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A Critique of the Lockean Theory of Intellectual Property

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ABSTRACT

Jurisprudence is among the most important elements in understanding law and legal method. The traditional idea of property has always been dynamic, and in contemporary conditions the concept of intellectual property has reached its zenith, extending its importance into almost every sphere of human life. In that view, this paper analyses the origins of intellectual property law through the lens of jurisprudence, examining the ideas of John Locke and critiquing the problems they raise.

Keywords: *Ideas, Intellectual property, Labour, Property, Social contract*

I. INTRODUCTION

Civil society is understood as an instrument through which citizens protect their freedom, guarding it against the state on one side and against the economy on the other.¹ What counts as a society is itself contested. The term is ordinarily used of a population that occupies a defined territory, is subject to a common system of political authority and is conscious of an identity distinct from the groups around it, although anthropologists have questioned whether so bounded a unit still describes anything real.² Law regulates social relations and sets common rules acceptable to the community at large, and in doing so it secures a deeper connection between law and society.³ Once that connection is established, the place of jurisprudence in the study of law comes into view. Jurisprudence is often called the eye of law, because it helps to untie the intricacies of legal doctrine and legal method.⁴ Its usefulness cannot be confined by naive assumptions about what it is for.⁵ In that light, this paper examines the shortcomings of the Lockean theory as a justification for intellectual property.

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¹ Sujit Lahiry, *Civil Society Redefined*, 66 INDIAN J. POL. SCI. 29, 29 (2005).

² Thomas Hylland Eriksen, *What is a Society?*, 11 ETHNICITIES 18, 20 (2011).

³ Tanu Kapoor, *Law and Society*, 8(10) INT'L J. SCI. & RSCH. 804, 804 (2018).

⁴ Hitanshu Chhillar, *Jurisprudence: The Eye of Law*, 3(3) INDIAN J. INTEGRATED RSCH. L. 1, 3 (2022).

⁵ Peter Wahlgren, *The Purpose and Usefulness of Jurisprudence*, 48 SCANDINAVIAN STUDIES IN LAW 505, 515 (2005).

II. UNDERSTANDING THE CONCEPT OF INTELLECTUAL PROPERTY

Property resists definition. Every proposed definition falls short of capturing the concept, and the analytical literature offers competing accounts rather than a settled one.⁶ In technical terms, property may be described as a concept employed in a legal system to regulate the relations between persons in connection with one or more goods.⁷ Salmond treats the law of property as the law of proprietary rights *in rem*, and distinguishes it from the law of obligations, which concerns proprietary rights *in personam*. On that usage a freehold or leasehold estate in land, a patent or a copyright is property, whereas a debt, a share or the benefit arising out of a contract is not. Salmond also distinguishes three senses of the term: all the legal rights of a person, proprietary as against personal rights, and rights of ownership in material things.⁸

Property takes various forms. It may be movable or immovable, and tangible or intangible, and intellectual property belongs to the intangible class. The term is tied to the human mind applied to creativity and invention.⁹ Intellectual property law protects intangible assets such as innovations, literary and artistic works, designs, phrases, symbols and images, through rights including patents, trademarks, designs and copyright, which allow owners to profit financially or to gain recognition from what they have made.¹⁰ The objective of that protection rests on two connected premises. The first is that it compensates inventors for the time and money invested in their work, for its publication, and for sharing ideas with the public. The second is that this compensation is delivered through patents or copyrights, because without it innovators would fall back on alternatives such as trade secrets, and a general shift to those alternatives would leave society worse off.¹¹

The jurisprudential background of any subject matter of law is not detachable from the law itself, and intellectual property is no exception. Jurisprudence defines law, identifies its sources, and carries the reflections of human beings on their connection to the world around them.¹² Many legal and political philosophers have written on the jurisprudence of intellectual property. This paper takes up the views of John Locke.

⁶ Adriano Zambon, *Property: A Conceptual Analysis*, 38 REVUS 55, 56 (2019).

⁷ Zambon, *supra* note 6, at 64.

⁸ T. Sita Kumari & G. Indira Priyadarsini, *Concept of Property: A Jurisprudential Perspective*, 1(2) GLS L.J. 7, 9 (2019).

⁹ Lalit Jaipuria, Bhupinder Singh & Rajkishore Nayak, *An Introduction to Intellectual Property Rights and their Importance in Indian Context*, 22 J. INTELL. PROP. RTS. 32, 32 (2017).

¹⁰ Reema Dominic, *A Study on Intellectual Property Rights and its Significance for E-Commerce*, 11(4) INT'L J. CREATIVE RSCH. THOUGHTS h93, h93 (2023).

¹¹ Daniel Stengel, *Intellectual Property in Philosophy*, 90(1) ARCHIVES FOR PHILOSOPHY OF LAW AND SOCIAL PHILOSOPHY 20, 22 (2004).

¹² Rohan Priyam, *Concept of Law in Jurisprudence*, 3(3) INT'L J. LEGAL SCI. & INNOVATION 538, 540 (2020).

III. VIEWS OF LOCKE ON INTELLECTUAL PROPERTY

John Locke (1632 to 1704) was an English philosopher known for his social contract theory and his liberalism. Against the view that human beings possess an inner sense of consciousness and knowledge through which moral truths are grasped, Locke argued that it is experience that leads a person to the truths of the world.¹³ The *Two Treatises of Government* is generally taken to be his major work in political philosophy.

The Lockean account of property can be stated compactly. By mixing labour with a thing, a person acquires exclusive property rights in what was formerly held in common.¹⁴ It is for that reason remembered as the labour theory of property. Its premise lies in Locke's account of the state of nature. In that condition, prior to the formation of the entity called the state, human beings lived according to reason and natural law, and Locke describes it as a state of "peace, good will, mutual assistance, and preservation".^{15,16} Yet three things were wanting in the state of nature: an "established, settled, known law, received and allowed by common consent to be the standard of right and wrong", "a known and indifferent judge, with authority to determine all differences according to the established law", and "power to back and support the sentence when right, and to give it due execution".¹⁷

Once the state is formed to supply those three wants, Locke holds that it has a duty to protect the private property of every individual. On the origin of property he writes that "[t]hough the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property."¹⁸ The claim is qualified in the same section. Labour grounds a right in what it is joined to, Locke adds, "at least where there is enough, and as good, left in common for others", and he returns to that condition when he says that appropriation works no prejudice to any other man "since there was still enough, and as good left".¹⁹ Read against intellectual property, the passage admits of more than one interpretation.

¹³ J.M. Jaja & P.B. Badey, *John Locke's Epistemology and Teachings*, 7(1) AFRICAN RESEARCH REVIEW 1, 2 (2013).

¹⁴ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* bk. II, ch. V, § 27 (1690).

¹⁵ Locke, *supra* note 14, bk. II, ch. III, § 19.

¹⁶ Elizabeth Kharkongor, *Thomas Hobbes's and John Locke's State of Nature and Social Contract: A Comparative Analysis*, 8(2) INT'L J. HUMANITIES & SOC. SCI. INVENTION 16, 17 (2019).

¹⁷ Locke, *supra* note 14, bk. II, ch. IX, §§ 124-126.

¹⁸ Locke, *supra* note 14, bk. II, ch. V, § 27.

¹⁹ Locke, *supra* note 14, bk. II, ch. V, §§ 27, 33.

IV. A CRITIQUE OF LOCKE

Locke's account speaks to the position of the owner or creator of an intellectual product. Whether it speaks equally to the position of the public is the lingering question. Works of the intellect are protected by statute so that the creator is not disadvantaged, but it must be asked whether such a right hardens into a monopoly in the hands of the holder. A monopoly over ideas is a real danger if, as Locke's principle suggests, protection follows from the mere investment of labour in an expression. Creativity may suffer, because every expression of an idea has further uses of its own. If a person were to hold ownership in the idea of making lemon juice, other inventors would be barred from working with comparable ideas.²⁰ The sufficiency proviso is the resource Locke himself supplies against that result, although its application to intangibles is contested: ideas are not depleted by use in the way that land and acorns are, so the constraint bites, if at all, on the exclusive right rather than on the act of appropriation.

A second criticism is that the theory leaves little room for the doctrine of eminent domain. Eminent domain is the power of the state to appropriate private property for a public purpose, exercised in India subject to Article 300A, under which no person may be deprived of property save by authority of law.²¹ Locke does not ignore the question, but the answer he gives is narrow: the supreme power cannot take any part of a person's property without that person's own consent, and taxation is lawful only with the consent of the majority, given either by the people themselves or by representatives chosen by them.²² Consent, on that account, does most of the work that public purpose does in modern property law, and the Lockean framework accordingly sits uneasily with the public domain and with compulsory acquisition. Locke is willing to allow that where the state acts against the interests of individuals they may resist, and put the rule into hands that will "secure to them the ends for which government was at first erected".²³ What he does not address is the converse case, in which the state curtails the right of an individual precisely in the public interest. That question Locke leaves unanswered.

V. CONCLUSION

Locke's theory holds that individuals acquire property rights by mixing their labour with common resources, and it has been extended to intellectual creations. It acknowledges the position of creators, but it invites the difficulties considered above: the risk of monopoly, the

²⁰ Prarthana Saha & Rahul Madathil, *Theories Justifying Intellectual Property*, 4(5) INT'L J. RSCH. PUBL'N & REV. 6135, 6137 (2023).

²¹ INDIA CONST. art. 300A.

²² Locke, *supra* note 14, bk. II, ch. XI, §§ 138, 140.

²³ Locke, *supra* note 14, bk. II, ch. XIX, § 225.

possibility that innovation is stifled where similar ideas cannot be applied, and a sufficiency proviso that is difficult to operate for intangible subject matter. It also leaves the doctrine of eminent domain with little purchase, because Locke makes consent, rather than public purpose, the condition of any state appropriation. The emphasis on the inviolability of individual property rights therefore leaves a gap where the state must override an individual right in the broader public interest. These gaps raise the question of how the protection of creators, the free circulation of ideas and the capacity of the state to act for the common good are to be balanced.

It is with these factors in mind that intellectual property statutes create express exceptions. In India, Chapter II of the Patents Act, 1970 sets out the subject matter that cannot be patented, and Section 3 lists what are not inventions for the purposes of the Act. Labour expended on subject matter falling within Section 3 does not convert it into a patentable invention.²⁴ Behind every legal rule there is a jurisprudential philosophy, which sometimes guides the law and sometimes exposes the mistakes of the status quo so that they may be corrected.

²⁴ The Patents Act, No. 39 of 1970, ch. II, § 3 (India).