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An Assessment of the Meaning and Context of Ownership and the Role of the Legal System in its Determination: Prospects and Challenges

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Abstract

Paramount to every functional legal system is the term 'Ownership'. That is, ownership in terms of; What ownership rights are? How they are acquired? What can be owned? Who owns what? How each legal system determines the type of ownership rights prevailing in each state and finally the limitations to the ownership rights? No jurisdiction functions effectively without defining clearly the ownership rights of the state. This paper aims at assessing the meaning and context of ownership and how it is justified by the respective legal systems. The methodology is doctrinal with primary and secondary sources on international law cases, statutes, textbooks, journals, articles, and online materials. The research found that property rights prevalent in a particular legal system are fixed by the legislature of the particular jurisdiction. The basic norm of each jurisdiction usually concluded how property are owned by the state and the individuals. The work equally observed that some legal systems based property rights on Private Ownership (Capitalism), State Ownership (Socialism), Communal Ownership (Communalism), Welfare State Ownership (Welfarism), Personal Ownership (Feudalism) etc. These types of ownership rights are ascertained by the law makers of each jurisdiction and decisions made on which to adopt for practice. The article concludes that ownership is an indispensable instrument of pol and social regulation which has played vital role in the society and different legal systems observe different ownership rights where the variation in styles depend on the historical and policy considerations of each legal system.

Key Words: Ownership, System, Legal, Context, Meaning, Determination, Role

Introduction

The term ownership is derived from the Latin word 'own' which means "to have or to hold a thing". One who holds a thing as his own is called 'owner' and will have the right of ownership over it. Therefore, the term ownership literally means legitimate and absolute right of a person over a thing. Ownership is the state or fact of exclusive rights and control over property which may be an object, land or real estate or intellectual property. It involves multiple rights, collectively referred to as title, which may be separated and held by different parties. The process and mechanisms of ownership are fairly complex; one can give, transfer and loose ownership of property in a number of ways. To acquire property, one can purchase it with money, trade it for other property, win it in a bet, receive it as a gift, inherit it, receive it as damages, earn it by work or performing services or by original appropriation (i.e. putting an unowned object to active use).

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One can transfer or lose ownership or property by selling it for money, exchanging it for another property, giving it as a gift, misplacing it or having it stripped from one's ownership through legal means such as eviction, foreclosure, seizure or taking. Ownership is self-propagating in that the owner of the property will also own the economic benefits of that property.

Meaning of Ownership

Various Jurists have defined ownership in different ways and all their definitions accept the right of ownership as ownership of the complete or supreme right that can be exercised over anything. At the height of individualist era, the tendency was to give fundamental rights the fullest possible scope. This is reflected inter alia in the way in which ownership as a fundamental right of property was regarded.

AUSTIN defined ownership in the early 19th century as "a right-indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration- over a determinate thing"[1].

From Austin's definition, ownership has 3 (three) distinctive attributes viz: indefinite user, unrestricted disposition, and unlimited duration.

HOLLAND follows Austin's definition of ownership and he defines ownership as plenary control over an object and according to him, 'plenary control' over an object implies complete and absolute control, unrestricted by any law or fact. Q2

In any circumstance it means the criticisms against Austin's definition of ownership would apply to the definition of Holland in so far as the implication of the term 'plenary control' goes.

To *SALMOND*[2]*, ownership vests in the complex of rights which he exercises to the exclusive of all others. Hence these rights reside in an individual to the exclusion of others. This definition thus brings out 2 (two) attributes of ownership namely:*

- *Ownership is a relation between a person and right(s) vested in him*
- *Ownership is incorporeal body or form*

Black's Law Dictionary[3]*defines ownership as the bundle of rights allowing one to use, manage and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control. Ownership rights are general, permanent and heritable. It further explains that ownership does not always mean absolute dominion. The more an owner, for his advantage opens up his property for use by the public in general the more his rights become circumscribed by the statutory and constitutional powers of those who use it.*

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[1]The Great Soviet Encyclopedia, 3rd edition (1970-1979).https://encyclopedia2.thefreedictionary.com/Managerial+Revolution,Theory+of +the accessed on 8/14/2018.

[2] Ibid

[3] Black's Law Dictionary, 9th edition, Bryan A. Garner.

However, it is worthy of note that ownership is the relation of the person with an object forming the subject matter of ownership. That the transfer of ownership in most cases involves a technical process of conveyance. Also that ownership consists of bundle of rights and all the rights are in rem.

English law with its continuous history of many centuries, has a large number of principles reflecting the liberties of the individual and sanctity of property.

2 What Can Be Owned and How it is Determined by Respective Legal Systems

To answer this question is to take a trip in history and analyze ownership, looking at various legal systems.

The concept of ownership is of both legal and social interest[4]. Not only have courts utilized the idea in such a way as to give effect to views of changing individual and social interest, but so great are its potentialities that in recent times it has become the focus of governmental policies.

Ownership consists of an innumerable number of claims, liberties, powers and immunities with regard to the thing owned, little wonder some jurists analyze the concept out of existence ad infinitum.

It is impracticable to talk of ownership devoid of claims of the owner, such a view is undesirable and inadequate. For the connotation of ownership does not correspond simply with its component elements any more than the word team connotes just a group of individuals. Another reason is that the various claims, etc. constitutes rather the contents of ownership than ownership itself. A person may part with the claims etc. to a greater or lesser extent, while still retaining the right of ownership.

Also, it is misleading to talk as if ownership meant only the claims etc. it would be truer to say that a person is entitled to these claims etc. by virtue of the right of ownership. Ownership as an asset has value apart from its component claims etc. Lastly, ownership is an institution that is generally recognized, so it is not surprising that certain features are shared amongst various legal systems.

Ownership in English law has to be approached historically, for its evolution is bound up with the remedies that used to be available. The peculiarity of English law is that it did not achieve an absolute ownership, as did Roman law. The idea of ownership did not evolve in the same way in relation to land and chattels. Land used to be held in feudal tenure, which has a system of land holding in return for services.

This holding was known as ‘seisin’, which originally meant no more than possession and denoted the state of affairs that made enjoyment possible. If the person seised was dispossessed, he had to rely on his seisin to get back on the land and for this the old remedy was the writ of right in which success depended on the claimant being able to establish a superior right to that of the possessor.

[4] The Great Soviet Encyclopedia, 3rd edition (1970-1979).

In the reign of Henry II the possessory are assizes were introduced and this led to the shadowy distinction between seisin and possession, between the respective basis of the writ of right and of the possessory assizes. This however was very unsure, since even possession carried with it the 'right' not only to be in possession but also to regain it if dispossessed until someone else proved a better right.

At this earlier times, there was no talk of ownership as such. The earliest mention and use of the word owner according to Mattland quoting Dr. Murray occurred in 1340 and ownership in 1583. A further step in the differentiation of seisin and possession came with the tenant for a term of years whereas seisin was protected by writ of right, the termor's right was protecte by a form of trespass- de ejection firmae (ejection of farm- a writ or action of trespass to obtain the return of lands or tenements to a lessee for a term of years that had been ousted by the lessor or by a reversioner, remainderman or stranger). His interest was not seisin, it was styled possession, which sharpened the contrast between seisin and possession.

With time new remedies emerged and replaced the old, trespass came to protect the possessor and ejectment was available to a person out of possession, who could prove a better right to possess than the possessor. These were based on the old principles, so much so that even ion modern law there are many cases which show that ownership of land is only a question of better right to retain or obtain possession relative to the other party to the dispute.

HOLDSWORTH however argues that the action of ejectment introduces a new idea. He said that in his action, a defendant in possession could set up a jus tertii (right of a third party) in answer to the plaintiff's claim to obtain possession, i.e. a superior title in a third party. Therefore, according to him, a plaintiff was required to establish a better claim than anyone else and in this way English law may be said to have arrived at the conception of an absolute right namely ownership.

At this point it is worthy of note that the idea of ownership of land is essentially one of the better right to be in possession and to obtain it, whereas with chattels, the concept has moved towards a more absolute one. Actual possession implies a right to retain it until the contrary is proven and to that extent a possessor is presumed to be the owner. Where the question is one of obtaining possession, the better right may be derived from prior possession and if not, it is said to derive from ownership, but where the question is one of retaining the thing, the better right is associated with ownership.

The idea of ownership as a right in a comprehensive sense is useful for indicating the whereabouts of certain types of interest. With land in particular, it has been evolved in such a way that as to enable the adjustment of concurrent interests.

Furthermore, attention should be drawn to some points

- The term ownership is used with reference to things. Thing has two meanings depending on whether it is used with reference to physical objects 'corporeal things' of certain rights 'incorporeal things'.

  The history of the common law in relation to land shows that different interests came to be treated as things in themselves known as 'estate' and so birth what is known and described as ownership of estate. In addition to this the idea of thing was also shaped by

the interaction between remedy and concept- the grant of a remedy stretched the concept, the concept was the basis for granting a remedy[5]. Also it is of historical importance to state that this ideology was not put to practice in relation to chattels. The use of the term ownership is thus arbitrary so far as it follows the concept of thing and one has to know the conventions of terminology to know how it is used.

Salmond in his analysis states that ownership consists of a bundle of claims, liberties, powers and immunities, that ownership in its most comprehensive signification, denotes the relation between a person and any right that is vested in him. That which a man owns in this sense in all cases is a right. Ownership is therefore corporeal. He then opined that to speak of the ownership of physical objects is a figure of speech. That what is meant is that certain claims etc. are vested in a person.

On the other hand, Professor G.H Williams finds Salmond's theory misleading as he points out that a word can have more than one usual meaning. He raises another objection that Salmond's way of stating ownership suggests that the idea of ownership of rights preceded that of physical objects, whereas historically the reverse would seem to have been the case. Professor Williams objects to the suggestion that ownership follows the concept of a thing. He rejects it as a verbal point and that as amounting to a substitution of the word thing for right. It is submitted that this objection overlooks the fact that not all rights are treated as things.

- Ownership is needed to give effect to the idea of 'mine', and 'not mine' or 'thine'. One aspect of it is that the ideology becomes necessary only when there is some relation between persons. A man by himself on a desert has no use for it. It is when at least one other person joins him that it becomes necessary to distinguish between things that are his and those that aren't his and also to determine what he may do with his things so as not to interfere with his companion. Without the society there is no need for law, or for ownership. Just as one is an institution of society, so also is the other.

- The right of ownership comprises of benefits and burdens. The former consists of claims, liberties, powers and immunities but the advantages given is curtailed by duties, liabilities and disabilities just to balance the scale.

- The claims etc. that comprises the content of ownership may be vested in persons other than the owner. Whether these others may by themselves be treated as owners depends on whether the conventions of the law treat their interests as things.

- An owner may be divested of his claims etc. to such an extent that he may be left with no immediate practical benefit. He remains owner nonetheless, this is because his interest in the thing which is ownership will outlast that of other persons, or if he is not presently exercising any of his claims etc., this will revive as soon as those vested in other persons come to an end. In the case of land and chattels, if the owner is not

[5] Op. cit.

In possession, his ownership amounts to a better claim to possession than that of the defendant. It is better in that it lasts longer. This substantially the conclusion reached by many modern writers who have variously described ownership as the residuary, the ultimate or the most enduring interest.

3. What Are Ownership Rights and How Are They Acquired?

The ways in which ownership arises differ in different legal systems. These variations depend on historical and policy considerations. Thus, it is a peculiarity of English law that a contract for the sale of specific goods can in certain circumstances pass immediate ownership without the need for any further conveyance, but same doesn't apply in the case of land[6].

In classical Roman law, certain ceremonies were required for the transfer of civil law ownership in certain kinds of things, the ceremony is called res mancipi [things of mancipium] - property, specifically italic land with its rustic servitudes and beasts of draft or burden, that can be transferred only by a formal ceremony of mancipation[7].

It may be said that a person is an owner at English law when he becomes entitled in specified ways to a thing designated as such, the scope of which is determined by policy, and his interest, constituted in this way will outlast the interest of other persons in the same thing. It is widely accepted according to various definition of ownership, that it is the complete or supreme right that can be exercised over anything.

Thus according to Hibbert[8], ownership includes four kinds of rights within itself namely: Right to use a thing; Right to exclude others from using the thing; Disposing of the thing; Right to destroy it.

On the other hand, Holland[9] opined that an owner has three rights on the subject owned namely: Possession, Enjoyment, Disposition.

Under modern law the modes of acquiring ownership can be broadly classified under two heads, viz: Original mode; Derivative mode.

The original mode is the result of some independent act of the owner himself. This mode consists of three kinds, namely:

Absolute- when ownership is acquired over previously ownerless object

Extinctive- where there exists a previous owner and the adverse act on the part of another person confers on the latter the right of ownership, this is how a right of easement is acquired after passage of time prescribed by law.

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[6] The Great Soviet Encyclopedia, 3rd edition (1970-1979).https://encyclopedia2.thefreedictionary.com/Managerial+Revolution+theory+of+the accessed on 8/14/2018.

[7] Black's Law Dictionary, 9th edition, Bryan A. Garnert.

[8]Ownership in Jurisprudence. http://ba llb handout notes.blogspot.com/2015/10/ownership in jurisprudence.html?m=1# accessed on 31/08/2019.

[9] Ibid

Accessory- is when acquisition of ownership is the result of accession. When ownership is derived from the previous version of law then it is called derivative acquisition i.e. derived mode takes place from the title of a previous owner and it is derived either by purchase, exchange, will, gift, etc.

Another better way of regarding the whole matter is to say that the way in which the term 'ownership' and 'thing' are used is governed by convention and policy.

4. Limitations to Ownership

It has been stated that ownership is a right in itself, distinct from its component jural relations, has always been useful for identifying certain groups of interests and for distinguishing them from others. It is also a social concept and an instrument of social policy. The social aspects of ownership reveal the manner in which its content came to be regulated over the years so as to determine how and to what extent an owner shall enjoy his interest in a manner compatible with the interests of others.

It has been stated that this content consists of innumerable jural relations[10], which establish relationships between the owner and other persons in the society. The extent of these reflects the social policy of the legal system. Broadly speaking, ownership normally carries with it claims to be given possession, against interference, and to the procedure, rents and profits. There are liberties to use and misuse and to exercise various powers. There are also powers of alienation and disposal, creation of limited interest, and so forth. There are also immunities, example against deprivation. The scope of these benefits is bounded by corresponding burdens, which are an integral part of ownership. There are various duties, liabilities, and disabilities, which prescribe and regulate how an owner should utilize his property for the benefit of other individuals or society.

An important restriction on ownership in the interest of another person is seen in the distinction between legal ownership at common law and equitable ownership at equity[11]. This occurs when there is a trust, which is the result of the peculiar historical development of the English law. A trust implies the existence of two kinds of concurrent ownerships, that of the trustee at law and that of the beneficiary at equity and is perhaps the outstanding products of the policies and values of the Judges of the old court of chancery. The ownership at law of the trustee was admitted in equity, but considerations of justice demanded that the content of his ownership should be exercised for the benefit of another person, who did not enjoy ownership at law. The interest of such a beneficiary was at first merely a personal one availing against the trustee alone, but the increasing need to protect that interest in ever widening spheres led to it being regarded as a kind of ownership[12].

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[10] The Great Soviet Encyclopedia, 3rd edition (1970-1979).https://encyclopedia2.thefreedictionary.com /Managerial+Revolution+theory+of+the accessed on 8/14/2018.
[11] Ibid
[12] Op. cit.

When described in terms of ownership, the distinction between legal and equitable ownership lies in historical factors that govern their creation and function; in terms of advantage the distinction is between the bare right, whether legal or equitable and the beneficial right[13].

AUSTIN was careful to emphasize that the liberties of users are not unlimited, but indefinite. The limitations may have been fewer in the past than they are now, but they have always represented the need to compromise between individual interests and life in society. The common law and statutory duties restricting liberty that exists need to be gone into in detail. An owner may not destroy or damage his own property to injure another. The fact of ownership can give rise to duties. Thus the tightening of nuisance, for instance the rule of Rylands v. Fletcher (both assuming their present form since the latter part of the last century), the rule in Donoghue v. Stevenson, and many other such rules will be familiar to any student of the law of tort. Statutory restrictions are legion, on building, farming, etc. Clear illustrations of social policy are to be found in the restrictions imposed in the interests of public health and safety, the drastic restrictions in times of national peril, restrictions on the use, misuse, and non-use of patents, and so on. Judicial interpretation of statutory limitations on ownership used to incline in favor of the individual, but there is now a greater awareness of the social purpose behind it.

Jurists who accept and follow the teachings of KARL MARX, in their quest for social reform, have drawn attention to the evil role which ownership has played. They opined that the owners of the means of production tend to grow into industrial commanders, wielding powers that strike at the foundation of the society. By obtaining monopoly in a commodity such an owner can corner the market and hold society to ransom as it were.

RENNER predicted that law would have to take account of the increasingly public character of ownership of property by investing it with the characteristics of public law.

LENIN also stated that private property is robbery and a state based on private property is a state of robbers who fight to share in the spoils. The remedy they proffered is to apply in varying degrees two concepts of ownership, a public and a private one. Ownership of the means of production could be public i.e. nationalized and only ownership of consumer goods should be open to private individuals. The distinction lies not in the nature of ownership but in the things capable of being owned.

Furthermore, one of MARX's more remarkable insight is the prediction of this development, only that hi treated it as an internal development within capitalism and part of the increasing alienation of the worker. Therefore, nationalizing ownership has not provided the hoped for control of power, and the managerial revolution has a wider and different impact than Marx had envisaged. What is needed is not nationalization of ownership but control of power by managers. In multi-party system of government, it is essential that the managerial boards of nationalized concerns should be independent of the government of the day, if they are to enjoy continuity and function efficiently, because government control of them poses problems. In addition to all these, nationalization has various drawbacks inclusive of the fact that it adds political power to

[13] Ibid

economic power and brings in its train increased bureaucracy and all that it entails, and it may also arguably hinder rational planning[14].

This Marx's theory is wholly not applicable in modern western societies because it is outdated. Although it was put to good use with success in Soviet Russia, easy parallels shouldn't be drawn from this. For one thing, nationalization was carried out there while the Russia concept of ownership was still in the potential dangerous state that ownership had been in the west over a hundred years before.

Conclusion

From all that has been said, it is clear that formal analysis of ownership alone fails to convey the idea of the part it has played in society. A functional study is indispensable to a complete understanding, for it reveals that the concept of ownership is full of potentialities as an instrument of policy and social regulation on a large scale. Functional legal systems practice different ownership rights styles and the variation in the styles depend on the historical and the policy considerations of each legal jurisdiction.

[14] Op. cit.