

CONSTITUTIONAL CROSSROADS: INDIA'S PROPERTY RIGHTS SAGA IN CONSTITUTIONAL LORE

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ABSTRACT

The Right to own Property has been a contentious topic in India ever since the constitution was drafted. Originally protected by Article 31 as a Fundamental Right, it was progressively diluted by a series of changes designed to limit judicial interference and preserve the legislative branch's authority. Property rights were declared mere Constitutional Rights under Article 300A of the Constitution when the 44th amendment removed them from part III of the Constitution. Through land reforms, the founding fathers sought to strike a compromise between upholding pre-existing property rights and establishing an equitable society. Nevertheless, the battle between the courts and the legislature resulted in a number of corrective rulings and constitutional revisions between 1950 and 1980. The paper examines later modifications and significant cases pertaining to property rights, including certain cases and Amendments and further contrasts India's property rights with those of the United Kingdom and the United States, where they are based under Fundamental Law. This paper contends that the 44th Amendment violated the Socialist principles outlined in the preamble, making it in essence unlawful and has tried to showcase through various case laws, the arbitrariness that the government has portrayed while passing such Constitutional Amendments.

Keywords: Eminent Domain, Right to Property, Kesavananda Bharti Case, Right to Livelihood, Constitution Amendments

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INTRODUCTION

The concept of amendment is based on the premise that the power to ‘amend’ the Constitution was never intended to include the ability to ‘destroy’ it.¹ Right to property has the distinction of being the most amended provision in the Indian Constitution and the only fundamental right ever to be abolished.² Ownership of Property has always been a point of contention between the common people and the government controlling a particular state. Common people had the belief that they were the absolute owners of their land, they believed that the adequacy of proper documentation will suffice and therefore, no one including the government had the right to take over their property. While the law is settled on the above proposition, it is now, a well-known notion that the government through its powers of “*EMINENT DOMAIN*” shall always have a right to acquire any property provided compensation given is “*JUST & FAIR*”. Removal of the right to property as a fundamental right through consecutive amendments aimed at curbing judicial interventions to uphold the supremacy of the legislature. Our constituent assembly has drafted the constitution in such a way that Article 31 elucidates the procedure, that a Statutory law is always required to be passed i.e., for any acquisition to happen a law from parliament needs to be passed. This has never been an issue; the real problem starts from the fact that how should the compensation be computed and what is “fair and just” in the eyes of the law. The idea of making Parliament supreme has been mentioned, deliberated, and discussed during the Constituent Assembly debates as well.³

CONSTITUTIONAL HISTORY

The right to property was among the most contentious provisions even at the time of Constitution framing.⁴ The Constituent Assembly wanted to frame a democratic constitution with a socialist feature to allow the nation in the future to become as socialist as its citizens desired or as its needs demanded. The founding fathers wanted to achieve democratic socialism by guaranteeing the

¹ William L. Marbury, The Limitations upon the Amending Power, 33 Harv. L. Rev. 223, 225 (1919-1920).

² Article 19(1)(f) of the Indian Constitution guaranteed the fundamental right to ‘acquire, hold and dispose of property’ to all citizens subject to reasonable restrictions by the Union and the State legislatures.

³ Austin, 99 “Pandit Nehru stated that no Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community.”

⁴ Granville Austin, The Indian Constitution: Cornerstone of a Nation 41 (1966).

rights of equality, property, and liberty to transform the socio-economic structure in the country by way of land reforms.⁵ To establish a liberal democratic legal order, there was a need to strike a balance between the contradictions of conserving existing property rights and ushering in a more egalitarian society through the redistribution of land. Even in mid-1900s, there were instances where the Supreme Court preferred the ‘*Right to Property*’ over the ‘*Right to Life and Personal Liberty*,’⁶ which was not favoured by the government and ultimately led to the rift between the legislature and the judiciary.

Post-independence, the Indian Government adopted several agrarian and land reform measures that were subjected to judicial scrutiny. This conflict between the Indian legislature and the judiciary can be witnessed through the series of constitutional amendments along with corrective judgments by the Supreme Court from 1950 to 1980.⁷ The State was acquiring land without providing reasonable and proper compensation as opposed to Article 31.⁸ It culminated in a series of High Court orders nullifying the land reform laws and regulations. Patna High Court passed an order to invalidate the Bihar Land Reforms Act, of 1950.⁹ The Patna High Court declared the Bihar Land Reforms Act of 1950 unconstitutional as violative of Article 14 of the Constitution, which guarantees the right to equality before the law. The State of Bihar appealed to the Supreme Court, which upheld the constitutional validity of the Act in 1952. The Court held that the Bihar Legislature was competent to enact the legislation, and the acquisition of the lands was for public purpose and fell under the ambit of Article 31(4) of the Constitution.

⁵ Ibid. 27 “The social revolution meant ‘to get (India) out of the medievalism based on birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit, and social education’”.

⁶ M.P. Jain, *The Supreme Court and Fundamental Rights* in S. K. Verma, Kusum (Ed.), *Fifty Years of the Supreme Court* (Oxford University Press 2015).

⁷ *Kameshwar v State of Bihar*, AIR 1951 Pat. 91; *Bela Banerjee v State of West Bengal*, AIR 1952 Cal 554; *Ram Kissen v Divisional Forest Officer* AIR 1965 SC 625; *Jeejeebhoy v Asst. Collector*, AIR 1965 SC 1096; *State of Madras v D. Namastvaya Mudatiar*, AIR 1965 SC 190; *Vajravelu v Special Deputy Collector*, AIR 1965 SC 1017; *Union of India v The Metal Corpn of India*, AIR 1967 SC 637; *State of Gujarat v Shantilal*, AIR 1969 SC 64; *R. C. Cooper v Union of India* AIR 1969 SC 1126; *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461; *Maneka Gandhi v Union of India*, AIR 1978 SC 597.

⁸ Article 31 of the Indian Constitution mandated that any State acquisition of property must be for a public purpose, only upon enactment of a valid law and upon payment of compensation.

⁹ *Kameshwar v State of Bihar*, AIR 1951 Pat. 91.

ISSUE OF COMPENSATION IN INDIA

Dr. Ambedkar, Law Minister, suggested that the issue of ‘compensation’ would be beyond the purview of any Court if the acquisition of the said property was made by Presidential assent.¹⁰ There were suggestions for adding a schedule enlisting all land reform acts which would have Presidential approval and could not be challenged in a court of law for infringement of any fundamental right or violation of any other constitutional provision.¹¹ The First Amendment was not popular among the masses concerning the power of acquisition enshrined under Article 31(2) and 31B. The ability to acquire property on payment of illusory compensation was used as a weapon of blackmail to secure “donations” for the election funds of the party in power from industrial and commercial concerns.¹² The law-making body was driven by political goals and often attempted to fulfil its interests by way of enactments.

The language of Article 31(2) of the Indian Constitution had left the term ‘*compensation*’ open to interpretations. The Supreme Court defined it as a ‘*just equivalent for the property appropriated*’ meaning payment of full market value to the owner of the private property.¹³ The Government attempted to avoid the discharge of this burden by enacting the Constitution (Fourth Amendment) Act, 1955, which made ‘*adequacy of compensation*’ non-justiciable. Hence, the laws and regulations about land reforms could not be challenged in a court of law for inadequate compensation.

The Supreme Court acted in its role of being the guardian and protector of the fundamental rights of individuals¹⁴. Similarly, the Calcutta High Court declared some provisions of the West Bengal Land Development and Planning Act, 1948 as unconstitutional.¹⁵ In 1950, the government of West Bengal acquired the property of Bela Banerjee and others for a public purpose. This was

¹⁰ Arvind P. Datar, "Our Constitution and Its Self-Inflicted Wounds" [2007] INJLCONLAW 4; (2007) 1 Indian Journal of Constitutional Law 92.

¹¹ “An Act included in the IX schedule could not be challenged under any fundamental right.” Ram Kissen v Divisional Forest Officer AIR 1965 SC 625; Jeejeebhoy v Asst. Collector, AIR 1965 SC 1096.

¹² “The Emergency, Future Safeguards and The Habeas Corpus Case: A Criticism”, P. 149.

¹³ Bela Banerjee v State of West Bengal, AIR 1952 Cal 554; State of Madras v D. Namastvaya Mudatiar, AIR1965 SC 190.

¹⁴ Romesh Thappar v. State of Madras, AIR 1950 SC 124; Daryao v State of Uttar Pradesh, AIR 1961 SC 1457 at 1461.

¹⁵ Bela Banerjee v State of West Bengal, AIR 1952 Cal 554.

considered as a landmark case in India that challenged the government's power of eminent domain. The compensation given was not given by the current date and was given on retrospectively from 1947. This was found to be unconstitutional.

It was held that even though '*Compensation*' is non-justiciable, the court would have to decide and make necessary interventions if the land reforms made no provision or illusory provisions for compensation due to the Fourth Amendment¹⁶. This was a significant legal case in the context of eminent domain in India. The case revolved around the constitutional validity of certain provisions of the Land Acquisition Act, of 1894, particularly those related to the determination of compensation for acquired land. There were four terms that have been expressly analysed by the court. The first being '*Just & equivalent*', the second is '*Just equivalent but not Adequate*', the third is '*Not Illusionary compensation but not Adequate*' and the fourth one which seems to be the most critical one to us is the concept of '*Illusory compensation*'. The court allowed the first three notions of compensation within the ambit of law but considered the fourth aspect i.e. Illusory compensation as something that gives arbitrary power to the Government. Further, it went ahead and held that if the principles laid down by law were 'relevant' for determining compensation, they would be beyond challenge.¹⁷ This was reiterated in the case of the *State of Gujarat v. Shantilal Mangaldas*.¹⁸ The Gujarat High Court ruled that sections 53 and 67 of the Bombay Town Planning Act of 1954 were unconstitutional in response to a writ petition filed by Shantilal Mangaldas. The Supreme Court affirmed the Act's validity in 1969 after the State of Gujarat filed an appeal after which the Court determined that the Act constituted a legitimate use of the government's eminent domain authority and that the compensation offered was reasonable and equitable.

Further, the Bank Nationalization case¹⁹ contested the government's 1969 nationalization of banks. The Supreme Court of India upheld the constitutional validity of the nationalization of banks in response to a writ petition filed by RC Cooper, a shareholder in several banks, alleging that his

¹⁶ Vajravelu v Special Deputy Collector, AIR 1965 SC 1017; Union of India v The Metal Corpn of India, AIR 1967 SC 637; State of Gujarat v Shantilal, AIR 1969 SC 64.

¹⁷ R. C. Cooper v Union of India AIR 1969 SC 1126.

¹⁸ State of Gujarat v. Shantilal Mangaldas 1969 AIR 634 1969 SCR (3) 341 1969 SCC (1) 509.

¹⁹ RC Cooper v. Union of India 1970 AIR 564, 1970 SCR (3) 530, AIR 1970 SUPREME COURT 564.

fundamental rights under Articles 14, 19, and 31 of the Constitution were violated by the nationalization of banks. The Court ruled that the government could nationalize banks for public purposes and that the right to property was not a *Fundamental Right*. The Court also held that the government's power of eminent domain was subject to judicial review and that compensation for acquired property must be just and fair. A 'true recompense' principle was laid down for computing the amount of compensation at the time of the nationalization of banks.²⁰ The true recompense principle means that if the state infringes on a person's right, then equal and adequate reimbursement will be paid by the state for mending the harm.

ANALYSIS OF SUBSEQUENT AMENDMENTS AND CASES RELATING TO PROPERTY

The Constitution (Twenty-Fifth Amendment) Act, 1971, was brought to dilute the fundamental right to property by substituting the term 'compensation' with 'amount' under Article 31(2) as the Supreme court had interpreted 'compensation' previously in various judgments.²¹ The term 'amount' would not be open to liberal statutory interpretation. It would limit judicial intervention in the determination of the quantum of money to be rewarded for the acquisition of property by the government. This also curtailed the fundamental right to property and permitted the acquisition of private property by the government for public use, on the payment of compensation which would be determined by the Parliament and not the courts. The amendment also introduced a new Article 31C, which prevented citizens from challenging laws relating to the acquisition of property if they were made to implement the Directive Principles of State Policy contained in Article 39(b) or (c). Consequently, the Amendment was challenged by the Kesavananda Bharati case²². One of the largest benches in Indian legal history heard the case, consisting of 13 judges from the Supreme Court of India. The Court held that the Parliament could not amend the Constitution to change its fundamental structure. It also held that the right to property was not a fundamental right and that the government has the power to acquire property for public purposes, subject to the payment of *Just and Fair compensation*. The Court also held that the government's power of eminent domain

²⁰ R.C. Sarkar, 'The case of Nationalization of Banks: Culmination of Trends', 4/CPS (1970), 55.

²¹ N.A. Palkhivala, 'Our Constitution Defaced and Defiled' (1974).

²² Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

is subject to judicial review and held that the ‘amount’ could not be ‘*illusory*’ or ‘*arbitrary*’ to go against the “*judicial conscience but also that of every reasonable human being.*” Further, it was held that the amount payable as compensation to the owner of private property need not necessarily be equivalent to the market value of the property. Instead, it should have some rational nexus with the value of the property. However, the Court did not clarify the test of ‘Illusory compensation,’ implying that it must be resolved on a case-by-case basis.²³

The Government enacted the Constitution (Forty-Fourth Amendment) Act, 1978, which removed the Right to Property as a fundamental right under Part III of the Constitution. It became a constitutional right under Article 300A,²⁴ and the “*law*” given under this provision should be “*Reasonable, fair and just*” as has been held in Maneka Gandhi case²⁵ to expand the purview of judicial review. The judiciary held that “*fairness and reasonableness of the statute under 300A is open to examination on the ground whether the impugned Act is just, fair and reasonable or arbitrary in nature.*”²⁶ Various petitions have been placed in the courts for reinstatement of the Right to property as a Fundamental Right.

In the case of Sanjiv Agarwal v. Union of India, it was argued by the petition that the establishment of Special Economic Zones mainly in the areas of Singur and Nandigram has led to mass displacements of people and in this view, Article 300A should be again made a fundamental Right. The court dismissed the petition and said that such an act would open settled constitutional cases. Further in 1985²⁷, The State of Maharashtra and the Bombay Municipal Corporation made the decision to expel pavement and slum inhabitants from Bombay city in 1981. Olga Tellis and other individuals contested the eviction, claiming that it went against their fundamental rights. The Supreme Court ruled in 1985 that evictions from one's home cannot be carried out by the government unless alternate housing is provided.

²³ Sujit Choudhry, Madhav Khosla, ‘The Oxford Handbook of the Indian Constitution’, [2016] Oxford University Press, ISBN 978-0-19-870489-8 at 981.

²⁴ Article 300A states that “no person shall be deprived of his property save by authority of law”.

²⁵ Maneka Gandhi v Union of India, AIR 1978 SC 597.

²⁶ Basantibai Fakirchand Khetan v. State of Maharashtra, AIR 1984 Bom 366 25; Mohinder Pal vs State Of HP, AIR 1995 HP 15.

²⁷ Olga Tellis & ors. V. Bombay Municipal corporations & ors. 1985 SCC (3) 545.

The Court ruled that the right to a livelihood is a part of the Indian Constitution's Article 21 right to life. The Court further held that just and equitable compensation must be provided for acquired property and that the government's eminent domain authority is subject to judicial review. The Olga Tellis case has become a landmark case in India for the protection of the rights of the urban poor and the homeless. The issue got settled for some time but again due to the Roerich and Devika Rani Roerich Estate (Acquisition & Transfer) Act, 1996, questions were put up on its constitutionality.

Finally, in 2011,²⁸ the Supreme Court of India heard the case and affirmed the Act's constitutional validity. The Court determined that the Act constituted a legitimate use of the government's eminent domain authority and that the compensation offered was reasonable and equitable. The case concerned the purchase of Linaloe cultivation land that Dr. Roerich had sold to K.T. Plantations Pvt. Ltd. The local officers declined the request for mutation in respect of those lands, and the lands stood in the name of the late Dr. Roerich in the Record of Rights. The case also dealt with the interpretation of Article 300A of the Constitution and whether the Act was violative of the said Article in so far as no specific compensation was prescribed for the acquisition of 468 acres of Linaloe plantation. The Court held that the Act was not expropriatory in nature and that the government's power of eminent domain was subject to judicial review. Recently, this is the current stand of the Supreme Court of India regarding the acquisitional rights that the government has. Long-story-short Supreme Court has the power of Judicial review when it comes to the adequacy of the compensation. This is a safeguard for the people of the country and helps to give justice to people.

RIGHT TO PROPERTY IN THE UK AND USA

In the *commonwealth system*, the right to property is a well-established principle under the fundamental law²⁹. It can be taken away only by the legislature by an enactment of a statute prescribing the regulations for payment of just and adequate compensation to the owner of the

²⁸ State of Karnataka v. K.T. Plantation Pvt. Ltd. & Anr.. AIR 2011 Supreme court 3430.

²⁹ Bowles v. Bank of England [1913] 1 Ch. 57. It states that right has been recognized by the unwritten fundamental law of Britain and followed by its colonies since ages.

private property for the acquisition of his property. Roscoe Pound has quoted Daniel Webster, an eminent jurist, who believes that saving fundamental laws is in the paramount interest of humankind.³⁰ It is a right that can only be taken away by express legislation to uphold the rule of law which presupposes no one is above the law. In the United States, acquiring property is linked with freedom so much so that it serves as a motivation to go to work every day to be independent³¹. According to the Fifth Amendment to the US Constitution, the State is required to give ‘*just compensation*’ for acquiring any private property by the Federal Government.³² Whenever there is a departure from the common law principle irrespective of whether it is facilitated through legislation or regulation, the property owner must be adequately compensated.

In the United Kingdom, the right to property is recognized as a ‘bundle of rights’ where the state has the power to acquire property compulsorily, it could only do so on payment of compensation and for a public purpose.³³ It has to oblige the owner of a property to alienate his possession for a ‘reasonable price,’ and this power must be exerted with caution.³⁴ The House of Lords has reiterated that compensation will be rewarded unless explicitly mentioned by a statute; it should not be construed that any property can be taken away without compensation.³⁵

CONCLUSION

Will, not force, is the basis of the state.³⁶ The idea behind having the fundamental rights and Supreme Court as the guardian against any violation is to uphold the Constitutional supremacy in the country. The amendment was constitutional through its process to invalidate the right to property as a fundamental right but unconstitutional in spirit as it went against the feature of *socialism* enshrined in the preamble to the Indian Constitution. Even at the time of constitution

³⁰ Pound, Roscoe, "The Spirit of the Common Law" (1921). College of Law, Faculty Publications. 1. <https://digitalcommons.unl.edu/lawfacpub/1>.

³¹ '16. Property Rights and the Constitution' (*Cato Institute*, 16 February 2017) <<https://www.cato.org/cato-handbook-policy-makers/cato-handbook-policy-makers-8th-edition-2017/property-rights-constitution>> accessed 1 June 2020.

³² Tom Allen, "The Right to Property in Commonwealth Constitutions" [2004] Cambridge University Press, ISBN 0-521-58377-2, 14.

³³ *Ibid*.

³⁴ William Blackstone, Commentaries on the Laws of England, I (London: Dawsons of Pall Mall, 1966; reprint of Oxford: Clarendon Press, 1765), p. 135.

³⁵ *Supra* note 18.

³⁶ S.N. Agrawal, *Gandhian Constitution for Free India*, (1 ed., Atlantic Publishers and Distributors Pvt. Ltd. 1998), 58.

framing, it was opined that democracy was essential to uphold socialism in India. The concept of socialism, in the Marxist sense, could not be applied in India, and this led to the evolution of the concept of Gandhian Socialism³⁷. It aims at establishing a classless society for the social and economic development of the people.

It was unconstitutional because it was a tactic of the Parliament to escape the bounds set by the judiciary by diminishing the power of judicial review and scrutiny. Judicial review is an established practice across jurisdictions, including third-world countries.³⁸ The court was inhibiting the state from exercising its arbitrary powers to take away property without giving proper compensation to the owner. The escapism is clear from the quantum of cases decided explicitly about the property at that time.³⁹

A nation that promotes the ideals of liberty and justice is a protector of all property rights because property serves as the foundation of all rights.⁴⁰ The analysis uncovers that the amendment can be viewed as unconstitutional because it seized freedom from the citizens and narrowed its power against other fundamental rights. The Supreme Court previously laid more importance to the right to property over the right to life also because the right to property would be more unambiguous as compared to the rest of fundamental rights.⁴¹ It would have been a powerful, concrete, and enforceable fundamental right. In my opinion, if the amendment were to pass today, it would be declared invalid at the very outset based on constitutional morality and transformative constitutionalism.

³⁷ It emphasizes on creation of self-sufficient villages and use of excess wealth for the upliftment of weak and downtrodden without any caste, class, or religious bias.

³⁸ John Hatchard, Establishing Popular and Durable National Constitutions in Commonwealth Africa, in *The Creation and Amendment of Constitutional Norms* at 1.

³⁹ *Supra* note 8.

⁴⁰ *Supra* note 28.

⁴¹ *Supra* note 7.