

# The Fundamental Right to Property in the Indian Constitution

Namita Wahi

## I. Introduction: The Property Paradox

The Fundamental Right to Property enjoys the unique distinction of not only being the second most contentious provision in the drafting of the Constitution,<sup>1</sup> but also the most amended provision, and the only fundamental right to be ultimately abolished in 1978. Unlike other rights of life, liberty, and equality that can at least theoretically be conceived as applying equally to all, the especially contentious nature of the right to property arises because the protection of property rights inevitably results in entrenching unequal distributions of existing property entitlements.

In line with the tenets of democratic socialism, the Constituent Assembly sought to transition to a liberal democratic legal order, which guaranteed rights of liberty, equality, and property, while simultaneously endeavouring to achieve social and economic transformation premised on land reform and redistribution of resources. However, the inherent contradiction between conserving existing property rights and ushering in a more egalitarian society through redistribution of land led to intense debate within the Constituent Assembly, ending in an uneasy compromise between competing interests. As ultimately adopted, Article 19(1)(f) of the Constitution guaranteed to all citizens the fundamental right to ‘acquire, hold and dispose

---

\* The author would like to thank Pallav Shukla for his invaluable research assistance in writing this chapter. Thanks are also due to the editors, and to David Grewal and Ananth Padmanabhan, for their helpful comments on the chapter.

<sup>1</sup> The debate over property rights took place over two and a half years and the controversy was more prolonged and acute than that over any subject except the choice of official languages. Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP 2000).

of property'.<sup>2</sup> This right was however subject to reasonable restrictions by the union and State legislatures in the public interest, stipulated in Article 19(6). Moreover, Article 31 of the Constitution provided that any State acquisition of property must only be upon enactment of a valid law, for a public purpose and upon payment of compensation. Certain laws were exempted from these requirements.

The paradox implicit in guaranteeing a fundamental right to property, while simultaneously embarking on a developmental project of land reform and State planned industrial growth, predictably resulted in tensions between the legislature and the executive on the one hand, that sought to implement this development agenda, and the judiciary on the other, which enforced the fundamental right to property of those affected. In the decades that followed, judicial enforcement of the property clause resulted in the invalidation of several laws seeking to bring about social and economic reform including land reform legislation, provoking several parliamentary amendments to the constitution. These include the First (1951), Fourth (1955), Seventh (1956), Seventeenth (1964), Twenty-Fourth (1971), Twenty-Fifth (1972), Twenty-Sixth (1972), Twenty-Ninth (1972), Thirty-Fourth (1974) and Thirty-Ninth (1975) constitutional amendments.<sup>3</sup> Of these, the First (1951), the Fourth (1955), the Seventeenth (1956) and the Twenty-Fifth (1972) were the most significant constitutional amendments and will be discussed in this chapter. The Forty Fourth Constitutional Amendment, 1978, deleted Articles 19(1)(f) and 31 from Part III, the chapter on Fundamental Rights in the Constitution. Instead, it inserted Article 300A in a new chapter IV of Part XII of the Constitution, thereby depriving the 'right to property' of its 'fundamental right' status.

---

<sup>2</sup> Constitution of India 1950, art 19(1)(f).

<sup>3</sup> In India, constitutional amendments do not add numbered addenda to the text; rather, they add articles to the Constitution.

## II. **The Fundamental Right to Property in the Constitution, 1950 and section 299 of the Government of India Act, 1935: Shifts and continuities**

The controversy surrounding the guarantee of a fundamental right to property had centred chiefly on the wording of Article 31. Surprisingly, the wording of Article 19(1)(f) and (5) attracted little debate even though no such provision had existed in the Government of India Act. ‘Acquisition and requisitioning of property’ was included as a subject in the Concurrent List enabling both Parliament and the State legislatures to enact laws on the subject.<sup>4</sup>

Article 31 was taken almost verbatim from section 299 of the Government of India Act 1935,<sup>5</sup> but with certain key differences that greatly strengthened the protection of certain kinds of property rights in post independent India and weakened those of others. Section 299 in turn gave ‘constitutional’ or ‘entrenched’ status to restrictions on the State’s power of compulsory takeover of land that had been enshrined in a series of colonial legislation starting from the Bengal Regulation I 1824 and culminating in the Land Acquisition Act 1894.<sup>6</sup>

Section 299 of the Government of India Act had provided in relevant part:

(1): No person shall be deprived of his property in British India save by authority of law

(2): Neither the federal nor a provincial legislature shall have the power to make any law authorising the compulsory acquisition for public purposes of any land,

---

<sup>4</sup> Constitution of India 1950, Entry 42, List III, Schedule VII.

<sup>5</sup> The Government of India Act 1935 was the last of the constitutional changes enacted by the British Parliament to respond to the increasing demands for greater autonomy since the late 19<sup>th</sup> century.

<sup>6</sup> For a review of colonial legislation regulating compulsory acquisition of land, see SG Velinker, *The Law of Compulsory Land Acquisition and Compensation* (Bombay 1926) iii; Om Prakash Aggarwala, *Compulsory Acquisition of Land in India*, vol 2 (University Book Agency 1974); HM Jain, *Right to Property under the Indian Constitution* (Chaitanya Publishing House 1968) 12.

or any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner, in which it is to be determined.

(3): No bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in either chamber of the Federal Legislature without the previous sanction of the Governor General in his discretion, or in a chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion...

Clause (1) embodied the fundamental principle of the common law that the executive may not extinguish property rights without the authority of the legislature. Clause (2) was intended to apply only to the compulsory acquisition of land and undertakings.<sup>7</sup> This was done ostensibly so as not to compromise laws relating to taxation.<sup>8</sup> Clause 3 safeguarded certain vested interests, including *zamindari*<sup>9</sup> and grants of land or tenure of land free of land revenue or subject to remissions of land revenue like *talukdaris*, *inamdaris* and *jagirdaris*. As to these 'particular classes of property', there was a requirement that the Governor General (or the Governor of a province) give his previous sanction for any legislation that would transfer such property to public ownership or extinguish or modify the rights of individuals in it. It was precisely this colonial legacy that the Constituent Assembly tried to reverse in the drafting of Article 31.

---

<sup>7</sup> Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge University Press 2000) 45.

<sup>8</sup> Allen (n 7) 45.

<sup>9</sup> The *zamindari* system was a land tenure system prevalent in the Punjab, Sindh, the Northwest frontier provinces, the United Provinces, Bengal and Madras. *Zamindars* were usually but not always hereditary aristocrats who held enormous tracts of land and ruled over the peasants who lived on it.

The Constituent Assembly debate on the drafting of Article 31 had centred on the following aspects of the provision.

1. How do we balance the individual right to property with social and economic reform?
2. Whether the meaning of 'public purpose' should be restricted to government purpose or could also include within its ambit broader social purposes?
3. What constitutes an 'acquisition' or 'deprivation' of property that would justify payment of compensation?
4. What do we mean by 'compensation' and 'fair', 'equitable' and 'just'?
5. Who would be the ultimate arbiter of the quantum of compensation and the form in which it would be paid?

As finally adopted, Article 31 provided as follows:

- (1) No person shall be deprived of his property save by authority of law
- (2) No property, movable or immovable, including any interest in, or any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

(3) No such law as is referred to in clause (2), made by the legislature of a State shall have effect, unless such law, having been reserved for the consideration of the President, receives his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called into question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect

a. The provisions of any existing law other than a law to which the provisions of clause (6) apply

b. The provisions of any law which the State will hereafter make

i. For the purpose of imposing or levying any tax or penalty, or

ii. For the promotion of public health or the prevention of danger to life or property, or

iii. In pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India or the Government of India and that of any other country, or otherwise, with respect to property declared by law as evacuee property.

(6) Any law of the State enacted not more than 18 months before the commencement of the Constitution may within 3 months of such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provision of clause

(2) of this article or that it has contravened the provisions of clause (2) of section 299 of the Government of India Act, 1935.

Clauses (1) and (2) of Article 31 were taken almost verbatim from section 299(1) and (2) of the Government of India Act 1935 with two differences. First, section 299 was restricted to cases of 'compulsory acquisition of property' but under Article 31, the protection for property also extended to 'taking possession' of property for public purposes. Thus, Article 31 mandated the payment of compensation even in cases where there was no transfer of title to the government. Second, Article 31(2) implicitly allowed legislatures to provide for compensation in some form (eg in bonds) other than monetary 'payment' as required under section 299(2) of the Government of India Act.

Clauses (4) and (6) were specially designed to protect land reform legislation. They created exceptions to the protection for property rights guaranteed in clauses (1) and (2) but these exceptions were not substantive, insofar as they did not define the property rights or interests that were exempted from the protections of Article 31. Instead they referred to periods of time, laws enacted during which, would be exempt from the requirements of Article 31(2). Thus, clause 4 exempted laws enacted from bills that were pending at the time that the Constitution went into effect. Clause 6 exempted laws that were enacted eighteen months before that date. Laws of both types needed the assent of the President, in effect that of the union executive.

Within the Constituent Assembly, there was a consensus on treating major land reform programmes on a different footing from other kinds of State acquisition of property.<sup>10</sup> There was however no consensus on the exact terms on which such land reform should be carried out. *Zamindari* and other intermediary tenures were to be abolished upon the payment of ‘some’ compensation though not ‘just’ or ‘market value’ compensation.<sup>11</sup> Cases of ‘individual’ acquisitions were justiciable even though many believed that the legislators who represented the interests of the people should be the ultimate arbiters.<sup>12</sup> When it came to actual drafting however, the only enactments protected from judicial review were those covered by the express provisions of Article 31(4) and (6). Ultimately, these clauses proved to be inadequate for the purpose of protecting land reforms throughout India, in part because the enactment and execution of all the State land reform laws took much longer than was perhaps anticipated. This in turn created the need for further amendments to the Constitution at a later date.

There were two other important differences between section 299 and Article 31. *First*, Article 31(5)(b)(ii) to which there was no corresponding provision in the Government of India Act 1935 enabled the State to make laws for the protection of public health or the prevention of danger to life or property and stipulated that such laws even if they ‘acquired’ or ‘took possession’ of property within the meaning of clause (2), would be exempt from the requirement of compensation contained in that clause. Zoning laws that limit construction on

---

<sup>10</sup> B Shiva Rao, *The Framing of India's Constitution: Select Documents*, vol 1 (Subhash C Kashyap ed, 2nd edn, Universal Law Publishing 2004) 286-91. There is disagreement amongst scholars as to the exact nature of the compromise embodied in the constitutional property clause but they all agree on this point. For differing views on other aspects of the compromise, see HCL Merillat, *Land and the Constitution in India* (Columbia University Press 1970), 45; TS Rama Rao, ‘The Problem of Compensation and its Justiciability in Indian Law’ (1962) 4 *Journal of the Indian Law Institute* 481, 484-86.

<sup>11</sup> Shiva Rao (n 10) 291.

<sup>12</sup> Shiva Rao (n 10) 291.



an individual owner's land or property, or laws requiring the destruction of dangerous structures are examples of laws that would be saved by clause 5(b)(ii).

Second, the inclusion of Article 19(1)(f) in the Constitution, for which there was no corresponding provision in the 1935 Act meant that not only must any deprivation of property take place after a validly enacted law, but the law must satisfy the requirements of Article 19(5) insofar as it affected the property of a citizen.

From the very outset, there was considerable litigation with respect to the constitutional property clause. Significantly, almost all of the cases where laws were challenged on grounds of violation of property rights also involved a challenge on the basis of the Article 14 guarantee of the right to equality. In the following sections, I will review the most important Supreme Court and High Court cases that outlined the doctrinal framework for interpretation of the property clause, at least until such time this framework was superseded by subsequent constitutional amendments.

### **III. Agrarian Reform and the First, Fourth and Seventeenth Amendments [Article 31(4) and (6), Articles 31A and 31 B]**

Even before the Constitution was adopted in January 1950, *zamindars* challenged the constitutional validity of the Bihar, Madhya Pradesh and United Provinces<sup>13</sup> *zamindari* abolition laws as violating the property and equality guarantees of the Constitution. These challenges were made even though the drafters had sought specifically, though not expressly, to protect these laws through the adoption of clauses (4) and (6) in Article 31.

---

<sup>13</sup>The United Provinces were later renamed as Uttar Pradesh.

In each of these cases, the petitioners claimed that the impugned acquisition law served no 'public purpose', did not adequately compensate them within the meaning of Article 31(2) of the Constitution and impermissibly discriminated against certain landlords in violation of Article 14 of the Constitution.

While the Allahabad<sup>14</sup> and Bhopal<sup>15</sup> High Courts upheld the constitutional validity of the UP and MP laws, the Patna High Court invalidated the Bihar law for violating the right to equality.<sup>16</sup> The Patna High Court held that Article 31(4) only protected laws against judicial review under the compensation provisions of Article 31(2) but not under the provisions of other fundamental rights contained in the Constitution.

All three decisions were appealed before the Supreme Court but before the Court could give its decision, the Constitution was amended to nullify the effect of the Patna High Court decision in the *Kameshwar Singh* case. The Constitution (First Amendment) Act 1951, enacted Articles 31A<sup>17</sup> and 31B and also introduced the Ninth Schedule in the Constitution. Through the adoption of these provisions, the amenders sought to do what had not been

---

<sup>14</sup> *Raja Suryopal Singh v State of Uttar Pradesh* AIR 1951 All 674.

<sup>15</sup> *Raj Rajendra Malojirao Shitole v State of Madhya Bharat* AIR 1952 MP 97.

<sup>16</sup> *Kameshwar Singh v State of Bihar* AIR 1951 Pat 91.

<sup>17</sup> Constitution of India 1950, art 31A: *Savings of Laws Providing for Acquisition of Estates etc.*

- (1) Notwithstanding anything in the foregoing provisions of this Part [Part III, containing Fundamental Rights] no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part. Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President has received his assent.
- (2) In this article,
  - (a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include any *jagir, inam or muafi* or other similar grant;
  - (b) the expression, "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, or other intermediary and any rights or privileges in respect of land revenue.

attempted in the original Article 31, namely to define the kinds of interests that should be placed beyond the protection of the compensation requirement in clause (2) of Article 31 and also of the other fundamental rights contained in Articles 14 and 19. Article 31A (1) provided that 'no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights' would be deemed void on grounds of inconsistency with the fundamental rights contained in Part III. Clause 2 defined the expression 'estate'. Clause 2(a) defined 'estate' to have the 'same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area' and stated that it 'shall also include any *jagir*, *inam* or *muafi* or other similar grant'. Clause 2(b) defined 'rights, in relation to an estate', to include 'any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, or other intermediary and any rights or privileges in respect of land revenue'.

The First Amendment also introduced Article 31B and the Ninth Schedule into the Constitution. Article 31 B stipulated that no provision of any law in the Ninth Schedule 'shall be deemed to be void, or ever to have become void, on the ground that [it]... is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part', that is, the Fundamental Rights. In other words, Article 13(1), which provided that any law inconsistent with the fundamental rights was invalid to the extent of that inconsistency, was in effect repealed so far as laws listed in the Ninth Schedule were concerned. Thirteen laws were listed in the Ninth Schedule including the Bihar Land Reform Act.

The *zamindars* of Bihar then attacked the validity of the First Amendment in *Shankari Prasad Deo v Union of India* but the Supreme Court upheld it.<sup>18</sup> The Court then went on to decide the appeals from the Patna, Allahabad and Bhopal High Courts.

In *State of Bihar v Kameshwar Singh* (hereinafter *Kameshwar Singh*),<sup>19</sup> the Supreme Court upheld the constitutional validity of the Bihar Land Reforms Act 1950, but by a majority of 3:2, found two provisions of the Act to be unconstitutional. Barred from considering the law against the requirements of Fundamental Rights in Part III, in a clear stretch on judicial reasoning, the Court found that these provisions offended against (a) an inherent need in eminent domain that an acquisition be for a 'public purpose' and (b) against Entry 42 in the Concurrent List, which mentioned 'principles on which compensation for property acquired or requisitioned...is to be given'.

For almost a decade after the First Amendment, the High Courts and the Supreme Court were involved in the resolution of cases involving *zamindari* abolition. Yet despite its controversial pronouncement in the *Kameshwar Singh* case, in all subsequent cases, the Supreme Court upheld *zamindari* abolition laws in their entirety. While the Court emphasised that payment of compensation for acquisition of property was a fundamental right under Article 31(2) of the Constitution, it recognized that judicial review of laws infringing this fundamental right was excluded in the case of *zamindari* abolition laws in accordance with the Provisional Parliament's intent as expressed through the enactment of the First Amendment to the Constitution.

---

<sup>18</sup> AIR 1951 SC 458.

<sup>19</sup> AIR 1952 SC 252.

But although the question of *zamindari* abolition was fairly settled, the question of what else was covered by the definition of ‘estate’ in the First Amendment was not, when Parliament enacted the Constitution (Fourth Amendment) Act, 1955. Described in greater detail in the next section, the Fourth Amendment made many changes to Article 31 and inserted Article 31 (2A). Significantly, the Fourth Amendment also substituted clause (1) of Article 31A,<sup>20</sup> and amended Article 31A (2) (b) to add the terms ‘*raiya*ts’ and ‘*under raiya*ts’ to the list of those whose ‘rights’ in an estate were removed from the protection of Articles 14, 19(1) (f) and 31.

---

<sup>20</sup> Constitution of India, Art 31A: *Savings of Laws Providing for Acquisition of Estates etc.* [Following the Fourth Amendment]

- (1) [Substituted by the Fourth Amendment]: Notwithstanding anything contained in Article 13, no law providing for—
- (a) The acquisition by the state of any estate or of any rights therein or any extinguishment or modification of any such rights, or
  - (b) The taking over of the management of any property by the State for a limited period of time either in the public interest or in order to secure the public management of the property, or
  - (c) The amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
  - (d) The extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or
  - (e) The extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, article 19 or article 31.

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President has received his assent.

Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof

- (2)
- (a) the expression “estate” shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include any *jagir*, *inam* or *muafi* or other similar grant;
  - (b) the expression, “rights”, in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, [*raiya*t, *under raiya*t] or other intermediary and any rights or privileges in respect of land revenue.

Apart from facilitating the abolition of intermediary tenures in the non-*zamindari* areas, the *jagirdari*, *mahalwari*, *ryotwari* and other miscellaneous land tenures, the Fourth Amendment also sought to facilitate the next stage of land reform involving imposition of land ceilings and redistribution of holdings. Again it fell to the courts to delineate what kinds of land revenue arrangements constituted ‘estates’ and ‘rights in relation to an estate’ within the meaning of the amended Article 31A(2)(a).

From 1955 to 1964, the Supreme Court interpreted this term expansively to uphold the constitutional validity of laws involving the abolition of intermediary rights in non-*zamindari* areas, including intermediary rights in *jagirdari* tenures in Rajasthan,<sup>21</sup> alienated and unalienated lands in the State of Bombay,<sup>22</sup> and *mahalwari* tenures in Punjab.<sup>23</sup> In *Atma Ram v State of Punjab*,<sup>24</sup> the Court interpreted the expression ‘rights’ in relation to an estate to have an all-inclusive meaning comprising both horizontal and vertical divisions of the estate. Thus, the expression included not just the interests of proprietors or sub proprietors but also lower grade tenants, like *ryots* or under *ryots*.

Nevertheless, by fashioning the ‘agrarian reforms’ test in *KK Kochuni v State of Madras* (hereinafter *Kochuni*),<sup>25</sup> the Supreme Court made it clear that the ouster of judicial review on questions of compensation was limited only to cases where the proposed acquisition of land had a connection with a scheme of agrarian or land reform. In all other cases, compensation payable under Article 31(2) should be market value compensation.

---

<sup>21</sup> *Thakur Amar Singhji v State of Rajasthan* AIR 1955 SC 504.

<sup>22</sup> *Ram Narain Medhi v State of Bombay* AIR 1959 SC 459.

<sup>23</sup> *Atma Ram v State of Punjab* AIR 1959 SC 519.

<sup>24</sup> *Atma Ram* (n 23).

<sup>25</sup> AIR 1960 SC 1080.

Moreover, in *Karimbil Kunhikoman v State of Kerala* (hereinafter *Kunhikoman*),<sup>26</sup> the Supreme Court held that lands held under *ryotwari*<sup>27</sup> tenure in the State were not estates within the meaning of Article 31A(2)(b). Wanchoo J speaking for the court held that a *ryot* was not really a ‘proprietor’ but a ‘tenant’. This was because a *ryot* could sell, mortgage, pass on to his heirs, or give away his holding, and he could not be evicted from the land except in case of his failure to pay the land revenue. But in theory, and for Wanchoo J this was the deciding point; the *ryot* could relinquish or abandon his land in favour of the government.<sup>28</sup> As a result, even though the Kerala Agrarian Relations Act 1960, was a law of agrarian reform, the petitioners’ lands were not ‘estates’ within the meaning of Article 31A and therefore in its application to the petitioners’ estates, the Act was subject to be tested on the anvil of Fundamental Rights. Here, like the Patna High Court’s decision in the *Kameshwar Singh* case, the Supreme Court struck down the law for violating the petitioners’ fundamental right to equality and not their fundamental right to property because of the graduated scale of compensation payable for lands acquired over the ceiling. Wanchoo J’s highly conceptualistic approach to the question of whether *ryotwari* lands were ‘estates’ within the meaning of Article 31A(2)(a) and consequent conclusion that a *ryot* was merely a tenant, and not the owner of the land, and therefore *ryotwari* lands were not covered by Article 31A, appears rather unconvincing in light of the actual practice of *ryotwari* tenures.

By indicating that *ryotwari* lands did not fall within the meaning of Article 31A, an interpretation that receives some support from the Parliamentary Debates on the First

---

<sup>26</sup> AIR 1962 SC 723.

<sup>27</sup> Under the *ryotwari* system obtaining in Madras, Bombay and central India, the government dealt directly with the *ryots* or peasants, whose land revenue was settled for a period of years—typically a long term, but not in perpetuity. Each *ryot* was recognised as individually responsible for paying his land revenue.

<sup>28</sup> *Kunhikoman* (n 26) [14].

Amendment,<sup>29</sup> the Court's pronouncement in *Kunhikoman* threatened land ceiling laws and agrarian reform in much of southern India.

The *Kochuni* and *Kunhikoman* decisions led Parliament to amend the constitutional property clause for a third time by the Constitution (Seventeenth Amendment) Act 1964. The Seventeenth Amendment made three important changes to the constitutional property clause. *First*, it inserted a proviso in Article 31A(1) which enabled the State to acquire land over and above the prescribed land ceilings in each State at less than market value compensation. *Second*, it amended the definition of 'estate' in Article 31A(2)(a) to specifically include lands under *ryotwari* settlement. Moreover, the term 'estate' now also included, all lands 'held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans'. Finally, the Amendment added forty-four laws to the Ninth Schedule thereby shielding them from judicial review on grounds of Articles 14, 19 and 31.

Once it became clear that land reform statutes could not be challenged on the basis of Articles 19(1) (f) and 14, the questions of controversy shifted to the interpretation of the terms of Article 31(2) that had also been contentious before the Constituent Assembly. These included the meaning of the words 'compensation', 'acquisition' and 'taking possession'.

#### **IV. Eminent Domain and Police Powers: The relationship between Articles 19 and 31 and the Fourth Amendment (1955)**

---

<sup>29</sup>*Parliamentary Assembly Debates on the Constitution (First Amendment) Bill 1951*, Provisional Parliament Debates, vol 12-13, cc 9913.



In any social system that recognizes private property, the State restricts property rights in the exercise of powers inherent in the State's sovereignty. In countries that have a written Constitution, these restrictions are often expressly embodied in the constitutional text. Broadly, these powers are classified as *police powers*, *eminent domain* and *taxation*. Distinguishing between these powers becomes important because even though State action in the pursuance of each of them may involve restrictions on existing property rights, the obligations on part of the State in each instance are different.

*Police power* has been defined as the power of promoting the public welfare by restraining and regulating the use of liberty and property.<sup>30</sup> In this chapter, we will confine our discussion of police powers insofar as they restrain or regulate the use of property. The power of *eminent domain*, in the broadest sense, may be understood simply as the power of the sovereign to take property for public welfare, without the owner's consent.<sup>31</sup>

When the State acquires property in the exercise of its *eminent domain* powers, the economic loss inflicted on the private owner is accompanied by a corresponding economic gain to the State or to someone nominated by the State.<sup>32</sup> Here, the State does not attempt to regulate the use of the owner, but, on the contrary, replaces him and deals with the property as if the State itself were the owner of the property.<sup>33</sup> Where the State regulates property in exercise of its *police powers*, the State does not make any economic gain to itself or its nominee, although, as a consequence of the regulation an economic loss is inflicted on the owner. The State deals with the property not as the owner, but as a sovereign having power over the owner and his

---

<sup>30</sup> Ernst Freund, *The Police Power, Public Policy and Constitutional Rights* (Callahan and Company 1904) 3.

<sup>31</sup> Julius L Sackman, *Nichols' Law of Eminent Domain*, § 1.11 (revised 3rd edn, Matthew Bender and Co 1983) cited from William McNulty, 'Eminent Domain in Continental Europe' (1912) 21(7) Yale Law Journal 555.

<sup>32</sup> PK Tripathi, *Some Insights into Fundamental Rights* (University of Bombay Press 1972) 224.

<sup>33</sup> Tripathi (n 32) 224.

property, directing the owner to observe the State's instructions in the use and enjoyment of his property.<sup>34</sup>

In India, the key concepts used in Articles 19, 31(1) and (2) were 'restriction', 'deprivation', and 'acquisition' respectively. The Supreme Court's interpretation of these terms involved two main questions. The first question concerned the interpretation of the terms 'deprivation' in clause (1) and 'acquisition' in clause (2) of Article 31 to determine whether they concerned the same or two different exercises of State power. The second question concerned the interplay of Article 31 with Article 19 (1)(f).

### **1. Article 31(1) and (2): Police Powers and Eminent Domain?**

In the Supreme Court's early decisions,<sup>35</sup> SR Das J put forth an interpretation of Article 31 whereby, Article 31(1) related to the *police powers* of the State and 31(2) related to *eminent domain*. When the State compulsorily acquired property in the exercise of its *eminent domain* powers under Article 31(2), such acquisition could only be pursuant to a valid law, for a public purpose and upon provision of compensation. However, when it deprived a person of his property for the purposes of the State like 'razing a building in the path of fire' such deprivation occurred in the exercise of the *police powers* of the State under Article 31(1).<sup>36</sup> Here the only requirement was that such deprivation must be pursuant to a validly enacted law.

---

<sup>34</sup> Tripathi (n 32) 224-25.

<sup>35</sup> *Chiranjitlal v Union of India* AIR 1951 SC 41; *State of West Bengal v Subodh Gopal Bose* AIR 1954 SC 92.

<sup>36</sup> HCL Merillat, 'Chief Justice S.R. Das: A Decade of Decisions on Right to Property' (1960) 2 Journal of the Indian Law Institute 183, 190-91.

However, another interpretation championed by Sastry CJ was that Article 31, clauses (1) and (2) should be read together as stating three requirements for acquisitions pursuant to the exercise of the State's powers of *eminent domain*. Article 31(1) stated the general principle that there shall be no taking or deprivation of property without a valid law, whereas Article 31(2) elaborated upon this principle by stipulating the requirements of a valid law, including the existence of a public purpose and the provision of compensation.<sup>37</sup>

The adoption of one or the other interpretation would differentially impact the extent of protection of private property under the Constitution. Adopting the first interpretation meant the State could take actions short of acquisition or taking possession of the property that substantially deprived the owner of the benefits of ownership without the requirements of public purpose and just compensation stipulated in Article 31(2). Under Article 31(1), the law authorising such deprivation was also not required to be 'reasonable' as contained in the requirement for 'reasonable' restrictions under Article 19(1)(f).

Curiously, none of the judges found a basis for the exercise of the State's police powers in Article 31(5)(2)(b)(ii) even though it is the most likely encapsulation of the same and Article 31(5)(2)(b)(i) expressly spoke of the State's power of taxation.

## **2. Article 19(1)(f): 'Capacity' vs 'Concrete property entitlements'**

On the second question, that of the interpretation of the relationship between Articles 19 and 31, the issue was whether the right guaranteed to citizens, 'to acquire, hold and dispose of

---

<sup>37</sup> *Subodh Gopal Bose* (n 35) [9].

property’ and its companion guarantee of a ‘right to carry on any occupation, trade or business’ under Articles 19(1)(f) and (g) simply concerned the *capacity* of all citizens or protected their *concrete interests* in a particular piece of property or business enterprise. Put differently, where there was an actual deprivation of a concrete property entitlement, did only Article 31 apply? Here, Sastry CJ took the view that Articles 19 and 31 were mutually exclusive. Article 19 merely referred to a citizen’s *capacity* to own property. This provision had no reference to the property that was already owned by him, which was dealt with in Article 31. In other words, Article 19 forbade the State from denying particular individuals or classes the right to own property or to carry on business, but did not protect a citizen’s interest in a particular piece of property from State interference. Sastry CJ noted that since Article 31, which was headed by the caption ‘right to property’, already protected property rights of citizens as well as non- citizens, whereas Article 19(1)(f) only protected the rights of citizens, any other interpretation would make Article 19(1)(f) redundant.<sup>38</sup> But if Articles 19(1)(f) and (5) were understood as dealing only with the capacity to acquire, hold and dispose of property in general, this distinction made sense. In that case, it would be justifiable to exclude aliens from such capacity, as had been done in several countries for the benefit of nationals, particularly with respect to rights in land. This interpretation finds some support from the Constituent Assembly Debates, particularly the statement of TT Krishnamachari, later Finance Minister. But even on Krishnamachari’s statement, the right did not merely protect the capacity to acquire, hold and dispose of property but some concrete though basic property entitlements.<sup>39</sup>

---

<sup>38</sup> In support of his argument, he referred to ss 111 and 298 of the Government of India Act 1935 that had similar provisions. *Subodh Gopal Bose* (n 35) [6].

<sup>39</sup> Krishnamachari stated that the clause did not embody ‘...a particular right to private property as such, no more than what any person in an absolutely socialistic regime will desire, that what he possesses, what are absolutely necessary for his life, the house in which he lives, the movables that he has to possess, the things which he has to buy, are secured to him...’ Shiva Rao (n 10) 291.

In contrast, other judges on the Court including SR Das and Jagannadhadas JJ took the view that Article 19(1)(f) applied both to abstract and concrete property rights. Jagannadhadas J noted that to:

[C]onstrue Article 19(1) (f) and (5) as not having reference to concrete property rights and restrictions on them would enable the legislature to impose unreasonable restrictions on the enjoyment of concrete property (except where such restrictions can be brought within the scope of article 31(2) by some process of construction).<sup>40</sup>

### **3. The relationship between Article 19(1)(f) and 31: “restriction” vs. “deprivation”**

In subsequent cases,<sup>41</sup> Sastry CJ’s interpretation of the relationship between Article 31(1) and (2), and Das J’s interpretation of the relationship between Article 19 and Article 31, both of which accorded stronger protection to property entitlements, became the established reasoning of the Court. According to this reasoning, Article 19(1)(f) and (g) not only protected citizens’ capacity to hold property or conduct a business but were also available to protect concrete property entitlements of citizens. These rights were subject to ‘reasonable’ State restrictions in the interest of the general public under Article 19(6). A restriction so substantial as to amount to a ‘deprivation’ of property or of the ability to carry on business would implicate the provisions of Article 31. In the case of a deprivation, which may or may not involve an acquisition of property, Article 31(1) and (2) read together prescribed three requirements that must be met—a legislative enactment, public purpose and compensation. On this interpretation, it became possible for an aggrieved citizen to challenge State

---

<sup>40</sup> *Subodh Gopal Bose* (n 35) [66].

<sup>41</sup> *Dwarkadas Srinivas v Sholapur Spinning and Weaving Company* AIR 1954 SC 119; *Express Newspapers v Union of India* AIR 1958 SC 578; *Bombay Dyeing and Manufacturing Company v State of Bombay* AIR 1958 SC 328; *Diwan Sugar and General Mills v Union of India* AIR 1959 SC 626.

interference with his property rights simultaneously as a deprivation of his property without compensation under Article 31 and also as an unreasonable restriction of his right to hold property or to carry on a trade or business under Article 19(1)(f) and (g) respectively. Initially, the Supreme Court tended toward the conclusion that if a 'restriction' on the exercise of a property right or the conduct of a trade or business was so severe as to be 'total', and therefore a 'deprivation' within the meaning of Article 31, Article 19 would not apply. This approach derived from the Court's approach to the interpretation of the right to life under Article 21 and personal liberty under Article 19(1)(d) in *AK Gopalan v State of Madras*.<sup>42</sup> There a majority of the Court (4:1) had held that the rights conferred by Article 19(1)(a) through (g) could be enjoyed only so long as the citizen was free and had the liberty of his person. But the moment he was lawfully deprived of his liberty pursuant to Article 21<sup>43</sup>, he ceased to have the rights guaranteed under Article 19.

#### **4. The relationship between Articles 19 and 31 following the Fourth Amendment**

In 1955, the Constitution was amended to adopt Das J's interpretation of the relationship between Article 31(1) and (2). This was unsurprising because this interpretation gave greater scope for State acquisitions without compensation, which the government claimed was necessary for its economic development and social redistribution agenda. The Fourth Amendment introduced a new clause 2A into Article 31 which provided as follows:

Where a law does not provide for the transfer of the ownership or right to possession of any property to the state or to a corporation owned or controlled

---

<sup>42</sup> AIR 1950 SC 27.

<sup>43</sup> Constitution of India 1950, art 21: Protection of life and personal liberty: 'No person shall be deprived of his life or personal liberty except according to procedure established by law'.

by the state, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

As a result of the amendment, Article 31(2) with its requirements of public purpose and compensation was to apply only when the State formally took title or possession of the property. If it otherwise ‘deprived’ a person of his property, the only safeguard under Article 31(1) was that such deprivation must be pursuant to a law.

Following the Fourth Amendment’s comprehensive evisceration of the guarantees under Article 31, Article 19 assumed greater importance. The question in cases following the Fourth Amendment was: whether a regulation or ‘restriction’ of property within the meaning of Article 19(1)(f) and (g), no longer assailable under Article 31, may still be attacked under Article 19? Two approaches were possible on this question. According to the first conceptualistic approach adopted in *AK Gopalan*, the notion of ‘restriction’ implied something to be restricted. However, the deprivation or total restriction of something meant that there was nothing to restrict.<sup>44</sup> The second approach sought to assess the intent of the drafters in including both Articles 19 and 31 in the Constitution. According to this approach, if the State were to be barred from unreasonable ‘restrictions’ on the rights to hold property or carry on business; could the Constitution drafters have intended that unreasonable deprivations of property be unchallengeable? Prior to the Fourth Amendment, the Supreme Court had adopted the first approach in a few cases.<sup>45</sup> However, given the danger to property rights posed by the Fourth Amendment, the Supreme Court adopted the second approach in

---

<sup>44</sup> *AK Gopalan* (n 42); *State of Bombay v Bhanji Munji* AIR 1955 SC 41.

<sup>45</sup> *AK Gopalan* (n 42); *Bhanji Munji* (n 44).

subsequent cases<sup>46</sup> holding that the law authorising the deprivation of property under Article 31(1) must be consistent with other fundamental rights including Article 19. Every deprivation was also a restriction on the right to property, whose reasonableness must be assessed by the courts.

## V. 'Public Purpose' and 'Compensation'

The laws that fell clearly within the scope of Article 31(2) needed to satisfy the requirements of public purpose and compensation.

### 1. Public Purpose

In all the agrarian reform cases, the Supreme Court had adopted a highly deferential approach to the requirement of public purpose. While this approach was especially evident in the *zamindari* abolition cases, the Court largely deferred to the government's articulation of public purpose even in cases involving acquisition of urban land for resettlement of refugees,<sup>47</sup> temporary takeover of a textile mill,<sup>48</sup> and nationalisation of road transport.<sup>49</sup> In successive cases, the Court held that the expression 'public purpose' was 'elastic and could only be developed through a process of judicial inclusion and exclusion in keeping with the changes in time, the state of society and its needs'.<sup>50</sup> The Court also clarified that acquisitions that benefited particular individuals or entities could satisfy the requirement of public purpose so long as they were in furtherance of a particular scheme of public benefit or

---

<sup>46</sup> *Narendra Kumar v Union of India* AIR 1960 SC 430; *Kochuni* (n 25).

<sup>47</sup> *State of West Bengal v Bela Banerjee* AIR 1954 SC 170.

<sup>48</sup> *Dwarkadas Srinivas* (n 41).

<sup>49</sup> *Saghir Ahmad v State of Uttar Pradesh* AIR 1954 SC 728.

<sup>50</sup> *Surya Pal Singh v State of Uttar Pradesh* [1952] 1 SCR 1056, 1073; *State of Bombay v RS Nanji* AIR 1956 SC 294 [12].



utility.<sup>51</sup> Over time, the list of public purposes has been continually expanded to include acquisitions for private industry<sup>52</sup> cooperative housing societies<sup>53</sup> and residential development,<sup>54</sup> all of which have been upheld by the Supreme Court.

## 2. Compensation

One crucial difference between section 299 of the Government of India Act 1935, and Article 31(2) of the Constitution was the omission of the word 'just' before the term 'compensation'. This was done to prevent courts from requiring payment of market value compensation, particularly in, but not limited to cases of *zamindari* abolition.<sup>55</sup>

### i. Zamindari Abolition cases and the First Amendment

From section 3 it is clear that, except for and following the *Kameshwar Singh* case, while the Supreme Court emphasized that payment of compensation for acquisition of property was a fundamental right under Article 31(2) of the Constitution, it recognized that judicial review of laws infringing this fundamental right was excluded in the case of land reform laws including abolition of *zamindari* and other intermediary laws. This was in accordance with the Provisional Parliament's intent as expressed through the enactment of the First Amendment to the Constitution. In all other cases, however, the Court insisted upon the payment of compensation that was the 'just equivalent' of the property acquired. Thus, for

---

<sup>51</sup> *RS Nanji* (n 50) [12]; *Bhagwat Dayal v Union of India* AIR 1959 P&H 544.

<sup>52</sup> *Sarmukh Singh Grewal v State of Uttar Pradesh* (1995) Supp (4) SCC 489 (acquisition for setting up a paper mill); *P Narayanappa v State of Karnataka* (2006) 7 SCC 578 (private industrial development, which may include technology parks, tourism and trade centres and townships); *Hindustan Petroleum Corporation Ltd v Darius Shapur Chennai* (2005) 7 SCC 627 (acquisition for a government corporation).

<sup>53</sup> *Kanaka Gruha Nirmana Sahakara Sangha v Narayanamma* (2003) 1 SCC 228.

<sup>54</sup> *Venkataswamappa v Special Deputy Commissioner (Revenue)* (1997) 9 SCC 128 (house sites to a cooperative society).

<sup>55</sup> Shiva Rao (n 10) 291; Granville Austin, *Working a Democratic Constitution: The Indian Experience* (OUP 1999) 76.

instance, in *State of West Bengal v Bela Banerjee*,<sup>56</sup> the Court invalidated a law that enabled acquisition of land by the State for resettlement of refugees following the partition of India, because the compensation was fixed at an anterior date to the acquisition without regard to changes in market value of the property following that date. Here the Court held that while the legislature could prescribe the principles on which compensation must be calculated, such compensation must be a 'just equivalent'<sup>57</sup> of the deprivation caused to the owner.

The Fourth Amendment was passed shortly after the decision in the *Bela Banerjee* case to oust judicial review of the adequacy of compensation.<sup>58</sup> Over the next decade, the Supreme Court gave a series of inconsistent decisions. In *Kunhikoman*, the Court held that the 'just compensation' standard would not apply to cases that were filed post the Fourth Amendment. But in *Vajravelu Mudaliar v Special Deputy Collector* (hereinafter *Vajravelu*),<sup>59</sup> the Court made a distinction between the following cases, (a) just equivalent, (b) just equivalent but inadequate, (c) not illusory compensation, but not adequate, and (d) illusory compensation, which was a colourable exercise of power. The Court held that while it would not intervene in the first three cases, it was obligated under the constitution even after the Fourth Amendment to intervene in the last case.<sup>60</sup> The Court noted that 'compensation' must 'compensate' and therefore could not be an illusory sum. The decision in this case was followed by a series of inconsistent rulings. While the Court applied the *Vajravelu* test in *Union of India v Metal Corporation of India Ltd*,<sup>61</sup> in several other cases<sup>62</sup>, the Court showed

---

<sup>56</sup> *Bela Banerjee* (n 47).

<sup>57</sup> *Bela Banerjee* (n 47) [6].

<sup>58</sup> The Fourth Amendment amended Article 31(2) to provide, 'No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate' (emphasis added).

<sup>59</sup> AIR 1965 SC 1017.

<sup>60</sup> *Vajravelu* (n 59) [16].

<sup>61</sup> AIR 1967 SC 637.

greater deference to Parliament on the question of compensation payable in case of State acquisitions of property. The *Metal Corporation* case was later overruled in *State of Gujarat v Shantilal Mangaldass*,<sup>63</sup> which was in turn overruled in the *Bank Nationalisation* case,<sup>64</sup> which restored the Court's powers of judicial review in cases where the compensation was illusory.

In 1972, the Constitution (Twenty-Fifth Amendment) Act was passed specifically to overturn the ruling in the *Bank Nationalisation* case. This amendment replaced the word 'compensation' in Article 31(2) with the word 'amount' and expressly ousted judicial review of the adequacy of compensation. Nevertheless, in *Kesavananda Bharati v State of Kerala* (hereinafter *Kesavananda*),<sup>65</sup> a majority of the judges of the Court emphasized that although the right to property was not part of the 'basic structure' of the Constitution, even after the Twenty-Fifth Amendment, the Court must inquire whether what is given as compensation is completely illusory or arbitrary. In *State of Karnataka v Ranganatha Reddy*,<sup>66</sup> the Court held that following the Twenty-Fifth Amendment, the *Vajravelu* and *Bank Nationalisation* cases were no longer valid law and that the court could not review the adequacy of compensation, but reiterated the *Kesavananda* ruling that compensation could not be completely arbitrary or illusory. But the Court did not clarify the test of 'illusory compensation' implying that this must be determined on a case-by-case basis.

---

<sup>62</sup> *Udai Ram Sharma v Union of India* AIR 1968 SC 1138; *Maneklal Chhotelal v MG Makwana* AIR 1967 SC 1373; *KL Gupte v Municipal Corporation of Greater Bombay* AIR 1968 SC 303; *State of Gujarat v Shantilal Mangaldass* AIR 1969 SC 634.

<sup>63</sup> *Shantilal Mangaldass* (n 62).

<sup>64</sup> *Rustom Cavasjee Cooper v Union of India* AIR 1970 SC 564.

<sup>65</sup> (1973) 4 SCC 225, [405], [407], [409]-[412] (Sikri CJ), [588] (Shelat and Grover JJ), [1165] (Reddy J), [690]-[697] (Hegde and Mukherjea JJ).

<sup>66</sup> (1977) 4 SCC 471.

## **VI. The Fundamental Right to Property abolished: Forty Fourth Constitutional Amendment**

The Constitution (Forty-Fourth Amendment) Act 1978, abolished Articles 19(1)(f) and 31 and inserted Article 300A into a new chapter IV of Part XII of the Constitution, thereby depriving it of its 'fundamental right' status. Article 300 A provides, 'No person shall be deprived of his property save by authority of law'. Following the Forty-Fourth Amendment, there is no express provision requiring the State to pay compensation to an expropriated owner except as provided in Article 30(1A) and the second proviso to Article 31A(1). Article 30(1A) provides for the payment of compensation when the property of a minority institution has been acquired. The second proviso to Article 31A (1) mandates the payment of market value compensation in the case of acquisition of estates, where personal cultivation is being carried on. This has created an anomalous situation, whereby, in all other cases of acquisition, there is no express constitutional requirement for the State to pay market value compensation.

In the immediate aftermath of the Forty-Fourth Amendment, some scholars opined that the amendment would have little effect because the requirements of 'public purpose' and 'compensation' would be read into Article 300A.<sup>67</sup> On the contrary, during the 1980s and 1990s, we see an almost complete abdication of judicial review on these questions. As described in section 5, judicial scrutiny on the question of 'public purpose' always lenient, was almost perfunctory during this period resulting in continuous expansion of the purposes for which government could acquire property without payment of market value compensation.

---

<sup>67</sup> PK Tripathi, 'Right to Property after the 44<sup>th</sup> Amendment: Better Protected than Ever Before' (1980) AIR 1980 SC (J) 49; SP Sathé, 'Right to Property after the 44<sup>th</sup> Amendment' (1980) AIR 1980 SC (J) 97.

In *Jilubhai Khachar v State of Gujarat*,<sup>68</sup> the Supreme Court reiterated that following the Forty-Fourth Amendment, it could not go into the adequacy of compensation awarded under an acquisition law. All it could do was to determine that the principles on which the compensation was decided were relevant and the compensation awarded was not illusory. The Court also rejected attempts to read the right to property into the right to life guarantee under Article 21.<sup>69</sup>

## VII. Reinstating the fundamental right to property in the Indian Constitution

Since the 2000s, widespread acquisition of land by the State for dams, infrastructure and private industry has received significant public attention owing to massive dispossession of poor peasants and traditional communities such as forest dwellers, cattle grazers, fishermen and indigenous tribal groups. In 2009, a public interest petition was filed before the Supreme Court, in *Sanjiv Agarwal v Union of India*,<sup>70</sup> seeking invalidation of the Forty-Fourth constitutional amendment and reinstatement of the fundamental right to property. The petitioner cited the large-scale displacements caused by the creation of special economic zones (SEZs) and by projects such as the Narmada dams and the land conflicts in Singur and Nandigram as motivating his demand. The petitioner argued that following the decision in *I.R. Coelho v. Union of India*<sup>71</sup>, fundamental rights could not be excluded from the purview of the “basic structure” as articulated by the Supreme Court in *Kesavananda*. Since the right to property enshrined in Articles 19(1)(f) and 31 was a fundamental right at the time

---

<sup>68</sup> (1995) Supp (1) SCC 596.

<sup>69</sup> *State of Maharashtra v Basantibai Mohanlal Khetan* (1986) 2 SCC 516 (Article 21 essentially deals with personal liberty and has little to do with the right to property); *Jilubhai Nanbhai Khachar v State of Gujarat* (1995) Supp (1) SCC 596 [58].

<sup>70</sup> *Sanjiv Agarwal v. Union of India*, WP 2009 (Supreme Court of India) (on file with author).

<sup>71</sup> (2007) 2 SCC 1, paragraphs 90-92

*Kesavananda* was decided, its subsequent abolition by the Forty Fourth amendment violated the “basic structure” of the Constitution, and was therefore unconstitutional. In 2010, the Supreme Court dismissed the petition without reaching the merits on grounds that the petitioner was a public interest litigant, not directly affected by the abolition of the fundamental right to property, and that entertaining the petition would lead them to reopening settled constitutional case law on property. In a recent interview with the author, the petitioner indicated that he was considering reviving the petition.<sup>72</sup>

Nevertheless, in recent years, the Supreme Court has reinstated the requirements of ‘public purpose’ and ‘compensation’ within Article 300A. In *KT Plantation Private Ltd v State of Karnataka*,<sup>73</sup> the Supreme Court held that the ‘rule of law’ prevailed in India and the Court was not ‘powerless’ in a situation ‘where a person was deprived of his property... for a private purpose with or without providing compensation’,<sup>74</sup> as a result of which any State acquisition of property must satisfy the requirements of ‘public purpose’ and ‘compensation’ under Article 300A.<sup>75</sup> In *Super Cassettes Industries Ltd v Music Broadcast Private Ltd*,<sup>76</sup> the Court reiterated these requirements in the context of intellectual property.<sup>77</sup> Noting that copyright was ‘property’ within the meaning of Article 300A, the Court emphasized that the compulsory licensing provisions contained in section 31 of the Copyright Act, 1957 must satisfy the requirements stipulated therein including that such deprivation must happen pursuant to a valid law and must satisfy a public purpose.<sup>78</sup>

---

<sup>72</sup> Interview with Sanjiv Agarwal, March 17, 2015.

<sup>73</sup> (2011) 9 SCC 1.

<sup>74</sup> *KT Plantation* (n 71) [202].

<sup>75</sup> *KT Plantation* (n 71) [189].

<sup>76</sup> (2012) 5 SCC 488.

<sup>77</sup> *Entertainment Network (India) Ltd v Super Cassette Industries Ltd* (2008) 13 SCC 30 [121].

<sup>78</sup> *Super Cassettes* (n 74) [81].

In September 2013, Parliament enacted the controversial Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013<sup>79</sup> (hereinafter LARR Act). The Act enhances the compensation payable in cases of forcible acquisition of land<sup>80</sup> and also provides for rehabilitation and resettlement awards in cases of displacement.<sup>81</sup> The Act also seeks to restrict the definition of ‘public purpose’ by providing a much more detailed listing of public purposes.<sup>82</sup> Consequently, the LARR Act has legislatively strengthened the requirements of public purpose and compensation that were weakened by the dilution of the right to property in the Constitution.

While the LARR Act empowered the government to acquire land for the enumerated public purposes for public-private partnerships as well as for private companies,<sup>83</sup> in a significant departure, the Act mandates that the consent of 70% of project affected families be obtained for public private partnerships and 80% in case of land being acquired by companies.<sup>84</sup>

However, no consent is necessary if the government acquires land directly for its own use, hold and control.<sup>85</sup> Moreover, every such acquisition would be subject to an elaborate social impact assessment (SIA) process stipulated in the LARR Act.<sup>86</sup>

The LARR Act came into force on January 1, 2014. But land acquisition done under thirteen sector specific land acquisition laws was exempted from its provisions for a period of one

---

<sup>79</sup> For the evolution and details of the changes made by this law to the 1894 Act, see Namita Wahi, ‘Equity of Land Acquisition’ *The New Indian Express* (29 November 2011) <[www.newindianexpress.com/opinion/article250235.ece?service=print](http://www.newindianexpress.com/opinion/article250235.ece?service=print)> accessed 14 November 2014; Namita Wahi, ‘Land Acquisition, Development and the Constitution’ *Seminar Magazine* (February 2012) <[http://india-seminar.com/2013/642/642\\_namita\\_wahi.htm](http://india-seminar.com/2013/642/642_namita_wahi.htm)> accessed 14 November 2014; Namita Wahi, ‘Compromise over land takeover’ *The New Indian Express* (11 September 2013) <<http://www.newindianexpress.com/opinion/Compromise-over-land-takeover/2013/09/11/article1778031.ece?service=print>> accessed 14 November 2014.

<sup>80</sup> Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013, ss 27-30 read with First Schedule (Land Acquisition Act).

<sup>81</sup> Land Acquisition Act, ss 31-33.

<sup>82</sup> Land Acquisition Act, s 2(1) read with s 3(za).

<sup>83</sup> *Ibid.* (n 76) s 2(2)

<sup>84</sup> *Ibid.* (n 76) s 2(2)

<sup>85</sup> Jairam Ramesh and Muhammad Ali Khan, *Legislating for Justice: The Making of the 2013 Land Acquisition Law* (Oxford: OUP, 2015), 4

<sup>86</sup> *Ibid.* (n 76) ss 4-6

year from the Act's coming into force.<sup>87</sup> On December 31, 2014, the President promulgated the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance, 2014 (hereinafter "LARR Amendment Ordinance"). This Ordinance brought the thirteen exempted laws within the purview of the compensation and rehabilitation provisions of the LARR Act.<sup>88</sup> Simultaneously, however, it exempted several categories of projects from the consent and SIA requirements stipulated in the LARR Act. The LARR Amendment Ordinance proved to be even more controversial than the LARR Act. Due to lack of social and political consensus, a bill slated to replace the Ordinance (hereinafter the "LARR Amendment Bill") could not be passed into law. The President repromulgated the Ordinance in April, and the government was forced to refer the LARR Amendment Bill to a joint parliamentary committee in May. The committee will submit its report in the winter session of Parliament. Simultaneously, in April 2015, three Delhi based NGOs and a farmers' organisation impugned the constitutional validity of the LARR Amendment Ordinance before the Supreme Court.<sup>89</sup> As a result, in 2015, all institutions of government, the executive, the legislature and the judiciary were preoccupied with the content of the right to property as altered by the LARR Act and the LARR Ordinance,<sup>90</sup> contributing to continued political and legal uncertainty surrounding the right to property.<sup>91</sup> Interestingly, the controversy around the implementation of the LARR Act, 2013 and its attempted amendment by the LARR Amendment Bill, 2015 has also centred on narratives of

---

<sup>87</sup> *Ibid.* (n 76) s 105(1) read with the Fourth Schedule

<sup>88</sup> LARR Amendment Ordinance s 12

<sup>89</sup> Dhananjay Mahapatra, 'Land Ordinance: Supreme Court seeks Centre's reply in four weeks' *The Times of India* <http://timesofindia.indiatimes.com/india/Land-ordinance-Supreme-Court-wants-Centres-reply-in-4-weeks/articleshow/46914332.cms> (April 14, 2015) accessed August 4, 2015

<sup>90</sup> Namita Wahi, 'The Story of Jairam Rajya', *India Today* <http://indiatoday.intoday.in/story/jairam-ramesh-land-acquisition-law-book/1/443924.html> (June 11, 2015) accessed August 4, 2015

<sup>91</sup> Namita Wahi, 'Lay of the Land' *The Indian Express* (March 18, 2015) <http://indianexpress.com/article/opinion/columns/lay-of-the-land/> accessed August 4, 2015



economic development and social redistribution of resources from the agrarian classes to industry.<sup>92</sup>

As this chapter goes to print, the political and legal uncertainty continues. On August 31, 2015, the LARR Amendment bill lapsed. Subsequently, the government's decision not to re-promulgate the Ordinance a third time has left the Supreme Court challenge to its constitutional validity infructuous. While news reports suggest that the government is still trying to build consensus in Parliament to pass the LARR Amendment Bill in the upcoming winter session<sup>93</sup>, recent electoral losses make such passage unlikely. Instead, the central government has encouraged states to amend the LARR Act, which they are empowered to do under Article 254(2) of the Constitution as the Act is on a Concurrent List subject, so long as the President ratifies such amendments. The state of Tamil Nadu has already done so<sup>94</sup>, and at least three other states are following suit.<sup>95</sup>

## VIII. Conclusion

The Fundamental Right to Property in India has come full circle. It started as a legal right against arbitrary State action insofar as it limited the colonial State's power to take away an individual's property except when this was done pursuant to a valid law, for a public purpose

---

<sup>92</sup> *Ibid.*

<sup>93</sup> 'Arun Jaitley: Consensus may emerge on land acquisition bill', *The Financial Express* <http://www.financialexpress.com/article/economy/arun-jaitley-consensus-may-emerge-on-land-acquisition-bill/161360/> (November 5, 2015), accessed November 14, 2015.

<sup>94</sup> Tamil Nadu Government Gazette Extraordinary (January 5, 2015) [http://niti.gov.in/mgov\\_file/LandAcquisition-TAMILNADU.pdf](http://niti.gov.in/mgov_file/LandAcquisition-TAMILNADU.pdf) (accessed on November 14, 2015).

<sup>95</sup> Shruti Shrivastava, 'Land Acquisition legislation: Amid central logjam, states move forward' *The Indian Express* (November 10, 2015) <http://indianexpress.com/article/india/india-news-india/land-acquisition-legislation-amid-central-logjam-states-move-forward/> accessed November 14, 2015.

and for just compensation. This right was enshrined in a series of colonial legislation starting with the Bengal Regulation I 1824 and culminating in the Land Acquisition Act 1894. The right was later elevated to the status of an 'entrenched' or 'constitutional' right by section 299 of the Government of India Act, 1935. When the Constitution was adopted in 1950, the right to property was elevated to the status of a 'fundamental right', which ensured that the State could not legislatively remove the limitations imposed upon its power to acquire property and made the right judicially reviewable. However, through a series of constitutional amendments, exceptions were carved out of the fundamental right to property as a result of which some of the limitations on the State's power to acquire property, specifically the requirement to pay market value compensation did not apply in particular cases. The Forty Fourth constitutional amendment in 1978 deprived the right to property of its 'fundamental' right status, thereby making the limitations on the State's power to acquire property non justiciable. However, in the last five years, there have been attempts made judicially to restore the right to its fundamental right status, as it existed before the Forty Fourth amendment. Simultaneously, the requirements of 'public purpose' and 'compensation' have been strengthened legislatively through the repeal and replacement of the Land Acquisition Act 1894 by the LARR 2013. The LARR Act's amendment by the thrice promulgated LARR Amendment Ordinance within a year of its enactment, and yet the inability of the government to garner parliamentary support to pass the LARR Amendment Bill, 2015, into law, testifies to the intense social and political contestation around the contours of the right to property, both as a legal and constitutional right.

Importantly, however, the trajectory of the right to property in the Constitution, as seen from the drafting of the original constitutional property clause, and its evolution through judicial interpretation, legislation, and constitutional amendment, demonstrates the Indian State's

continual attempts to reshape property relations in society to achieve its goals of economic development and social redistribution. Each iteration of the property clause favoured property rights of certain groups and weakened those of others and was the product of intense contestation between competing groups that used both the legislature and the judiciary to further their interests.

Concomitantly, lurking behind the development of the Supreme Court's doctrinal jurisprudence is the Court's fear of arbitrariness of State action. Almost all of the property cases also involved a challenge on grounds of the equality guarantee in Article 14, and in a majority of these cases, the impugned law was invalidated for violating the right to equality and not the right to property. This is not only evident in the agrarian reform cases that led to the First, Fourth and Seventeenth Amendments to the Constitution but is also a recurring theme in recent cases that have sought to judicially reinstate the fundamental right to property following its abolition by the Forty Fourth Amendment, as well as the debates on the enactment of the LARR Act and the LARR Amendment Bill.