

The Term Beneficial Ownership

1. About Elephants

a) “*I Know Them When I See Them*”

There is a popular statement of a former Bank of England official in 1987 regarding the definition of beneficial owners:

They are like elephants; you know them when you see them.¹

This reference to the now well-known *Elephant Test* is not uncommon in English Law.² Already 23 years before the English official, U.S. Supreme Court Justice POTTER STEWART said “I know it when I see it” in his concurring opinion in the decision *Jacobelli v. Ohio*.³ A short excursion with significance to the entire thesis may be permitted here. Unlike their civil law colleagues, common law judges are not required to hide their personal opinion behind the decision of the majority. They are entitled to express their agreement (concurring opinion) or disagreement (dissenting opinion) with the decision. It is not uncommon that, over time, such opinions outweigh the significance of the original majority decision itself.⁴ Probably the most famous example of such an opinion is Supreme Court Justice OLIVER WENDELL HOLMES’

¹ GEIGER, DER WIRTSCHAFTLICH BERECHTIGTE 1; Zulauf, Urs, Gläubigerschutz und Vertrauensschutz – zur Sorgfaltspflicht der Bank im öffentlichen Recht der Schweiz, ZSR 113, N 245, n. 70.

² *Cadogan Estates Ltd v. Morris*, EWCA Civ 1676 (1998).

³ 378 U.S. 189 (1964).

⁴ BELLEAU & JOHNSON, *I Beg to Differ: Interdisciplinary Questions about Law, Language and Dissent* 176; D’Amato, *Legal Uncertainty*, 71 CAL. L. REV. 9 (1983); an example in federal Indian law is the dissenting opinion in *United States v. Alcea Band of Tillamooks* (Tillamooks I), 329 U.S. 40 (1946) (propagating to differentiate between recognized and aboriginal Indian title in connection with compensation for taking) and *Tee-Hit-Ton Indians v. United States*, 248 U.S. 272 (1955) (applying such differentiation), see *infra* chapter “The Beneficial Ownership Concept Applied in Federal Indian Law”, Sect. 3e).

“still-echoing dissent”⁵ in *Lochner v. New York*.⁶ His quote “A constitution is not intended to embody a particular economic theory, whether of paternalism [...] or of laissez-faire”⁷ is a powerful statement against the court allowing politics to interfere with the constitution. H.L.A. HART, in his famous article, *American Jurisprudence through English eyes: The Nightmare and the Noble Dream*, was convinced that Holmes would have many decisions with political motivation to protest against.⁸

Referring back to *Jacobelli v. Ohio*, the case was brought to the Supreme Court by the owner of a movie theater in Ohio who was heavily fined for showing the French movie *Les Amants* in his theater. It is stated that the movie

involves a woman bored with her life and marriage who abandons her husband and family for a young archeologist with whom she has suddenly [...] fallen in love. There is an explicit love scene in the last reel of the film, and the State’s objections are based almost entirely upon that scene.⁹

The question was whether the movie, particularly the love scene, was obscene and therefore not entitled to protection by the First and Fourteenth Amendments of the United States Constitution. Judge Stewart stated that

[...] under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.¹⁰

This example shows the logical use of the *I know it when I see it* explanation in dealing with evidence in a legal case compared to our British bank official. It is clearly irresponsible to make beneficial ownership decisions in such a manner. To at least attempt a definition of such a term is necessary for the proper and fair operation of our legal systems.

⁵ TAMANAH, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 73.

⁶ 198 U.S. 45 (1905); Hand, *Due Process and the Eight-Hour Day*, 21 HARV. L. REV. 500 (1908) and for the aspect of *due process*: Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 819f (1935); Grechenig & Gelter, *The Transatlantic Divergence in Legal Thought*, 31 HASTINGS INT’L & COMP. L. REV. 312 (2008); for the impact of *Lochner* on federal Indian law see: Lee, *Rediscovering the Constitutional Lineage of Federal Indian Law*, 27 N.M. L. REV. 286 ff. (1997).

⁷ 198 U.S. 75; KATHERINE, *John R. Commons and the Origins of Legal Realism; Or, The Other Tragedy of Commons*, UCLA School of Law, Law and Economics Research Paper Series, Research Paper No. 08-19, 1-28 (2009).

⁸ HART, *American Jurisprudence through English eyes: The Nightmare and the Noble Dream*, 5 GA. L. REV. 978 (1958).

⁹ *Jacobelli*, 378 U.S. at 187.

¹⁰ *Id.*

aa) The Problem with Metaphors

The official and the judge find themselves faced with the task of defining a *Ding an sich* (the thing in itself).¹¹ The *Ding an sich* is the concept of the German Philosopher IMMANUEL KANT.¹² FRIEDRICH NIETZSCHE (1844–1900) uses this idea to demonstrate human incapability to explain a concept without using metaphors. Concepts always consist of a multitude of elements. Because these elements are unique (no leaf is identical to another) metaphors oversimplify and never entirely capture every individual element of a concept. In line with NIETZSCHE, Supreme Court Justice BENJAMIN N. CARDOZO (1870–1938) said: “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought they end often by enslaving it.”¹³ Before CARDOZO, LORD MANSFIELD warned: “Nothing in law is so apt to mislead as a metaphor.”¹⁴ However, for lack of better alternatives in bringing about a common understanding of a concept, metaphors remain a useful tool. In any event, to simply say *I know it when I see it* is not a solution, but rather a sign of premature intellectual resignation.

bb) Seeing Elephants v. Seeing Beneficial Owners

Quite contrary to a beneficial owner, an elephant is certainly not easy to overlook. Even little children can define elephants: big grey animals with a trunk and big ears and sometimes very long teeth. More importantly, elephants always fit that description. In other words, once you have seen an elephant, you can always recognize another one. A beneficial owner, on the other hand, can be a 70-year-old drug lord or a 3-year-old girl. As will be shown throughout this thesis, the forms of appearance of Beneficial Owners are so manifold that seeing *one* cannot set a precedent.¹⁵ When I see *one*, I have done only that.

cc) Conclusion

The above sufficiently shows that using the elephant test to describe the nature of beneficial ownership might be amusing but of limited use. Saying *I know it when I see it* dodges a definition which does not depend on a concrete example. A different

¹¹ NIETZSCHE, *Über Wahrheit und Lüge im aussermoralischen Sinn* 309. English translation available on: http://www.e-scoala.ro/biblioteca/friedrich_nietzsche.html.

¹² KANT, PROLEGOMENA §13, Note II.

¹³ Umbeck, *Might Makes Rights: A Theory of the Formation and Initial Distribution of Property Rights*, 19 ECON. INQUIRY, 39 (1981), 245 N.Y. 602 (1927); GROSSWALD CURRAN, *Comparative Law and Language* 9.

¹⁴ Quoted in Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 711 (1917) n. 4.

¹⁵ Bederman, David J., *Beneficial Ownership of International Claims*, 38 INT’L & COMP. L. Q. 938 (1989).

approach is necessary. When discussing the approach, another story that deals with an elephant may be more useful, i.e., *The Blind Men and the Elephant*.

b) The Blind Men and the Elephant

aa) The Story

An ancient fable that is told in different versions in several civilizations also deals with an elephant. There is even a famous poem by JOHN GODFREY SAXE called *The Blind Men and the Elephant*. Here are the first two verses¹⁶:

It was six men of Hindustan
To learning much inclined,
Who went to see the Elephant
(Though all of them were blind),
That each by observation
Might satisfy his mind.

The *First* approached the Elephant,
And happening to fall
Against his broad and sturdy side,
At once began to bawl:
“God bless me!-but the Elephant
Is very like a wall!

The poem continues with the second man touching the tusk of the elephant, taking it for a spear, the third taking the trunk for a big snake, and so on. A heated debate arises amongst the six blind men which the poem does not resolve. There are different versions of the story where a *Deus Ex Machina* impersonated by a king or a wise man tells the blind men that each of them is right and wrong at the same time.

bb) Symbolism for Approaches

The blind men symbolize the different approaches to understanding the essence of an object. The blind men did not fail to understand the essence of an elephant because of their blindness, but because of their stubbornness. If only they accepted that what they discovered did not compete with what their brethren discovered, they would have combined their individual knowledge and a comprehensive understanding of the essence of an elephant would be within their reach!

Everyone who has spent just a few moments pondering about the essence of beneficial ownership will agree that what applies to the elephant also applies here. As will be shown throughout this thesis, beneficial ownership is a very colorful concept that cannot be adequately described with classical legal analysis. Legal

¹⁶ By JOHN GODFREY SAXE (1816–1887) available at: <http://www.suite101.com/content/theadventure-of-culture-writing-a7944>.

analysis is just one element albeit prominent. But, so much being told already at this point, beneficial ownership is a concept to be located at the border between legal and non-legal issues. Non-legal issues are given more importance than usual.¹⁷

2. Elements of the Analysis

The previous section discussed the apparent reluctance to define beneficial ownership beyond the acknowledgement of its mere existence. One of the reasons behind this reluctance is the fact that the beneficial ownership concept despite its ubiquitous use cannot be easily captured in classic legal terminology and conception. If classical legal analysis does not seem to provide the necessary instruments to better capture the beneficial ownership concept, other methods of analysis need to be reviewed. These elements will provide support for the discussion of the location and concrete perusal of the beneficial ownership concept in the second part of this thesis. Several elements (several fields of thought) have been selected to prepare such foundation.

“Once we see the need to study law in an international context, things really get messy.”¹⁸ The first element of analysis involves this *messiness* in the different perceptions of lawyers from different jurisdictions. The second element focuses on the functionality and realism each sustainable legal solution must contain. The third element discusses history, which is particularly important if common law is involved. The fourth element is often overestimated by practitioners and underestimated by academics: experience. The fifth element is language, which in many ways can be seen as the central element around which all the other elements revolve. This chapter will close with a discussion of the Law & Economics movement and its potential influence on the development of the beneficial ownership concept.

a) *Perceptions*

aa) What Are Perceptions?

One of the main pitfalls of legal analysis can be found in its different underlying perceptions. Perceptions are to be understood in this context as the learned and experienced, sometimes expressed and sometimes implied, understanding of a legal system and its concepts. Perceptions are often the fertile ground in which legal thought is planted. Perceptions build part of the collective unconscious of legal thought: they resemble the mentality of the members of a legal system. Quite similar to the mentality of people of any given country, perceptions are not always easily accessible to rational thought, nor are they commonly documented. Legal fields like federal Indian law,

¹⁷ For the interpretation of non-legal, illegal, and anti-legal see *infra* chapter “Common Law, Equity, and Beneficial Ownership”.

¹⁸ Macaulay, *The New versus the Old Legal Realism*, 2 WIS. L. REV. 401 (2005).

as will be shown below, are filled with different perceptions. Not paying attention to perceptions can render court decisions incomprehensible.¹⁹ The fairly generic yet typical example below shall demonstrate the importance of respecting perceptions.

bb) Some Perceptions of Property

Article 544 of the French civil code, with its most celebrated definition of property worldwide states²⁰:

La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements (Property is the right to use and control things in the most absolute manner provided this use and control are not prohibited by the law.).²¹

This Article shall now be compared with its less famous but, at its introduction, not less celebrated Article 641 of the Swiss Civil Code²²:

Le propriétaire d'une chose a le droit d'en disposer librement, dans les limites de la loi. (The owner of an object is free to dispose of it as he or she sees fit within the limits of the law.).²³

A certain similarity in the method applied to these two articles exists. Both work along the lines of a general rule followed by an exception. However, when looking at the composition of these articles, important differences surface. The French article uses property itself as the subject while the Swiss article uses a person, the owner. This is not a simple matter of preference but representative of the programmatic French style versus the more practical Swiss style of legislation.²⁴ At the root of the differences of these styles are the French perception with the emphasis on the right of property and the Swiss' perception with its emphasis on the responsibility of the owner.

The French version still echoes the French Revolution. The revolutionary claim for redistribution by abolishing feudal property had, at least ideologically, the purpose to entitle every French citizen to private property. The right to dispose of property in *the most absolute manner (de la manière la plus absolue)* has a

¹⁹ Bowers & Carpenter, *Challenging the Narrative of Conquest: The Story of Lyng v. Northwest Indian Cemetery Protective Association* 492 ff. (explaining the cultural significance of a certain area of land which was largely ignored by the Supreme Court); see *infra* chapter "Fundamental Aspects of Federal Indian Law" Sect. 3b).

²⁰ MATTEI, BASIC PRINCIPLES OF PROPERTY LAW 19, 74.

²¹ About the general application of this notion of limited absolute ownership in modern civil law codes see Parisi, *Entropy in Property*, 50 AM. J. COMP. L., 605, 609 (2002) with references to § 903 of the German BGB and the Italian Codice Civile.

²² ZWIEGERT & KOETZ, AN INTRODUCTION TO COMPARATIVE LAW 171 (3rd ed. 1998) ("With the coming into force of the Swiss Civil Code the concert of European private law codes was enriched with a powerful new voice representing the particular style of Swiss legal thinking").

²³ Official translation by the Swiss Government available at: <http://www.admin.ch/ch/e/rs/c210.html>.

²⁴ ZWIEGERT & KOETZ, *id.* at 172.

conceptual significance, but also a political ideological connotation.²⁵ The protection of every citizen's right to freely dispose of his own property had not been codified as explicitly before the Code Civil. Until then, property had been understood as a negative right to prohibit other individuals or the government from unwanted interference.²⁶ Despite the obvious difficulties to implement such a generous rule which ended up in countless bureaucratic restrictions, the French Revolution demanded a bold commitment to the law.

The right to dispose of property *in the most absolute manner* does not appear in the Swiss version. The Swiss Civil Code entered into force in 1907, a little more than 100 years after the French Civil Code. The revolutionary passion had faded in the meantime and France had already had other kings and even an emperor. The Swiss Code Civil shifted its focus from the idea of property as a freedom to grant to the simple owner with his rights and obligations, leaving the more programmatic aspect to the Swiss Federal Constitution.²⁷

cc) Conclusion

The example above gives a first impression of the significance of perceptions. Laws, decisions, and commentaries have the purpose to prescribe and explain rules of an individual nation. National laws only have to make sense to their subjects; they do not have to make sense to persons or nations who are not affected by them. Nevertheless, the moment a need arises to explain why one national law is different from another, perceptions can help clarification.

Further, the mere semantic comparison of the wording of regulations from different nations would be too superficial because "*foreign legal data* are not comparative law."²⁸ Such a method of comparison resembles the hopeless attempt to literally translate a funny story or, even more difficult, a joke, into a foreign language: Unfortunately the punch line usually gets lost in translation. The purpose of understanding perceptions is to prevent exactly that from happening.

The perceptions that nourish concepts like beneficial ownership vary. They depend on the individual case and legal topic at hand. For instance, the role of beneficial ownership in federal Indian law is nourished by the current perception that the redistribution of land resources that followed the colonization of the New World was unfair. It is further perceived that this unfairness can only be remedied by granting Native Americans the freedom to own their land legally and not just physically. The federal Indian law discussed in this thesis will have to take these perceptions into account because the mere physical relationship to a resource is

²⁵ Kent, Michael B., *From 'Preferred Position' to 'Poor Relation'*, 39 N.M. L. REV. 8 (2009).

²⁶ Claeys, *Jefferson meets Coase, Land-use Torts, Law and Economics, and Property Rights*, NOTRE DAME L. REV. 154 (2010).

²⁷ Guarantee of ownership: Art. 26 of the Swiss Federal Constitution.

²⁸ Zweigert & Siehr, *Jhering's Influence on the Development of Comparative Legal Method*, 19 AM. J. COMP. L., 220 (1971).

often referred to as *beneficial ownership*.²⁹ An actual discussion of these perceptions would prove to be futile since perceptions are not a result of intellectual debate but rather a matter of awareness.

b) Functionality

According to ZWEIGERT and SIEHR, the best legal method consists mainly of the analysis of solutions to legal issues and their functionality. “The basic methodological principle of all law is functionality.”³⁰ The so-called *functional approach* to law is a key element of Legal Realism,³¹ a highly influential movement lead by American legal scholars such as OLIVER WENDELL HOLMES (1809–1894), KARL LLEWELLYN (1893–1962), FELIX S. COHEN (1907–1953),³² and ROSCOE POUND (1870–1964) who were strongly influenced by the German scholar RUDOLF VON JHERING (1818–1892).

For him [VON JHERING] law came to mean law only if it was effectively applied, while the aims and objects of law became the legally protected interests.³³

Legal Realists insisted “that law must be seen as it actually functions, not as an abstract body of rules, concepts and principles.”³⁴ ARTHUR LEFF, a more skeptical mind, summarized the role of Legal Realism as follows:

[...] out of the hills, came the Realists. What their messianic message was has never been totally clear. But it is generally accepted that, at least in comparison to the picture of their predecessors which they drew for themselves, there were much more interests in the way law actually functioned in society.³⁵

What are these *other interests* that LEFF mentions here? ZWEIGERT and KOETZ refer to these interests as the *needs of social life* which require a search in the domains of other social sciences, such as economics, sociology³⁶ or political science.

²⁹ See *infra* chapter “The Beneficial Ownership Concept Applied in Federal Indian Law”, Sect. 1.

³⁰ ZWEIGERT & KOETZ, *COMPARATIVE LAW* 46 (3rd ed. 1998).

³¹ For the German equivalent *Freirecht* movement see Grechenig & Gelter, *The Transatlantic Divergence in Legal Thought*, 31 HASTINGS INT’L & COMP. L. REV. 348 ff. (2007).

³² Cohen, *Transcendental Nonsense*, 35 COLUM. L. REV. 821 (1935), with a passionate plea for functionalism as a defense against meaningless concepts.

³³ Zweigert & Siehr, *Jhering’s Influence*, 19 AM. J. COMP. L., 217 (1971); see also MATTEI, *BASIC PRINCIPLES OF PROPERTY LAW* 22; Grechenig & Gelter, *The Transatlantic Divergence in Legal Thought*, 31 HASTINGS INT’L & COMP. L. REV. 347 (2007).

³⁴ TAMANAHA, *LAW AS A MEANS TO AN END* 103; COHEN, *supra* n. 32.

³⁵ Leff, *Some Realism about Nominalism*, 60 VA. L. REV. 453 (1974); Macaulay, *The New versus the Old Legal Realism*, 2 WIS. L. REV. 369 (2005); Grechenig & Gelter, *id.* at 359 (2007).

³⁶ Leff, *id.* at 473; GEORGAKOPOULOS, *PRINCIPLES AND METHODS OF LAW AND ECONOMICS* 57; for the United States, see ZWEIGERT & KOETZ, *COMPARATIVE LAW* 44, 247 (3rd ed. 1998).

What is compelling about the functional method is the notion to invite legal thinking to fill in where legal data is missing.³⁷ To assume an intention behind every silence of the legislator or legal scholar is only one possibility of many. One of the intentions behind this thesis is to show that beneficial ownership is a concept that has been familiar to common law countries for at least two centuries. This long history might reveal some functional elements which can help establish a better understanding of the beneficial ownership concept.

Without subscribing to Legal Realism in its entirety, the functional approach will not be honored here as a matter of principle, but rather as an intelligible approach for dealing with a concept of a nature that cannot be clearly considered as a *legal* concept. As will be shown throughout this thesis, beneficial ownership is such a concept.

c) History

The development of concepts has a history. Concepts have a history. The history of a concept may go much further back in one legal system than in another. Regarding the history of beneficial ownership, the American concept is much older than the European concept.³⁸ This alone would not be enough to reflect on the role of history in this thesis. Of course, there is the importance of history as an element of any academic research in general and of legal research in particular. Law is created by people and the conception of law finds its roots in history. By creating law, a minority or a majority of people decide which individual or collective human interests need protection. To study history means to understand the environment in which laws have been created. History can explain the cultural, political, and socio-economic circumstances a law was born into.

History must be a part of the study, because without it we cannot know the precise scope of the rules which it is our business to know.³⁹

However, a *caveat* must be placed here. The historical analysis of the law must not be exaggerated. HOLMES warns:

We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present.

With regard to that light of the past, GOETHE's *Mephisto* makes an important observation in this regard:

³⁷ HART, *American Jurisprudence through English eyes*, 5 GA. L. REV. 987 (1958) (giving a valid account of the cultural differences between US- and English Law using this problem as an example).

³⁸ See *infra* chapter "Beneficial Ownership Used in U.S. Supreme Court Decisions".

³⁹ Holmes, *The Path of the Law*, 10 HARV. L. REV.

Weh Dir, dass Du ein Enkel bist! Vom Rechte, das mit uns geboren ist, von dem ist leider! nie die Frage (Woe unto thee, that thou'rt a grandson born! As for the law born with us, unexpressed; That law, alas, none careth to discern).⁴⁰

That lack of synchronicity between a generation's needs and the law is important to bear in mind when analyzing phenomena like the concept of beneficial ownership. This is particularly true in the case of Swiss law importing Anglo-American legal concepts instead of creating legal concepts which are rooted in Swiss law. If the light of the past is switched off, the light of the present is darkened with incomprehensiveness.

Special weight will be put in this thesis on the historical analysis. The intention is to look beyond an ordinary account of historical facts and dates in order to identify historical circumstances which facilitated the concept of beneficial ownership. For this purpose, traditional legal institutions and concepts need to be scrutinized and checked for their potential to foster an idea that combines factual, economical, and legal elements in the same way as the beneficial ownership concept.

d) Experience

aa) As a Method

At the beginning of this thesis,⁴¹ the expression *I know it when I see it* has been analyzed. In the given context, the half-sentence could be added: *once I have experienced seeing it* without changing the content of the sentence. To resort to experience if the law does not seem to provide a satisfactory answer is not an uncommon method.⁴² An example can be found in the suggestion that the Swiss legislator *intentionally* avoided a definition of beneficial ownership to avoid prematurely narrowing down the amount of beneficial ownership cases.⁴³ In other words, the legislator decided to wait and see what could qualify as beneficial ownership and perhaps then decide on a definition. Not only is such a decision in clear contrast to the wisdom that good legislation should be based on matured and established facts, but to entirely omit a definition of a key term or concept would be the work of a legal *cascadeur*. Officials would thereby be vested with the power to decide what in their experience qualifies as beneficial ownership. Such an approach is very similar to the *I-know-it-when-I-see-it* approach and thus equally unacceptable.

⁴⁰ GOETHE, FAUST, DER TRAGÖDIE ERSTER TEIL 57; English translation from E-text released in 2002 and prepared by David Reed from Project Gutenberg: www.gutenberg.com; VON KLEIST wrote an amusing *anecdote* about a soldier who demands to be executed for the violation of an antiquated code which the legislator had simply forgotten to abrogate; VON KLEIST, SÄMTLICHE ANEKDOTEN UND ANDERE PROSA 59.

⁴¹ See *supra* Sect. 1 of this chapter.

⁴² See *id.*

⁴³ GEIGER, DER WIRTSCHAFTLICH BERECHTIGTE (VSB) 1 f.

Beneficial Ownership

Basic and Federal Indian Law Aspects of a Concept

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