feature article

Private Property Without Rights

Steven Kates

There appears to be little popular resistance to the increased regulation of the economy and the gradual erosion of essential freedoms.

It was often said that the fall of the communist tyrannies in Eastern Europe would spell the death of socialism. It did certainly put an end to Cold War tensions, which were a question of power relations, but it did nothing to resolve the question of socialism as such. Indeed, it now appears, just over a decade after the fall of the Berlin Wall, that those who said that, with the end of communism, socialism would begin to have a freer reign have proven to be right.

The essential difference between capitalist and communist social organisation is that, under capitalism, most productive assets are privately owned and their uses are coordinated by voluntary choices in markets. Under communism, by contrast, productive assets are collectively owned and coordinated by coercive central plans.

Old school 'hard' socialism and communism involved taking into public control the means of production. Once you were rid of capitalists—that is, once you had rid yourself of the private owners of productive capital—the economy 'could be run for people and not for profit' as the old slogan used to say. The Cold War was thus in many ways a battle over private versus public ownership, and the hands-down winner has been capitalism: capital must be in the hands of private owners if an economy is genuinely to thrive.

But since winning the Cold War, we have found that there was another war being waged the entire time from which a very different victor may have emerged. It was a war with lower stakes than the Cold War itself, but one with consequences of its own: we are no longer in danger of wholesale socialism, but we still face the continual erosion of our liberties in a piecemeal fashion and with the active complicity of the population at large.

The social role of private property rights

To understand this particular conflict, we have to understand the true meaning of private property. Ownership confers not possession of a physical asset as such, but control over an open-ended bundle of rights. Property rights allow owners to exclude others from the use of their asset and enable them to use, benefit from and dispose of property.[1] Thus, the owner of a piece of real estate can fence off land to exclude others, can rent out or give away certain rights of way, the right to sow and harvest crops, the right to mine, the right to hunt on the land, and so on. Often, owners only realise the full benefit of their property when they combine property rights in what they own with those of others. In a free capitalist society, people also enjoy full property rights in their own labour and skills.

Property rights have been at the core of our social system for millennia. Our legal system recognises ownership and protects owners from outright seizure of assets by the state without full compensation, not

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because it is good for business, but because it is good in itself. Ownership of one's property, title to one's own home, goods and chattel, as well as full ownership of one's time and talents, are at the bedrock of what we believe about where the government's rights extend and end.[2] It takes resources to exercise one's rights, and no community that has deprived citizens of their property rights has remained free for long.

Property rights were gradually better protected in European history as rulers came to realise that only merchants and citizens with secure property rights would flourish and create a revenue base enabling them to wage wars. But citizens strove for property rights not because there was a theoretical belief that private ownership was good for prosperity, although it is, but simply because freedom was perceived as intrinsically good.[3] Security in one's property was seen as a fundamental need if individuals were to have personal security overall.

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Private property depends on institutions, both the spontaneous social rules by which people respect the property rights of others—such as honesty—and government-made institutions, namely legislation to surround ownership with secure title against all forms of marauder, including marauding governments. Constitutions were designed and the common law developed to ensure that those who owned property did so in the knowledge that they were protected from the predations of others.

In a market economy, the protection of private property by the institutions of society and the state—indeed the popular acceptance of the institution of private property rights—depends on a *quid pro quo*. The owners of assets are expected to risk those assets, time and again, in new ventures, propelling innovation and material welfare. Those who refuse to compete are made to face the risks of seeing their assets lose value. In most circumstances it is either go forward or go back. There is no standing still in a free economy.

The regulatory taking of property rights

Countering this bedrock belief in the importance and sanctity of private property was a very different belief system, captured in the old socialist slogan that 'property is theft'. Here was stated the essence of the case against private ownership and security of title. Those who owned property were seen as doing so only at the expense of others. Parcelling off some section of the world and calling it one's own was perceived as a crime against the rest.

Communism and old-fashioned 'hard' socialism as it was practised have shown beyond all doubt that government ownership creates misery and economic despair. Virtually no one now makes the case for widespread nationalisation.

Instead a social system is emerging in which private property rights are increasingly taken away, one by one, by government control and regulation. Although the familiar takings clause protects owners against outright seizure of assets and people are protected from slavery, piecemeal takings of rights to use assets and talents have become increasingly frequent. Freedom of contract is being curtailed without compensation, even where it inflicts considerable losses on owners. Regulatory takings erode the usefulness and the value of what we own, but these are proliferating under a different form of social control from communism and 'hard' socialism. Governments no longer seek to take on the risk and the burdens of outright ownership. Someone else can do the owning and good luck to them. But the rights to use property freely are subordinated to state purposes.[4]

There are, of course, good reasons why a community will often want to constrain the absolutely free use of private property rights over and above the standard constraint that your property use must not harm that of others. There may be reasons of public health and safety that induce governments to prohibit certain property uses. However, a full understanding of the nature of private property should mean that such 'regulatory takings' in the common interest must lead to full compensation of the owners who lose certain property rights. This is

frequently not done, and the value of private property is eroded.

Ownership therefore no longer confers the right to determine how the assets owned will be disposed. The circle of free decisionmaking within which property can be used is becoming increasingly narrow. In thinking about the long-term prospects for the economy, one must wonder about an economic future in which the encroachment of governments on the rights to use, benefit from and dispose of one's own property as one sees fit is being continually increased.

Here we are not talking about fraudulent activities, but the kinds of bureaucratic and legal controls that limit how particular assets are used. These limitations are designed to ensure that privately-owned assets are employed in a way that meets with the approval of others who have no title and run none of the personal risks associated with ownership.

The piecemeal erosion of freedom

How much of the actual decisionmaking of a business is left to the owners of the firm and will never be second guessed by some area of business regulation? Take wages. There is probably no-one left alive who can recall when businesses were free to choose the rates of pay and the conditions they provide. In fact, no employee is free to negotiate away certain benefits in exchange for others, so that irrespective of what might be desired, all full-time employees will receive a specified number of weeks of annual leave and have superannuation payments made on their behalf.

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The wage issue is, of course, only the tip of the iceberg on a raft of regulations covering the employment of labour that extends throughout every aspect of the working relationship. And in spite of all attempts at reform, it is only getting worse.

Then there is pricing. There was a time when the very notion of price regulation would have been recognised as beyond the pale. It would have been seen as economically absurd that some bureaucratic authority should look over the shoulders of those who own and manage firms to tell them how much they ought to charge for the products they produce. The certainty of large-scale economic damage was clearly understood, widely enough, to ensure that such controls did not happen. If only that were the case today.

The problem is not just regulation, but the apparent fact that there is a diminishing constituency who understand the issue and oppose this continual hemming in of business. Fewer and fewer people have direct experience of producing for competitive markets and being responsible for earning a living directly from producing and selling. More and more derive their incomes from regulations and transfers and are educated in modes of thinking that assume that income has nothing to do with effort and risk-taking. There is consequently a growing willingness to accept more regulation. Indeed, there is a widespread—and growing—desire for such regulation, which will make it increasingly difficult for business to earn a profit.

Such regulation will make us as a community less wealthy but, more importantly, it will make us less free. We will have handed authority to various bureaucratic organisations which have only the faintest notion of what it takes to add value, to innovate and take entrepreneurial risks for the sake of expected profits. Instead they will be filled with beliefs about schemes for protecting the consumer or the disadvantaged or some other supposed beneficiary of regulation when in fact the consequence may as likely harm those who are least able to protect themselves.

Private property and competition in the market were once clearly understood as cultural institutions whose importance lay in the personal freedoms they bestowed and in the wealth and innovation opportunities that such freedoms allowed us to achieve. Where are the defenders of the market now? There is no serious sense in which the increased regulation of the economy meets with popular resistance. Populist sentiment now appears to support greater regulation and increased state control.

Some examples

A few examples should assist in seeing present trends. The decision in the Safety Net case in 2001, which followed an actual decline in GDP, was not met with a wall of dismay. Depending on the level of earnings one already had, there were increases of $13, $15 or

$17 granted. Such increases, even with a slowing economy, were seen as inevitable and right. Where were the economists to lament that such increases will cost jobs? Do we just accept higher wages even when the economy is going backwards and unemployment is on the rise because that has been decreed? Are firms now unable to protect themselves from unaffordable increases in their costs? Can employees not prevent increases in the wages they receive even where it puts them out of a job?

Similarly, the Australian Competition and Consumer Commission (the ACCC) is making a pitch for much wider powers for price control. This is not just some desire to take actions during an extreme emergency where market failure is so overwhelming that there is little one can do other than turn to a regulator. Instead, price regulation would occur in a vastly increased number of cases.

In the ACCC's recent submission to the Productivity Commission's Review of the *Prices Surveillance Act 1983*, it listed the sorts of areas in which it believes it ought to be involved. It is a quite frightening list. Where it believes it might have a role in pricing is large and astonishingly intrusive. The ACCC sees the need for regulation in all of the following circumstances:[5]

- where demand for a product is enhanced by the fact that other people demand the same product so that the more people who sign on to one particular business, the more likely others will need to sign on as well (a phone network being the most obvious example);
- where large economies of scale exist that can reduce the number of firms in an industry;
- where the structure of investment may create barriers to entry by other firms;
- where there are legislated monopolies;
- where an industry is in transition to a more competitive environment;
- not only where there is a natural monopoly, which is the traditional, but rather rare, case for price regulation, but also where there is something the ACCC describes as a 'natural oligopoly' and access to infrastructure might be impeded, and;
- where firms have been 'declared' as part of the national access regime.

And finally, just in case this brief was not wide enough, according to the ACCC there may also be the need for price oversight 'where there is considerable public concern about particular pricing outcomes',[6] in short in practically all markets. As the ACCC states, in this situation we would need 'price monitoring which requires the firm to provide specific cost, profit and price data at regular intervals'.[7]

Other examples abound. The perennial clamour for increased public spending during slowdowns in the economy can be added to the list of where central control is sought. The example of Japan—where fiscal deficits in one stimulation package after the other have only produced stagnation, government debt, bank instability and deep-seated social malaise—apparently acts as no deterrent. Raising public spending as a proportion of GDP so as to create faster economic growth still has a surprisingly large degree of support, even among economists where one could only have hoped that such views had mostly died out.

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Interest rates rise and fall with a regularity based on little more than vague concerns held by the Reserve Bank governor about future inflationary prospects. We have passed over to the Bank the right to make such judgements about the economy's rate of growth based on his view of the rate of inflation in 18 months' time, a period in which no economic forecast can hope to be right other than by chance. We have therefore passed almost beyond political control the right of a public agency to undermine profitability and put thousands of people out of work because of its own reading of the economic tea leaves.

The idea that in an era of budget surpluses, low wages growth and temperate bank lending there is a need for the Reserve Bank to actively slow the economy meets with almost universal assent. Where market forces lie in all this would be impossible to divine. There is simply a willingness to accept central bank interest rate regulation. The actual outcome—a profound slowdown in activity—is not held as evidence one way or the other about the Bank's right to do what it does.

And finally there is the environment, which has opened immense new possibilities for regulation and state control. Environmental doomsayers have learned from the past at least this much—that their predictions must be far enough in the future so that they cannot be invalidated within a reasonably brief period of time. The global collapse of world food supplies, as predicted for the end of the 1980s by Paul Ehrlich, never happened. Similarly, the disappearance of stocks of raw materials and crude oil did not come to pass. In fact, all of the scares of an earlier era that were built around these tales of impending disaster failed to occur, with astonishing little damage to the credibility of those who had made such forecasts. But no longer are such errors open to relatively immediate exposure. Now we have predictions of catastrophe that are expected to occur at some time well into the future but whose prevention requires radical action to be taken with no delay.

There is a frightening diminution of concern within the population at large about what is happening to the essential freedoms that only their own vigilance can preserve.

Today, even while there are no end of genuine environmental problems that need attention, the only one that seems to matter—the one that grabs the limelight—is global warming. If global warming is actually happening and whether it is a product of human activity, remains, so far, outside of any demonstrable calculation and proof. No-one can say with any certainty that it is not happening, but neither can they say with any greater certainty that it is.

There is nonetheless so great a desire to regulate that should the Kyoto protocols pass into active practice, or some other agreement equally intrusive come into force, it will lead to an extraordinary increase in centralised control over the economy, an increase well beyond the imagination of any but the most hardened socialists of the past. But if the fate of the planet is at stake, who could possibly resist?

Conclusion

The socioeconomic system that is emerging has at its core the delegation of commercial risk to the owners of assets while the government stands at the tiller directing the economy this way and that. Individuals are given the nominal right to own as a means of offloading the risk of enterprise onto someone else.

This is a concept of governance in which those in power say to their citizens that you can own what you like but we will regulate you to make you do what we want with the assets you hold. If successful, this achieves the same objectives of collective control as old 'hard' socialism aspired to achieve, but it does so using entirely different means.

These shifts in how we manage our affairs may end up having serious long-term consequences for our future prosperity and our freedoms. With sensible and light-handed regulation, whose aim is to proscribe fraud and thuggery and to create trust and support enterprise as a way to promote growth and employment through private ownership of the means of production, the prospects for Australia are limitless.

But we are looking instead at an increased willingness on the part of those who make laws to add further prescriptive regulations to those that already exist, and a frightening diminution of concern within the population at large about what is happening to the essential freedoms that only their own vigilance can preserve.

Endnotes

1. For discussion of these issues, see for example, W. Kasper, *Property Rights and Competition*, Policy Monograph 41 (Sydney: The Centre for Independent Studies, 1998), ch. 4; also W. Kasper and M. E. Streit, *Institutional Economics: Social Order and Public Policy* (Cheltenham, UK: Edward Elgar, 1998), 175-200.
2. The point was made emphatically by Milton Friedman in his celebrated *Capitalism and Freedom* (Chicago-London: Chicago University Press, 1962), in which he demonstrated that citizens who do not have full property rights and other economic freedoms cannot effectively be free.
3. See Kasper and Streit, *Institutional Economics*, 383-385.
4. See R. Epstein, *Towards a Regulatory Constitution* (Wellington: New Zealand Business Roundtable, 2000); also W. Kasper, *Building Prosperity: Australia's Future as a Global Player*, Special Publication 3 (Sydney: The Centre for Independent Studies, 2000), 94-95.
5. These matters were concisely stated in the Australian Competition and Consumer Commission's 'Supplementary Submission to the Productivity Commission Review of the *Prices Surveillance Act 1983*' (February 2001), 9-10.
6. ACCC, 'Supplementary Submission', 10.
7. As above.