

Locating the Right to Property within the Constitution of India

- Tavisbi Beria*

I Introduction

It is not uncommon in transitional democracies to place substantive restrictions on the amending power of the authorities like the Parliament to something as fundamental and basic as the Constitution of the country. As the bench in *Golak Nath*¹ put it, if such absolute powers are given to the legislature, it may even re-write the entire text of the Constitution by way of numerous amendments. The Indian Constitution, however, has no such provision. The Supreme Court has, by way of its judgment in the case of *Keshavananda Bharti*², somewhat restricted such absolute amending power. It held that the 'Basic Structure' of the Constitution is out of bounds for the Parliament and cannot be altered under any circumstances. "The *Golak Nath* and the *Kesavananda Bharati* cases were landmark judgments of the Supreme Court not only over right to property and land but a set of legal negotiations attempting to settle the contradictions between right to property as a fundamental right and acquisition of land for development under Directive Principle of State Policy".³

India's expedition with property rights, in 1950, started out on a strong note; right to property was initially a Fundamental Right (Article 19(1)(f)) under Part III of the Constitution, before it became subject to a lot of controversies and ultimately met its ill fate when it was abolished by the 44th Amendment in 1978, and reincarnated as a mere constitutional right under Article 300-A. Property rights acted as a roadblock to the erstwhile Government's (the Congress party) aim of dismantling the widely prevalent zamindari system by way of land reforms.⁴

At the outset, it is not practically possible to go into a detailed analysis of land legislations and judicial view of the same in this paper; therefore the question that will be addressed relates to whether the right to property, as it now stands, falls under the 'basic structure' of the Constitution of India. In my opinion, the right to property should be given the stature of a fundamental right, especially in light of the social, economic and political realities of India in this

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¹ *Golak Nath v. State of Punjab*, AIR 1967 SC 1647 (India).

² *Keshavananda Bharti v. State of Kerala*, AIR 1973 SC 1461 (India).

³ Siddhartha Mukherjee, *Land Acquisition in Contemporary India*, 63 IJPA 85, 88 (2017).

⁴ H.C.L. Merilatt, *The Indian Constitution: Property Rights and Social Reform*, 21 OHIO ST. L.J. 616 (1960).

day and age. However, such right cannot be said to be a part of the ‘basic structure’ of the Constitution.

II Evolution of right to property in India

Right to property has come a full circle in India. In colonial times, the right was first introduced as a legal right as specified in various land acquisition acts. The right was then raised to the stature of a constitutional right by way of the Government of India Act, 1935.⁵ When the Constitution was enacted in 1950 post independence, the right was elevated to being a fundamental right under Article 19(1)(f), making the right open to judicial review. “However, through a series of constitutional amendments, exceptions were carved out of the fundamental right to property as a result of which some of the limitations on the State’s power to acquire property; specifically the requirement to pay market value compensation did not apply in particular cases.”⁶ Some of these cases played a pivotal role in the controversies surrounding the right and need to be examined in detail. However, issues with respect to the debates surrounding eminent domain, inclusion of certain Land Acts in the Ninth Schedule, legality of the Ninth Schedule itself, the detailed analysis of affect of the Amendments is beyond the scope of this paper; since these issues are relatively ‘in the past’ and the dust has somewhat settled.

Coming to analysis, while on the one hand Article 19(1)(f) gave the citizens of India the right to acquire, hold and dispose of property⁷, Article 31, on the other hand, took away this right as it codified the principle of eminent domain (Eminent domain is used to denote the power of the State over all private property within its bounds).⁸ The First Amendment Act⁹ was passed in 1951, which added the Article 31-A and 31-B¹⁰, broadly stating that no land acquisition law could be held void on the ground that it is inconsistent with the fundamental rights. Subsequently, a number of cases came up with respect to the compensation issue.

One of the most pivotal cases in this multitude of cases was *Bela Banerjee vs State of West Bengal*.¹¹ The ratio of the case was that compensation in Article 31 meant ‘equivalence in value’. In the case, land was acquired for the purpose of providing housing to refugees post war. The

⁵ NAMITA WAHI, *THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION* 1156-1170 (Oxford University Press 2016).

⁶ *Id.*

⁷ INDIA CONST. art. 19, cl. 1(f).

⁸ Arthur Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV 596 (1942).

⁹ The Constitution (First Amendment) Act, 1951, Acts of Parliament, 1951 (India).

¹⁰ INDIA CONST. art. 31.

¹¹ *The State of West Bengal v. Mrs. Bela Banerjee*, AIR 1954 SC 170 (India).

compensation was fixed to market value on a given date irrespective of when the land was acquired. This was held to be wholly arbitrary and not amounting to just and fair compensation based on reasonable principles of calculating the same. The Court held that compensation has to be “a just equivalent of what the owner has been deprived of”¹². This decision was essentially guided towards protecting the rights of the individuals against arbitrary state action in keeping with constitutional values of equality and liberty. The legislature attempted to dilute the effect of this case by passing the Fourth Amendment Act¹³ which amended Article 31(2) to make challenge to a law on the ground of inadequacy of compensation void.

Subsequently, in *Vajravelu Mudaliar vs Special Deputy Collector*¹⁴, the Court specifically laid down four types of compensation- “(i) when the law provides for adequate compensation but there is difference of opinion as to the adequacy of it in a given case; (ii) where the law provides for partially inadequate consideration based on valid principles related to the property at the time of acquisition; (iii) where it fixes arbitrarily the compensation based on principles unrelated to the property or to the time of acquisition or to both; (iv) where the compensation fixed is illusory”¹⁵; holding that only in cases where the compensation fell in the fourth category would the Court be entitled to intervene. A series of cases came up which followed these precedents. The *Metal Corporation*¹⁶ case that agreed with *Vajravelu*, the *Shantilal*¹⁷ case that overturned *Metal Corporation* holding that after passage of the Fourth Amendment, there was no scope of judicial intervention in assessing adequacy of compensation.

The bank nationalisation case¹⁸ subsequently overturned *Shantilal* bringing an end to the confusion with respect to compensation, upholding the *Bela Banerjee* ratio as good law and establishing that the principles of compensation were not beyond scrutiny and that the legislature was not the final authority with respect to compensation under Article 31(2). This case ruled out the scope for any arbitrary Parliamentary action. In response to this, the Twenty Fifth Amendment Act¹⁹ was passed replacing the word ‘compensation’ with the word ‘amount’ in Article 31(2) and expressly excluding judicial review of the adequacy of compensation in property related cases.

¹² *Id.* (CJI Patanjali Sastri).

¹³ The Constitution (Fourth Amendment) Act, 1955, Acts of Parliament, 1955 (India).

¹⁴ *P. Vajravelu Mudaliar v. Special Deputy Collector Madras*, AIR 1965 SC 1017 (India).

¹⁵ *Id.*

¹⁶ *Union of India v. The Metal Corporation of India Ltd.*, 1967 AIR 637 (India).

¹⁷ *State of Gujarat v. Shri Shantilal Mangaldas*, AIR 1969 SC 634 (India).

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

¹⁹ The Constitution (Twenty Fifth Amendment) Act, 1971, Acts of Parliament, 1971 (India).

III Current Position of Right to Property

After the 44th Amendment²⁰ was passed in 1978, the fundamental right stature of property rights was brought down to a constitutional right under Article 300-A²¹. Article 300-A read: “Persons not to be deprived of property save by authority of law- No person shall be deprived of his property save by authority of law”. This led to a contraction in remedies available to deprived landowners as they could now only approach the various High Courts by way of writs under Article 226 (because right to property was now a right under Part XII and not Part III of the Indian Constitution) and a writ under Article 32 in the Supreme Court could not be filed.

In the *K.T. Plantation vs State of Karnataka*²² case, the Court held that the right to claim compensation was inbuilt in Article 300-A and that “requirement of public purpose is invariably the rule for depriving a person of his property”²³. In the case, the judges also referred to the rule of law as being part of the basic structure, though not expressly codified in the Constitution. Further, the State has to justify both grounds of compensation and public purpose adequately. However, in my opinion despite such a wide interpretation of the law, there is a need to make the right to property a fundamental right; the reasons are elaborated upon in the following sections.

Another legislation that has been passed (with respect to the controversial issue of compensation) by the Congress party in 2013 is the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as the LARR Act 2013). The effect of this Act is also dealt with in the later sections.

IV Reasons for Making Right to Property a Fundamental Right

Socio-economic Aspect

Land acquisition by the Government (as per the powers under Article 300-A), although done for the benefit of the economy in the long run, has a greater impact on the have-nots as compared to the haves. All benefits of development and infrastructure building are indirectly reaped by the haves; the only affect on the poor is that it deprives them of their land- the source of livelihood

²⁰ The Constitution (Forty Fourth Amendment) Act, 1978, Acts of Parliament, 1978 (India).

²¹ INDIA CONST. art. 300-A.

²² *K.T. Plantation v. State of Karnataka*, 2011 9 SCC 1 (India).

²³ *Id.*

of many. The families of these landowners (mostly farmers) are entirely dependent on them and compulsory acquisition of land affects them gravely.

Initially, a lot of land acquisition was done by the Government in order to build infrastructure and for development projects. These initiatives were justified as being important for economic development and public welfare. There was not much resistance to such reforms. Post-liberalisation, however, private investment and commercialisation was on the rise and landowners started becoming increasingly aware of their rights. Pro-business governments began acquiring land excessively. However, unlike what happened before, the farmers started protesting against compulsory acquisition of land.²⁴

The Singur and Nandigram case is a classic example of such protests. In 2006, the State Government of West Bengal allotted some 1000 acres of fertile land to Tata Motors for the purpose of building a car manufacturing plant, citing the Land Acquisition Act, 1894 (a predecessor to the LARR Act 2013) and the eminent domain principle. The acquisition was challenged and the Calcutta High Court allowed it. The Supreme Court overruled saying that the “entire acquisition process was illegal”.²⁵ Although the Judiciary does act as a watchdog, such illegal acquisitions on a relatively smaller scale are not uncommon. It is therefore important to restrict the Government’s power and give farmers a greater right. The Narmada Bachao Andolan, although more of an issue related to environmental protection, also depicts the displacement problem while building of dams.

Another case that reflects the plight of the displaced persons is the Sanjeev Agarwal vs Union of India case. The petitioner questioned that the new policy on Special Economic Zones, “which has as its goal the taking over of property of individuals, small peasants and farmers under the Land Acquisition Act without reference to their reasonableness.”²⁶ The Court in this case refused to accept the plea of the petitioner to make the right to property a fundamental right, citing re-opening the issue of property rights as a reason; without looking into its merits and saying that the petition could be filed in a more appropriate case.²⁷ If the Superior Court refuses to look into such issues, it can affect the already existing rights of the distressed property holders.

²⁴ Mukherjee, *supra* Note 3.

²⁵ Press Trust of India, *Singur land acquisition issue: A timeline*, THE HINDU, Aug. 31, 2016.

²⁶ J. Venkatesan, *Court rejects plea to make property a fundamental right*, THE HINDU, Oct. 19, 2010.

²⁷ Aju John, *The paradox of the fundamental right to property*, MYLAW BLOG, (March 20, 2013), <http://blog.mylaw.net/the-paradox-of-the-fundamental-right-to-property/>.

The Rights and Resources Institute in a study found that as of 2016, there were 289 ongoing land disputes out of which 163 were seen to have a direct link to land acquisition.²⁸ These disputes if taken to Court, not only lead to an addition to the excessive burden on the Courts but also further burden the farmers because of the associated time and cost aspect.

Looking at what acquisition of land essentially does to the displaced landowner and his family and how the Government has in the past attempted to make illegal acquisitions, one can make a convincing case that the right to property of the land owner needs more protection than being a mere constitutional right. Giving such a right the stature of a fundamental right could somewhat curb the Government's power to acquire land in excess of what is required in reality.

Political Aspect

It is also important to look at the political situation in India and the agendas of the ruling party in order to assess the need for right to property as a fundamental right; especially in light of the fact that the business community does have a substantive impact in shaping the direction Indian politics takes.²⁹ Pro-business governments therefore are keener on developing infrastructure to facilitate trade and commerce, the owners of which (big businesses and entities) fill their pockets. The current party in power, the Bhartiya Janata Party (BJP) proposed an amendment bill in 2015 to the LARR Act, 2013; which could largely affect the compensation provided to those whose property was acquired for 'public purpose'.

The UPA during its ruling years introduced successfully the LARR Act, 2013 to somewhat pacify distressed farmers and put in place a stable legal mechanism for provision of compensation. This replaced the former Land Acquisition Act 1894. The primary aim was to provide for adequate compensation and rehabilitation and resettlement initiatives for the farmers whose land was to be acquired. The compensation was to be judged on the basis of four pillars- compensation, consent, social impact assessment and rehabilitation/resettlement.

The BJP after coming to power introduced an ordinance and amendment diluting the provisions of the LARR Act, 2013. It excluded certain categories of projects from the consent pillar and social impact assessment pillar of the LARR which are two very essential components.³⁰ To this, Congress leader Malikarjun Kharge said "It's an anti-farmer and anti-people ordinance.

²⁸ Namita Wahi et al, *Land Acquisition in India: A Review of Supreme Court Cases from 1950 to 2016*, CENTRE FOR POLICY RESEARCH, New Delhi, 2017.

²⁹ Merilatt, *supra* note 4.

³⁰ Namita Wahi, *supra* note 28.

Government is in no mood to consult either the standing committee or other legislative bodies.”³¹

Such Government actions, although detrimental to the interests of farmers, is protected by the words “save by authority of law” in Article 300-A of the Constitution, that embodies the eminent domain concept to a certain extent. The proposed amendments to the LARR Act is only an illustration of how the BJP government may use powers granted under Article 300-A to acquire land in the name of ‘public purpose’ and leave the land owners distressed.

In order to curb such arbitrary steps taken by the Government, there is a pressing need to identify the right to property as a right under part III of the Constitution so as to provide it a greater level of protection and make it judicially reviewable by the Supreme Court under Article 32.

V Why not make it part of basic structure?

It is important here to make a distinction between fundamental rights and the basic structure. Not all fundamental rights form part of the basic structure (thereby getting immunity from legislative changes). It can be seen as three concentric circles- the first outer circle being ordinary constitutional rights, the second middle circle being fundamental right and the last inner circle being the basic structure (see Annexure). The innermost circle has the greatest protection. Therefore, even if it is established that the right to property must be made a fundamental right, it would still not necessarily fall within the ambit of the ‘basic structure’ of the Constitution.

The very meaning of ‘basic structure’ of the Constitution is that it holds utmost sanctity and is out of the reach of the Parliament. It embodies the core values of the Constitution and protects its unalterable features like the federal character of the Constitution, the democratic republican form of Government, the clear separation of powers among the three organs, the unity and integrity of the nation³² and so on. All of these point to core values and principles of the Constitution and have imbedded in them a sense of constitutional morality and essence of human rights.

The fact that a 13 judge bench in *Keshavananda Bharti*, (largest bench in the history of Supreme Court in India) expressly stated that right to property would not fall within the ambit of basic

³¹ Jitendra, *Government introduces land amendment bill amid protests, walkout*, DOWNTOEARTH, (Aug. 17, 2015), <https://www.downtoearth.org.in/news/government-introduces-land-amendment-bill-amid-protests-walkout-48723>.

³² *Keshavananda Bharti v. State of Kerala*, AIR 1973 SC 1461 (India).

structure is also of significance. The judges in the case analysed the right in detail and came to an informed conclusion. Sikri J., characterised the right to property as a check on social revolution.³³ Also, the Keshavananda ratio holds as good law even today. The Court held that the basic structure indicates “the broad outlines of the Constitution, while the right to property is a matter of detail.”³⁴ They go into the approach of the framers of the Constitution and hold that subordination of “individual right to property to social good”³⁵ is what was intended. It was also held that right to receive ‘amount’ (compensation) would be a fundamental right. So, if a part of the right is made fundamental, the entire right should be given the status of a fundamental right, in my view.

Although it can be argued intuitively that the right to property is also a matter of human right rather than merely a matter of detail; and that if individual right itself is compromised, who will reap the benefits of the ‘social good’, it is still not good enough to make the right a part of basic structure. Countering the human right argument, it was held in the European Convention on Human Rights and Freedoms that property rights could not be held to be ‘human rights’ if they could be absolutely overridden by the State.³⁶ In response to the second argument, the harmonisation of individual and social good is possible by making right to property a fundamental right under Article 19(f) (its original location) and at the same time placing restriction on it as is placed on other rights under the Article.

Making the right a part of the basic structure would do more harm than good. Although the Constitution is a living, breathing, organic document, the basic structure is still the rigid part. Paying heed to the numerous controversies associated with different facets of the right to property, it is not difficult to establish that a certain amount of flexibility is required with respect to the right. The meanings associated with issues like compensation, deprivation, acquisition, public purpose are fast changing and an adaptive law is required to keep pace with such changes. If read as part of basic structure, there will be very less scope for making substantial changes in the way the right to property is construed.

However, the individual right to property is definitely entitled to a greater protection than being a mere constitutional right, for the very reasons discussed in the preceding sections. In addition, the primary purpose of the Government’s acquisition of land- doing away with the zamindari system has been achieved. It is therefore advisable to now restore individual rights to property to

³³ Tom Allen, *Property as a Fundamental Right in India, Europe and South Africa*, 15 ASIA PAC. L. REV. 193 (2007).

³⁴ Keshavananda Bharti v. State of Kerala, AIR 1973 SC 1461 (India).

³⁵ *Id.*

³⁶ Tom Allen, *supra* note 33.

its previous position. Also, since the fundamental rights in Part III are slightly inclined towards the individual, adding the right to property within the scheme of rights provided therein will provide it greater protection too.

VI Comparison with Common Law

Discussion about property rights has been going on in England since as early as the 17th century. Initially, in the 1290-1490s, lawyers in England lacked a terminology for describing interest in lands and goods that was legally protected.³⁷ In the fifteenth century, the idea of property began developing but it was still not used with reference to land. The pressing question at the time was whether the power of ‘dominium eminens’ (eminent domain as it is now known) rested with the emperor who could dispose of the ‘property’ of his subjects.³⁸ The contemporary discussion on the topic is however premised on whether the right to property is a human right. The drafting of the right to property in Europe, was preceded by an apprehension that it would limit socio-economic reform.³⁹

In the contemporary context, European human rights law recognises the ‘right to peaceful enjoyment of possessions’, makes the deprivation of the same subject to conditions and also protects State action in public interest.⁴⁰ It is interesting to note that compensation is not referred to anywhere in the Article. It does bear a resemblance to Article 31 of the Indian Constitution in that regard.

It is also interesting to look at the case laws that developed over time in common law jurisprudence. In the case of *Sporrong and Lonroth vs Sweden*, the Court of Human Rights emphasised the need for a fair balance between individual and community interest with respect to acquisition of property.⁴¹ In the Indian context, this requirement has been defined by Courts as “public purpose/interest”. Another case is that of *James vs United Kingdom* in which the English Court read the right of fair compensation into the right to property.⁴² The issue of compensation has been a hot topic in India and no further emphasis needs to be placed on it. Although both of these aspects were not laid down in the letter of the law in Europe, they were nevertheless brought in through case law. The same applies to India too. It can therefore be

³⁷ David J. Seipp, *The Concept of Property in Early Common Law*, 12 LHR 29 (1994).

³⁸ *Id.*

³⁹ Tom Allen, *supra* note 33.

⁴⁰ Article 1 of the First Protocol of European Convention on Human Rights.

⁴¹ Tom Allen, *supra* note 33.

⁴² *Id.*

established by looking at these cases that ‘public purpose’ and ‘compensation’ are very fundamental aspects of the right to property, even if the text of the law does not say so. The importance given to the right to property even in common law, in my opinion, justifies the need to make it a fundamental right in India.

Additionally, it can be argued that while the driving logic in both jurisdictions might be similar, the magnitude of the reforms in India and Europe differ significantly. While the Court of human rights is considerate in giving some leeway to the State (relaxing the compensation standard a bit, for instance), the Supreme Court in India applied the compensation facet in the multitude of cases very stringently clearly placing emphasis on individual rights. Thus, implying that individual right is above all. The position in two other common law countries- Australia and South Africa can also be glanced at to further strengthen the argument in favour of right to property as a fundamental right.

In Australia, Section 51 (xxxix) of the Constitution provides for “the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.”⁴³ In 2010, a Bill was introduced in the House of Representatives, the purpose of which was to alter the Constitution to restrict state powers of acquisition without compensation on “just terms”.⁴⁴ Thus, the major objective was protection of individual rights.

Section 25 of the South African Constitution codifies the right to property. The idea of compensation in Section 25(3) limits it to being “just and equitable”.⁴⁵ The current Government in the country however is making attempts to change the property clause in the Constitution so as to completely do away with any compensation whatsoever.⁴⁶ This may seriously compromise individual rights. The South African position is in contrast to India; essentially because of the apartheid problem unique to South Africa. The landless majority are blacks in the country and acquisition and redistribution of land may be justified in keeping with principles of equality. So, a comparison with South Africa may not yield an accurate basis of comparison. An important

⁴³ Commonwealth of Australia Constitution Act, 1900.

⁴⁴ Diane Spooner, *Property’ and acquisition on just terms*, LAW AND BILLS DIGEST SECTION, 2010, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook43p/property.

⁴⁵ Tom Allen, *supra* note 33.

⁴⁶ Steven Friedman, *Changes to the Constitution may boost, not weaken, South African property rights*, THE CONVERSATION, (Aug. 3, 2018, 10.57 pm AEST), <https://theconversation.com/changes-to-the-constitution-may-boost-not-weaken-south-african-property-rights-100979>.

lesson, however, is that gender and land has been placed in the same chapter on Bill of Rights in South Africa implying its fundamental importance.⁴⁷

An analysis of common law positions on the right to property reveals its fundamental importance in all jurisdictions. The issue of compensation is clearly a dominant one in all countries and ‘just’ compensation is felt to be important. Thus, according to me, the debates surrounding property rights clearly lay out its fundamentality- not only in India but even in other common law countries. It must be raised to the status of a right under Part III of the Constitution.

VII Conclusion

In conclusion, the right to property has been a very controversial topic in the history of India; especially given the tussle between the judiciary and the legislature. All things considered, in my opinion, the right to property must be made a fundamental right; primary reasons being the problem of displacement of the landowners, no resettlement provisions and the issue of payment of only meagre compensation. In order to provide some leeway for acquisition of property after codifying the right as a fundamental right, reasonable restriction can be placed over the right as provided with other fundamental rights under Article 19 of the Indian Constitution. Looking at the position taken by other common law jurisdictions also, it is clear that the right in its very nature is a fundamental one and the text of the Constitution should recognise it as such. As Tom Allen puts it, ‘even though the textual basis might seem to be lost, there is a substantive review persistent in construing the right to property in light of liberal individualism and legislative and executive action justified as social good.’⁴⁸ However, in light of the clear stand of the Court (in the Keshavananda⁴⁹ case) and other supporting reasons as argued in this paper, the right cannot be read as a part of the basic structure of the Constitution of India.

ANNEXURE

See page 6, ‘Why not make it part of basic structure?’, paragraph 1.

⁴⁷ Essy M. Letsoalo, *The implementation of the property clause in South Africa’s constitution: problems and proposals*, PAMBAZUKA NEWS, (Apr. 27, 2018), <https://www.pambazuka.org/land-environment/implementation-property-clause-south-africa%E2%80%99s-constitution-problems-and-proposals>.

⁴⁸ Tom Allen, *supra* note 33.

⁴⁹ Keshavananda Bharti v. State of Kerala, AIR 1973 SC 1461 (India).

