

FREEHOLDS AND FREEDOM: THE IMPORTANCE OF PRIVATE PROPERTY IN PROMOTING AND SECURING LIBERTY

Paul Johnson

In the seventeenth annual IEA Hayek Memorial Lecture, the author examines the historical connection between individual property and individual liberty. Freehold ownership has been essential to the progress of freedom among the English-speaking peoples. Accordingly, the protection of private property should be given high priority in our system of law.

The connection between political liberty and the individual ownership of property is one of the great certitudes of human society. It is carved in granite, at least in the English language, where the words 'freedom' and 'freehold' come from the same root and have impinged on and interrelated with each other through many centuries, from the most distant origins of Anglo-Saxon communities in the Dark Ages.

The propensity of private property to promote freedom only functions when ownership rights are enforced by the rule of law. In Greek societies, and in Rome after the overthrow of the Republic, private rights were subordinate to the public power, so representative institutions withered or never developed at all. It was a different story among the Germanic tribes, which began to settle in the British Isles from the early fifth century. Among them – though we have no written evidence – rudimentary forms of freehold were widespread, and leaders tended to take important decisions after consulting widely with freeholding followers.

This key conjunction becomes more specific when early Anglo-Saxon England emerges in the documents. The laws of Aethelbert of Kent in the early seventh century reveal the existence of large numbers of free peasants with a *Wergild* or death value of 100 golden shillings each. They are likewise to be found, in even larger numbers, though with a much smaller *Wergild*, in the laws of Ine, King of Wessex, at the end of the century. At the same time there are indications that freeholders met with local kings in the assembly known as the *Witan* to make or

amend laws, and as Anglo-Saxon England was united, from King Alfred's day onwards, the great *Witan gemot* developed as the consultative council of the country, distant ancestor of parliament and of the American House and Senate.

The Norman 'Conquest' and the arrival of a form of feudalism did nothing fundamental to change this connection between freeholding and constitutional government. Slavery had virtually disappeared in Anglo-Saxon England, and the Normans, who were themselves rooted in the relatively free societies of Scandinavia, did nothing to re-impose it, though various forms of unfree tenure persisted for many centuries. King William I's barons gave him, in theory, knight-service in return for their lands, which were not, therefore, strictly speaking freehold. But knight-service was gradually commuted to money-payments, and once land was bought and sold on the market, however primitive, true freehold developed. The King's great barons met three times a year, at Christmas, Easter and Whitsuntide, in the Great Council, to give advice and consent, this taking over the function of the *Witan gemot*. At a lower level freeholders were summoned to serve on juries, to judge facts and give evidence, by which law was enforced.

In 1068 William embarked on the Domesday survey, determined at the Christmas Great Council, when the King 'held very deep speech with his council about [England] – how it was peopled and with what sort of men'. The survey itself was carried out by expert commissioners, summoning local juries of freemen to provide the sworn facts,

and was conducted and recorded throughout in a highly responsible manner, indicating that the rule of law was taken very seriously indeed. This is the first great recorded political and economic event in English history, and shows the overwhelming importance of individual landed property in society and government. The Book itself – I have held it in my hands and it is remarkably light, being written on parchment, not paper – was the first key State Paper in English history, and is still the central pride and joy of the Public Record Office in London.

The King continued to rule in conjunction with his great landed freeholders for two centuries. When the central power was weak, as under the disputed reign of Stephen, 1130–54, anarchy ensued, teaching the lesson that individual ownership had to be balanced by crown authority to ensure that the rule of law was upheld in courts which guaranteed owners' property rights. The reaction to anarchy, under Henry II, saw the enactment of a formidable series of constitutional laws, which the King was careful to enact at a series of Great Councils, where the freehold landed interest was fully represented.

When royal tyranny, as opposed to baronial anarchy, threatened to upset the national consensus and the rule of law, as under Henry II's son, King John, the property-owning nation, which of course included the church and the emerging towns, was forced to come together to bring him to reason. This was the story behind *Magna Carta* (1215), the second great political event in English history. It was written in the form of a statute, which the King was obliged to sign, and all his leading men of property did likewise. It guaranteed every person's rights, according to his condition, and promised that everyone should be judged by his equals. It became the first of the Statutes of the Realm, which continue to this day, and is also therefore the prototype for the enactments of Congress.

From *Magna Carta* onwards, there was a tendency to enlarge Great Councils into parliaments, in which towns as well as the landed interests were represented. This sprang from the need to raise money to keep the King's Government going, for the King could no longer 'live on his own' (i.e. from the Crown estates), so special taxes were imposed, and that could be done only with the consent of those taxed, i.e. the owners of property, whether real (landed) or mercantile and financial. The major freehold landowners attended parliament by individual writ of summons, but they were joined by 'Knights of the Shires', two from each county, elected by minor landowners with property not less in value than 40 shillings a year. These 'forty-shilling freeholders' remained the basic constitutional unit in the country until the Great Reform Bill of 1832, and the 80 or so County Members carried more weight in parliament than the burgesses from the towns. The latter were chosen by a variety of franchises, but all were based on individual ownership of property, and of course MPs from the richest cities – Bristol, Norwich and above all London – carried more authority. Parliament as a whole constituted a representative assembly of property ownership of all kinds, in which mere head-counting of persons only very slowly became of significance, and was not formally acknowledged until 1832. Nations which adopted democratic institutions in the twentieth century proceeded immediately to one-person-one-vote methods of election, rather than going through the intermediate stage of property ownership as the

criterion, which in England lasted half a millennium. Perhaps this is one reason why such democracies have proved so fragile.

The existence, in England, of a parliament based on private property ownership, and forming a tripod of power – King, Lords and Commons – which constituted sovereignty – was in contrast to most European countries, and explains why the English-speaking peoples developed differently, especially in two respects. First, it enabled England to preserve the rule of law more surely. Even during the reign of Henry VIII (1509–47), England's nearest approach, in the whole of her history, to a State-type tyranny, the King was always careful to proceed through parliament, both in enacting laws which repudiated the papacy and Catholicism, and in executing his wives, like Anne Boleyn and Catherine Howard, and ministers, such as Sir Thomas More and Thomas Cromwell. Parliament might be subservient but it still functioned, and represented the consensus of property owners, so the rule of law continued to be upheld.

The question remained to be settled, however: was the King subject to the rule of law, as much as anyone else? If the answer was 'yes', then property was safe, protected by the courts. If 'no', then it was insecure, and the Stuart Kings were quite clear that they were above it. As Charles I put it: 'A King and a Subject are plain different things.' In effect he claimed he was not bound by *Magna Carta* but could impose taxation according to his judgment of national need. This was the real cause of the Civil War of the 1640s, and the issue was posed even before it broke out, when Charles exacted Ship Money (to pay for the Navy) by his own decree.

The opposition to this unauthorised tax was personified in John Hampden (1594–1643), a Buckinghamshire landowner and MP. He was a man of considerable wealth, and this is important for it enabled him to take on all the power of the Crown and its lawyers, in a case which was fought through the Courts high and low from 1635 to 1638. As Clarendon, an eye-witness, wrote in his great History of the Rebellion, his refusal to pay the tax and his fight in the Courts made him a symbolic national figure, 'every man inquiring who and what he was that durst at his own charge support the liberty and property of the Kingdom, and rescue his country from being made a prey to the Court'. Had Hampden been a poor man he could never have done it. His example is a classic case of which we need not only men of principle but wealth to give principle the sharp edge of power. As Hampden himself said: 'He would be content to lend as well as others but feared to draw upon himself that curse of *Magna Carta* which should be read twice a year against those who impinge it'. A century later, denouncing George III's similar attempt to impose taxes upon the Americans, Edmund Burke underlined the moral point beneath the financial issue: 'Would twenty shillings have ruined Mr Hampden's fortune? No, but the payout of half twenty shillings, on the principle it was demanded, would have made him a slave.' Hampden's wealth enabled him to fight the case vigorously and make its details universally known, so that while judgment in 1638 went to the King by majority (the judges being divided), Hampden won a moral victory, and when the Long Parliament met two years later, one of its first actions was to declare the judgment 'against the laws of the realm, the rights of property and the liberty of the subject'. Hampden continued to use his freehold wealth to support freedom, raising a regiment of

green-jacketed infantry when the Civil War began, and dying from wounds received at the head of it in 1643.

Rich men have continued to use their resources to fight unjust authority in cases where poor men have no choice but to submit. A significant case occurred as recently as the early 1950s, in Churchill's post-war government. The war had invested government with all kinds of extraordinary powers over persons and property, and parliament was slow to revoke this. The Marten family, considerable landowners in Dorset, had been forced to sell land at Critchel Down in 1940, to the Royal Air Force. At the end of the war, Commander Marten, head of the family, asked to buy the land back. This was refused. Instead the land was transferred to the Ministry of Agriculture, which in turn let it to a tenant. Marten, a man as obstinate as Hampden and as wealthy, fought the case. He eventually got an inquiry, which after much legal expenditure, found in his favour. The whole affair was an example of bureaucratic arrogance. The Minister of Agriculture, Sir Thomas Dugdale, who had been misled and lied to by his civil servants, felt bound in honour to resign, and his parliamentary secretary, Lord Carrington (later a distinguished Foreign Minister) tried to do likewise, but was persuaded to remain by Churchill, who was greatly perturbed by the bureaucratic tyranny revealed by the affair, and promised to speed up the repeal of all such wartime infringements of liberty. Thus Marten not only got his land back but won a much larger battle.

Sir James Goldsmith, the billionaire, told me, not long before his death, that he intended to devote his life and fortune to fighting instances of government oppression of individuals who were too poor to fight for themselves. Alas, he died, aged 65, soon after. Would there were rich men today ready to carry out his intentions, for the curse of bureaucracy has never been heavier, the number of regulations more numerous, and the cost of resisting any injustice more ruinous.

The second way in which the English-speaking peoples developed differently from their Continental neighbours was in using the principle of private property to further overseas expansion. This, in turn of course, enabled colonies thus founded to proceed from the start to govern themselves and found representative institutions. In Portugal and Spain, forerunners in the field, the State did all and financed all, and the crowns of the two countries treated colonies as the personal possessions of the sovereign who retained all rights. The French crown, broadly speaking, adopted the same policy, until in due course, in a moment of madness, the Emperor Napoleon sold all that remained, the Louisiana Purchase, to the American government in 1803 for a paltry sum.

The English approach was quite different. The work of voyaging, exploration and settlement was left entirely to private enterprise. Individual 'adventurers' fitted out their own expeditions, as Sir Walter Raleigh did with the first settlement of Virginia at Roanoke. More usually, a commercial company was formed, in which men – and women – took shares and divided the profits accordingly. Royalty might participate, but as individual shareholders, on exactly the same terms as their subjects. Thus Queen Elizabeth herself had shares in Sir Francis Drake's great voyage round the world, reaping a splendid harvest of profit. The settlement of both Virginia and Massachusetts was undertaken by commercial companies,

setting a pattern followed for a century. Never in the history of human institutions has the connection between individual property and individual liberty been so surely and openly demonstrated. Obviously where private fortunes supplied the finance for the colony, private views would determine its government. To be sure, the companies operated under Crown licence, and the Crown might appoint governors. But the principles of representation and self-government applied from the start. Indeed in the case of Massachusetts, the first constitutional meeting took place while the *Mayflower* was still at sea. The crown had neither the money, power nor will to rule its American colonies, as Portugal, Spain and France ruled theirs, and by the time it formed the inclination to exercise authority, in the late seventeenth century, it was too late: the American colonies were, in effect, self-governing. Then when George III and his ministers imposed the Stamp Duty, they were seen as acting as usurpers and innovators, overthrowing an unwritten constitution of immemorial antiquity, and the King could easily be portrayed as another King John or Charles I.

The wealthy men who financed the original settlement tended to be radicals in religion and in politics: those who believed in constitutionalism and representation. Many of them were prominent in parliament in resisting James I and Charles I. Hampden himself, for instance, was one of the 12 men to whom the Earl of Warwick granted in 1631–32 a large tract of land in what is now the state of Connecticut. The colonists followed closely and profited from the events of the Civil War, and its aftermath. In the running of the colonies, the connection between private wealth in land, personal fortunes, and the holding of office, was continually emphasised. The colonists noted, too, that when the English twice dispossessed the monarch, first in 1688 when James II was replaced by his daughter Mary and his son-in-law William III, and then in 1715 when the Stuart line was effectively replaced by the Hanoverians, the effective leaders in both moves were the great Whig landowning families, such as the Russells, the Cavendishes and the Spencers. They turned a divine-right monarchy into a parliamentary one.

It is impossible, then, to exaggerate the importance of that unique form of private property, the ownership of freehold land, in the progress of liberty among the English-speaking peoples. The connection continued in American history. The great majority of those who created the American Revolution in the 1770s owned freehold land, often in large parcels. They saw themselves as the natural successors of the landed gentry who resisted Charles I and raised troops of horses at their own charge, to fight him. As one of them put it, 'they rummaged in *Rushworth's Collections* [documents about the Civil War of the 1640s] to find precedents'. Outstanding among them was George Washington, not only because of his height (6'3") but his landed possessions, which were enormous, and which he farmed and exploited with industry and skill, then and later, to make himself one of the richest men in the hemisphere. Washington took a landowner's view of the crisis. Of course he objected to 'taxation without representation'. But his particular objection was the royal ordinance, which might, if enforced, prevent Americans from occupying and exploiting land beyond the Appalachians. He saw that America's long-term future was in thrusting across to the Pacific and taking the entire

continent. In his own way he was a 'manifest destiny' believer, and that is why he took up the sword. He wanted to serve without pay, both as general of the forces and later, as president, because he believed men of individual wealth had a duty to defend and promote freedom – *richesse oblige*, in fact. He saw himself as setting an example for all property owners. Unlike Franklyn, Jefferson, Adams and Madison he had a vision which went beyond mere liberty from England to a vast, property-owning nation, based on almost unlimited land. He had this vision because he had visited more of America than any other of the revolutionaries, and had penetrated further into it, to grasp its potential.

Historical experience shows that, at least in Anglo-Saxon societies, the possession of freehold land leads directly to participation in the exercise of power and the enjoyment of freedom. As America expanded inland, it adopted, and pursued on an enormous scale for over a century, a cheap land policy. Under this, millions of immigrants to America, arriving without property, were able in one generation to acquire by borrowing, and eventually own without encumbrance, sizeable farms. This process was accompanied, and promoted, by the extension of the vote, initially to some, soon to many, eventually to all male citizens.

Ownership of land, as the most politically significant form of personal property, continued to be the mainspring of the American economy, as the impulse behind the growth of its democracy and freedoms, to the middle of the nineteenth century. But in the meantime, the Supreme Court under John Marshall, and the wisdom and energy of Marshall himself, had laid the juridical and legal basis of American capitalism, which in time produced a vast property-owning citizenry in America's burgeoning towns and cities, thus reinforcing freedom and democracy by ownership of non-landed assets.

In many societies outside the Anglo-Saxon tradition the development of liberty and permanent representative institutions was impeded by the insecurity of ownership. It was not so much that private property was rare as that there was no guarantee the courts would defend it in opposition to the State. Take the case, in France, of Nicholas Foucquet, Superintendent des Finances to Louis XIV and a younger contemporary of John Hampden. He amassed a great fortune, and built the magnificent chateau of Vaux-le-Vicomte, using the team of the landscape gardener André le Nôtre, the painter Charles le Brun and the architect Louis le Vau. He made the mistake of entertaining the King there and displaying its splendours. Louis XIV, envious and competitive, promptly had Foucquet arrested and imprisoned for the remaining 19 years of his life, confiscated all his property, and used it, together with the design-team, to begin the building of Versailles. There was no redress in a regime where a mere *lettre de cachet*, sealed with the King's privy seal, could lead to perpetual imprisonment without trial, or exile. Hence in France under the *ancien régime*, the landed classes and wealthy merchants were seldom if ever tempted to use their assets to advance public liberties, taking rather the easy path of sharing the spoils with the royal government. The only hope of change was revolution, often leading to more oppression. In Russia the Tsar alone enjoyed

liberty of thought and action, and his property alone was secure. There, too, where private property could not be used to promote reform, the foreseeable end was popular uprising and the massacre of the royal family. In present-day Russia, where the rule of law is not yet firmly established, the new breed of financial oligarchs who have looted the country's natural assets, and flaunt their wealth in international society, are scarcely more secure than Nicholas Foucquet.

Unfree regimes both in the recent past and today have employed a variety of devices either to prevent private individuals from acquiring substantial property or from using it to promote liberties. In both fascist Italy and Nazi Germany, currency controls and heavy punishment of any infringement of them, real or imaginary, were the favourite method. In Communist countries, the private sector had virtually no existence. That no longer applies in China, where huge fortunes are being amassed and many millions of the new bourgeoisie now possess substantial assets. But the absence of a rule of law which can be relied on to protect the individual and his assets against the state, and the obstacles raised to prevent their transfer abroad, keeps private property tame and harmless: no Hampdens there as yet.

This is one of many reasons why China's progress to wealth and widely based prosperity is likely to be overtaken in due course by India, which enjoys the protection of the rule of law, first established by its British rulers, and where the rich can use their fortunes as they please, even against the government. For if private wealth promotes freedom in a lawful society, so in turn freedom promotes yet more wealth. The economic superpowers of the future will almost certainly possess private fortunes of every size, in abundance, and the legal protection which alone underwrites their value. They will also enjoy, as do the United States and Britain today, free institutions.

So the moral is plain. Let us welcome the lawful acquisition of private property by individuals as part of the normal functioning of a civilised society. Let us seek to promote its spread to all sections of the population. Let us revive the term 'a property-owning democracy' and make it meaningful. Let us give the protection of private property a high priority in our system of law. Let us beware, particularly, of statutory assaults on private property in the pseudo-benevolent guise of the pursuit of an unattainable, because unnatural, and ultimately undesirable equality. Human beings are creative, original, constructive and marvellous, precisely because they are unequal in countless different ways, and that is reflected in the acquisition and enjoyment of property, and the pursuit of freedom which flows from it.

Freedom and freehold, a natural conjunction and an infinitely benevolent one. That is the lesson history teaches.

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Paul Johnson is a journalist, historian, speechwriter and author (marigold.johnson@virgin.net).