

Concept of Property - Jurisprudential Perspective

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Life, liberty, and property do not exist because men have made laws. On the contrary, it was the fact that life, liberty, and property existed beforehand that caused men to make laws in the first place.

Frederic Bastiat

Introduction:

Cormac McCarthy said that 'At one time in the world there were woods that no one owned', when man had no selfishness and possessiveness. During that ancient period man lived without ownership and he knew no owning of things. That is why Lisa St. Aubin de Teran says, 'I knew, as every peasant does, that land can never be truly owned. The whole mankind are the keepers of the soil, the curators of trees'. But as time passed man became civilised, with the civilisation man also developed possessive nature accordingly John Locke explained that 'Every man has a property in his own person. This nobody has a right to, but himself'. So man started claiming property as his right. James Madison rightly mentioned 'As a man is said to have a right to his property, he may be equally said to have a property in his rights'. But in due course of civilisation man has transformed such that he could not live devoid of property. Ayn Rand also made a mention that 'Just as man can't exist without his body, so no rights can exist without the right to translate one's rights into reality, to think, to work and keep the results, which means: the right of property'. But man should understand the reality as posed by Martin Luther King, Jr. that 'Property is intended to serve life, and no matter how much we surround it with rights and respect, it has no personal being. It is part of the earth man walks on. It is not man'.

Today man believes that property plays a vital role, it is a key right inseparable from Life and Liberty. Hence this term is given importance in Law. As a legal term, property is prominent in many doctrines and statutes. Importantly, in contrast to contractual rights that avail only against other parties to an agreement, property rights avail against the rest of the world, irrespective of consent. Thus, classifying an interest as property has far-reaching

implications in our legal system.³ Property is a very wide term includes anything which holds some value and can exercise the right of ownership. The word property in its most comprehensive sense includes all legal rights of a person except his personal rights, which constitute his status or personal condition.⁴ Article 17 of the Universal Declaration of Human Rights (UDHR) declares the right to property as follows: (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.

The object of the right to property as it is usually understood nowadays, consists of property already owned or possessed, or of property acquired or to be acquired by a person through lawful means. Not on opposition but in contrast to this, some proposals also defend a universal right to private property, in the sense of a right to every person to effectively receive a certain amount of property, grounded in a claim to Earth's natural resources or other theories of justice.⁵

Meaning of Property:

Property is fundamental to economic life. It is a vital institution in the economy of the society. Historically this institution has been accepted and recognised in varied forms. Phibrick writes that “the concept of property never has been, is not, and never can be of definite content”. Yet attempts have been made to explain the concept of property.⁶ The word property is used in different senses. According to some sociologists it includes goods or things owned by individual or group of individuals. According to Anderson and Parker, “Property consists of goods and services that society gives an individual or group of individuals the exclusive right to possess, use and dispose of it”. This right of goods and services is expressed in the value system of the society. Property is something that is scarce and which one owns. It involves possession and ownership of things owned. It is regulated by the norms and customs of the society. Davis writes, “Property consists of rights and duties of one person or group as against all other persons and groups with respect to some scarce goods”. MacIver says, “Property is not wealth or possessions, but right to control, to exploit, to use or to enjoy wealth or

³ Abraham Bell and Gideon Parchomovsky, A Theory of Property, 90 CORNELL L. REV. 531, 533 (2005).

⁴Raichand v. Dattatrya, AIR 1964 Bom. 344.

⁵ Kiron, Right to Property, LEGAL SERVICE INDIA, <http://www.legalserviceindia.com/legal/article-48-right-to-property.html>.

⁶ David J. Seipp, *The Concept of Property in the Early Common Law*, 12 LAW AND HISTORY REVIEW, , 29-91 (1994).

possessions which may be owned by an individual or a number of individuals who belong to the same social group or kin or clan. Property, as Hobhouse's says, "is to be conceived in terms of the control of man over things", a control which is recognised by society, more or less permanent and exclusive. The essential point in the notion of property, as says Ginsberg, is that there is recognised right of control over things vested in a particular person - or persons – a right which, within certain limits, is free from the interference of others.⁷

Definition and Nature of Property:

'Property' is a general term, the term that govern people's access to and control of things like land, natural resources, the means of production, manufactured goods, and also texts, ideas, inventions, and other intellectual products. Agreements and disagreements about their use are legally responsible because resource-use matters to people. Natural resources are particularly serious where they are scarce and necessary to all living beings. Some have suggested that property relations only make sense under conditions of scarcity.⁸ But other grounds of conflict are possible: there may be disagreements about how a given piece of land should be used, which stem from the history or symbolic significance of that piece of land, whether land in general is scarce or not. (Intellectual property provides an example of property rules that do not respond directly to scarcity; moreover unlike material objects, the objects of intellectual property are not in multitude, for their use by any one person does not preclude their use by any number of others.)⁹

The term property has been described by various jurists as:-

Salmond says that the law of property is the law of proprietary rights 'right in rem', the law of proprietary rights 'in personam' is distinguished from it as the law of obligations. According to this usage, a freehold or leasehold estate in land, or patent or copyright is included in property but debt or shares or benefit arising out of a contract is not property. According to Salmond, property has been termed in a variety of senses:

⁷ Property Rights: The Meaning, Nature, Types, Advantages and Disadvantages | Sociology, YOUR ARTICLE LIBRARY, <http://www.yourarticlelibrary.com/sociology/property-rights-the-meaning-nature-types-advantages-and-disadvantages-sociology/8541>.

⁸ Waldron, Jeremy, Property and Ownership, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2016 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/win2016/entries/property/>.

⁹ *Id.*

- Legal Rights- It includes all those rights which a person is entitled by a way of law. All those material objects which a person owns as per the law are his legal rights. These are the rights which he can exercise over others. It includes a person's personal as well as proprietary rights.
- Proprietary Rights- It does not include personal rights, it only include proprietary rights. It means that land, chattels, shares or debts are his property but his right to life and reputation are not included in his property.
- Corporeal Property- It only includes those property which real or which can be seen i.e. land, chattels, etc. It does not include shares or debts as property.

Hobbes and Blackstone are in favour of that property which is entitled by law, i.e. legal rights where as Austin suggests that property as the greatest enjoyment which a person holds. According to him, property includes whole of assets whether personal or proprietary.¹⁰

Jurisprudential Perspective of Property:

Property rights have certain specific characteristics which are not possessed by other kinds of rights and duties. Owner of the property can transfer it by way of sale, exchange or gift and also can be transmitted from one generation to the next. According to Davis "In any event the conception of property always implies that except on some taboo, on sale or transmission it could be transferred". In this sense a person's right in his wife or his skill are not property rights, for they are not transferable. There is also a distinction between Ownership and Possession of a thing. The term property is commonly used to define the objects which are owned. In other words, property denotes those things in which right of ownership can be expanded. The term property includes both living and non-living things. Lands, chattels, shares, and debts are included in the property. In a wider sense, the term includes all those rights which a person has or can be exercised. For instances, right to life, personal liberty, reputation and all those rights which he can exercise against others. Hence, in its wider sense, it can be termed as all those things or material objects without which a person cannot live.¹¹

¹⁰ Anusha 22, Laws of Property under Jurisprudence, LEGAL BITES (June 5, 2018), <https://www.legalbites.in/property-laws-jurisprudence/>.

¹¹ *Id.*

Theories of Law of Property¹²: Various theories have been provided by jurist from time to time to provide better explanation and recognition to the law of property. Such theories are both in support and against the law of property. Following are the important theories of property.

The Natural Law Theory: The Natural law theory is based on the principle that one who possesses the object is the owner of the property. It provides that when an ownerless thing is being possessed by someone then that person become the owner of the property. The reason is that the law recognized the property through its owner. This theory also gets recognized by law because the priority of the ownership of property is given to that person who is in the possession of the property. This principle is supported by various jurists. Grotius says that all the things were originally without an owner and whoever occupied them became the owner. According to Blackstone, the natural law theory provides that one who starts making use of a thing acquired an interest in that thing even for a short period or last long. This theory has been criticized by some jurist also; Henry Maine says that it is erroneous to think that possession gives right over the title of the property. Where Bentham says that property is not originated by the occupation of an ownerless thing, but it is the creation of law. He believes that property exist only when there is an existence of law.

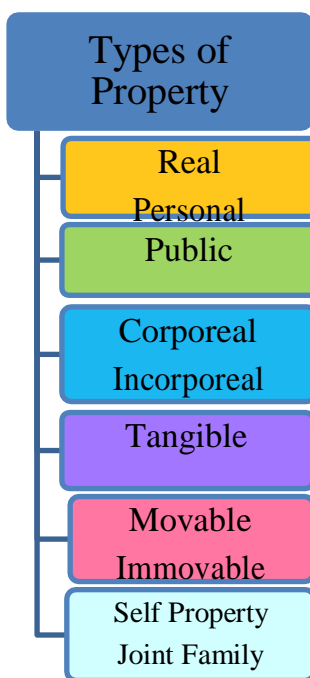
The Labor Theory: According to this theory, the person who has used his skills and labor to produce an object is the owner of that object because it is the result of his hard work. Though this theory is not recognized in modern times because there are many situations where one can acquire property from others by a way of will or contract. The labor theory is also called as the positive theory. Spencer supported this theory. He holds that property is the result of labor of an individual and one who has not put any labor to produce the property cannot acquire it.

Metaphysical Theory: This theory was propounded by Kant and Hegel. Both of them justified the theory but this theory was not recognized as it is not concerned with reality. According to Kant, a thing rightfully belongs to someone when he is connected with it in such manner that when someone else uses it without consent, it causes damage to the owner also. He provides that as per this theory, there is physical connection between the owner and the object. Hegel holds that property is the objective manifestation of the personality of an individual. In other words, property is an object in which person has a right to direct his will.

¹² *Id.*

Historical Theory: This theory talks about private property and its slow and steady growth. This theory is propounded by Bentham and got support from Henry Maine. The growth of property through three distant stages in. First Stage provides that a tendency is developed among people to take things in natural possession and exercise it independently of the law of state. Second Stage provides for juristic possession which means possession in fact and as well as in law. Third Stage is based on the ownership of the property recognized by law. The law guarantees the owner of property exclusive right and control over the property.

Psychological Theory: This theory provides that the property came into existence based on the tendency of a human being. Every one desires to own thing and to exercise control over them. Bentham has supported this theory and hold that property is a conception of mind. It is nothing but an expectation to own a property and make use of it to the fullest. Dean Pound also supported Bentham and asserted that the conception of property is the acquisitive instinct of an individual who desires to have control and possession over the property.



Types of Property:

Under English law, property is generally classified into real property and personal property. Real property comprises of all properties admitted to specific recovery and is freehold interests in land. Property in respect of which only a personal action lay was classified as personal property, i.e., which comprised of all forms of property other than real property. The distinction in English law between real and personal property is paralleled in Indian law by the distinction between immovable and movable property.¹³ Property may also be broadly classified into three types, private property and common (public) property, corporeal and incorporeal property, tangible and intangible property. The property is also classified based on the

acquisition and holding of the property. If it belongs to an individual, if he himself acquires and holds it, then property is self-acquired property. If the property is held by joint family then

¹³ G. C. Venkata Subbarao, Revised by Jaya V.S., Property Law, STUDOCU, <https://www.studocu.com/en/document/symbiosis-international-university/property/essays/property-laws-subbarao/1766256/view>.

it is called as Joint family property. Herein property is held jointly by all the members of the family.

Constitutional Perspective of Property¹⁴: Property as a fundamental right: The Constitution (44th Amendment) Act, 1978 omitted article 19(1) (f), i.e., right to acquire, hold and dispose of property and the sub-heading Right to Property under article 31. The effect of this change is that the Right to Property is no more a fundamental right. A new chapter IV has been inserted in Part XII of the Constitution and the provision in article 31 has been transferred to article 300A. Thus the right to property though a constitutional right is not a fundamental right. If this right is infringed the aggrieved person cannot access the Supreme Court directly under article 32.

The Article 300A states- "No person shall be deprived of his property save by authority of law". It is the only article, which was inserted by a constitutional amendment with the express purpose of creating a legal right, which is not a fundamental right. The earlier article 31 applied to all persons. The citizens were given the right to acquire, hold and dispose of property by article 19(1) (f). Both articles 19 and 31 were fundamental rights. The right to property had been changed and modified by 1st, 4th, 7th, 25th, 39th, 40th, and 42nd Amendments. Most of them were aimed at nullifying the effect of judgments and doing away with the obligation of the State to pay compensation. The expression 'law', used in article 300A would mean a Parliamentary Act or an Act of the State Legislature or a Statutory Order having the force of law. The State cannot deprive a person of his property by recourse to its executive power. The power can be exercised only by authority of law and not by mere executive order.¹⁵ One can challenge the acquisition procedure on the ground of violation of article 300 A along with article 14, 19 and 21. Thus, you should file a writ before the High Court under article 226 of the constitution. File such writ on the ground that state government did not pay compensation before acquiring the land.¹⁶ Article 300 A mandates that fair compensation is a constitutional right of the citizen and it is mandatory for the government to pay reasonable compensation. Acquisition of land without payment of adequate compensation violates the constitutional right guaranteed under article 300-A.¹⁷ Government violates the rule of law by not paying fair or

¹⁴ BRIJ KISHORE SHARMA, INTRODUCTION TO THE CONSTITUTION OF INDIA 127 (7th ed. 2015).

¹⁵ Hindustan Times v. State of U. P., (2003) 1 SCC 591.

¹⁶ *Right to property under article 300 A*, <https://kanoonirai.com/right-to-property/>

¹⁷ *Id.*

adequate compensation of the land proportionate to the prevailing market price of the property. Even after this Amendment, it was held by the judiciary that a law depriving a person of his property could be judicially examined as to its reasonableness.¹⁸ The Seventeenth Amendment Act, 1964 further made a special provision regarding compensation of land acquired from small farmers, which should not be less than market value of the land.¹⁹

The rule of law is the basic structure of the constitution and is incorporated in articles 14, 19 & 21 of the constitution. If there is a provision for the transfer of ownership or right to possession to the state or a corporation owned or controlled by the state, there should also be a provision for compensation to the person deprived of the property. The amount of compensation, however, is at the discretion of the legislature and its adequacy cannot be called in question in a court of law.²⁰ This right to property enjoyed a greater measure of protection under the Constitution as originally adopted but it was found to be an impediment to the establishment of a socialistic pattern of society in India. Hence the right has been attenuated by constitutional amendments. Under the Twenty-fifth Amendment, the word 'amount' has been substituted for 'compensation' to enable the legislature to fix whatever "amount" it likes while taking over private property for public purposes. The Supreme Court in *Golak Nath v. Union of India*²¹ held that a constitutional amendment abrogating or abridging a fundamental right would be hit by article 13 (2) and so would be void. This decision overrules the earlier decision to the contrary in *Shankari Prasad's case*.²² The Constitution (Twenty-fourth Amendment) Act has superseded the decision in *Golak Nath's case*. It provides that the expression "law" in article 13 does not include a constitutional amendment. The validity of 24th Amendment has been upheld in *Kesavananda Bharati v. State of Kerala*.²³

Fundamental rights and Directive Principles: Fundamental rights are intended to guarantee individual liberty. Directive principles are socialistic. They indicate the way in which the state should legislate for ensuring economic and social justice. In *State of Madras v. Champakam*²⁴ it was held that if a law conflicts with fundamental rights, it is void even if it may have been passed for implementing the directives of state policy. In 1971, the Constitution (Twenty-fifth Amendment) Act has provided that if the law contains a declaration that it is intended to give

¹⁸ Anukriti Jain, *Constitutional Battles on Right to Property in India*, 3 J Civil Legal Sci 124, 124 (2014).

¹⁹ *Kochuni vs. State of Madras*, (1960) 3 S.C.R. 887.

²⁰ See the Fourth Amendment of the Constitution.

²¹ AIR 1967 SC 1643.

²² AIR 1951 SC 458.

²³ AIR 1973 SC 1461.

²⁴ AIR 1951 SC 226.

effect to the policy embodied in article 39 clause (b) or clause (c), the law shall not be challenged on the ground that it conflicts with articles 14, 19 and 31 of the Constitution.

Article 39 contains the following directive principles: (1) Citizens should have the right to an adequate means of livelihood. (2) Resources of the community should be equitably distributed. (3) Concentration of wealth should be avoided. (4) Equal wage for equal work for men and women. (5) Childhood and youth should be protected against exploitation. (6) Health and strength of workers should not be abused. To give effect to these principles even fundamental rights can be overridden by means of law. This is the effect of the Constitution (Twenty fifth Amendment) Act. The result of the 44th amendment is that the right to property cannot hereafter retard or frustrate legislative efforts for the socio-economic regeneration of our country and the achievement of a truly socialistic pattern of society based upon economic freedom and equality, in response to the challenges posed by modern times and the aspirations of the younger generation.²⁵

Property and Ownership:

Property is a general term for rules governing access to and control of land and other material resources. Because these rules are disputed, both in regard to their general shape and in regard to their particular application, there are interesting philosophical issues about the justification of property. Modern philosophical discussions focus mostly on the issue of the justification of *private* property rights (as opposed to common or collective property). ‘Private property’ refers to a kind of system that allocates particular objects like pieces of land to particular individuals to use and manage as they please, to the exclusion of others (even others who have a greater need for the resources) and to the exclusion also of any detailed control by society. Though these exclusions make the idea of private property seem problematic, philosophers have often argued that it is necessary for the ethical development of the individual, or for the creation of a social environment in which people can prosper as free and responsible agents.²⁶

There are three species of property arrangement: common property, collective property, and private property. In a common property system, resources are governed by rules whose point is to make them available for use by all or any members of the society. A tract of common land, for example, may be used by everyone in a community for grazing cattle or gathering food. A park may be open to all for picnics, sports or recreation. The aim of any restrictions on

²⁵ *Supra* Note 8.

²⁶ *Supra* Note 8.

use is simply to secure fair access for all and to prevent anyone from using the common resource in a way that would preclude its use by others. Collective property is a different idea: here the community as a whole determines how important resources are to be used. These determinations are made on the basis of the social interest through mechanisms of collective decision-making—anything from a leisurely debate among the elders of a tribe to the forming and implementing of a Soviet-style ‘Five-Year Plan’.

Private property is an alternative to both collective and common property. In a private property system, property rules are organized around the idea that various contested resources are assigned to the decisional authority of particular individuals (or families or firms). The person to whom a given object is assigned (e.g., the person who found it or made it) has control over the object: it is for her to decide what should be done with it. In exercising this authority, she is not understood to be acting as an agent or official of the society. She may act on her own initiative without giving anyone else an explanation, or she may enter into cooperative arrangements with others, just as she likes. She may even transfer this right of decision to someone else, in which case that person acquires the same rights she had. In general the right of a proprietor to decide as she pleases about the resource that she owns applies whether or not others are affected by her decision.²⁷ One of the means to acquire the property is inheritance.

To conclude property is that which belongs to a person who acquires in his lifetime which may be self acquired or inherited. Property can be treated as proprietary rights as well as personal rights. Every individual is entitled to personal as well as proprietary rights. The concept of property is explained by various eminent Jurists in Jurisprudential angle. Some jurists have supported the concept of the property while some are against it. The concept of property has a special significance in jurisprudence. As jurisprudence also provides a description of other proprietary rights based on the property.²⁸ The concept of property has a special significance in jurisprudence because the determination of proprietary rights such as ownership, title, etc. is solely based on property. Again, rights and duties are also closely related to property. It is for this reason that the law relating to property has been developed as an independent branch of law in jurisprudence. The right in property are basic civil rights has long been recognised, today basic Jurisprudential concept of property has expanded its horizons to modern concept of Intellectual property.

²⁷ *Id.*

²⁸ *Supra* Note 10.

Under Indian Constitution also certain vital changes were taken place with regard to right to property. The final form in which the right to property was incorporated in the fundamental rights declared that all citizens shall have the right 'to acquire, hold and dispose of the property'.²⁹ But it has transformed from fundamental right to legal right. After emergency there were changes in the political environment of the country as well as in the realm of Constitutional Law. The Constitution (42nd Amendment) Act 1975 made significant changes in the constitution mainly with the aim of removing the impediments to growth of the socio economic reforms in the constitution. The amendments to the constitution were inspired to express clearly the ideals of socialism, secularism and integrity of the nation, to make directive principles more comprehensive and to bring socio economic reforms. At present the right to property was transformed into a legal right as in accordance with article 31(1) inserted under article 300A which declared that 'No person shall be deprived of his property as per the authority of Law'.

²⁹ INDIA CONST. art. 19, cl. 1(f).