Abstract

In modern economics property rights are analysed from a purely utilitarian perspective. Their evolution and subsequent social costs are ignored. We emphasise that property rights promote incentives but we ignore the consequences of their presence, and effect on distribution, on the incentives of the property-less members of society. By contrast, both Adam Smith and Henry Maine (a legal historian who was also a great influence on Hayek), examine property rights in a clear historical—and anthropological—manner and are therefore acutely aware of the social significance of the emergence of property rights. Both of them describe a process in which the acquisition of property rights lead to the power to exclude and to the lapse of the correlative duties towards those who are left without property. The main difference between them is that Maine sees in this an evolutionary inevitability which emanates from the necessary demise of social cohesion due to changes in mode of subsistence (technology). Smith, however, sees this as a failure of the political system to translate into law that which at all time would be deemed as a moral necessity: the care for those who are property less. What in his view allows such a breach of morality to be sustained is the working of the invisible hand. In terms of Maine’s argument, Smith is simply saying that the correlative duties lapsed because there was no problem for the property less individuals to acquire their subsistence in other means and as independent agents who sign contracts with the owners of property. However Smith does recognise that there are conditions under which, this mechanism fails. In such a case, his analysis corresponds to Maine’s analysis in reaching the conclusion that there are clear social costs associated with the emergence of property rights and these have efficiency implications.