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HILL UNIVERSITY

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**School of Law**

PRESENTS



**The Transfer of  
Property Act: A Land  
Administration  
Perspective**

**17 AUG  
2020**

11:00 am onwards

**Highlights**

- The background of enactment of this law in India
- Main provisions of this law and their implication for an effective land administration system in the country,
- Changes required in the law keep pace with contemporary requirements of land administration and land markets



Microsoft Teams

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# TRANSFER OF PROPERTY ACT, 1882

## A LAND ADMINISTRATION PERSPECTIVE

**B. K. Agarwal**

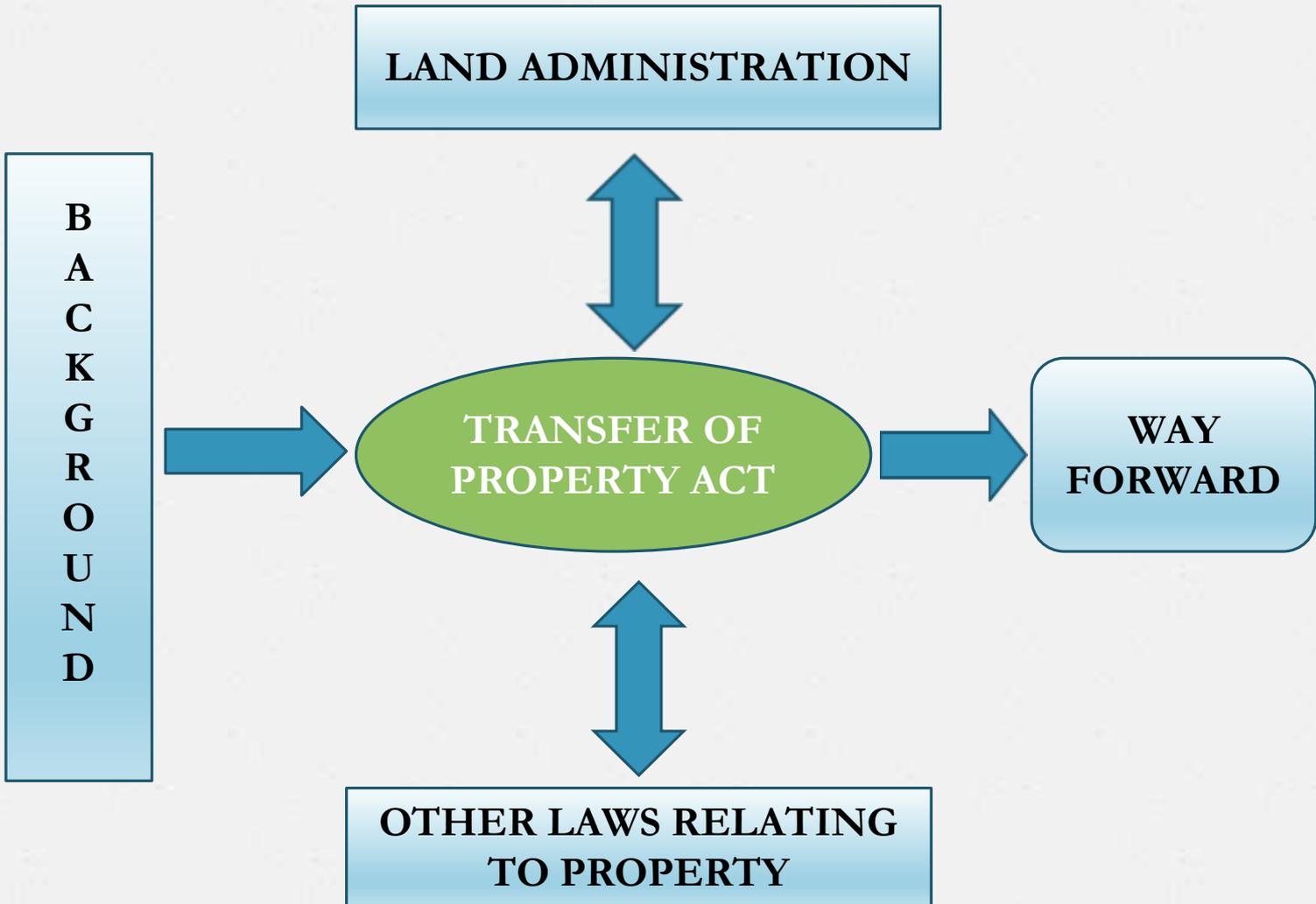
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# Overview of Presentation

Presentation divided into **Four** parts

**I-** Background: Codification of Property Law

**II-** Land Administration : A conceptual Framework

**III-** Transfer of Property Act: Provisions affecting  
Land Administration

**IV-** Conclusions

# BACKGROUND

Codification of Property Law in India

# Civil law in Initial Phase

- Ambiguity about civil laws applicable to India in first half of 19<sup>th</sup> century.
- Privy Council in Mayor of Lyons v. East India Company (1836) held-English law applied to only British people. Indians were governed by their own laws.
- It was impractical to apply English laws even to Britishers in all cases.
- Government Regulations directed that where no specific rule exists courts should decide according to 'justice, equity and good conscience'.

# English Law

- o Two systems of law were administered at the same time in England till the year 1875.
- o Common Law administered by the King's Benches.
- o Law of Equity in the Court of Chancery.
- o The law was mostly made through the judgements in different cases.

# English Property Law

- Sir Arthur Underhill, a celebrated British lawyer, author of about 186 law books said in 1919 before the Departmental Committee on transfer of land law in England:

*“The English Law of real Property can only be explained by an elaborate historical analysis. It takes a life time to master and when mastered is but lean, wasteful and barren learning.”*

# English Property Law

- Williams Joshua writer of famous book on English land law 'Williams on Real Property', in 1878 said:

*“ Some of the most remarkable of these laws, viewed by themselves apart from their history, and judged only by the benefits which now result from them appear to me to be absolutely worthless. Others are more than worthless, they are absurd and injurious”.*

- His son Cyprian Williams, who edited his book for 27 years, while giving evidence before Royal Commission on the Land Transfer Acts in 1909 said:

*“...the English law of real property has been adapted to the exigencies of the life of the present day. But this change has been so accomplished that, in point of form, the English law of real property is a disgrace to a country which aspires to be numbered amongst civilized nations.”*

# Customary Law in India

- o Different religions had different customary laws in India
- o Within a religion also different sects and regions had different laws.
- o No single authority on customary laws.
- o English judges depended on the opinion of Maulavis and Pandits to decide cases.
- o Opinion in the same circumstances differed from person to person.

# Codification of Laws in India

- o The British Government in 1833 decided to take up codification of laws in India.
- o Mr. Macaulay as British MP said in his speech:  
*‘I believe that no country ever stood so much in need of a code of law as India and there was never a country in which the want might be so easily supplied’.*
- o First Law Commission was formed in 1834 with Mr. Macaulay as Chairman.
- o Subsequently, three more Law Commissions were appointed in 1853, 1861 and 1879.

# Reasons for Codification

- o Judicial Administration was an important instrument of political control over Indian people.
- o British Government was not comfortable with freedom to Indians to follow their customary law.
- o They were not willing to give authority of making law to judges in India.
- o The British wanted to try codification in India before taking it up in England.

# Transfer of Property Act

- o Originally it was planned to draft a Civil Code for India.
- o Later on separate laws were enacted to be compiled later in the Civil Code.
- o Draft of Transfer of Property Act was given by the third Law Commission in 1870.
- o It remained under review by the Government of India for a long period.
- o It was referred to Fourth Law Commission in 1879
- o Law was finally enacted in 1882.

# Land Administration

## A Conceptual Framework

# Land Administration

Institutions, Laws, Procedures, Policies, Processes,  
related to:

- o Land ownership and other rights in land
- o Land Information System
- o Taxation relating to land
- o Land use planning, control on use of land
- o Land development, construction over land

## LAND ADMINISTRATION

Land  
Information  
System

Land  
ownership  
and other  
rights in  
land

Land use  
planning,  
control on  
use of land

Land  
development,  
construction  
over land

Taxation  
relating to  
land

# Land Administration in India

- Records-of-Rights
- Registration of land transactions
- Land Information System
- Land Revenue and Property Tax
- Planning Regulations, Permissions
- Regulation of Construction activity,  
Regulation of Builders etc.

# Record of Rights in India

- Introduced by the British about 150 years back. Basic system not changed much since then.
- Main purpose of introducing ROR was to collect land revenue which was 60% of total revenue in 1841. Now it is less than 2%. Main purpose now is to maintain title records
- It is most comprehensive parcel-wise record of ownership and other rights over a property.
- It is equivalent to cadastre maintained in many European countries like France, Germany, and the Netherlands etc.

# Record of Rights In India (Cont.)

- It is maintained under laws of respective states which are nearly similar.
- These laws are applicable in cities as well as in villages.
- Maintained by Divisional Commissioner, Collector, Tehsildar, Patwari etc. called 'Revenue Officers' .
- Presumption of truth attached to the entries in ROR

# Land Registration

- o Registration: recording a private transaction in public record
- o Need of registration of rights in land
  - o To record character of rights transferred
  - o To give notice to the world
  - o To decide priority in case of future disputes
  - o To facilitate title search

# Systems of Land Registration

- Deed Registration

- Registration of Title

( Registration of Title is also referred to as Torrens System, Conclusive Title or Guaranteed Title)

# Systems of Land Registration

- Registration of Deeds System
  - ❖ Transfer of title through a transfer deed
  - ❖ Registration of deed for record purposes
  - ❖ Registration does not guarantee good title
  
- Registration of Title (Torrens System)
  - ❖ Transfer of title by registration
  - ❖ Registered title is indefeasible
  - ❖ State indemnity against any defect in title

# Registration In India

- o India follows deed registration system
- o Deed registration under the Registration Act 1908
- o Registration compulsory for most of the land transactions
- o Some exemptions- inheritance, court decree, government grant etc.
- o Title verified through search of historical records by buyer
- o Granter-grantee index and tract-wise index maintained by registrar to facilitate title search

# Legal Standing of Registration

- Legal principle of '*Nemo dat*' “no one gives what he doesn't have”
- Registration only an evidence of transaction, not a conclusive proof of title
- Validity of transaction not examined by registrar
- A transaction is invalid unless registered but registration is no guarantee of validity.
- An unregistered deed is not admissible in court as evidence.

# Goals of Effective Land Administration

- o All the transactions in property should be registered
- o Process of registration and entry in Record-of Rights should be simple
- o Rights should be ascertainable without any ambiguity
- o Information on rights in property should be available freely and quickly
- o There should be minimal litigation related to property

# State of Land Administration

- o Land disputes dominate civil litigation in India
- o Access to Justice Survey 2015-16 estimates 2/3 of cases relate to land disputes.
- o Process of registration is complex and expensive
- o India ranks 55<sup>th</sup> in the international Property Rights Index
- o As per World Bank report on 'Ease of Registration of Property' India is 154<sup>th</sup> among 190 countries.

# State of Land Administration

- o All the transactions in property are not registered due to many exemptions
- o Ownership recorded in ROR is not conclusive proof of title
- o Registration of deed is no assurance of valid title
- o Search of title is a cumbersome process.
- o There is no way to know about any litigation pending in courts

Transfer of Property Act  
Provisions Affecting Land Administration

# Registration of Transactions

- o The Registration Act 1908 (sec.17) requires compulsory registration of almost all instruments affecting rights in immovable property of value Rs. 100 or more.
- o No unregistered instrument affects immovable property (Sec. 49)
- o Registration Act is applicable to the written instruments only.
- o If there is no instrument, there is no registration

# Provisions in Transfer of Property Act

- o Sale, exchange and mortgage of an immovable property of value of Rs.100 or more by a registered instrument only. ( Sec. 54, sec 59, Sec.118)
- o All gifts of immovable property by a registered instruments only (Sec. 123)
- o All leases of more than a year by a registered instrument (Sec. 107)

# Escape Routes

- o No registration for mortgage by deposit of title deeds [Sec. 58(f)]
- o Leases up to one year by unregistered instrument or oral agreement (Sec.107)
- o Agricultural leases are exempted from registration (Sec. 117)
- o Gifts by Muhammadans are exempted from the provisions of the Act (Sec. 129)
- o Gifts to an idol/religious institution are exempted
- o Act is not applicable to the grants by the government

# Great Escape

- o A transfer of property can be made without writing unless expressly required by law (Sec. 9)
- o Many transaction like family partition, settlement, relinquishment can be oral.
- o The Act is not applicable to territories comprised in Part B states before 1956 and in states of Bombay, Punjab and Delhi unless notified by the state government
- o State government may by notification exempt an area from Sec. 54, 59, 107, 123 (Sec. 1)

# Concept of Lis Pendens

- o During the pendency of litigation neither party can transfer the property as to affect rights of other party. (Sec. 52)
- o Transfer is not prevented but the transferee is bound by the final order of the court.
- o There is no way for transferee to know about pending litigation
- o Supreme Court has advised amendment in the law
- o Law Commission has also recommended amendments

# Conditional Transfers

- Transfer of Property Act allows conditional transfers which create uncertainty in title of transferee.
- Some of valid conditions are:
  - Transfer taking effect on happening of a specified uncertain event (Sec. 23)
  - While transferring property to one person, an ulterior disposition to another person if prior disposition fails (Sec. 27)
  - Transfer of property to one person with condition that it will pass on another person on happening of a specified uncertain event. (Sec. 28)
  - Transfer will cease to have effect in case of happening of a specified uncertain event (Sec. 31)

# Conditional Transfers (Cont.)

o Illustration given in the Act below Sec. 27

*“ A transfers property to his wife, but, in case she should die in his life time, transfer to B that which he had transferred to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of B does not take effect.”*

However if with advance forensic science it is proved that wife died even a fraction of second before A, B will get the property.

# Conditional Transfers (Cont.)

- o Conditional transfer enhances freedom of transferor but destroys freedom of transferee which is against the free alienability of property, an essential feature of modern land markets.
- o Rules of valid and invalid conditions, fulfillment of condition substantially, specified uncertain event being impossible to happen are amenable to varied interpretations giving rise to litigation.
- o Dependence of title on happening of certain event subsequent to transfer create uncertainty in title.
- o Conditional transfer can alter title without giving notice to the world.

# Transfer by Non-owner

- Following provisions allow transfer of property by a person other than owner:
  - ❑ Election when necessary (Sec.35)
  - ❑ Transfer by a person authorized only under certain conditions to transfer (Sec. 38)
  - ❑ Transfer by ostensible owner (Sec. 41)
  - ❑ Transfer by person having authority to revoke former transfer (Sec. 42)
  - ❑ Transfer by unauthorized person who subsequently acquires interest in property transferred (Sec. 43)

# Transfer by Non-owner (cont.)

- o Such provisions give uncertainty to the title of transferee and are hinderance to good land administration
- o Records of title can not be updated in case of transfer by a person other than owner
- o These provisions are bound to increase litigation.

# Constructive Notice

- o Sec. 3 of the Act provides that any person acquiring rights in immovable property shall be deemed to have notice of any registered instrument relating to that property.
- o There is no provision for a deemed notice of transfers by succession or transfers exempted from registration.
- o An entry in Record-of-Rights should be a deemed notice as most of the exempted transfers are entered there.

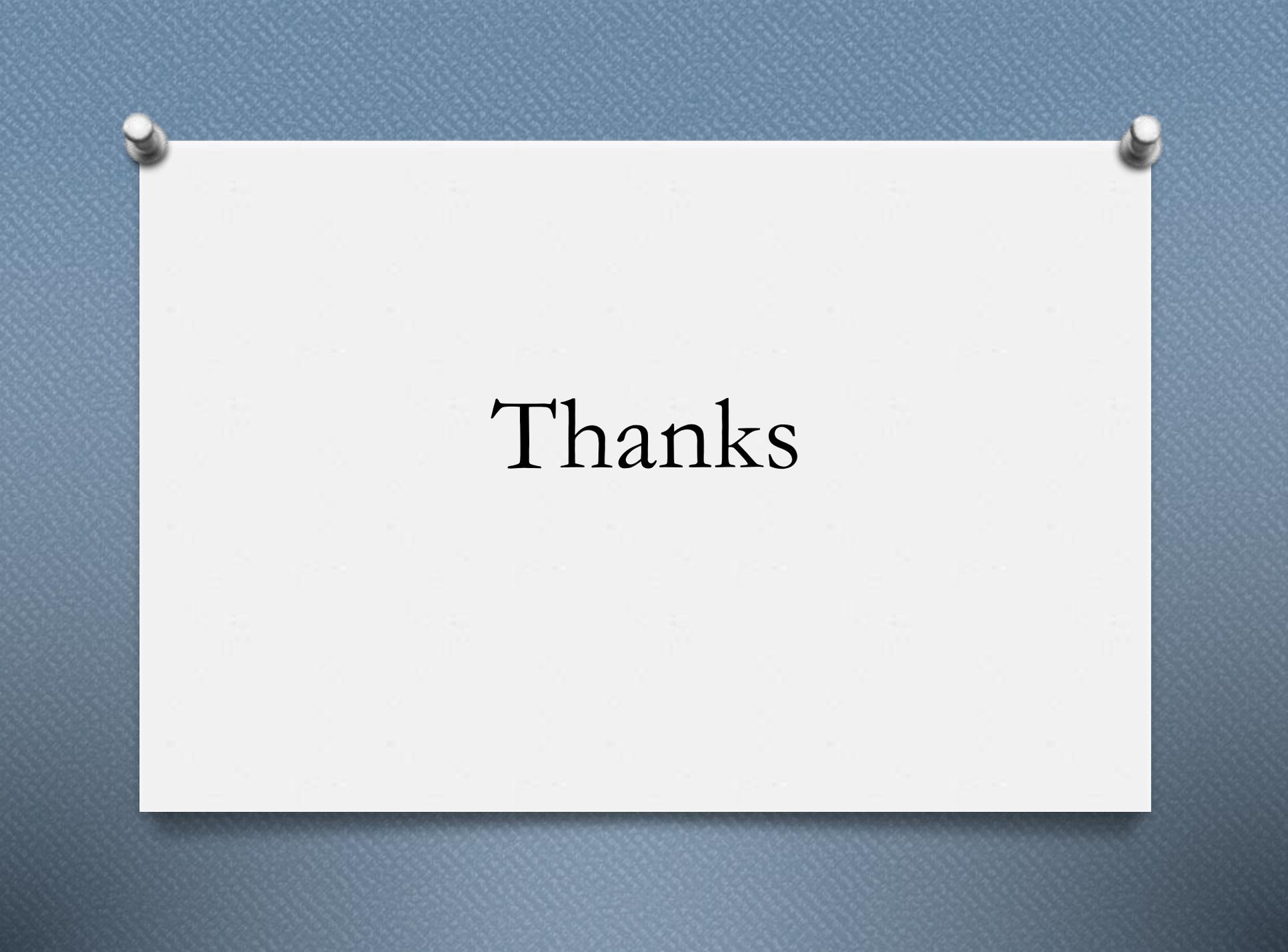
# Conclusions

# Conclusions

- o The Transfer of Property Act is mostly based on 'common law' and 'principles of equity' prevalent in England in 19<sup>th</sup> century.
- o There have been no significant changes in the Act since 1929.
- o While in England common law and principles of equity kept on evolving, in India those are frozen in time.
- o A statute law requires periodical review to keep pace with contemporary socio-economic requirements

# Conclusions (cont.)

- o Now an effective land administration and efficient land markets are essential requirements of economy.
- o This was not a priority when the Act was drafted
- o The Act requires a review to incorporate the present socio-economic requirements and priorities.



Thanks