PHILOSOPHY OF PROPERTY AND COMPENSATION

PROPERTY IS nothing but a basis of expectation of deriving certain advantages from a thing, which one is said to possess, in consequence of the relation in which one stand towards it.[1] But what is it that serves as a basis of law upon which to begin operations, when it adopts objects which, under the name of property it promises to protect? A feeble and momentary expectation may result from time to time from circumstances purely physical, but a strong and permanent expectation can result only from law. Property and law are born together and die together. Before laws were made there was no property, take away laws and property ceases.[2] With the work of Hohfeld (1923) and Honore (1961), twentieth century lawyers came to view property as a 'bundle of rights' rather than viewing it through the old image of property as a 'thing'.[3]

There is a well-worn trilogy of ownership forms - private, commons and state property.[4] Problem lies here is that how the concept of private property arises as such, on the whole recent work in the theory of property has taken as given that it's fundamental question concerns, and must concern, the justice of private property as one among several main institutions of society that distribute the benefits and burdens which arise through social cooperation.[5] Private property is to be evaluated from the standpoint of political, that is, distributive justice and it is to be compared with alternative ways of distribution holdings, viewing it always as one part of a complex system of social, economic and political institutions.[6]

For all theorists whether liberal communitarian and utilitarian, trilogy as described earlier now has become dichotomy – that is private and commons in the wake of worldwide movements towards privatization. Neither the old property - as - thing metaphor nor the current property - as - bundle metaphor conveys well the nuanced way law structures control

1. Bentham's *Theory of Legislation* 68-69 (2007).
2. *Ibid.*
3. Peter Cane, Mark Tushnest (ed.) *The Oxford Handbook of Legal Studies* 63 (2003).
4. *Ibid.*
5. Jules Coleman, Scott Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law* 752 (2002).
6. *Ibid.* see also J. Waldron, *Private Property* (1988); S.R. Munzer, *A Theory of Property*, (1990) and J. Christman, *The Myth of Property* (1994).

over scarce resources. In particular, the idea of property - as - thing misses the complex internal relations among owners of a thing while the modern bundle metaphor suggests more fluidity than appears in existing property relations.[7]

According to present day scholars, even beyond the standard trilogy lie new and useful analytic tools, not just anticommons property and liberal commons, but also as yet unimagined property types that will respond to new real world property puzzles. Property theorists are redefining, constructing and integrating property theory as they update the hoary metaphors of property law. None of the basic terms for property are stable. This is not to say that they are meaningless or disintegrating, but that property scholarship can gain from pushing these categories to move beyond polarising oppositions that render problems invisible and jurisprudetial debates unresolvable.[8]

With the growth of the concept of private property another concept which rises almost equally is the 'takings' and Indian sense 'acquisition' and incidental factors specially compensation, which has now taken centre stage. Basically, two main problems are associated with the latter, that whether in that particular situation compensation is required or not, and if answer is in affirmative then what is just compensation, speaking more specifically in the Indian context whether compensation should be 'just' or only 'compensation'?

Most writings by legal scholars in this field has been concerned to find a rationalising principle or set of principles which "explain" in the sense of imposing an intelligible order upon judicial decisions in compensability cases, or otherwise to suggest a principle to govern judicial decision of such case.[9]

Examination of judicial decisions and of legal commentary focussed on them indicates that one of the four factors has usually been deemed critical in classifying an occasion as compensable or not: (i) whether or not public or it's agent have physically used or occupied something belonging to the claimant; (2) the size of harm sustained by the claimant or degree to which his affected property has been devaluated; (3) whether the claimant's loss is or is not outweighed by the public's concomitant gain; (4) whether the claimant has sustained any loss apart from restriction of his liberty to conduct some activity considered harmful to other people.[10]

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7. *Supra* note 3 at 68.

8. *Id.* at 77-78.

9. Frank Michelman, "Property, Utility and Fairness and Comments on Ethical Foundation of 'Just Compensation' Law" 80 *Harvard Law Review* 1165 (1967).

10. *Id*. at 1187.

Takings can be explained either by the way of harm-prevention and benefit extraction, although former approach sometimes may behave in a strange manner as happened in *Miller* v. *Schoene*[11] popularly called as *Cedar Rust* case, wherein Supreme Court upheld a Virginia statute requiring destruction, without compensation, of cedar trees infested with a pest deadly to nearby apple orchards (a basic factor in the local economy) but harmless to cedar themselves. How can it be safely said that cedars are the nuisance and not the apple tree themselves? A survey of the general "tests" most commonly discussed in connection with judicial judgments of compensability has yielded no conclusions save that none of tests is adequately discriminating and reliable.[12]

In terms of strictly utilitarian approach compensation is payable only when demoralizations costs[13] and efficiency gains[14] are higher than settlements costs.[15] Alongwith, that compensation principle should be assessed on the touchstone of Rawlesian theory of justice.

Fairness and utilitarian tests both suggests that any amount of unequalizing burden should not be put on any person unless it cannot be avoided. Like many other fundamental provisions, however the compensation clause is couched in language of such abstraction as to strike terror in the heart of literalists who imagine that the constitutional text will somehow reveal it's secrets without the further intervention of human minds : "Nor shall private property be taken for public use without just compensation" and with respect to India the word compensation is even not qualified with just. At best, these words set out a number of

11. 276 U.S. 272 (1928).

12. *Id.* at 1202.

13. "Demoralization costs" are defined as the total of the (1)dollar value necessary to offset disutility which accrue to losers and their sympathesizers specifically from the realization that no compensation is offered and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathetizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.

14. Efficiency gains are defined as the excess of benefits produced by a measure over losses inflicted by it, where benefits are measured by the total number of dollars which prospective gainers would be willing to pay to secure adoption and losses are measured by the total number of dollars which prospective losers would insist on as the price of agreeing adoption.

15. 'Settlements Costs' are measured by the dollar value of time, effort and resources which would be required in order to reach compensation settlements adequate to avoid demoralization costs. Included are the costs of settling not any the particular compensation claims pointed, but also those of all persons so affected by the measure in question or similar measures as to have claims not obviously distinguishable by the available settlement apparatus.

basic questions that must be answered : When does an interest qualify as private property? Under what conditions should the state be said to have taken the interest? When does justice demand compensation and how is the adequacy of payment to be assessed?[16]

The problem with respect to American compensation policy revolves around basically 'takings' and 'regulation', if it is former then compensation is allowed if latter then no compensation. Harlan[17] and Holmes[18] expressed their opinion regarding the compensation policy in respect of taking problem occupied centre stage in America at different time interval. What seemed to concern the early scholars was not the fact of loss but the imposition of loss of unjust means.[19]

The precise rule to be applied is this, when an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, than the act is a taking, and compensation is constitutionally required, but when the challenged act is an improvement of the public condition through resolution of conflict within private sector of the society, compensation is not constitutionally required.[20]

Thus, to understand the concept of compensation and to put forward principles to find out the quantum it is essential first to understand the nature of property that is whether it is bundle of rights or it is merely a thing and with it's assistance compensation has to be assessed.

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16. Bruce A. Ackerman, *Private Property and the Constitution* (1977).
17. *Mugler* v. *Kansar* 123 U.S. 623 (1887).
18. *Penysylvania Coal Co*. v. *Mohan*, 260 U.S. 393 (1922).
19. Joseph Sax, Taking and Police Power 74 *Yale L J* 36 (1964).
20. *Id.*, 57.

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