

# Right to Property in India: A Journey from Fundamental Right to mere Constitutional Right

Ms. LEGHA MAMTA RANJITSINGH

Research Scholar,  
Department of Law,  
Kurukshetra University,  
Kurukshetra (Haryana), India

## Abstract:

The Fundamental Right to Property appreciates the one of a kind refinement of not exclusively being the second most combative arrangement in the drafting of the Constitution, yet additionally the most altered arrangement, and the main fundamental right to be eventually nullified in 1978. The direction of the right to property in the Constitution, as observed from the drafting of the first established property proviso, and its advancement through legal understanding, enactment, and protected change, shows the Indian State's ceaseless endeavors to reshape property relations in the public arena to accomplish its objectives of monetary improvement and social redistribution. Property, as a legitimate social organization, has various structures in various societies and lawful frameworks. The establishment of private property has been a disputable issue with clashing perspectives, one totally denying the right to possess private property and different backings the holding of the private property. The long and rough history of the law of land securing in India has moved along two unmistakable directions one that started when the Constitution of India, 1950 ensured the fundamental right to property; and another that started before with the institution of the Land Acquisition Act, 1894. Surprisingly, the two directions have moved generously, very free of the other in the course of recent years and both should be investigated conjunctively.

**Keywords:** *Constitution of India, Right to Property, Right to Property and Constitutional Right*

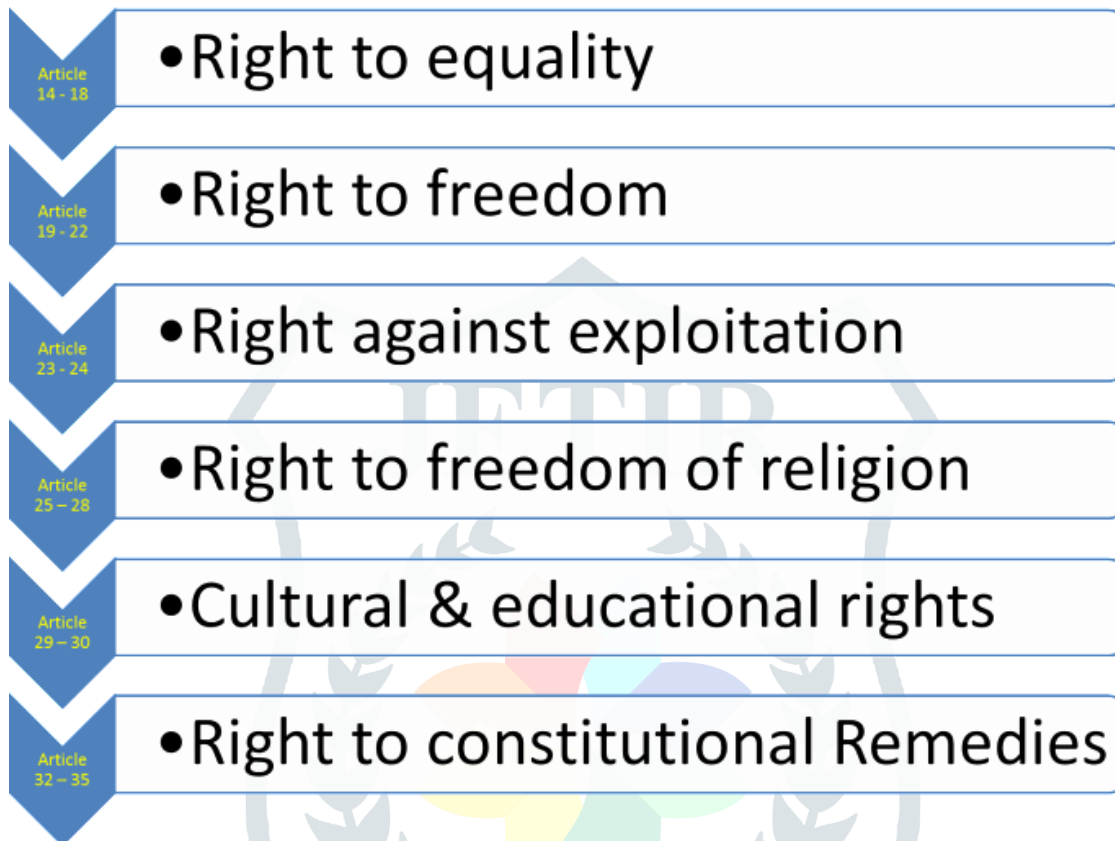
## Introduction:

The constitution of India guarantees certain basic rights to the citizens of India known as the Fundamental Rights, which are justifiable. The Fundamental Rights of Indian Citizens guaranty that the residents of the land can lead a peaceful life, as long as they inhabit the country<sup>1</sup>. The individual

<sup>1</sup> Allen, T., 2007. Property as a fundamental right in India, Europe and South Africa. *Asia Pacific Law Review*, 15(2), pp.193-218.

Fundamental Rights of Indian Citizens are most of the time similar in all the democratic countries <sup>2</sup>. The Rights have their roots in numerous sources, including England's Bill of Rights, the United States Bill of Rights and France's Declaration of the Rights of Man.

There are six fundamental rights recognized by the Indian constitution:



### Nehru's Era:

Jawaharlal Nehru, in his utopian zeal to achieve an egalitarian society and rapid growth, fought several battles with the judiciary and also amended the Constitution. Through land reform, Nehru wished firstly, to acquire sufficient land for public purposes, and secondly, to deprive rich maharajas and other landowners of surplus wealth (which mostly existed as large swathes of land). Emboldened by an absolute majority in both houses of Parliament, he believed that his government possessed the power to take away the several thousand hectares of land lying with these landowners, for public purposes such as the building of dams and industries, and that those landowners did not have to be compensated commensurate with the market value. The principle hindrance to his plan was the fundamental right to property articulated in Articles 31 and 19(1)(f) of the Constitution. Regrettably,

<sup>2</sup> Sripathi, V. and Thiruvengadam, A.K., 2004. India: Constitutional amendment making the right to education a Fundamental Right. *International Journal of Constitutional Law*, 2(1), pp.148-158.

however, the judiciary driven by the Supreme Court was not set up to disregard (at this time) the fundamental right to property<sup>3</sup>.

Therefore, when Nehru at the Center, and the Chief Ministers having a place with the Congress Party in the states, began instituting enactments abrogating zamindari extremely old framework where landowners possessed and held enormous swathes of farmland (or estates)— the Supreme Court and a few high courts struck them down. For example, the Patna High Court struck down the Bihar Land Reforms Act, 1950 in *Kameshwar Singh v. State of Bihar*, AIR 1950 Pat 91, and the Calcutta High Court struck down the West Bengal Land Development and Planning Act, 1948 in *Bela Banerjee v. State of West Bengal*. The Supreme Court maintained the last administering in 1953<sup>4</sup>.

The very first casualty of Nehru's zeal was the Constitution itself. The First Amendment to the Constitution in 1951 inserted Articles 31A (1) and 31B. The former protected laws providing for the acquisition by the State of any estate or of any rights in them, or the extinguishment or modification of any such rights, from being declared void on account of Part III of the Constitution, that is, the fundamental rights. Article 31B created the Ninth Schedule to the Constitution and protected the laws placed within in from being declared void on account of Part III<sup>5</sup>.

However, much to Nehru's dismay, the issue was far from settled as, the First Amendment notwithstanding, the Supreme Court, in *State of West Bengal v. Bela Banerjee*, upheld the Calcutta High Court decision striking down the West Bengal Land Development and Planning Act, 1948 on the ground that the money paid against the acquired land had to be commensurate with the "current market value" of such land. Notably, the Supreme Court did not disagree with its own ruling in *Shankari Prasad's case*<sup>6</sup>.

Nehru then brought forth the Fourth Amendment to the Constitution, which substituted Clause (2) of Article 31, with the following: "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."

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<sup>3</sup> Chaudhry, F., 2016. A Rule of Proprietary Right for British India: From revenue settlement to tenant right in the age of classical legal thought. *Modern Asian Studies*, 50(1), pp.345-384.

<sup>4</sup> Gae, R.S., 1973. Land law in India: with special reference to the constitution. *International & Comparative Law Quarterly*, 22(2), pp.312-328.

<sup>5</sup> Ganguli, A.K., 2016. 11\_Right to Property: its Evolution and Constitutional Developments in India.

<sup>6</sup> Ganguli, A.K., 2016. 11\_Right to Property: its Evolution and Constitutional Developments in India.

These two decisive moves also gave birth to a genie called the Ninth Schedule—whereby any law once placed in that schedule became above judicial review. A compliant Supreme Court had, in *Shankari Prasad v. Union of India*, AIR 1951 SC 458, while upholding the First Amendment, declared that Parliament enjoyed the unbridled power to amend the Constitution in whatever manner it liked. Several subsequent rulings by the High Courts and the Supreme Court in that period toed Nehru’s line.

### Indira Gandhi:

Nehru’s daughter Indira Gandhi, emboldened with an even greater majority in both houses of Parliament and guided by an even stronger belief in her virtue, but devoid of any sincere agenda for growth, would employ the same means, that is, the amendment of the Constitution, to achieve her stated goal of “*Garibi Hatao*” with the devastating consequence of the Emergency <sup>7</sup>.

The judiciary, which thought it could wrest the initiative from the executive once the over-arching patriarch of modern India was gone, stumbled before the ‘Iron Lady’ of Indian politics <sup>8</sup>.

In 1967, the Apex Court struck down the *Seventeenth Amendment to the Constitution* (passed barely a month after Nehru’s demise, and therefore attributable to him) in *I.C. Golaknath v. State of Punjab*, AIR 1967 SC 1643, on the ground that Parliament’s amending power was not “unbridled and unrestricted.”

Interestingly, the *Seventeenth Amendment* was no more radical than its predecessors—the *First* and the *Fourth Amendments*. If anything, it was a minor extension of the *First* and *Fourth Amendments* (which had already been held valid under Nehru’s incumbency) and was almost innocuous. It sought to take away the sting of the adverse impact of the *Fourth Amendment* on the demand for compensation commensurate with the market value of the acquired land <sup>9</sup>. While adding forty-four state land-reform legislations into the Ninth Schedule (thus taking the total number of legislations contained in it to sixty-four), the *Seventeenth Amendment* also inserted another *proviso* to Article 31A (1).

Pre 1978 Amendment	Article 19(1)(f)
Post 1978 Amendment	Articles 31(a), 300 A

“Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be

<sup>7</sup> Banerjee, A. and Somanathan, R., 2007. The political economy of public goods: Some evidence from India. *Journal of development Economics*, 82(2), pp.287-314.

<sup>8</sup> Jariwala, C.M., 2015. *Emerging Right to Environment: An Indian Perspective*.

<sup>9</sup> Morris, S. and Pandey, A., 2007. Towards reform of land acquisition framework in India. *Economic and Political Weekly*, pp.2083-2090.

lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for *payment of compensation at a rate which shall not be less than the market value thereof*”.

After victory in the war against Pakistan, the populist slogan “*garibi hatao*” ensured a thumping electoral triumph for Indira Gandhi and the complete decimation for her rivals in the 1971 general elections. The stage was set for her to implement (or at least to be seen to be implementing) her socialist agenda. When it came to the impatience with the obstacles to her agenda, Indira was her father’s daughter. She exhibited an increasing impatience with her political rivals and with those on the Bench.

The adverse ruling by the apex bench in *R.C. Cooper v. Union of India*, AIR 1970 SC 564 (popularly called the “*Bank Nationalization Case*”), that the “Constitution guarantees that compensation should be actual, real, and commensurate to the value of property acquired” rattled Indira and coming as it did on the heels of *I.C. Golaknath’s case* in 1967, accentuated her impatience<sup>10</sup>. She brought an array of Constitutional amendments; first among them were the *Twenty-fourth* and the *Twenty-fifth Amendments*. In fact, Indira’s impatience is manifest from the fact that Law Minister H.R. Gokhale<sup>11</sup> introduced bills for both Amendments on the same day—July 22, 1971<sup>12</sup>.

*The Constitution (Twenty-fourth Amendment) Act, 1971* had the following highlights:

Clause 4, which read, “Nothing in this article shall apply to any amendment of this Constitution made under Article 368”, was inserted in Article 13.

Correspondingly, a new clause was inserted in Article 368 that read, “Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.”

The highlights of *The Constitution (Twenty-fifth Amendment) Act, 1971* were that Clause (2) of Article 31 was substituted by a new clause which said, “No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for the acquisition or requisitioning of the property for *an amount* which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified

<sup>10</sup> Murphy, J., 1992. Insulating land reform from constitutional impugment: an Indian case study. *South African Journal on Human Rights*, 8(3), pp.362-388.

<sup>11</sup> Henderson, M., 1979. Setting India’s Democratic House in Order: Constitutional Amendments. *Asian Survey*, 19(10), pp.946-956.

<sup>12</sup> Neuborne, B., 2003. *The Supreme Court of India*. *Int’l J. Const. L.*, 1, p.476.

in such law; and no such law shall be called in question in any court on the ground that the *amount so fixed or determined is not adequate*".

The most incredible aspect of the *Twenty-fifth Amendment* however, lay in the insertion of a new Article 31C which read, "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or *article 31*; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy".

Sensing the popular mood in her favour, and buoyed by the fact that she had successfully buried the ghost of *Golaknath* with (like her father) two decisive Acts, Indira Gandhi passed the *Twenty-ninth Amendment* to the Constitution in 1972, which added two more state land reform legislations, namely the *Kerala Land Reforms (Amendment) Act, 1969* and the *Kerala Land Reforms (Amendment) Act, 1971* to the Ninth Schedule. (Curious observers will notice the similarity with Nehru's *Seventeenth Amendment Act*; the *Twenty-ninth Amendment* was also quite innocuous, but met the same fate).

In *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 1461, no less than thirteen judges of the Supreme Court sat to review the correctness of the *Golaknath* ruling (that had been given by a nine-judge bench), as also to check the constitutionality of the *Twenty-fourth*, *Twenty-fifth*, and *Twenty-ninth Amendments*. The result was a mixed bag for Indira Gandhi. While the aforesaid amendments were largely held constitutional, the Parliament's amending power was made subject to a hitherto unheard of "basic structure doctrine". The thirteen judges, in as many separate judgments, did not attempt to define the doctrine, nor determine its constituents. Thus, "instead of breaking the impasse between the judiciary and the executive over whose fiat ruled supreme when it came to amending the Constitution, the Supreme Court, only complicated the issue even further – at least in the short-term, it did appear that way," remarked H.M. Seervai in his treatise, *The Constitutional Law of India*.

Most significant for the right to property; the *Kesavananda Bharti case* also chose to ignore the Ninth Schedule, which continued to swell invariably with every new amendment. The period between 1973 and 1979 represented a crude situation that witnessed an extraordinary conflict where the Parliament could not impinge on the 'basic structure' of the Constitution for land reform, it continued to unabashedly add land-reform legislations into the Ninth Schedule, all of which continued to undermine the fundamental right to property, and arguably therefore, its basic structure. The things began to change gradually when after the Emergency, in 1979, the Janta Government enacted the *Forty-fourth*

*Amendment which inter alia omitted Article 31, thereby extinguishing the fundamental right to property. For the first time in the constitutional history of India, the executive as well as the judiciary concurred that such a right had outlived any utility it may have possessed* <sup>13</sup>.

### **Pre and Post Constitutional Aspects:**

Be that as it may, the right to property is a characteristic and innate right of a person. The vast majority of the cutting-edge constitutions, aside from those of socialist nations, have perceived the right of private property. In this manner, residents have right to claim and have the property. This right of individuals clashes with the right of state to procure the property. In India, no fundamental right has offered ascend to such a large amount of prosecution than property right among state and people. The Indian adaptation of famous area has found in passage 42 List III, which says "procurement or demand of property". Under the first Constitution Article 19(1)(f) and 31 accommodates insurance of property right and later they were canceled and Article 300A was embedded. For better comprehension of Article 19(1)(f) and 31 alongside established revisions <sup>14</sup>. Article 31(2) of the constitution accommodates necessary Acquisition of land. The intensity of famous area is fundamental to the sovereign government. The arrangements of the fifth revision to the constitution of the United states is that private property can't be taken for open use without just remuneration <sup>15</sup>. The guideline of mandatory securing of property is established on better cases of the entire network over an individual native, is appropriate just in those situations where private property is needed for open use or requested for the open welfare.

The Supreme Court brought up in State of Bihar V. Kameshwar Singh case that Article 31(2), as it remained before the correction did not explicitly make, the presence of 'open reason' a condition point of reference to the intensity of securing, however it was a fundamental element of prominent area, and the proviso continued on the suspicion that obtaining can be for an open reason. After an investigation of the experts, Das J. in Kameshwar Singh case, arrived at the resolution that no firm meaning of "open reason" can be set down for its idea, it has been quickly changing in all nations, he planned as a working definition, that whatever advances the general enthusiasm of the network, as restricts to the specific enthusiasm of the individual must be viewed as an open reason.

The right to property was at first present in Indian constitution under part III : Fundamental right, Article 31 yet it was nullified by 44<sup>th</sup> Amendment Act, 1978. At first it was made a fundamental right in order to

<sup>13</sup> Patel, R., 2006. Hindu women's property rights in India: a critical appraisal. Third World Quarterly, 27(7), pp.1255-1268.

<sup>14</sup> Sathe, S.P., 1974. Judicial review in India: limits and policy. Ohio St. LJ, 35, p.870.

<sup>15</sup> Shekhawat, V.S., 1994. Judicial Review in India: Maxims and Limitations. The Indian Journal of Political Science, 55(2), pp.177-182.

give assurance of property and give legitimacy of land to the individuals living in recently autonomous India.

In any case, a while later it was nullified in light of the fact that the Indian government needed to bring area changes and empower social equity (by taking area from landowners who have surplus land and afterward appropriating it to landless ranchers) .

It likewise planned to set up equivalent dispersion of assets.

Now it is made a constitutional right under Article 300A which states that no person can be deprived of his / her property except by authority of law.

- A person cannot live without rights to Food, shelter, movement, faith, expression, speech.
- A person can live without property.

The government cannot guarantee to property to every citizens. Because of, in the modern technologies can grant the property to everyone is impossible matter among population size. The government has responsibility of making the law for social, political and economically development.

### **Historical Background:**

Prior to autonomy, the landholding design in India was slanted; a couple of individuals had authority over all the land while the others functioned as tenant farmers. In states where socialist gatherings were in power, they were particularly keen on expelling zamindari framework and actualizing land conveyance. Indeed, even Socialist gatherings needed to redistribute lands. Yet, the nearness of Right to Property as a Fundamental Right implied that any transition to appropriate land was tested in Supreme Court straightforwardly, and it was done as such. Other issue was land procurement to set up ventures under Nehru-Mahalanobis program of industrialization. Substantial businesses just as littler ones were arrangement for import-substitution. All assembling in India was being finished by PSUs which implied that a large portion of the land acquisitions for ventures were being finished by government as it were <sup>16</sup>. So government was intensely putting resources into amending the error of putting Right of Property under Fundamental Right and, making it into a sacred right.

At the season of autonomy India was all the while battling under the burden of numerous severe systems the boss among them was the Zamindari framework which prompted abuse of different poor workers on account of domineering proprietors. Consequently, to annul this framework and present a progression of agrarian changes to accomplish the perfect of "Equity - Social Economic and Political" as cherished in the prelude of our Constitution, the right to property was expelled from Part III of our

<sup>16</sup> Singh, J., 2006. Separation of powers and the erosion of the 'right to property' in India. Constitutional political economy, 17(4), pp.303-324.



Constitution for example Fundamental Rights by means of the Constitution 44th Amendment Act, 1978. It was rather made a protected right under Article 300A which states that. " No individual can be denied of his property with the exception of by power of law."

Fundamental right to property in India was expelled to encourage laws that license rearrangement of land and to encourage procurement of land for formative ventures. Indian government, around then, was not rich enough to pay individuals whatever they requested for their territory. In this way, they removed it from Fundamental Rights and weakened its standing.

### **Universal Declaration of Human Rights:**

Article 17 of the Universal Declaration of Human Rights (UDHR) <sup>17</sup> enshrines the right to property as follows:

- Everyone has the right to own property alone as well as in association with others.
- 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 <sup>18</sup>. 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.

### **Judicial approach:**

Dwarkadas Srinivas v. Sholapur Spinning and Weaving Co. Ltd., the Sholapur Spinning and Weaving Co. Act of 1950 enabled the government to take control of the property to Sholapur Spinning and Weaving Company. The question was whether the Act was invalid as it did not provide for compensation. The government did not acquire the property therefore government was contended that Article 31 clause (2) providing for compensation did not apply since only clause (1) applied any authorized law was sufficient to deprive a person property right. As clause (1) authorizes any deprivation of property under authority of law.

The learned Chief Justice would postulate that the limiting power thereof is correct by clause (2). The Supreme Court held that the Sholapur Spinning and Weaving Company Act 1950 was void. Article 31 Clause (1) and (2) should be read together. So when there is deprivation of property, though there is no acquisition by the state clause (2) applied and compensation becomes payable.

<sup>17</sup> Gilbert, J., 2013. Land rights as human rights: the case for a specific right to land. SUR-Int'l J. on Hum Rts., 18, p.115.

<sup>18</sup> Sinha, K. and Singh, N., 2016. Land Acquisition in India: History and Present Scenario. Journal of Legal Studies and Research, 2(4), pp.2455-2437.

Hence, any deprivation of property should be:

- (1) Authorized by law; (Article 31 clause 1)
- (2) Necessitated by a public purpose; (Article 31 Clause 2)
- (3) Subject to payment of compensation.

Saghir Ahmed v. State of Uttar Pradesh issue was based on the Road Transport Act, 1951, which vested in the state government the road transport services in the interest of the general public. Supreme Court held that the Act was unconstitutional as it offended the provisions of Article 31(2) of the constitution. The fact that passenger buses of the appellant had not been acquired or might not have been deprived but they were depriving their business of running buses for hire on public roads<sup>19</sup>. Following the Shollapur case discussed above, the Supreme Court held that depriving a person of his interest in a commercial undertaking even though state did not acquire or take possession of it, attracted the provisions of Article 31(2).

State of West Bengal v. Subodh Gopal Bose is the third case relevant to the present discussion. This case made it quite clear that the obligation of paying compensation arose only where the state action resulted in the substantial deprivation of private property of the individual. The Supreme Court held that the abridgment of right was not amount to substantial deprivation of the right to property within the meaning of Article 31. The West Bengal Revenue Sales Act 1859 was declared void by the Supreme Court as it infringed Article 31 of the constitution. The judgement in this case shed new light on the extent of protection of property rights under the constitution Patanjali Sastri C.J. observed that the constitution made a definite break with the old order and introduced new concepts in regard to many matters, particularly relating to word 'acquisition' which is used in narrow sense in the constitution it might have used in same sense in pre constitutional legislation.

Chiranjit Lal's case it was held that Article 19(1) (f) would continue until the owner deprived of such property by authority of law under Article 31. If there was 'deprivation' of property under clause (1) of Article 31 by law, the citizen was not entitled to compensate at all, while he was entitled to compensation if property was acquired or requisitioned under clause (2) upon the point as to what is 'deprivation' there was conflict. In Kochunni's case court made it clear that clause (1) dealt with deprivation of property other than acquisition or requisition as mentioned in the clause (2) and other could be no acquisition or requisition unless there was transfer of ownership or a right to possession to the state or its nominee.

<sup>19</sup> Wahi, N., 2015. The fundamental right to property in the Indian constitution. Available at SSRN 2661212.

**Conclusion:**

India began with a property rights system in 1950 and the right to property was a Fundamental Right ensured by the constitution. Property rights represented a test to the administration as it attempted to start its program of land changes to destroy the zamindari framework—a structure of horticulture that took after feudalism and had brought about a monstrous measures of land being vested in a couple of hands. Our lawmakers were right to the extent that they were attempting to destroy an exploitative institutional set-up. This brought about a tussle between the legal executive and the parliament which extended for a couple of decades. The parliament looked to get changes that would have debilitated property rights and undermined the intensity of the legal executive in evaluating the parliament's choices. Simultaneously, the legal executive always baffled the endeavors of our lawmakers as it attempted to secure property rights. This tussle finished in 1978 with the 44th Amendment to the constitution, which erased the fundamental right to property from the constitution and gave it a far flimsier insurance as a negligible statutory right. With the debilitating of property rights, the extent of persuasive land securing was expanded. The property of the poor was persuasively procured by the state to construct dams, framework or mechanical undertakings. We find in India, in this manner, a bizarre story at work. The state initially took property from the rich proprietors and offered it to the poor for the sake of 'social equity.' It shocks no one then that the previous couple of decades have seen many grass roots developments rise with individuals challenging the state's subjective procurement of their territory and property. From challenges against the development of Narmada dam, to later dissents in Singhur and Orissa; individuals are encouraging together to request their rights. The debilitating of property rights has not simply had financial results; it has prompted an across the board discontent among the individuals. There have been some positive improvements over the most recent couple of years. For one, the state has come to perceive that it can't overlook the across the board discontent that is developing among the individuals. Another significant advancement has been the Forest Rights Act, which looks to give woodland tenants the land rights of backwoods occupants and other poor networks.