

## THE COMPROMISE OF THE FUNDAMENTAL RIGHT TO PROPERTY

**Research Question:** *Should the Right to Property fall within the ambit of the 'Basic Structure of the Constitution of India?*

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### **Abstract**

*The aim of this research paper is to expose the acts of legislature in trying to fulfil the arbitrary and political motives under the garb of Article 31A and 31B which led to a compromise of the fundamental right of property. The right to property is a basic right which every human should have in order to feel safe and protected, however this fundamental right was very brutally uprooted from the Indian Constitution, resulting in unrest and lawlessness in the country. The citizens of the country were doubly oppressed, firstly they were deprived of their right to property for reasons which were arbitrary and maligned and secondly they were also not adequately compensated for the loss they had to suffer.*

*Through this paper, an attempt has been made to throw light on the fact that stripping off the fundamental right to property from the constitution and not providing it protection under the basic structure doctrine has been the worst decision especially for the underprivileged.*

**Keywords:** *Right to Property, Basic Structure, Fundamental Rights, Indian Constitution*

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## INTRODUCTION

There has been a constant tussle between the judiciary and the legislation with respect to right to property. Right to property has been subjected to various changes, starting as a fundamental right under Article 19(1)(f) then being amended numerous times by the Parliament to finally being abolished and becoming a mere legal right in India. The end result of this decision has not proven to be fruitful to the country and it stands in clear violation of the basic structure doctrine of the Indian Constitution. The basic structure upholds the supremacy of the Constitution and preserves its secular, republic, democratic, federal, and sovereign characteristic. It also includes individual freedom, liberty and dignity, equality within its ambit. If these fundamental rights are excluded from the basic structure of the constitution of India it would result in the nullification of these essential elements like right to life, freedom and liberty. The basic structure lies outside the amendatory process of the Parliament since changing it would lead to the abrogation of the core principles and values on which the whole Constitution of India is based upon and which is fundamental to the well-being of the public. Right to property should also fall within the spheres of the basic structure and any violation of that right would amount to the violation of the basic structure doctrine.

In the *Kesavananda Bharati Case*, Justice Khanna says, “*no article of the constitution is immune from the amendatory process simply because of the fact that it relates to a fundamental right and is contained in part III of the Constitution.*” Therefore, the right to property was not a basic feature of the constitution; however, the rest of the bench did not support his belief.<sup>1</sup> The unanimous decision of the nine judge bench showed that the fundamental right could never have been beyond the scope of the basic structure of the

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<sup>1</sup> *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461

constitution.<sup>2</sup> Since, right to property was a part of Article 19 of the constitution; it too fell within the ambit of the basic structure and should have been protected from the amendatory process which led to its deletion from the constitution of India.<sup>3</sup>

Earlier, the framers of the constitution had given sufficient importance to the right to property by introducing Article 19(1)(f) and Article 31 as a fundamental right. Just like section 299 of Government of India Act, 1935 which secured the right to property and contained safeguards against expropriation without compensation and against acquisition for a non-public purpose.<sup>4</sup> The articles so provided in the constitution briefly stated that every citizen has an individual right to acquire, hold and dispose of property.<sup>5</sup> However, it is the responsibility of the state as well, that the wealth and means of production are not concentrated in limited hands but are also distributed to sub serve the common good.<sup>6</sup> This leads to a conflict between the state's power to implement the said principles and citizen's rights since the fundamental right of property is not absolute.<sup>7</sup> The right is subject to law of reasonable restriction in the interest of the general public.<sup>8</sup> The state's power is also subject to the condition that the law made by them that infringes the fundamental right should pass the test of reasonableness and public interest.<sup>9</sup>

## **REASON WHY FUNDAMENTAL RIGHT TO PROPERTY WAS SCRAPED OFF**

The main reason which led to the deletion of the fundamental right to property was when

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<sup>2</sup> Ibid

<sup>3</sup> Ibid

<sup>4</sup> Sushanth Salian, *History of the Removal of the Fundamental Right to Property*, Centre for Civil Society 232, 233-234 (2002)

<sup>5</sup> Ibid

<sup>6</sup> Ibid

<sup>7</sup> Ibid

<sup>8</sup> Ibid

<sup>9</sup> Ibid

Articles 31A and 31B were inserted in the constitution through the first Amendment Act, 1951.<sup>10</sup> Under this Amendment Act, any law providing for acquisition by the state of an estate so defined or any rights which lead to modification or extinguishment of such rights could not be questioned on the ground that it was inconsistent with, or took away or abridged any of the rights conferred by articles 14 or 19 or 21.<sup>11</sup> Article 31-B and Schedule Nine was an attempt to usurp judicial power, under the subsequent amendments.<sup>12</sup> With the introduction of these articles and Schedule Nine, the legislature was able to get away with the void laws which infringed the fundamental rights.<sup>13</sup> Since, it was stated in article 31B that none of the acts or regulations specified in the Ninth Schedule nor any of the provisions shall be deemed to be void on the ground that they are inconsistent with Part III, notwithstanding any judgements, decree or order of any court or tribunal to the contrary.<sup>14</sup> The list kept on increasing with the increasing amendments.<sup>15</sup>

The use of these amendments to add more and more laws to the Ninth Schedule resulted in the substitution of constitutional philosophy by totalitarian ideology.<sup>16</sup> It represents a cynical attitude to the rule of law and the philosophy underlying our constitution.<sup>17</sup> The main objective of the ninth schedule of the constitution was to protect only land reform law from being challenged in the court however; it was being misused for political gains.<sup>18</sup>

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<sup>10</sup> Gopal Sankaranarayanan, *The Fading Right to Property in India*, Law And Politics In Africa, Asia And Latin America (Apr. 19, 2019 8:47 PM),

<sup>11</sup> Ibid

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> Ibid

<sup>16</sup> Salian, Supra note 4

<sup>17</sup> Ibid

<sup>18</sup> Ibid

Further, the parliament amended clause 2 and inserted clause 2-A to article 31, which enabled the state to deprive a person of his property in an appropriate case by law.<sup>19</sup> This gave an arbitrary power in the hands of the state to confiscate a citizen's property which is a clear infringement of the fundamental right of the citizens.<sup>20</sup> Their main attempt was to usurp the judicial power.<sup>21</sup>

The reasonable restrictions so imposed by the state were gradually proving to be unreasonable especially with the amendment of clause 2 of article 31.<sup>22</sup> This occurred after the famous case of *Bela Banerjee v. State of West Bengal*<sup>23</sup>. In this case private land was acquired for the settlement of immigrants and development under the West Bengal Development and Planning Act.<sup>24</sup> According to the act the owners of the land were given compensation which amounted to the market value of the property on December 31, 1946 no matter when the land was compulsorily acquired.<sup>25</sup> The Act was challenged saying it is unconstitutional and void as the compensation provided was not 'just' and thus Article 31(2) of the constitution was violated.<sup>26</sup> As parliament suffered a blow it came up with 4<sup>th</sup> Amendment.<sup>27</sup> As a result the amended clause 2 stated that no law could be called in question in any court on the ground that the compensation provided by that law is not adequate.<sup>28</sup> This gave unreasonable powers to the state and made it the final arbiter on the question of

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<sup>19</sup> Ibid

<sup>20</sup> Ibid

<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> AIR 1954 SC 170

<sup>24</sup> Ibid

<sup>25</sup> Ibid

<sup>26</sup> Ibid

<sup>27</sup> Ibid

<sup>28</sup> Ibid

compensation.<sup>29</sup> It gave an arbitrary power to the state to fix at its discretion the amount of compensation for the property acquired or requisitioned.<sup>30</sup>

Since all these amendments fell under the Ninth Schedule, they remain protected from the dangers of judicial review even though they infringed the fundamental rights of the constitution.<sup>31</sup> Like in the case of *Kochunni v. State of Madras*, the Supreme Court did not accept the plea of the state that Article 31(1) after amendments gave an unrestricted power to the state to deprive the person of his property.<sup>32</sup> However, later in the cases judiciary decided that a law should be provided for compensation for public purpose and should also satisfy the double test of 'reasonable restriction' and 'public interest' provided by article 19(5).<sup>33</sup>

The scenario was such that whenever the judiciary invalidated a law by terming it as unconstitutional the legislature would conveniently amend the constitution in order to uphold its supremacy over the judiciary.<sup>34</sup> These legislative manipulations finally lead to the deletion of Article 19(1)(f) and article 31 from the constitution of India<sup>35</sup>. Thus, it was no more a fundamental right but a legal right.<sup>36</sup> The amendment also led to the insertion of 300 A which says that no person shall be deprived of his/her property without a valid lawful reason. "Therefore, in one fell swoop, the right to property was taken from a position of pre-eminence and consigned to be a mere legal right."<sup>37</sup>

## RESULT OF RIGHT TO PROPERTY BEING SCRAPED OFF

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<sup>29</sup> Sankaranarayanan, Supra note 11, at 224

<sup>30</sup> Ibid

<sup>31</sup> Sali, Supra note 4, at 236

<sup>32</sup> 1960 AIR 1080

<sup>33</sup> Sali, Supra note 4

<sup>34</sup> Ibid

<sup>35</sup> Ibid

<sup>36</sup> Sankaranarayanan, Supra note 11, at 229

<sup>37</sup> Ibid

The Stripping of the fundamental right to property led to unrest among the people especially the weaker and the less privileged sections of the society.<sup>38</sup> Arbitrary licensing policies and widespread acquisition of land for private purposes led to a rise in protests and resistance movements in India with Marxist nationalism cutting a red swathe across the nation.<sup>39</sup> India being a developing nation requires more and more land for infrastructure projects like highways, airports housing and power projects.<sup>40</sup> As a result, with the support of the local government many small landholders were deprived of their land for very less compensation.<sup>41</sup> In order to address these problems a number of bills were introduced in parliament both for the limited basis on which land was acquired and for the rehabilitation of those who had been displaced.<sup>42</sup> However, with the deletion of the fundamental right there is no proper redressal for this problem and therefore the victims of these state actions have a very limited recourse to the law, only seeking greater compensation amounts, which have also lost the protection earlier afforded by Article 31.<sup>43</sup>

The council of Europe chose a cautious rode in granting the right to property.<sup>44</sup> They never intended to challenge the concept of ownership such as absolute control, even though they feared that giving such a right could cripple social and economic reforms.<sup>45</sup> The very first right to property was authorized in in Article 1 of the First Protocol to the Convention ('P -1') which did not include any idea of compensating the person who has been deprived of his

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<sup>38</sup> Sankaranarayanan, Supra note 11, at 230

<sup>39</sup> Ibid

<sup>40</sup> Ibid

<sup>41</sup> Ibid

<sup>42</sup> Ibid

<sup>43</sup> Ibid

<sup>44</sup> Tom Allen, *Property as a Fundamental Right in India, Europe and South Africa*, 15 Asia Pac. L. Rev. 193, 203-207 (2007)

<sup>45</sup> Ibid

private property.<sup>46</sup> The plain text of the law focused on the acquisition of property based on the grounds of lawfulness and public interest.<sup>47</sup> It further gave the State unfettered discretion to determine what would qualify as a justifiable ground for acquiring private property.<sup>48</sup> However, with time this law was given a broader interpretation by the courts. In the case of *Sporrong and Linnroth v. Sweden*, the court made it very specific that it would engage in a substantive review of property legislation.<sup>49</sup> The Court stated that, “an interference with property would satisfy P1-I only if ‘a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.’”<sup>50</sup> Similarly, in *James v. United Kingdom*, the Court stated that, “compensation terms are material to the assessment whether a fair balance has been struck between the various interests at stake.”<sup>51</sup> Accordingly, the “taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable.”<sup>52</sup>

Neither did the plain text of the law imply that the interference of State in private property would not be a subject to substantive judicial review nor did it signify the application of the fair balance test.<sup>53</sup> However, the court expanded the interpretation of the law based on an internal development of the proportionality doctrine and did not rely on external changes in social and economic sectors.<sup>54</sup> Interest in property was made a subject to judicial review

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<sup>46</sup> Ibid

<sup>47</sup> Ibid

<sup>48</sup> Ibid

<sup>49</sup> Ibid

<sup>50</sup> Ibid

<sup>51</sup> Ibid

<sup>52</sup> Ibid

<sup>53</sup> Ibid

<sup>54</sup> Ibid



because while some human rights are absolute in nature, others can be subject to an interference by the State based on proportionality and it would be irrational to consider an interest as a human right if the State would have the absolute power to abrogate it.<sup>55</sup>

The Court of Human Rights approach to compensation was less stringent with respect to the approach adopted by the Indian Courts.<sup>56</sup> However, both the courts felt that the compensation must have a reasonable nexus to the value of property.<sup>57</sup> Though, the council could permit compensation less than the full amount where the deprivation of the property from its owner would result in a heightened economic growth or social justice.<sup>58</sup> In the case of *Lithgow v. United Kingdom*, as in *R C Cooper*, compensation was required by the legislation on the basis of valuation of principles that excluded the full value of some assets.<sup>59</sup> Though, the amount of compensation did not even equal to the company's cash reserves, in *Lithgow*, with some of the nationalized companies still the court of Human Rights held that State had satisfies the basic criterion of fairness.<sup>60</sup> This was because compensation was reasonably related to the value of property; moreover, the valuation could be justified, even though the actual amounts of compensation were very low, because it simplified and accelerated the nationalisation process<sup>61</sup>. However, compensation to be based on a system of valuation that excluded consideration of some assets would mean that there would be no relationship between compensation and the value of the taken property, therefore the Supreme Court of India was not willing to allow it.<sup>62</sup> However, the principle adopted by the Supreme Court had its

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<sup>55</sup> Ibid

<sup>56</sup> Ibid

<sup>57</sup> Ibid

<sup>58</sup> Ibid

<sup>59</sup> Ibid

<sup>60</sup> Ibid

<sup>61</sup> Ibid

<sup>62</sup> Ibid

drawbacks.<sup>63</sup>

## PROBLEMS THAT AROSE DUE TO THE DELETION OF THE RIGHT

Even if we assumed that there was a socially justified public purpose in place for taking away the land of an individual, the problems that arose, in order to ensure efficient allocation of resources were that what compensation should be paid and who should decide the amount of the compensation, the judiciary or the legislature.<sup>64</sup> If the legislature were to fix the compensation, there is a possibility for it to be undervalued.<sup>65</sup> Also, if the legislature ascertains the compensation which is not reasonably related to the value of the property or is based on arbitrary principles then the compensation must be judicially reviewed.<sup>66</sup> The principle that bases compensation on market value is problematic where the acquisition is on a large scale because in such cases the market value of the land will be an inadequate compensation for the value lost in account of the damage caused to the social world, for example the construction of Narmada Dam.<sup>67</sup>

Secondly, the problem that arose after the deletion of the fundamental right to property and introduction of the Ninth Schedule was that the public purpose for which the property of the individuals was taken away from them was not under judicial review. It is important that public purpose should be open to judicial review.<sup>68</sup> This is because since the takings involved a forced exchange that generates a surplus, this surplus should be divided in proportion to the

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<sup>63</sup> Ibid

<sup>64</sup> Jaivir Singh, *(Un)Constituting Property The Deconstruction of the 'Right to Property' in India*, pp.24-29 (Working Paper Series 2012) (2004)

<sup>65</sup> Ibid

<sup>66</sup> Ibid

<sup>67</sup> Ibid

<sup>68</sup> Ibid

investment made in the state by citizens.<sup>69</sup> This gave the government a power of unfettered discretion to determine what would qualify as a justifiable public purpose.<sup>70</sup>

### **WHY DELETION OF THE RIGHT WAS NOT A SUITABLE MOVE-CONCLUSION**

Since, compensation and determination of public purpose could be arbitrarily decided by the parliament without any reasonable justification; it breached Article 14 of the constitution which guarantees equality before the law.<sup>71</sup> This disturbs the doctrine of basic structure as the principle of equality constitutes the heart and soul of the constitution. Therefore, right to property should be a part of the basic structure to avoid such difficulties.

Therefore, it is important to restore the fundamental right to property to the people; it is one of the important rights which need to be protected under the Part III of the constitution. The amendments so made to the Article 31 (1)<sup>72</sup> and 31(2)<sup>73</sup> of the constitution should be deleted because they give nothing but arbitrary and unreasonable power to the state and thus gives way to legislative manipulation. “If the fundamental right to freedom of speech or personal liberty pertains to basic structure, there is every reason that the fundamental right to property should also pertain to it, as the former set of rights could have no meaning without the latter. Protection of freedom depends ultimately upon the protection of independence, which can only be secured, if property is made secure.”<sup>74</sup>

From the above discussion it is crystal clear that there are a plethora of problems attached to

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<sup>69</sup> Ibid

<sup>70</sup> Ibid

<sup>71</sup> Article 14

<sup>72</sup> Article 31

<sup>73</sup> Article 31

<sup>74</sup> Sankaranarayanan, Supra note 11, at 254

right to property being made a mere statutory right. Article 19(1)(f) <sup>75</sup>is deeply embedded in the whole fabric of our constitution that it cannot be uprooted without leaving a void and broken threads behind. The fundamental right to property should also pertain to the basic structure like the fundamental rights to freedom of speech or personal liberty, as the latter set of rights would have no meaning without the former. <sup>76</sup>Even the framers of the constitution understood the unique conditions of the country and the needs of the people and therefore they made the laws accordingly. They visualised the society, in which every citizen would own some property not only as a means of livelihood but also as a security chip from economic oppression and tyranny. <sup>77</sup> The Supreme Court of America which first accepted the distinction between personal rights and property rights and accorded a preferred position to the former has also accepted the fact that the distinction between the two rights is not possible by saying that “the dichotomy between personal liberties and property rights is a false one.” <sup>78</sup> This is because people have rights and property has no rights. Whether the property in question is a welfare cheque, a home or a savings account, the right to property without unlawful deprivation is a ‘personal right’, not less than the right to speak or the right to travel. <sup>79</sup> The court said that a fundamental interdependence exists between the personal right to liberty and the personal right in property. <sup>80</sup> Neither is of importance without the other. <sup>81</sup> Therefore, the right to property is a fundamental part of the basic structure of the Indian constitution and separating this right from the doctrine would lead to its destruction.

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<sup>75</sup> Article 19(1)(f)

<sup>76</sup> Vyshnavi Neelakantapillai, *Right to Property under the Indian Constitution*, Lawyers Club India (Mar. 07, 2011), Available at: [http://www.lawyersclubindia.com/mobile/articles/details.asp?mod\\_id=3515](http://www.lawyersclubindia.com/mobile/articles/details.asp?mod_id=3515) (Accessed on 01.09.2020 )

<sup>77</sup> Ibid

<sup>78</sup> Sankaranarayanan, *Supra* note 11, at 254

<sup>79</sup> Ibid

<sup>80</sup> Ibid

<sup>81</sup> Ibid