CHAPTER II
PHILOSOPHICAL AND JURISPRUDENTIAL CONCEPTIONS OF PROPERTY

Proprietary rights of an individual in a civilized society implies an individual’s claim to control and to apply to what he discovers; and reduces to his power, what he creates by his labour, physical or mental, and what he acquires under the prevailing social, economic or legal system by exchange, purchase, gift or succession. Most of the legal systems distinguish different types of property, especially between land and all other forms of property. They often differentiate between tangible and intangible property.

2.1 Philosophical Concept of Property

Renowned philosophers like Jean Jacques Rousseau, Aristotle, Thomas Aquinas, John Locke and David Hume held the view that a property acquired by a person through his labour is his property. Thomas Acquinas observed that law should be framed not only for the community, but also for the individual. Further, human acts are about individual matters and law is the director of human acts. Hence, human laws should be framed not for the community, but for the individual. Today, private property is equated with the property owned by a non-governmental legal entity.

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2.1.1 Theory of First Occupier

This theory states that the first occupier of the property shall be considered as the owner of the property. According to Jean Jacques Rousseau, “the right of the first occupier, though more real than the right of the strongest, becomes a real right only when the right of property has already been established. In this right we are respecting not so much what belongs to another as what does not belong to ourselves”\(^5\).

Certain conditions must be satisfied to establish the right of the first occupier over a plot of land: In the first place, the land must not yet be inhabited; secondly, a man must occupy only the area he needs for his subsistence, and in the third place, possession must be taken not by an empty ceremony, but by labour and cultivation, the only sign of proprietorship that should be respected by others, in default of a legal title. However, though the acquisition has been made, the right which each individual has to his own estate is always subordinate to the right which is enjoyed by the community; without this, there would be neither stability in the social tie, nor real force in the exercise of sovereignty\(^6\).

2.1.2 Aristotle’s View

According to Aristotle, property is a part of the household, and therefore the act of acquiring property is a part of managing the household; for no man can live well, or indeed live at all, unless he be provided with necessaries. And as in the acts which have a definite sphere, the workers must have their own proper instruments for the accomplishment of their work, so it is the management of households… Thus, a possession is an instrument for maintaining life\(^7\).

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2.1.3 John Locke

John Locke expounded the view that though the earth and all inferior creatures are common to all men, every man has a ‘property’ in his own ‘person’, over which nobody has any right. The ‘labour’ of his body and the ‘work’ of his hands, we may say, are his property. Whatsoever, then he removes out of the state that nature hath provided and left it in; he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property.

Thus, labour in the beginning, gave a right of property, wherever anyone was pleased to employ it, upon what was common, which remained a long while, the far greater part, and is yet more than mankind makes use of. Initially men, for the most part, contented themselves with what is unassisted and unoccupied i.e., what nature offered to their necessities. However, subsequently in some parts of the world, where the increase of people and stock had made land scarce, several communities settled the bounds of their distinct territories, and, by laws, within themselves, regulated the properties of the private men of their society; and so, by contract and agreement, settled the property.

2.1.4 David Hume

David Hume held the view that property of objects is acquired by accession. When a property is connected in an intimate manner with objects that are already a person’s property, that property becomes his own. Thus the fruits of our garden, the

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8 [http://plato.stanford.edu/entries/locke-political/#StaNat](http://plato.stanford.edu/entries/locke-political/#StaNat) (visited on September 10, 2012). Locke appears to suggest that one can only have property in what one has personally laboured on when he makes labour the source of property rights, Locke clearly recognized that even in the state of nature, “the turfs my servant has cut” can become my property. Locke, according to Macpherson, thus clearly recognized that labour can be alienated. See, John Locke, *Of Civil Government* (Book II), Chapter V, Sections 25 and 27.

9 [http://www.sparknotes.com/philosophy/locke/section4.rhtml](http://www.sparknotes.com/philosophy/locke/section4.rhtml) (visited on September 10, 2012). The limitations that Locke places on property in the state of nature without money are as follows: “one must put one's labour into something to claim it; one cannot take more than one can use (rule of subsistence); and money subsumes both”. *Ibid.*
offspring of our cattle, and the work of our slaves, all form part of our property, even before possession\(^\text{10}\).

### 2.2 Different Theories of Property

Theories by which men have sought to give a rational account of private property as “a social and legal institution” can be conveniently arranged in six principal groups, each including many forms\(^\text{11}\): (1) Natural theories, (2) Metaphysical theories, (3) Historical theories, (4) Positive theories, (5) Psychological theories and (6) Sociological theories.

#### 2.2.1 Natural Law Theory

According to natural law theory, property was acquired by occupation of an ownerless object and as a result of individual labour. Grotius observed that originally all things were without an owner and whosoever took hold of them or occupied them became their owners\(^\text{12}\).

Blackstone\(^\text{13}\) stated that, “by the law of nature and reason, he who first began to use a thing, acquired therein a kind of transient property that lasted to so long as he was using it and no longer; or to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. But when mankind increased in number, craft and ambition, it became necessary to entertain conceptions of more permanent dominion and to appropriate to individuals, not the immediate use only but the very substance of the thing to be used. The theory of occupancy is the ground and foundation of all property or of holding those

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\(^{10}\) See generally, Norman Kemp Smith (ed.), *The Philosophy of David Hume: A Critical Study of its Origin and Central Doctrines* (1941).


\(^{12}\) John Neville Figgis, *Studies of Political Thought from Gerson to Grotius, 1414-1625* (2nd edn., Cambridge, 1923), Ch.7; See also, V.D Mahajan, *Jurisprudence and Legal Theory*; (5th edn., Eastern Book Co.), p. 471.

\(^{13}\) On the significance of property rights, See William Blackstone, *Commentaries on the Laws of England, (1765-69)*, Book II, Ch.1, p.2. He regards the freedom to control material things as “the guardian of every other rights”.

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things in severally with by the law of nature, unqualified by that of society, was common to all mankind”\(^{14}\).

### 2.2.2 Metaphysical Theory

Immanuel Kant asserted that, “a thing is rightfully mine when I am so connected with it that anyone who uses it without my consent does me an injury. But to justify the law of property, we must go beyond cases of possession; and where there is an actual physical relation to the object, any interference therewith, is an aggression upon personality”\(^{15}\).

### 2.2.3 Historical Theory

Three clearly defined stages are discernible in historical theory: (1) natural possession which existed independently of the law or the State, (2) juristic possession, in which there was a conception of both fact and law, and (3) the development of ownership. According to Henry Maine, “private property in the shape in which we know it was chiefly formed by the gradual disentanglement of the separate rights of individual from the blended rights of the community”. Thus the ownership of property can be traced back to the crude fact of physical control to a property right independent of the fact of possession\(^{16}\).

### 2.2.4 Positive Theory

Spencer, the propounder of positive theory postulates that, property is the result of individual labour\(^ {17}\) and no man has any moral right to that property which he has not acquired by dint of his personal or individual effort. According to Adam Smith, the expectation of the profit from “improving one’s stock of capital” rests on private property rights. It is an assumption central to capitalism that property rights

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encourage their holders to develop the property, generate wealth and efficiently allocate resources based on the operation of markets. From this has evolved the modern conception of property as a right enforced by positive law, in the expectation that this will produce more wealth and entail better standards of living\textsuperscript{18}.

2.2.5 Psychological Theory

Several psychological and sociological theories have been formulated chiefly in Italy. The advocates of these theories seek the foundation of property in an instinct of acquisitiveness, considering it a social development or social institution of that basis\textsuperscript{19}.

2.2.6 Sociological Theory

According to sociological theory, property should not be considered in terms of private rights, it should be considered in terms of social function. Property is an institution, which secures the maximum of interests and satisfies the maximum of wants. Property rights are an instrument of society and derive their significance from the fact that they help a man form those expectations which he can reasonably hold in his dealings with others. These expectations find expression in the laws, customs, and mores of a society. An owner of property rights possesses the consent of fellowmen to allow him to act in particular ways. An owner expects the community to prevent others from interfering with his actions, provided that these actions are not prohibited in the specifications of his rights\textsuperscript{20}. According to Laski, “property is a


\textsuperscript{19} \textit{Supra} n.1 at p.131.

social fact like any other; and it is the character of social facts to alter. It has
assumed the most varied aspects, and it is capable of yet further changes”

2.2.7 Marxian Theory

Karl Marx defines private property as the right of an individual, or group of
individuals, to exclude others from the use of an object. In its undeveloped form,
private property is the simple relation of the individual to the natural world in which
his individuality finds objective expression. Private property finds its ultimate
expression only in the relation of wage-labour and capital. He did not make any
distinction between personal and private property in his later works. In his theory of
the commodity, he describes commodities, including the concept of owning them, as
an aspect of his theory of alienation. In the section "The fetishism of commodities
and the secret thereof" of his treatise, Marx states that commodities appear to be a
"fantastic form of a relation between things" rather than a social relationship
between people. This means that all aspects of commodities, ownership, value, etc.
are fetish aspects of a social relationship.

There is some connection between ‘personal property’ and ‘means of
production’. Personal property is considered private property that is movable, as
almost an extension of one's person and does include property from which one has
the right to exclude others. These objects can range from simple commodities to
houses, depending on one's perspective, but definitions tend to include personal
items such as clothing, books, food, or records. All the same, personal property is
sharply different from private property in its productive capacity. Not all forms of
personal property has productive capacity whereas private property like land and
machines might have some productive capacity. From the socialist point of view,
private property refers to capital or means of production that is owned by a business
class or few individuals and operated for their profit. As mentioned above, personal
property refers to tangible items and possessions that individuals own. Socialism

22 See generally, Karl Marx, Das Capital, Vol.1; Shlomo Avineri, The Social and Political
Thought of Karl Marx (Cambridge University Press, 1968), pp.177-79.
does not advocate the abolition of personal property, believing that it is an acceptable form of ownership of an item, unlike private property. From the Marxist perspective, which is very similar to that of the socialist, private property is a social relationship and not a relationship between a person and a thing as in the case of personal property. It also describes personal property, as earlier stated, as those objects which are personal, or an extension of one's self. The Marxist perspective also does not uphold the abolition of personal property: it believes that it is only private property that should be done away with.

2.3 Jurisprudential Concept of Property

The substantial civil law can be divided into three clearly defined groups: the law of property, the law of obligation and the law of status. The first deals with proprietary rights in rem; the second with proprietary rights in personam, and the third, with personal or non-proprietary rights whether in rem or in personam. A right in rem is, roughly, a right in respect of res, a thing. Property right is a classic example of it. Rights in rem are characterized as those rights which bind the entire world, that is, rights which must be respected by all or virtually all, of the subjects of the legal system: “everybody must refrain from trespassing on my land.” In contrast, a right in personam is a right available against a particular person, such as those created by a contract.

2.3.1 The Interest in Property

The interest of a person in property is the interest in exclusively determining the ‘use of things’. However, this should not be misinterpreted as a requirement that an owner or owners must use their own things, nor that there cannot be co-

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23 Supra n.11 at p.411. See also, Campbell, “Some Footnotes to Salmond’s Jurisprudence”, 7 C.L.J 217 (1940).
26 The earliest known use of the word ‘owner’, according to Maitland, quoting Dr. Murray, occurred in 1340, and ‘ownership’ in 1583. See, Sir Frederick Pollock & Frederic William
ownership of property by a few or many people. The claim is that a right to a thing is a property right only to the extent that some others are excluded from the determination of its use. The interest in property is incorporated into the structure of legal norms at two levels, as a general right and as specific rights. We have special rights to those items of property we own. Here, the law protects our particular interest in the specific items of property we have and sees to it that these special rights in rem correlate to a general duty in rem upon all others not to interfere with property. We also have a general interest in all property, not only because we might, as the result of a transfer, own anything, but because we have an interest in the practice of property itself.

The term ‘property’ has been used in a variety of senses. In its wider sense, property includes all the legal rights of a person of whatever description. The property of a man is all that is his in law, exclusion of others is the life essence of property. In this regard, Blackstone noted that property means, “the inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior”. According to Hobbes, “of things man have are his own life and limbs, and in the next degree, in most men, those that concern conjugal affection and after them riches and means of living”. John Locke holds that, “every man has a property in his own person” and a man has a right to


Ibid.


Supra n. 13.

preserve “his property that is his life, liberty and estate”\textsuperscript{34}. Jeremy Bentham argues that, “property and law are born and must die together. Before the laws, there was no property: take away the law, all property ceases”\textsuperscript{35}.

In a narrower sense, property includes the proprietary rights that constitute an individual’s estate or property; and the personal rights that constitute his status or personal condition. In this sense, the land, chattels, shares and debts due to a person are his property; but not his life or liberty or reputation\textsuperscript{36}.

In the narrowest use of the term, property includes nothing more than corporeal property or the right of ownership in material things. Consequently, patent, copy rights which are incorporeal, are excluded. According to Austin, the term property is sometimes used to denote the greatest right of enjoyment known to the law excluding servitudes\textsuperscript{37}.

Erle J. observed that, “the notion that nothing is property which cannot be earmarked and recovered in detenu or trover, may be true in an early stage of society when property is in its simplest form and the remedies for the violation of it are also simple, but it is not true in a more civilized State when the relation of life and the interest arising there from are complicated\textsuperscript{38}.”

Land is considered as ‘immovable’ property; and chattels as ‘movable’ property. According to Salmond\textsuperscript{39}, an immovable piece of land has many elements:

- A determinate portion of the earth’s surface.
- The ground beneath the surface down to the centre of the earth.
- Possibly the column of space above the surface, ‘\textit{ad infinitum}’.

\textsuperscript{34} John Locke, \textit{Treatise on Civil Government} II Ch.V, S.27.
\textsuperscript{36} Supra n.29.
\textsuperscript{37} Supra n.17 at p.899. See also, Austin, \textit{Jurisprudence}, II, p.790; Austin, \textit{Jurisprudence}, I, p.371.
\textsuperscript{38} R.N. Smith (1855) 6 Cox CC 554.
\textsuperscript{39} Salmond, \textit{Jurisprudence}, (7\textsuperscript{th} edn.), pp. 277-79.
Coke observed that, “the earth hath in law a great extent upwards, not only of water as hath been said but of air and all other things even up to heaven 40”.

2.4 Four Dimensions of Property Right

According to Stephen Munzer 41, the idea of property or the sophisticated or legal conception of property involves a constellation of Hohfeldian elements 42, correlatives, and opposites, a specification of standard incidents of ownership and other related but less powerful interests; and a catalogue of “things” (tangible and intangible) that are the subjects of these incidents.

The four dimensions of property can be examined under the following heads: (1) Theory of Rights, (2) Space or Area of Field, (3) Stringency of Protection and (4) Time.

2.4.1 Theory of Rights

Property involves rights, privileges, powers and immunities that govern the relative power of individuals over tangible and intangible things. In Lucas v. South Carolina Coastal Council 43, the petitioner challenged the validity of Beachfront Management Act, which was intended to protect the beach/sand dune coastal system from unwise development that jeopardized the stability of the beach/dune adjacent property. The U.S. Supreme Court upheld the contention of the petitioner and observed that it is apparent that the legal validity of his claim will depend upon what

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42  For a discussion on Hohfeldian analysis of rights, See, Hohfeld, Fundamental Legal Conceptions (1923); See also, Hohfeld, “Fundamental Legal Conceptions” 23 Yale L J 16 (1913); Hall, Readings in Jurisprudence, Chapter II; Corbin, “Legal Analysis and Terminology” 29 Yale L J 163 (1919); Kocourek, Jural Relations (2nd ed., 1928); Radin, “A Restatement of Hohfeld” 51 H L R 1141 (1938); Maber, “The Kinds of Legal Rights” 5 Melbourne University Law Review 47 (1965).
we consider property, as a substantive matter, to be. A more precise explanation is that, the validity of any property claim will depend upon the particular rights, privileges, powers, and immunities that we have decided (through our legal system) to confer.

The theories of rights that have been used in American law for this necessary dimension are diverse and conflicting. For example, theories that have appeared at various times in the jurisprudence of the U.S Supreme Court include the bundle of ‘traditionally’ or ‘commonly’ recognized right to possess, use, transport, sell, donate, exclude, or devise and the ‘fundamental’ attributes of ownership. The ordinary meaning of property interest is the right to protection of one’s ‘reasonable’ investment backed by ‘historical’ expectations; the right to anticipated commercial gains; the rights enumerated in an executed contract.

2.4.2 Theory of Space

The idea of spatial dimension for a conception of property is obviously in its literal sense more readily applicable to land or other corporeal property than it is to property of a different sort. In a fee simple property, the owner is entitled to the land below the surface and to the air above it. The former may give entitlement to minerals on the earth, subject to statutory control, and the latter ensures any interference in the air space. In *Penn Central Transportation Co v. New York City*, the question was whether the ‘air rights’ above the building, which were

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47 In England, the term real property was originally applied to property which could be specifically recovered by means of a real action. A real action was available only to a person who had a freehold interest in property held on free hold tenure. A free hold interest is an estate whose duration of enjoyment was uncertain i.e. *fee simple*. See, Prof. G.C Venkata Subbarao, *Commentaries on the Transfer of Property Act*, (C.Subbiah Chetty Co., Madras, 1987), p.6.
48 *Supra* n. 29 at p.33.
completely ‘taken’ by the city’s development Corporation, amounts to a prohibition. The Court accepted the proposition that it was part of the enjoyment of the whole property of the owner; and therefore amounts to an interference in the enjoyment of property right.

### 2.4.3 Stringency of Protection

Some of the common property rights are the right to use, possess, exclude, device, and so on. In a hierarchical ordering of these rights, the right to exclude has (for instance) been called “one of the most essential sticks in the bundle of rights that are commonly characterized as property. It is one of the most treasured strands in an owner’s bundle of property rights; and the violation of this right is ‘qualitatively more severe’ than the violation of other property rights; and hence it leads to an almost automatic right to compensation\(^{50}\).

### 2.4.4 Time

Time is an important factor in connection with property rights of an individual. The dimension of property right with regard to time can be easily illustrated, when it is associated with the ‘ordinary meaning’ of ownership, the ‘reasonable expectations’ of purchasers, the historically rooted ‘expectations of land owners’, or the applicable background principles of ‘common or statutory laws’ applied to a particular spatial dimension, and determined with reference to a particular point in time. This content may be determined, for example, at the moment of purchase or acquisition\(^{51}\), at the moment of useful employ\(^{52}\), at a particular historical moment\(^{53}\), or at another time. The idea of private property as rights, powers, and immunities, which govern the relative powers of individual over tangible and intangible things, is involved in the enforcement of property rights in law at a particular time.

\(^{50}\) Loretto v. Teleprompter Manhattan CATV Corporation, 458 U.S 435 (1982).
\(^{52}\) Supra n.49.
\(^{53}\) Supra n.44 at p. 715.
2.5 Real and Personal Property

The distinction between real and personal property is closely connected to but not identical with the distinction between immovable and movable property. English law makes a distinction between real property and personal property. The former category covers an interest in land, whereas the latter generally includes interest in property other than land. The term ‘real property’ derives from the fact that land was the only type of property that could be the subject matter of a real action i.e., an action to recover the actual thing (or res) in the common law courts. The term ‘personal property’ derives from the fact that this type of property could only be the subject of a personal action, i.e., an action for compensation for loss. This division into real property (realty) and personal property (personality or chattels) roughly corresponds to the division into immovable and movables in civil law jurisdiction.

Personal property can be sub-divided into two categories: chattels real and chattels personal. Chattels real include leases. Chattels personal in turn can be sub-divided into choses in possession and choses in action. The former category comprises choses that can be enjoyed by taking possession of them, for e.g. a car or a book, whereas the latter category of choses can be enjoyed only by bringing an action for them, for e.g. the right to a debt or the proceeds of a cheque54.

2.6 Corporeal and Incorporeal Hereditaments

Land includes the surface of the earth, together with all the sub-jacent and super-jacent things of physical nature such as buildings, trees and minerals. It also gives the word a far wider meaning, and one, which would not occur to those not well versed in legal terminology. Using the word “hereditament” to signify a right that is heritable, i.e. capable of passing by way of descent to heirs, our legal

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ancestors reached the remarkable conclusion that hereditaments are either corporeal or incorporeal\textsuperscript{55}.

Real property can be divided into corporeal hereditaments and incorporeal hereditaments. Corporeal hereditaments consist of property that affects the senses that may be seen and handled by the body; incorporeal hereditaments are not the object of sensation; they can neither be seen nor handled, they are creatures of the mind and exist only in contemplation.

All property, of whatever kind, is an incorporeal right to the corporeal use and profit of some corporeal thing.

According to Salmond, “real property and immovable property form interesting circles which are very nearly though not quite coincident. The law of real property is almost equivalent to the law of the land, while the law of personal property is all but identical with the law of movables. The partial failure of coincidence is due to any logical distinction but the accidental course of legal development, and possesses no scientific basis. Real property comprises of rights over land, with such advantages and exceptions, as the law has seen fit to establish. All other property rights, whether in \textit{rem} or in \textit{personam}, pertain to the law of personal property\textsuperscript{56}.

\textbf{2.7 Right in \textit{re-propria} and Right in \textit{re-aliena}}

Jurisprudentially, a right to property can also be divided into either a right in \textit{repropria} or a right in \textit{re-aliena}\textsuperscript{57}. Right in \textit{repropria} is applicable only against a self-acquired property of either description or a right, which is the outcome of one’s own effort. E.g. land, buildings, copyrights, literary or artistic works. Right in \textit{repropria} can be divided into: (a) a right in \textit{corporeal} property (tangible property) and (b) right in an \textit{incorporeal} property (intangible property). The word corporeal is

\begin{itemize}
  \item \textsuperscript{55} E.H Burn, \textit{Cheshire and Burn’s Modern Law of Real Property}, (14\textsuperscript{th} edn., Butterworths), p.135.
  \item \textsuperscript{56} Supra n. 39.
  \item \textsuperscript{57} Ibid.
\end{itemize}
related to tangible properties, which can be touched and seen. The word incorporeal means intangible things i.e. which cannot be touched e.g. patents, copy rights etc.

In the case of right in re-aliena, the right is limited to the enjoyment of others’ property. This right is also applicable against both corporeal and incorporeal properties. For example, right to easements, tenancy rights and the right to take usufructs from others’ property under an agreement are rights in re-aliena.

2.8 Literal Meaning of ‘Property’

According to Halsbury’s Law of England, ‘property’ means ‘property of a tangible nature, whether real or personal, including money and wild creatures which have been tamed or are ordinarily kept in captivity, and any other wild creatures or their creases if, but only if, they have been reduced into possession which has not been lost or abandoned or are in the courses of being reduced into possession, but does not include mushrooms growing wild on any land or flowers, fruits or foliage of a plant growing wild on any land’.

Property is to be treated as belonging to any person having custody or control of it or having in it any proprietary right or interest, not being an equitable interest arising only from an agreement to transfer or grant an interest or having a charge on it. Where property is subject to a trust, the persons to whom it belongs are to be so treated as including any person having a right to enforce the trust. Property of a corporation sole is to be so treated as belonging to the corporation notwithstanding a vacancy in the corporation.

The term property is derived from the Latin term “properietat”. Blackstone described property as that “which a master has in the person of his servant, and a father in the person of his child. “The inferior”, he says “hath no kind of property in

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59 See Miller v. Collins (1896) 1 Ch. 573; Re Fox, Brooks v. Marston (1913) 2 Ch.75; A.G v. Farrell (1931) 1 K.B. 8; See also, R.W.M Dias, Jurisprudence, (5th edn., Butterworth, 1985), pp.299-301.
60 Supra n.11 at p.411.
the company, care, or assistance of the superior, as the superior is held to have in those of the inferior”. Thus a man’s property is all that is his in law. But this usage is, however, obsolete in the present day. Another definition for property\textsuperscript{61} is that, “property is the right and interest, which a man has in lands and chattels to the exclusion of others. The term property is a generic term of extensive application, and while strictly speaking it means only the right which a person has in relation to something, or that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects, it is frequently used to denote the subject of the property, or thing itself which is owned or in relation to which the right of property exists”. Black’s Law Dictionary\textsuperscript{62} defines property as that, which is peculiar or proper to any person; that which belongs exclusively to one. In strict legal sense, property is an aggregate of rights which are guaranteed and protected by government. Webster’s Dictionary defines, ‘property’ as “that which a person owns, the possession or possessions of a particular owner”\textsuperscript{63}.

2.9 Statutory Meaning of ‘Property’

Transfer of Property Act, 1882 defines “immovable property” thus: “immovable property does not include standing timber, growing crops or grass”\textsuperscript{64}. This is not an exhaustive definition. Moreover, it has a negative connotation. The General Clauses Act, 1897 defines “immovable property” so as to include, land, benefits that arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth\textsuperscript{65}. In \textit{Suresh Chand v. Kundan}\textsuperscript{66}, the apex court held that “as there is no special definition of immovable property in the Transfer of Property Act, the general definition contained in the General Clauses Act would prevail”\textsuperscript{67}.

\textsuperscript{63} \textit{Webster’s Unabridged Dictionary of the English Language}, (Portland House, New York), p.1153.
\textsuperscript{64} Section 3 of Transfer of Property Act, 1882.
\textsuperscript{65} Section 3(26) of General Clauses Act, 1897.
\textsuperscript{66} (2001) 10 SCC 221.
\textsuperscript{67} \textit{Ibid}. at p. 224.
The Registration Act, 1908 defines “immovable property” as that which includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefits to arise out of land and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops, or grass. In Shantabai v. State of Bombay, trees were held to be ‘immovable property’ because they are attached to or rooted in the earth. Section 2 (6) of the Registration Act expressly says so and though the Transfer of Property Act does not define immovable property precisely, trees attached to earth except standing timber are immovable property, even under Transfer of Property Act, by virtue of the provisions of the General Clauses Act. In the absence of a specific definition, the general definition must prevail. The legal basis for the rule is that trees that are not to cut continue to draw nourishment from the soil and that the benefit of this goes to the grantee.

In Chathu Madia Nair v. The Commissioner, Hindu Religious and Charitable Endowment, Madras, Varadaraja Iyangar J. observed that the undoubted existence of a right to property in the hereditary trustees, by way of their right to administer and manage their institution, must be given due regard while framing a scheme of management for such institution. In another case the Court held that the action of the respondents in ousting the petitioner from taking the contracted forest products deprives him from his valuable property without any compensation, and therefore blatant violation of a Constitutional right. In another case, the Madras High Court held the right to hold a market as an incident of the ownership of the property; and hence a notification issued for closing down private markets unconstitutional.

68 Section 2 (6) of the Registration Act, 1908.
69 AIR 1958 SC 532.
70 Supra n.65.
71 AIR 1958 SC 57.
72 Rabindra Kumar Purakayastha v. Forest Officer, Govt. of Manipur, AIR 1955 Man. 49.
73 Kandiyil Vania Pudukudi Ramunni Kurup v. Panchayt Board, Badagara, AIR 1954 Mad. 754.
In *Deokinandan Prasad v. State of Bihar*74, the Supreme Court of India held that the right of the petitioner to receive pension is ‘property’ under Art. 31 (1) of Indian Constitution; and by a mere executive order, the State had no power to withhold the same.

A *profit a prendre* is an incorporeal right75 clothing the possessor of it with an interest in land. It is a right to enter on the land of another and take there from a profit of the soil. Right to collect and remove sand is a *profit a prendre* and has to be regarded as immovable property within the meaning of Transfer of Property Act and Section 3(26) of the General Clauses Act76. Two things are necessary for a successful claim for a *profit a prendre*: (a) the person claiming must have interest in the land and (b) the claim must be in respect of a produce or profit of soil77.

In addition to the above, a spate of rights has been brought under the rubric ‘immovable property’ by liberal interpretations of the Supreme Court and various High Courts in India. For instance, ‘equity of redemption in mortgaged property’78, ‘reversion in property leased’79, ‘a Hindu widow’s life-interest in the income of her husband’s immovable property’80, ‘a right of ferry’81, ‘an interest of mortgage’82, ‘license for fishing’, ‘right to worship an idol by turn’83 etc.

Ancient, medieval and modern philosophers contributed a lot by propounding various theories related to the ownership of property. Though the theories are disparate, private property has been identified as a "social and legal institution" 84. Philosophers generally perceive property to be an instrument for

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74 AIR 1971 SC 1409.
77 *Chief Controlling Revenue Authority v. Anti Biotic Project*, AIR 1979 All. 355.
81 *Krishna v. Akilanda*, 13 Mad. 54.
achieving fundamental values. Some philosophers of property have concentrated on its ability to advance values such as utility, justice, liberty, self-expression and social evolution\(^{85}\). Another philosophical tradition focuses not upon the purposes of property, but upon its origins\(^{86}\). Private property has been viewed by some philosophers as a bulwark against the dictatorial authority of governments\(^{87}\).

Following their foot prints, jurists have evolved concepts of rights, obligations, liabilities etc. with regard to property; and foregrounded that property is "something" that belongs to "some one" and that it has to be protected by the State. Consequently, the international organisations felt the need for the protection of property rights. The international initiatives in this regard form the subject matter of the next Chapter.


\(^{87}\) This is a theme in *The Federalist Papers*, (1786); and in Friedrich Hayek, *The Constitution of Liberty*, (1972).