

## **“44<sup>th</sup> Amendment to the Constitution of India Revisited: The Right to Property Debate”**

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The scope of the right to property was being reduced by the legislature from the originally drafted Constitution, year by year. The 44th amendment act of 1978 to the constitution brought with it a major change. It amended the right to property enshrined in the constitution by derecognising it as a fundamental right and terming it as just as a constitutional right. The said amendment added article 300A which corresponds to Article 31(1) only which has been inserted under Part XII under a separate chapter IV 'Right To Property' and deleted Article 19 (1) (f) and Article 31 of the Constitution of India which make the position of Right to property worst than before. The said article gave effect with respect to

- 1) The change towards the legislature stance with respect to the obligation of paying compensation while acquiring or requisition of property.
- 2) The close relation of property to various other fundamental rights
- 3) Lastly to the correlation of fundamental rights to directive principles.

When the constitution was drafted for the first time, Article 31 elements stated as

*“a) that the acquisition or requesting is for a public purpose;*

*b) that when such a law is passed, it must provide for the payment of an amount to the owner, either by fixing the amount or by specifying the principle upon which it is to be determined and given [Art. 31(2)]”<sup>1</sup>.*

It included the doctrine of Eminent Domain and this doctrine basically means “the power of the sovereign to take property for public welfare without the owner’s consent”<sup>2</sup>. That makes

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<sup>1</sup> Durga Das Basu, Commentary on the Constitution of India (8<sup>th</sup> edition, 2012), Vol 3, Part XX.

<sup>2</sup> Durga Das Basu, Commentary on the Constitution of India (8<sup>th</sup> edition, 2012), Vol 8, Part XX, Pg. 9699.

the fundamental right to get compensation in cases of deprivation. In the case of State of West Bengal vs. Bella Banerjee<sup>3</sup>, it was held that the term Compensation under Art. 31(2) meant "full compensation", which means the market value of the property at the time of the acquisition. This gave rise to the 4th amendment to the constitution by the legislature in which it stated the adequacy of compensation amount couldn't be challenged in the court. That was nullified in the case of R.C. Cooper vs the Union of India<sup>4</sup> Stated that *"that the Constitution guarantees a right to compensation - an equivalent in money of the property compulsorily acquired which is the basic guarantee and, therefore, the law must provide compensation, and for determining compensation relevant principles must be specified; if the principles are not relevant the ultimate value determined is not compensation"*<sup>5</sup> after which the state again came up with an amendment, which replaced the word "compensation" with "amount". These changes in the constitution were upheld by the Apex court in the major landmark judgment of the Kesavananda Bharti Case which gave the judiciary the power to review when it was an "illusory" amount. Throughout the next few years, major drastic changes were viewed with respect to the 44th amendment, like the removal of the obligation of the compensation, which meant that *"it has been left to the legislature to deprive a person by the authority of law; if such law takes away a person's property without the payment of any compensation, the validity of such law can't be challenged before the court because no compensation has been paid or made payable by such law"*<sup>6</sup> and then there was the insertion of Article 300A. The said amendment literally shows that the object of the state is not to pay an adequate amount (market value) for the Acquisition of land and the removal of the fundamental right to get compensation for the acquisition of the property. Also, it cannot get compensation alone by the Entry 42nd of list III of 7<sup>th</sup> schedule of Indian Constitution. Supreme Court stated that *"We find no apparent conflict with the words used in Entry 42 List III so as to infer that the payment of compensation is inbuilt or inherent either in the words "acquisition and requisitioning" under Entry 42 List III. Right to claim compensation is, therefore, cannot be read into the legislative Entry 42 List III"*<sup>7</sup>. So, legislature removes the obligation to pay the compensation while acquiring the private property.

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<sup>3</sup> (AIR 1954 SC 170).

<sup>4</sup> (AIR 1970 SC 564).

<sup>5</sup> R. C. Cooper Vs. UOI, (AIR 1970 SC 564).

<sup>6</sup> Durga Das Basu, Commentary on the Constitution of India (8<sup>th</sup> edition, 2012), Vol 8, Part XX, Pg. 9673.

<sup>7</sup> K.T. Plantation vs State of Karnataka, (2011) 9 SCC 1.

“Article 300A and Article 31(1), to some extent, are a replica of each other, and hence, all the judicial pronouncements rendered by the Court on Article 31(1) should equally apply while interpreting Article 300A”<sup>8</sup>. “Supreme court adopted that the law authorizing the deprivation of property under article 31(1) must be consistent with other fundamental rights of property including Article 19(1)(f) of the constitution. Every deprivation was also a restriction on the right to property whose reasonableness must be assessed by the courts”<sup>9</sup>. In *Menaka Gandhi vs. UOI*<sup>10</sup> case, the court decided the case by combining the readings of Article 14, 19(1) (c) and 21 for the test of reasonability for a guarantee of personal liberty. So, it will be argued that the law must be struck down if it was unreasonable, arbitrary or unfair for the acquisition of land even though the ground of unreasonable was taken away which was derived from the Article 19(1)(f). But, here 19(1)(f) was repealed which removed the reasonability test of the act or provision under Article 31(1) and “Article 21 no inspiration can be derived to strike down a law of acquisition of property, on the ground that it does not pay proper compensation and is unreasonable or unfair”<sup>11</sup>. When the act provided no compensation for acquisition of the land then the argument for the unreasonable is not standing under article 14 because the discrimination is not happening between the same classes of people. Here a class of people represented by the people whose property is acquired by authority of law. It seems that Article 14 alone doesn't have the power to strike an act or provision in the matter of property. Even though, if we accept the argument then it would give a drastic change to the object of 44th amendment and the court has “the duty to give effect to this object and not act contrary to it”. The court will then limit its scope of judicial review. Therefore, act can't be struck down by the right to property itself whereas before the 44th amendment Article the right to property as a fundamental right can do. Violation of Constitutional right will provide the compensation only whereas the Violation of Fundamental right will strike down the provision or act also.

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<sup>8</sup> Durga Das Basu, *Commentary on the Constitution of India* (8<sup>th</sup> edition, 2012), Vol 8, Part XX, Pg. 9675.

<sup>9</sup> Sujit Choudhry, Madhav Khosla, Pratap Bhanu Mehta: *The Oxford Handbook of the Indian Constitution* (1<sup>st</sup> edition, 2016), Pg. 956

<sup>10</sup> AIR 1978 SC 597.

<sup>11</sup> *State of Maharashtra vs. Basantibai Mohanlal Khetam*, AIR 1986 SC 1466.

Recently year, In *KT Plantation Private Ltd V State of Karnataka*<sup>12</sup>, “*the Supreme Court held that the 'rule of law' prevailed in India and the court was not 'powerless' in a situation 'where a person was deprived of his property.... for a private purpose with or without providing compensation', as a result of which any State acquisition of property must satisfy the requirements of 'public purpose' and 'compensation' under Article 300A*”<sup>13</sup>. Also, Court held that “*public purpose is a precondition for deprivation of a person from his property under Article 300A and the right to claim compensation is also inbuilt in that article and when a person is deprived of his property the State has to justify both the grounds which may depend on scheme of the statue, legislative policy, object and the purpose of legislature and other related factors*”<sup>14</sup>. Court has made several attempts to restore the fundamental right status to the right to property, as it existed before the 44th amendment. But the position has still not been restored because before the 44th amendment the legislature had discretionary power to decide the quantum of compensation with the privilege of judicial review over the quantum when the compensation was illusionary and arbitrary. Whereas after the 44th amendment in the case of *KT Plantation V State of Karnataka*, it was held that the discretionary power to decide whether the compensation would be provided or not would be under the umbrella of judicial review over the scheme of statue, legislative policy, object and the purpose of legislature and other related factors.

Right to property is closely related to the right of livelihood, that is recognised under right to life, livelihood include shelter and same for the Right to resist (Article 19(1)(e)), if we don't have the right to property as fundamental right (an absolute right) then how would we get protection from the deprivation. For example, consider a situation wherein a poor man is living in a hut, then the State passes a legislation which seemed like reasonable restriction like saying that the land where he lives should be used for the public purposes in order to build an educational institution, for the lack of Institution building to provide education. That is protected under Article 21A resulting in the poor man being thrown out of the land because there was a reasonable restriction and fundamental right prevail over a constitutional right. Also, you can file your petition in high court under Article 226 not directly in Supreme Court,

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<sup>12</sup> (2011) 9 SCC 1.

<sup>13</sup> Sujit Choudhry, Madhav Khosla, Pratap Bhanu Mehta: *The Oxford Handbook of the Indian Constitution* (1<sup>st</sup> edition, 2016), Pg. 960.

<sup>14</sup> Sujit Choudhry, Madhav Khosla, Pratap Bhanu Mehta: *The Oxford Handbook of the Indian Constitution* (1<sup>st</sup> edition, 2016), Pg. 961.

which is covered under Article 32 of the Indian constitution because the right to property is ceased to be a fundamental right. It increases the procedural time.

“Fundamental right and Directive Principle of state policy (hereinafter DPSPs) in India constitution together comprise the human right of the individual”<sup>15</sup>. The DPSPs imposed a duty on the state to acknowledge the fundamental rights in the view to achieving the Socio-economic goals. In *Kesavananda Bharti vs. State of Kerala* (AIR 1973 SC 1461), Court held that the DPSP and Fundamental rights are harmoniously constructed, which means that the interest of individual and the communities in large will have the same importance. But it will prevail over another part of the constitution right because the fundamental right prevails over the constitutional right. DPSPs and fundamental have the same power. When property is ceased to be fundamental right then the legislature may affect the individual right of property without any problem if it seemed as reasonable. Also, DPSPs enforcement not needs to be justifiable. If the right to property was a fundamental right and DPSPs enforcement seizes the property right, it will be protected better as a fundamental right because of the harmonious construction. So, It affects the right to property as the constitutional amendment, which was protected more before as the fundamental right.

First, 44<sup>th</sup> Amendment removes the right to property as a fundamental right, which removes the power to file writ petition directly to Supreme Court. Second, it reduces the obligation of the compensation on the state for the acquisition of private property. Third, Article 300A has not inherited the power to strike down the act or provision which violates the right to property. Forth, Right to property ceased as fundamental right effect to other fundamental right and last, DPSP will also prevail the Right to property protected under Article 300A. Because of foresaid reason the right to property is pre-44<sup>th</sup> amendment is better than post-amendment.

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<sup>15</sup> V.N. Shukla, *Constitution of India* (Eastern Book Co., 2015).