



RIGHT TO PROPERTY: EVOLUTION FROM A FUNDAMENTAL RIGHT TO A HUMAN RIGHT

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INTRODUCTION

The Basic Structure Doctrine emerged from *Kesavananda Bharati v State of Kerala*¹, the most celebrated case in the legal history of India. This doctrine holds that the power to amend the Constitution guaranteed under Article 368 must not damage or destroy the basic features of the Constitution.² The following features have been identified by the Supreme Court as being a part of the basic structure:

1. Judicial Review
2. Democracy
3. Secularism
4. Rule of Law
5. Harmony and Balance between Fundamental Rights and Principles of State Policy
6. Limited Amending Power
7. Equality
8. Independence of Judiciary

Fundamental rights guaranteed under Part III of the Constitution are also included in the basic structure. Even though the Right to Property is merely a statutory right under

Article 300A, it should be a fundamental right and hence, included in the Basic Structure Doctrine because of various social, political and legal factors which operate in the Indian context.

This paper aims to understand the history and background of the property law in India. It seeks to analyse the evolution and development of the right to property from being a fundamental right to being demoted to merely a statutory right. Further, it seeks to provide social, political and legal reasons as to why it should be a fundamental right in India and hence, included in the Basic Structure Doctrine. The paper concludes by providing a comparative analysis of the property law provisions of India and USA.

HISTORY AND BACKGROUND

• UNDER BRITISH INDIA

The concept of property is one which is dynamic and keeps on evolving over time. The legal framework regulating property also keeps changes depending on the evolution of the concept of property. If we trace the history and background of the right to property in India, it would be pertinent to look at the right to property under the rule of the British. The report of the Joint Committee on Indian Constitutional reforms³ recommended that the land should be taken only in cases of public interest and

¹ *Kesavananda Bharati v State of Kerala*, (1973) 4 Supreme Court Cases 225.

² Jugen Bast, *Verfassung Und Recht in Uebersee/ Law and Politics in Africa, Asia and Latin America*, vol. 44 no. 2, 273-276. <https://www.jstor.org/stable/43239612?Search=yes&resultItemClick=true&searchText=basic&searchText=structure&searchText=doctrine&searchUri=%2FAction%2FdoBasicSearch%3FQuery%3Dbasic%2Bstruc>

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³ Report of the Joint Parliamentary Committee on Indian Constitutional Reforms, 1934 Vol I para 369.



compensation should be paid to the owner i.e. essentially the principle of eminent domain should be included. Based on the recommendations and certain changes in the amendments, section 299 of the Government of India Act, 1935 provided certain safeguards against a compulsory acquisition of land property and for payment of compensation in the event a property is acquired for public purposes.⁴

• UNDER THE INDIAN CONSTITUTION

After independence from the British Rule, a Constituent Assembly had been formed with the purpose of framing the Constitution for India. Driven by the goal of social justice, the draftsmen of the constitution created separate chapters for the basic justiciable tenets i.e. Fundamental Rights and for values that India would cherish i.e. Directive Principles of State Policy.⁵ Right to Property was included as a fundamental right and was dealt with by two provisions. Firstly, Article 19(1)(f) declared that all citizens shall have the right to acquire, hold and dispose of property. Secondly, Article 31 was included which basically reiterated the section 299 of the Government of India Act, 1935 and preserved the principle of eminent domain, thereby providing certain safeguards against compulsory acquisition of individual properties by the sovereign. Soon after the

Constitution came into force, there was a plethora of litigation concerned with the constitutional provision of right to property. Majority of these cases dealt with challenging laws on the grounds of violation of property rights and also invoking the right to equality guaranteed under article 14.⁶ The courts all across India dealt with these cases in a somewhat similar fashion, by striking down the various acts as unconstitutional and restricting the government from acquiring land from private owners.⁷ As a result of these decisions, the Government was concerned with the fact that the courts were challenging their authority and this was evident by the letter which Prime Minister Nehru wrote to the Chief Ministers which said that "If the Constitution itself comes in our way, then surely it is time to change that Constitution"⁸

• ANALYSIS OF VARIOUS CASE LAWS HIGHLIGHTING THE EVOLUTION OF RIGHT TO PROPERTY

The First Amendment was brought in the year 1951 and it inserted Articles 31A and 31B along with the Ninth Schedule in the Constitution. The amendment was brought by the central government as it felt that the judicial pronouncements may endanger the whole zamindari abolition programmes.⁹ Article 31A smoothened the process of

⁴ A.K. Ganguli, *Right to Property: Its Evolution and Constitutional Development in India*, JOURNAL OF THE INDIAN LAW INSTITUTE, vol. 48 no. 4, 489-526. https://www.jstor.org/stable/pdf/43952060.pdf?ab_segments=0%2Fdefault-2%2Fcontrol&refreqid=search%3A125e74dbd5ece3a3aba0aa7e3a1a8bf8.

⁵ *Supra* note 4.

⁶ Namita Wahi, *The Fundamental Right to Property in the Indian Constitution*, CPR INDIA,

<http://cprindia.org/sites/default/files/chapters/The%20Fundamental%20Right%20to%20Property%20in%20the%20Indian%20Constitution.pdf>.

⁷ *Id.*

⁸ Letter of 1.2.1951, Nehru's Letters to Chief Ministers, Vol. 2, Delhi 1997, p. 325.

⁹ Anirud Prasad, *A Critique of the Ninth Schedule to the Constitution of India*, The Bar Council of India Journal, 58 (1978).



zamindari abolition¹⁰ and Article 31B along with Ninth Schedule operated with retrospective effect such that any laws included in the Ninth Schedule could not be challenged as being violative of fundamental rights. This was done to prevent judicial intervention with acts which intended to promote social change thereby fulfilling the constitutional goal of egalitarianism.¹¹

The discussion of the following case laws and the amendments becomes important to understand how the interpretation of the right to property changed overtime:

In the case of *State of West Bengal v Bela Banerjee*¹², the acquisition of urban land for resettlement of refugees was in question. The court held that it is the prerogative of the Parliament to enact laws that fix the amount of compensation to be provided or specify the principles on the basis of which the compensation would be decided. The judiciary or the courts have no role in this context. However, the role of the courts comes into the picture in deciding whether the compensation provided is 'just equivalent' of what the owner has been deprived of.

After the above judgment, the Parliament reacted by introducing the Fourth Amendment in 1955 which inserted clause (2-A) wherein the Parliament excluded the right of the courts to decide upon the level of compensation. Later, in 1964, the 17th

Amendment was introduced to further extend the scope of Article 31A.

In the case of *Vajravelu Mudaliar v Special Deputy Collector*¹³, the act in question discriminated between taking land for housing purposes and for public purposes. The court held that it cannot question on the adequacy of the compensation but if the compensation provided is illusory or if the principles on the basis of which compensation is to be decided are irrelevant then the legislature commits a fraud on its powers. The new formula was somewhat different from the *Bela Banerjee's* view but still the courts claimed a foothold in the area of compensation and did not completely vacate the field.¹⁴

Following the same new formula discussed above, the court in the case of *Union of India v Metal Corporation*¹⁵, held that the act in contention which provided that the unused equipments of a company were to be valued at the actual cost and the used equipments were to be valued at the written down value was invalid as it does not provide compensation within the meaning of Article 31(2).

The view changed with the case of *State of Gujarat v Shantilal*¹⁶ wherein the court repudiated the idea of 'just equivalent' and held that the court would interfere only if the compensation was illusory or the principles were irrelevant and thereby it held

¹⁰ Anonymous, *Right to Property Under the Constitution of India: An Analysis*, SHODHGANGA, http://shodhganga.inflibnet.ac.in/bitstream/10603/48090/9/09_chapter%202.pdf.

¹¹ *Id.*

¹² *State of West Bengal v Bela Banerjee*, (1954) AIR SC 170.

¹³ *Vajravelu Mudaliar v Special Deputy Collector* (1960) AIR SC 1080.

¹⁴ *Supra* note 10.

¹⁵ *Union of India v Metal Corporation* (1965) AIR SC 1017.

¹⁶ *State of Gujarat v Shantilal* (1969) AIR SC 634.



the Bombay Town Planning Act, 1955 as valid. This case ensured greater freedom to the legislature and the scope of judicial review was restricted to the extreme situation of abuse of legislative power.¹⁷

The final case which again changed the interpretation of the word 'compensation' was the *Bank Nationalisation*¹⁸ case wherein the Banking Companies (Acquisition and Transfer of Undertaking) Act 1969 was held invalid as the principles on the basis of which the compensation was to be determined were irrelevant and thus, the compensation was not within the meaning propounded by Article 31(2). This decision was criticised on two grounds, firstly, it runs counter to what the fourth amendment is designed to achieve¹⁹ and secondly, that the court had interpreted the meaning of compensation in various different ways which caused confusion.

As a result of this case, the government was scared of the fact that such an interpretation would create difficulties in the government's socio-economic programme.²⁰ Thus, the Parliament introduced the 25th Amendment Act which replaced the word 'compensation' with the word 'amount' so that the interpretation offered in the *Bank nationalisation* case could not be used and the scope of judicial review gets compressed.

• PRESENT POSITION

The above case laws highlight the constant tussle between the legislature and the judiciary. The Parliament, on one hand wants freedom in acquiring land and thereby fulfilling the socio-economic objectives which lead to formation of a welfare state. On the other hand, the judiciary is concerned with upholding the fundamental right of individuals. This can broadly be construed as a tussle between Directive Principles of State Policy and Fundamental Rights. The fundamental right to property was a fore front of controversy for over 25 years before it was resolved by the Janata Government by the 44th Amendment.²¹ This amendment repealed the Article 19(1)(f) and Article 31 as a result of which the right to property was no longer a fundamental right but merely remained a statutory right under Article 300A. Thus, any person could no longer approach the Supreme Court directly under Article 32. The only remedy would be approaching the high court under Article 226 or any civil court.²² Also, the Article 300A is based on the language of Article 31(1) and it does not expressly provide the obligation to compensate the owner.

Regarding the principle of eminent domain, the court in the case of *KT Plantation Private Ltd v State of Karnataka*²³ held that the principle of eminent domain is enshrined in the Article 300A even though there is no express mention. As a result, the public purpose condition and the compensation obligation are to be followed. Finally, in *P.T. Munichikkanna Reddy v Revamma*²⁴, the court extended the scope of right to property

¹⁷ M.P. Jain, *Indian Constitutional Law*, WADHWA & Co., vol. 2, 1485.

¹⁸ R.C. Cooper v Union of India (1970) AIR SC 564.

¹⁹ *Supra* note 10.

²⁰ *Id.*

²¹ *Id.*

²² Naveen Sharma, *Right to Property in India*, DEEP & DEEP PUBLICATIONS, 240-49, 1990.

²³ *KT Plantation Private Ltd v State of Karnataka* (2011) 9 SCC 1.

²⁴ *P.T. Munichikkanna Reddy v Revamma* (2007) 6 SCC 59.



and held that it is not just a statutory right but is also a human right.

SOCIAL, POLITICAL & LEGAL ASPECTS

Indians do possess the right to property, but many Indians are not aware of the fact that what the right means to them and how the right adequately protects their land. Apart from this, there exist several other regulatory restrictions that can protect individuals from freely utilizing their piece of land.²⁵ In the absence of secured property rights and regulatory restrictions on property, it has affected the poorest in India. While the rich people mostly living in the cities have comparatively secure titles to their property, the poor people living in farms, villages and forests do not.²⁶ If the property rights can be secured by the poorest in India, then it will help the country to eradicate poverty and prosper as a whole. The property rights of millions of people in India are neither secured nor well defined.²⁷ The following points can be taken into consideration in order to strengthen the thesis of this research paper:

- 1) Compulsory acquisition: From the past few decades the state has extended the scope of compulsory acquisition; leading to displacement of many helpless people without adequate consideration. This problem has been one of the major sources of discontent amongst the people in the country and thereby influencing many movements in order to secure their rights.

- 2) Insecure titles: Tones of people in India do not have a clear title to their respective lands, and it is hard to determine the title of one's land even though the person is living on the piece of land for many years.

- 3) Poor land records and Administration: The state has not only failed its responsibility in recognizing the land rights of many citizens but also has failed in creating adequate mechanisms for determining the title of people's property.²⁸ The land laws are poorly maintained plus the laws are numerous and cumbersome and extremely hard to comply with.²⁹ Hence the land or property laws needs to be well defined so that the people are not exploited in relation to their respective property.

- 4) Limited Scope of Legal Procedure: Due to the omission of Article 31 of the constitution, the illiterate population of the country has been exploited at various stages of the legal process. For instance, if the petitioner wants to appear in the court on the ground of right to property then the petitioner will have to comply with the provisions of Article 226 wherein the petitioner can only appear in the High Court or any civil court. However previously the position was different as the petitioner could also appear in the Supreme Court just by complying with the provision of Article 32. This change has led to a lot of inequality amongst the citizens of the country which was not the stand of the constituent assembly at the time of framing of the constitution.

²⁵ Anonymous, *Property Rights*, INDIA INSTITUTE, <http://indiai.org/property-rights/>

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*



The following legal aspects are of prime importance while discussing the right to property as a fundamental right:

• BASIC STRUCTURE DOCTRINE

In the case law of *Kesavananda Bharti vs State of Kerala*³⁰, Justice Khanna held that no article of the Constitution is immune from the amendatory process because it is related to a fundamental right and is contained in the part III of the constitution.³¹ Justice Khanna was of the view that the right to property cannot be considered as a basic feature of the constitution. However, this view was neither sought for, neither supported by the other majority of judges.³² As a matter of fact, the judgement of *Kesavanada bharti*³³ was delivered at the time when the Right to Property was a part of the constitution and majority of the judges in the case believed that the fundamental right were never supposed to be beyond the scope of Basic structure of the constitution. Thus, it is impossible to read the decision of Justice Khanna so as to make the fundamental rights beyond the scope of the Basic Structure.³⁴ The court went ahead and observed that the basic structure was reflected in the Article 21 along with Article 14 and Article 19.³⁵ These 3 Articles comprised the core values of the Constitution and if allowed to amend then it would completely change the nature of the Constitution and would nullify the essential

elements on which the constitution was framed.³⁶ In the following case of *M.Nagaraja*³⁷, the court held that the "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." Any legislation which abridges such rights would be violative of the basic structure doctrine. Even the Right to Property is considered as a human right and thereby placing it on the same pedestal from which it had dislodged.³⁸ Human rights are considered to be one of most integral and essential principles on the basis which a society is formed and if property rights are also considered as basic human rights then it cannot possible be said that it is not a basic feature of the constitution.

• EMINENT DOMAIN

Article 31 of the constitution is the representation of the principle of eminent domain in India. With such a great history and firm establishment of the principle, there was little reason to amend the legislation. The idea of formulating the principle of eminent domain in the Constitutional Assembly was developed due to common understanding between the drafters for the reasons specified. From the time that Runnymede was made famous till the House of Lords upheld the English regent's acquire saltpetre for his ammunition and thereafter, it has been

³⁰ *Supra note 1*

³¹ Gopal Sankaranarayanan, *The Fading Right to Property in India*, NOMOS VERLAGSGESELLSCHAFT MBH, vol. 44 no. 2, 220-236. https://www.jstor.org/stable/pdf/43239608.pdf?ab_segments=0%2Fdefault-2%2Fcontrol&refreqid=search%3Ad9e56d9d740b3fdd4ded465a412a26f8.

³² *Id.*

³³ *Supra note 1*

³⁴ *Supra note 31*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *M.Nagaraj v. Union of India*, (2006) 8 Supreme Court Cases 212

³⁸ *Supra note 31.*



universally the state that has the right to acquire private property for a public purpose, recompense.³⁹

Originally the Article 31 consisted of 6 sub clauses, wherein the first sub clause laid down the protection against deprivation without complying the procedure specified by law. The 2nd sub clause provided with necessary compensation in situations wherein the principle was applied. This provision extended to both movable and immovable property.⁴⁰ However, post the 44th amendment act the Article 31 was deleted from the Part III of the constitution with the intention of placing it in some other part of the constitution.⁴¹ However only the 1st clause of Article 31 was reincarnated as Article 300-A, while all the remaining sub clauses were deleted.

Many experts of the Indian constitution have heavily criticised the omission of the various provisions under Article 31 of the constitution. They believe that the decision was implemented just to fulfil an electoral pledge of the Janta Party.⁴² Due to circumstances explained above the level of discrimination between the majority comprising mainly of actual tillers and personal holders of land and the minority i.e. mainly the rural poor. This situation is not only anomalous, but also is wholly against the ideals of the constitution enshrined in the directive principles, especially in relation to economic and social justice.⁴³ Such

inequalities between the majority and minority would strike at the root of the equality code and thereby damaging the basic structure of the constitution.⁴⁴

COMPARATIVE ANALYSIS BETWEEN USA AND INDIA

The present position regarding property rights in India has been discussed at length above concluding that it is available only as a legal right under Article 300A and not as a fundamental right. As far as the United States of America is considered, their views were strongly shaped by the English constitutional traditions and they referred the Magna Carta as a safeguard against the arbitrary government.⁴⁵ The right to property is dealt with by the Fifth Amendment. It protects the right to property in two ways.⁴⁶ Firstly, it takes into account the concept of fair procedures by providing that any person may not be deprived of property by the government without the due process of law. Secondly, it encompasses the principle of eminent domain i.e. provides for the 'public purpose' condition and the obligation of 'just compensation'. Article 21, paragraph 1 of the *American Convention on Human Rights* provides that "the law may subordinate such use and enjoyment to the interest of society"⁴⁷, thus, it basically gives power to the government to acquire any property just by declaring that it is in the interest of the society. This lacuna has extended the scope

³⁹ *Id*

⁴⁰ *Id*

⁴¹ *Id*

⁴² *Id*

⁴³ *Id*

⁴⁴ *Id*

⁴⁵ James W. Ely Jr., *Property Rights in American History*, VANDERBILT UNIVERSITY,

<https://www.hillsdale.edu/wp-content/uploads/2016/02/FMF-2008-Property-Rights-in-American-History.pdf>.

⁴⁶ Linda R. Monk, *Privacy & Property Rights*, PBS, <http://www.pbs.org/tpt/constitution-usa-peter-sagal/rights/privacy-and-property-rights/>.

⁴⁷ The American Convention on Human Rights.



of acquiring property even for private purposes under the garb of public use.

In 1954, the U.S. Supreme Court nearly erased the public use clause from the Constitution in the case of *Berman v Parker*.⁴⁸ The court held that the power of the Congress is not limited by the Fifth Amendment to seize private property with just compensation to any specific purpose.⁴⁹ Later, the principle was extended in the case of *Hawaii Housing Authority v Midkiff*⁵⁰, wherein the Supreme court held that the Parliament was correct in acquiring land from private owners essentially to redistribute it to a wider population of private owners.⁵¹ Finally, in 2005, in the case of *Kelo v City of New London*⁵², the Supreme court took a broad view of public purpose and held that a public purpose of economic development that might directly benefit the private parties is included therein.⁵³ This judgment did not go down well with the public as it essentially gave the government a free hand to acquire property even for private purposes and thereby, do something which is violative of the Fifth Amendment. Thus, as a matter of constitutional law, the public use clause is a dead letter.⁵⁴

It can be seen that the property rights in USA have paved the way for using the principle of eminent domain aggressively by acquiring private property for private use. American courts have diminished the judicial

recognition of constitutional protection of property rights.⁵⁵ It can be said that the future remains uncertain and there is very little prospect for relief from the Supreme Court or the Congress in the short run.⁵⁶ The position in India has been better than that in the US as even though the right to property is not a fundamental right, it still remains a legal right. The most important point of diversion is that in India the courts have not done away with the public purpose condition. Even under Article 300A, the court has interpreted that both the conditions i.e. the use should be of public purpose and there should be just compensation needs to be followed. The deletion of right to property from the Part III has certainly had drastic impacts but it still remains a legal right and the judiciary has been proactive in upholding the individual rights.

CONCLUSION

In the end we would like to conclude by saying that the Right to Property should be a fundamental right in India since the right to live with human dignity is also a fundamental right which flows from Article 21 which assures life and personal liberty to all the citizens of India and the right to live with human dignity naturally insures to the citizens some basic rights like shelter, environment and even livelihood. India being a country wherein the level of inequality is extremely high, the omission of the right to

⁴⁸ *Berman v Parker*, (1954) 348 US 26.

⁴⁹ *Id.*

⁵⁰ *Hawaii Housing Authority v Midkiff* (1984) 467 US 229.

⁵¹ *Id.*

⁵² *Kelo v City of New London* (2005) 545 US 469.

⁵³ *Supra* note 24.

⁵⁴ Daniel Walker, *Property Rights, American Constitutionalism, and International Human Rights Law*, FOUNDATION FOR ECONOMIC EDUCATION, <https://fee.org/articles/property-rights-american-constitutionalism-and-international-human-rights-law/>.

⁵⁵ *Id.*

⁵⁶ *Supra* note 45.



property as a fundamental right would make the situation even more worse than before and this would strike the roots of the basic structure doctrine. Also, even though the Supreme Court of India has rejected the PIL which was filed in 2007 to include right to property as a fundamental right, the fact that people are aware provides a ray of hope that the future of property rights in India is not bleak.

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