

Chapter 7

Personhood and Theories of Property – Evolution of Jurisprudence

The understanding of personhood under the different legal theories become imperative for reaching a fruitful to the current research because the fundamentals of inventorship, authorship and ownership hinge on the existence of personhood. International trends have largely suggested that without natural personhood, law will not recognize AI and therefore the grant of ownership becomes a meaningless formality. The current chapter represents an attempt to cull out the important principles and theories concerning personhood.

7.1 Personhood

7.1.1 Nature of Personhood

Personhood has historically been considered as a tricky proposition by courts worldwide. Reluctant to comment on when life becomes infused into personality in law, courts have largely followed the approach of equating legal personality with the capacity to hold rights and bear responsibilities.³²⁴ In the seminal case of *Roe v. Wade*³²⁵, the United States Federal Supreme Court observed that –

“We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.”

In the words of Brian Z. Tamanaha -

“...there exists no unique, correct way to group entities that would belong under the moniker of a ‘legal person’...there is no universal and permanent notion for legal personality...like other conventionally recognized legal forms anything but ephemeral.”³²⁶

³²⁴ *Wartelle v. Women's & Children's Hospital* 704 So. 2d 778 (La. 1997).

³²⁵ 410 U.S. 113, 159 (1973)

³²⁶ Brian Z. Tamanaha, *What is Law?* 60 (2017)

As pointed out by Fagundes, the concept of ‘personhood’ has been intricately woven into the fabric of law and its expressive dimension. Under this dimension, law does not simply regulate individual behaviour but also gives rise to social values and aspirations. Social ideals therefore become the barometer by which the merits of individual action are to be judged.³²⁷ Norman Fost opines that if the greater common good merits, it would also be feasible to leave certain entities outside the realm of personhood. The concept is therefore characterised by continuous instability of perception.³²⁸

Eric Posner theorizes that law effects two types of changes on the society –

- i. **Behavioural** – subjects of law are told about the kind of the behaviour that is acceptable in society.
- ii. **Hermeneutic** – beliefs and value systems of the members of society are altered over the course of time. When applied to personhood, the hermeneutic effect indicates the entities which qualify as persons and the ones which do not act according to the beliefs of the society.³²⁹

On analysing the above view-points, it becomes clear that the question of personhood cannot be determined in isolation from the socially acceptable perspective. Social desirability of a person in law is as much important as the individual attributes which dictate the person’s legal identity.

There are other schools of thought, e.g. modernist/legal realist approach and post modernism, that, however, advocate that personhood must be ascertained independent of social context and influence. These philosophies maintain that when it comes to determining personhood the centrality of individual experience is more important than connection with overarching institutions or beliefs, with the sole

³²⁷ Dave Fagundes, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction* 114 Harv. L. Rev. 1745, 1750 (2001), “The law uses personhood as a primary means of specifying its object, and although no coherent body of doctrine or jurisprudential theory exists regarding this legal metaphor, a set of rhetorical practices has developed around it.”

³²⁸ Norman Fost, *Organs from Anencephalic Infants: An Idea Whose Time Has Not Yet Come* 18 HASTINGS CENT. REP. 5, 7 (1988).

³²⁹ Eric A. Posner, *Law and Social Norms* 33 (2000)

object being attainment of a good life for that individual.³³⁰

Hence, there is no uniform approach under law to help us determine the existence of personhood. The underlying considerations are a blend of individual and collective, and both have approaches have their respective merits. The issue has become further complicated with the advancement of technology which has created entities capable of replicating human consciousness and performing tasks without human intervention.³³¹

As noted by Donna J Haraway,

*“Through scientific culture, the boundary between human and animal was thoroughly breached, and also the boundary between human and machine came into question, leading to bold claims for human beings to become localized in a system architecture whose basic modes of operation are probabilistic, statistical.”*³³²

In a similar vein, Van Beer observes that human enhancement technologies present great legal and policy challenges for their framers trying to define personhood, because it is the ‘embodied human nature’ which is directly at stake.³³³ Keeping these perspectives in mind, it would be trite to examine the opinions of different jurists on personhood in legal theory.

³³⁰ Stephen M. Feldman, *The Supreme Court in a Postmodern World: A Flying Elephant* 84 Minn. L. Rev. 673, 676-77 (2000).

³³¹ See also Dave Fagundes, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction* 114 Harv. L. Rev. 1745, 1755 (2001), *“This difficulty is exacerbated by the tension between our strongly individualist legal culture and the utter dependence of law on this metaphor. Moreover, social anxiety about personhood matters not only because it exposes ambivalence within the law, but also because the law, through its expressive dimension, signals norms and values that influence ideas and opinions about personhood. This anxiety is likely to become more acute. Technological and economic progress promise to muddy further the waters of personhood, calling into question the once-stable notion of who counts as a living human.”*

³³² Donna J. Haraway, *Simians, Cyborgs, And Women: The Reinvention of Nature* 151(1991)

³³³ Britta van Beers, *The Changing Nature of Law's Natural Person: The Impact of Emerging Technologies on the Legal Concept of the Person* 18 GERMAN L.J. 560 (2017).

7.1.2 Explanations by Jurists

The gist of the discussion on existing theories of personhood suggests that the concept of personhood has two main consequences:

- i. **Claim of capacity** – Capacity entails an ability to interact with the environment comprising of similar persons. The psychological development of the person should be such that the person demonstrates self-consciousness i.e. the person should frame a plan and execute it intelligently. This reasoned course of action would suggest that the entity enjoys so much personality that it is able to judge the consequences of its actions on its interests.
- ii. **Claim of rights** – Rights enable the person to exercise its capacity without undue interference. This shows that person should enjoy a degree of autonomy where such person gets to choose the manner in which the life strategy is implemented. Due to this autonomy, it ceases to be the servant or a tool in the hands of a third person.

Giovanni Pico Della Mirandola noted in his 'Oration on the Dignity of Man' that the essence of a man's personhood lay in his ability to shape his own destiny free from any interference. The concept was borrowed by John Rawls in his celebrated work 'Theory of Justice'. Rawls also incorporated the aspect of 'life lived according to plan' from the theory developed by John Stuart Mill. Rawls noted that the ability of a person to systematically plan and execute the core purpose of his life shows a level of coherence in all the constituent elements of his life and is integral to his identity as a 'unified and moral person'. Rawls stressed on two key elements of personhood:

- i. **Self-worth** – where the person in question holds the core values and purpose of life in the highest level of esteem.
- ii. **Self-confidence** – where the person has the self-belief to implement the required steps for fulfilling the intentions.

Rawls also stressed on the individual's capacity to remain a part of a *modus vivendi* ('manner of

living’) community where a political structure is established based on consensus of members of the community. Such a structure would be characterized by a reciprocal understanding of mutual rights and duties. A rational response to mutual needs is more important than an emotional understanding in this kind of a community set up.³³⁴ Rawls, in fact, provides a three-fold classification of communities:

- i. **Closely knit** – sharing common political, social, cultural and religious values
- ii. **Pluralism of incompatible doctrines** – though the ideologies of community members have comprehensive inconsistencies, mutual co-existence is possible due to shared overlap of value systems. This system prevails in majority of the modern democracies where a consensus develops regarding a system of terms of fair cooperation. The system is a result of rational and reasonable behaviour of the community members.
- iii. ***Modus vivendi*** – the members of this community are rational but not reasonable. Unlike the second type of community, there is no shared consensus of values, but a ‘convergence of interests’ where all members have certain benefits from the system and therefore favour *status quo*.³³⁵

Dworkin coined the phrase ‘ethical individualism’ in this regard which means that a person carries the ‘ultimate responsibility’ to decide what is best suited to his wellbeing. The objective would be to ensure that the person takes life changing decisions and treasures each and every one of them without any regret.³³⁶

³³⁴ John Rawls, *A Theory of Justice* 358, 386 (1999)

³³⁵ John Rawls, *Political Liberalism* 48-52 (1993)

³³⁶ Ronald Dworkin, *Politics, Death, and Nature* 6 *Health Matrix* 201, 206 (1996); Ronald Dworkin, *Euthanasia, Morality, and Law Transcript* 31 *Loy. L.A. L. Rev.* 1147, 1149 (1998).

Another important facet of personhood can be derived from the **theory of self-ownership** given by John Locke which requires autonomous entities with self-consciousness and capacity to be given personhood unless there is a good reason for denial. Accordingly, Hubbard has coined a **‘Behavioural Test’** for personhood which can be broken down into the following components:

- i. Interaction with environment along with engagement in complex thought and communication;
- ii. Sense of self and purpose;
- iii. Creative life plan chalked and a sense of how to execute those plans for the fulfilment of life’s purpose; and
- iv. Ability to reside in a *modus vivendi* community, respect other members’ rights and remain responsible for their violations amongst one another.³³⁷

Thus, simply having goals is not enough unless the entity in question ‘cares’ about whether those goals are attained and the successful implementation of the plan. Hubbard further opines that a *modus vivendi* community would easily accommodate machines who have been programmed to rationally analyse and understand the human point of view through observation and intelligent guesswork. Additionally, for artificial entities to enjoy even limited rights after being granted personhood, humans and these entities must be in a position to mutually impose their perspectives and co-exist in the same system. The will to impose must be present on both sides. Hubbard also warns about the negative repercussions on denying machines of their legitimate right which could threaten the sanctity of a *modus vivendi* community or halt the maturity of such a community to a more stable structure. Any governing law or policy must however consider that human control on artificial entities should not be taken for granted. Once these entities become self-conscious, they will develop sufficient will power to make independent decisions, connect with fellow artificial devices and negotiate on their own terms. With the dilution of boundaries, humans cannot be

³³⁷ F. Patrick Hubbard, “DO ANDROIDS DREAM?”: *PERSONHOOD AND INTELLIGENT ARTIFACTS*, 83 Temp. L. Rev. 405 (2011)

expected to dominate machines in every walk of life.³³⁸ As pointed out by Aristotle, and approved by Rawls, a person devoted to a task should enjoy the process of exercising his mental faculties. The enjoyment and engagement to that task and process should increase with the rising complexity of the challenge. This would be a pure reflection of such person's attachment to the outcome of the whole exercise.³³⁹

Adriano suggests a three-pronged test to satisfy legal personality:

- i. The entity must **become a subject of law** through its very existence,
- ii. A subject would be considered individualized under law when it develops the capacity of **holding rights and fulfilling obligations, having legal relations and enjoying a status** distinct from other players in the legal framework,
- iii. Granting of legal status to the subject, its rights and obligations resulting in **'legitimization'**.³⁴⁰

Accordingly, Adriano frames the following definition of 'personality':

"Personality is the individualization of the juridical person by means of a factual situation in which it is placed, foreseen by a legal norm that allows personality to distinguish it from other volitive beings in the commercial-legal relationships in an environment of law where the concrete case develops."³⁴¹

³³⁸ Daniel C. Dennett, *Brainchildren: Essays on Designing Minds* 153, 164, 169 (1998)

³³⁹ John Rawls, *A Theory of Justice* 374 (Harvard Univ. Press rev. ed. 1999)

³⁴⁰ Elvia Arcelia Quintana Adriano, *THE NATURAL PERSON, LEGAL ENTITY OR JURIDICAL PERSON AND JURIDICAL PERSONALITY* 4 Penn St. J. L. & Int'l Aff. 363, 373 (2015), "A legal entity is a juridical construction that is given with the following five elements: the being or subject, its will, the subjective rights, the obligations and the juridical personality. In the specific case, the legal entity is individualized through the recognition of the juridical personality that allows the same to acquire the holdership of rights and being susceptible of obligations. In consequence, the conduct of a juridical person implies its will. The importance of the personality, in addition to individualizing the subject as holder of rights and obligations, is also that it is the suitable means to allow the legal entity to exteriorize itself juridically." See also, RWM Dias, *Jurisprudence* 250 (1985), "Law takes into account of human beings so far as their jural relations are involved, and this, in Roman law, with its emphasis on remedies, meant the power to sue as well as well the recognition of interests in property."

³⁴¹ *Ibid*

While the theories discussed above deal with attributes of personhood in the absolute sense, a there also exists a school of thought which portrays it in a relative sense. Here, personhood has to be understood in contrast with things which simply exist. A person, on the other hand, must have the capacity to possess things and establish proprietary relationships. The ancient Roman classification of the domain of law speaks of three important concepts – *persona* (*persona*), things (*res*) and actions (*actiones*).³⁴² Selkala and Rajavuori opine that it is this ability of a person couple with the capacity to bear rights and duties that makes its actions significant in the eyes of law. The rights of a person must therefore be enforced.³⁴³

Immanuel Kant talked about an ‘enlightened way’ that distinguishes between persons and things. A person is blessed with ‘autonomous agency’ which is expressed through his moral action. The agency represents a link between the person and the action. Kant recognized ‘moral action’ as an indispensable element of personhood.³⁴⁴ Immanuel Kant coined his philosophy popularly referred to as 'Kantian ethics' - a school of thought which aligns intricately with an ontological aspect. The philosophy is premised on the following parameters:

- a. reason
- b. knowledge with stress on moral obligation, and
- c. humanity

Kant's views on natural personhood may be understood largely through two facets

- a. **Empirical functionalism** - Under this view, the dimension of personhood is seen as an assortment of functions or capabilities. It includes the key tenets of awareness regarding self, cognitive functions and the capability to create jural relations. It views the human personhood as an aggregation of its constituent parts and how they interact with the world at large.

³⁴² Gaius, *Institutiones* 30 (1904).

³⁴³ Toni Selkala and Mikko Rajavuori, *Traditions, Myths, and Utopias of Personhood: An Introduction* 18 German L.J. 1017 (2017)

³⁴⁴ M. Korsgaard, *Kantian Ethics, Animals, and the Law* 33 OXF. J. LEG. STUD. 629 (2013)

b. **Ontological Personalism** - Under this view, every, a human being assumes personhood by virtue of his very nature. This has no relation with the capabilities of the person or his interaction skills.

The biological aspect is the most important consideration for human existence and identity.

Kant was a firm believer in 'transcendental idealism' i.e. the process of perceiving objects but only the manner in which our senses are direct us. The information gathered by our sensory perceptions are organized and this is responsible for creation of objects visible in the world. Kantian ethics is premised on the notion of moral duty which may be interpreted in the following ways:

- a. There is no plausible scenario in which we consider our own individual goodness as fit for cancelling just in order to get a particular attractive thing.
- b. Everything other than that is of no or little use without innate goodness.

For Kant, the most fundamental attribute of his philosophy is 'Categorical Imperative', which means a command which carries no exceptions, and entails an 'action only on that maxim through which a person can at the same time will that it should become a universal law'. This means that an action can only be executed if can be generalized for everyone. In relation to personhood, this principle removes the possibility of harbouring empirical views. The most fascinating proposition advanced for Kantian Ethics to substantiate ontological personalism is the 'Humanity Formula' which means that a person should

"act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end".³⁴⁵

The objective is to bring forth the notion of respect for persons which is instrumental to our humanity providing humans their much-needed intrinsic value. Each person is measured, not on what they accomplish, but rather on that premise that they are persons. Considering them as 'means to an end' does not render the personal freedom they require. Considering them as an 'end in itself'

³⁴⁵ Steve Wilkens, Beyond bumper sticker ethics: an introduction to theories of right and wrong 99-114 (2011)

portrays what would be most appropriate for that individual. Kant and his philosophy are premised in moral obligation and human utility. With the stress on persons and respect, Kant lends himself more to the ontological personalist theory, instead of the ‘empirical functionalist’ concept.³⁴⁶

Friedrich Carl Von Savigny, on the other hand, spoke of ‘innate freedom’ being integral to personhood rather than moral agency. The legal capacity of a person in law is the direct result of this freedom. Savigny asserted that the primary notion of ‘person’ must align with the basic notion of human being, its original identity manifests itself in the legal capacity of that person. Even though human beings make up that ‘original identity’, positive law may extend this capability to notional entities like companies. However, Savigny maintained that this is pure legal fiction because as it did not emerge from the principles epitomised by the *Volksggeist* i.e. the ‘spirit of the people’. The legal understanding of a ‘person’ should therefore roughly amount to ‘real’ personhood.³⁴⁷

John Austin advocated under his ‘analytical will theory’ that as long as an entity possessed will, it could be governed by law. Will was the primary distinguishing factor between persons and things. A person in law must possess will and be capable of holding an interest in a thing.³⁴⁸ The positivist school of thought reigned supreme during the 19th and 20th century and law finally settled on a tautological definition of a ‘person’ as a unit which can bear rights and duties.³⁴⁹

Austin designated persons as ‘subjects of law’ flowing from the German concept of ‘Rechtssubjekt’. Austin has talked about the differences between ‘rights in rem’ and ‘rights in personam’ and proposed a bifurcation of law branching out into persons and things.³⁵⁰

³⁴⁶ Dennis M. Sullivan, *The Conception View of Personhood*, (2003) *Ethics and Medicine*, 19:1, 11-33

³⁴⁷ Friedrich Carl von Savigny, *System des heutigen Römischen rechts* § 60 (1840).

³⁴⁸ See generally C.B. Macpherson, *The Political Theory of Possessive Individualism* (1977)

³⁴⁹ Frederic William Maitland, *Moral Personality and Legal Personality* 6 *J. Soc. COMP. LEGIS.* 192 (1905)

³⁵⁰ John Austin, *Lectures on Jurisprudence: Or, the Philosophy of Positive Law*, Vol. I 348 (1885)

Although, most of Austin's remarks about personhood have been made in passing, a separate chapter has been devoted to personhood and associated questions in 'Lectures on Jurisprudence' which was published in 1879. He made a reference to 'modern Civilians', in the following passage:

"Human being' is the meaning which is given to the term person, in familiar discourse...Many of the modern Civilians have narrowed the import of the term person as meaning a physical or natural person. They define a person thus: ... a 'human being, invested with a condition or status."

Austin uses the term 'status' in a restricted way which includes terms consisting of rights and excluding terms which are exclusively burdensome, or which comprises obligations. According to this concept, biological persons who have no entitlements cannot be treated as persons, but things.³⁵¹

Austin uses 'person' in light of the notion of 'individual', and asserts that persons are imbued with rights and subject to duties, or, at the bae minimum, have shown capabilities of satisfying both parameters. For Austin, 'person' and 'human being' are virtually the same thing; it just happens that only human beings are capable of holding rights and bearing duties. Some Continental jurists and philosophers denied slaves' personality, but Austin does not use 'person' in this sense. He though realises that the law may at some point confer legitimacy upon artificial persons and proposes the term 'legal person'. Austin however attributed the creation of such a classification only 'for the sake of brevity in discourse'.³⁵²

The post-world war era however brought about a different outlook on personhood. The human element became much more integral to legal personality than the tautological aspect, relation between the state and person, or between person and thing. Both the Universal Declaration of Human Rights ("UDHR") and International Covenant on Civil and Political Rights ("ICCPR") stress on the human element as a vital pre-requisite for personhood.

³⁵¹ Peter Stein, *The Character and Influence of the Roman Civil Law* 242 (1988).

³⁵² *Ibid*

The UDHR clearly states in its preamble that –

“Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person...”³⁵³

The preamble of ICCPR also recognizes that –

“...inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...these rights derive from the inherent dignity of the human person.”

Thus, for the first time in the history of human civilization, being recognized as a person had nothing to do with political recognition or proprietary rights. Being human was all that mattered in the wake of these international developments.³⁵⁴ Autonomous agency and rationality were viewed as too male centric and lacking in inclusiveness in respect of women and sexual minorities. It was the genetic human constitution which gained greater precedence as a parameter for judging personhood rather than the politics of gender and property.³⁵⁵ The dignity of man lent itself to a more naturalistic interpretation of rights than any time before.³⁵⁶ The point is further strengthened by the observations of UNESCO that the racially neutral concept of a biological person must also apply in the domain of law.³⁵⁷ A parallel can be drawn with the apprehensions expressed by Hans Kelsen in the tendency of law to limit itself to ‘person’ rather than ‘man’. Unlike the former, the latter did not limit itself to right and duty bearing units but expanded its reach beyond borders typically untouched by the state regulations.³⁵⁸

³⁵³ Universal Declaration of Human Rights, https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf

³⁵⁴ Samuel Moyn, *The Last Utopia: Human Rights in History* 13 (2010)

³⁵⁵ R.M. Smith, *One United People: Second-Class Female Citizenship and the American Quest for Community* 1 YALE J.L. & HUMAN. 229 (1988); Ida Blom, *Structures and Agency: a transnational comparison of the struggle for women's suffrage in the Nordic countries during the long 19th century* 37 SCAND. J. HIST. 600 (2012)

³⁵⁶ Robert Perske, *The Dignity of Risk and the Mentally Retarded* 10 MENT. RETARD. 24 (1972).

³⁵⁷ UNESCO, THE RACE QUESTION, <https://unesdoc.unesco.org/ark:/48223/pf0000128291>

³⁵⁸ Hans Kelsen, *General Theory of Law and State* 94 (1949), “*Man is a concept of biology and physiology, in short, of the natural sciences. Person is a concept of jurisprudence, of the analysis of legal norms.*”

The onset of 1970's saw a different kind of evolution of the concept of legal personhood with corporate personhood coming into the picture. Moral agency was no longer a requirement for determining personhood of a corporate entity. The moral agency of a corporation could be determined through the intentionality of its actors or agents constituting the alter ego of the corporation. An entity could therefore exist symbolically, possess no biological elements and yet be treated as a person under law.³⁵⁹

More innovations have crept into the approach of law in recent times, where things belonging to our surroundings could also command personhood without enjoying rights, bearing duties, or possessing innate human qualities. Jurisdictions like New Zealand, Ecuador and India have conferred personhood on different elements of nature like river, waterfalls etc. in consonance with this approach. Such approaches work independent of norms and rules because humanity is seen as an integral component of nature.³⁶⁰

³⁵⁹ Rita C. Manning, *Corporate Responsibility and Corporate Personhood* 3 J. Bus. ETHICS 77 (1984); Kenneth E. Goodpaster & John B. Jr. Matthews, *Can a Corporation Have a Conscience?*, 60 HARV. BUS. REV. 132 (1982); Kenneth E. Goodpaster, *The Concept of Corporate Responsibility* 2 J. Bus. ETHICS 1 (1983).

³⁶⁰ Sam Adelman, *Tropical Forests and Climate Change: A Critique of Green Governmentality* 11 INT. J. LAW CONTEXT 195 (2015); *The Double Life of International Law: Indigenous Peoples and Extractive Industries* 129 HARV. L. REV. 1755 (2016).

7.2 Theories of Property

7.2.1 Utilitarian Theory

The utilitarian theory analyses the positive or critical aspects of an action based on the consequences that may flow from such action. The question to be asked is that is such action capable of maximizing welfare or utility? The utilitarian analysis can be divided into two key questions:

- a. how to explain the good (or utility) at which law or policy makers are to target
- b. how to consolidate individual experiences of that good in order to analyse the overall effects of social choices.

Bentham equates the feeling of good with the sensation of pleasure from which we must subtract the pain experienced by a person. What provides pleasure to a particular person is entirely subjective - it may so happen that a game of push-pin provides more pleasure to a man than the pursuit of arts or natural sciences. In such a case, the game will have more utility than the field of study. To calculate the quantum of goodness, Bentham devised the hedonistic calculus. Under this calculus, Bentham assigned cardinal values to units of pain and pleasure which enables us to compare the extent to which a person likes different types of the same object (e.g. different flavours of ice cream), two persons' level of preference for the same object (e.g. Borges and Neruda's preference for different flavours of ice cream) and two persons' level of preference for two different things (e.g. comparing the extent to which Borges likes ice cream and the extent to which Neruda likes reading a poem.) Bentham also pointed out that merely because a person spends more money on buying something does not mean that he or she derives more pleasure out of such thing. A person may not be able to afford the quantity of something which he likes because of lack of financial wealth and instead spend the money on more necessary items. So, if Borges has only \$10, he will spend only \$3 to buy ice cream and \$7 to buy bread though he may like ice cream far more

than bread.³⁶¹ John Stuart Mill adds that there could be classification even amongst pleasures with intellectual pleasures occupying the higher pedestal and carnal pleasures taking their place in the lower rungs of the classification.³⁶²

Utilitarianism essentially dictates that the institutions around property should be shaped in such a manner to ensure that the net utility of the property is maximized. For instance, the authority responsible for registration of the property must carry out its duty lawfully to make sure that the parties selling and buying the property are able to achieve maximum value from the transaction and do not have to bother about uncertainty surrounding the process of registration or bribe the officer to get the work done. The focus is therefore not on the nature of the property but what kind of results it is able to generate under what conditions or circumstances. Robert Nozick gives a different dimension to the concept of utility. He reckons that the value generated through interaction with a property need not be measurable in finite terms. Nozick illustrates his perspective with the example of a man ploughing a field which failed to yield the requisite quantity of crops. However, that man will still be entitled to a share of the produce based on his input of labour. Nozick therefore explains the concept of utility as a 'moral acclaim' through a more rights-based approach rather than mere means to an end.³⁶³

Though shades of utilitarianism can be found in Aristotle's concept of private property (as later borrowed by Thomas Aquinas too), the next major upheaval came in the law and economics utilitarianism of the twentieth century. The proponents of this school attempt to solve problems of law by applying tools of economics. Richard Posner calls this 'applied utilitarianism.'³⁶⁴

The first important aspect of this theory is the 'tragedy of commons' - a premise developed by Garrett Hardin in 1968. Hardin stated that wealth which is free for all is valued by none because

³⁶¹ J. Bentham, *An Introduction to the Principles of Morals and Legislation* 73, 93, 102 and 107 (1789).

³⁶² M.D. Adler, *Future Generations: A Prioritarian View* *G.W. L. Rev.* 77 (2008–09) 1478, 1479

³⁶³ G.S. Alexander, *An Introduction to Property Theory* 17 (2012)

³⁶⁴ R.A. Posner, *Utilitarianism, Economics and Legal Theory* *J. Legal Stud.* 8 (1979) 103, 119

while one person would wait planning to use it subsequently, the others may come and use it up any time using an example where an unlimited number of herdsmen keep increasing the number of their livestock limitlessly within a limited grazing area to derive the maximum utility out of such area. Eventually, the benefits per person rise but the costs of using the common pool of resources are not evenly shared by all.

Harold Demsetz uses the term 'externality' that is the consequence of a decision to allocate the resources in a certain manner to describe this kind of situation. Demsetz opines that communal ownership greatly diminishes the value of a shared pool of resources by increasing the externalities. This problem is taken care of in private ownership where the owner's wealth is tied to his exclusive skill to maintain and enhance it. Demsetz further argues that private ownership brings lower transaction costs and is able to strike a more successful bargain as compared to community ownership.³⁶⁵

In addition to wasteful over consumption, public ownership also allows 'free riders' to reap the benefits of labour put in by other persons. The free riders are only concerned about their own material gain and compromise the general standards of productivity through their indications. A private ownership scheme based on the individual rational actor model is therefore the way forward. Only those decisions will be favoured where there is an increase in net wealth to the greatest possible extent.³⁶⁶

Elinor Ostrom, however, argues that even commons can be successfully managed and controlled provided:

- a. the boundaries are well defined.
- b. rules of appropriation are succinctly laid down.
- c. participatory mechanisms for amendments to rules exist.

³⁶⁵ H. Demsetz, *Towards a Theory of Property Rights* Am.Econ. Rev. 57 (1967) 347, 354-358

³⁶⁶ C.M. Rose, *Property as story telling perspectives of Game Theory, Narrative Theory and Feminist Theory* Yale JL & Human 2 (1990): 37, 44-48

- d. incorporation of enforcement authorities.
- e. sanctions are imposed against violation of rules.
- f. speedy and inexpensive resolution of disputes.
- g. autonomy from external interference.³⁶⁷

Guido Calabresi and A. Douglas Melamed suggested a unique approach to analysing the nature of a property. They opined that proprietary rights were like a bundle of sticks and must be allocated only to those persons who valued them the most. The utility of that property must be determined based on the value it would bring to the owner.³⁶⁸

On a perusal of all the utilitarian perspectives, one of the major positives that emerge is the openness of the school of thought to an empirical approach. However, the philosophy falls short on two counts:

- a. Assuming that all goods of identical value are substitutable regardless of the nature of such good or the concerned necessity. A luxury and necessary good may be equally priced in terms of their ability to generate pleasure but they are not interchangeable in terms of the purpose they serve to the owner of that good.
- b. the theories do not distinguish sufficiently between material (tangible) and social (intangible) goods in terms of their relevant utility to the ultimate consumer.³⁶⁹

7.2.2 Labour and Libertarian Theory

John Locke's theory of property can be discerned from 'Two Treatises of Government.' Elaborate explanations can be found in the fifth chapter of this book. The politics of his views were largely moderate and egalitarian. Locke's premise was developed in opposition to the theory propounded by Robert Filmer who sought to justify the royal absolutism of James II. Filmer intended to restrict

³⁶⁷ T.W. Merrill and HE Smith, *What happened to Property in Law and Economics* Yale LJ 111 (2001) 357, 360-383

³⁶⁸ G. Calabresi and A.D. Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral* Harv. L. Rev. 85 (1972): 1089

³⁶⁹ G. Tullock, *Smith v. Pareto* Atlantic Econ. J. 27 (1999): 254-259

the conception of private property to royal descendants by emphatically asserting that it was a product of divine grant to the first king and would pass in a linear manner to the successors of the throne. Locke's theory was primarily aimed at deconstructing the notions of royal absolutism.³⁷⁰

For a more thorough understanding of Locke's view on private property, it would be trite to explore his understanding of natural law. Locke felt that natural law is a constellation of rights and duties which has been woven into the fabric of the universe. This law can be construed by the use of rational faculties and has existed from a time prior to the social right arrangements. Unlike the positive laws enacted by the legislature, natural law is indeterminate and must be the touchstone based on which every positive law ought to be assessed. Self-preservation is the fundamental tenet of the system of natural law and Locke deduces that every man has an equal right to means of subsistence serviceable and open to all for the purpose of self-preservation.³⁷¹

Locke's analysis of development of the institution of private property can be divided into three stages:

- a. state of nature when private property materializes for the first time.
- b. with the onset of money, the lop-sided distribution of wealth creates gross inequalities in the society.
- c. the community enters into a contract to form a government responsible for control and management of property rights.

Locke's views on the state of nature is far removed from Hobbesian dystopia of constant warfare. He felt that the state of nature was relatively tranquil as lives of men were governed by laws of nature at the disposal of man's ability to reason. Every person has equal authority over the other in a system antithetic to negative communism where mutual obligations or duties are non-existent. Rather, Locke was a firm believer in the concept of affirmative communism where every person

³⁷⁰ G. Sreenivasan, *The Limits of Lockean Rights in Property* 21 (1995)

³⁷¹ S.R. Munzar, *A Theory of Property* 255 (1990)

had an equal entitlement in the world's natural resources. Gopal Sreenivasan terms this situation as a 'paradox of plenty' where every man can potentially exhaust the entire reserve if consent of every other man is not obtained bearing in mind the basic requirement of self-preservation. But, such a consent is impracticable leaving the population to perish even if there is enough means of subsistence to satisfy every member of the population.³⁷² To resolve this eternal paradox, Locke came up with the labour theory to delineate the contours of private property.

Locke justified the ownership of private property on the basis of the labour expended to remove a portion of the property from the reserves of nature. Locke stated that it was only with respect to this portion that he could claim ownership rights by excluding everyone else from its possession, use and enjoyment.

Locke however subjects the ownership to three constraints:

- a. a man should not extract such portion which gets spoilt before he can use the entire portion.
- b. a user must leave sufficient quantity for the other users to appropriate.
- c. Locke coined the 'principle of charity' which states that a man must refrain from extreme wants due to the share of property devolving from his ancestors.

He also asserted any mode of acquisition of property must be legitimate. The test of legitimacy would be the fairness of such acquisition and it should be the product of his honest industry. The second stage is marked by the inception and use of money which became the new medium of exchange in place of the barter system involving transactions in kind. This would mean that disputes regarding physical possession of land and other forms of property would decline steadily but economic inequalities would escalate as some people seek to improve their means of subsistence by hoarding more money through unfair means. Law naturally takes a backseat with the reduced number of disputes as people are compelled to live within their means. Money, however,

³⁷² J. Waldron, *The Right to Private Property* 222 (1988)

leads to a drastic rise in accumulation of property by a select few resulting in concentration of wealth and rampant economic disparities. So, the nature of disputes now concerned the quantum rather than the question of title - more and more such claims began clash against each other for a bigger share in the existing pool of property. Locke concedes that money is instrumental in paving the path of material progress and encouragement of productive behaviour. However, he remained apprehensive regarding its influence on man's tendency to accumulate rather than share the fruits - a shining piece of metal which induces hoarding and leads to economic imbalance.³⁷³ The third stage in Locke's theory of property entails the formation of a civil society. This civil society is necessitated primarily by the inability of natural laws to delineate the boundaries of individual entitlements and provide a neutral adjudicatory authority to hear and resolve disputes. Property in a state of nature is therefore highly insecure leading to a pact between the people and the community constituting the representatives of the people.³⁷⁴

By entering into this contract, people agree to subject their respective properties to the positive laws passed by the community and expect protection in lieu of payment of proceeds of maintenance as taxes. The laws of nature however do not become entirely redundant under the new social contract. They constitute an important check and balance on the policy actions of the community in addition to the trust reposed under the terms and conditions of the pact. The laws passed by the state can therefore never adversely affect the rights of self-preservation of its subjects by unlawful seizure of property, oppressive taxes or creation of blatant inequalities depriving man of his basic subsistence.³⁷⁵

Locke's theory of property is popularly termed as the theory of consent because consent forms the root of social contract whereby a man submits to the determination of the majority. Private

³⁷³ C.M. Rose, *Property as story telling perspectives of Game Theory, Narrative Theory and Feminist Theory* Yale JL & Human 2 (1990): 37, 45

³⁷⁴ J. Stevens, *The Reasonableness of John Locke's Majority* Pol. Theory 24 (1996) 423, 439.

³⁷⁵ W. Kendall, *John Locke and the Doctrine of Majority Rule* 90-111 (1941)

property, though hugely recognized and protected, must not leave the others worse off under the tenets of natural law. The theory fails to satiate the likes of Robert Nozick who have come forward with significant critical arguments of their own in opposition to Locke's views as discussed below. Nozick contended that Locke's views would apply only to a primitive scheme of appropriation and remain incompatible with the permanent and heritable elements of private property. At every stage of appropriation, a man would leave his successors worse off as compared to himself leading to a result where he can never stake a valid and permanent claim of any form of private property. Therefore, Nozick tweaks the Lockean approach slightly to state that the true test of ascertaining the merits of a system of private property would be whether such scheme would leave persons with inferior appropriation scope and skills in a comparatively more advantageous position.³⁷⁶

Nozick therefore argued in favour of remodelling the Lockean perspective to suit the contemporary spirit of capitalism which governs human lives today in every nook and corner of their earthly existence. Nozick's approach though is flawed in respect of its inherent limitations of lacking a metric unit to measure the levels of being better off or worse off under the different models of private property ownership.

Nozick's critique of the labour mixing theory makes an equally interesting reading. He gives the example of pouring radioactive tomato juice into the ocean, citing that such an act does not confer rights of ownership on the person pouring the juice. Though to be fair, Locke's moral entitlement was based on the value generated by applying the labour of body and work of hands in consonance with his will or intellect.³⁷⁷

³⁷⁶ R. Nozick, *Anarchy, State and Utopia* 176 (1974)

³⁷⁷ D. Armitage, *John Locke, Carolina and the Two Treatises of Government* JI. Pol. Theory 32 (2004) 632

As we see in the case of the common law doctrine of accession, a person obtaining a material from another person and transforming the value of such material beyond recognition becomes entitled to the benefits accruing from the added value.³⁷⁸ However, it will be wise to remind ourselves even this doctrine does not allow unqualified private ownership. So, a person A taking a special piece of wood from B and making a violin out of it, must share the profit from the sale of such violin proportionately with B through just and fair payment of remuneration to B.

7.2.3 Personality Theory

Hegel's perspective on property is centred more around the individual than collective good as seen in the case of some of the other schools of thought. It is a right based consequentialist approach where the main purpose of owning a property is self-realization and the maximum expression of individual freedom. Hegel's view is more in tune with the positive notion of liberty where specific acts are directed towards realizing oneself rather than a mere absence of restraint. Hegel defined an individual as a unit of freedom aware of its sheer independence.³⁷⁹

Hegel states that a person can only ascertain his needs after development of the requisite free will. It is only at this stage that the personality attains its fullest expression. He calls this a twostep process - one where the individual detaches the universal from the particular and then back to the particular. The proper development of free will holds the key to a person becoming an ethical member of the community. Hegel considered property as a necessary medium for the person's development both as an individual and a member of the society.³⁸⁰

He defines 'property' as the relation of the property to the external sphere of things understood by way of free will. Hegel states that a person has the absolute right of appropriation of all things.

³⁷⁸ G.H. Nobles, *Breaking into the Back country* WM & Mary Quarterly 46 (1989) 655

³⁷⁹ See I. Berlin, *Two Concepts of Liberty*, An Inaugural Lecture delivered before the University of Oxford on October 31, 1958.

³⁸⁰ J.E. Penner, *The Idea of Property in Law* 171 (1997)

Property, in his opinion, is a category of things which is external to the human consciousness since nature does not have any internal consciousness and is composed of those very things.

To quote his exact words:

"..Attainments, erudition, talents, and so forth are of course owned by free mind and are something internal and not external to it, but even so, by expressing them it may embody them in something external and alienate them...Therefore, they are not immediate at the start but only acquire this character through the mediation of mind which reduces its inner possessions to immediacy and externality."

An analysis of the above extract brings out two key elements of Hegel's notion of property:

- a. contract
- b. alienation

Internal characteristics of one's personality like the individual will, ethical life and religion cannot be considered as property because of a lack of capability to be alienated.³⁸¹

Alan Ryan remarks that Hegel's theory has a sensational outreach to the masses for its resonance in their day to day lives. The theory makes a great deal of practical sense and earns its merit accordingly. Hegel's analysis extends the realms of private property from the relation of the free will with external objects to an experience of self-realization by ethical development leading to the membership of ethical communities - the family, civil society and ultimately the state. Property therefore does not repel but attracts association with the society.³⁸²

The theory however has been criticized by Waldron and Alan Brudner. Waldron feels that Hegel does not clearly justify the necessity of alienation of property. Brudner on the other hand remarks that the ethical community or common good which drives the process of self-realization suffer from a lack of adequate explanation. The theory does not offer sufficient information on what are the

³⁸¹ G.S. Alexander, *An Introduction to Property Theory* 36 (2012)

³⁸² J.L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property* 453 U. Miami L. Rev. 60 (2006)

fundamental constituent elements of these communities or common good. Waldron goes on to add that Hegel's embodiment of free will creates normative fences around property objects and is over-reliant on rights maintaining an eerie silence on the aspect of duties with a very bourgeoisie flavour to it.³⁸³

Margaret Jane Radin provides a very interesting dimension to Hegel's theory by proposing the concept of personhood. She reckoned that there were two types of property - personal property carrying certain emotional allure making it irreplaceable (e.g. a wedding ring) and fungible property that may be substituted readily regardless of their monetary value. Radin urged the law makers to protect the personal property more proactively for their key role in human flourishing. However, the fungible rights were far more susceptible to control and regulation by the government representing a more diluted form of private ownership. Radin's theory can be best understood by referring to her following extract:

*"Most people possess certain objects they feel almost a part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world."*³⁸⁴

³⁸³ D. Knowles, *Hegel on Property and Personality* Phil. Q. 33: 45, 51

³⁸⁴ M.J. Radin, *Lacking a Transformative Social Theory: A Response* Stan. L. Rev. 45 (1993): 409, 422