

Land and Property: Conceptualizing Property as an Institution of Land

Paramita Bhattacharyya

Assistant Professor, Jyotinmoy School of Law, Kolkata (India)

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Corresponding Author

Email: mailtoparamita84[at]gmail.com

ABSTRACT

Man is a land animal, and everything that he requires for satisfaction of their material needs must be won by constant labor from the land on which he lives, the mother Earth. The law confers rights to use land as an integral attribute to property entitlements. Property rights have, however, been subject to incremental reform by a number of different legal and policy instruments. The most important institution which affects the use of land is property. Property in land is considered as a bundle of rights. Property implies human relationship. Property is not considered as a material thing but it consists with rights which extend over the property object or rather over the activities which involve the use of land. There are various physical factors within which man uses land. In addition to the physical factors there are various group habits in the relation between men which affect their behavior in the use of land. This paper considers the impact of these physical factors and habits in use of land as property. Property rights change from time to time, depending on laws and institution of society. Women, children and slaves were once property. The property object is not always tangible. The paper explores about developments on property rights theory, and anticipates the further modifications to property concepts. The paper considers effective environmental policy for rural land use and community interest in sustainable management of land. The paper argues for development based land use as well as agricultural based land use.

1. Introduction

The land is the mother of all things. The majority of human activity throughout the history has occurred in land areas that support agriculture, habitat, and various natural resources. Land, sometimes referred to as dry land, solid surface of Earth that is not permanently covered by water.¹ Man is a land animal, and everything that he requires for satisfaction of their material needs must be won by constant labor from the land on which he lives, the mother Earth.² Man along with all plants and animals have been living on the surface of this earth for years together. He has been using, the soil water bodies, forest, grass lands, animals, minerals etc. all related with land in various ways. Man gets the primary needs of life from the land. All human settlements, roads, agriculture, grazing of domestic animals, establishment of industries etc. are done on land. Land is our most impotent primary natural resources. Natural resources are not available equally everywhere in the surface. Man too does not utilize land equally at all times. It has been being used differently in different times with the growth of civilization.

2. Type of Lands in India

India is one of the largest countries of the world. It ranks seventh in respect of size, and second in respect of population. The total land area of India is 32 lakh 87 thousand square kilometer. Three major types of lands are found in India in respect of its relief, such as, mountains, plateaus and plains. About 29% of our total land areas are mountains, 28% plateaus and 43% plains. land is mostly used in India for forests, pastures, farming, human settlements and such other useful purposes.

The mountains include the high Himalayan mountains in the north, the Arravalli ranges and the Western Ghats in the

west, the Vindhyas and the Sapura range at the centre, the Eastern Ghats in the east, the Agro, Khaki and Jacinta range in the north east. The plateaus include the Chhotnagpur Plateau, the Amarkantaka, Malawi, Karnataka and the Deccan plateaus. The plains include the Gang etic plains in the north, the Brahmaputra valley, the east and the west coastal plains and the flood plains of different river valleys of India.

About 80% of the total land area of India is utilized by man. This land utilisation of man is influenced by the relief, climate, soil as well as man's social and economic conditions.

According to use, lands in India are utilized as forest-lands, pasture and grazing lands, agricultural or farm lands, settlement and other such purposes.

3. Forest Lands

India was covered with dense forests in primitive ages. More and more lands were needed for agriculture, settlement industry, roads etc. with the growth of population. So man utilized land by cutting down and cleaning the forests in order to fulfill his growing needs. Now only about 22% of the total land area of our country is covered with forests.

The National Forest Policy formulated in the year 1952 proclaims that about 33% of the country's total land area should be covered with forests in order to maintain ecological balance in our environment. It will control the country's climate and the country will be saved to a great extent from the ravages of flood, drought and cyclones. Therefore, there should be forests in about 60% of lands in hilly areas and 20% of lands in the plains.

According to law, these forests are of three categories; such as, reserved forests, protected forests and unclassified

forests. Valuable forests are taken as the reserved forests, for which about half of the total lands under forests have been conserved. Man gets many useful forest products from the forests.

Forests play vital role in checking soil erosion, controlling flood, increasing the amount of rainfall and creating favourable conditions in the local climate. That is why forests are an important natural wealth of the country.

Forests of India are being destroyed owing to various natural as well as man-made causes. So the extent of forests is gradually diminishing.

In some hilly areas of the country, the Advises adopt shifting cultivation by clearing forests. Such type of farming is known as "pod" on "tail" cultivation in Orissa. At some places forests are cut down to raise farm lands, settlements, industries, roads etc. Cattle also treat forests as their grazing ground thereby the seedlings and finally the forests are destroyed.

Only 2% of the total forest land of the world is in India. But 15% of the total world population and 13% of the total cattle population depend on forests. It is known as biotic pressure. Such enormous pressure is an important reason of deforestation. Besides, floods, cyclones and land erosion etc. also diminish the forest areas of our country.

Various projects like a forestation, social forestry, farm forestry etc. are being worked out in order to increase the forest area and efforts are being made to bring more land under forests. Artificial forests are being raised on waste lands in village and town areas under the social forestry scheme.

Plantations are likewise in progress on bunds and plots dividing boundaries under the farm forestry scheme. By means of afforestation, the destroyed forests of hills, mountains and plateaus are being developed and thereby the extent and density of forests are increasing.

4. Pastures and Grazing Lands

There are pastures and grazing lands of about 4% of the total land area of India. These are mainly seen in hilly areas. We don't have any definite grassland area. So, pastures are almost mingled with the forests of hilly areas and dwindled forests of the foot hills.

In the past, there were some definite grazing lands in each village of India. But it is almost non-existent, so to say. These are being used for human settlement and such other related purposes. Now, pastures and grazing lands are seen mainly in the foot hills of the Himalayan Mountains, the Eastern and the Western Ghats and the north-eastern mountain areas.

It has been very much necessary to grow more food by adopting farming on more and more lands owing to the growth of population and for want of rains for about eight months a year as a result of which it is not possible to spare definite land areas for grazing purposes. Himachal Pradesh has the maximum land under pastures and grazing lands in India.

5. Land for Agriculture or Farm Lands

India is primarily an agricultural country. About 55% of the total land areas are used for growing food-crops, vegetables, cash crops and fruit. Food-crops are grown on about 45% of land out of the total 55% under cultivation. Vegetables and fruit are grown on the rest of the lands and some lands are left without any cultivation occasionally.

India has more farm lands according to its land area as compared with the other countries of the world; but it is strange that the agricultural products are less. Plains, river-valleys, flood-plains and delta areas are mostly used for agriculture. Very limited farming is done on the plateaus and mountain-slopes. Shifting cultivation or pod cultivation is carried on by clearing the forest areas.

Only paddy is cultivated on about three-fourths of the total land under food-crop cultivation, as rice is the staple food of the people in most parts of India. Wheat is grown on less amount of land than this; the area of farm lands is increasing year after year as more people depend on agriculture. The area of land under food-crop production in 1951 has by now increased by one and a half times; but the per capita holding of arable land has been decreasing gradually because of rapid growth of population.

6. Land Under Human Settlement etc.

About 19% of the total lands in India are being used for settlement of villages, towns, roads and rail-roads, airports, factories and for educational, health and administrative organizations. As per 1981 census, there were 3,949 towns, 557, 137 villages having human settlements and 48,087 villages having no human settlement.

A major portion of lands is also being used in construction of roads and rail-roads for communication among those towns and villages. Some lands are also being utilized for establishing industrial organizations, and setting up schools, colleges, universities, dispensaries and various offices.ⁱⁱ

7. Land System In India

The word 'land system' means system of production. It involves social, technological and economic condition along with productivity and distribution of income, it also includes legal rights of individual over land and sovereign rights of appropriation.

The Vedic period is said to be between 1500 BC to 500 BC. Cattle rearing and agriculture are two main occupations of people. Land civilization was developed in hands of tribes. These tribes exercised control over the areas that they had taken possession thereof. There was no concept of state ownership but land acquisition by supreme power was there. we can give example of 'Ashvamedh Yaga'. The concept of individual or private property is recognized in this era. "Dharmasastra" and 'smriti' talks about occupation of land by private individuals, Which is what we called today 'private property' or 'ownership' or 'possession'. In later Vedic period, 'sixteen mahajanapadas' has firmly recognized the power of king as 'sarvabhauma'ⁱⁱⁱ

In Mauryan and Gupta's empire, there was a huge change in political and economical elements in India. There was a growth of concept of private property and there was a tradition of giving land grants to priests, temples, and officials in administration.

India is vast in size and diverse in culture. So already there had been a diversification in land rights and land acquisition by ruler. Economic system was feudal in nature in the then period. The struggle of medieval period was not only over ownership but also over harvest.

Land System of Mughals was based on three main intermediary systems. These are:

- 1) Mansabdari System
- 2) Jagirdari System
- 3) Zamindari System

Zamindari System as relating to land system. Under the Mughal period, Zamindar was divided into three categories

- 1) Primary Zamindar who had some proprietary rights over the land.
- 2) Secondary Zamindar who had intermediary rights and helped the state in collecting land revenue.
- 3) Autonomous chiefs who were of the category of zamindars that has autonomous rights and helped the state in collecting the land revenue.

There was a terrible famine in Bengal in 1769-70. The local rulers collected taxes with severity. Peasants became poor and nobody cared for the welfare of masses.

8. Land system in British Period

Appropriation of Land by government has got its statutory character in India in pre-constitutional colonial Law with the hands of East India Company. Primarily the aim of the company was commercial soon powers of the company were transformed into administrative body.^{iv}

The first Law in India for acquisition of immovable property for public purpose was Bengal Regulation Act I of 1824. The rule empowered the government to acquire immovable property at a fair reasonable price for construction of roads, canals, or other public purpose. There was no proper legislation in respect of 'public purpose'. In order to remove the difficulty Act I of 1850 was enacted. Next attempt was made in Bombay Presidency by Building Act XXVIII of 1839 for acquiring land for public purpose. Act XX of 1852 was also made for same purpose in Madras. All these enactments were repelled by Act VI of 1857 which enacted one general law for acquisition of land for public purpose in all the territories under East India Company. Thereafter Act XXII of 1863 was enacted. Act provided for acquisition for private individuals and companies and applied to works of public utility. Ultimately Act X of 1870 repelled both the previous said Acts and made a consolidated Act provided for acquisition of land for public purposes for companies. This Act was finally repealed in 1894 by the present Act.

Property rights

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. The term property is explained in Jurisprudence by various eminent Jurists. 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.

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.

Hobbes and Blackstone are in favour of that property which is entitled by law, i.e. legal rights.

Austin suggests that property is the greatest enjoyment which a person holds. According to him, property includes whole of assets whether personal or proprietary.

Kinds of property:

- Corporeal
- Incorporeal

Corporeal Property

It is also termed as tangible property. It is the right of ownership over material things. It includes only those things which are real and visible. Person who has the right to use a thing is called as the owner of the object and the object is called as property. It includes only material things, i.e. land, house, chattels, money, ornaments etc.

Corporeal property may be divided into two categories,

1. movable and immovable property
2. Real and personal property.

Incorporeal Property

Incorporeal property is other proprietary rights which are right in rem and are not tangible and real. Incorporeal Property can be divided into two

1. Jura in re aliena
2. Jura in re propria

Jura in re aliena

They are called as encumbrances. It includes property, the ownership of which is in the hand of one person and it is used by other person.

It is categorized into following:

1. Lease;
2. Servitude;
3. Securities;
4. Trusts;

Right In Re Propria

Proprietary rights are of both materials as well as non-material things. Material things are the physical objects and non-material things are the rights attached to the things. Right in re propria is mainly over immaterial things. The person having right over the thing which he attains due to his skill and labour.

It is categorized into following:

1. Patent
2. Copyright
3. Commercial Goodwill

9. Theories of Law of Property

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.

1. 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.

2. 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.

3. 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.

4. 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 has three distant stages.

First Stage- It 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- This provides for juristic possession which means possession in fact and as well as in law.

Third Stage- This 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.

5. 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.

In this text *The Common Law*, Oliver Wendell Holmes describes property as having two fundamental aspects. The first, possession, can be defined as control over a resource based on the practical inability of another to contradict the ends of the possessor. The second, title, is the expectation that others will recognize rights to control resource, even when it is not in possession. He elaborates the differences between these two concepts, and proposes a history of how they came to be attached to persons, as opposed to families or to entities such as the church.

- Classical liberalism subscribes to the labor theory of property. They hold that individuals each own their own life, it follows that one must own the products of that life, and that those products can be traded in free exchange with others.
- "Every man has a property in his own person. This nobody has a right to, but himself." (John Locke, *Second Treatise on Civil Government*)
- "The reason why men enter into society is the preservation of their property." (John Locke, *Second Treatise on Civil Government*)
- "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." (Frédéric Bastiat, *The Law*)
- Conservatism subscribes to the concept that freedom and property are closely linked. That the more widespread the possession of private property, the more stable and productive is a state or nation. Economic leveling of property, conservatives maintain, especially of the forced kind, is not economic progress.
- "Separate property from private possession, and Leviathan becomes master of all... Upon the foundation of private property, great civilizations are built... The conservative acknowledges that the possession of property fixes certain duties upon the possessor; he accepts those moral and legal obligations cheerfully." (Russell Kirk, *The Politics of Prudence*)
- Socialism's fundamental principles center on a critique of this concept, stating (among other things) that the cost of defending property exceeds the returns from private property ownership, and that, even when property rights encourage their holders to develop their property or generate wealth, they do so only for their own benefit, which may not coincide with benefit to other people or to society at large.
- Libertarian socialism generally accepts property rights, but with a short abandonment period. In other words, a person must make (more-or-less) continuous use of the item or else lose ownership rights. This is usually referred to as "possession property" or

"usufruct". Thus, in this usufruct system, absentee ownership is illegitimate and workers own the machines or other equipment that they work with.

- Communism argues that only collective ownership of the means of production through a polity (though not necessarily a state) will assure the minimization of unequal or unjust outcomes and the maximization of benefits, and that therefore humans should abolish private ownership of capital (as opposed to property).

Both communism and some kinds of socialism have also upheld the notion that private ownership of capital is inherently illegitimate. This argument centers mainly on the idea that private ownership of capital always benefits one class over another, giving rise to domination through the use of this privately owned capital. Communists do not oppose personal property that is "hard-won, self-acquired, self-earned" (as the Communist Manifesto puts it) by members of the proletariat. Both socialism and communism distinguish carefully between private ownership of capital (land, factories, resources, etc.) and private property (homes, material objects and so forth).

10. Acquisition of Property

There are various modes of acquisition of property. SALMOND has described four modes of acquisition of property.

1. Possession
2. Prescription
3. Agreement
4. Inheritance^v

11. The Value of land and development

Development is process of changing the uses of land from one to another. It is conversion of land to different uses. It is a post world war II phenomenon. Though it is a part of story, most recognized view is that it is an age old process began when ancient people organized their extended families in to tribes and forming villages and primitive town for the benefit of all. Egypt, Greece, Rome civilizations are example of humble beginnings. The growth and development in terms of complexity have changed their nature to urban development. Every permanent improvement and change in the soil, and every betterment of society, every facility given to production is development. A systematic approach is offered towards land development process. It is known as land development design. Land development design is the systematic process of collecting, studying, analyzing and assessing the proposed plan and its impact on land and land owners.

12. Right to Property And Indian Constitution

The Indian Constitution, did not disregard the property rights, in 1970 one year before the famous Bank Nationalization case, Parliament passed a law to make changes to the fundamental rights as laid down in Constitution, which now saw the undoing of the fundamental right to property as guaranteed by article 19[f]. In Bank Nationalization case^{vi}, the supreme court by majority held that, a law on acquisition should also meet the test of article 19(1) and 19(5). With 44th amendment, the right to property as guaranteed under 19(f)

was transformed into merely a legal right instead of fundamental right. The new article 300-A stated that, "no person shall be deprived of his property save by the authority of law." The related article 31 dealt with compulsory acquisition of property and eminent domain power of state. Clause (1) and (2) of article 31 stated about three limitations subjected to which state may exercise its eminent power. Limitations as imposed under article 31 are, firstly, property right can be deprived only through legislation; secondly, deprivation can only be possible for public purpose, and thirdly, compensation for deprived property must be equivalent to market value of the property acquired.

The word "compensation" in article 31(2) created lots of problems and obstructions to the Government. When Govt. sought to acquire land for public purpose, the land owners were immediately filing writ petitions before Supreme court under article 31 or before High courts under article 226. The supreme court of India in *Bela Banerjee's Case*^{vii} held that the word compensation in article 31 implied "Full Compensation", that is the market value of property at the time of acquisition. Supreme Court further held that legislature must, "ensure that what is determined as payable must be compensation, that is, a just and equivalent of what the owner has been deprived of." After the constitution 4th amendment in the year 1955, the apex court in famous *R.C Cooper's Case*¹ popularly known as *Bank Nationalization Case* held that compensation under Article 31 implied full monetary equivalent of the property taken from owner that is market value at the time of acquisition. The result was constitution 25th amendments in 1971. The amendments replaced the word "amount" for the word "compensation" appearing in the repealed Article 31(2). But In *Keshavananda Bharati Vs State of Kerala*² Supreme Court held that the amount which was fixed by the legislature could not be arbitrary or the illusory but must be determined by a principle which is relevant to the acquisition of the property.

The fundamental "right to property" has been modified by parliament by several constitutional amendments i.e., insertion of article 31- A by first amendment in 1951, and also Article 31 B was added by same amendment and next attempt was made by addition of article 31 C and by 25th Amendment Act, 1971 To overcome this problem in the year 1978 44th Amendment to Constitution of India was taken place and article 31 and article 19(f) also repealed. Fundamental right has been transformed to property right by insertion of article 300-A in Constitution of India

13. Conclusion

"You take my life, when you do take the means whereby I live"^{viii} The land is the mother of all things. If by the word "land" we mean only agricultural land it is not enough. Land means hunger, thirst, nakedness, notice to quit, demolition of homes, breaking up of family, landlessness, displacement, civilization, development and many more. The word land in law usually means tenements of a permanent nature. Property is a belonging to a person who acquired it either through his hard work or through succession or out of an agreement. Property

can be treated as proprietary rights as well as personal rights. Every individual is entitled to personal as well as proprietary rights. Though the most important institution of land is property and it is an attribute of human beings but it is not the only means to use the land as property. The word Land can't be limited to the definition of a property, there are other institutions which are well versed to set the land by their own nature.

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