

DEBUNKING THE TUSSLES BETWEEN EXECUTIVE AND JUDICIARY THROUGH THE LENS OF RIGHT TO PROPERTY

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ABSTRACT

The Fundamental Right to Property enjoys the unique distinction of not only being the second most contentious provision in the drafting of the Constitution, but also the most amended provision, and the only fundamental right to be ultimately abolished in 1978ⁱ. The evolution of right to property has not been a smooth journey at all. While tracing the trajectory of right to property one can see ‘n’ number of tussles between the judiciary and the executive. Both seemed to have different conceptions about the importance of this right, which constantly led to contradictory opinions in cases. Judiciary regarded it to be an important part of an individual’s freedom while the executive wanted to restrict its effectiveness in order to acquire land for state purposes. This tussle ultimately led to the conversion of right to property from fundamental right to constitutional right. What this conversion did was that it reduced the degree of freedom and effectiveness of this right and gave more power to the state to acquire land for its own purpose. The tussle between the executive and the judiciary was mainly due to the difference in opinion regarding this right. This paper tries to showcase these tussles through various case laws and amendments and also tries to look into the question of whether these tussles lasted even after the conversion of right to property to constitutional right or whether the judiciary changed its stance after the conversion and sided with the executive.

Keywords- Right to Property, Tussle, Executive, Judiciary, Politics, Fundamental Right, Constitutional Right, Constitution of India

INTRODUCTION

Origins of right to property can be traced back to the British era and in the statutes, they laid down for governing India. Property rights rose up as a major issue in the late nineteenth century. From the late nineteenth century and the early twentieth century onwards, demands were made by the people to have more autonomy in their properties and the rights associated with it. This demand called for codifying laws on this matter and laying down statutes for its governance. Right to property came into the limelight with the passing of the Government of India Act, 1935. Section 299 of this Act shed light on property rights and read as follows: -

“(1) No person shall be deprived of his property in [British India] save by authority of law.

(2) Neither the Federal or a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired land either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined.

(3) No Bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in either Chamber of] the Federal Legislature without the previous sanction of the Governor-General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.

(4) Nothing in this section shall affect the provisions of any law in force at the date of the passing of this Act.

*(5) In this section "land" includes immovable property of every kind and any rights in or over such property, and "undertaking" includes part of an undertaking.*ⁱⁱⁱ

This section laid the foundation for articles 31 and 19(1)(f) of the Indian Constitution. The drafting of the above-mentioned section was done on the basis of section 299 of Government of India Act, 1935. With independence, politics in our country boomed to a new extent. The politicians understood the importance of property as an issue to gain mass support. So, the politicians felt the need for abolition of the zamindari system and wanted to redistribute land to people. With the idea of abolition of zamindari rose the concept of eminent domain. It was this idea which further led to the formation of various state land acquisition acts which ultimately led to a conflict between the fundamental right to property of landowners and the state's power of an eminent domain. This conflict sparked a tussle between the executive and the judiciary which lasted until 1978.

TUSSLE BETWEEN EXECUTIVE AND JUDICIARY

The executive wanted to exercise its power of eminent domain and take over certain pieces of land while the judiciary always felt the need to protect the fundamental right of individuals and ended up striking down the statutes. This caused a chain reaction where the executive would always come up with a new amendment every time the judiciary tried to restrict its power. This tussle can be understood better through case laws and resulting amendments.

The first case came in the form of **Kameshwar Singh v State of Bihar**ⁱⁱⁱ wherein the state government brought in the Bihar Land Reforms Act under which it wanted to exercise its power of eminent domain and acquire land from zamindars. The act provided to pay compensation to the zamindars but the mechanism for providing compensation was not the same for all the zamindars. The act provided that zamindars with large plots of land will be provided proportionate compensation and not the full value of the land while zamindars with smaller plots of land would be provided with full compensation. This distinction was not backed by any substantial reasoning and was arbitrary in nature. Also, the act did not provide 'compensation' in the sense the term compensation was envisaged under article 31(2) of the Constitution of India. One of the zamindars contended the validity of such an act in the court

and the court reached the conclusion that the act violated article 14 and article 19(1)(f) of the Constitution of India. The court said that the differential rate of providing compensation violated the right to equality while taking away land without proper compensation violated article 19(1)(f).

Facing this obstacle from the judiciary in exercising its power of eminent domain, the government soon came out with the first constitutional amendment in the year 1951. With the first constitutional amendment, the government inserted articles 31A and 31B to the Constitution. Article 31A barred any provision which violated any fundamental right while exercising the state's power of eminent domain from judicial review. Article 31B on the other hand introduced the Ninth Schedule and stated that "*Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.*"^{iv} The intent behind the introduction of these provisions was to keep the judiciary at bay while exercising the power of eminent domain.

Soon after the amendment came the case of **Bela Banerjee v State of West Bengal**^v before the Supreme Court of India in 1954. In this case, the state government under the WB Land Development and Planning Act, 1948 decided to acquire some land for public purposes like the establishment of towns and immigrant settlement programs. What the government did here was that they decided to acquire this particular plot of land in 1951 and fixed compensation as the market value of the land in 1946. Mrs. Banerjee contended this in court saying that the compensation was not fair, was arbitrary and this was a blatant misuse of power on the part of the government. The court, in this case, felt the need to interpret the term 'compensation' used in article 31(2) and ruled that the compensation has to be **just equivalent** of the land being taken and, in this case, was not clearly just equivalent. Justice Shastri C.J. stated that: -

"While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated such principles must ensure that what is determined as payable must

be compensation, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the court.”^{vi} The judiciary in this case did not delve into the question of fundamental rights due to the bar by article 31A and instead chose a smarter way to circumvent the bar. As the judiciary did not take up the issue of fundamental rights in this case, the executive could not take the defense of article 31A and ultimately had to provide for just compensation.

Seeing the judiciary’s stubbornness to protect the fundamental rights of individuals against the state’s power of eminent domain, the government in 1955 brought about the **fourth** constitutional amendment. It amended Article 31(2). To directly quote from ‘The Constitution (Fourth Amendment) Bill,1955’ the proposed bill stated “*Recent decisions of the Supreme Court have given a very wide meaning to clauses (1) and (2) of article 31. Despite the difference in the wording of the two clauses, they are regarded as dealing with the same subject. The deprivation of property referred to in clause (1) is to be construed in the widest sense as including any curtailment of a right to property. Even where it is caused by a purely regulatory provision of law and is not accompanied by an acquisition or taking possession of that or any other property right by the State, the law, in order to be valid according to these decisions, has to provide for compensation under clause (2) of the article. It is considered necessary, therefore, to re-state more precisely the State's power of compulsory acquisition and requisitioning of private property and distinguish it from cases where the operation of regulatory or prohibitory laws of the State results in "deprivation of property". This is sought to be done in clause 2 of the Bill.*”^{vii} The amended article 31(2) read as follows: -

“No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.”^{viii}

With this amendment, the judiciary's powers were reduced and the role which judiciary played in protecting the fundamental rights of the individuals was also narrowed down. But this was not going to stop the judiciary from finding innovative ways to rule such cases and circumvent the executive's bar on it. This could be seen soon in the case of **Karimbil Kunhikoman v State of Kerala**^{ix}. In this case, the facts were quite similar to other classic cases but the ruling giving to protect the fundamental rights was unique. Prior to this case, article 31A(a) read as:

“the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights”^x

The court ruled that this case was not hit by the bar posed by article 31A as article 31A used the term 'estate' which in the court's opinion did not include the local terms like jagir, ryotwari, etc. used in different states for land. Hence, the bar was on judicially reviewing cases involving 'estate' and not on cases involving local terms for 'land'. The court quashed the statute in this case and protected the fundamental rights of the individuals.

This judgment triggered yet another amendment to the constitution. This was the **seventeenth** amendment to the constitution in which article 31A was amended. The reason for amending it was stated in the Constitution (Seventeenth Amendment) Act, 1964. The reason stated was *“The expression "estate" has been defined differently in different States and, as a result of the transfer of land from one State to another on account of the reorganisation of States, the expression has come to be defined differently in different parts of the same State. Moreover, many of the land reform enactments relate to lands which are not included in an estate. Several State Acts relating to land reform were struck down on the ground that the provisions of those Acts were violative of articles 14, 19 and 31 of the Constitution and that the protection of article 31A was not available to them. It is, therefore, proposed to amend the definition of "estate" in article 31A of the Constitution.”^{xi}* The amended article then included the terms jagir, ryotwari lands, inams, etc.

The constant tussle between the judiciary and the executive can clearly be seen from these cases and how the judiciary was protecting an individual's rights while how the executive was countering it with various amendments. This tussle did not stop here and was continued in the case of **Vajravelu Mudliar v Special Deputy Collector**^{xii} and **RC Cooper v Union of India**^{xiii}. In **Vajravelu Mudaliar's case**, the court came up with a concept of illusory

compensation. They did not use the word inadequate compensation as using the term inadequate compensation would attract the bar posed by the fourth constitutional amendment. The court ruled that the compensation was illusory in nature and reasoned it by stating that “*If the legislature, though it ex facie purports to provide for compensation or indicates the principles for ascertaining the same, but in effect and substance takes away a property without paying compensation for it, it will be exercising power which it does not possess. If the legislature makes a law for acquiring a property by providing for an illusory compensation or by indicating the principles for ascertaining the compensation which do not relate to the property acquired or to the value of such property at or within a reasonable proximity of the date of acquisition or the principles are so designed and so arbitrary that they do not provide for compensation at all, one can easily hold that the Legislature made the law in fraud of its powers. Briefly stated the legal position is as follows. If the question pertains to the adequacy of compensation, it is not justiciable, if the compensation fixed or the principles evolved for fixing it disclose that the Legislature made the law in fraud of power in the sense we have explained, the question is within the jurisdiction of the court.*”^{xiv} It can clearly be seen in this case that the court has come up with an innovative line of reasoning in order to circumvent the bar.

In **RC Cooper’s case**, the government laid down a law under which it planned to take over 14 commercial banks and nationalise them. The mode of compensation in this case was an issue of contention as the statute stated that the compensation was to be decided by the government by its own calculation and if the banks did not agree with the compensation then they could proceed for arbitration wherein the award which would be announced would be given to the bank not in cash but in securities which would be frozen for a period of ten years. Such a mode of compensation seemed arbitrary to the banks and they filed a case before the Supreme Court of India. The court in this case relied on the dictionary meaning of the term ‘compensation’ and ruled that the compensation was illusory in nature. It stated that Article 31(2) guaranteed a right to compensation for compulsory acquisition of property and that by giving to the owner, for compulsory acquisition of his property, compensation which was illusory - (just compensation – low price for a prime location) or determined by the application of principles which were irrelevant, the constitutional guarantee of compensation was not complied with and the court could interfere.^{xv} Hence the judiciary again ruled in the favour of protecting the individual’s fundamental rights and struck down the statute.

This decision sparked a huge debate among the executive branch of the government ultimately resulting in yet another constitutional amendment. The **twenty-fifth** constitutional amendment^{xvi} was brought which amended article 31(2) and replaced the word ‘compensation’ with the term ‘amount’.

The tussle between the executive and the judiciary lasted for a while after this until 1978, when the **forty-fourth** amendment was brought in which ultimately converted the right to property from fundamental to a constitutional right. Forty-fourth amendment deleted article 31 and repealed Article 19(1)(f). It introduced article 300A which read as “*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.*”^{xvii} This is how the right to property after numerous tussles between the executive and judiciary was converted into a constitutional right.

SITUATION AFTER THE 44th CONSTITUTIONAL AMENDMENT

With the right to property now merely being a constitutional right, the role of the judiciary also changed. The judiciary now had a quieter role to play and the effectiveness of the right was reduced to a great extent. There were many limitations on the judiciary now in the way of new statutes being implemented by the legislature. Various legislations were implemented from 1978 onwards. First, the cases started to be ruled now on the basis of the Land Acquisitions Act, 1894 which was subsequently amended to form the Land Acquisitions (Amendment) Act, 1894. This act lasted for a while until 2013, when the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 was brought in. This act was also amended in 2015. All the subsequent amendments to these acts were in one way or another a mode of making land acquisition easier for the executive.

What was very common to see after the 44th constitutional amendment was that now the government had started to acquire land under the Land Acquisition Act on behalf of the private corporations or industries. They would somehow justify doing this by stating that the purpose was ultimately a public purpose and the acquisition was interconnected to public purpose. The judiciary, in such cases, did not have a standard opinion throughout the years. At some point it would consider it invalid whereas at some other stage it would justify the executive’s actions

and consider it valid. But in most cases, the judiciary would rule in the favour of the executive. Hence it was pretty much visible that the judiciary no more had the same stance on this issue and did not always protect the individual's right to property.

The change in the judiciary's opinion can be clearly seen through the following cases.

In 1963, the Supreme court of India decided the case of **Somavanti and Ors. v State of Punjab and Ors**^{xviii}. What had happened in this case was that a private corporation which carried on the business of manufacturing various types of refrigerators compressors and ancillary equipment made a request to the government of Punjab to allocate them sufficient land for setting up their factory. The government upon getting such request notified the land of the plaintiff stating that it was acquiring it for public purpose. The state in this whole transaction merely made a donation of Rs.100 in the total cost of acquiring the land. The petitioners challenged the constitutionality of such an act. The court in this case ruled in the favour of the government and upheld the acquisition of land. It said that whether the land was acquired for public purpose or not was not open for the court to decide and it was merely enough to be a public purpose if the government considers the purpose as public purpose. It further stated that the provision in the act which stated that the mere notification of the government was a conclusive evidence of public purpose was not unconstitutional and upheld that provision. Lastly it also stated that the state's act of paying mere 100 rupees was within the law as sec.6 of the LA Act used the phrase "wholly or partly out of public revenues" in terms of paying the compensation. Hence the state need not pay substantial amount but a small amount in the whole acquisition cost is also accepted.

This case clearly showed the change in the judiciary's stance and how it did not protect an individual's right but went on to justify such a colourable act of the state. Another such debatable judgement came in 2003 in the case of **Pratibha Nema and Ors. V State of MP and Ors**^{xix}.

In this case again the government notified certain land for acquisition in order to provide it to various diamond cutting industries. It provided the land for setting up of various diamond cutting industries which were private corporations. The petitioner's land was notified and they challenged the constitutionality on the ground that this was not for any public purpose. the government justified its action by saying that by setting up such diamond cutting industries,

exports of the country will rise leading to growth of the economy. Petitioners contended such a purpose to be vague and also contended that the government had taken way more land than required. The court in this case again ruled in the favour of the government and stated that the judicature to decide the extent of land to be acquired was that of the government and individuals could not contest this. Also, the court held the purpose to be a public purpose and hence held the acquisition to be constitutional and dismissed the case.

By 2013, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act had come in. What this act did was that it increased the amount of compensation to be paid to the people from along with widening the scope of public purpose. In 2015 it was amended in order to add few more entries that should be treated as public purpose. These entries involved industrial purposed to be considered as public purpose. Hence the executive through this act made acquisition of land by state on behalf of private industries legal and backed it with a statute.

The latest judgements which became a point of debate in the recent years are that of **Pune Municipal Corporation v Harakchand Misirimal Solanki & Ors.**^{xx} and **Indore Development Authority v Shailendra & Ors**^{xxi}. Both of these cases are similar. What happens in these cases is that the Government has acquired some land of these people under the LA Act of 1894. These people had some disputes which have been contended in the court. During these proceeding the LA Act of 2013 has been enacted. What has happened now is that these people have asked to be compensated under the new act as they can receive more compensation under it and have refused the compensation offered under the old act. The courts in these cases have given the judgement that no compensation will be given under the new act. It said that since these people refused to take compensation before, it was a mistake on their part and hence now they cannot claim that the acquisition was invalid as no compensation is being given. It said that such acts of people slower the process and hinder the state's power and as such it ruled that if people had rejected to accept compensation before they cannot as for remedy now in court.

These two cases again reflected the judiciary's stance towards the individual's rights and showcased how the judiciary had now started to protect the executive's decisions against an individual's rights.

CONCLUSION

The evolution of right to property has not been a smooth ride. While tracing its origins one can clearly see the rough trajectory. Its evolution has been full of constant tussles between the executive and the judiciary and how one tried to counter the other with the legislative or judicial weapons each possessed. Though this tussle has halted from 1978 onwards. No such tussles are visible after the landmark 44th constitutional amendment. The only reason for this is the change in the judiciary's standpoint on the issue of eminent domain. After 1978, the judiciary no longer tried to protect the individual's right of property as opposed to that of state's power of eminent domain. This change in the judiciary's stance can be closely related to the difference between a fundamental right and a constitutional right. Till the time right to property was a fundamental right, the judiciary always stood up for the individual as against the state but as soon as it was turned into a constitutional right, the judiciary started to change its stance and played a quieter role. It hardly protected the individual's right but always gave precedence to the state as compared to the individual. This change in stance can also be related to the growing political culture of the country and how the branches of the government which are supposed to be independent of each other have started to correlate to each other. The gap between the branches has reduced and they are seen working together. This could possibly be another reason for this change in the judiciary's stance. Hence, with the above case laws in mind, it would be safe to say that the judiciary has changed its stance on the issue of the right to property as opposed to its stance pre-1978.

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