

## CONFIGURATION OF PROPERTY RIGHTS IN COMMON AND CIVIL LAWS: WITH SPECIAL REFERENCE TO INDIA

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### ABSTRACT:

The configuration of property rights in any legal system plays a very pivotal role in shaping the economic suction and the legal relationships within a societal framework and eventually the structure of the economy of a nation. This research paper explores the difference and analyzes the similarities in the way property rights are configured under common law and the civil law systems with a particular focus on this scenario in India, which beautifully blends the element from both the traditions and the legal philosophies. In common law system the property rights are fundamentally governed by the precedents and an emphasis is given to the individual ownership and the freedom to transfer the property. On the other hand, the civil law systems are mostly more concrete and codified herein, the property rights are well defined and systematically regulated through statutory laws and an established centralized judicial system. In India the legal framework is a perfect mix and presents a unique intersection of these two legal traditions. Because the Indian Legal system is hugely influenced by the British Colonial Rules that reflects Common law influence which was later on shaped by its own constitutional framework and legislative enactments creating a civil law influence. This research paper delves deep into how the concept of property rights are framed in India by analyzing the key legal provisions such as the Transfer of Property Act of 1882 and the Indian Contract Act of 1872 along with the Hindu Succession Act and other personal laws, along with the principle of justice and equity which are rooted in the common law philosophy. By comparing these frame-works the research reveals the challenges and opportunities in India revolving around the property law regime by the way of providing a detailed insight into how a hybrid legal system fetches a balance between the individual rights and the public welfare in the contemporary world where globalization has increased tremendously. The paper aims to contribute to an ongoing discourse on the evolution of property rights in the legal systems while conceptualizing their impact on the economic development of the nation's along with the justice and social equity concept in countries like India.

**Key-words:** Property, Property Rights, Transfer of Property Act, 1882, Common Law, Civil Law, Succession.

## **INTRODUCTION:**

The concept of property in common law and civil law appears to be quite different. On one hand while the common law emphasizes upon ownership on to the pieces called as Estates, civil law keeps an a more holistic approach while discussing ownership on dominions. Fragmentation is the core idea of property law. The major distinction that lies between civil and common laws in the context of property is based on fragmentation. Civil law system that traces back to the Roman law emphasizes more on ownership and creating Dominion or domain. This in civil law, gives an effect against all and creates a right in rem for the person, who holds ownership over a domain. In a contradiction to this common law system establishes property in small pieces called estate and defines the future interests upon it. However, this distinction is restricted to the idea and the both the laws ultimately creates the same reality vis-à-vis property and similar applications. Basic feature of both the laws are to create rights over a property and then to prevent invasion.

## **PROPERTY RIGHTS IN COMMON LAWS:**

Common Law system is basically the legal system which is more or less common or commonly derived between those country who were colonies of Britain including India and the United States. Not always but some common law countries might have uncodified laws and non-codified constitution, the judgments are binding, contractual liberties are guaranteed and mostly the acts which are not expressly prohibited by law are considered to be permitted.

Similarly, the concept of property in the common law system is also based on same core ideas. The common law recognises the rights on property and also controls the ownership on the basis of common law principles and it is not necessary to have a statutory requirement to assert ownership. In common law, right over property can be applied to tangible as well intangible goods like houses and patents etc.

In India the property rights are gathered by many ways and includes transfers, acquisitions, inheritance, creation etc as mechanism to attain rights on the property. Laws are mostly codified and governs all the means by which the right over a property can be created, acquired, held and disposed of. However, still there are places where law is silent and it is the principles of common law that guide us through. Some of such principles of common law in context of right to property are:

### **Eminent Domain:**

*Golak Nath case*<sup>1</sup> gave way to the concept of eminent domain and the court held that private property has to give way to eminent domain so that public purposes can be attained and fulfilled.

Justice Hidayatullah<sup>2</sup> says that Grotius treats *ius quaesitum* i.e. acquired rights and *dominium* i.e. ownership to serve either the individual interest or the public good. Where there is a conflict in these two, it is the *eminems* that is the public good that needs to be taken care by the law.

Constitution through Article 300A comprehended the way to the idea of *ex vi super eminentis dominiji* which means that the land is the eminent domain or an absolute territory of State and state can acquire it back by violating a private right over it with due authority, procedure and compensation for the public welfare<sup>3</sup>.

### **Caveat Emptor:**

In England there is covenant of title which is incorporated in Transfer of Property Act of 1882 as well. But the underlying principle to assert a defect free title is caveat Emptor which means let the buyer beware. It is the buyer who is expected and bound by the law to look after his own interest. If he sleeps over his rights the law cannot be expected to come for his rescue later on. Law assists those people who choose to diligently assist themselves while creating any right in the property. If a person chooses to buy a property without looking into the title then he does so at his own risk and later on law cannot help him to get rid of the repercussions. It was this principle and its applicability even without any codified law in this regard that led to a preposition that in absence of any written covenant to the contrary this common rule would apply on all the transactions and the buyer would not hold the seller liable for any kind of defect of title if he was not aware and caveat emptor was not complied with. When the buyer did not specify the purpose and ordered a good without description then later on, he can hold the seller liable for a good that did not suit his purpose of buying it<sup>4</sup>.

In the matter of *Mariappan v. The Inspector General of Registration and Others*<sup>5</sup>, the Madras High Court held that if the buyer purchased the property, it is expected that he ought to have

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<sup>1</sup> *Golak Nath v. State of Punjab*, AIR 1967 SC 1643.

<sup>2</sup> Chief Justice Hidayatullah in his Tagore law Lectures on “Right to Property and the Indian constitution.

<sup>3</sup> *Jilubhai Nanbhai Khachar v. State of Gujrat*, AIR 1995 SC 142.

<sup>4</sup> *Re Andrew Yule Company*, 1959 Cal 928.

<sup>5</sup> Writ Petition (MP) Number 22782 of 2018.

done so with due diligence and the concept of caveat emptor allows him not to be ignorant about the nature of the title of the property which he bought.

### **Doctrine of Warranty:**

In common law another important principle in context of right to property is warranty. Whether or not the warranty is expressly made part of conveyance, warranty is an implied rule. In the absence of a contract to the contrary warranty is taken to be an absolute and irrebuttable aspect. The principle was explained in the matter of *Balsau Veeraraghavalu v. Boppna Manikyam*<sup>6</sup>, the concept of warranty is incorporated in English Law and its applicability is restricted territorially. In India the principle of implied warranty is recognised in Transfer of Property act of 1882 in the context of sales and exchanges. It can be inferred that it was an intentional attempt of the legislators to preserve the English common Law principle of warranty in consonance with the equitable rights in conveyances and contracts.

### **Quiet and Peaceful Enjoyment:**

In common law besides the contract of transfer there is always an implied principle of quiet and peaceful enjoy which is bestowed upon the buyer. The principle lays down that a rightful buyer should not be disturbed in his enjoyment of the property while he possesses the property. Along with ownership and title there is always and implied right of peaceful and quiet enjoyment that transfers in the favour of the buyer. In the case of *Krishan v. Muthu Gounder*<sup>7</sup>, it was held that redemption of mortgage comes with a right to redeem the property back for its peaceful and quiet enjoyment. It is the responsibility of the mortgagee to return the property to the mortgagor in such a way that a peaceful enjoyment of the property can happen. Similarly, where a decree of possession of suit of property is passed in favour of a party, the other party is obliged to return the possession of the property in such a way that quiet possession can be asserted.

### ***Nemo quod Non-dat Habet:***

The principle of *nemo dat non qua habet* that no one can give what he doesn't have is another principle of attached with property transactions which talk about the capacity of the transferer. Only the one who has the authority and power to transfer a property can transfer and create a

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<sup>6</sup> Balsau Veeraraghavalu v. Boppna Manikyam, (1916)31 MLJ 380.

<sup>7</sup> AIR 1997 Mad 57.

sound right. The one who has no right over a property cannot transfer. In common law there is no exception to this right.

### **Title Free from Doubt:**

It is a general right of the purchaser irrespective of whether it is expressly mentioned in the agreement or not to get a title free from doubt transferred with the possession of the property. Right is not dependant on the contract and is part of the transaction as it is based upon the principle underlying the law that protects the *bonafide* purchasers.

Other than these a sale of immovable property creates many rights for the parties based on the principles of common law. The Indian Contract Act of 1972, the Specific Relief Act of 1963, the Transfer of Property Act of 1882, the Sales of Goods Act of 1930 and the Indian Registration Act of 1908 and many other laws encompass the principles of common law in context of right of property. Few such principle are the principle related to *spes successionis*, where a mere chance to succeed can not transferred by the heir apparent, doctrine fixation that creates a broader understanding as to identification of the immovable property, feeding the grant by estoppel and equity in redemption in case of mortgage etc. The implications of these common law principles help to create a justified and equitable right over the property for the parties involved.

### **PROPERTY RIGHT IN CIVIL LAWS:**

Mostly the Countries who were formerly Dutch, French, German, Portuguese or Spanish colonies follow civil law system. It is by and large a codifies the system of law that originated from the Roman Law. In civil law system codified laws based on a codified constitution are found which are binding for all and judiciary also functions on the basis of these laws. However, the judgments of the courts are binding for all. There are comparatively less contractual freedoms given to the parties in the civil law system as compared to the common law system. Civil law is considered to be more prescriptive than common law. In India, predominantly it is a common law system that prevails but the civil law influence due to colonization by the Frenchs and Portuguese cannot be denied. With codified constitution and many codified laws specifically in the context of property, it will be right to say that in India we see a beautiful symphony of both the common law and civil law system.

Civil laws in India establishes three kinds of properties on the basis of ownership:

- Private Property wherein the right is exclusively given to an individual over a property, excluding everyone else to interfere in it. Example: Private house.
- Common Property; the property that is collectively owned and also administered collectively is called common property. Example: Fishing in the river.
- Public Property; The property that is owned and managed by the State is called public property as it belongs to public but is controlled and administered by the State. Example: National Parks.

Let us focus on private properties and the position in civil laws, related thereto.

### **The Constitution of India:**

It was the idea of public welfare being the greater objective than private necessity that triggered the transformation of right of Property from a fundamental right<sup>8</sup> to a constitutional right<sup>9</sup>. The motive was to make the mandate of socialism and the concept of equal distribution of resources work. This led in creating facilities of public and public interest could be served in a better way.

The Constitution (Forty-fourth Amendment) Act of 1978 made the right to property a constitutional and human right under Article 300A. Now a person can have a right to property but with due legal authority he can be deprived of this right for a public purpose, after duly compensating him for the same.

### **Transfer of Property Act of 1882:**

The Act primarily deals with transfer between two living being i.e. *inter vivos* and creation of rights related to property. The transfers which are governed by this Act are sale, gift, lease, mortgage and exchange etc. These transactions are governed by the Act and are mostly based on the general principles of the contract. The rights over property that are recognised in the Transfer of Property Act are right to ownership, possession and right to alienation, mortgage rights, easements rights etc. The Act clearly lays down the contractual rights of the transferor and the transferee in context of property transactions and also safeguards the rights so created over a private property. The private property is treated as an object over which the absolute privilege to not only acquire but to hold and enjoy and even to alienate it, is given to the rightful

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<sup>8</sup> Article 31 of the Constitution of India, 1950.

<sup>9</sup> Article 300A of the Constitution of India, 1950.

owner. The law in itself is very extensive and codifies the transfers of private property in a prescriptive way.

The Act does not deal with inheritance, succession, insolvency and sale through court auctions etc.

### **Indian Contract Act of 1872:**

The Act lays down the basic principles related to the contract and it creates the understanding for all the contractual relations, including the relationships having property as the subject matter. Bailment, charge, pledge etc are some of the aspects which are expressly dealt with, in the Indian Contract Act and the rights of the parties are also clearly laid down. The Act in general creates a sync in between the contractual freedoms of the parties and the legal restrictions, if any. The general principle laid down here are the basis on which it is easier to understand the property transactions in general.

### **Sales of Goods Act 1930:**

Based on the basic principles of the contract, this Act lays down the law that deals with selling of goods for a price. The Act created rights of the buyer over the movable property in the form of goods that he buys. The Act defines contract of sale, agreement to sell etc. wherein the subject matter is the goods that is movable property.

### **Hindu Succession Act 1956:**

The Act talks about the inheritance, intestate properties, Partition etc. and the rights of parties over the property arising thereto. The Act lays down the implications of the process of inheritance, succession and partitions etc. and also provides an idea as to what kind of rights in property these events create in the favour of successors, heirs or coparceners, as the case may be.

Other than these there are many other laws like; Indian Stamp Act of 1899, Indian Registration Act of 1908 which deals with various rights on property in India.

Besides corporeal property there is incorporeal property also that is recognised and can be acquired by the private individuals. Intellectual property rights are also a genre of property rights. In civil law system in India, there are laws dealing with such rights in the property.

### **Intellectual Property Rights:**

Intellectual property is a set of intangible assets which can be owned by the individuals or the companies and like any other property these assets are also safeguarded so that the right over them is not violated by anyone. They are majorly a product or outcome of human intellect and not present in tangible form hence called intangible or intellectual property.

There are many legislations in civil law system that monitor, create, protect and safeguard rights over intellectual properties.

Copyright Act 1957, creates rights of the copy right holders i.e. creators of literary, dramatic and other kinds of artistic works. Copy rights are considered to be incorporeal property rights. The Trade Marks Act 1999 deals with the trademarks which are marks that are capable of being represented graphically and also to distinguish a person's services and goods from others. Trade marks are intellectual property rights and the Act lays down the rights of the person holding a trademark for his goods or services. Similarly, the Patent Act of 1970 that deals with ownership and rights over a patent granted under the Act for any invention.

Both corporeal and incorporeal properties and rights on them are regulated by many codified laws in India and the list is very vast.

However, these laws majorly create five kinds of rights over the property which are collectively called "Bundles of Rights". Which of the rights will be included in this bundle of rights in context of a property will ultimately depend on the contract and how it is designed but still it is important to understand the rights which collectively form this bundle of rights.

- Right of Possession: to take over and possess the property.
- Right of Control: to own and control how and who all can use the property.
- Right of Enjoyment: to enjoy the property peacefully without any encroachment or disturbance.
- Right of Disposition: to alienate and give away the property.
- Right of Exclusion: to exclude and shut everyone else out and make the property exclusive for oneself.

While explaining the right to private property in the civil law system it was held that property in legal connotation means aggregate of the rights which are guaranteed and protected by the law. It extends to all the species of the valuable right and also the interests like ownership, exclusivity, an indefinite right to use and also dispose of and ultimately exclude everyone else legally from interfering with it. The word 'Property' is comprehensive and connotes everything corporeal or incorporeal, real or personal, visible or invisible, tangible or intangible which can

be exchanged, sold, bartered, leased out, mortgaged in exchange of value and makes up the wealth, status or estate of a person. Property is the most comprehensive<sup>10</sup> term and describes every possible interest of the person having it.

Courts have time and again given an extensive meaning to the word property in this court gave extended meaning to the word property<sup>11</sup>.

## CONCLUSION

The common law system being less prescriptive in nature is based on some common principles while civil law describes property as the subject and the rights over it in an elaborative and prescriptive manner. The courts have time and again used both the system to address the concerns of the parties as practically they both lead to a similar implication. Hence it is right to say that the understanding of the both the systems is required to drive a comprehensive understanding of the concept of private properties and the rights, thereupon.

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<sup>10</sup> In Ramanatha Aiyar's The Law Lexicon, Reprint Ed. 1987 at p. 1031

<sup>11</sup> Dwarka Das Shri Nivas of Bombay v. The Sholapur Spinning and Weaving Company Limited, 1954 SCR 674.

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