

***For Habitat International***

**Private property rights not to use, earn from, or trade land in  
urban planning and development:  
a meeting between Coase and Buchanan**

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**Abstract**

This paper discusses the importance of private property rights not to trade a resource, with reference to the economic emphasis on transactional efficiency due to Hayek's friend, **Ronald H. Coase** (1910-2013). These were stressed by **James M. Buchanan** (1919-2013), a supporter of Austrian economics, for the planning and development of a market economy that respects human dignity based on freedom. It has been explained that the ideas of Coase and Buchanan are not contradictory, but complementary. The former

focused on voluntary contracting and the latter on institutional stability that safeguards the freedom of contract. Three contentious topics in property planning and development, namely trends in the exercise of eminent domain and land resumption in favour of doubtful public use or purpose; a legislative tendency to reduce the period of occupation for adverse possession; and government eviction of squatters from public land, are illuminated by such rights not to trade.

After specialisation, nations are no longer free not to trade – yet freedom not to trade is essential if trade is to remain voluntary – a precondition for trade to be mutually beneficial... (Daly 2013: p 42)

## **I. Preamble**

In the literature for and against globalization, the concept of the “freedom not to trade”<sup>1</sup> in relation to the private property rights of poorer or weaker countries, looms large (Daly 2006; Daly and Goodland 1994, Ruskola 2005; Hillman 2008, Lawn and Clarke 2010, Daly 2013). However, a theoretical difficulty remains, for freedom not to trade supporters, in linking the state as an actor in

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<sup>1</sup> Technically, this term must be distinguished from the same expression in American law which is jargon, in anti-trust law, for the refusal by a monopoly or cartel to sell products to outsiders (see Barber (1955), Van Houtte, H. (1984, 1984/1985)) or the right to boycott, often associated (anti)segregation politics (see Klinetobe (2006)).

international trade policy to individuals within an economy. Without such a link those like James M. Buchanan (1919-2013),<sup>2</sup> who do not accept the state as an organism or the concept of a “general will” to accept such freedom, will remain unconvinced.

Interestingly, Buchanan provides a micro-subjectivist argument for constitutional protection of the right not to trade (Buchanan 1993). As will be explained in this paper, which was written in the context of urban land planning and development, the concern with the right *not to* trade, together with the right *not to* use or derive income from a resource, is fundamentally sound in terms of the economics, if not also the morality, of private property and should not be confused with protectionism.

## **II. Introduction**

Planning theory has been enriched by Coasian neo-institutional economic interpretation of private property rights. This treats state planning intervention by edict as a means of assigning new rights not previously recognized or attenuating existing rights (Lai 1997, Webster and Lai 2003). The property rights in question, whether newly created or reduced, are mostly articulated in terms of what one may call “positive” aspects. For ideal private property rights in the tradition of Cheung (1974), these “positive” private property

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<sup>2</sup> 1986 Nobel laureate in economic science.

rights refer to the exclusive and autonomous, tripartite right to use, to derive income (yield) from, and to alienate (transfer) a resource. While Cheung used the expression, “right *to*,” Foldvary (1998: p.239) preferred “right *of*” use and transfer and “rights *to*” the yield. Foldvary also grouped the rights regarding use and transfer as “rights of possessions,” to distinguish them from the “right to the yield”. In any case, property rights are seen by legal scholars and economists as a “bundle of rights” as regards resources, and even body and life. These rights, together with the rule of law, according to Hayek (1944) and most economists, are considered the necessary conditions for a well-functioning market economy, if not for capitalism.

This paper deals with property rights regarding resources and not the person.<sup>3</sup> Rights can be divided into alienable and inalienable categories. As this work addresses private property rights to resources, it is about alienable rights. Otherwise, any discussion on the right to alienate (transfer) would be meaningless, if not immoral.

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<sup>3</sup> To hold one’s life and body as “one’s property” can be abused to justify suicide, euthanasia, and voluntary slavery. The exercise of the private property right that is taken to refer to oneself and to sell someone into slavery is part of the private property rights owned by a person, which some economists (like Cheung 1972) treat as fact. This can certainly be criticized from a natural law point of view and other value positions.

The contribution of Coase to urban planning and development is enshrined in the so-called Coase Theorem based on Coase's paper, "The Problem of Social Cost" (Coase 1960). This emphasized the efficient potency of contractual solutions to *ex-ante* externalities, and the theoretical problems posed by free-riding and zero-marginal cost goods. In doing so it pointed to the general importance of institutional design in affecting resource use and allocative efficiency in the presence of transaction costs.

The main policy implication of this view for a market economy is to select the correct design that can reduce transaction costs. Such a design facilitates contractual solutions by internalizing externalities and providing public goods charging the user by efficient price discrimination, thereby avoiding incurring the spending and mistakes often due to state intervention. The Coasian policy world, therefore, favours transactions as a logical means to maximize total wealth. This line of thinking is embraced by supporters of globalization and free international trade in their campaign to demolish trade barriers erected by tariffs, quotas, and unreasonably high standards of safety in the workplace and in product design.

### **III. A challenge to the Coase Theorem from Samuelson to Buchanan**

Nobel laureate Paul A. Samuelson (1915-2009) disputed the Coase Theorem by pointing out that under some situations, parties may opt not to trade along the “contract curve,” (1967) a locus of feasible equilibria of efficient transactions for both. Coase (1988) retorted that Samuelson’s case is incorrect for two reasons. First, it is illogical due to the admission of the existence of a contract curve. Second, parties that irrationally refuse trading would not stand the test of survivability.

It is submitted that only the first reason is good, while the second is redundant because it entails time and uncertainty for the model, which the Coase Theorem assumes away. Coase (1988) agreed with Cheung that the Theorem’s assumption of zero transaction costs means that it is a timeless one (i.e., there is no uncertainty to consider). Transactions always occur within the Edgeworth box<sup>4</sup> where there is an unexhausted opportunity to trade, and such a trade must lie on the contract curve, which is Paretian efficient.

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<sup>4</sup> One can conceive of the possibility that there is a third ‘virtual’ contracting party and hence a second contract curve outside the monetary/labour price system – the ‘do nothing’ option – not because that is ‘no trade’ (hence irrational), but because that is more highly valued (leisure, being one’s own master, etc.) than the available ‘market’ price can compete with.

In reality, however, due to the presence of time and uncertainty, not to mention transaction costs, non-trading or even a refusal to trade can be efficient in an inter-temporal sense. In *Property as a Guarantor of Liberty*, Buchanan (1993) argued that a refusal to trade is important for personal liberty, as it allows one a viable alternative to self-produce. Buchanan's point is not so much about Coasian *efficiency* even in an inter-temporal sense *per se*, but about the very nature of private property rights, as elaborated in the next section.

Coase himself was interested in situations in which exchange (trade) is possible in a given state of technology. In other words, he dealt with no scenario in which trade was refused or came with production or innovation. Given this, his preference for the freedom of contract was clear, so there is nothing in Coase's writings that contradicts Buchanan's views in *Property as a Guarantor of Liberty*, and vice versa.

The ideas of Coase and Buchanan are mutually compatible, though distinct in contribution. Berggren (2013) correctly pointed out that Buchanan saw private property as important not so much as the basis for *efficient exchanges*, but to any endeavour including, but not limited to, trade free from undue external interference. Whereas Coase helped explain the power of voluntary contracting

based on some delimitation of private property rights, Buchanan showed that such rights, as a means of liberty, must include the right not to trade. This right and the other two rights to not use or not derive income from a resource are part and parcel of the freedom of contract under common law. In short, freedom of contract implies both positive tripartite right and its converse.

#### **IV. The true meaning of private property rights**

A true right is one that one can exercise or withhold from or cease exercising at any time at will. This means that a true right must grant its holder both a right to do or not do something. The former right is not more “active” and the latter “passive” or “negative”. Both are positive (that is, borrowing from JL Austin (1962), they are explicitly performative<sup>5</sup>) and must co-exist as true options for an autonomous choice. “One of the fundamental conditions for trade to be mutually beneficial is that it is and remains voluntary. This condition is compromised if the freedom not to trade is lost” (Lawn and Clarke 2010: p.2221).

Consider in light of Lawn and Clarke (2010), Cheung’s (1973) classification of private property rights in terms of the exclusive and

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<sup>5</sup> Austin, John L. *How to Do Things with Words*, Oxford: Clarendon Press, 1962.



autonomous rights to use, derive income from, and alienate in relation to human capital (i.e., the knowledge and work power of a person). If a right to use one's labour to work is not accompanied by the right not to work (i.e., "leisure" or "rest"), work becomes a personal duty owed to a right holder. If the state effectively claims such right, then slavery becomes a personal duty! This often happens under totalitarianism.

The right not to derive any income at all is perfectly sound at law and needs no further justification. However, it may violate the standard postulate of maximization based on rationality. Income here, therefore, refers to *pecuniary yield*. The maximization of income is not deterministic in the sense that one may choose the type of income to maximize. Some non-pecuniary income may be hard to measure in cardinal terms, but can be ranked as certain to the person. If a right to earn as much money as possible is not complemented by a right not to earn as much as possible, this would deny a person his/her choice of vocation based on considerations other than monetary income.

If a right to alienate is divorced from the right not to alienate whenever someone offers him or her "an objective market price", then a person cannot continue as a sole proprietor, but must hire

other's property or work as someone's employee. This is exactly the rights system under centrally-planned "socialism" of the Soviet type.

In other words, true private property rights over a resource that uphold true personal freedom refer to three sets of exclusive rights:

1. The exclusive right to use or not to use a resource.
2. The exclusive right to derive or not derive income from the resource.
3. The exclusive right to alienate or to not alienate the resource.

These rights entail the correlative<sup>6</sup> "no rights" to interfere with them by a third party unless they cause harm to them and right to interfere if they do cause harm.

It is often assumed in economic modeling that the three sets of rights are exercised to *maximize* wealth<sup>7</sup>. However, this morally neutral assumption does not entail or compel a person to maximize it to his/her personal satisfaction. Maximization<sup>8</sup> is an option,

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<sup>6</sup> The concept here is not the same as any pair of "jural correlatives" in American jurist Hohfeld (1913: p.30).

<sup>7</sup> This implies income maximization and cost minimization.

<sup>8</sup> This surely includes but is not limited to "monetary maximization" or "monetizable maximization". Maximization is only truly free and compatible with the freedom of property that it is optional and not deterministic from the stance of the property owner and not a third party, especially the state. Two issues are pertinent: (a) the relationship between private property rights as a legal concept and private property rights as an economic concept and (b) the relationship between three types of rights: to use/not use; to derive/not

rather than a necessity, for an individual, and the rights can be exercised to various degrees, if at all, and for diverse purposes, whether egoistic or altruistic. Otherwise, economics ceases to be really choice-theoretic, but deterministic, and becomes an excuse for denying personal moral responsibility for avarice and greed,<sup>9</sup> which even children without any religion<sup>10</sup> can understand.

It is submitted that Coasian transactional analysis, to defend a market economy, must be buttressed by the recognition and protection of the positive RIGHTS NOT TO use, derive income from, or alienate a resource (in other words, the right not to maximize), which is simplified as the “private property rights not to use, earn or trade”. This is so as long as it is accepted that the resource in

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derive income from, and to alienate/not alienate from an economic point of view. Regarding (a), there is no requirement for maximization from a legal point of view. Thus, the economist’s view is a special case of the legal understanding. Regarding (b), maximization implies that the three types of rights to (and not to) must be alternative means to maximization such that the right to refuse to use entails a desire to lease, sell, etc., or that an apparent refusal to use/derive income from/transfer is intended to maximize gains other than monetary ones, as explained in the text above.

<sup>9</sup> See note 13, post.

<sup>10</sup> All major monotheist religions and universalist ethics systems like Confucianism and Buddhism condemn greed and avarice. Maximization by improper means is universally condemned. Saunders (2007) correctly distinguished greed from private enterprise in his advocacy for “capitalism”, which fall in the last definition of Foldvary (1998: p. 65), i.e., a market economy or free enterprise.

question is “property” of a person, the owner.<sup>11</sup> Economics is degraded by determinists into *economism*, which leads some to ridicule a refusal to deal as irrational, given the assumption that rationality means unrestrained maximization, which entails trade because there is always a price (substitute) for anything owned and summarised in the form of the “normal” indifference curve.<sup>12</sup> Worse still, some even conflate the morally neutral assumption of maximization in positive economics to support not just a Social Darwinist interpretation of a market economy, but also a social ethics that exalts greed as socially beneficial.<sup>13</sup> In any event, trained economists, such as Bell (1995), Cubitt (2005), Lai and Yu (2003),

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<sup>11</sup> The “right not to trade” in relation to the right to trade was wrongly used by Majumdar (2006) as an analogy to justify “right to die” in relation to the “right to live”, disregarding the concept that a person’s life does not belong to the person but God such that one can but should not treat one’s life as if one’s property. See note 3, ante.

<sup>12</sup> In applied economics, this technical view has been contested by Chang (2000) in relation to social justice; Arnesen and Norheim (2014) as regards quality of life (trade of life for health) and Ziliak (2009) to education. For application of vertical indifference curves in economic inquiry see for instance Scott (1972); Kelman (1978); Hirshleifer (1985); Siegel and Crockett (2013).

<sup>13</sup> This confuses maximization with greed. See, for instance, Taylor (2011). The dignity of a person is based on and manifested in his/her freedom to choose to subject any natural instinct, passion, or sentiment (such as the maximization of wealth or the avoidance of discomfort and pain) to his/her will. Those who fall prey to *economism* treat a person as a mere animal that acts purely on instinct. Saunders (2007) did not discuss greed in his advocacy for “capitalism”. See Foldvary (1998: p. 65) for some definitions, which include a market economy or free enterprise.

Lai and Lorne (2006), find the exclusion of the right not to trade as problematic.

In the field of planning and development, the violation of the private property RIGHTS TO use, earn, and transfer has been well-addressed by theorists. For instance, Lai (1996, 1997) explained how zoning by edict attenuates the property rights to subject the freedom of change in the use of land to the requirement of planning approval to derive income from land by down-zoning and to alienate land by prohibiting subdivisions or imposing a scheme that requires site assembly. All these imposed controls, applying Cheung's theory of price control (1974), can be treated as taxation in kind (Lai, Kwong, and Kwong 2011; Lai and Kwong 2012). Property taxes and stamp duties imposed not to provide public goods, but simply to regulate property transactions and prices, have similar adverse empirical effects than rent control (Cheung 1979). However, the private property RIGHTS NOT TO (or RIGHTS TO NOT) use, earn, or trade have been neglected, as the focus of most property rights theorists has been on the infringement of the RIGHTS TO use, derive income from, and alienate a land resource, as mentioned above. Institutional measures by way of legislation or judicial interpretation influenced by transaction cost reasoning, which ignore the spirit of private property rights recognised by Buchanan, have been introduced to threaten the very foundation of a healthy

market economy. Three good examples are eminent domain, or the taking of land by the state for public projects or for the benefit of developers; adverse possession after a short period of occupation; and the expulsion of squatters from government land.

The empirical effects of a public policy or law that infringes upon the private property right not to trade are similar to that which invades the private property right to trade. Some examples are an intensification of use, an increase in the frequency of redevelopment, and alienation due to the loss of some real option value, generally captured by Cheung's (1974) theory of price control. Such a policy or law is often not perceived as morally problematic or politically contentious because some arguments for the public interest appear persuasive, as in the case of the neglect of the right to not trade in international law. Is it not, after all, a matter of "balancing" the interests of the public and the individual (West and Levine 1983)? Granted that private property is not an absolute right, it remains to be seen if the balancing act is done justly and fairly. As a warning to the modern secular mind, the taking of Naboth's vineyard by King Ahab on the pretext of the "public interest" (cursing the sovereign) in a judicial manner, as recorded in the Scripture, is instructive. This requisition (taking) occurred after the former rejected the king's offer of a plot of land or money in exchange for his vineyard, on grounds of the duty to safeguard

ancestral land, foreshadows many unjust examples of “legal” taking, usurpation of other’s private land, and the expulsion of strangers from one’s land. Some parallels can surely be drawn between this scriptural account of old and the way a modern state expropriates a person’s private property. There is nothing new under the sun.

### **V. Private property rights not to trade and taking of land by eminent domain (“taking”<sup>14</sup>) or “resumption”**

In a freehold regime, privately-owned land can be confiscated by the state under the law of eminent domain. Fifty years ago, lawyers Kratovil and Harrison (1954) explained that the Fifth Amendment to the U.S. Constitution permits the taking of land for public use upon the payment of fair compensation. The key considerations are the meaning of public use and what constitutes fair compensation.

The latter is a hard technical subject, as property valuation is involved. Suffice it to say that the empirical study by Munch (1976) revealed that high value properties tended to be overcompensated, but those at the lower end tend to be undercompensated.

The question of public use is easier to understand. A layperson to the law may think that a “public use” refers to a government or

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<sup>14</sup> See Alterman (2010) for a good comparative international study.

community use, while a welfare economist may think that it refers to a use that is a “public good” in nature. Both would have been correct before the end of World War II (Nichols 1940). Both are wrong now after the District of Columbia Redevelopment Land Agency case of 1952, which ruled that a public use can mean a private use under a government urban renewal scheme (Pritchett 2003). The court has since reinterpreted “public use” (Berger 1977/1978; Pritchett 2003; Sandefur 2006) and liberally changed the law of property, resulting in “private takings” and what Thompson (1990) called “judicial takings”. Public outcry against the use of state power to appropriate (take) land for private use has led to calls for reform in many states, as Sandefur (2006) and Garnett (2006) correctly pointed out. These were in line with Buchanan’s emphasis on the right to not trade and his stress on the spirit or intent of that right being that “private takings” cannot simply be a matter of compensation<sup>15</sup>, both were also a source, when violated, of “dignitary harm” to owners because no one’s property would be safe.<sup>16</sup>

“With respect to property, the (U.S.) Constitution imposes on government the universal command that ‘Thou shalt not steal.’ Theft

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<sup>15</sup> A subject on which Lehavi and Licht (2006) offered a solution that echoed the one proposed by Lai (2002: pp.221-222).

<sup>16</sup> Garnett (2006) cited Fischel (2004, p.949).



is wrong whether committed by one person or a majority of persons. Some people alone are being required to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole. As Justice Samuel Chase wrote in 1798, “[i]t is against all reason and justice, for a people to entrust a legislature with the power to take property from A and give it to B” (Siegan 1997: p.29). Professor Judge Siegan is certainly correct, especially in light of the 9<sup>th</sup> Amendment.

Modern government urban renewal projects, however, are often accepted and used as valid policy and as thus providing judicial grounds for taking private land from A and giving it to B as private property. There are two typical alternative economic justifications for this onslaught on private property rights to use and to not use in the ABSENCE of genuine public use needs. The first is that the existing use generates *negative externalities* (such as urban decay and crime); the second is that the use is an *obsolete (uneconomical) use of the land*. The reality is that the former is an excuse and the latter is the real motivation: the project beneficiaries stand to gain.

To cover up a project of profiting from other’s property, a supporter may resort to the economic jargon of “holding out” to condemn the victim for being greedy by allegedly unwarrantly

demanding an excessive price for moving. Various measures to combat “holding out” and ensure “efficient bargaining” have been practiced to coerce a sale. The truth is that the owner subject to a threat of eminent domain may simply have resolved to refuse to sell at any price. The implication of this is that the private ownership of land becomes, *ipso facto*, wrong once a state urban renewal project that targets that plot of land is endorsed. This false accusation and compulsory sale of private land against the will of the owner denies the right of the property owner to not alienate his/her resource. Efficiency is really a non-issue. There is no Coasian problem of bargaining, as there is no contract curve in the first place. The accuser assertion is tantamount to asserting that there is one such curve and the landowner fails to grant them profits by agreeing to sell. The story, in the final analysis, is often a simple one of naked rent-seeking by abusing the law.

In a leasehold land regime like Hong Kong, the taking of land by the state has similar property rights issues. Unlike in the U.S., capitalism is “guaranteed” in post-colonial Hong Kong’s written constitution, the Basic Law. Such “constitutional capitalism” is, in fact, socialist as regards private land, which can be “resumed” by the state for any “public purpose”<sup>17</sup> under the *Lands Resumption*

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<sup>17</sup> The legal drafting here obviously sought to give the state a freer hand than simply “public use”.

*Ordinance* so long as it pays compensation, which does not cover any lost redevelopment potential. The Urban Renewal Authority (formerly the Land Development Corporation (LDC)), a government corporation, is the principal user of this Ordinance to implement its urban renewal projects, which are typically profit-seeking, carried out in collaboration with developers. The projects generally have virtually nil in-situ rehousing or reassignment of business premises, and are vaguely justified as “better urban environments”.

In response to requests for development interests, the government also passed in 1998 a *Land (Compulsory Sale) Ordinance* to allow for the compulsory sale of the remaining 20% of land interests in any multi-owned property.

The use of these laws invades private property rights without valid justification, but local professional bodies, unlike their American counterparts, have been silent about them. Even worse, land resumption and the forced sale of land in Hong Kong are actually breaches of government promises over land. Leasehold land interests for private uses in Hong Kong are sold as commodities in auctions. The durations of these leases, among other rights, are guaranteed as part of the conditions of sale. These laws allow for the *premature termination* of leases for “public purposes”

(essentially those determined by the URA) or even private redevelopment.

In one project, the pretext of promoting urban renewal to overcome the problems of land amassing and consolidation using private sector resources was exposed when LDC refused to accept the landowners all agreeing to a redevelopment scheme of their own. The results of such government-led urban renewal predicated on taking of private land have cost the destruction of traditional Chinese shopping streets along with small but viable small family businesses such as traditional Chinese clothes shops; chemists and wedding card printers, with no obvious gain in property values for the community (Lai et al 2007).

## **VI. Private property rights not to trade and adverse possession**

Whereas eminent domain for urban renewal purposes implicitly denies the private property right not to use land to its fullest extent (say, for a modern office tower than a family-run garage) and the compulsory sale of land to facilitate redevelopment negates the property right not to alienate, the modern law of adverse possession negates the right not to use and/or derive income from the land.

Whereas the case of eminent domain and the compulsory sale of land involve balancing public and private interests in a polity, the

law of adverse possession is instead a matter of balancing the interest of the landowner and the interest of the occupant who denies the rights of the former. The law transfers ownership from the former to the latter when such defiance continues over a period of time.

The historical origin of this was probably when an absentee landlord or his successor suddenly appeared one day to order squatters who had built an entire town or market on his/her land to quit without resettlement assistance or compensation. As this would be grossly inequitable, the law therefore evolved to deprive the landlord of his right over the land. In modern language, the absentee landlord failed to be a good “steward” of the land, whereas the squatter improved it.

By law, to dispossess a landlord, a person has to prove, on a balance of probability, that s/he has been squatting over a specified period of time, while the landlord is unable to produce evidence either of rental payment or that the person succeeded in frustrating any attempt by the landlord to recover possession. There is no need for the person to prove that the way s/he used the land was more valuable than allowing it to remain vacant or to even claim distress if s/he were evicted. In other words, there is no Coasian cost-benefit

analysis here at all for the mere fact that the landlord could not produce any evidence of rent paid.

Fox O'Mahony and Cobb (2008) explained that the new judicial attitude towards squatting has become denominated in terms of the stewardship concept, which goes against the landowner who fails in both (stewardship, which is at fault, and deterrence against owner's failure in stewardship, which is justified).

In reality, some who succeeded in depriving landlords of their land were not truly "squatters," but licensees who were permitted by generous landlords to stay gratuitously on their land to make a living without any documentation or other evidence of this arrangement changing hands. Then, on the advice of someone (a greedy son or daughter of the squatter) who knew the law, the squatter could go to court (sometimes with legal aid) to deprive the landlord of his/her lands when the 'licensees' were eventually asked to leave because the landlord could not show that the 'licensee's' possession was derived from a clear and written agreement. Such acts are legal but highly contentious if not also immoral and public money was spent to pay B by robbing A. The lesson here is that one should not be generous to friends without caution and must obtain agreements to use of land, business deals or otherwise, in writing – a scenario that involves higher, rather than lower, transaction costs.

It is interesting to ask the question of why no hardship test for parties to adverse possession suits is involved and why a life interest was not granted to a successful claimant against the landlord. In any case, the law has become increasingly impatient as the period of effective possession has been shortened over time. In Hong Kong, it has been reduced from 25 to 20 and now to just 12 years.

## **VII. Private property rights not to trade and eviction of squatters from public land**

The state as the property owner of government land, like any private property owner, surely has the right to evict squatters. But whether to use or not to use this right is the question. Many countries have clear policies of toleration concerning public finance, social, and political grounds, but some that have been highly effective in clearing and rehousing squatters have accelerated into an expulsion drive, probably to present a better international image for the country by removing eye scores.

However, as a private landowner can choose to be charitable and grant free licences to occupants, the state can allow squatters to stay. A failure to take care of poorer squatters can be a political if not also a moral problem.

Although Buchanan did not comment on the treatment of squatters on government land, his emphases on the state as a protector of private property rights, and on the partitioning of property rights on land can be extended to cover squatting on government land by the poor.

For one thing, these squatters may squat on private land if they are forcibly evicted from public land, so toleration of some squatting contributes to the efficient use of land that is otherwise under-utilized.

For another, assigning squatters some entitlements (which may include rehousing or compensation when the land is needed for other uses) in recognition of their innovations (Lai et al 2014) is a view that does not treat squatting always and everywhere merely as a rent-seeking behaviour, as that depends on institutional designs.

## **VIII Conclusion**

The Coase Theorem works under the freedom of contract, which assumes the existence of gain from trade AND a contract curve between parties given zero transaction costs and clearly defined property rights. Buchanan's analysis of the need to safeguard the right to refuse or cease trading essentially defends the very basis of the freedom of contract. The private property rights of not to use,



derive income from, or alienate a resource (i.e., not to be party to any contract curve) are as important as the private property rights to use, derive income from, and alienate the resource. Modern judicial land use policies, as manifested in eminent domain, resumption, adverse possession, and the uncompensated eviction of squatters from public land, tend to disregard these rights and have attracted scholarly criticisms. Besides efficiency, the matter pertains to the dignity of a person in refusing to maximise wealth when he can for whatever purposes so long as the public is not harmed. This dignity is negated when the “not to” rights are denied.

The discussion in this paper leads to the following proposals that respect the security of private property as much as the efficiency in economic transactions for wealth maximization. They duly take into account the public interest and the hardships of individuals. They respect, but do not absolutise private property rights, as defined and explained in the main body of this paper. Accordingly these suggestions are:

(a) that eminent domain and resumption should only be for genuine public uses after adequate compensation is paid, which reflects the opportunity costs of land and when there are no realistic alternatives;

(b) the law of adverse possession should compare the potential hardships of landlords and occupants of the land and limit possession, if legal action is successful, to one party's lifetime; and

(c) Squatters on government land should not be evicted by the state without being rehoused, paid some compensation or granted some entitlements (say licences) due to private innovations for and improvements to the land.

These suggestions are in line with Buchanan's views and compatible with Coasian contractarian emphasis, which relies on a solid private property rights system. It is hoped that these suggestions will kindle an interest in the importance of the private property rights not to use, derive income from, or alienate a resource for human dignity in public policies.

Note that this work does not favour or support eminent domain, especially when the state contracts with landowners in exchange for a promise of security for a number of years. Rather, it criticizes it, especially because it often falls short of proving public use, which is a necessary, but insufficient, reason for exercising draconian state power that is best reserved for imminent national security (i.e., collective personal and property rights protection) concerns. The test of no viable alternative in Proposal (a) above must be a real one. As Foldvary pointed out, the principle of

eminent domain, “even if sound, is in practice violated by *TAKINGS* that benefit special and private” rather than genuine public interest (Foldvary 1998, p.126). This kind of rent-seeking (Tullock 1993) Buchanan certainly would have objected to vehemently.

Transactionism and indifference to rights of owners of property to opt out in trade are all threats to human dignity and freedom. This may not be so much “missing markets” of “capitalism” (Hodgson 2005) but what an arena for voluntary social exchange entails.

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### **Bibliography and references**

Alterman, Rachelle. Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights, Chicago: American Bar Association, 2010.

Arnesen, T.M. and O.F. Norheim. “Quantifying Quality of Life for Economic Analysis: Time Out for Time Tradeoff,” Medical Humanities 29, No.2 (2014): pp.81-86.

Austin, John L. How to Do Things with Words, Oxford: Clarendon Press, 1962.

Bell, Duran. "On the Nature of Sharing: the Range of Methodological Individualism," Current Anthropology 26, No.5 (1995): pp.826-830.

Berger, Lawrence. "Public Use Requirement in Eminent Domain," Oregon Law Review 57 (1977/1978): pp.203-246.

Berggren, Niclas. "James M. Buchanan, Jr. Ideological Profiles of the Economics," Econ Journal Watch 10, No.3 (2013): pp.292-299.

Buchanan, James M. Property as a Guarantor of Liberty, Locke Institute, Aldershot: Edward Elgar, 1993.

Barber, Charles F. "Refusals to Deal under the Federal Antitrust Laws," University of Pennsylvania Law Review 103, No.7 (1955): pp.847-885.

Chang, Howard F. "A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle," Yale Law Journal 110, No.2 (2000): pp.173-235.

Cheung, Steven N.S. "The Enforcement of Property Rights in Children, and the Marriage Contract," Economic Journal 82 (1972): pp.641-657.

Cheung, Steven N.S. "A Theory of Price Control," Journal of Law and Economics 17 (1974): pp.53-71.

Cheung, Steven N.S. "Rent Control and Housing Reconstruction: the Postwar Experience of Prewar Premises in Hong Kong," Journal of Law and Economics 22 (1979): pp.27-53.

Coase, Ronald H. "The Problem of Social Cost," Journal of Law and Economics 3 (1960): pp.1-44.

Coase, Ronald H. The Firm, the Market and the Law, Chicago: Chicago University Press, 1988.

Cohen, Lloyd. "Holdouts and Free Riders," Journal of Legal Studies 20, No.2, (1991): pp.351-362.

Cubitt, R. "Experiments and the Domain of Economic Theory," Journal of Economic Methodology, 12, No.2 (2005): pp.197-210.

Daly, Herman. "Population, Migration, and Globalization," Ecological Economics 59, No.2 (2006): pp:187-190.

Daly, Herman. "Globalisation versus Internationalisation, and Four Reasons why Internationalisation is Better," Ch.2 in Philip Lawn (ed.), Economic Transition and the Environment: Forging a Path to Sustainable Development, Cheltenham: Edward Elgar, pp.39-49, 2013.

Daly, Herman and Robert Goodland. "An Ecological-Economic Assessment of Deregulation of International Commerce under GATT," Ecological Economics 9, No.1 (1994): pp.73-92.

Fischel, William A. "The Political Economy of Public Use on Poletown: How Federal Grants Encourage Excessive Eminent Domain," Michigan State Law Review No.4 (2004), pp.929-956.

Foldvary, Fred E. Dictionary of Free-Market Economics, Cheltenham: Edward Elgar, 1998.

Fox O'Mahony, Lorna. and Neil Cobb. "Taxonomies of Squatting: Unlawful Occupation in a New Legal Order," The Modern Law Review, 71, No.6 (2008): pp.878-911.

Garnett, N.S. "The Neglected Political Economy of Eminent Domain," Michigan Law Review 105 (2006): pp.101-150.

Hayek, F.A. The Road to Serfdom, Chicago: Chicago University Press, 1944.

Hillman, Arye. "The Gains from Trade and Refusal to Trade," Ch.12 in Globalization and Emerging Issues in Trade Theory and Policy: Frontiers of Economics and Globalization, Emerald, pp.193-208, 2008.

Hirshleifer, J. "From Weakest-Link to Best-Shot: Correction," Public Choice 46, No.2 (1985): pp.221-223.

Hodgson, Geoffrey M. "Knowledge at Work: Some Neoliberal Anachronisms," Review of Social Economy 63, No.4 (2005): pp.547-565.

Hohfeld, Wesley\_Newcomb. "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," Yale Law Journal 23, No.1 (1913): pp.16-59.

Klinetobe, Charles. "Jury Trials and Gerrymanders: the Legal Effort to Maintain Segregation in July of 1957," Historian 68, No.2 (2006): pp.221-240.

Kratovil, Robert and Frank J. Harrison, Jr. "Eminent Domain. Policy and Concept," California Law Review 42, No.4 (1954): pp.596-652.

Lawn, Philip and Matthew Clarke. "The End of Economic Growth? A Contracting Threshold Hypothesis," Ecological Economics 69, No.11 (2010): pp.2213-2223.

Lai, Lawrence. W.C. Zoning and Property Rights: a Hong Kong Case Study. Hong Kong: Hong Kong University Press, 1996.

Lai, Lawrence W. C. "The Property Rights Justifications for Planning and a Theory of Zoning," Progress in Planning: Recent Research in Urban and Regional Planning 48, No.3 (1997): pp.161-246.

Lai, Lawrence W.C. "Planning and Property Rights in Hong Kong under Constitutional Capitalism," International Planning Studies 7, No.3 (2002): pp.213-225.

Lai, Lawrence W.C. and Valerius Wai Chun Kwong. "Racial Segregation by Legislative Zoning and Company Law: an Empirical Hong Kong Study," Environment and Planning B: Planning and Design, 39, No.3 (2012): pp.416-438.

Lai, Lawrence W.C. and Ben T. Yu. The Power of Supply and Demand: Thinking Tools and Case Studies for Students and Professionals, Hong Kong: Hong Kong University Press, 2003.

Lai, Lawrence W.C., Mark Hansley Chua, and Frank T. Lorne (2014), "The Coase Theorem and Market for Squatting on Crown Land and Water: a Hong Kong Comparative Study of the Differences between the State Allocation of Property Rights for Two Kinds of Squatters," Habitat International, Vol. 44, pp. 247-257.

Lai, Lawrence W.C, Valerius Wai Chun Kwong, and Jason Wai Yin Kwong. "Segregation Legal and Natural: an Empirical Study of the



Legally Protected and Free Market Housing Ownership on the Peak,” Habitat International, 35, No.3 (2011): pp.501-507.

Lai, Lawrence W.C., Kwong Wing Chau, Wah Sang Wong, Edward C.Y. Yiu, Pearl, Y.L. Chan, and S.K. Wong. “Measuring and Interpreting the Effects of A Public-Sector-Led Urban Renewal Project on Housing Prices: An Empirical Study of a Comprehensive Development Area Zone Developed Upon Taking in Hong Kong,” Environment and Planning B: Planning and Design 34, No.3 (2007): pp.524-538.

Lai, Lawrence W.C. and Frank T. Lorne “The Coase Theorem and Planning for Sustainable Development”, Town Planning Review 77, No.1 (2006): pp.41-73.

Lehavi, Amnon and Amir N. Licht. "Eminent Domain, Inc." *Columbia Law Review* 107 (2007): pp.1704-1748.

Majumdar, Abhik. “The Right to Die: the Indian Experience,” Australian Journal of Asian Law6, No.2 (2004): pp.157-175.

Munch, Patricia. “An Economic Analysis of Eminent Domain,” Journal of Political Economy 84, No.3 (1976): pp.473-498.

Nichols, Philip Jr. “The Meaning of Public Use in the Law of Eminent Domain,” Boston University Law Review 20 (1940): pp.615-641.

Pritchett, Wendell E. "The 'Public Menace' of Blight: Urban Renewal and the Private Uses of Eminent Domain," Yale Law & Policy Review 21, No.1 (2003): pp.1-52.

Ruskola, Teemu. "Law's Empire: The Legal Construction of "America" in the "District of China," Law & Humanities Workshop, Columbia University, June 1-2, 2005.

Samuelson, Paul A. "The Monopolistic Competition Revolution," in Robert E. Keuenne (ed.), Monopolistic Competition Theory: Studies in Impact: Essays in Honour of Edward E. Chamberlain, New York; Wiley and Son, 1967. Reprinted in R.C. Merton (ed.) The Collected Scientific Papers of Paul A. Samuelson, Vol.III, 1972, Cambridge, MA: The MIT Press, pp.18-51.

Saunders, Peter. "Why Capitalism is Good for the Soul?" Policy 23, No.4 (2007): pp.3-9.

Siegan, Bernard H. Property and Freedom: The Constitution, The Courts, and Land Use Regulation, New Brunswick, Transactions, 1997.

Taylor, Michael H. "On Greed: Toward "Concrete and Contemporary Guidance for Christians," The Ecumenical Review 63, No.3 (2011): pp.295-305.

Thompson, B.H. "Judicial Takings," Virginia Law Review 76, No.8 (1990): pp.1449-1544.

Van Houtte, Hans. "International Commerce and Morality," Notre Dame International and Comparative Law Journal 2 (1984): pp.1-18.

Van Houtte, Hans. "Treaty Protection against Economic Sanctions," Les Moyens de Pression Economique et le Droit International, R.B.D.I. (1984-1985): pp.34-56.

Sandefur, T. "The Backlash So Far: Will Americans Get Meaningful Eminent Domain Reform," Michigan State Law Review (2006): pp.709-778.

Scott, Robert Hanley. "Avarice, Altruism, and Second Party Preferences," Quarterly Journal of Economics 86, No.1 (1972): pp.1-18.

Siegel, Jenifer Z. and Molly J. Crockett. "How Serotonin Shapes Moral Judgment and Behavior," Annals of the New York Academy of Science 1299, No.1 (2013): pp.42-51.

Tullock, Gordon. Rent Seeking, Aldershot: Edward Elgar, 1993.

Webster, Chris J. and Lai, Lawrence W.C. Property Rights, Planning and Markets: Managing Spontaneous Cities, Aldershot: Edward Elgar, 2003.

West, W.A. and Levine, Barry Michael. "Balancing the Sanctity of Private Property Rights against the Need for Land Use Regulation: An Anglo-American Perspective," Notre Dame International Law Journal 1 (1983): pp.33 to 52.

Ziliak, Stephen T. "Haiku Economics: Little Teaching Aids for Big Economic Pluralists," International Journal of Pluralism and Economics Education 1, Nos.1-2 (2009): pp.108-129.