

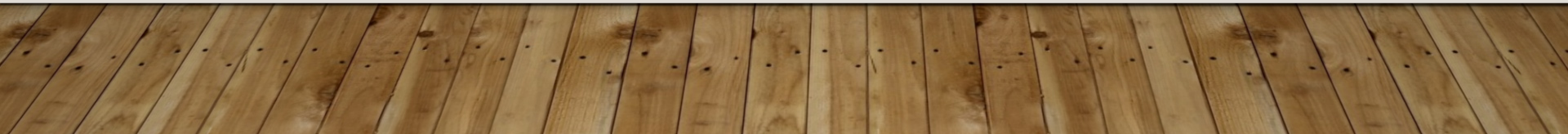
PROPERTY “RIGHT” AND FUNDAMENTAL “RIGHTS” : LAW AND POLITICS

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ADVOCATE

GLOBAL HISTORY OF THE RIGHT TO PROPERTY

- Right to Property was a check against the power of the King – Magna Carta – recognition of the rights of the Lords.
- American Revolution – was about property – escape from feudalism and creation of private property rights- abolition of right of primogeniture and right to hold property in perpetuity (fee tail or entail).
- France – attack on property from Society perspective – French Revolution- Article 17 of the Declaration of the Rights of Man- Robbespiere – more extreme Diderot – against private property –as the source of the highest evil and manifestation of “avarice”.
- Colonialism – destroyed the old property holding systems in colonies – and created new ones – a whole new class – anti colonial struggles became anti property rights as well.



GLOBAL HISTORY

- Rise of Communism – Russia and China – abolition of the Right to Property – even Fascism and Nazism – detracted from property – based on social needs.
- 3rd World – 1950s to 1980s – spate of nationalisations – perceived to be extension of the anti colonial struggle
- 1990s – collapse of communism – Property rights became the touch stone of democracy and free market .
- Mixed Economies in the world – like India – post 1990s – needed land for expansion of industry to leap frog to the stage of Developed Countries – land was difficult to get.
- Conflict and return of Right to Property – not as a privilege of the privilege of the rich but an instrument of resistance of the poor.

INDIC CONCEPTIONS OF CLAIMS TO PROPERTY

- Svatta – ownership – roughly claim on property – traced back to Vedas.
- Property can be acquired by purchase , getting, buying and exchange .
- Svatta – is absolute but is one amongst interlocking rights –and your Svatta may be subject to others (Paratantra) who are completely independent – like Raja ,Guru , Jati , Kula (who are Svatanttra- independent).
- Claims are not hierarchical – equal and sometimes even contradictory – right to coparcenor v. right of karta.
- Society recognises property not state – king has no superior claim – can only retain what is his – even what he has recovered from thieves.
- Transactions can be done on each svatta but does not clear the slate of the other existing claims.
- 3 propositions of Bharatiya property holdings recognised in law – HUF , Devottur and land to the tiller.
- Till today Law does not recognise claims on common lands and lands held by villages – to a lesser extent tribes – Forest Rights Act.

RIGHT TO PROPERTY IN THE GOVERNMENT OF INDIA ACT, 1935 AND THE CONSTITUTION OF 1950

Govt of India Act, 1935:

Article 298- Any body can hold property but special protection to agricultural tribes of specific areas.

Article 299 -No person to be deprived of his property except by authority of law

Property can only be acquired for public purpose.

Article 300 - Special Protection of titles of grants made (special exception to Zamindars)

Constitution of India, 1950:

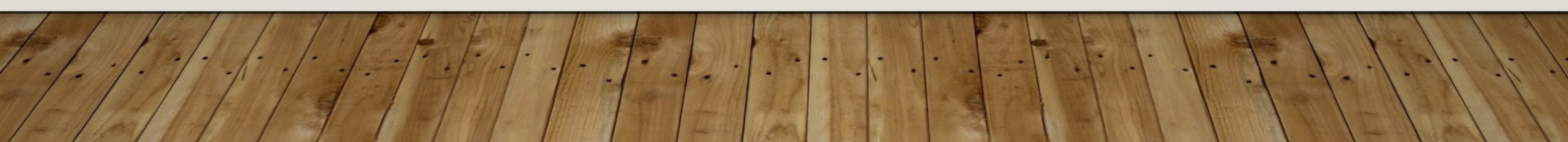
Article 19(1) (f) – right to acquire , hold and dispose property – subject to 19(5) reasonable restrictions in interests of general public and STs.

Article 31 (1) – No one could be deprived of property without authority of law

Article 31 (2) Property can be acquired for public purpose save by authority of law and that law will have to provide for compensation or a mechanism to calculate it.

Subsequently 31 (2) was amended and then Articles 31A , 31B added before removing Right to Property to 300A as a

Constitutional Right.



SUPREME COURT ON THE RIGHT TO PROPERTY

3 Phases

- The **Conflict** phase - (Liberal phase)- **Kameshwar Singh** (abolition of Zamindari), **Sholapur Spinning and Weaving Company** (compulsory acquisition of shares). Stood up against compulsory acquisition.
- The **Compromise** phase on nationalisation – Stood up for compensation and accepted nationalisation – **RC Cooper** (Bank Nationalisation Case) , allowed abolition of privy purses in **Privy Purses case.** (Socialist Phase)
- Post Liberalisation Phase – trying to read in Property Rights as a Human Right – first surreptitiously in **Indore Vikas Pradhikaran** – 2007 by Justice Sinha – as human right and then as a right of the poor in the **Land Acquisition cases** of Justice Singhvi in 2011 - 2012.

THE POLITICS OF THE RIGHT TO PROPERTY IN INDIA

- Pre Independence – Mahatma Gandhi , Rajaji and Sardar Patel (Conservatives) v. Nehru , Bose and JP (Socialists) – Gandhi- “Trusteeship” – Limiting the Right to Property to property.
- Post independence – Socialists wanted land redistribution and abolition of right to property – after death of Sardar – large scale amendments brought in – prolonged battle with the Courts.
- Nehru tried to collectivise farming – spectacularly opposed successfully by Rajaji and Swatantra Party.
- Indira Gandhi – nationalisation – Swatantra and Jan Sangh spoke about protection of the right to property - abolition of Privy Purses and Bank Nationalisation and nationalisation of other industries – followed by amendment to Preamble .
- Janta – to get rid of the problem once and for all – moved it to a Constitutional Right – effectively putting an end to the right to property debate for quite some time.
- Post Liberalisation – economy was deregulated – land acquired by stealth for industry.
- Came up against the Singur movement – that too against the Communists.
- **Now the failure of the Land Acquisition Bill – Right to Property is for the little person.**

FUTURE OF THE POLITICS OF THE RIGHT TO PROPERTY IN INDIA

- There is pressure on Land – Land is required for industrialisation – Make in India .
- Without industrialisation – India cannot progress.
- However there is also pressure on agricultural land – huge shortage of land – cultivation of land in different countries in Africa.
- Land is also a cultural, civilisational issue.
- Solution – Possibly lease , possibly redevelopment.
- Property rights as to nationalisation – seems to be settled presently.
- In fact use of Property rights defence by recalcitrant industrialists to avoid payment of legitimate dues are questions which we are facing.
- Every issue as mentioned above has a political impact.

RIGHT TO PROPERTY AS A FUNDAMENTAL RIGHT – FUTURE FORM

- Property rights are important – but history has taught us – that civilisationally and even for the rule of law it cannot be absolute.
- The Right to Property is a tool of the weak and not a privilege of the rich – that is now increasingly being recognised.
- Taking it away as a fundamental right was a mistake – because no one knows what is a constitutional right – but the right to property has to be adequately made subject to other restrictions like other Fundamental Rights.
- I personally would like more recognition of methodologies of Indic property holdings as part of property rights – inclusion of conceptions of Svatta and non recognition of “eminent domain”.
- If we have to release animal spirits and a market system has to be truly representative – it has to be culturally and civilisationally close to its people.
- Less of “rights and entitlements” – and more of recognition of claims – traditionalisation of constitutionalism.