CHAPTER I

INTRODUCTION

(a) The Concept of Property:

Any discussion of law of expropriation or taking of property will involve at the threshold the question of what has been expropriated. It will have to be precisely determined whether and what type of property has been expropriated by the state. Therefore, the concept of property is central to the whole question of taking of the property.

Many distinguished international lawyers have emphasized this point. At the same time they have been dissatisfied with the inadequate attention paid to this concept. Rosalyn Higgins says, "... I am very struck by the almost total absence of any analysis of conceptual aspect of property. So far as the concept of property itself is concerned, it is as if we international lawyers say; "property has been defined for us by municipal legal systems; and in any event, we know property when we see it. Comparatively few of these international law source materials address themselves to what property is, at least in any explicit sense.[1]

The same point was made more than 30 years ago by F.A.Mann. He emphasised the point that no state can be fixed

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1. Rosalyn Higgins, "The Taking of Property by the State: Recent Developments in International Law, "Recuel Des Course, vol.116, (1982-III) p.269.

with responsibility for expropriation unless the act complained of can fairly be said to involve the taking of property within the meaning attributed to that conception by the general principles of law recognized by civilized nations. But he lamented: "It is unfortunate that no international lawyer discussing expropriation, confiscation or nationalization has as yet to any appreciable extent investigated the municipal law on such fundamental matters as the conception of property, the conception of taking, the ambit of the duty to compensate and so forth. This is the principal reason why most studies of international law relating to the taking of property are also unsatisfactory. They rest on insecure and insufficient foundations, with the result that on a number of crucial points they have only positivistic assertions to offer."[2]

The point these two jurists make is that for a proper understanding of the law of expropriation it is crucial to define and demarcate precisely the concept of property which is alleged to have been taken away. If the concept of property is not precisely defined, the other discussions will be inadequate. As Higgins puts it, how can we know if an individual has lost property rights unless we really understand what property is?[3]

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2. F.A.Mann,"State Contracts and State Responsibility" The American Journal of International Law, vol.54 (1960),p.583.

3. Rosalyn Higgins, n.1, p.268.

The importance of this definitional problem will be readily apparent from an illustration. In Amoco International Finance Corporation v. Islamic Republic of Iran[4], the respondent government submitted that, among other things, Amoco's interest in Khemco was not property. The respondent maintained that the Claimant's ownership interest in Khemco cannot be regarded as property. The tribunal in this case rejected the contentions of the respondent and decided that claimant's interests were indeed property rights.

It would be desirable therefore that an attempt should be made to delineate the concept of property. Kingsley Davis says that property is essentially the distributive system in its static aspect. It consists of the rights and duties of one person or group (the owner) as against all other persons and groups with respect to some scarce good. It is thus exclusive, for it sets off what is mine from what is thine; but it is also social, being rooted in custom and protected by law.[5]

Davis adds that rights and duties are not tangible in a physical sense, and the tangibility or intangibility of the thing owned is of no great consequence. What is important is the exchange value of the object, the nature and

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4. Amoco International Finance Corporation v.Islamic Republic of Iran, International Legal Materials vol.27,(1988),p.1314.

5. Kingsley Davis, Human Society (New York, 1967) p.452.

completeness of the rights and the number and characteristicof the owners.[6] Richard Epstein,[7] following John Locke, sets forth a simple conception of property. According to him it is the individual's right to unfettered possession, disposition, and use of corporeal and incorporeal objects.

It will be helpful for our purposes if we try to identify the legal characteristic of property rights. One characteristic of property rights is their transferability. The assumption is that these rights may be exchanged whenever such an exchange seems mutually profitable to the parties concerned.

Another characteristic of property rights is that property rights in an object do not necessarily imply actual use and enjoyment of the object by the owners. The object may be stolen by another to use and enjoy. Or it may be borrowed with the consent of the owner. Or, the owner may rent it at a cost. Therefore it is important to remember that there is a distinction between ownership and possession.

A third and extremely important characteristic of property is its power aspect. It can be said that this is the most salient characteristic of property rights because it is a source of permanent dissension in society. It was

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6. Ibid.
7. Richard A. Epstein, Takings; Private Property And the Power of Eminent Domain (Massachusetts 1985) p.10.

probably because of this characteristic that Tolstoy, regarded it as source of all evil in society. He says: "In our time property is the root of all evil and of the suffering of the men who possess it, or are without it, and of all the remorse of conscience of those who misuse it, and of the danger of collision between those who have it and those who have it not. Property is the root of all evil and at the same time property is that toward which all the activities of our modern world is directed, and that which directs the activity of the world.[8]

The aspect of power of property should be emphasized. The possession of exclusive rights to something that is scarce and valuable necessarily implies the possession of power over others who also desire the scarce and valuable things. The more complete the right of one group in the thing, the greater is the control which can be exerted over other individuals and groups. The amount of power derived by the owner of property also depends on the extent of the other's needs for that which is owned.

Another characteristics of property rights is that they refer to concrete objects. But at the same time it should also be kept in mind that it is not always so. It is a fallacy to assume that property is a thing owned rather than the rights which constitute the ownership. It is incorrect to imagine that the property is the material object. While

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8. L.Tolstoy quoted in, Laura S.Underkulfer, "On Property: An Essay", The Yale Law Journal vol.100, (1990). p.127.

it is true that the tangible objects may be part of a property situation but it is more important to keep in mind that the central fact of property are legally enforceable rights. In other words, the nature of property is to be found in the institutionally defined rights, not in the physical attributes of the object.

The concept of property refers to various types of rights. R.H.Tawney says, "in most discussions of property the opposing theorist have usually been discussing different things. Property is the most ambiguous of categories. It covers a multitude of rights which have nothing in common except that they are exercised by persons and enforced by the sate. Apart from these formal characteristics, they vary indefinitely in economic character, in social effect, and in moral justification. They may be conditional like the grant of patent rights, or absolute like the ownership of ground rents, terminable like copyright, or permanent like freehold, as comprehensive as sovereignty or as restricted as an easement, as intimate and personal as the ownership of clothes and books, or as remote and intangible as shares in a gold mine or rubber plantation.[9]

A final word about the concept of property. Some jurists have made an attempt to enlarge the traditional concept of property. They want to include more and more

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9. R.H. Tawney quoted in S.I. Benn and R.S.Peters, Social Principles and the Democratic State, (New Delhi 1979), p.156.

things within the ambit of property rights. Charles A.Reich[10] persuasively argues that the conception of property should be broadened. Reich argues that property rights are becoming relative; he is in favour of inclusion of other rights which achieve equivalent purposes.

Reich reinterated his views again in 1991. In a commentary on his previous article, again published in Yale Law Journal, he suggested that broadening the base of property rights was indispensable for a stable democratic society. He recommended an evolutionary view of property which he described as New Property. In his own words, "More basically, new property represents the birth right of every individual. I reject the idea that new property is value transferred to the needy from another group in society; I call this form of wealth "property" because it is inseparable from citizenship and personhood. I cannot accept the idea of a propertyless people in a democratic society. Yet that is what will happen if we limit the concept of property to its traditional forms. I believe it is better social policy to allow and encourage the concept of property to evolve as society changes, keeping the function of the property alive whatever the form.[11]

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10. Charles A. Reich. "The New Property" Yale Law Journal vol.73, (1964), pp.738-787.

11. Charles A. Reich, "Commentaries", Yale Law Journal vol.100, (1991), p.1468.

(b) Justification for Taking the Property:

As was discussed in the preceding section, the property has always been a source of trouble in society. Philosophers Plato and Aristotle noted and emphasized the pernicious effect of property in the society.

The reason is very simple. As was seen, a very important and critical attribute of property is its power. Property is directly related to power. People with property have a tendency to exploit those without power. As a result there has been a perpetual conflict between those who have property and those who have not. This tension has always fascinated political and legal philosophers about the justification of property. John Locke was the greatest spokesman of the natural right of property. His conception was simple. People come together in a society in order to protect their life, liberty and property ----- the rights they enjoyed in the state of nature prior to the formation of civil society. These rights are inviolate. It follows that the right is prior even to the primitive society. He says property is without any express compact of all the commoners.[12]

This right, Locks says, each individual brings to society in his own person just as he brings the physical energy of his body. This right does not originate in the society. Therefore society can not regulate it except in

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12. John Locke, quoted in George Sabine, A History of Political Theory (New Delhi, 1973), p.487.

certain exceptional circumstances. Locke strongly believed that part of the justification for the existence of society and the government was to ensure protection of this right. Thus it is obvious that Locke's concept of property has very pronounced individual characteristics.

Opposed to this strongly individualist approach towards property is the approach advocated by Hegel. Hegal suggested that the idea of individual rights ---- indeed of individuality --- is socially constructed rather than pre-social. As Richard A Posner, interpreting Hegel, says, "Economic freedom in the classical liberal sense is one of the luxuries made possible by social organization. The individual's right to property is not natural. His possessions are a product of social interaction rather than of his skills and efforts alone. Moreover those skills may be, at least in part, a social product too.[13]

Gradually the natural law theories of property advocated by Grotius and Pufendorf and Locke lost their sway over the mind of the people. They were replaced by those theories which emphasized the social character of property. As Duguit says, the laws of property are being socialized. It means that people are ceasing to think in terms of private rights and are thinking of it in terms of social function.

Recent social economic theory has turned to the

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13. Richard A. Posner, The Problems of Jurisprudence (Cambridge, 1990), p.346.

function of property in the social=welfare state. It is laid down that ownership, an absolute power of disposing of a thing, had originally been a just and adequate legal institution in a society in which property, work, and use went together in a simple economic order. Marx urged that in the evolution of society ownership of a complex of things no longer coincides with personal work and use, but as absolute control of the complex, thought of as capital, becomes a source of a power of command.[14]

Thus a powerful change came in the thinking and consciousness of man. Demands and pressures increased for interference in the domestic property system. Property was seen more as a system of exploitation than the genuine expression of individuality. The growing disenchantment with the system of private property culminated in the interventionist state. The days of *laisseze faire* came to an end.

(c) Expropriation Under Municipal Law:

The right of expropriation or nationalization is now a well settled principle of municipal law. The international tribunals also recognize this fact. Thus, in Amoco Asia Corporation Et. Al v. Indonesia[15], the tribunal stated the principle most succintly:

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14. Roscoe Pound, An Introduction to the Philosophy of Law (New Haven, 1965) p.131.
15. Amco Asia Crop v. The Republic of Indonesia. International Legal Materials vol.24 (1985) p.1022-1039.

"First of all, the state is the natural protector of nation's public interest and welfare. Accordingly, except when the state acts like a private person, that is,not exercising in any way its sovereign powers, the state is to be and indeed, is effectively, granted the right to alter, and even to suppress, where the public interest so requires, a situation or relationship it created by a previous act, even if this act is the source of the state's commitment and obligations. This is the fundamental principle of the right of a sovereign state to nationalize or expropriate property, including contractual rights previously granted by itself, even if they belong to aliens, by now clearly admitted in national legal systems as well as in international law; as to the latter, the principle is embodied in Resolutions of the General Assembly of the United Nations (in particular Resolution 1803/xvii of 14 December 1962) and in a number of international judicial and arbitral decisions. However, the right to nationalize supposes that the act by which the state purports to have exercised it is a true nationalization, namely a taking of property or contractual rights which aims, to protect or to promote the public interest."[16]

The tribunal made a firm and clear distinction between a private law contract and public or state contracts. It said that a public law contract "is not identical to a private law contract, due to the fact that the state is entitled to withdraw the approval it granted for reasons which could not be invoked by a private contracting entity, and or to decide and implement the withdrawal by utilizing procedures which are different

16. Ibid., p.1029.

from those which can and have to be utilized by a private entity."[17]

All the major domestic systems provide for the right of state to acquire and expropriate property within their respective territories. Within the broad spectrum of the right to expropriate there may be sometimes considerable variations. But the overriding principle is established beyond doubt that a state can nationalise the property situated within its territory.

In India the right to property enjoyed by an individual has undergone considerable change since the original Constitution of 1949. A brief history of the right to property under the Indian Constitution will throw considerable light on the right of the state to expropriate property within Indian municipal legal system.

Under the Constitution there was threefold guarantee of the right to private property. First every citizen was guaranteed the right to acquire any property by any lawful means, to hold it and to dispose it freely, limited only by certain reasonable restrictions. Secondly, the Constitution guaranteed that no person shall be deprived of his property except by the authority of law (Art.31(1)). This in simple terms, meant that, a man can not be deprived of his property except by a duly enacted law. Otherwise, the right to property was secure. Moreover, the executive branches of the government could not take the property of a man. As the

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17. Ibid.

Supreme Court said in Wazir Chand v State of H.P.[18] and Virendra v. State of Punjab[19], any property which is seized by the police or the government without proper legal authority will be released at the intervention of the courts.

The Supreme Court also laid down in Dwaraka v. State of Bihar[20] and Virendra v. State of U.P.[21] that as against its own subjects a sovereign can not exercise an 'Act of State' and a subject can not be deprived of his property by an executive fiat. If the power is conferred by a statute that is another matter.

Article 31(1) was, therefore, intended as protection against executive, but not against legislative, taking of property. Moreover, as the Supreme Court said in Kunnathat v. State of Kerala[22], the law authorising taking of property must be a valid law enacted by a competent legislature and not inconsistent with any of the fundamental rights guaranteed by part III of the Constitution.

Lastly, the Constitution mandated that if the state wants to acquire the private property of an individual or to requisition, it could do only on two conditions.

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18. Wazir Chand v. State of H.P. AIR 1954 S.C. 415.
19. Virendra V. State of Punjab. AIR 1957 S.C. 896.
20. Dwaraka v. State of Bihar AIR 1959 S.C. 249.
21. Virendra v. State of U.P. (1955) I.S.C.R. 415.
22. Kunnathat v. State of Kerala. AIR 1961 S.C. 552.

(i) that such acquisition or requisition is for public purpose;

(ii) that when such legislation is enacted, it must provide for payment of an amount to the owner ---------- either by fixing the amount or by specifying the principle upon which it is to be determined and given. [Art.312)].

The provisions of the Constitution regarding the obligation of the state to pay compensation for taking of property for public purposes have undergone serious changes as a result of the amendments of the constitution by the First, the Fourth, the Seventh, the Twentyfifth and the Forty-second Amendment Acts. The present position can be described thus:

(A) Though the Legislature was under a constitutional obligation to pay compensation, the adequacy of the compensation shall not be liable to be questioned in a court of law. When a legislation authorises the acquisition of a person's property for a public purpose, he would not be entitled to challenge the validity of that law in a court of law that the legislature had not provided for payment of full value of his property. This Fourth Amendment in Art 31(2) was adopted because the Supreme Court, in State of West Bengal v. Bela Bannerjee[23] interpreted the word compensation as implying full compensation, that is, the market value of the property at the date of the acquisition. By this judicial interpretation of the word compensation,

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23. State of West Bengal v.Bela Banerjee (1954)S.C.R.558.

the government felt hampered in implementing its programme of national planning and development. But even after this fourth Amendment, the Supreme Court again held in Cooper v. Union of India[24] that the very word compensation implied full monetary equivalent of the property taken away from the owners, that is, its market value at the date of the acquisition.

To meet this judicial interference, the 25th Amendment of 1971 was brought by which the word compensation in Clause (2) of Art. 31 was substituted by the word 'amount'. But again the Supreme Court, in the Full Bench case of Keshavananda v. State of Kerala[25] held that the amount which was fixed by the legislature could not be arbitrary or illusory, but must be determined by a principle which is relevant to the acquisition of property.

(B) By a number of successive amendments certain exceptions to Art.31(2) were introduced in Art.31A-31D to exclude the obligation to pay any amount as compensation in the case of laws providing for acquisition by the State of nationalisation, if such laws relate to matters specified in these exceptional provisions.

By 42nd Amendment Act 1976, the Parliament enlarged the scope of Art 31C by including within its protection any law to implement any of the Directive Principles enumerated in Part IV of the constitution. As a result, if any of the

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24. Cooper v. Union of India AIR 1970 S.C. 564.

25. Keshavananda v.State of Kerala, AIR 1973 S.C. 1641.

acquisition was made with the object of giving effect to any of these directives the reasonableness of such a law cannot be questioned under Article 14 or 19.

The successive amendments had considerably weakened the protections afforded to right to property. But the 44th Amendment, 1978 finally eliminated the right of property altogether from the list of Fundamental Rights in part III. By this amendment, now the right to property under Indian constitution is no longer a fundamental right but merely a legal right.

The result is that if an individuals property is taken away by a public official without legal authority or in excess of the power conferred by law in this behalf, he shall have to find his remedy from the High Court under Art.226 or by an ordinary suit.

It is obvious from the above that theoretically and practically also, under Indian municipal legal system, the Indian state can expropriate or nationalise the property under its jurisdiction. Particularly after the 44th Amendment Act, there is no substantial barrier against legislative expropriation of property.

Under the United States Constitution also the prerogative of the sovereign to regulate and expropriate property is beyond dispute, though the fifth amendment bans uncompensated takings of property. It is true that under U.S. constitutional law "the norm of repose"[26], that is,

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26. Laurence H. Tribe,. American Constitutional Law (New York, 1988), po.528.

the idea that government must respect vested rights in property and contract, that certain settled expectations of a focussed and crystallized sort should be secure against governmental disruption, at least without appropriate compensation, is well established.

But even against this important background of a constitutional protection of property and contractual rights the taking of private property after payment of appropriate compensation is indisputable. As the United States Supreme Court said in Georgia v. City of Chatanogga.[27]

> "The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed essential to the life of the State. It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will."

It is also well settled that the U.S. government can terminate a contract by future legislation. The person whose property rights are taken or destroyed is entitled to just compensation, not damages as for breach. The U.S.Supreme Court in College Point Boat Corp. v. U.S.[28] has upheld the proposition that where the U.S. Government terminates a contract under powers conferred by statute, the statutory right to terminate impliedly becomes a term of the contract.

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27. Geargia v. City of Chatanooga 24 U.S. 472, 480 (1924).

28. College Point Boat Corp. v. U.S. 267 12 (1925).

The position under British constitutional law is also that governmental authority can be exercised in public interest to regulate property and contractual rights. Indeed, it can be said that because of the doctrine of Parliamentary supremacy, no British Court could be entitled to question that the Parliament was acting with a view to further the public welfare. The right to property and contract are even less secure in Britain than they are in the United States or India. As a result, the British Crown can vary or terminate a contract and such executive action will be perfectly valid legally.

The French constitutional law also requires that any taking of property will be lawful if there is provision for the payment of a just and prior indemnity (*juste et prealable inademnite*).

The above overview of some major domestic system of expropriation law establishes that as for as municipal legal system is concerned, the right of public authorities to take private property for public purposes is well established provided that there is provision for that compensation and the procedures of expropriation are legally valid.