by the state through law. Material goals and ownership rights predominated in this arrangement, and the state was an active participant in protecting property, promoting the private creation of wealth, and accessing its surplus through taxes to fund state institutions.

Land has always been at the heart of ideas about wealth and has been the subject of great changes in social and economic relationships over time. Prior to the emergence of property rights in the 17th and 18th centuries, land was viewed differently. In feudal Europe’s agrarian society, land and labor were woven together, land tenures reflected a person’s status and responsibilities, and the commons were a part of complex social organization. Land and labor were not regarded as commodities to be bought and sold in the market, but rather were “embedded” in social relationships, subject to social dues, moral consideration and community management. Social reciprocity, gifting, and sharing between households were widely practiced.

The institutions dealing with land have changed over time. The commons, a major European institution until the 14th century, was dramatically affected by enclosures from the 14th to 18th centuries. During this period in England alone, more than 4,000 Enclosure Acts of Parliament were passed, enclosing 7 million acres. In medieval and Renaissance Europe, land was viewed as a special category of property, an outcome of the era’s social and political upheavals, including the decline of religious influence, the breakdown of efforts to prohibit interest (then called ‘usury’), the rise of a mercantile class, the development of centralized national institutions (initially monarchies, followed by the nation-state sovereignty model after the signing of the Treaty of Westphalia in 1648),