
THE CONTEMPT OF PROPERTY RIGHTS IN INDIA

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ABSTRACT

This paper seeks to analyse the special and exclusive position held by property rights in India and how due to its unique recognition in the Constitution of India and its successive reproduction not only resulted in a dilution of rights but also posed a threat to the basic tenets of public law and interpretation of the Constitution. The law of property has never been a consistent or a static subject. It underwent a lot of changes that resulted in its evolution over time. It has evolved in a flexible manner and has been interpreted in mixed manners across societies and over periods of time. The concept of property includes intangible and immovable property as well. Let us not forget that Article 32 was the avenue utilized to approach the Supreme Court directly against the violation of fundamental rights. The consequence of the 44th Amendment was that there was no further right to approach the supreme court when right to property was infringed by state action. The paper further seeks to analyse the further consequences of the amendment. The inherent contradiction between conserving existing property rights and ushering in a more egalitarian society through redistribution of land led to intense debate within the Constituent Assembly, ending in an uneasy compromise between competing interests. This paper also seeks to explore and discover the context of the debate.

The quest for accumulation was a part of human nature ever since the civilization. Be it the individual's hunt for food or shelter or land or power, human was always in a quest of accumulation. In India, the Manusmriti narrates how the four castes had different ways of obtaining ownership of property. The Brahmin got through sacrifices and other religious practices, the Kshatriyas by conquests and annexations, the Vaishyas from their business and the Shudras by working for others. Property includes land or any item a person can legally claim it. In the patriarchal society of India, even a woman is considered a property of her husband. As rightly described by John Stuart Mill,

The idea of property is not some one thing identical throughout history and incapable of alteration, but is variable like all other creations of the human mind; at any given time it is a brief expression denoting the rights over things conferred by the law or custom of some given society at that time; but neither on this point nor on any other has the law and custom of a given time and place a claim to be stereotyped forever. A proposed reform in laws or customs is not necessarily objectionable because its adoption would imply, not the adaptation of all human affairs to the existing idea of property, but the adaptation of the existing ideas of property to the growth and improvement of human affairs¹

India experienced a long period of British colonial rule for almost two centuries. This repressive colonialism made lives of the masses miserable. Therefore, the framers of the Constitution made sure that the basic human rights which were denied to the masses in the past were ensured through the Constitution.

Property rights in India always had a special and exclusive position due to its unique recognition in the Constitution for being the only fundamental right to be ultimately abolished in 1978. The controversial nature of right to property emerges because the conservation of property rights results in unequal distribution of existing property due to the social stratification system that exists in India. Therefore, there was an inherent contradiction between conserving the property rights entitlements and evolving into a more egalitarian society by redistribution. This explains why the debate over property rights took place over two and a half years. This was the only controversy that was more prolonged than that over any subject except for the choice of official

¹ A.K Ganguli, *Right to Property: Its Evolution and Constitutional Development in India*, Journal of the Indian Law Institute, vol. 48, no. 4, (2006)

languages². However, after the big debate, the Constitution guaranteed to all the citizens the fundamental right to ‘acquire, hold and dispose the property’ under art 19(1)(f).

This inherent contradiction between protection of property rights and embarking on a developmental project on land reforms and industrial growth resulted in tensions in the executive and the legislature. These tensions provoked a lot of parliamentary amendments to the constitution. The Forty Fourth Constitutional Amendment, 1978, deleted articles 19(1)(f) and 31 from part III of the Constitution which deals with Fundamental rights. Article 31 was taken from section 299 of the Government of India Act, 1935 but with certain key differences. These differences strengthened certain property rights and weakened others in the Independent India. Instead, article 300A was inserted which deprived the “fundamental right status” to the right to property.

Just few months after the Constitution came into force, the provisions related to property were invoked by individuals from the states of Bihar, Madhya Pradesh and Uttar Pradesh challenging land reforms in their respective states. The High Court of Bihar struck down the Bihar management of Estates and Tenure Act, 1949 as unconstitutional for being unreasonable in not providing for compensation. This resulted in the First amendment introduced Article 31B and the Ninth Schedule where art. 31B specified that no provision in the Ninth schedule ‘*shall be deemed to be void, or ever to have become void, on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of fundamental rights*’ and the ninth schedule contained thirteen laws.

Nehru’s actions might be justifiable at that time but there was a lack of prescience. This amendment of including the ninth schedule was used by the less responsible government as a restraint to the judiciary. Article 31 continued to be in force for the next almost two and a half decade where a series of constitutional amendments were carried out for neutralizing the impact of judicial interpretation of the Constitution. In the wake of the Supreme Court judgement of the Bela Banerjee’s case³, the Parliament enacted the 4th Constitutional Amendment act, 1955 by which an insertion was made in art 31(2) which laid down that “no law shall be called in question on the ground that the compensation provided by law is not adequate.” In Golaknath⁴’s case, 17th Constitutional amendment act was challenged on the ground that inserting Punjab

² Austin Granville, *The Indian Constitution: Cornerstone of a Nation*. Oxford University Press, (1999)

³ The State Of West Bengal vs Mrs. Bela Banerjee And Others, (1954) AIR 170

⁴ I.C.Golaknath and ors. Vs State of Punjab & Anrs., (1967) AIR 1643

Land Tenures Legislation in the Ninth Schedule resulted in a deprivation of fundamental right to property. The Bank Nationalization case⁵ gave rise to the enactment of 25th Constitutional Amendment Act, 1971 where the word 'compensation' was substituted by 'amount'. The Keshavananda Bharati case⁶ challenged the 25th Amendment Act and sustained 24th Amendment by overruling Golaknath. It is also one of the most celebrated cases which laid down the doctrine of basic structure.

After the two year suspension of human rights and an era of state excess during the 2-year national emergency (1975-77) imposed by the Congress Government, the Janata Party formed a coalition government to reverse the draconian acts by the Congress. One of the key elements of their election manifesto was to remove the fundamental status of the right to property. Therefore, the 44th amendment deleted both articles 19(1)(g) and 31, with the first clause of article 31, which laid down the protection against deprivation of private property without following the procedure laid down by law, being reproduced in article 300A. article 31(2) provided the safeguard of compensation to be paid in such an event of taking property, was completely omitted. This means according to the Constitution, a law can be made which permits to acquire private property without any mandate to pay the compensation. H.M.Seervai has commented on this grave omission: (cite)

"The rights conferred by Article 19(1)(f) and Article 31 (read with the entries in the Legislative Lists regarding acquisition and requisition of property) were so closely interwoven with the whole fabric of our Constitution that those rights cannot be torn out without leaving a jagged hole and broken threads. The hole must be mended and the broken threads replaced so as to harmonise with the other parts of our Constitution. The task is not easy, and the courts will be called upon to answer problems more formidable than those raised by Article 31 after it was amended a number of times."⁷

The 44th amendment had a severe impact on the entire Constitution and was a blow on basic structure which was laid down in the Keshavananda Bharti case. Justice Khanna admitted that right to property is not a part of the basic structure. However, the court observed that basic structure could be found reflected in article 21 read with article 14 and 15. (cite)⁸

⁵ Rustom Cavasjee Cooper v. Union Of India, (1970) AIR 564

⁶ Keshavananda bharti vs State of Kerala and Anr., (1973) AIR SC 1461

⁷ Ishwar Das Murlidhar v. State of Bihar, (1983) AIR Patna 281

⁸ I.R. Coelho v. State of Tamil Nadu, (1970) 3 SCR 530

According to the doctrine of basic structure, the basic features of the Constitution cannot be amended or altered by legislations passed by the Parliament. However, in the subsequent rulings, the position of fundamental rights was restored. In *I.R. Coelho*, it was held that fundamental rights would indeed be a part of the basic structure.

Though compensation was no longer mandatory to be paid to the private property owner, owners belonging to the minority institutions and those who individually cultivated their own land within the ceiling limit were made exceptions. Such provisions leads to discrimination between people belonging to different classes or religious institutions. The inequities that were emerging as a result of this Amendment was obvious due to the retention of other Constitutional provisions which enjoin the payment of compensation in certain circumstances.⁹ Such inconsistency would strike at the root of the equality code and cause serious damage to the basic structure of the Constitution.

As it was held in the case of *M.Nagraj*, “Fundamental rights are not gifts from the State to its citizens, but are basic human rights of intrinsic value. Part III of the Constitution merely confirms their existence and gives them protection.¹⁰”(cite) These basic human rights are inherent to all humans regardless of class, religion, sex, nationality, language, ethnicity or any other status. These rights establish the necessary principles based on which a society survives. As mentioned earlier, ‘property’ is not just the immovable land, it also includes movable and intangible objects as well. Article 32 allows to approach the Supreme Court directly when a fundamental rights is violated by an action of the state. This results in a number of unfortunate and helpless creditors or aged pensioners to take a different recourse.

The content of the right to property to be adopted in the Constitution was one of the most difficult topics that the Constituent Assembly had to encounter. This proves the complexities and intricacies involved with this right to property. After almost two years of debate, the Constituent Assembly decided to include right to property as a fundamental right, particularly in article 31. The Universal Declaration of Human Rights, 1948 was adopted by the United States which stated that everyone had a right to own property and non one shall be deprived of

⁹Gopal Sankaranarayanan, *The Fading Right to Property in India Law and Politics in Africa, Asia and Latin America*, vol. 44, no. 2, 236, (2011) *JSTOR*, www.jstor.org/stable/43239608.

¹⁰ *M. Nagraj V Union of India*, (2006) 8 SCC 212

property arbitrarily¹¹. Inclusion of fundamental right to property in the Indian Constitution was also greatly influenced by the said declaration of human rights.

In this era of globalization and with the rise of multilateral trade agreements and the World Trade Organization, business and international laws have just become more complex. This transition of property rights in developing economies like India throw light upon the political and social foundations of property. Privatization is the central form of economic reform in most of the developing economies, which was the case with India. Because of privatization, private individuals and private companies gained ownership over the state owned property and is also often a synonym for deregulation. This is the time where the debate of right to property arises again.

There is little hope for the revival of a right that has been lost. The 44th amendment was passed in 1978 and it has been 42 years since the passing of the Constitutional Amendment. Though it was challenged in 2007, it was dismissed later in the year 2010. As a result of this amendment, the illegalities that were formed still stand, which is exploited by the government. Due to this exploitation over private property, it led to deprivation and disappointment among the masses. The insight of the framers of the constitution was never flawed. It was all because of the courses that were adopted by the subsequent governments that was severely flawed. So as to undermine the power and authority of the obiter dicta, the power of Constitutional Amendment has been liberally exercised and was at the extremes – it was either applied with a lot of restraints or only nominally. Because of the judicial powers of the Supreme Court which are far-reaching, the mistakes of the subsequent governments were rectified by the application. Though the power of judicial review is exercised not very often, judicial interpretation has increased the scope of it. As a result, the Supreme Court today is one of the most powerful superior courts anywhere in the world. If the government obtains a will to bring about reform, the status quo could be restored by a lot of imagination. However, till then, whether the right to property is dead, or merely dormant is a question that must remain to be answered.¹²

¹¹ A.K Ganguli. *Right to Property: Its Evolution and Constitutional Development in India*, Journal of the Indian Law Institute, vol. 48, no. 4, (2006)

¹² Gopal Sankaranarayanan, *The Fading Right to Property in India Law and Politics in Africa, Asia and Latin America*, vol. 44, no. 2, 236, (2011) *JSTOR*, www.jstor.org/stable/43239608..