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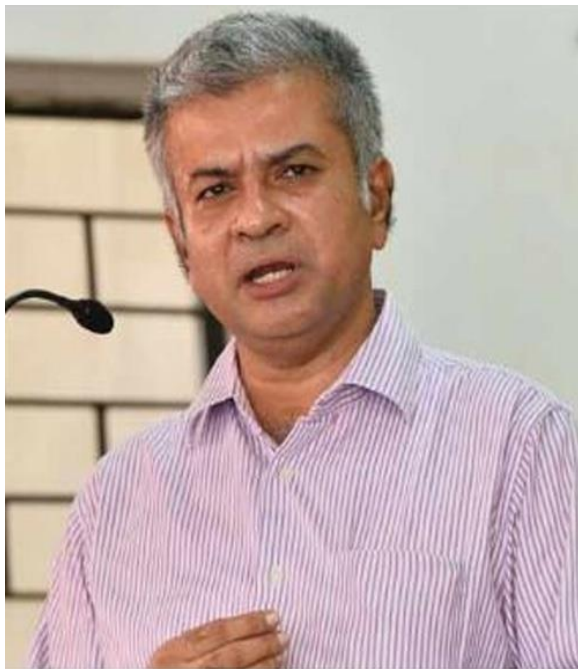
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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

Ownership And Bundle Of Rights - Does Property Ownership Have A Fixed Legal Meaning?

Authored By-Vinayak Sankaranarayanan

‘Ownership’ is a meaningless legal label, and questions about the application of that label to particular things—such as human tissue or intangible assets—conceal a range of quite different issues. The law would do better to abolish the label and evaluate the reasons for applying each ‘stick’ in the ‘bundle’ to each thing separately.

This essay argues the idea that Property ownership has no fixed legal meaning. The meaning of Property ownership is complex and depends on human values and human institutions. Honore’s concern was not to describe all instances of property ownership across all economic systems and situations¹. He also did not attend the list of incidents to be a definite, limited criteria for defining ownership. It is still possible to generate new concepts of property ownership on the basis of case-law like McFarlane and Douglas had done from the “duties” perspective.

This essay is divided into three parts. Part 1 reflects the different meanings of property “ownership” across different perspectives. Part 2 examines the theme of property ownership firstly in relation to intangible assets and thereafter in relation to human tissue. Part 3 assesses the bundle of sticks principle in more detail by evaluating the representativeness of such a label.

Part 1

The bundle of rights describes property as a collection of rights vis-a-vis others instead of being rights to a thing.² It is distinguished from Blackstone’s “absolute dominion” conception of property which gives the sole right of possession and transmission of the property to the owner. These rights include, amongst others, the right to possess, the right to use and the right to capital. The right to possess, for example, means the right to “keep exclusive control of the object owned”. The right to use is not the right to manage or to get income- rather it is the right to get enjoyment out of the thing. The bundle of rights approach conceives of property as a group of rights rather than “thing” rights such as a car.

Given that there are several restrictions on the use and exclusion of property, how useful is it as a tool to indicate ownership vis-a-vis the bundle of rights?³ Cohen viewed property as involving relations between people. He emphasized the role of government in regulating property which could “withhold” land at will since it fundamentally belonged to the state⁴. The legislature may impose restrictions on *uses of things* through highway speed limits or home-building restrictions. Ownership can also be mistaken for Quasi-ownership whose interests derive from public agencies and social objectives. However, it can be argued that these restrictions do not question ownership because it may not strike at the ownership-character- the restriction could simply be a public policy initiative to curb rash driving. The restriction does not alter the power of use of the owner to anyone else.

An issue with ownership is that different stakeholders view the concept of ownership differently. We saw ownership from the legislative-regulatory perspective. Economists have a different conception. Economists view ownership as consisting of those property rights whose purpose is to advance allocative efficiency by permitting persons to enjoy the benefits and pay the costs generated by their activities⁵. This field of property would include rights to liberty but not social-security transfer payments.

Thus, it is submitted that discussions about property and ownership has broken into a set of disconnected usages⁶. Thus, Grey concluded that the bundle or rights had been replaced by thing-ownership leading to property losing political importance because thing ownership is less integrated in the economy than the bundle of rights idea of ownership which specifies the different forms of rights and responsibilities with a thing.

Since different parts of property rights serves different societal interests and purposes, Christman argues that ownership should be classified into different rights categories-encompassing control rights and income rights⁷. Control rights are the use of things to do with possession, management and capital interest. Income rights enable the rights holder to gain a benefit from relinquishing some control rights in an object and the content of income rights is dependent on the circumstances within which the benefit was awarded.

¹ Jane B. Baron, 'Rescuing the Bundle-of-Rights Metaphor in Property Law' [n.d.] University of Cincinnati Law Review 10-

² Johnson D (2007) 32 Vermont Law Journal

³ Johnson(n2)258

⁴ Robilant A, 'PROPERTY: A BUNDLE OF STICKS OR A TREE?' (2019) 66 VANDERBILT LAW REVIEW 886

⁵ Gray, K. (1991). Property in Thin Air. *The Cambridge Law Journal*, 50(02), pp.47

Nozick provides a Marxist conception of property. He argues that ownership is a natural right on the basis that labour is a commodity that is transferred to employers upon any work done⁸. He thus concludes that taxation is similar to forced labour given that when the employer expropriates the fruits of work, it denies any moral ownership of it to the worker. However, this property analogy only works if the labour input can be traced into a measurable share of the asset.

The stick of excludability questions the validity of the distinction between property ownership and contract. Gray argues that every lease and security in land originated from an arrangement of consent⁹. There are many rights of property can be assimilated into some consensual theory. With the excludability test, we must surely doubt any big difference between contract and property. This can be witness in the fluid nature of the contractual chose in action. There has been lengthy debate since *Tulk v Moxhay* about whether the restrictive covenant has contractual or proprietary status.

Katz provides a conception of ownership where exclusion is not a distinct aspect of ownership in itself but rather a part of its “agenda-setting authority” that best explains ownership¹⁰. Agenda-setting refers to the idea that ownership’s defining characteristic is its authority to set an agenda on how to use a resource. The importance of “agenda-setting” in comparison to exclusion can be shown through adverse possession. The inconsistent use approach of adverse possession protects owners against squatters as long as the squatter’s use of land use does not interfere with the owner’s agenda.

In *Didow v Alberta Power limited*, the court held that the power lines that hung over the plaintiff’s land was an encroachment and thus liable for trespass¹¹. Katz places significance in the fact that the court defines trespass in terms of the owner’s agenda and not in terms of the owner’s rights to exclude from his airspace .

⁶ Gray, K. (1991). Property in Thin Air. *The Cambridge Law Journal*, 50(02) 72

⁷ John Christman, *The Myth of Property: Toward an Egalitarian Theory of Ownership* (,) 142

⁸ Michael, M. (1997). Redistributive Taxation, Self-Ownership and the Fruit of Labour. *Journal of Applied Philosophy*, 14(2), pp.137-146.

⁹ Gray(n5) 47

¹⁰ Katz L, “Exclusion and Exclusivity in Property Law” (2008) 58 *University of Toronto Law Journal* 275

¹¹ *ibid*.

Part 2

Most property in the modern economy is intangible such as trademarks, and stock-shares¹². Intangible rights means that ownership and property can no longer be classified as “rights in things”. Even if one has minority shares in a company and the directors sell the company, that does not prevent minority shareholders from having a claim against the same corporation¹³.

Property rights cannot any longer be characterized as “rights of ownership” or as “rights in things” by specialists in property.

There is not much of a right to exclude for intangibles. Copyright law creates a laundry list of use rights but emphasizes little on defining the protected expression¹⁴. According to McFarlane, property does not extend to rights in intangible things. However, patent law defines the right to exclude as when one “makes, uses or sells the patented invention”. However, Holmes disagrees by arguing that the conception of a contract by itself promotes exclusion because a debt incurred is a property for the creditor¹⁵. This debt is then liable for sale like for the acquisition of a lien.

In *eBay v Bidder's Edge* (BE), the Defendant, Bidder's Edge ("BE"), was an internet auctioning website that allowed on-line buyers to compare prices across different online stores including eBay¹⁶. To obtain its database, BE used automatic computer programmes to access the eBay site 100,000 times a day, thereby consuming 1% of the data transferred by eBay. For this eBay claimed an injunction against BE.

The courts held that BE was liable because the eBay's reduced system performance harmed eBay's legal property right in the computer system¹⁷. Moreover, it held that the the right to exclude others from using physical personal property was not equivalent to the rights protected by copyright.

¹² Smith HE, “Exclusion versus Governance: Two Strategies for Delineating Property Rights” (2002) 31 *The Journal of Legal Studies* 7

¹³ *ibid.*

¹⁴ Smith HE, “Exclusion versus Governance: Two Strategies for Delineating Property Rights” (2002) 31 *The Journal of Legal Studies* 113

¹⁵ *ibid.*

¹⁶ *eBay v Bidder's Edge* [2003] 89 *ABA Journal* 40 (Court for the Northern District of California)(Ronald Whyte)

¹⁷ *ibid.*

A problem with cyber-trespass was created by the case involving *Thriftly-tel* wherein combining trespass of real property with trespass to chattels creates a new kind of property right that goes beyond the right common law granted personal property owners¹⁸. By acknowledging that more electronic contacts are sufficient to keep a claim, the courts are creating a rule of inviolability for personal property. In the *eBay* decision, the court sidesteps the fact that the cyber-trespass argument is wrongly used to protect *eBay*'s intellectual interest in the database. The important idea is that each type of property carries a different bundle of rights¹⁹. IP law balances the rights of authors to exploit their creations against the public's right to exploit the owner's mental creation. Real property, however, is given an inviolate interest for the owner.

A second argument against cyber-trespass is that the theory will stifle the free-flow of information because if the theory becomes widely applied, it will destroy the competition and efficiency by reducing choice for the buyer because the website owner may control how information is used on its website.²⁰

What is the limit to bodily freedom? Just as there are trespassory rules against meddling with other people's chattels, so too there are rules banning homicide, assault, rape and false imprisonment²¹. Furthermore, any society committed to conceptions of universal individual freedom takes it as axiomatic that one of the most fundamental freedoms is what we may call the 'bodily-use freedom principle': a person is free to use his body as he pleases.

Property theory for body material conflicts with the right to privacy and right to bodily integrity because as was argued forcefully by Rao, although property "severs the body from the person who owns it, privacy keeps the body and person inextricably intertwined²²." Nevertheless, it can be argued that Honore's idea of an "owned thing" is not necessarily severed from the owner because for example, personal information can be possessed and transferred as an ownership entitlement while remaining "intertwined" with the person²³.

¹⁸ D Kearney, 'Network Effects and the Emerging Doctrine of Cybertrespass' [2005] 23(16) *Yale Law & Policy Review*

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ Harris JW, (1996) 'Who Owns My Body?' 16 *OJLS* 55-61

²² J Penner: *The Idea of Property in Law* (OUP 1992) pp.68-73

²³ *ibid.*

The irony is that whilst consent and autonomy might be convenient to those who oppose forced abortion, personal consent might be unpopular in “degrading” situations such as prostitution or prostitution. This idea was reflected on in *R v Brown* which involved the harm caused by sadomasochism²⁴. The majority found that any harm that goes beyond the “merely transient and trifling” would be subject to legal intervention. Thus, we can conclude that the courts encourage personal autonomy for all types of activities.

A lack of property rights in body material would create a legal void because when an object has economic value, it leads to the condition of “scarcity”²⁵. Property rights solve the risk of dispossession created due to scarcity. If a chattel is subject to a property right then, as a right in rem, all people have a duty to refrain from interfering with the object (human body).

The expressive theory of property justifies ownership entitlements in regards to features that are important to people such as independent-decision making and welfare. A common argument by expressive theorists against the body having a property element is that it is demeaning to human integrity if a body part could be sold like a commodity²⁶. This should therefore be a major criticism of income rights because income rights revolves around the idea of money and commoditization. One error is in trying to justify a full bundle of ownership entitlements within the expressive theory of property. Income rights cannot be defined as “expressive” because income rights are based on social and economic conditions²⁷.

Given the unique public demand for medical research, Grey suggests a third alternative of allocating the property right to third parties such as biobanks. This has already been successfully done in Estonia where ownership is with the state²⁸.

A corpse cannot be owned. If there is no right to bodily integrity and ownership when alive, there is no reason for death to relieve ownership. Moreover, from a public policy perspective, as

²⁴ Harris(n17)61

²⁵ Wall J, *Being and Owning: the Body, Bodily Material, and the Law* (Oxford University Press 2015)

²⁶ Wall J, “The Legal Status of Body Parts: A Framework” (2011) 31 *Oxford Journal of Legal Studies* 783

²⁷ *ibid.*

²⁸ Gibbons S, 'Are UK Genetic Databases Governed Adequately? A Comparative Legal Analysis' (2007) 27 *Legal Studies*

in *Doodeward v Spence*, it is in the interests of public health not to make cross claims to the ownership of a corpse²⁹.

A more minor issue is that property exceptions must be more explicitly defined. In *Moore v Regents of the University of California*, Section 274e(a) of the National Organ Transplant Act defined “human organ” in a way that excluded human tissue and cells.

The court squashed Moore’s claim to a proprietary interest on the basis that allowing patients property rights in their tissues would require medical experts to negotiate for rights to tissues which might lead to reduced search activity because of greater administrative duties in maintaining those sources. The court also believed that a patented cell line was legally distinct from the claimants cells because the cell line was awarded for the doctors “human ingenuity” and that patent was a product of Golde’s invention³⁰.

Part 3

An advantage of the bundle of rights conception is that it allows Legal Realists to develop a political function of property that develop a social and economic character of property because land ownership creates wealth and status³¹. The bundle of rights, Hanoch Dagan argues, is malleable because it captures the idea that must be modified with human values³². For example, at one time, the landlord was obligated to offer tenants only the bare right of possession instead of actual possession and had no duty to maintain the premises. Today, the landlord’s bundle of rights requires him to consider the tenants interests throughout the commercial relationship.

In contrast to the bundle of rights embraced by legal realists, critics emphasise the role of the “thing”. The “thing” is defined by Pollock as some matter of rights and duties conceived as a whole and apart from all others³³. The thing ownership conception of property defeats the vision of a regulatory welfare state which was developed by the bundle of rights concept. The

²⁹ Douglas S and Goold I, “Property In Human Biomaterials: A New Methodology” (2016) 75 The Cambridge Law Journal 485

³⁰ *Moore v Regents of the University of California* [1990] www.courtlistener.com (Supreme Court of California)

³¹ Baron J, “Rescuing the Bundle-of-Rights Metaphor in Property Law” [2014] University of Cincinnati Law Review

³² *ibid.*

thing mediates the rights between owners, possessors, and others with property interests on the one hand and duty bearers (and so on) at large on the other

The bundle-of-rights theory is useful to obtain information³⁴. Clarifying the rights one has against someone else in complicated property environments requires a close examination of how legal rights have been divided over time and allocated to other parties.

Some feel the bundle of rights is far too broad and open-ended. Katz argues for a boundary approach since it differentiates non-owners from owners easily by recognising only one owner to the object³⁵. This is unlike the bundle of rights where ownership interests are shared and divided.³⁶

From the perspective of property law promoting the environment, it can be argued that the bundle of sticks with its emphasis on correlative tensions, fails to encourage an interpretation of property as shared interests in an object³⁷. The various stakeholders should be subject to duties to the environment's sustainability.

The bundle of rights makes little mention of owner's duties³⁸. The "duties" are only extensions and correlative of rights belonging to others so that a supermarket proprietor must permit entry to protesters due to their free-speech right to enter public property³⁹. Thus, we do not have a detailed view of the extent and vision of ownership beyond the concisely detailed bundle of rights.

³³ Smith, H. (2014). THE THING ABOUT EXCLUSION. *BRIGHAM-KANNER PROPERTY RIGHTS CONFERENCE JOURNAL*, 3,p.115.

³⁴ Baron J(n27) 34

³⁵ Larissa Katz (2008) Exclusion and Exclusivity in Property Law, 58 University Of Toronto Law Journal, p.275

³⁶ *ibid.*

³⁷ Johnson(n2)10

³⁸ Baron J (n27) 260

³⁹ *ibid.*

Conclusion

This essay has emphasised the role of the bundle of rights and its important role in connecting the varying perspectives of ownership. Despite its criticisms, the bundle of rights gives a structure and meaning to ownership that would otherwise be torn apart by contrasting views.

