1 Introduction

It is difficult to imagine a state without stable rules regarding the allocation of resources. At the same time, the content and nature of these rules are as changeable as the economic, social and political circumstances in which they operate. A successful state must therefore recognise the institution of property, while also recognising the need to modify property rules and distributions in appropriate circumstances. In practical terms, the state must have the power to take, tax and regulate property without the consent of individual property owners, but the exercise of these powers must be subject to some sort of restraint.

This book concentrates on the constitutional law regarding the compulsory acquisition of property in the Commonwealth. Most Commonwealth countries include a right to property in a constitutional bill of rights.[1] These rights generally provide that property may not be acquired compulsorily except for a public purpose and upon payment of adequate compensation. The framing and interpretation of these rights to property raise a number of common issues across the Commonwealth, and this book seeks to describe the main issues and the different ways in which framers and judges have addressed them.

In the Commonwealth, comparative law has always played an important role in legal development. The use of comparative law in Commonwealth courts can be traced back to the colonial era, when the Privy Council held that a single common law applied to all common law

[1] See the following constitutional provisions: Australia, s. 51(xxxi); Bahamas, s. 27; Barbados, s. 16; Belize, s. 17; Botswana, s. 8; Cyprus, Art. 23; Dominica, s. 6; Fiji, s. 9; The Gambia, s. 22; Ghana, s. 20; Grenada, s. 6; Guyana, s. 142; Jamaica, s. 18; Kenya, s. 75; Malta, s. 37; Malawi, Art. 18; Malaysia, Art. 13; Mauritius, s. 8; Namibia, Art. 16; Nauru, s. 8; Nigeria, s. 42; St Christopher and Nevis, s. 8; St Lucia, s. 6; St Vincent, s. 6; Solomon Islands, s. 8; South Africa, s. 25; Tanzania, Art. 24; Tonga, Art. 18; Trinidad and Tobago, s. 4(a); Uganda, s. 26; Vanuatu, s. 5; Zambia, Art. 16; Zimbabwe, s. 16.

jurisdictions in the Commonwealth, except as specifically varied by legislation.[2] This established the practice of looking to judgments from a variety of jurisdictions as an aid to determining national law. The practice was also reinforced by the development of a Commonwealth legal community, tied together by factors such as similar methods of legal education and scholarship, and the movement of lawyers and judges between countries. Comparative method also played an important role in shaping Commonwealth rights to property. To take just one example, the Nigerian right to property of 1960 drew on earlier Indian legislation and the Indian independence Constitution, and, in turn, the Nigerian provisions subsequently provided the model for many other Commonwealth constitutions. Comparative method was not restricted to the Commonwealth: the influence of the United States' takings and due process clauses is apparent in some early constitutions, and aspects of the German right to property can be seen in the recent constitutions of Namibia and South Africa.

Comparative legal method continues to play an important role in Commonwealth law, despite the weakening of the formal links that once tied the member states to each other. In some respects, the continuing strength of the comparative method is puzzling. The differences between the legal systems of its member states are considerable, especially in relation to the elements of the legal system that are relevant to the right to property. In particular, one can find common law, civilian, customary and hybrid systems of private property in the Commonwealth, and the constitutional law of a given country could be presidential or 'Westminster', federal or unitary, bicameral or unicameral. The extra-legal variation is even more dramatic: free market, *dirigiste*, capitalist, socialist and 'welfare state' governments have all, at one time or another, been in power in the Commonwealth.

For some comparative lawyers, the depth of these differences would suggest that comparative analysis of Commonwealth law is likely to be of little value. Either it sends the legal analysis of any given nation's law in an inappropriate direction, or it gives a false impression of analytical rigour where there is none. This criticism is apt where explanations of differences in legal systems are offered. Exposing differences between legal systems without explaining why differences exist is unlikely to be very interesting, and seeking to explain differences without moving beyond the bounds of the legal system is unlikely to be very convincing.

[2] See *e.g. Robins* v. *National Trust Co. Ltd* [1927] A.C. 515 (P.C.).

It is also an apt criticism in relation to Commonwealth cases on the right to property. Although foreign cases are frequently cited in argument and decisions, there is often no rigour to the comparative method of judges. There are cases where courts attempt to lay down rules regarding the use of comparative law; for example, a judge may discourage comparisons with cases from jurisdictions where the right to property is drafted in different terms. However, there are also cases where these methodological concerns are ignored. Where comparative law is used, there is no real evidence of a method as rigorous as, for example, the methods of reasoning from cases decided within the jurisdiction or the methods of statutory interpretation.

Nevertheless, judges and advocates use comparative law for different purposes than do comparative scholars. Moreover, judges and advocates do not use comparative law in the same way that they use the rules of precedent or statutory interpretation. Comparative law performs a rhetorical function, rather than a deductive or predictive function. The advocate uses comparative law to support an argument that a provision should be read in a particular way, and the judge uses it to persuade his or her audience that he or she has read the provision properly. The same argument might not be accepted if it is supported only by, for example, an economic analysis of the effects of the same reading of the provision. In this sense, comparative law could be loosely described as part of the grammar of legal advocacy in the Commonwealth. In the face of the profound differences that exist between Commonwealth countries, this is therefore the defence of comparative study: despite the differences, even a cursory look through law reports of most jurisdictions reveals that comparative law regularly makes an appearance in judgments. Lawyers who are not aware of the comparative perspective on an issue deprive themselves of a valuable rhetorical technique.

Outline of chapters

This book seeks to give an overview of the right to property. No single theme dominates all chapters, and emphasis varies according to the subject matter of each chapter. However, it is possible to describe a number of the general themes and the chapters where they are discussed in greatest detail.

Chapter 2 examines the right to property at common law. In most of the Commonwealth, there is no real distinction between

unconstitutional legislation and ultra vires legislation. Hence, the idea of a constitutional right to property that does not give the courts the power to declare legislation ineffective may appear contradictory. However, constitutional law has also referred to the unwritten fundamental law of Britain and its colonies. In practical terms, adherence to fundamental law depends on the legislature's sense of the ethical limitations on its powers. In this sense, it binds the legislature without necessarily being enforceable by the executive or the judiciary. It would be inaccurate, however, to say that the executive and the judiciary play no part in enforcing fundamental law. The executive often has some discretion in determining how to implement legislation, and may consider fundamental law in exercising its discretion. Moreover, in the colonial period, the Crown had powers of disallowance and reservation, which were exercised in relation to colonial legislation. The exercise of these powers enabled the executive to ensure that colonial legislatures did not infringe fundamental law. The judiciary's role in enforcing fundamental law is generally limited to its discretion in relation to statutory interpretation, but this is certainly not insignificant.

In the English system, there are several principles of fundamental law that protect property. The first is the principle that only Parliament may authorise the compulsory acquisition of property or the imposition of taxes. This principle is rarely litigated, although there are some modern cases where governments have fallen foul of it.[3] The second is the principle that Parliament may authorise the compulsory acquisition of property only when it is in the public interest and only upon payment of compensation. Chapter 2 investigates how these principles find their expression in the courts, and it also investigates areas where fundamental law may continue to develop. In particular, the Supreme Court of Canada has held that, although Canada has the power to expropriate aboriginal lands, the power is held in a kind of trust relationship with aboriginal peoples. This relationship is not contained in the written constitution, and it can be overriden by express statutory provisions to the contrary, but where it applies, it requires Canada to provide compensation. Hence, it could be described as part of the constitutional law of Canada; it binds the legislature, and the courts

[3] See *e.g. Bowles* v. *Bank of England* [1913] 1 Ch. 57; *Congreve* v. *Home Office* [1976] Q.B. 629 and *Fitzgerald* v. *Muldoon* [1976] 2 N.Z.L.R. 615 (S.C.). For examples under written constitutions, see: *Deokinandan Prasad* v. *Bihar* A.I.R. 1971 S.C. 1409 and *Akoonay and Another* v. *Att.-Gen.* [1994] 2 L.R.C. 399 (C.A. Tanz.).

enforce it except in specific circumstances where the legislature has clearly indicated its intention to override it.

Chapter 2 also examines the Crown's prerogative powers over property, since the prerogative is the one exception to the principle that the executive may not take property without legislative authorisation. At one time, the prerogative was important to the Crown's finances, as the Crown held a variety of powers to claim certain types of goods and had certain privileges which benefited it financially. In the modern era, the question of the extent and scope of the prerogative powers over property has arisen only in relation to wars and emergencies, and it is this area that is examined.

Chapter 3 reviews the drafting of rights to property in written constitutions. The shortest right to property in the Commonwealth was that of the Government of Ireland Act 1920, which provided simply that the legislature of Northern Ireland did not have the power to 'take any property without compensation'. At the other extreme is Zambia's right to property, which runs to over 1,000 words. The prolixity of many of the provisions can be explained by a number of different factors. These are explained in greater detail in chapter 3, but in essence it seems that the drafters wrote the provisions for judges and lawyers rather than a general audience. There was also the British mistrust of written bills of rights, which stemmed partly from the belief that the generality of the language of most bills of rights reduced their effectiveness. For these reasons, it seemed appropriate to adopt the precise style of statutory drafting. By the 1980s, attitudes had changed, and there was a deliberate movement by drafters to greater generality.

Although the British resisted the inclusion of comprehensive bills of rights in written constitutions of colonies, they did advocate the inclusion of rights to property in the independence constitutions of their former colonies. There were two main reasons for this: the first was the fear that the newly empowered legislatures would authorise the confiscation of property held by Europeans and their allies amongst local property-owning classes, and the second was a general belief that the protection of property would contribute to the economic and political stability of the new nation. There was very little analysis of the potential impact of a right to property on the state's capacity to govern effectively, perhaps because the fundamental law regarding property was enforced by the executive in most colonies. Hence, it was already the case that legislation authorising the expropriation of property was subject to review on grounds that it did not serve a public purpose or

that it did not provide for payment of compensation. In this sense, the constitutionalisation of the right to property merely shifted the review jurisdiction to the courts.

In general, the British campaign for rights to property met with very little resistance from national leaders, and the impact of a right to property on a state's power to reform the economic system was often left unexamined. There were exceptions, of course; for example, in India and South Africa, the British had no influence on constitutional drafting. Even so, the debate in these countries tended to focus on the potential impact of a constitutional right to property on land reform rather than its impact on government generally. There are also a number of countries without constitutional rights to property. Singapore has a constitutional bill of rights, but it does not include a right to property. Other countries have enacted bills of rights that do include rights to property, but only give the judiciary a limited power to review legislation. New Zealand is one example, and the United Kingdom has recently enacted the Human Rights Act, which gives the European Convention on Human Rights (limited) effect in domestic law. Canada is in the unusual position of having a constitutional bill of rights (the Charter of Rights and Freedoms) which does not contain a right to property, and a statutory bill of rights (the Canadian Bill of Rights) which does contain a right to property. There are also a number of Commonwealth countries that either repealed or suspended the application of their constitutional bills of rights. Nevertheless, in most countries, the need to attract and retain investment made it prudent to enact constitutional provisions that secured property. The development of the international law of human rights gives further support to rights to property.[4] In any case, in many countries the struggle against colonial rule did not focus on specific constitutional rights or structures, but on achieving independence. Hence, the British were often able to take the initiative in drafting bills of rights and, with the Nigerian Bill of Rights of 1960, they arrived at a model which was subsequently used in most countries. The similarities between these provisions explain, in part, the importance of comparative law in their interpretation.

Chapter 4 examines the methods of interpretation most often used by

[4] Rights to property can be found in the Universal Declaration of Human Rights (Article 17), the European Convention on Human Rights (Article 1 of the First Protocol), the American Convention on Human Rights (Article 21) and the African Charter on Human and Peoples' Rights (Article 14).

the Commonwealth judiciary when dealing with constitutional rights to property. In very general terms, their methods fall into two categories: the legalist and the purposive. While legalist interpretation dominated constitutional law for many years, most Commonwealth judges now say that they interpret purposively. In practice, purposive interpretation seems to supplement, rather than supplant, legalist interpretation. Most courts use a purposive analysis only where ambiguities result from the application of the rules of grammar to the express language of the provision in question. In general, purposive interpretation is not used to uncover conflicts between the grammatical meaning of a provision and the actual intentions of the framers. Even in this limited sense, however, purposive interpretation takes on several forms. Some judges treat it as a variant of the 'mischief rule' of statutory interpretation, which requires the courts to identify the defect in law that led to the enactment of the provisions in question and then to interpret the provisions in the manner that remedies the defect. Constitutional bills of rights are usually drafted with much greater generality that most statutes in the Commonwealth, and so it is usually not possible to identify a specific mischief that a particular provision of the bill of rights addresses. However, it does show why many Commonwealth courts regard purposive interpretation as a type of historical interpretation, where judges seek to implement the actual intentions of the framers. Historical interpretation is not, however, the only form of purposive interpretation. Other judges relate purposive interpretation to the broad design of the constitution. For these judges, a constitution creates a structure of government, and hence constitutional interpretation should reflect and strengthen that structure. There are also a group of judges that regard their function as the protection of inherent or natural rights of individuals; for these judges, a purposive interpretation is one that is sensitive to the ethical purpose of protecting property.

Despite these differences, most Commonwealth judges take the view that a purposive interpretation of a bill of rights is a generous interpretation. In this context, a generous interpretation is one that favours broad readings of rights over narrow readings, and the protection of the individual over the needs of the state. For example, many judges have said that the right to 'property' extends to every type of property, including anomalous interests that might not qualify as property in some circumstances.[5] However, the courts do not take a

[5] See pp. 122–4, below.

consistent line on generous interpretation. For example, 'property' is usually interpreted broadly, but 'acquisition' is sometimes interpreted quite narrowly. Moreover, there are issues where generosity seems to be shown to the legislature rather than the individual. In particular, the interpretation of 'public purpose' requirements tends to favour the legislature. Indeed, on closer examination, it is not clear what 'purposive and generous' interpretation means in relation to the right to property. As chapters 5 to 8 demonstrate, when the courts discuss the various elements of the right to property – such as the meaning of 'property', 'acquisition', 'deprivation', 'public purpose' and 'compensation' – they often adopt the private law meanings of these terms and apply them to the facts in a fairly mechanical way. There are exceptions, of course, but the majority of decisions follow a predictable pattern: the judge declares that the constitution must be interpreted purposively and generously, and perhaps that 'property' must be given an expansive interpretation. But from this point onwards, there is no explanation of what that purpose may be, or even how generosity to the individual should translate in terms of the actual result. The judges tend to go immediately to private law cases on property and base their conclusions on those cases. In effect, they often treat the constitutional right to property in the same way as they treat statutory provisions on the expropriation of property. Indeed, the only clear judicial statement on the desirability of protecting property comes from the Supreme Court of Canada, which refused to find an implied right to property in the Charter, just as it had previously refused to find a substantive right to property in the statutory Bill of Rights.[6] Other courts often seem uninterested in identifying why property should be constitutionally protected. How they are then supposed to interpret the right to property 'purposively' is difficult to see; why it should be 'generous' is even more difficult to grasp.

Chapter 5 concentrates on two questions relating to the meaning of property. The first question is whether there is an essence or core to property that distinguishes interests that are constitutionally protected from those that are not. We might expect the response to this question to be informed by purposive interpretation. For example, if the purpose of the right to property is the attraction or retention of investment, then arguably the courts should focus on rights, which derive from investment. This would include most traditional forms of property,

[6] *Irwin Toy Ltd* v. *Att.-Gen. of Quebec* [1989] 1 S.C.R. 927 at 1003.

such as land, chattels, and intangible forms of property such as intellectual property and choses in action, although it might exclude unimproved land. It could also include goodwill or a trade position, or even any sort of interest or expectation obtained by private investment that can be turned to economic gain, such as an educational qualification. Alternatively, if the purpose of a right to property is the enhancement or protection of individual welfare and human dignity, the right to property should be interpreted in a manner that fulfils this goal. Social welfare entitlements would be given protection, at least to the extent that they maintain personal security and dignity, but perhaps property held by corporations or other artificial legal persons would not. There are constitutional cases where judges seem to be have a sense of the core values of property that they should be protecting, but, in general, the entire question is not addressed.

The second question asks whether obligations are part of property. The liberal conception of property describes it as a bundle of rights. The emphasis is therefore put on the social and economic power flowing from ownership of property, and not on the obligations that may flow from it. It is linked with the liberal theory of the constitution, which stresses the importance of limiting state powers so as to protect individual choices. Hence, liberals tend to regard property as an area of personal inviolability into which the state may not intrude. In general, liberal theory dominates the Commonwealth jurisprudence on the right to property, but there are signs of a communitarian approach. The communitarian conception of property treats obligations as an integral part of the relationship between the owner and others. It may appear that any differences are merely a question of description; that is, both liberals and communitarians would agree that the property rights of a gun owner do not include the right to use it to injure others. However, communitarians are generally more inclined to view the obligations broadly, and to emphasise the legitimacy of the state's role in enforcing those obligations. Hence, if obligations are treated as part of ownership, the enforcement of the obligation is not a deprivation of property. However, if obligations are external to ownership, there may be an argument that any enforcement of those obligations is a deprivation of property. As chapter 6 shows, this may affect the constitutionality of the limitation. Communitarians also tend to locate the source of property in the individual's relationship with the community, where ideas of reliance and dependence determine the allocation of resources; by contrast, liberals tend to locate the source of property in individual

choice or action, such as the first possession of an unowned object or a consensual transfer from one person to another. These differences have an important effect on the range of interests that are constitutionally protected under the right to property.

Chapter 6 is entitled 'Acquisition and deprivation'. The interpretation of these terms is critical because the right to property does not extend to every law or state action that has an adverse effect on property. The drafting of some provisions reflects an assumption that the right to property would apply only to the typical expropriation of land and other traditional types of property. Hence, many constitutions guarantee compensation only when property is compulsorily acquired or taken possession of; there is no express guarantee for the destruction or deprivation of property, or for injurious affection, or for economic losses caused by the regulation of property. This raises an important issue: does an 'acquisition of property' occur only when the state acquires precisely the same rights or interests as the individual? Or can it occur when the state indirectly secures the benefit of the property, without a formal acquisition?

Framers and courts also distinguish compensatable from non-compensatable state actions according to the purpose of the state's action. Examples are the seizure of property to satisfy a criminal fine, a tax liability or a judgment debt. In these cases, it is not necessary to determine whether the state's actions amount to an acquisition or merely a deprivation of property. This approach distinguishes between the powers held by the state. The power to acquire property for the state's use is the power of eminent domain, and it is treated differently from the state's police (or regulatory) power and its taxation powers. The exercise of the power of eminent domain requires compensation, but the exercise of other sovereign powers over property, such as police and tax powers, does not. Some constitutions include detailed provisions that describe purposes for which compensation need not be paid; under other constitutions, the courts have developed similar rules by implication.

Chapter 7 examines the principles regarding the purposes for which property may be taken. While most constitutions state that property may only be taken for a public purpose or in the public interest, there are very few cases where the courts have found that no public purpose exists for the taking. The courts do not wish to limit legislative power in the style of the Supreme Court of the United States in the late nineteenth and early twentieth centuries. In *Lochner* v. *New York* and other