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A prelude to property under international trade

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Abstract

Property from time immemorial has always been the concern of all people may it be of different class, sex, language, colour, ethnicity etc. A lot of work has been done on deciphering the meaning of Property itself. The difficulties with these definitions have plagued speculative jurists to come up with new definitions. Speaking of the relationship of a person to a thing is of limited usefulness in legal discourse because a thing cannot bring or defend a law suit. The law does not deal with rights, privileges, powers, their co-relatives and opposites, in the abstracts: it deals with relationship between and among peoples. It seems that western law tends to ascribe to the possessor of a thing. On the other side it is said that property is a culturally constructed concept. The content of the term depends on the culture in which it is employed and, within any particular culture, very often upon the period in which the concept is being discussed. Thus, in the light of both western and non western perspective the researcher intends to trace property as the subject matters of trade i.e. goods, intellectual property and services.

Keywords: Property, rights, power, privileges, duty, goods, services, WTO

Introduction

This article explores the concept of property under international trade regime. The researcher intends to trace property as the subject matters of trade i.e. goods, intellectual property and services. Before tracing property, in these subject matters, under international trade law, let us have a brief view of evolution of property under primitive society. In the early or primary stage humans still lived in their original habitat, i.e. dwelling in tropical or subtropical forests. In the Palaeolithic or Stone Age, with the invention of the bow and arrow, hunting became one of the normal occupations. However, the food derived by hunting could not be stored due to its perishable nature. So, consequently, an association towards congregation for other inventions started growing.

With the development of domestication of animals, stock breeding and growing of crops, there was greater accumulation of wealth. The civilization growing in this way gave themselves the scene of property (basically private property). The possession of the wealth began to shift from clan to clan (gens). The sense of possession created the sense of ownership and hence, property among its holder.

Now when people started making sense in property its value rises as numerous rights were being attached to it. To have the sense of property as what property is, let us look it by knowing the meaning, nature and concept of property. And to appreciate the finding of the researcher it is necessary to have the understanding about the meaning of property.

Meaning, Nature and Concept of Property

The word property means in normal English usage; "an object of legal rights" or "possession" or "wealth" collectively, frequently with strong connotation of individual ownership. The English word property derives either directly or through French 'proprieté' and from Latin 'Proprietes', which means "the peculiar nature or quality of a thing" and "ownership". The word proprietas is derived from propius, an adjective meaning "Peculiar" or "own" as opposed to communis, "common" or "another's". Thus even before it comes to be a legal term, "property" expresses what distinguishes an individual or a thing from a group or from another. It is the face of one to others, what separates me from he and she, what lies in a person's view or what has priority in times [1].

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A lot of work has been done on deciphering the meaning of Property itself. However, here the researcher tends to find one of the most accepted definitions of property. When we look at the definition part it is frequently defined as the rights of a person against a thing. The difficulties with this definition have plagued speculative jurists to come up with new definitions. Speaking of the relationship of a person to a thing is of limited usefulness in legal discourse because a thing cannot bring or defend a law suit. The law does not deal with rights, privileges, powers, their co-relatives and opposites, in the abstracts: it deals with relationship between and among peoples. So, one can see that western law tends to ascribe to the possessor of a thing:

1. The right to possess the thing with a duty in everyone else to stay off.
2. The privilege of using the thing with no right in anyone else to prevent that use.
3. A power to transfer any or all the possessor's rights, privileges, powers, and immunities to stop anyone else, and
4. An immunity from change by any one of those same rights privileges and powers (so that everyone else is disabled from changing them) ^[2].

Thus, property can be defined as the sum of rights and duties, privileges and no rights, powers and liabilities, disabilities and immunities that exists with respect to thing not against thing. Property is a relationship among people under the Hofeldian scheme. For the purpose of this article, things include all movable and immovable, tangible and intangible and real and personal.

It is said that property is a culturally constructed concept. The content of the term depends on the culture in which it is employed and, within any particular culture, very often upon the period in which the concept is being discussed. Joseph Singer has put it quite well when he said that "property rights must be understood as both contingent and contextual ^[3]." In the light of above statements let us look at property from both western and non-western perspective.

The Western Concept of Property

For more than centuries, thinkers have pondered on the nature and meaning of Property. Variants have been seen to the extent from communal ownership to stewardship to absolute dominion. Plato rejected the concept of private property and argued instead for commonly owned property. According to him, rulers would have no private property while other property would be held for the common good ^[4]. In the early 17th century the Dutch speculative jurists Hugo Gracius announced the 'theory of eminent domain'. On one hand according to Gracius, the state did have the power to take private property. On the other hand for such a taking to be lawful, it had to be for a public purpose and had to be accompanied by the payment of just compensation to the individual whose property was taken. The idea was not new with Gracius, but he stated in such a way that it became a common place of western political thought. In the late 17th century Semual Von Pufendorf refined a theory of the origins of property right that has been in existence since ancient times. Property, Pufendorf said, is founded in the physical power manifested in seizing the object of property (occupation). In order, however, to convert the fact of physical power into a right, the sanction of the state is necessary. But the state cannot Pufendorf

seems to suggest, make a property rights where physical possession is not present.

Pufendorf contemporary John Locke had a different theory. What gives a man a right to a thing according to Locke, is not simply his seizing of the object but rather the fact that he has mixed his labour with the thing in making it his own. This right to a thing arising out of labour is a natural right. It does not require state sanction in order to be valid. Indeed property is at the fundamental to the contract that the people make in forming the state.

Bentham's follower John Stuart mills associated property with liberty and suggested that security of property is essential for man to maximize his potential for liberty. When Immanuel Kant's categorical imperative says that persons must always be treated as ends in themselves rather than means, George Waltham Friedrich Hegel suggested that same imperative applies to the person's property. The reason for this, according to Hegel, is that when some extends his will to a thing, he makes that thing a part of himself. Protection of property is thus intimately connected to it with will of the people.

The middle of the 19th century saw the first concerted attacks on institution of property. Karl Marx holds that property is nothing but a device in social warfare between the capitalist and proletarian's classes, the means by which the capitalist expropriates the labour of the proletarian and keeps him in slavery.

The Non-Western Concept of Property

As early in 478 BC, Confucius developed a view of property that the state was obliged to secure for the people the basic means of their subsistence. He called for an "interventionist model" and supported, for example, a fair distribution of goods ^[5]. This view was reiterated by Mencius, a follower of Confucius, who, while affirming the concept of private property, also argued that the government should control the distribution and use of land to assure the subsistence of the people ^[6].

Similarly, the Islamic view of property rights conceived of a dual ownership of property between a human being and Allah. The land was thought to be a sacred trust that must be used productively but without exploitation or hoarding ^[7]. Thus, the land owner may benefit from his or her land but only within a circumscribed range. The concept was not one of unlimited dominion. Property rights were essentially public, state, or private. Private rights depended on use and public lands might be converted to the private realm by productive use of such land.

On the other hand, private, unused land might revert to the state. The public nature of the ownership of land in Islamic law was that landowners were here required to pay a levy of a part of the earnings from the land for the benefit of the poor. This levy was not viewed as voluntary charity but as a social obligation and, correlatively, as a right of the poor to receive ^[8].

Various Native American Nations have also viewed property rights differently from those of the typical western model. While most recognized individual rights in personal property, their view of rights in land varied widely. Many nations did not recognize individual property interests in land. In some cases this was because tribes were nomadic and such interests were not relevant to their existence or were even adverse to it ^[9]. Others had a more communal or even spiritual sense about the land. They viewed the land as

belonging to all and no individual could exercise complete dominion over it ^[10]. While individuals who occupied particular land could enjoy the fruits of their labour, they had an obligation to preserve the land for future generations. They merely used the land in trust, an example of tenure from which the stewardship concept developed ^[11].

Property under International Trade law

After understanding the views of both western and non-western world on property let us now look at international trade law jurisprudence to find out whether property lies in goods or intellectual property or in services as these three constitute the subject matter of trade till date. Since, it is the WTO under which international trade is regulated so it becomes necessary to look at it first.

WTO (world trade organisation) being the champion of all international trade transaction, keep its concern over commercial transactions. It is an institutional structure which takes care of those issues which GATT could not take care of. It has to look at how the member is benefited? Whether free trade is going on or not? How trade can be made free by reducing trade barrier? How to look at the dispute between member nations? But when we look at the trade topics which WTO is concerned with, we find following broad areas:

- 1) Goods,
- 2) Intellectual property,
- 3) Services,
- 4) Dispute settlement,
- 5) Doha development agenda,
- 6) Building trade capacity,
- 7) Trade monitoring and
- 8) Other topics

There is nowhere direct use of the word 'property' as such. Out of various trade topics three are only transferable and constitute the subject matter of trade. However, the researcher here is interested to find out whether 'property' lies in goods, in intellectual property or in services. For this, the subject matter is being tested on the western law model which tends to ascribe certain rights, privilege, immunity and power to the possessor of a thing. For this, let us analyse each trade topics simultaneously.

Goods

By looking at the index of dispute issue under the Dispute Settlement Body of WTO it is found that goods cover both tangible and intangible goods. In both cases if one has to find out property in it one has to have a look at what type of transaction it is. The necessity to find out where the property is arises because there is fragmentation of property in terms of delivery and possession and the issue of who has property in the goods is of practical importance in the event of insolvency, loss or damage to the goods and claim for payment of price.

The passing of property is also important in the act for the part it plays in determining when a seller may sue for the price of goods ^[12], instead of contended with an action for damages for non-acceptance ^[13]. To trace as where property lays one has to look at the type of transaction.

As in FOB ^[14] (free on board) contract, seller who does not retain the bill of lading ^[15] and who surrenders possession of the goods to the buyer or buyer's agent (carrier) will have neither a lien nor a right of retention over the goods. Nevertheless, even if the seller's surrenders possession

before payment, that seller will have the right to stop the goods in transit if the buyer becomes insolvent during this time. In CIF ^[16] (cost insurance freight) transactions, the buyer conventionally pays against shipping documents at that point; the property will pass to the buyer, consistently with the parties shared intention and not upon an earlier shipment of goods.

One of the exceptional areas where the parties cannot provide for property to pass is where the goods have not yet become ascertained. According to sec 16 of the Sales of Goods Act, 1979, where there is a contract for the sale of unascertained goods no property in goods is transferred to the buyer unless and until the goods are ascertained. Until defined goods are attached in some way to the contract, it is impossible in fact for the question, Property to what, to be answered. The question of when property passes is to be established from sec 17-19 of the Sale of Goods Act 1979. According to s 17(1), property passes when the parties intend it to. The intention of the parties is to be gathered from the terms of the contract, the conduct of the parties and the circumstances. Thus, it is established that there lies property in goods.

Intellectual property

TRIPS ^[17] as such do not define property or intellectual property but talks about the desire to reduce distortion and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not become barriers to legitimate trade ^[18]. TRIPS, is to protect the right in the property arising out of intellect.

Intellectual property, very broadly, means the statutory rights over the object which results from intellectual activity in the industrial, scientific, literary and artistic fields. Generally speaking, intellectual property law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain time-limited rights to control the use made of those productions. Those rights do not apply to the physical object in which the creation may be embodied but instead to the intellectual creation as such ^[19]. Though, intellectual property is intangible in nature but it is same as tangible property. Testing it on the western law model which tends to ascribe certain rights, privilege, immunity and power to the possessor of a thing, certifies it to be called as property.

Services

The role of services has changed dramatically in recent decades. Services represent the largest single sector in developed economies and increasingly in developing economies as well, accounting for nearly two-thirds of value-added and employment in the former and about half in the latter. Services are also the fastest-growing component of international trade. Since 1980, services exports have grown more strongly than merchandise exports and now amount to about US\$1.5 trillion annually, or about one-fifth of total world exports ^[20].

Trade in Services, refers to the sale and delivery of an intangible product, called a service, between a producer and consumer. International trade in services is defined by the *Four Modes of Supply* of the General Agreement on Trade in Services (GATS).

- (Mode 1) Cross border trade, which is defined as delivery of a service from the territory of one country into the territory of other country;
- (Mode 2) Consumption abroad - this mode covers supply of a service of one country to the service consumer of any other country;
- (Mode 3) Commercial presence - which covers services provided by a service supplier of one country in the territory of any other country, and
- (Mode 4) Presence of natural persons - which covers services provided by a service supplier of one country through the presence of natural persons in the territory of any other country [21].

Now after knowing services as a subject matter of trade the researcher tries to establish that how services also constitute a property. The first contention goes like this. There are properties created by law, like copyright. Another sort of property that can be created without physical control consists in *rights under contracts*, such as the employee's right to a salary or the seller's right to be paid the price of something he has sold. This sort of property gives the employee or seller an exclusive right, because the payment has to be made to him and no one else. It is of the value because of the certainty or likelihood that the payment will be made. Its value is, once again, increased by the fact that, if it is not made the employee or the seller can call on the law to enforce it [22]. On this argument if services are sold under a contract then the seller or the producer has the right to sue the buyer or consumer on default of payment. Thus, it can be said that services are also property.

Secondly, buying and selling of a thing adds value to it. Services, is also holding one of the most important essentials of property, i.e. marketable value as services are being bought and sold. Now finally, let us test this under western law model which tends to ascribe certain rights, privilege, immunity and power to the possessor of a thing. When it is said that the consumer has bought services from the service provider or the producer he possess following attributes:

1. The right to utilise the service with a duty in everyone else to stay off.
2. The privilege of using the service with no right in anyone else to prevent that use.
3. A power to transfer any or all the user's rights, privileges, powers, and immunities to stop anyone else, and
4. An immunity from change by any one of those same rights privileges and powers (so that everyone else is disabled from changing them).

Thus, it becomes clear that services also comes under property which can be sold and bought and gives various rights to its consumer.

Conclusion

Property from time immemorial has always been the concern of all people may it be of different class, sex, language, colour, ethnicity etc. The above analysis of property under international trade law gives us a view that either public or private international law, property has been part of both the division. However, the mode of dealing with it is different. It is also established that property is found in

the goods, in intellectual property rights and even in services which constitute the subject matter of trade and commerce.

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12. Sec 49(1) sales of goods act, 1979.
13. Sec 50 sales of goods act, 1979gf.
14. One of the trade terms under INCOTERMS. According to this type of contract the seller must load the goods on the vessel nominated by the buyer free of cost. The buyer must instruct the seller the details of the vessel and the port where the goods are to be loaded.
15. It is a document of title which acts as an evidence of contract of carriage. It is a document issued by the seller where the shipper signs, confirming the nature and quantity of cargo. Physical inability of the merchant to have control or possession over goods has triggered the custom of the use of bill of lading.
16. This is also a trade term under INCOTERMS which is one of the most popular trade terms. Under it the seller has to provide insurance to the goods and pay freight charges. In his seller can be paid for the goods before their arrival at the destination port, on showing of certain documents.
17. TRIPS stands for trade related intellectual property.
18. See preamble of TRIPS, 1995.
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