

## Concepts of property

### What is property?

- **Felix Cohen** - to talk about property is not to talk about objects but about relations between human beings, or more accurately about relations between persons in relation to things. Private property must at least involve the right of the owner to exclude others from doing something in respect of the object of ownership. (the owner has a right to exclude the non-owner from something or other)
  - Property is not a thing but the relationship one has with a thing; describing the relationship between the subject and object of property
  - Subject: person who owns the object
  - Object: the physical thing you have legal relations with
- **Personal rights** (contracts, torts, unjust enrichment) are only enforceable against the person you have a contract with BUT **Property rights** is enforceable against the whole world

### Property vs Contractual rights – *King v David Allen & Sons Billposting*

- Facts: King entered into a contract with Allen, under this agreement he agreed that he would permit anyone to post advertising on the walls of the bill post
- Damages could be obtained from King because by leasing the land to someone else he put himself into a position where he could not keep his end of the deal
- A license creates only personal rights not property rights - did not run with the land only creates contractual rights which is enforceable against the party to the contract not against the whole world.

### Theories of private property

- Questions that may be asked are:
  - What should be the objects of property?
    - Courts are reluctant to find new property rights
    - Can it be used, enjoyed. Alienated and discussed
    - Look to theories
  - What should be the subjects of property?
    - Look to theories
- Justifications of private property can be found in the following theories

#### • **Locke's labour theory**

- This gives reward for effort hence if you work hard for something you should be rewarded for your efforts
- Issue: when someone gives the money and someone puts in the effort?
- Issue: Sometimes we don't actually want to improve things but merely to preserve it
  - You do not actually want to improve land but merely to keep it in its natural state i.e. heritage land

#### • **Economic efficiency**

- Based on efficient allocation of resources, depletion and degradation of resources
- Initial allocation of the object should be given to the person who is more likely to make the most efficient, effective and economic use of it
- Contingency: certain property rights that should be accessible to everyone

#### • **Utilitarianism**

- Greatest good for the greatest number of people, property rights for the improved welfare of the community
- They argue that the state should allocate resources in a way that would be the most useful to the largest number of people
- Medical example- the doctor would make better use of the cells rather than the cell owner
- This prevents the overuse of resources

#### • **First occupation theory**

- The first person should be the owner

#### • **Personality theory**

- People have the right to own property to develop their autonomy
- This focuses on the private rights of individuals, requiring property to distinguish us from others (Hegel)

### Characteristics of property

- Right to use, enjoy, possess, alienate (transfer) and exclude others as per Blackburn J in *Milirrpum v Nabalco*
- Characteristics are culturally and historically exclusive- some cultures you have the right to use but not to exclude e.g. Native title
  - Nonetheless possible to find property where one of these features are missing
  - **The right to use or enjoy**
    - Property doesn't refer to a thing but is a description of legal relationships with a thing
    - It is a resource as per *Yanner v Eaton* (1999)
  - **The right to alienate**
    - *R v Toohy*
      - Assignability is not in all circumstances an essential characteristic of a right of property.
      - By statute some form of property are expressed to be inalienable
      - But it must be capable in its nature of assumption
  - **The right to exclude**
    - It is a private right to exclude others exercisable against the general public, including the state
    - Public rights are to be distinguished from public ownership of utilities or industries, where the State owns assets on behalf of the public so as to regulate their use for public benefit

### Recognition of new forms of proprietary interests

#### **Restrictive covenants**

- This is a covenant imposing restrictions on the use of land, a negative agreement and obligation for someone not to do something
- Covenants are a form of proprietary rights and this is a novel situation where they created a right in order to fix a problem
- In equity the restrictive covenants run with the land and enforceable against subsequent purchaser if notice is given
- To avoid unfairness in *Tulk v Moxhay* courts created a new property right : the price they paid reflected the restrictive covenant
- *Tulk v Moxhay* (1848)
  - Facts:
    - Tulk owned undeveloped land in the middle of Leicester Square in London and surrounding houses.
    - He sold the undeveloped land to one Elms, who covenanted inter alia to retain the land in an open state.
    - The land was later acquired by Moxhay, who, despite taking with notice of the covenant, argued that it was unenforceable against him
  - Held:

- Lord Chancellor defied earlier precedent and upheld the grant of an injunction restraining Moxhay from developing the land,
- This is hence a property right found in restricting the use of land
- The decision was based on the fact that Moxhay purchased the land with notice of the covenant and the price paid reflected the restriction.
- The decision has since been affirmed and applied in numerous decisions in Australia and the basis for intervention clarified

### Human Bodies

- Law is still unclear about rights in human bodies but generally humans cannot be the object of property
- Once blood is removed from the body the donor of the blood no longer retains property
- Human Tissues Act 1983- inter alia prohibits the sale of human tissue (doesn't say anything about whether or not property rights can be held in tissue or blood)
- The tenor of recent decisions on the matters (such as *R v Kelly* and *Roche v Douglas*) would suggest that courts may be willing to recognise a property right in bodily tissue and fluids, where there is no legislation prohibiting this
- "it is not improper against human health or immoral for human tissue to be owned" Bazley
- However, body party may be considered to be:
- *Bazley v Wesley Monash IVF Pty Ltd [2011]*
  - Facts:
    - Bazley's husband was sick and a sample of his sperm was taken and given to Monash. He signed that Monash would not be allowed to be used in the event of his death. Bazley wanted to obtain this once he died.
  - Held:
    - Sperm is human tissue that is capable of being his property. While he was alive he owned his sperm and when he dies ownership passes to his legal representative which is his wife. As long as they paid the storage fee of the sperm the contract is maintained. They merely pay for the storage and once she doesn't want it to be stored she can asked to be returned.
- They distinguished sperm from body parts
  - Reasons why it is unlawful; religion, public health and public decency
  - Certain circumstances it is not improper or immoral for human products to be owned
    - Theory that underlines this is the personhood theory (autonomy and having rights over yourself and your body) hence a person should be entitled to own their own body and bodily products
- Note: you cannot own a corpse but there is limited circumstances when it comes to burial that you can

### *Moore v Regents of the University of California*

- Facts:
- Policy issues considered:
  - Protection of a competent patient's rights to make informed decisions, and to maintain a strong fiduciary (trusting) relationship between doctor and patient
  - The necessity of allowing innocent parties, such as researchers to continue to be unhindered by civil liability
- Held:
  - Conversion of human cells should be made possible, a decision made by the legislature due to the complex social issues involved
  - Not necessary to extend conversion law (law of someone infringing on another person's personal property) because disclosure obligations and fiduciary relationships will ensure the protection of patient's rights

### Native title

- A new form of property interest is native title and this was recognised for the first time in the case of Mabo
- *Mabo v Queensland (1992)*
  - Held: acquisition of the land by the British crown did not discontinue native title. Distinguished ultimate title which does not confirm beneficial ownership. Beneficial ownership could only be confirmed where there was no native title or it was distinguished.
  - The crown's status as ultimate owner gives them power to distinguish native title. Any interest that is lower than fee simple requires a comparison of the extent of the title by the native group.
  - Held that they had a special continuing relationship with the land which was not extinguished
- Native title stand alongside the Doctrine of Tenure (crown has ultimate sovereignty)
- It shakes the concept that only individuals can have property by stating that communities can too
- Important to recognise a new proprietary right here because (first occupation) idea of terra nullius; the court catching up with changing morals (for many years terra nullius was widely accepted) by the time Mabo came along the court needed to change to meet the beliefs of most of society.
  - *Radical title*: This is the title owned by the Crown in its sovereign capacity to create titles in favour of itself or individual subjects. It can be seen as the proprietary aspect of sovereignty, namely the expression of sovereign power in the domain of creating rights over land. As the Latin term *radix*, meaning 'root', suggests, it is the legal source of all property rights.
  - *Absolute beneficial title*: This is the legal title that is closest to the common expression 'ownership'. It is the term that captures the local, unencumbered rights over land.
  - *Plenary title* and *plenum dominium*: A full title, namely, absolute ownership with unlimited rights to the property in question, with a complete absence of any tenurial obligations.
  - *Allodial title*: A title that has not been derived from any Crown grant; a title that does not have feudal obligations attached to it; a title that is absolute.
  - *Paramount title*: The title that the sovereign holds; the capacity to assume title when native title has ceased; the title of the monarch entitling him or her to the benefit of services and incidents.

### Property in a spectacle

- Courts are reluctant to find property in a spectacle because of the impractical consequences because you cannot stop people from opening their eyes & describing what they see
- *Victoria park racing*
  - Facts:
    - Victoria park brought about an action of nuisance. They argued that they were creating a spectacle and they should have property rights in that. Court needed to consider if you could own a spectacle.
    - VP had taken steps (fencing) to ensure that only people who had paid could see the races
    - Taylor brought land adjacent to VP and built on it in order to see the races and broadcast it