

WHAT IS PROPERTY?

¿QUÉ ES LA PROPIEDAD?

ADRIANO ZAMBON*

Abstract:

This paper aims to provide an answer to the question: What is property? Initially, two different uses of the term “property” will be outlined, and an attempt will be made to show how they can be explained in two different ways. The two explanations share some aspects, the analysis of which will lead to the minimal sense of the word “property”. This sense, which can be seen as the concept of property and as a specific type of answer to the initial question, will be distinguished from the conceptions of property. Then, the relationship between this concept and the notions of person and good will be analyzed, together with a problem related to the transfer of property. Finally, some general conclusions regarding the usefulness of the type of answer here provided to the initial question will be formulated.

Keywords: *Concept; Conception; Norms Or Rules; Property; Subjective Legal Positions*

Resumen:

Este artículo tiene como objetivo proponer una respuesta a la pregunta: ¿Qué es la propiedad? Inicialmente, se delinearán dos usos diferentes del término “propiedad” y se intentará mostrar cómo pueden ser explicados de dos maneras diferentes. Las dos explicaciones comparten algunos aspectos, cuyo análisis conducirá al sentido mínimo de la palabra “propiedad”. Este sentido, que puede verse como el concepto de propiedad y como un tipo específico de respuesta a la pregunta inicial, se distinguirá de las concepciones de propiedad. Luego, se examinará la relación entre este concepto y las nociones de persona y bien, junto con un problema relacionado con la transferencia de la propiedad. Finalmente, se formularán algunas conclusiones generales sobre la utilidad del tipo de respuesta aquí propuesto a la pregunta inicial.

Palabras clave: *concepto; concepción; normas o reglas; posiciones jurídicas subjetivas; propiedad*

* University of Milan, Milan, Italy (adriano.zambon@unimi.it). Article received on March 15, 2020 and accepted for publication on June 2, 2020.

I. THREE PROBLEMS

When dealing with property, it is good to first distinguish three different problems that concern it.¹

The first problem, which I will deal with in this article, is the problem of what property is. The second problem is the problem of justification of property and concerns the reasons to argue that the existence of property is right.² The third and final problem is the problem of distribution of property: what is the right way to distribute property?

As mentioned above, I will deal with the first problem. The reason for this choice is that this problem must necessarily be solved before one can try to solve the other two. Indeed, they require that ideas about what is right and what is wrong be applied to property, but it is not possible to apply such ideas to property if it has not been established what property is. It is for this reason that the first problem that legal philosophy must deal with (when dealing with property) can only be this.

For this purpose, I will proceed as follows. First, I will look at some ways of using the term “property” and try to understand what the purpose of each of these uses is. Second, I will show how different theses can be advanced on what property is, which can be used to explain, in different ways, the uses of the term “property” previously considered. Third, I will try to highlight that all the theses in question represent different descriptions of property and that they can be described by using a single formula. This possibility means that such a formula is a description of property shared by all the theses in question. Completing these operations will lead to get an answer to the question: “What is property?”.

Such an answer, however, is not unproblematic: it allows us to find what could be seen as the concept of property, which will have to be distinguished from the conceptions of property. After describing this distinction, it will be pos-

1 On this distinction, see HART (1968), p. 4.

2 This is only a generic description of the problem of justification of property, because it seems possible to distinguish three different types of justification of property: a general justification (which answers to the question of why there should be any property at all), a specific justification (which answers to the question of why there should be a specific sort of property), and a particular justification (which answers to the question of why a particular individual should have property). This distinction comes from BECKER (1977), p. 23, which, however, applies it to the justification of property rights.

sible to see how certain elements related to the concept of property are external to this concept and also why this concept can be useful.

II. TWO USES OF THE TERM “PROPERTY”

A good way to start wondering what property is is to ask oneself how we use the term "property". If we look at how this word is used in ordinary language and in legal language, we can see that its uses are mainly two.³

The first use is found in phrases such as “This contract concerns the property of that land” or “This statute concerns the property of algorithms”. In sentences of this type, the term “property” seems to designate something that has as its object a material good (such as a land) or an intangible good (such as an algorithm). Property, in such cases, can be regarded as property *of* a good. So, it is something that concerns a good.

Second, the word “property” can be used to designate a material or an immaterial good, for example in sentences such as “This land is private property”, “This pen is my property”, and “This information is property of the company”. In such cases, the term is not employed to designate something that concerns a good, but the good itself.

Therefore, the two different things that the term “property” can designate are:

1. something that has a material or an immaterial good as its object;
2. a material or an immaterial good.

Are there any connections between these two uses? To understand if the answer to this question is affirmative, it is possible to consider the first thing that the term can designate, given that for now it is excessively generic (unlike the second thing). What is that something that the term “property” designates in the first of the two uses considered and that concerns a good?

3 However, it is important to specify that I will not refer to the use of the term “property” aiming to designate the feature or the features of something (it is a use that can be found in phrases like “This compound has miraculous properties”). On this point, see SNARE (1972), p. 200.

III. THE IMMATERIALITY OF PROPERTY

A first question to be addressed in order to arrive at an answer to the question just asked is whether what “property” designates in the cases mentioned above is something material or immaterial. The correct option seems to be the second one, and it is not uncommon to come across claims of its obviousness. Despite this, we can ask ourselves what arguments can be used to defend it. Such an argument can be found in the “Blue Bentham”:⁴

There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind.

To have a thing in our hands, to keep it, to make it, to sell it, to work it up into something else; to use it – none of these physical circumstances, nor all united, convey the idea of property. A piece of stuff which is actually in the Indies may belong to me, while the dress I wear may not. The aliment which is incorporated into my very body may belong to another, to whom I am bound to account for it.⁵

Bentham seems to assume that there is an equivalence between the material and the visible. He then claims that the existence of property over a good does not constitute something that can be perceived through sight (and the fact that Bentham speaks of property to indicate something other than a good indicates that the use of the term to which he refers is not the use by which a material or immaterial good is designated). This is demonstrated by the fact that those physical circumstances that are normally associated to property and can be perceived through sight do not tell us anything about the property of a good: one can see them, but one cannot see anything of the property of that good. Consequently, by virtue of the equivalence assumed initially between the visible and the material, property cannot be something material.

The thesis of the invisibility of property is supported, in an analogous way, by Felix S. Cohen in the following exchange of words between *B* and *C*:

B. Well, here is a book that is my property. You can see it, feel it, weigh it. What better proof could there be of the existence of private property?

4 JENKS (1932), p. 289.

5 BENTHAM (1931), p. 112.

C. I can see the shape and color of the book very well, but I don't see its propertiness. What sort of evidence can you put forward to show that the book is your property?⁶

An analogous argument is employed by Frank Snare, when he writes that “a stolen apple doesn't *look* any different from any other apple”,⁷ which means that the existence of property over a visible good is not visible.

IV. PROPERTY AS ONE OR MORE SUBJECTIVE LEGAL POSITIONS

After accepting that property is something immaterial, we could say that it is a right. On the basis of this answer, the term “property”, in its first use, designates a right concerning a good. This answer makes it possible to explain the second use of the term in this way: the term “property” would designate the good over which the right in question exists.⁸

This answer, however, generates another question: what are the characteristics of the right identifiable with property? In other words, what are the contents of this right? That is, more simply, what right is it? There may be different answer to this question. One could claim, for example, that property is the right to the exclusive use of a good⁹ and then specify what the expression “exclusive use of a good” means, by saying, for example, that the right to the exclusive use of a good implies the possibility of consuming or destroying the good and the exclusion of others from the access to the good. From a certain point of view, it can be said that specifications of this kind do not lead to a change of the thesis according to which property is a single right (*i.e.*, the right to the exclusive use of a good).

However, from another point of view, such specifications can lead to a partial change of the answer provided initially. In other words, it can be argued that, actually, property is not a single right, but a plurality of rights. Basically, what can be initially read as a clarification of the notion of exclusive use of a good can be seen as indicative of the fact that identifying property with a single right is not sufficient to satisfactorily account for property. Instead, it is necessary to

6 COHEN (1954), p. 359.

7 SNARE (1972), p. 200.

8 An expression of this idea can be found in BLACK (1910), p. 955: “The word is also commonly used to denote any external object over which the right of property is exercised”.

9 In this direction, see, for example, PENNER (1997).

accept that property is a cumulation of multiple rights (for example, the right to consume the good, the right to destroy it, and the right to the exclusion of others from the access to the good), different from each other because of their contents. If property can be described as a plurality of rights, the claim that property is a single right can be regarded as a claim made for purposes of simplification. It could therefore be said that only at first sight property is *one* right and that, actually, it is a *plurality* of rights, put together and simultaneously held by the same person.¹⁰ Therefore, the good designated by the term “property” in its second use would be the object of this plurality of rights.

If we believe that property is one right or that property is a plurality of rights, we will recognize that the content of this right or of these rights determines a regulation of the relations between the holder of the right or of the rights and other persons in connection with one or more goods. Therefore, whether one identifies property with a single right or with multiple rights, the function of that right or those rights will always be describable as the regulation of the relations between persons in connection with one or more goods.

Therefore, the declensions of the thesis that property can be described through the notion of right are two:

1. property is a single right that regulates the relations between persons in connection with one or more goods;
2. property is a plurality of rights (which, only for reasons of simplification, can be described as a single right) which regulate the relations between persons in connection with one or more goods.

It is possible to criticize the second declension of this thesis, by noting that the position of the rights holder is not equivalent to a group of subjective legal positions that are only active (such as rights), but also passive, such as, for example, the duty not to use the good in a way that is harmful to other persons, or the liability to execution or taxation. On the basis of these observations, it is possible to advance the idea that property would actually amount to a plurality of subjective legal positions, which are not only rights (*i.e.*, active subjective

10 A thesis of this kind can be found in HOHFELD (1917), p. 746, in relation to the case of a fee-simple owner: “Suppose, for example that A is fee-simple owner of Blackacre. His ‘legal interest’ or ‘property’ relating to the tangible object that we call *land* consists of a complex aggregate of rights (or claims), privileges, powers, and immunities”.

legal positions), but also passive subjective legal positions.¹¹ The function of these positions is, again, describable as the regulation of the relations between persons in connection with one or more goods. A consequence of this idea is that, when we use the term “property” to designate a good, we are designating the good over which all these legal positions exist.

The thesis just described, as well as the other two theses previously shown, is a declension of the thesis that property can be described through the notion of subjective legal position, whether this position is a right or not.

V. PROPERTY AS ONE OR MORE NORMS OR RULES

So far, I have examined the thesis that property can be explained through an appeal (which takes different forms) to the notion of subjective legal position. An alternative position is that property coincides with one or more norms or rules, which, like the subjective legal positions employed by that thesis, can be seen as having the function of regulating the relations between persons in connection with one or more goods.¹² This thesis explains property not through the notion of subjective legal position, but through the notion of norm or rule. On the basis of this thesis, the term “property”, when it is used in the second of the ways described above, designates the good in connection with which the relations between persons are regulated by one or more norms or rules.

Something must be added about the relationship between the thesis of property as one or more subjective legal positions and the thesis of property as one or more norms or rules. The norm or rule or the norms or rules just mentioned can be regarded as the source of the right that, according to the first declension of the first thesis, coincides with property, or as the source of the subjective legal positions that, according to the second declension of the same thesis, coincide with property. The difference between the two theses is therefore a matter of perspective, since it depends on the choice to privilege the notion of subjective legal position or the notion of norm or rule in the explanation of property. In the first case, we will give value to what gives rise to one or more of the subjective legal positions existing in a legal system (*i.e.*, to one or more of the norms or

11 For a characterization of this kind, consider the analysis offered by HONORÉ (1961), which appeals to a list of subjective legal positions (seen as standard incidents).

12 For a thesis of this kind, see SNARE (1972) and WALDRON (1985), p. 318: “[t]he concept of property is the concept of a system of rules governing access to and control of material resources”.

rules that compose it); in the second case, instead, to what originated from one or more of the norms or rules of a legal system (*i.e.*, to one or more of the subjective legal positions held by the members of that system).

Therefore, one could say that these two theses are two different ways of describing the same phenomenon. Is there, one might ask at this point, another description, which can describe both? If the answer to this question is affirmative, the description in question must constitute a description of property shared by the two theses.

VI. A COMMON BASIS

Now it is necessary to understand if the different theses on property described above share something with each other. Are there elements in common between the two general descriptions of property I have considered?

As has been said, from the first point of view, property is a group of subjective legal positions or a single subjective legal position (more specifically, a right) with the function of regulating the relations between persons in connection with one or more goods. Instead, from the second point of view, property coincides with one or more norms or rules that regulate the relations between persons in connection with one or more goods. In both cases, therefore, the function of the entities identified with property is the same: to regulate the relations between persons in connection with one or more goods; and this is the first element common to both descriptions (both the one of the first thesis and the one of the second thesis). So, the difference between the effects of the two theses is only in the diversity of the things identified with property; the function of these things is the same.

Now let us focus on the type of things that perform this function in both cases. In the first case, these are subjective legal positions, while, in the second case, they are norms or rules. Is there an element that is common to these two types of entities? The answer is affirmative. When we try to describe a norm or rule, as well as when we try to describe a subjective legal position, we must necessarily resort to expressions such as “obligatory”, “permitted”, “forbidden”, and the like. The notions which we must make use of, in order to speak of norms or rules and of subjective legal positions, are, therefore, at least, deontic modalities (that is, at least, obligatory, permitted, and prohibited). These modalities are the “building blocks” of both the notion of subjective legal position and the notion of norm or rule. Obviously, this is not the same as saying that the notion of norm or rule and the notion of subjective legal position are equivalent: simply, both

notions can be described through the use of deontic modalities.¹³ A question that could arise at this point is: how many deontic modalities?

The answer is that, depending on the characteristics of the thesis regarding property one chooses to adopt, one deontic modality or more than one deontic modality will be needed. If, for example, we claim that property is the right to the exclusive use of a good, we could describe this right using a single deontic modality, that is, by saying that only one individual is permitted to use that good. In other cases, a plurality of deontic modalities could be used, for example when we want to describe a group of different subjective legal positions or a group of different norms or rules that are not all describable only by using “permitted”. So, both cases can be described by speaking of the use of a set of one or more deontic modalities.

Therefore, if we combine the two shared points that I have described, we can go so far as to say that property can always be described as a set of one or more deontic modalities that regulate the relations between persons in connection with one or more goods: this is the idea that unites the two conceptions of property I have examined. So, the minimal sense of “property” can be regarded as a set of one or more deontic modalities that regulate the relations between persons in connection with one or more goods.

It is important to note that identifying property with a set of one or more deontic modalities that regulate the relations between a person and a good is nothing but a more synthetic way of expressing the idea that property is a set of one or more deontic modalities that regulate the relations between that person and other persons in connection with that good. The reason for this is that the relation regulated by one or more deontic modalities between a person and a good is nothing other than the relation regulated by one or more deontic modalities between that person and other persons in connection with that good.

Obviously, it is possible to rely on this minimal sense to explain the two uses of the term “property” seen at the beginning. First off, that something designated

13 A treatment of property that highlights the connection between normative modalities and subjective legal positions, as well as the connection between them and the image of property as a “bundle of sticks”, can be found in MUNZER (1990), p. 23: “The idea of *property* [...] involves a constellation of Hohfeldian elements, correlatives, and opposites; a specification of standard incidents of ownership and other related but less powerful interests; and a catalog of ‘things’ (tangible and intangible) that are the subjects of these incidents. Hohfeld’s conceptions are normative modalities. In the more specific form of Honoré’s incidents, these are the relations that constitute property. Metaphorically, they are the ‘sticks’ in the bundle called property”.

by the term “property” in its first use corresponds to a set of one or more deontic modalities that regulate the relations between persons in connection with one or more goods. The second use of the term, instead, can be explained as a way to designate the good in connection with which the relations between persons are regulated by a set of one or more deontic modalities.

VII. CONCEPT AND CONCEPTIONS OF PROPERTY

It is possible to express the conclusions just reached using some more familiar notions, namely the notions of concept and conception, already employed in the study of the notion of property in legal philosophy.¹⁴ It can be claimed that the minimal sense of the term “property” is the concept of property, while the descriptions of property offered by the two theses described above are conceptions of property. They share the concept of property, but shape it in different ways, because they qualify the deontic modality or the deontic modalities of the set that is the concept of property (*i.e.*, deontic modalities that regulate the relations between persons in connection with one or more goods) as constitutive elements of different entities: either as the building blocks of one or more subjective legal positions or as the building blocks of one or more norms or rules.

This means that the reason why the descriptions of property proposed by the two theses previously described can be qualified as conceptions of property is only that the minimal sense of the term “property” here proposed is more basilar and generic than the senses associated to the term “property” by those two theses.

The difference between concept and conceptions of property can also be employed for another purpose: not only can it be used, as has just been done, to qualify the different conclusions produced by theories on the meaning of the term “property” as different conceptions of property, but also to qualify as such the different ways in which property occurs in different legal systems. Different legal systems present more or less different forms of property, but all of them can be described by using the concept of property. They may differ in the way in which the deontic modalities contained in the set identifiable with the concept of property are used to regulate the relations between persons in connection with one or more goods: choosing, in order to regulate the relations between persons in connection with one or more goods, how many and which deontic modalities to use and to what (*i.e.*, to which human conduct) they must be applied means

14 See WALDRON (1985). There are other important uses of the distinction between concept and conception: see, for example, RAWLS (1971), pp. 5-6, and DWORKIN (1977), pp. 134-136.

creating a specific form of property, which can be qualified as a conception of property.

A problem that can be addressed at this point is that the building blocks of the concept of property can be regarded as the building blocks of other concepts. For example, the concept of usufruct and the concept of mortgage can both be described as sets of one or more deontic modalities that regulate the relations between persons in connection with one or more goods. This seems to make it impossible to distinguish things like usufruct and mortgage from property (but also to distinguish things like usufruct and mortgage from each other), yet it seems absurd to deny the existence of the possibility of a distinction in this case. The point that must be highlighted is that the distinction in question takes place at a different level from the level in which concepts, that is, the minimal senses of terms such as "property", are placed. It becomes possible to distinguish property from usufruct as soon as the level of concepts is abandoned, and one moves to a level in which concepts are declined in different ways.

All this makes it apparent that the description of property here proposed is not to be regarded as a definition providing the necessary and sufficient conditions for every use of the term "property".

VIII. WHAT IS EXTERNAL TO PROPERTY

It is now time to consider a specific problem related to the treatment of property here proposed, that is, the problem of what is external to property: given the concept of property described above, what are the elements that, though relevant to the content of this concept, can be regarded as external to it? Such elements can be found by focusing on two different issues.

The first issue concerns the relation between the concept of property and the notions of person and good. It is important to underline that persons and goods are constitutive elements of the concept of property, but this concept does not offer a definition of "person" and of "good". This means that the criteria to identify persons and goods are external to the concept of property. This concept is a set of one or more deontic modalities that regulate the relations between persons in connection with one or more goods, but it does not tell us which entities are qualified as persons and which entities are qualified as goods. It is not property that makes something a person or a good; rather, once it has been established which entities are persons and which entities are goods, it becomes possible to apply the concept of property, that is, to employ a set of one or more legal mo-

dalities to regulate the relations between those entities that have been qualified as persons in connection with those entities that have been qualified as goods.

The second issue I want to discuss is similar to the one considered by August Thon, who wondered if the power that transfers property could be regarded as a part of property itself.¹⁵ Thon's answer was negative. To support it, he employed the following example: if I throw a stone from one point to another, what transferred the stone is a strength, but nobody would say that this strength came from the stone; consequently, this strength must be something external to the stone. This example would show that what transfers (in the example, the strength) cannot be, at the same time, what is transferred (in the example, the stone). Because of this, it can be said that the power that transfers property cannot be part of property, just as the strength that transfers a stone cannot be part of that stone.

Here I do not intend to critically examine the arguments formulated by Thon. I limit myself to pointing out that a problem similar to the one faced by Thon emerges from one of the theses that have been previously illustrated. More precisely, the problem in question emerges if we follow one of the forms of the thesis of property as one or more subjective legal positions and consider property as a group of rights. Given these assumptions, we can wonder whether to include the right to transfer property in that group.

The affirmative answer may be problematic: if we assume, for example, that property is a group that includes the rights X, Y, and Z, and that Z is the right to transfer property, Z has as its object property itself, *i.e.*, the rights X, Y, and Z, which means that this case is a case of partial self-reference, due to the fact that Z also refers to itself. A way to avoid the partial self-reference of this case is to claim that a characterization of property like the one just presented is not entirely correct: the mistake would be in thinking that Z is a member of the group that coincides with property. If it is stated that Z is a right that is not a constitutive element of property, the problem of partial self-reference is eliminated, because Z becomes a right external to property.

IX. CONCLUSIONS

At this point, it is possible to briefly repeat the theses supported until here and formulate some general conclusions that may be drawn from them.

15 THON (1878), pp. 327-328.

I have started with the distinction between three problems regarding property. By concentrating on one of them (the problem of what property is), I have distinguished two theses which constitute two different ways of solving it: the thesis of property as one or more subjective legal positions and the thesis of property of one or more norms or rules. I have argued that these theses can be seen as different descriptions of the same phenomenon and that there is a more general description of it, which is the minimal sense of the term “property” (a set of one or more deontic modalities that regulate the relations between persons in connection with one or more goods). By relying on this description, I have attempted to account for the second use of the term “property” (by which a good is designated). Finally, I have used the notions of concept and conception and applied them to property, arguing that the minimal sense of the term “property” that I have described is the concept of property, while the conceptions of property are the descriptions of property provided by the two theses described, but also the forms of property created in the different legal systems.

At this point, one might wonder what usefulness finding the concept of property has. Maybe it would be more useful to enquire about individual forms of property or to examine in more depth the criteria by virtue of which certain things are qualified as goods or people, or the criteria by virtue of which the concept of property is applied. Certainly the study of these themes is fundamental, but finding the concept of property may not be considered useless, since it helps us to understand why we feel that, although the term “property” can be used in different ways in legal language and ordinary language, there is something that is common to the different uses considered here. Finding the concept of property makes it possible to understand what this common element is. This, in turn, makes it possible to understand within which semantic boundaries the debates on the meaning of the term “property” move. A definition of the term “property” that cannot be described in the terms of the concept of property would represent an attempt at innovation, an escape from the boundaries in question.

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