

The Elusiveness of Property

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1 Introduction

It was a pleasure to be asked to contribute to this volume of essays in honour of Professor Jes Bjarep. I have known Jes for many years. We meet usually at conferences; but I and my graduate pupils had the benefit, two years ago, of a seminar paper which Jes came to Oxford to deliver. The seminar series concerned the philosophical foundations of property rights. Jes brought his great jurisprudential learning to bare on the sceptical contributions to property theory of writers within the so called “Scandinavian Realist” tradition. It was well for us to learn that it is not only common-law commentators who find the matter puzzling.

“Property” is a notoriously elusive concept in Western thought. One reason for this is the dissonance between, on the one hand, the lay or popular role of property in social life, and, on the other hand, two seemingly incompatible systems of legal dogmatics about property to be found, respectively, in civil and common-law legal systems. An Englishman, an American, a German or a Frenchman, who knows little of the law, would probably take much the same view of the sort of rights he had if he owned, say, a house, a car and some money at the bank. The assumptions common to such people constitute what might be called the modern Western or liberal notion of property. Lawyers in their respective jurisdictions, however, deploy very different concepts, one from another, when they produce statutes or court judgments or treatises about property. As a matter of legal dogmatics, there is no singular Western conception of property. It is that which makes comparative law in the field of property so difficult as compared, for example, with comparative contract or tort/delict.

I suggest that we begin with ordinary lay assumptions, as though there were no such thing as legal dogmatics. Suppose you overhear someone saying to another person “I own that bicycle” or “that bicycle is my property.” You know nothing about the circumstances that prompted the observation. Three contextual scenarios may be imagined. First, the speaker may be complaining that someone who took the bicycle without his permission was acting wrongly. Call that “the trespass context.” Secondly, he might have been asserting that the bicycle belonged to him and to no-one else because he had bought it or someone had made him a present of it. Call that “the title context.” Thirdly, he might have been rebutting someone else’s objection to the way he treated the bicycle, asserting that, as owner, he was free to do with it what he chose. Call that “the content context.” Potentiality for all three contexts is enfolded within the lay notion of property. It’s mine, so no-one else ought to meddle with it. It’s mine and no-one else’s, because I can show how it came to be mine. It’s mine, so I can do what I like to it.

Complexities arise once property is enshrouded within legal dogmatics. I shall consider only two illustrations of the variations between civil and common law, relating first to land and secondly to monetary and intangible resources.

2 Land

The most notorious difference between common-law and civil-law systems, in the field of property, relates to the ownership of land. The root cause of this difference is the predominance, for lawyers, of the title context. In a civil-law system a person proves that he owns land, usually by reference to some public register devised by the legislature. He may contract with a tenant that the latter is entitled to occupy the land, but, in principle, the tenant's rights are contractual only, not proprietary. In contrast, common-law systems embody a doctrine of estates in land derived, historically, from English feudal law. At common law a person acquires a title, not to ownership of the land, but to an estate.

An estate in land consists of the right to possess the land exclusively for a period of time. The greatest freehold estate is the fee simple, which will endure so long as its present holder does not die intestate and without heirs – which is to say that, in practice, its duration is indefinite. There were other freehold estates at common law: the life estate, and the entail. These have largely disappeared within modern systems. But at the end of the middle ages there emerged a novel estate which endures to this day: the leasehold estate. The origin of this estate derives from the importance attached by lawyers to the trespass context. Persons with whom the freeholder contracted that they might possess land for a fixed term of years were eventually granted rights of action to recover the land against the rest of the world, just as medieval freeholders had been protected. On that account common-law dogmatics concluded that a tenant also has an estate which is proprietary in nature.

At common law title to both freehold and leasehold estates was proved by reference to a series of conveyances or assignments of the estate in question – documents collectively described as the “title deeds.” In modern common-law systems state registration has usually displaced title deeds. Nevertheless, the register records that someone is the proprietor, not of the land, but of an estate in the land. The dogmatic formulation of the position is the denial that the common law deploys any concept of ownership. The following citation from a standard textbook on English land law is typical:

All titles to land are ultimately based on possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title, and it may be said without undue exaggeration that so far as land is concerned there is in England no law of ownership, but only a law of possession.¹

The position is commonly contrasted with classical Roman law. Roman actions asserted that the thing vindicated was something to which the claimant had an absolute title. From these pleadings there was constructed a singular concept of “dominium” which was maintained, as a matter of legal dogmatics, even after it

¹ Burn, E.H., *Cheshire and Burn's Modern Law of Real Property*, 17th edn, London, Butterworths, 2000, p. 26.

ceased to represent the substance of the law.² At common law actions for the recovery of land never do, and claimants in chattel torts need not, assert absolute title.³

This contrast ignores the content context. Title, relative or absolute, is one thing. What, supposing you have any kind of title, you are at liberty to do to or with the resource to which you have the title, is another.⁴ In practice common lawyers employ the term “ownership” and its cognates to stand sometimes for absolute title and sometimes for jural content (the latter being an incident of an estate in the case of land). It is presupposed that the person who holds the estate is, as land-owner, free to use, to control and transfer the land as he pleases, unless some transaction or rule of law provides otherwise. Contential ownership is, for example, frequently deployed when the impact of some property-limitation rule, such as nuisance law or planning law, is in question. To the extent that an activity is not a nuisance or an infringement of planning control, the land-owner may engage in it. Contential ownership is a taken-for-granted base-line.

Ever since Hohfeld’s seminal analysis of fundamental legal conceptions,⁵ it has been customary for english-speaking lawyers to characterize ownership or property as a “bundle of rights,” although Hohfeld himself never employed this metaphor.⁶ The “bundle” idea is misleading in so far as it implies a very large, but nevertheless finite, collection of items. I have argued that ownership conceptions are essentially open-ended amalgams of prima facie use-privileges, control-powers and powers of transmission.⁷ The law does not say: because X owns something, he is entitled to do the following A-Z things in relation to it. Rather, when some particular disputed use arises, the law says: since X is owner, he may act in that way unless there is some reason against him doing so. The concrete situation in relation to a resource is the product of the applicable ownership conception and particular property-limitation rules.

The common law presupposes a non-technical, lay conception of contential ownership. The same was true of classical Roman law, notwithstanding its obsession with title. Roman lawyers defined usufruct and the various classes of praedial servitudes; but they did not have to delineate what a person who had

² Actions could be brought by a quiritary owner, a bonitary owner or a good-faith possessor – see Nicholas, Barry *An Introduction to Roman Law*, Oxford, Clarendon Press, 1962, p. 99-103, 125-28, 155-57. Birks, Peter *The Roman Law Concept of Dominium and the Idea of Absolute Ownership* (1985) *Acta Juridica* 1-37, p. 27-37.

³ See Buckland, W.W. and McNair, A.D., *Roman Law and Common Law*, 2nd edn, revised by FH Lawson, Cambridge University Press, 1952, p. 67 ff.

⁴ See Honore, Tony *Making Law Bind*, Oxford, Clarendon Press, 1986, p. 184-87.

⁵ Hohfeld, W.N. *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Yale University Press, 1919, p. 71 ff.

⁶ Gregory Alexander suggests that the first explicit use of the ‘bundle of rights’ metaphor may have been in a treatise on the law of eminent domain written by John Lewis and published in 1888 – Alexander, G.S. *Commodity and Propriety*, University of Chicago Press, 1997, p. 322 (n 40). For criticism of the metaphor, see Penner, J.E. *The Bundle of Rights Picture of Property* (1996) 43 *University of California Los Angeles Law Review* 711-820.

⁷ Harris, J.W. *Property and Justice*, Oxford, Clarendon Press, 1996, p. 28-32, 64-68, 120-125 and passim.

dominion over a farm or a cow was thereby at liberty to do to or with it, because everybody would know that already. Modern civil-law systems do proffer definitions of the content of ownership, but in terms so abstract that real content is still given by extra-legal, social presuppositions.

The title and the trespass contexts display important variations between common-law and civil-law systems. But the content context transcends these differences. Hence it is possible for a common-law court to cite a civil-law judgment when some novel question arises about what land-owners are, as owners, free to do. For a recent illustration, consider the ruling of the House of Lords on the question whether the erection of a tower in the Canary Wharf development in London which interfered with neighbours' television receptions constituted an actionable nuisance.⁸ There was no English authority directly in point. However, there was a decision of the German Federal Supreme Court which had ruled that no action lay in such circumstances, since the Civil Code deliberately left it to the freedom of the owner to use his property as he wished, so long as he did not cross the boundary of neighbouring land by the emission of imponderables. The decision was accepted as persuasive authority and the House ruled that the tower-erectors could not be sued in nuisance. Lord Goff commented:

The German principle appears to arise from the fact that the appropriate remedy falls within the law of property, in which competing property rights have to be reconciled with each other. In English law liability falls, for historical reasons, within the law of torts, though the underlying policy considerations appear to be similar.⁹

3 Monetary and Intangible Resources

Another important topic as to which there is divergence between common-law and some civil-law systems concerns the scope of property institutions. In respect of which resources may a person have "property?" Does property arise only in respect of tangible objects, land and goods, as is assumed by civil codes which follow the German pattern? Or is property a more ramshackle notion that extends, as common-law systems suppose, to resources which may be classified under five types: land; chattels; money; what I call "cashable rights" – bank accounts, company shares and so on;¹⁰ and ideational entities of various kinds – intellectual property? The narrower Germanic view stems, ultimately, from Roman law wherein actions to vindicate dominion lay only in respect of a tangible *res*. According to the dogmatics of German private law the only true property consists in ownership of a material asset (*eigentum*). In common-law systems, by virtue of the institution of trusts, proprietary interests may be held in funds. The content of a fund may comprise items of all the five types mentioned

⁸ *Hunter v. Canary Wharf Ltd* [1996] 1 AC 655.

⁹ *Ibid.* p. 686.

¹⁰ Harris, *Property and Justice*, p. 50-55.

above and, as Bernard Rudden has shown, the learning which once applied to estates in land has been transferred to funds.¹¹

There is no doubt that, within the social and economic life of any modern Western country, a man's wealth may include holdings in things other than land or goods. His money, his cashable rights and his copyrights or patents come within the law of succession and the law of bankruptcy. All such holdings are included within the term "possessions", according to the jurisprudence of the European Court of Human Rights, when the first protocol to the European Convention on Human Rights asserts that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions."¹² Juristic debate nonetheless persists as to whether monetary and intangible holdings of wealth should be called "property."

Contrast the approaches of two modern civilian jurists – Boudewijn Bouckaert¹³ and Wolfgang Mincke.¹⁴ These writers do not disagree about the details of the law. They differ as to the central rationale for institutions of private property and from this divergence insist on different definitions of property. For Bouckaert the purpose of private property is the extension of individual autonomy into the material world. People incorporate objects into their projects and life-plans. Justifications for assignable debts or intellectual property are merely economic and hence "exogenous to the inner logic of private law."¹⁵ Hence true property consists only in rights over tangible objects. Mincke notes that the German term *eigentum* and the Dutch *eigendom* are limited to indicating the most extensive rights a person may have in corporeal things, whereas the English word "property" and the French *propriete* include debts, patents and copyrights. Taking the economic rationale as primary, he argues in favour of the English/French broader conception of property. "We need to be able to transfer obligations. Our economy would come to a halt without that possibility. So we have to model our legal tools according to this need."¹⁶

In my submission modern property institutions serve simultaneously two overall functions: controlling the use of things, and allocating social wealth as private wealth.¹⁷ What I am free exclusively to use I am usually also free to sell. My money gives me access to things I can exclusively use. If there is a case, based on autonomy, for exclusive use of land or chattles, there is surely also one for autonomous transacting with one's money, bank accounts, shareholdings and copyrights. Property, of all kinds, both enhances autonomy and subserves

¹¹ Rudden, B. *Things as Thing and Things as Wealth* in Harris J.W. (ed.), *Property Problems: From Genes to Pension Funds*, London, Kluwer Law International, 1997, p. 146-163.

¹² See Ovey, Clare and White, Robin C.A., Jacobs and White: *The European Convention on Human Rights*, 3rd ed, Clarendon Press, 2002, p. 300-319.

¹³ Bouckaert, B. *What is Property* (1990) 13 *Harvard Journal of Law and Public Policy*, p. 475-816.

¹⁴ Mincke, W. *Property: Assets or Power? Objects or Relations as Substrata of Property Rights* in Harris (ed.), *Property Problems*, p. 78-88.

¹⁵ Bouckaert, *What is Property?*, p. 805.

¹⁶ Mincke, *Property: Assets or Power?*, p. 83.

¹⁷ Harris, *Property and Justice*, p. 4 and passim.

markets. Bouckaert's nostalgia for a true property limited to physical objects is a false lead.

4 The Structure of Property Institutions

I argued in my *Property and Justice* that, in order to achieve an overview of property institutions, we must deploy theoretical constructs which transcend both the popular understanding of property and also the distinct dogmatics of different legal systems. I offered a definition of property designed to reflect the structural features of property institutions – the ways in which the pieces interconnect:

“Property” designates those items which are points of reference within, and therefore presupposed by, the rules of a property institution – viz, trespassory, property-limitation, expropriation and appropriation rules. Such items are either the subject of direct trespassory protection or else assignable as parts of private wealth (or both).

Therefore “property” comprises (1) ownership and quasi-ownership interests in things (tangible or ideational); (2) other rights over such things as are enforceable against all-comers (non-ownership proprietary interests); (3) money; and (4) cashable rights.¹⁸

There is no univocal, singular concept of ownership, applicable to all resources at all stages of social and legal development. Instead there is a spectrum of ownership interests. Ownership has always been a taken-for-granted organizing idea but its content varies, historically, according to the social presuppositions taken into the law. The content of ownership is more extensive in the modern West than it was in primitive or feudal times. It may shrink in the future if it comes to be accepted, for example, that owners, *qua* owners, are not entitled, even *prima facie*, to use resources in environmentally detrimental ways. Within common-law systems, the ownership interest which is an incident of a legal estate in land is less for leasees than for freeholders. In all systems the content of ownership differs as between tangible resources, on the one hand, and monetary and intangible resources, on the other.

Foundational to all property institutions are the twinned, and mutually irreducible, notions of trespassory rules and the ownership spectrum. By “trespassory rules” I mean any rules imposing obligations on all members of a society, other than some specially excepted individual or group, not to make use of a resource without the consent of that individual or group. In modern property institutions such rules are applied to ideational entities, as well as to chattels and land. That is why the terminology of “intellectual property” has arisen.

“Ownership interests” display three characteristics. First, they all involve a juridical relation between a person (or group) and a resource. Secondly, the juridical relation consists of an open-ended amalgam of privileges and powers. Thirdly, they authorize self-seekingness on the part of the favoured individual or

¹⁸ Harris, *Property and Justice*, p. 139.

group. Title conditions vest ownership interests in individuals or groups so that they slot into the protection of trespassory rules. Ownership interests are logically primitive organizing ideas. Where a “property-limitation rule” applies, some positive or negative mode of using a thing, which would otherwise be privileged to someone by virtue of his ownership interest in it, is negated by the imposition of a corresponding negative or positive duty; or the exercise of a power, otherwise inherent in ownership, is qualified or curtailed. “Expropriation rules” divest owners, against their will, in favour either of the state or of private persons. “Appropriation rules” are sometimes the counterparts of expropriation rules, and sometimes apply to resources which, but for their impact, would be ownerless.

Universal outworks of modern property institutions include “non-ownership proprietary interests” (easements/servitudes, mortgages etc.) and “quasi-ownership interests” (public property of all kinds). Both are protected by trespassory rules. Whereas ownership interests comprise the three elements of resource-relation, open-endedness and authorized self-seekingness, non-ownership proprietary interests exhibit the first and third, but not the second; and quasi-ownership interests the first and second, but not the third. Public agencies do not “own” resources vested in them in the same sense that private individuals do. The content of the juridical relation is a combination of privileges and powers modelled on those of a comparable private ownership interest and other features derived from the particular public function for the discharge of which the resource is vested in the agency. The holder of a quasi-ownership interest cannot, as an ordinary owner may, respond to any criticism of the use made of a resource: “The thing is mine to do with as I please”!

When money takes the form of physical tokens – coins and banknotes – trespassory protection obviously applies. “Cashable rights”, such as assignable debts and nowadays milk quotas and waste disposal licences, are transmissible as part of a person’s private wealth. For that reason, expropriation and appropriation rules have come to be applied to them – for example, within bankruptcy law. Once propriethood is conferred upon them by virtue of their transmissibility, direct trespassory protection may follow – in modern English law, bank balances may be the subject of theft. Even if direct trespassory protection does not come about, the cash into which cashable rights are transformable is always the subject of such protection. In that way, even the proprietary status of debts builds upon the core combination of trespassory rules and the ownership spectrum.

5 Property Rights

Trespassory rules, civil and criminal, protect ownership interests. Their content varies from one system to another. They impose duties to which owners have correlative rights. As a matter of legal dogmatics, such duties and their correlative rights are typically dealt with, not under property law, but under the law of obligations or the criminal law. Without them, however, property could not serve its twin functions of controlling use of things and allocating private

wealth. Nothing could be owned if nothing could be stolen or otherwise wrongfully interfered with.

Correlative rights should be contrasted with what may be called “domain rights.” If an individual, a corporation or a group has a protected ownership interest, there is reserved to him or it a domain of action in respect of some resource. The domain comprises an open-ended amalgam of *prima facie* rights, that is, authorizations to act self-seekingly. Such rights consist, depending on the nature of the resource, of use-privileges, powers to control uses by others, and powers of transmission. These are the rights which traditionally come within the law of property. Notwithstanding variations in legal dogmatics, their substance is much the same in all modern Western legal systems.

Contemporary preoccupation with human rights requires us to bring into play a third conception of rights. An interest of mine may be deemed to be of such importance that I have standing to insist that the community institute or maintain measures to protect it. If that is the case, I may be said to have a “background right.” Western systems suppose that the propertyholdings I have acquired are the subject of such background rights.¹⁹ However, they are so only in a heavily qualified sense. The state should police the trespassory rules which protect my property and should institute or maintain systems of gift, testation and sale whereby I may effectively exercise my transmission powers, and it should grant me immunity from arbitrary expropriation. Nevertheless, my interest in my holdings is always subject to a mass of qualifications embodied in property-limitation and expropriation rules.

The functions of controlling use and allocating wealth could be discharged without deploying private property rights. In the past many resources were controlled by communitarian institutions of a collectivist kind, as Paolo Grossi has documented.²⁰ To-day, notwithstanding the flight to privatisation, large swathes of quasi-ownership interests remain vested in public agencies. Universal exclusion of private property rights would, however, diminish individual autonomy and deprive communities of the economic benefits of incentives and markets. For any future one can foresee, a total abolition of property rights is unthinkable.

¹⁹ See my *Is Property a Human Right?* in McLean, Janet (ed.), *Property and the Constitution*, Oxford, Hart Publishing, 1999, p. 64-87.

²⁰ Grossi, P., *An Alternative to Private Property: Collective Property in the Juridical Consciousness of the Nineteenth Century*, trans. Cochrane, Lydia G., University of Chicago Press, 1981.