

## Topic One: The Concept of Property

### **A. The Nature and Essence of Property**

- Something that belongs to you, or something that you can own is Property.

*Grey: "Property is a mere illusion, vague concept like air."*

What does property right give you?

- The right to possess
- The right to sell
- The right to exclude
- The right to alienate
- The right to enjoy

Propositions about Property drawn from *Cohen's Article: "Dialogue on Private Property"*

- If something is your property, you have certain rights over it.
  - o Property is not the object itself but rights in relation to the object.
- More than one person can have property in an object
  - o E.g. you may have a mortgage interest over land, whereas someone else has an easement or lease over the land.
  - o As more than one person has rights over the land/ object we would need to consider the merits or relative claims and determine who has the strongest interest if there are competing and inconsistent claims. (Indefeasibility)
- Person can have property rights in intangibles
  - o E.g. Shares, Copyrights to protect your ideas and have control, patents protects innovations, debts owed to you would enable you to have intangible rights over the debt.
- Property is a set of legal relationships between people in relation to the object and is subjected to limitations.
  - o E.g. Property rights don't enable you to do illegal actions on land.
  - o E.g. Property rights don't enable you to build anything you want.
- State Sanction: Private property gives you the right to exclude others from certain activities and requires the state in carrying out such decisions.
- Numerous clause theories: People cannot create different types of property because property law only recognizes a limited form of properties.

### **B. A) Justifications for and criticisms of private property**

- Ziff's Hierarchy

"Privatizing the decision-making power over resources inevitably means that some will do quite well and others not. There had better be good reasons for allowing that to happen"

1. First Order Theory: *Why* do we have the institution of private property?
2. Second Order Theory: *What* resources should be objects of property?
3. Third Order Theory: *Who* should have private property?

- There are 3 types of properties

- o Private Property: Individual persons have right to exclude the rest
- o Common property: Property is communally owned
- o Collective property: Owned by state on behalf of everyone

## **B) Theories justifying private properties**

### ***First Order Theories- WHY and WHO have private properties?***

1. **First Occupation Theory:** Finder's Keeper "Original discoverer entitle to ownership"  
Limitation: What happen if there is more than one finder? E.g. Employer owns Workers discovery. Fails to explain occupation by gift.
2. **First Labor Theory:** The right to the fruits of one's own labor, provides incentivizes for people to work harder.  
Conditions:
  1. Must mix your labor with it: Take something from the state that nature has provided and left, it he mixes his labor with it.
  2. There must be some land left over for others
  3. We must not let our land spoil e.g. Cultivate all plants, chop all treesLimitations:
  - a) People produce more for cash (money) as money does not decay, it allows us to purchase labor
  - b) Machinery labor
  - c) Assumes labor enhances the value of land.
  - d) There are people that cannot work e.g. Elderly/ disable
  - e) Animal doing labor e.g. Cows
  - f) Does not apply to domestic labor (Women)
  - g) Working in providing services industries.
3. **Utilitarianism:** Wealth is the measure of happiness and property indicates wealth and having property can allow maximization of human happiness.  
Limitation: assumes wealth is a measure of happiness and assumes all people are rational and maximize wealth
4. **Personhood (Hegal):** Property provides an opportunity for every individual to be able to express his/her personality (ownership enables you to express identity).  
Limitations: Don't exactly justify what private property is.
5. **Economic efficiency theory:** Private property creates incentives to use resources efficiently and prevents waste as individuals are more likely to care for their own property. In order to prevent waste Property should be Transferable, exclusive and universal.  
Limitations: Assumes everyone is rational and maximizes wealth.

## **C. Characteristics of Property**

Property rights exist as a bundle of rights, and can still be recognized even if they derive from their own system of law (e.g. Native Title in *Mabo*)

### **The Liberal Triad:**

- a) Use/ Enjoy: Ability to use and enjoy the particular thing/ land
- b) Exclude: Ability to exclude others from using/taking the particular thing/ land
- c) Alienate (Deposition): ability to dispose of the thing as you chose/ can be sold or given away

<p><b>Millirrpum v Nabalco</b> <b>1971</b></p>	<p>Aboriginal justifying their rights to the land, want recognition to land rights.</p> <p>The significant of the case:</p> <ul style="list-style-type: none"> <li>- It recognizes that the Aboriginal clans had a recognizable system of law, and that system of law involved a relationship between the clans and the land.</li> <li>- The relationship differed from forms of proprietary interest of land known to the common law as it did not involved: <ul style="list-style-type: none"> <li>a) The total exclusion of other groups and because the ownership was not individualized but held on a communal basis.</li> </ul> </li> </ul>	<p>Although plaintiffs have proved an establishment of a recognizable system of law present, their usage of the land did not fall within the Australian legal system of interests, which we describe as private property.</p> <p>Blackburn J: 2 Step Process: a) Did you have a system of law? b) If so, did you have property right under that system of law? Was the interest proprietary in nature?</p> <p>Factual Drawn out:</p> <ul style="list-style-type: none"> <li>- Plaintiff have no economical relation to land</li> <li>- Plaintiff had rights to use and enjoy but not exclude as other tribes were allowed to enter</li> <li>- Plaintiff had no right to alienate.</li> </ul> <p>Blackburn J Regarded property as rights to: 1) Use/ Enjoy 2) Exclude 3) Alienate</p>
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Differences between property interest and contractual interest

- Proprietary interest are *in rem* (Enforceable against the world)
- Contractual interest are *in personam* (Enforceable against a person/party)
- Property rights are more superior than contractual rights.

<p><b>King v David Allen &amp; Son</b> <b>Billposting</b> 1916 (UK case- persuasive)</p>	<p>Defendant (King) gave the appelland (David Allen) permission to affix posters and advertisements to the plank walls of a picture house (not been built yet) by entering into a contract that is legally binding. The appelland then demised the premises to "Phibsboro Picture House" in which the company</p>	<p>It was not a proprietary interest and was unenforceable against company as the company was not a party to the contract. Refer to Privity of Contract.</p> <ul style="list-style-type: none"> <li>- Proprietary interests are enforceable <i>in rem</i></li> </ul>
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	<p>agreed to build the picture house. Agreement between the appellant and defendant was not referred in the lease. Defendant was director of company. Company ended up refusing to perform appellant's obligation under the agreement. Issue: The defendant's right under the agreement enforceable against the company?</p>	<p>- Contractual interests are enforceable <i>in personam</i>.</p>
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Remedy for Property Interest

- Property interest: Grants you either an injunction/ or specific performance
- Contractual interest: Damages

<p><b>Jaggard v Sawyer</b></p>	<p>Jaggard sued Sawyer for an injunction for a continual breach of a proprietary right. Sawyer would need to use Jaggard's driveway to access their property. Jaggard argued that an award of damages would be licensing a continued invasion of proprietary rights.</p> <p>The plaintiff's injury was small, and capable of quantification in money. Damages were adequate and it would have been oppressive to grant an injunction.</p>	<p>The Court held that normally an injunction would be awarded for a breach. But, due to the unusual circumstances, the court awarded damages.</p> <p>It shows that injunctions are discretionary and that judges can resolve matters, as they deem appropriate.</p>
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Licenses:

1) Bare License:

- Not Binding on 3<sup>rd</sup> Party
- Revocable at Will
- No property rights involved

E.g. Getting an invitation for a dinner party.

2. Contractual license:

- Contractual rights only
- Consideration may be required
- Probably irrevocable (dependant on contractual terms)
- No exclusive possession
- If terms were breach would only result in damages.

E.g. Purchasing a ticket

3. Contractual license coupled with an interest.

- Irrevocable
- Binding on 3<sup>rd</sup> party

E.g. License to enter is enhanced into the interest. Full property rights attached.

- **Exam answer for Heidke AND/OR COWELL (For license):** It appears from the facts that (Sam) have only a license to be on the property because there is nothing to suggest otherwise. Once his license was terminated he became a trespasser. He can make a claim against (whomever), but he will be limited to damages (Cowell).
- **Exam answer for Heidke AND/OR COWELL (for license coupled with an interest):** It appears from the facts that (Chris) has a proprietary right coupled with a license because [INSERT FACTS], he will likely be able to get an injunction from the court preventing (whomever) from stopping Chris from [INSERT ACTIVITY] (Heidke)

**D. Subjects and Objects of Property**

WHO can own private property?

WHAT can be subject of property rights?

**E. Recognitions of new forms of property by Courts and parliament**

Courts rarely recognize new type of property rights, as they can be enforceable against the whole world.

Court Recognitions:

Recognition of Property rights:

**a) Restrictive Covenants:** (negative covenant, e.g. guarantee sea view)

- In equity: Runs with the land and is enforceable against any subsequent purchaser if notice was given.

<b>Tulk v Moxhay 1848</b>	Contractual promise (covenant) to keep the garden block undeveloped when sold to party. Tulk owned land with garden, park and house nearby. Sold the vacant land and garden to E and requested E not to build over the garden. E kept his promise over the years but then sold to Moxhay who did not uphold promise while being aware of covenant. Tulk sought an injunction to prevent Moxhay to build over garden. Tulk has no contract with Moxhay.  Issue: Can Tulk get an injunction? Is the covenant enforceable <i>in rem</i> ? Property right?	Covenant was binding on subsequent purchaser of land if they had notice of covenant. Therefore, doesn't matter if covenant was binding on Moxhay as it was a proprietary interest and not a contractual license.  a) Moxhay knew of covenant. b) Burden of covenant would have affected the cost of the land.  Tulk has a right <i>in rem</i> therefore injunction was granted and property interest was found.
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**b) Native title:**

Native title was first visited in "*Millirrpum v Nabalco*", however the claim was rejected. As it was found that there were no property right being exercised (no right to exclude) as the ownership was not individualized but held on a communal basis. The legal doctrines that prevented the recognition were Terra Nullius and Doctrine of Tenure. During the time of "*Millirrpum v Nabalco*", Australia was

