



Constitutional Property Rights In A Comparative and Philosophical Perspective

Background:

‘Critical Legal Studies’ is a body of legal philosophy that aims to critique legal systems as the product of existing power structures within society, highlighting the oppressive mechanisms at work in seemingly ‘neutral’ legal provisions and cases. It applies Marxist and postmodern methods of thinking to practical legal contexts.

Thus far, the majority of scholarship in this area is entirely theoretical, with minimal empirical research or testing.

Aims and Methodology:

I carried out comprehensive research on case law in 3 Jurisdictions: Ireland, the US, and South Africa. The aim of the analysis was to test whether Critical Legal Studies claims that strong protection for constitutional property rights result in a lack of focus on redistributive outcomes in other areas of law were empirically observed in actual case law.

Additionally, close readings of key texts from legal philosophers in the Critical Legal Studies movement were carried out, to ensure that the empirical aspect of the project was testing the genuine thesis of the philosophical movement.

Findings:

All 3 jurisdictions showed evidence that accorded with the Critical Legal Studies claim, but each in different ways.

- In the US, where the constitution strongly recognises the right to property, there was evidence of a variety of cases discouraging redistribution, going beyond the original constitutional provisions.
- In South Africa, where the constitution recognises a right to housing, judges were inclined to side against private property, and in favour of redistribution, even in private law cases largely unconnected to the constitutional framework.
- In Ireland, where the constitution recognises a right to property but with a social justice limitation, judges were found to primarily focus on communitarian outcomes, but the legislature responded to the constitutional protection of rights by imposing limited redistributive policies.

This would seem to confirm the claims from authors such as Duncan Kennedy, that constitutional provisions “set the tone” for other legal decisions, and influence the overall political outlook of a legal system.

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