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Law as Means to Justice: The Right to Property

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Abstract

Law has various aims. One of them is the establishment or restoration of justice in society. The primary institution that delivers justice in society by upholding the law is the judicial system or judiciary. This paper discusses property rights, as a constitutional right, through the lens of justice. It begins with a brief discussion of law and justice (the relationship between them) and a brief history of the right to property in India. Thereafter, it discusses how justice is delivered through the constitutional provision of the right to property. Then, it discusses the right to property and its interpretation by the judiciary through time, focusing on the era after the removal of the right to property from the list of fundamental rights. At last, it discusses the shortcomings and ambiguities in the judicial interpretation of this right and how this affects the marginalized sections. It concludes with suggestions about how this void can be filled and a better system of interpretation can be created.

Keywords: right to property, justice, 300A, 44th Amendment, law and justice

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Introduction

One of the main aims of law is to serve justice in society. The right to property underwent major changes in India, but its underlying principle remained the same: a person should not be unreasonably or unjustifiably deprived of their land. Private property is prone to major threats in welfare states, especially when the requisition of property is seen as a measure of serving social justice. This article does not seek to agree or disagree with this idea. It merely seeks to examine the application of the right to property to serve justice. Is it the privileged or the poor who have more to fear from this seizure of property by the state? Which section is the most affected? Is the provision of the right to property and compensation in the Constitution helping in serving justice? What role do the judiciary and its interpretation play in the rightful implementation of the legislation in this regard? My thesis here is that, as regards the usage of law to deliver justice in society, the judiciary plays a paramount role in the rightful implementation of the right to property in society, however, its current interpretation is inadequate to serve justice for the poor and marginalized of the society.

Law & Justice: An Interplay

Before we look at the right to property through the lens of justice, we must understand what justice is. Justice has different meanings, and thus we would be erring if we limit ourselves to one perspective. The concept of justice originates from the Latin word '*justus*' that refers to the quality of being 'fair', 'right', or 'just'. In the modern world, it is assumed, not incorrectly, that justice refers to rightness according to the prevailing ethics, morals, law, equity, and rationality in society.² Therefore, 'justice being done' refers to fairness, rightfulness, and equity being established (or re-established, after a particular event) in society.

Salmond defined justice as the means to provide everyone his share. Plato defines justice in terms of equality. According to him, "The meaning of justice is to discharge one's duties honestly and not to interfere in other actions."

² David Miller, 'Justice', *Stanford Encyclopedia of Philosophy* (26 June 2017) <https://plato.stanford.edu/entries/justice/> accessed 1 December 2021.

John Rawls, in his book 'A Theory of Justice', describes justice through the concept of the social contract. He elaborates that everyone, in society, decides the principles of justice with a presumption of equality and equity of all. He uses justice and fairness synonymously.³ Fairness, according to him, is the equal treatment of everyone despite differences. Justice can also be called the result of fair treatment.

There is a deep connection between law and justice. Law has been described as the origin of justice by some. By others, justice has been described as the origin point of law. So, according to the former idea, the law is the basic foundation of justice and there is no justice without the backing of the law. According to the latter, the idea of justice gave rise to law; the law is the set of rules and principles that help restore justice in society.

Another widely accepted definition of justice, and the perspective I would use to look at justice in this article, is that it is the proper, rightful, and effective implementation of the law. In these terms, if the law is properly and fairly implemented in society, justice is inevitable.

Law and justice, as concepts, are not the same. What may be considered lawful may not always be considered just. As a corollary, what may be considered just may not always be lawful.⁴ Therefore, it is essential to understand the difference between the two. Law, as far as John Austin's definition is considered, is the command of the sovereign backed by sanction. Therefore, the law has legal backing (those who do not follow it are liable to be punished). Justice, in most societies, does not have a legal backing; it merely has a moral or ethical backing, which, in most societies, are not enforceable. A lot of what is considered 'just' in society is not legally enforceable. Justice is abstract, but the law is concrete. Also, the administration of justice is possible without the use of the law, but, as mentioned before, such acts are not protected by law.

³Leif Wenar, 'John Rawls' *Stanford Encyclopedia of Philosophy* (25 March 2008) <https://plato.stanford.edu/entries/rawls/#InsFouStaSeq>, accessed 1 December 2021.

⁴ Roscoe Pound, 'Justice according to Law' (1913) 13 CLR 696.

The Right to Property

Now that we have discussed one aspect of our title – which is, law and justice *per se* – we move on to discuss the primary subject of our study: the right to property. Thereby, when we talk about law as a means of justice, we refer to the law of the right to property and how justice can be delivered through it. Before that, we would understand the current status of the right to property in India, and how it came to be that way.

The Constituent Assembly saw many speaking in favor of the inclusion of the right to property in the Constitution. They supported the grant of compensation to all those whose property gets acquired or seized by the government. Here we discover the first idea of social justice through the accommodation of the right to property within the ambit of the fundamental rights in India. Those who were not in favor of such an accommodation did so because, according to them, it would make the process of ‘redistribution’ of land (according to the socialist ideals of the constitution) and ‘nationalization unaffordable’.⁵

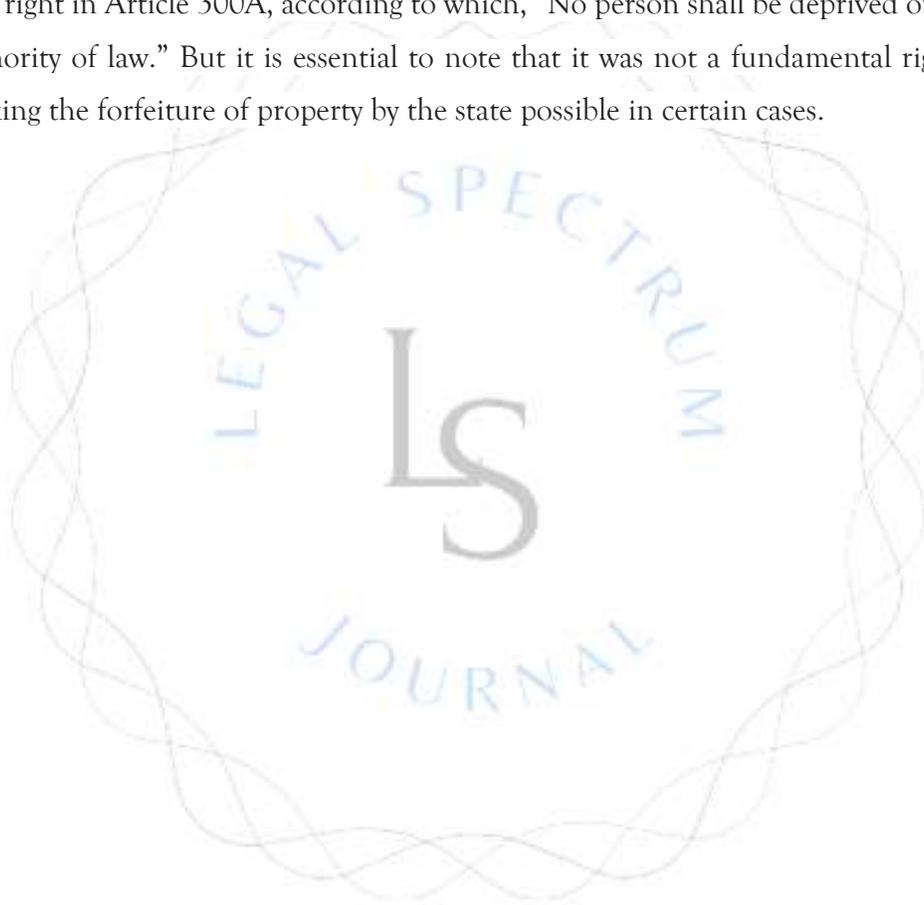
Article 19(1) (f) of the original draft of the constitution ‘guaranteed to the Indian citizens a right to acquire, hold and dispose of the property. Art 19 (5), however, permitted the state to impose by law reasonable restrictions on this right in the interests of the general public or for the protection of any Scheduled Tribe.

Article 31(2) stated,

[n]o property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principle on which, and how, the compensation is to be determined and given.

⁵ Tom Allen, ‘The Revival of the Right to Property in India’ (2015) 10 AsJCL 23, 25.

In the case of *Golak Nath v. State of Punjab*⁶, the Court upheld that the Parliament could not enact any legislation that would violate the basic structure of the constitution, thereby preventing any alterations to the fundamental right of property. It was met with opposition and further amendments followed. The manifesto of the Janata Party (that went on to win the elections in 1977) contained the promise of getting rid of the right to property. The Court had made clear that could not block such a repeal because a considerable majority in *Kesavananda Bharati v. the State of Kerala* had held that the right to property is not included in the basic structure of the constitution.⁷ The right was removed from the list of fundamental rights by the 44th Amendment Act of 1978. Instead, it added the right in Article 300A, according to which, “No person shall be deprived of his property save by authority of law.” But it is essential to note that it was not a fundamental right anymore, thereby making the forfeiture of property by the state possible in certain cases.



⁶ (1967) 2 SCC 762.

⁷ Tom Allen, 'The Revival of the Right to Property in India' (2015) 10 AsJCL 23, 29.

Right to Property through Lens of Justice

The state now finds itself equipped to seize the land of any person, as long as it is done lawfully. Through the years, courts have had to deal with cases where the property was acquired by the state unjustifiably and no compensation was provided in its place. Other fundamental rights like the right to equality (Article 14), the right for protection against unreasonable restrictions to carry on a business (Article 19(1) (g)), and the right to life and liberty (Article 21) have been established as rights relevant to the right to property.⁸ Accordingly, the non-arbitrariness of the state power must also be relevant; thereby, any requisition of property must be fair, just, and reasonable, which are the basic ingredients of justice.

1. Current scenario: delivering justice through right to property

The right to property may be of varying types: the erstwhile fundamental right to property, the current constitutional right to property, and the right to property in various religions (personal laws of communities). In this section, we will be examining the objective of having a right to property when we talk about delivering justice through law and what the current status of this idea is.

Ownership of property, in itself, provides a means of security to people. Security of that right over the property – through constitutionally recognized rights – gives further certainty to people. The right to property contains an implied right to compensation enshrined in it; the compensation must be provided in case the property is indeed seized by the state. This right to property may also be referred to as the right to private property. Thereby, the state must not unreasonably encroach upon private property.

In socialist nations such as India, private property is threatened by land reforms and nationalization measures the most. Though the land reforms helped with the adequate redistribution of land immediately after independence (taking them away from wealthy zamindars and giving them to the poor), in the present day, the poor are the most vulnerable to an unreasonable land grab. This can be illustrated by the case of *Vidaya Devi v. The State of Himachal Pradesh*,⁹ in which the plaintiff's land was forcefully taken away from her in 1967

⁸ *ibid.*

⁹ (2020) 2 SCC 569.

(when the fundamental right to property was still in place) without due compensation. She, being unaware of her rights, never filed a case. The Court ordered the state to pay one crore rupees as compensation. Thus, it can be clearly understood by this case how the absence of a right to property and compensation can affect the delivery of justice in the nation. The presence of the right to property still enshrined in Article 300A of the Constitution helped Devi acquire due compensation from the state and, thus, get justice.

The presence of judicial review has helped the courts scrutinize the legislation made by the legislature according to the basic structure of the constitution. Though the 44th Amendment removed the fundamental right to property from the Constitution, the Court opined that the right to compensation still exists and the requisition of property must only be done for public purposes.¹⁰ However, this interpretation suffered oscillations through the decades after the Amendment. We will understand that through some of the most influential cases adjudicated by the Court in this regard and its reasoning in each of them.

2. Cases in Highlight: How the Judiciary Interpreted the Right to Property

*Minerva Mills v Union of India*¹¹ is one of the cases to be discussed with regard to the right to property and its relation to justice. This textile mill was nationalized under the order of the Central Government. It filed a petition in the Supreme Court that the 42nd Amendment Act 1976 violated the basic structure of the constitution. Also, it argued that the nationalization of the mills without adequate compensation was arbitrary and also violates the right to equality. Though the argument was rejected at the time, this raised a question regarding whether other fundamental rights could be used to protect property rights.

The Bombay High Court in the case of *Basantibai Fakirchand Khetan v. State of Maharashtra*¹² said that the 44th Amendment did not take away the “natural right to property” of citizens. About Article 300A, it said,

The legislation must be just, fair and reasonable whether protection of Arts. 14 and 19 are available or otherwise, and the submission that the legislation provides for

¹⁰ Tom Allen, 'The Revival of the Right to Property in India' (2015) 10 AsJCL 23.

¹¹ (1980) 3 SCC 625.

¹² 1983 SCC OnLine Bom 256.

deprivation of property under Art. 300A of the Constitution must be just, fair and reasonable deserves acceptance.¹³

The Supreme Court overruled this case and said that the legislation was already fair, just, and reasonable.¹⁴

In the case of *Olga Tellis v. Bombay Municipal Council*,¹⁵ the court examined the usage of the right to life (enshrined in Article 21) to protect the right to property. In this case, slum and pavement dwellers were evicted from the pavements by the Council. They filed a petition in the Supreme Court. In this case, the court stretched the usage of the right to life to the 'means of living that was more than just a 'mere animal existence. Thus, the Court said that the Council could not evict the pavement dwellers, since the right to life extends to all the means to an enjoyable life. It can be inferred that this ruling did not confer property rights on the dwellers; it merely postponed the eviction until they could find any alternate arrangements.¹⁶ The reason for the court's ruling rests on the principle that the Council could not arbitrarily impose this eviction on the dwellers.

Another case that highlighted the scope of Article 300A was the case of *Jilubhai Nanbhai Khachar v. State of Gujarat*.¹⁷ The Court stressed elements of this Article that played the role of the right to property. However, it did not say that compensation was compulsory; some confusion regarding that remained. However, it implied that this legislation was eligible for judicial review.

Through the case of *State of Tamil Nadu v. Ananthi Ammal*,¹⁸ the Court observed that the payment of compensation through installments was unreasonable and violative of Article 14. In the cases that came after this, the Court implied the importance of the Article 300A as a separate right to property, and, in one case, it stressed that the court can interfere into the right to property of a person as long as it is for a public purpose and reasonable compensation must therefore be paid'. In the case of *State of Bihar v. Project Uchcha Vidya*,

¹³ Ibid.

¹⁴ *State of Maharashtra v. Basantibai Mohanlal Khetan* (1986) 2 SCC 516.

¹⁵ (1985) 3 SCC 545.

¹⁶ Tom Allen, 'The Revival of the Right to Property in India' (2015) 10 AsJCL 23.

¹⁷ 1995 Supp (1) SCC 596.

¹⁸ (1995) 1 SCC 519.

Sikshak,¹⁹ the Court described the two parts of the 'eminent domain' feature of the Article: one being the requisition of property for public purposes only and the other being the payment of adequate compensation for it. Thus, the requisition must be 'reasonable', and proportional compensation must be provided for it. Accordingly, the courts must find a balance between upholding the public interest and also upholding the constitutional right to property.

*K.T. Plantation v State of Karnataka*²⁰ made things clearer. Though the Court recognized that the 44th Amendment removed the fundamental right to property from the Constitution, it expressed doubt about whether the concept of 'eminent domain' was a part of Article 300A. At last, it opined that the right to fair and reasonable compensation could be 'inferred' from the Article. The Court cleared that 'the limitation or restriction should not be arbitrary or excessive or what is beyond what is required in the public interest'. Thus, it must be 'just, fair and reasonable. However, it also says that

Measures designed to achieve greater social justice, may call for lesser compensation and such a limitation by itself will not make legislation invalid or unconstitutional or confiscatory. ... in each case, the scheme of the impugned Act, its object, purpose as also the question of whether payment of nil compensation or nominal compensation would make the impugned law unjust, unfair or unreasonable in terms of other provisions of the Constitution as indicated.

The judgments of other cases like *James v The United Kingdom*²¹ and *Lithgow v The United Kingdom*²² showed the same line of reasoning the Supreme Court followed in *K.T. Plantation*: exceptions to full compensation were allowed.

The Court has made clear that 'measures designed to achieve greater social justice, may call for lesser compensation and such a limitation by itself will not make legislation invalid or unconstitutional or confiscatory'.²³ Thus, the contents of the provision determine its unconstitutionality. To serve social

¹⁹ (2006) 2 SCC 545.

²⁰ (2011) 9 SCC 1.

²¹ (1986) 8 EHRR 123.

²² (1986) 8 EHRR 329.

²³ *KT Plantation* (n 19).

justice, the taking of a property may be justified, but paying less than the market value for that may be considered unjustified.

The European Court of Human Rights, in the case of *Radovici and Stanescu v Romania*, stated that a state could not make the property owners take on the burden of providing social justice. According to this reasoning, states could not seize property without compensation with an excuse of delivering social justice.

3. Shortcomings in the Judicial Interpretation from the Perspective of Marginalized Sections

The Court feels the need for a distinct right to property (300A), besides the usage of Articles 14, 19, and 21 to serve its purpose, because the usage of the latter has left 'gaps in the protection of property. Some cases of unreasonable deprivation of property may not fall within the purview of those articles and thus the need for a distinct right is felt in such cases. Also, the inclusion of a judicial review for Article 300A is the second reason why this right is essential.²⁴

The controversiality of large-scale evictions from lands varies from case to case. In the Narmada Dams project, the aim of the evictions was public development. Other projects, like the evictions of 'encroachers' from the forest lands, have a different story. The eviction of indigenous people from their lands rarely serves a public purpose. Some legislations like the Forest Rights Act of 2006 were passed to protect the traditional forest dwellers from being unjustly deprived of their lands. However, the Act has only been partially successful; bureaucratic hurdles have made it difficult for the foresters to realize their rights. Moreover, the provision of compensation and alternative vocational opportunities are not enough for those who have been removed from their traditional lands. The poor are especially vulnerable because they are more prone to being displaced from their lands than big corporations are. Rehabilitation and resettlement rarely serve the needs of those who have been removed from their community.²⁵ The displacement of people residing in Old Tehri for the construction of the Tehri dam is one example. Although villagers were given compensation through resettlement provisions, many of the displaced, especially the poor and marginalized, still suffer the

²⁴ Tom Allen, 'The Revival of the Right to Property in India' (2015) 10 AsJCL 23.

²⁵ Ibid.

repercussions of their displacement from their homeland.²⁶ Furthermore, the right to property is more likely to be exploited by the better-offs to serve their purposes. The people who do not know about the market prices of their land would not be able to demand reasonable compensation for it if it is indeed seized. The poor and the unaware, thus, rarely find themselves benefitting from these provisions and the courts' have not been able to intervene properly.

In such a situation, the government of a welfare state must task itself with providing adequate means and awareness to the marginalized through awareness campaigns and accessibility measures. In some of the cases mentioned above, the plaintiffs were poor and uneducated (Devi and the pavement dwellers). Their journey towards justice was long and treacherous since they were not even aware of their rights. It is essential to note that many cases of unjustified seizure of property thus go unreported.

Therefore, institutional reform is necessary. The courts need to come up with standard principles to deal with cases of unreasonable requisition of the property so that uniformity in judgments can be maintained and upheld. Ambiguities in the legislation must be removed through a rightful interpretation by the courts so that justice is no more delayed or denied.

²⁶ Ishan, 'Tehri Dam Displaces 40 Villages in Uttarakhand, Oustees Demand Revenue Village Status' (Land Conflict Watch, 23 March 2021) < <https://www.landconflictwatch.org/conflicts/tehri-dam-displaced-families-now-stuck-in-human-wildlife-conflict-near-rajaji>> accessed 12 December 2021.

Conclusion

The ambiguities in the legislation compounded by ambivalence in the judicial interpretation have led to a crisis in the proper implementation of the law of the right to property. The judiciary plays a primary role in the delivery of justice through the rightful implementation of the law. Consequently, it is fair to conclude that the duty rests on the judiciary (and hence, the courts) to come up with a proper mechanism to deal with cases concerning the right to property. For this, it must clear the ambiguities in the use of Article 300A, the nature and extent of compensation to be given, whether compensation is compulsory in all cases, and apply the principles of justice, equity, and good conscience in places where the Article is not serving its purpose and one of the parties is likely to be denied justice if the Article is applied. This is how we progress towards a more equitable and rightful implementation of the law of the right to property.

