

Evolution of Property Rights in India

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1 Introduction

Right to property is framed as a human right under the Universal Declaration of Human Rights¹ and is recognized as a fundamental right in most democracies. It is one of the most controversial of rights, always in need of an appropriate definition suited to a nation's political, social and economic conditions.² While all liberal constitutions allow for certain reasonable restrictions on an absolute right to property for some public good, the challenge facing every country is where to draw the line against state interference into a person's right to own and enjoy property.

In 1950, independent India drafted into its new Constitution a set of fundamental rights for its citizens to free speech, peaceful assembly, association, to move freely throughout the territory, to reside and settle in any part of the country, "to acquire, hold and dispose of property", and to practice any profession, or carry on any

The original paper titled "*Evolution of property rights in India: Lessons from the past, possibilities for the future*" was published by the Liberty Institute, New Delhi, under its Right to Property Project which was supported by the Friedrich Naumann Foundation for Freedom.

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¹Universal Declaration of Human Rights, Article 17, "(1) Everyone has the right to own property alone as well as in association with others; (2) No one shall be arbitrarily deprived of his property".

²Definitional issues have ensured that right to property has not been included in the International Covenant on Civil and Political Rights and International Covenant of Economic, Social and Cultural Rights.

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occupation, trade or business. The Constitution also gave the nation an independent judiciary.

Of all the fundamental rights enshrined in the Indian Constitution, the right to property has been persistently under attack from the executive. Political philosophies of the day claimed a need to set right historical wrongs. Whittling down property rights through repeated subversion of the Constitution was the chosen path. This pitted the executive against a judiciary, which believed itself to be the final arbiter on the Constitution as framed by the founding fathers.

Undermining of the right to property as a fundamental right precipitated by a weak rule of law regime saw a corresponding rise in the abuse of the eminent domain power. The justification for dilution of the right to property for a more equitable distribution of land by taking from the large landlords, gave way to acquisition of land from small and marginal farmers, for projects and activities that benefit the rich and powerful. This led to a growing sense of injustice and numerous public protests.

This paper will trace the evolution of the right to property in India under the Constitution of India since 1950 and through the substantial and often conflicting jurisprudence. The paper will look at the executive's role in the gradual dilution and eventual elimination of the right to property as a fundamental right through the play of politics of equity and distributive justice. Was the Supreme Court's assertion of its supremacy over the Parliament's powers to determine the extent of property right commensurate with the Court's abdication of its review powers in the face of gross abuse of eminent domain?

The property rights story in India is characterized by the dilution of the right to property in the first 30 years, driven by socialist ideology and a sense of distributive of justice, as much as populism, and the corresponding abuse of the land acquisition laws. The next 30 years illustrate how the wheel has turned as citizenship deepened. The poorest are at the forefront demanding protection of their property rights and reinforcing the criticality of rule of law.

2 Evolution of Property Rights in India: Pre-independence

The concept of private property as understood in today's constitutional sense evolved with the interpretation of classical Hindu law by judges of the British Empire. The English common law practices ironed out conflicting texts and divergent customary rules prevailing across India and codified problematic elements of a Hindu's right to property and its alienation (Gandhi 1985).³

³The earliest record of the concept of private property in India is in the Manusmriti, *The Code of Manu*, a body of ancient Sanskrit texts detailing religious and legal duties of Hindus.

Muslim rulers⁴ had introduced the *Jagirdari* system of creating temporary alienations on military-revenue considerations, which evolved in the sixteenth century. *Jagirs* (land holdings) were granted to nobles, scattered away from each other to prevent consolidation by the assignees (Gandhi 1985). British rulers inherited the existing land settlement systems of the Mughals that covered much of the Indian sub-continent. Waning Mughal rule had made the *jagirdars* de facto owners of the land. It was politically expedient for the colonial rulers to continue dealing with them to generate land revenue. By imposing the English common law to determine property relationships, the British ironically laid the ground for recognition of private property rights in India.

In 1793, the British government granted Permanent Settlements to *zamindars* (landed aristocrats)⁵ in the region of Bengal with ownership rights over land. The settlement was extended to Bihar, Madras and Orissa. Modified versions of such settlements, including short-term alienations, were created in other parts of India also (Gandhi 1985; Mearns 1999).⁶ The common feature of these diverse land tenure systems was that the *zamindars* did not technically own the land and the tillers of the land were tenants of the *zamindars*.⁷

The concept of eminent domain as an attribute of State sovereignty was first introduced by the British through the Bengal Regulation I of 1824, which authorized compulsory acquisition of private property by the State.⁸ The Land Acquisition Act of 1894 empowered the State to acquire private land for a 'public

⁴Muslim rule in the Indian sub-continent was spread roughly between tenth to eighteenth centuries.

⁵The term '*zamindar*' is broadly used for 'intermediaries' across varied tenure systems, who administered land on behalf of the rulers, but did not own it.

⁶Broadly, three different types of revenue systems were introduced by the British, which evolved into the land tenure systems that independent India inherited. The *Zamindari* system introduced around 1793, prevailed over most of North India, including present-day Uttar Pradesh (except Avadh and Agra), Bihar, West Bengal, most of Orissa, and Rajasthan (except Jaipur and Jodhpur). The *Ryotwari* system, introduced in Madras in 1792 and in Bombay in 1817–18, held sway over most of South India, including present-day Maharashtra, Karnataka, Tamil Nadu, Kerala, Andhra Pradesh, and most of Madhya Pradesh and Assam and also the princely states of Jaipur and Jodhpur in Rajasthan. The *Mahalwari* system was introduced between 1820 and 1840 to the present-day Punjabs in Pakistan and India, and Haryana, parts of present-day Madhya Pradesh and Orissa, and the princely states of Avadh and Agra in Uttar Pradesh.

⁷Permanent Settlements meant that *zamindars* paid revenue fixed in perpetuity to the government, which was at rates higher than what was paid prior to 1793.

⁸Bengal Regulation I, 1824 applied to the Bengal Presidency. Similar laws were enacted for Bombay (Building Act XXVII of 1839) and Madras (Act XX of 1852 adopting sections of the Bengal Regulation I, 1824). Separate amendments brought the railways under these legislations. First consolidated land acquisition law for British India was Act VI of 1857 repealing all previous legislations. See, Law Commission of India, Tenth Report: *Law of Acquisition and Requisition of Land*, 1958.

purpose' on payment of compensation.⁹ Constitutional protection of property figured for the first time under the British rule in the Government of India Act of 1935. Expropriation of private property, including land and commercial and industrial undertakings, without 'public purpose' and full compensation was illegal.¹⁰

3 Indian Constitution and Property Rights

By the end of the British rule, *zamindars* held vast tracts of land with complete control over the tillers' rights. This land was however, hugely fragmented, because of the historical nature of alienations made first by the Mughals and later by the British. In the run-up to the Indian independence in 1947, socialism was the dominant ideology of the Indian National Congress, the party that led India's freedom struggle against British rule. Insecurity of land tenures among the village communities, poverty and indebtedness and recurring famines preoccupied negotiations on law-making with the British to secure independence and later, within the Constituent Assembly drafting the Constitution for independent India.

The Constituent Assembly was strongly divided between government take over of private property and the continuance of property rights as it stood in the 1935 Act. Even among those who favoured expropriation, and no one really opposed abolition of *zamindari*, differences arose over how much compensation should be paid (Austin 1999).¹¹ The Constitution of India, which came into effect in 1950, was therefore, a compromise. So while the citizens enjoyed fundamental right "to acquire, hold and dispose property" under Article 19(1)(f), Article 19(5) made this right subject to reasonable restrictions in public interest. This fundamental right could also be taken away under Article 31, the eminent domain article, but taking of

⁹Land Acquisition Act 1894, originally applied only to British India. The Native States passed their own land acquisition acts, for example, the Hyderabad Land Acquisition Act 1899, the Mysore Land Acquisition Act 1894, the Travancore Land Acquisition Act 1914. See, Law Commission of India, Tenth Report: *Law of Acquisition and Requisition of Land*, 1958.

¹⁰Government of India Act 1935, "Section 299 (1): No person shall be deprived of his property in British India save by authority of law; Section 299(2): Neither the Federal nor a Provincial Legislature shall have power to make any law authorizing the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or any company owning, any commercial or industrial undertaking, unless the law provides for the compensation for the property acquired and either fixes the amount of compensation, or specifies the principles on which, and the manner in which, it is to be determined...; Section 299(5): In this section 'land' includes immovable property of every kind and rights in or over such property, and undertaking includes part of an undertaking.

¹¹The Social Revolution and the First Amendment, Chapter 3. While Rajendra Prasad, Jawaharlal Nehru and Sardar Vallabhbhai Patel were on one page that *Zamindari* must be abolished, Mahatma Gandhi had earlier expressed himself against unjustly dispossessing *zamindars* of their property and instead advocated converting their mind-set to holding property in trust for their tenants.

private property could only be ‘by the authority of law’, ‘for public purposes’ and on payment of compensation.

Though compensation was a fundamental requirement, there was to be no ‘just compensation’, only that the law should provide for compensation for the acquired property and either fix the amount or specify the principles of determination of compensation (Singh 2005). The Constitution also placed ‘acquisition and requisitioning of property’ as a Concurrent List item which meant that both Parliament and the State legislatures could enact laws on the subject. But authority of the Parliament was established as a fundamental principle and legislations passed by the States required Presidential assent.

The founding fathers’ primary goal was to ensure social engineering through agrarian reforms.¹² Land was made a ‘state subject’ by the Government of India Act 1935, and this position continued under the Indian Constitution. Individual States therefore, enacted a large number of land reform legislations essentially to abolish intermediary tenures, regulate the size of holdings (to enable ceiling-surplus redistribution of land to the landless), and for consolidation (of fragmented land holdings) and settlement of tenures/ownership.

A series of judgments from the Supreme Court and High Courts in the first years of the Constitution belied the expectation of the Constituent Assembly that the government would be allowed a free hand with its social engineering. Courts repeatedly struck down laws enacted by the State Legislatures as *ultra vires* of fundamental rights and rule of law principles of the new Constitution.

4 Individual Right Versus Community Rights: Constitution Amendments 1951–1964

The court rulings hit three property issues—expropriation of *zamindari* land on abolishing of *zamindari*, takings under police power and nationalization of trade and business to effect government control over economy, defeating Prime Minister J. L. Nehru’s expectations that the courts would endorse his philosophy that no individual could override the rights of the community (Austin 1999).

The First Amendment to the newly minted Constitution in 1951 was meant to remove hurdles posed by the judiciary on ‘dilatatory litigation’.¹³ Article 31A barred judicial review of any fundamental right violation as a result of an eminent domain

¹²Government’s land reforms agenda had five components: Abolition of the Intermediaries; Tenancy Reforms; Ceiling on landholdings; Consolidation of holdings; Compilation and updating of land records.

¹³Two rulings of the Patna High Court invalidated the Bihar Management of Estates and Tenures Act 1949 for violating Articles 19(1)(f) and 31 (*Sir Kameshwar Singh (Darbhanga) vs The Province of Bihar*, AIR 1950 Patna 392) and the Bihar Land Reforms Act 1950 for determining compensation that infringed Article 14 as unequal treatment (*Kameshwar Singh vs State of Bihar*, AIR 1951 Patna 91).

exercise. Article 31B was inserted creating the Ninth Schedule in the Constitution to prohibit courts from questioning agrarian land reform legislations inserted in the Schedule.¹⁴

In 1953, the Supreme Court held that the compensation provided for acquisition of private land to rehabilitate refugees was inadequate and defined compensation as “a just equivalent of what the owner has been deprived of”.¹⁵ In another case relating to placing a company under government-appointed agents, the Supreme Court said it amounted to deprivation of property for which government was liable to compensate the shareholder.¹⁶ The Supreme Court also struck down government takeover of private operators from running buses on hire on public roads.¹⁷

The Fourth Constitution Amendment in 1955 therefore, amended Article 31A to protect government takeover of management of companies. If ownership of property was not transferred to the government, it would not amount to compulsory acquisition even though the person was deprived of his property.¹⁸

The Seventh Constitution Amendment in 1956 harmonised multiple entries in the Seventh Schedule on the single subject of acquisition and requisition of property and deleted similar entries in the Union and State Lists to remove technical difficulties in legislation. Entry 42 was broadly framed in the Concurrent List as ‘42. Acquisition and requisition of property’. Parliament’s authority over legislations passed by the States was maintained.

The Seventeenth Constitution Amendment in 1964 was a sign of an all-out turf war between the executive and the judiciary that had less to do with property rights. The Supreme Court had declared Kerala Agrarian Relations Act 1961 unconstitutional and not protected from judicial scrutiny by the amended Article 31A. Granville Austin writes that the Court may have been ‘splitting hairs’ by picking on what was more of a nomenclature issue and not unusual, given the variety of land tenure systems in the country.¹⁹ This Amendment broadened the definition of ‘estate’ to include tenure systems like *inam*, *jagir*, land held under *ryotwari* settlement and any equivalent ‘estate’ in local law. Small holders of land within the

¹⁴A first list of 13 agrarian laws from the States of Bihar, Bombay, Madhya Pradesh, Madras, Uttar Pradesh, etc. were placed in the newly created Ninth Schedule.

¹⁵*State of West Bengal vs Bela Banerjee & Ors.*, AIR 1954 SC 170-2.

¹⁶*Dwarkadas Srinivas vs Sholapur Spinning and Weaving Co.*, AIR 1954 SC 199; *State of West Bengal vs Subodh Gopal Bose*, 1954 SCR 587.

¹⁷*Saghir Ahmad vs The State of Uttar Pradesh*, 1955 SCR 707.

¹⁸The Constitution (Fourth) Amendment Act 1955. Seven more laws were added to the Ninth Schedule, four of which dealt with non-agricultural property (including the law questioned in the *Bela Banerjee* case, the West Bengal Land Development and Planning Act 1948) and three concerned business regulations “in order to put an end to the dilatory and wasteful litigation and place these laws above challenge in the courts”.

¹⁹*Karimbil Kunhikoman vs The State of Kerala*, 1962 Supp (1) SCR 829. The Court said that lands held by *ryotwari pattadars* (holders) are not ‘estates’ under Article 31A(2)(a) and that under Article 14, compensation principles between affected categories were discriminatory. In *Krishnaswami vs State of Madras*, AIR 1964 SC 1515, the Supreme Court also invalidated the Madras Land Reforms Act 1961.

ceiling limits were protected from land acquisition or at least were entitled for full compensation (Austin 1999).²⁰

5 Golak Nath, Bank Nationalizations and Princely Privileges: Constitution Amendments 1971–72

In 1965, the Supreme Court again interfered with the expanded definition of the term ‘estate’ in Article 31A and declared that Article 31(2) required payment of a just equivalent compensation for expropriated property.²¹ But the turning point in executive-judiciary conflict came with the Court’s decision in the *Golak Nath* case.²² The Court ruled through a wafer thin majority, six to five, that fundamental rights, including the right to property, were ‘primordial rights necessary for the development of the human personality’ and were given a ‘transcendental position’ in the Constitution. Parliament’s power to amend the Constitution could not therefore be used to abridge the fundamental rights. The Court then declared the First, Fourth and Seventeenth Constitution Amendments unconstitutional and reaffirmed the supremacy of fundamental rights in general and right to property in particular. But taking a step backward, the Court allowed these Constitutional amendments to remain valid till the date of its decision through the doctrine of ‘prospective overruling’.²³

The *Golak Nath* case set off ‘the great war’ compared to the ‘earlier skirmishes’ between the Parliament and the judiciary over supremacy. The Indira Gandhi led Congress government believed that its socialistic goals could not be realized unless the right to property was modified. The Objects and Reasons of the Twenty-fourth Constitution Amendment Act 1971 directly referred to the *Golak Nath* judgment. “[t]he result of the judgment is that Parliament is considered to have no power to take away or curtail any of the fundamental rights guaranteed by Part III of the Constitution even if it becomes necessary to do so for giving effect to the Directive Principles of State Policy and for the attainment of the objectives set out in the Preamble to the Constitution.” The amendment therefore, aimed at making all

²⁰The Constitution (Seventeenth) Amendment Act 1964, also inserted 44 new laws in the Ninth Schedule.

²¹*Vajravelu vs Special Deputy Collector, West Madras*, AIR 1965 SC 1017.

²²*Golak Nath vs State of Punjab*, 1967 2 SCR 763. The appellants had challenged the order of the Collector declaring their land holdings surplus under Punjab Security of Land Tenures Act 1953, the violation of their fundamental rights under Article 19(1)(f) and (g) and Article 14 and sought to declare the 1st, 4th and 17th Constitution Amendments as *ultra vires*. 17th Amendment had placed the Punjab Security of Land Tenures Act 1953 in the Ninth Schedule.

²³*Golak Nath vs State of Punjab*, 1967 2 SCR 763. Two earlier judgments of the Supreme Court had held that Parliament had the power to amend the fundamental rights as it did by the 1st, 4th, 17th Constitutional Amendment. See, *Shankari Prasad vs Union of India* 1952 SCR 89 and *Sajjan Singh vs Union of India* 1965 1 SCR 933.

fundamental rights amendable to give effect to the Directive Principles of State Policy (Directive Principles).²⁴ It excluded amendments from the reach of Article 13, which does not permit making of any law infringing fundamental rights.

To counter “a property oriented and capricious judiciary” (Austin 1999) the Twenty-fifth Amendment Act in 1972 was aimed at reasserting the supremacy of eminent domain expropriations with or without compensation, against some Supreme Court decisions on the nationalization of certain private enterprises.²⁵ The amendment replaced the term ‘compensation’ by the word ‘amount’ in Article 31(2) payable for compulsorily acquired property. Courts were barred from questioning the ‘amount’ on grounds that it was not adequate or paid other than in cash putting to rest the tendency of courts to invalidate legislations on grounds of inadequate compensation. A new Article, 31C, was inserted giving the Directive Principles precedence over the fundamental rights, and included an ‘escape clause’ (Austin 1999, pp. 244–245) stating that no law declaring its purpose to be fulfilling the Directive Principles in Article 39(b) and (c) could be challenged in court on the ground that it did not do so. Article 14 (equality before the law), Article 19 (the freedoms article) and the property terms of Article 31 were made subordinate to the most classically socialist of the Directive Principles and an entire category of legislation placed beyond judicial review.

The Twenty-fifth Amendment in effect put a closure on the confusion over what the law was in case of government acquisition of private property. Court rulings were inconsistent on the First and Fourth Amendments as to the extent of judicial review on the Ninth Schedule laws and adequacy of compensation. The government too contributed to the adverse rulings by calculating questionably low compensation in several cases “either from zealously or carelessness”.²⁶ Further, none of the constitution amendments had removed the word ‘compensation’ from Article 31,

²⁴The Constitution of India 1950, Directive Principles of State Policy is contained in Part IV of the Constitution, these are a set of non-justiciable principles or standards covering social, economic and political justice, administrative, environment and culture, peace and security, necessary for governing the country.

²⁵*Rustom Cavasjee Cooper vs Union of India* (1970 3 SCR 530) (popularly known as the *Bank Nationalization* case). In this case, the Supreme Court declared the Banking Companies Act 1969 invalid by which 14 banks were nationalized, for violating fundamental rights. The Statement Of Objects And Reasons of the 25th Amendment mentioning the *Bank Nationalization* case, stated “[T]hus in effect the adequacy of compensation and the relevancy of the principles laid down by the Legislature for determining the amount of compensation have virtually become justiciable inasmuch as the Court can go into the question whether the amount paid to the owner of the property is what may be regarded reasonably as compensation for loss of property.”

²⁶In *State of Gujarat vs Shantilal Mangaldas*, 1969 (3) SCR 341, for example, the Court said, “If compensation was not illusory, it would not be justiciable”. In *Vajravelu vs Special Deputy Collector, West Madras*, AIR 1965 SC 1017, the Court held that “Legislature in making a law of acquisition or requisition shall provide for a just equivalent of what the owner has been deprived of or specify the principles for the purpose of ascertaining the ‘just equivalent’ of what the owner has been deprived of.” In *Union of India vs Metal Corporation of India Ltd.*, (1967) 1 S.C.R. 255, the Court held that principles for determination of compensation was irrelevant and compensation illusory.

“inviting judicial supposition that the government intended payment of equivalent value of property taken.” (Austin 1999). The Twenty-fifth Amendment thus cleared the way for over hundred nationalization laws in coal, coking coal, copper mines, steel plants, textile mills and shipping lines.

The Twenty-sixth Constitution Amendment Act in 1971, also concerning property rights, derecognized former Princes of Indian princely States, ended their privileges and abolished their privy purses. This amendment followed the Supreme Court nullifying a Presidential order of 1970, which had derecognized erstwhile Princes.²⁷

6 Fundamental Rights Case and the Forty-Second Amendment 1977

It came to be known as the Fundamental Rights case not because of what the judges of the Supreme Court wrote in the judgment, but what the judges interpreted of the judgment in subsequent cases. The *Kesavananda* judgment²⁸ delivered on 24 April 1973 became a significant moment in India’s constitutional history when the Supreme Court held that there was a ‘basic structure’ of the Constitution and that it could not be altered. All Constitution amendments after the date of this judgment, which alter the ‘basic structure’, can be challenged as *ultra vires*.

The judgment was highly controversial and the judges divided on political lines. The ‘View by the Majority’ statement by seven of the 13 judges and signed by nine, holding that “Article 368 does not enable Parliament to alter the basic structure or

²⁷The Constitution (Twenty Sixth) Amendment Act 1971 amended Article 363 of the Constitution which gave special privileges to erstwhile princely states of India which merged with the Indian State after independence in 1947. Privy purses were payments made to royal families of these princely states to compensate for loss of ruling rights. See, *H.H. Maharajadhiraja Madhav Rao Jiwaji Raoscindia Bahadur vs Union of India*, 1971 SCC (1) 85. Supreme Court struck down Presidential Orders of 6 September 1970 as illegal and inoperative and “the petitioners will be entitled to all their pre-existing rights and privileges including right to privy purses, as if the orders have not been made.” See also Datar (2013).

²⁸*Kesavananda Bharati vs The State of Kerala*, 1973 4 SCC 225. The main petitioner, Swami Kesavananda Bharati, head of a religious sect (mutth) in Kerala challenged the Kerala government’s attempt under two State land reforms legislations to impose restrictions on the management of its mutth properties. Other petitioners included land owners affected through compulsory acquisition or operation of ceiling laws, owners of companies nationalized and erstwhile rulers of princely states. The State government invoked its authority under Article 31 (eminent domain) but the lawyers to the main petitioner, led by Nani Palkhivala, fought the petition under Article 29 (right to manage religiously owned property without government interference) and also challenged the constitutionality of three amendments, the 24th, 25th and 29th (the last one placed the Kerala Land Reforms Act 1969 in the Ninth Schedule).

framework of the Constitution” was as dubious as it was confusing (Austin 1999).²⁹ The majority decision of the court upheld the constitutionality of the Twenty-fourth and Twenty-fifth Amendments, but struck down Article 31C’s ‘escape clause’.³⁰

On a reading of the judgment it is not clear whether fundamental rights were meant to be part of the so-called ‘basic structure’. The doctrine finds mention in the separate opinion of Justice H.R. Khanna without any reference to the fundamental rights. Justice Khanna resolved this contradiction by ‘a strange exercise’ of clarifying his own judgment 2 years later in the *Indira Gandhi* case!³¹

The *Kesavananda* verdict caused the government to wreck vengeance on the judiciary through the Forty-second Amendment in 1977, at a time when national Emergency was in force across India. The judgment was invalidated and the Parliament granted itself unrestrained powers to amend any part of the Constitution without judicial review.³² The amendment also restricted and stripped courts including the Supreme Court, of many of their powers, and gave primacy to the Directive Principles over the fundamental rights.³³

7 Abolition of Right to Property: The Forty-Fourth Constitution Amendment 1978

Suppression of civil liberties in the 2 years of Emergency (1975–1977) intensified the efforts by the Janata government to undo the harm wrought by the Forty-second Amendment. But the Objects and Reasons of the Forty-fourth Constitution Amendment Bill made it clear that the right to property was not to be accorded the

²⁹13 judges delivered 11 opinions and the “View by the Majority” statement followed the opinions at the end of the judgment. The opinions were lengthy and lacked precision about what was actually decided. This was slightly mitigated by the ‘conclusions’ which summarized opinions, but they conflicted with the statement signed by nine judges and had discrepancies when compared to their individual opinions. Without the statement there would not have been a court ‘decision’ in any comprehensible sense.

³⁰The Constitution of India, Article 31C, “... and no law containing a declaration that it is for giving effect to such policy shall be called into question in any court on the ground that it did not give effect to such policy”.

³¹*The Kesavananda Bharati Case: The untold story of struggle for supremacy by Supreme Court and Parliament*, Andhyarujina (2011), Chapter VI. See, *Indira Gandhi vs Raj Narain*, 1976 2 SCR 347. In fact, Justice Khanna upheld Article 31C which had immunized any law from the challenge of Articles 14, 19 and 31 if it were made in pursuance of Articles 39(b) and (c) of the Directive Principles and also held valid the 29th Constitution Amendment Act 1972 which gave protection to the Kerala Land Reforms laws in the Ninth Schedule, subject of challenge in the *Kesavananda* case.

³²The Forty Second Constitutional Amendment Act 1977, the amendment to Article 368 prevented any constitutional amendment from being “called in question in any Court on any ground”.

³³The Forty Second Constitutional Amendment Act 1977, “No law implementing any of the Directive Principles could be declared unconstitutional on the grounds that it violated any of the Fundamental Rights.”

honour of a fundamental right. “In view of the special position sought to be given to fundamental rights, the right to property, which has been the occasion for more than one amendment of the Constitution, would cease to be a fundamental right and become only a legal right. Necessary amendments for this purpose are being made to Article 19 and Article 31 is being deleted...Property, while ceasing to be a fundamental right, would, however, be given express recognition as a legal right, provision being made that no person shall be deprived of his property save in accordance with law” (Austin 1999, pp. 421–422).³⁴

The Forty-fourth amendment thus, completely took away what remained of the fundamental right to property, to buy, keep and sell properties, within reasonable restrictions, by deleting Articles 19(1)(f) and 31. There was no longer any fundamental right to compensation or amount payable in lieu of expropriation. Article 300A was introduced as an enabling constitutional right, that “[n]o person shall be deprived of property save by authority of law”. Only two exceptions to the right to property remained—first, minorities could establish educational institutions and second, the right to compensation at market value for persons who held land for personal cultivation within the ceiling limit.

8 Legacy of *Kesavananda*, Article 300A and the Right to Property

In 1980, the Supreme Court re-established its power as the protector of the Constitution in the *Minerva Mills* case, by declaring unconstitutional the part of the Forty-second Amendment, which prevented any constitutional amendment from being “called in question in any Court on any ground”. The Court also struck down the amendment that gave precedence to the Directive Principles over the fundamental rights³⁵ and reiterated that, “[A]ll constitutional amendments made after the decision in *Kesavananda Bharati* case would have to be decided by reference to the ‘basic structure’ doctrine...”.³⁶

³⁴Ironically, it was not the Congress government, the judiciary’s *bête noir* on all the property battles since 1950, which deleted the right to property, but the successor Janata government. Janata Party’s election manifesto promised to remove the fundamental right to property and retain it as a statutory right. The principal rationale for the move was to protect other fundamental rights as right to property was the cause of many amendments and conflicts with the judiciary. The Party may have used removal of right to property as a fundamental right as an inducement for the support of the communist parties and others.

³⁵Though Article 31C was later interpreted in other Supreme Court cases, the extent to which fundamental rights in Article 14 and 19 may be overridden in pursuit of the DP remains unclear even today.

³⁶*Minerva Mills vs Union of India*, 1980 3 SCC 625. Government assumed management and then nationalized privately owned mills under the Sick Textiles Undertaking (Nationalization) Act 1974, which was challenged in the *Minerva Mills* case by the mills’ previous owners.

With the *Minerva Mills* case and the sobering experience of the Emergency, the right to property ceased to be a matter of contest between the government and the judiciary. *Kesavananda* had held, unanimously, that fundamental right to property was not a basic feature of the Constitution. The judiciary had thus conceded that determination of the extent of the right to property was the domain of the executive, but held its ground that it had the power of judicial review through the ‘basic structure’ doctrine. The Parliament had wrested the powers to amend the Constitution so long as it did not violate the ‘basic structure’, and to exercise eminent domain under the authority of any law. “The great contests over property rights in cases like *State of West Bengal vs Subodh Gopal Bose*, *State of West Bengal vs Bela Banerjee*, *K.K. Kochuni vs State of Kerala*, *P. Vajravelu Mudaliar vs Special Deputy Collector*, *R.C. Cooper vs Union of India*, became a matter of the past and irrelevant to the future. In retrospect it seems strange how much the Supreme Court was preoccupied with the sanctity of property rights and the challenge to economic laws and policies of Government and how little it was concerned with the personal rights of individual during the period from 1954 to 1976” (Andhyarujina 2011).

The constitutional history of right to property is really one of interpreting the power of the Parliament to amend the Constitution under Article 368. This was accomplished by determining whether Directive Principles could be given effect vis a vis the right to property under Articles 19(1)(f) and 31 and by the interpretation of the term ‘compensation’. The political and social consensus on the limited value of the right to property was accepted by different political views that its extinguishment was necessary for social and economic objectives.

After 1978, all types of deprivation of property are made under Article 300A. The only exceptions require the State to ensure that “the amount fixed or determined” for acquisition of property of a minority educational institution, shall not “restrict or abrogate the right guaranteed” by Article 30(1)³⁷ and, second that, “[P]ayment of compensation at a rate which shall not be less than the market value thereof” is guaranteed to the land loser who held land “within the ceiling limit” and “in his personal cultivation”.³⁸ These exceptions imply that the State is not obligated to pay compensation for any property acquired under Article 300A.

The law of the land was crystallized in a 1995 case³⁹ where the Supreme Court unequivocally held that the right to property is not a ‘basic feature’ and is therefore, not a fundamental right under the Constitution. The Court held that judicial interpretation should not be a tool to reinduct the doctrine of compensation as concomitant to acquisition or deprivation of property under Article 300A. The Court even

³⁷See, The Constitution of India 1950, Article 30(1A) read with Article 30(1).

³⁸See, The Constitution of India 1950, Article 31A(1).

³⁹*Jilubhai Nanbhai Khachar vs State of Gujarat*, 1995 Supp (1) SCC 596.

refused to entertain the contention that different principles of compensation provided by different laws were discriminatory and therefore, a violation of Article 14.

In 2010, the Supreme Court again missed an opportunity to read the right to property as a fundamental right on the basis of the *IR Coelho* decision (discussed later). The Court declined to invalidate the Forty-fourth Amendment and restore the fundamental right to property without considering the merits of a Writ Petition, in which, the petitioner, Sanjiv Agarwal, had cited indiscriminate violation of eminent domain and argued that large-scale displacements caused by projects like the Narmada dam, Special Economic Zones and land acquisition instances in West Bengal had dispossessed the poor.⁴⁰

9 The Ninth Schedule: A Bottomless Pit

The constitutional history of right to property is incomplete without a discussion on the Ninth Schedule. With the fundamental right to property gone, the Ninth Schedule containing laws, which cannot be declared void on the ground that they violated any fundamental right, has become a bottomless pit to protect laws “regardless of their quality or legality... and for laws to serve personal interests of the powerful.”⁴¹ The Ninth Schedule laws fall in the categories of land redistribution, nationalization of private industries, tenancy, and rent and price controls enacted by Central and State governments. The Schedule has also been used to protect laws on elections and reservation policies. The current tally of the Ninth Schedule laws is 284 which include about 150 amendment acts.

Article 31B, the source of the Ninth Schedule was not discussed in *Kesavananda*. It came up for consideration in *Waman Rao vs Union of India*,⁴² where the Supreme Court upheld validity of the First Amendment that introduced this Article and the Ninth Schedule in the Constitution and decided not to allow questioning of any law inserted after 24 April 1973 (date of the *Kesavananda* decision).

⁴⁰*Sanjiv Agarwal vs Union of India* (2010) in Writ Petition (C) No. 464 of 2007. See also Agrawal (2014) where the author quotes the Chief Justice of India saying in Court that, “It has to be read along with the 42nd Amendment by which the word ‘socialist’ was inserted in the Preamble to the Constitution. If your contention is to be accepted, then we will have to reverse earlier judgments on property rights. Recently, we dismissed the Gudalur Janmam petition seeking similar relief. We can’t reopen the issue.”

⁴¹*Working a Democratic Constitution, A History of the Indian Experience*, Austin (1999). The Social Revolution and the First Amendment, Chapter 3.

⁴²1981 2 SCC 362.

In *IR Coelho* (2007), the Supreme Court held that “*Kesavananda Bharati*’s case cannot be said to have held that fundamental rights chapter is not part of basic structure.” The validity of each new constitutional amendment is to be judged on its own merits and the actual impact of the law on the fundamental rights has to be considered to determine whether or not it destroys the ‘basic structure’. So all post-24 April 1973 laws, including those protected by the Ninth Schedule, have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them.⁴³

Yet, a subsequent bench in 2010 equivocated on the issue when applying *IR Coelho*’s principles on the validity of another law which was placed in the Ninth Schedule after 24 April 1973.⁴⁴ The Court held that the validity of a law put in the Ninth Schedule would be invalidated only if it breached some ‘overarching principles’ like secularism, democracy, separation of powers, power of judicial review, rule of law and ‘egalitarian equality’. The concept of ‘overarching principles’ was evolved in an earlier case presumably to dispel the uncertainty caused by the Court’s own subjective and confusing articulation of the ‘basic structure’ doctrine.⁴⁵

These rulings on the Ninth Schedule *vis a vis* the fundamental rights are irrelevant to the right to property as it is no longer a fundamental right. The need to keep ‘progressive legislations’ on land reforms out of the purview of judicial scrutiny was felt necessary at a time when the right to property could be asserted as a fundamental right. Other Ninth Schedule legislations added, when India was riding high on a socialist style planned economy and needed to control a concomitant rise in black markets, and were open to challenges for infringement of other fundamental rights, are no longer valid in the current economic scenario. Even post *Kesavananda*, by which time it was clear that right to property was not even a basic feature of the Constitution, laws continued to be inserted in the Schedule.⁴⁶

⁴³*I.R. Coelho (Dead) By LRs vs State of Tamil Nadu & Ors.*, 2007 2 SCC 1. To clear the inconsistencies of the *Waman Rao* case, the case was referred to a Constitution Bench of nine judges in 1999. The issue related to a law passed by the Tamil Nadu assembly that was invalidated prior to the *Kesavananda* verdict for violation of fundamental rights, but was placed in the Ninth Schedule later.

⁴⁴*Glanrock Estate (P) Ltd. vs The State of Tamil Nadu*, 2010 10 SCC 96. Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act 1969 failed to meet the benchmark of the ‘overarching principles’.

⁴⁵*M. Nagaraj vs Union of India*, 2006 8 SCC 212. See also, *The Kesavananda Bharati Case: The untold story of struggle for supremacy by Supreme Court and Parliament*, Andhyarujina (2011), Chapter X. The Court held that Article 14 by itself was not a basic feature of the Constitution, but was only a principle of formal equality. The principle of “egalitarian equality” was an “overarching principle” of the Constitution, like democracy, secularism, rule of law, etc.

⁴⁶The 47th Constitution Amendment 1984, the 66th Constitution Amendment 1990, 76th Constitution Amendment 1994, 78th Constitution Amendment 1995, have inserted laws in the Ninth Schedule.

Yet the Supreme Court did not throw the Ninth Schedule out of the Constitution in these cases. But it is interesting to note the decline in the use of the Ninth Schedule in the last two decades, clearly the outcome of increased judicial scrutiny.⁴⁷

10 Conclusion

Ownership of property has been critical in determining the power and political evolution of society from ancient times. With increasing number of people owning property, land and other assets, the demand for political participation in decision-making has increased. From the initial days of democracy in ancient city states in Greece, to Magna Carta in England in 1215 AD, the American revolution in 1776, and expansion of voting rights in the nineteenth-century Europe, all reflected the growing aspiration of people to participate as equals in the political process, based on property ownership.

In 1950, the Indian Constitution recognized right to property as a fundamental right. It also adopted universal adult franchise. Constituent Assembly debates inform that right to property was incorporated as a compromise to ensure that the rich and powerful political elites are not alienated. On the other hand, universal adult franchise was adopted to ensure widest political participation, and thus providing legitimacy to the new order emerging from the end of colonial rule.

The progressive dilution and then finally deletion of the right to property created perpetual scarcity of land, as land and property market got strangled. The scarcity fuelled corruption and gave rise to an unholy nexus between the economically powerful and politically connected through the rampant misuse of the land acquisition laws.

A fundamental shift in the political consciousness is taking place in India today regarding property rights. While restoration of right to property as a fundamental right in the Constitution is still not on the table, the demand for protection property rights, particularly of the poor, can no longer be brushed aside. Political devolution to the States, where land could become a key feature of the local governments, with State and Central government exercising residual authority is a future to look forward to in a deepening democracy. This paper is a small effort towards the process of improving our understanding of the legal evolution of property rights in India and how it can shape a just and productive future for the country.

⁴⁷The last time a law was added to the Ninth Schedule was in 1995.

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Land Policies in India

Promises, Practices and Challenges

Pellissery, S.; Davy, B.; Jacobs, H.M. (Eds.)

2017, XV, 227 p. 11 illus., Hardcover

ISBN: 978-981-10-4207-2