# THE BALANCE OF INTERESTS AND EMINENT DOMAIN IN INDIA: EXAMINING CONSTITUTIONAL IMPERATIVES

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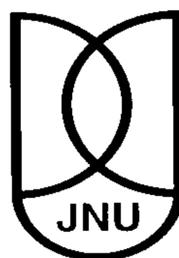
**DOCTOR OF PHILOSOPHY**

by

**RAMRATAN VENKATESH DHUMAL**

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JAWAHARLAL NEHRU UNIVERSITY
Centre for the Study of Law & Governance
NEW DELHI-110067. INDIA

## DECLARATION

I hereby affirm that the work for this thesis **"The Balance of Interests and Eminent Domain in India: Examining Constitutional Imperatives"**, being submitted to as a part of the requirements of the **Ph.D Programme** of the Jawaharlal Nehru University, was carried out entirely by myself. I also affirm that it was not part of any other programme of study and has not been submitted to any other institution/ university for the award of any degree

11/08/2016

**Ramratan V. Dhumal**

## CERTIFICATE

We recommend that the thesis be placed before the examiners for evaluation.

**Prof. Jaivir Singh**
(Chairperson)

अध्यक्ष/Chairperson
विधि एवं अभिशासन अध्ययन केन्द्र
Centre for the Study of Law and Governance
जवाहरलाल नेहरु विश्वविद्यालय
Jawaharlal Nehru University
नई दिल्ली/New Delhi-110067

**Prof. Jaivir Singh**
(Supervisor)

पर्यवेक्षक/Supervisor
विधि एवं अभिशासन अध्ययन केन्द्र
Centre for the Study of Law and Governance
जवाहरलाल नेहरु विश्वविद्यालय
Jawaharlal Nehru University
नई दिल्ली/New Delhi-110067

Office Tel. : 91-11-26704021, 26742506 • Telefax : 91-11-26742506 • Email : dir_cslg@jnu.ac.in; dir.cslg@gmail.com

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# ABBREVIATIONS

| | |
|---|---|
| A.C. | Appeal Cases |
| A.I.R. | All India Reporter |
| All. | Allahabad |
| BJP | Bharatiya Janata Party |
| BSP | Bahujan Samaj Party |
| Bom. | Bombay |
| CAD | Constituent Assembly Debates |
| C.W.N. | Calcutta Weekly Notes |
| Cal. | Calcutta |
| C.L.J. | Calcutta Law Journal |
| C.P.L.R. | Central Provinces Law Reports |
| EIA | Environment Impact Assessment |
| HC | High Court |
| H.L. | House of Lords |
| I.C. | Indian Cases |
| I.L.R. | Indian Law Reports |
| Lah. | Lahore |
| M.P. | Madhya Pradesh |
| Mad. | Madras |
| NAC | National Advisory Council |
| NDA | National Democratic Alliance |
| Nag. | Nagpur |
| OBCs | Other Backward Classes |
| P.C. | Privy Council |
| P.R. | Punjab Reports |

| | |
|---|---|
| SCRD | Standing Committee on Rural Development |
| PILs | Public Interest Litigations |
| Pat. | Patna |
| SCC | Supreme Court Cases |
| SCs | Scheduled Castes |
| STs | Scheduled Tribes |
| SEZs | Special Economic Zones |
| UK | United Kingdom |
| U.P. | Uttar Pradesh |
| U.S. | United States |
| UPA | United Progressive Alliance |

# CHAPTER 1

## INTRODUCTION

Since time immemorial, land has profoundly influenced the human civilization, particularly after the advent of the agricultural techniques. Even in the twenty-first century, its importance has not withered, rather strengthened, in the economic transition from agriculture to market-domination. Land attributes such as multiple use and limitedness, and anthropological attributes such as increasing population, among others, have rendered it of immense value. Land determines the social, economic and political status of an individual in any society. These key attributes, however, has made land highly controversial. Numerous wars have been fought in the quest for the expansion of territories, including the two World Wars that cost millions of human lives. Consequently, post-World War II introspections amongst nations resulted in the formation of the United Nations (UN). It aims to ensure peace and prosperity among all nations by respecting the sovereignty of every nation. For ensuring peaceful coexistence, the deliberations further ensured a guarantee of human rights to every individual, establishment of democratic governments and legal systems, etc. The emergence of a normative regime of human rights broadly recognized the land rights and attempted to resolve land conflicts.

Even in the twenty-first century, issues pertaining to land appear to be highly controversial. Although there is no major war at the scale of a world war at present, the use of the eminent domain principle encapsulates the controversy over land. Eminent domain means the sovereign authority of the State to acquire private property for public purposes. It traces its origin from Hugo Grotius's 1625 legal treatise, *De Jure Belli et Pacis* (On the Law of War and Peace) (Stoebuck 1972: 553-559). Currently, it is one of the most debated issues across the globe, highly contrasted with the property rights (Azuela and Herrera 2009: 337-362). On the one hand, the State is entrusted with the eminent domain power and on the other hand, the same State is assigned with the protection of human rights. Ultimately, a dichotomy arises over the exercise of these powers. The State seems in confrontation with its subjects.

Liberalization of the market has further intensified the debate, as there is a huge demand for land for implementing developmental policies. Nevertheless, strong protests have been witnessed against the taking of land for commercial purposes, whether in Africa (Allen 2010), China (Krishnan 2012) or the United States of America (US) (Dugdale 2005; Underkuffler 2006: 377). For instance, in the US after the *Kelo v. City of New London*[1] decision, widespread agitations were carried out against the judicial ruling and executive highhandedness on the application of the eminent domain principle. The *Kelo's*[2] verdict validated the executive exercise of eminent domain for economic development. Subsequently, after extensive protests, many State legislatures intervened to nullify the decision (Somin 2007: 1931).

Like many other countries, India too, has witnessed the eminent domain crisis. Besides land being vital to agriculture and livelihood, it plays a decisive role in India in other aspects as well. It determines the social, religious, economic and political status of an individual in the society. According to the Ministry of Agriculture's Annual Report 2010–11, more than half of the Indian population engages in agriculture for livelihood. The use of eminent domain for public purpose challenges the traditional authority as well as the established social milieu. At times, it results in life-threatening violence. For instance, in 2011, violent agitations were witnessed against the POSCO land acquisition in Odisha (Chattopadhyay 2007; Das 2011; Nayak and Mishra 2011: 12), the TATA land acquisition in Singur and Nandigram in West Bengal (Dam 2007; Fernandes 2007: 203), the Yamuna Expressway land acquisition at Bhatta Parsaul in Uttar Pradesh (Kumar 2011: 20; Parsai 2011), and in many other cases. According to a report of the Research and Resources Initiative and the Society for Promotion of Wasteland Development, since 2011, almost 130 districts in India have witnessed violent protests against the exercise of eminent domain (Gopalakrishnan 2012: 3; Sethi 2014). In its concluding remark, the report estimated that these protests will be intensified in the next fifteen years, as one crore and ten lakh hectares of land was required for various projects (Gopalakrishnan 2012: 23).

Indeed, many protests have pressurized the government to delay or withdraw the land acquisition process. For instance, in 2012, the Maharashtra government cancelled the

[1]545 US 469 (2005).
[2]Ibid.

land acquisition process for four major Special Economic Zones (SEZs) in Pune and Aurangabad (*Indian Express* 2012). Similarly, the land allotted to TATA at Singur was cancelled after the Trinamool Congress Party came into power (Staff Reporter *The Hindu*, 2011). Major land acquisitions for infrastructure and industrial development have received setbacks. The government appeared on the threshold, as it had to balance the aspirations of the landowners, particularly peasants, on the one hand, and the need for economic development in terms of setting up infrastructure on the other.

Overall, the issues concerning the eminent domain process revolve around legal norms. For more than a century, the Land Acquisition Act of 1894 served as the basis of eminent domain until its replacement in 2013. The Act of 1894 introduced a uniform application; before its enactment, the British had separate regulations for different regions—namely, Regulation I of 1824 in Bengal for the construction of roads and canals, the Building Act XXVII of 1839 in Bombay and the Act XX of 1852 in Madras. After independence, the 1894 Act was retained. As mentioned above, the transition of 1894 Act from 1894 to 2013 was not peaceful, but marred with many agitations. Some human right activists termed the Act as archaic and coercive (Patkar 2011: 5). Amidst continuous protests by peasants and activists, on the one hand, and consistent impediment in the availability of land for the implementation of liberalized policies on the other, the Parliament repealed the 1894 Act and adopted the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

The 2013 Act was the outcome of prolonged deliberations between the Parliament and civil society that began from 2007 (Khan and Ramesh 2015: 10). In 2007, the Parliament introduced the Land Acquisition (Amendment) Bill. The Bill lapsed and was reintroduced in 2009. It faced severe opposition in the Parliament and was referred to various committees like the National Advisory Committee (NAC) and the Standing Committee on Rural Development (SCRD) for reconsideration. Significant changes were proposed to the Bill. It was reframed and reintroduced in 2011. It comprehensively included fair compensation, rehabilitation, resettlement, Social Impact Assessment (SIA) and Environmental Impact Assessment (EIA). After two years of rigorous debate in the Parliament, finally, the 2013 Bill was approved (Tewari 2013). It received the assent of the President on September 26, 2013. The

United Progressive Alliance (UPA) government considered the 2013 Act progressive enough to ensure fair compensation and transparency than its predecessor—the 1894 Act (*The Hindu* 2013). However, since the execution of the new legislation from January 1, 2014, the Act has witnessed considerable reconsideration from the National Democratic Alliance (NDA) government. The government promulgated an ordinance to alter certain provisions of the 2013 Act (*Indian Express* 2014; *India Times* 2014; *The Hindu* 2014). The ordinance received an unprecedented criticism (Joshua 2015; Khan and Ramesh 2014: 148).

Therefore, eminent domain remains an unsettled issue. Although the transition in terms of the eminent domain from the 1894 Act to the 2013 Act involved divergent issues, the fundamental point is the substantive exercise of those rights within the contours of the constitutional principles. It is not only economic development and liberalized policies that in the recent times have stimulated the debate on eminent domain in India, but also, historically, land reforms since the enactment of the Constitutional provisions have been equally controversial. As a result, it is the nature of the eminent domain governed by the Constitution that demands a reconsideration in order to overcome its abuse. The whole crisis is situated within the ambit of Indian constitutionalism. Hence, issues such as public purpose, compensation, resettlement, rehabilitation, acquisition for private companies, EIA, SIA, establishment of land acquisition courts, etc., demand a reconsideration within the fuctional aspect of the Indian Constitutionalism.

### 1.1. Review of Literature

Until 2005, the literature on eminent domain law was relatively scarce. Post-2005, two significant factors have contributed to the emergence of an extensive literature on eminent domain. First, the government incessantly occupied land in order to implement developmental schemes, establish export houses and secure foreign investment reserves. Secondly, to realize those objectives, the government passed the Special Economic Zones (SEZs) Act, 2005 and offered land at cheaper rates. The passage of the SEZs Act in 2005 marked a significant beginning in the emergence of an extensive literature on eminent domain. Large pockets of land were acquired under the SEZs Act that triggered protests. The Government sometimes succumbed to the pressure and annulled certain previously allotted SEZs. There is also a huge

controversy over the success of the SEZs. The Comptroller and Auditor General of India has highlighted the pessimistic outcomes of land acquisition in SEZs and stated that it has failed to achieve the desired results (Aggarwal 2014; *India Business* 2014). Since 2007, the discontent from SEZs made inroads into the eminent domain process of the 1894 Act; for instance, the Nandigram and Singur land acquisitions among others. Eventually, various studies emerged and highlighted the plight of the farmers.

The Singur and Nandigram land acquisitions were the most prominent incidents that the studies highlighted. These incidents received the utmost attention from scholars, among the scholars, two fundamental and contradictory arguments prevailed: some authors favoured industrialization and justified the move by the Left government to acquire productive agricultural land (Sarkar 2008; Sen 2007) while some opposed industrialization on agricultural land, terming acquisition as a regressive land acquisition policy (Chandra 2008; Fernandes 2007; Guha 2007). Abhirup Sarkar has argued for a pro-industrialist approach with Singur-like projects, mainly to cope with the pathetic economic situation in West Bengal. Sarkar theoretically justifies the role of the government to acquire land for private companies, primarily to reduce the transaction costs. However, he points at two shortcomings of the 1894 Act that triggered violence viz., inadequate compensation and absence of a rehabilitation policy (Sarkar 2007: 1435-1442). On the other hand, Nirmal Chandra, on the basis of the findings of the 'Task Force on Indirect Taxes Report, 2002' opposed industrialization as the government provided private enterprises enormous fiscal concessions or sops. Such concessions were considered as detrimental to the welfare of the people. Land acquisition has caused mass displacement of Scheduled Castes (SCs), Scheduled Tribes (STs) and Other Backward Classes (OBCs). Chandra therefore suggests that no agricultural land should be acquired (Chandra 2008: 36-51). Similarly, Walter Fernandes opposed the Singur land acquisition, as the proceedings under the 1894 Act impoverished the peasants and labourers. Impoverishment was inherent in the absence of a rehabilitation scheme, an extensive administrative manipulation in framing the compensation and a flawed development pattern as well as a legal system. Besides impoverishment, critical issues of food security and informed consent were ignored under the 1894 Act (Fernandes 2007: 203-206). Even some anthropological studies on Singur and Nandigram found that the land acquisitions have caused immense repercussions, and to overcome it, the victims

adopted the political gimmick of protests (Guha 2007: 3706-3711). Overall, the Singur and Nandigram incidents were one of the major factors that pressurized the Government to review the 1894 Act.

Eventually, in 2007, the Government introduced three bills to overcome the protests and to ensure a peaceful land acquisition process: the Land Acquisition Amendment Bill 2007, the Rehabilitation and Resettlement Policy 2007 and the Rehabilitation and Resettlement Bill, 2007 (SCRD 2011: para 1.7). The bills lapsed after the dissolution of the fourteenth Lok Sabha. Again in 2009, they were re-introduced but failed to gain any consensus. Shortly thereafter, on the recommendation of the Department of Land Resources of the Ministry of Rural Development, the bills were unified and titled as 'The Land Acquisition, Rehabilitation and Resettlement Bill, 2011'. There was a clear relationship between the incidents of violent protests (Singur, Nandigram and others) and the changes incorporated in the land acquisition policy (SCRD 2011: 3.10).

The literature surveyed traces the legal trajectory of the land acquisition law from 1894 to 2013. At the outset, it describes the shortcomings of the 2007 Bill and then the more altered and reformed version of the 2011 Bill.

On the 2007 Bill, few studies have addressed the abuse of the 1894 Act and the outcomes of the Bill. In this regard, Nirmal Mohanty pointed out three major conflicts regarding the exercise of eminent domain. First, private property rights versus the needs of development; second, land as a private good versus as an anchor for social identity and third, gainers versus losers. In the recent years, conflicts over land acquisition have resulted due to social and political empowerment, increase in population density and an involvement of the private sector in development activities. According to Mohanty, these conflicts can be resolved by encouraging voluntary transactions and adherence to a strict interpretation of the public purpose, and both these remedies were adequately addressed by the 2007 Bill (Mohanty 2009: 44-50). Similarly, Tarun Choudhary justified the 2007 Bill as it fairly addressed the shortcomings of the 1894 Act. The shortcomings included the excessive discretionary power of the government, delays and a lack of information and transparency (Choudhary 2009: 73-82).

After extensive deliberations, the 2007 Bill lapsed and was replaced by another 2011 Bill. Scholars immediately engaged the political, economic and legal perspectives to

point out the defects of the bill. Michael Levien undertook a political and economic approach and asserted that the Bill was introduced in order to implement neo-liberal policies and to overcome protests. According to him, although the Bill reduces the role of the government in the land acquisition process and promotes a timely acquisition, it will eventually cause a mass displacement. Levien suggests three concrete measures to rectify the Bill: First, the State should not acquire land for private purposes; Second, all acquisitions should seek a prior informed consent of the Gram Sabha and; Third, should incorporate rehabilitation, resettlement and equity shares for the farmers (Levien 2011: 66-71). Similarly, Sanjoy Chakravorty viewed land acquisition as causing injustice and misery, along with political turmoil and violence. The 2011 Bill offered no viable solution to the public purpose and pricing process in the rural areas (Chakravorty 2011: 29-31). In another extended work, Chakravorty (2013: 2) focused on the market value of land acquisition. The study argues that the enormous increase in compensation will pose impediments in the process of the acquisition of land. Kenneth Bo Nielsen argues that due to the failure of the legal system to ensure fair relief in terms of land acquisition, the subaltern strategies such as protests and demonstrations proved worthy, especially in the cases of Singur and Nandigram. Even the 2011 Bill failed to ensure efficient legal practices in challenging the State against land acquisition; it facilitates private capital investments and all its provisions, no matter how appropriate in terms of providing fair compensation, do not prevent discontentment among the peasants. Hence, public movements and party politics are considered an efficient form of resistance (Nielsen 2011: 38-40). In another study, Jayanta Bandyopadhyay and Tapas Roy contend that any prospective law ought to strike a balance between economic development and the plight of landowners. In terms of electoral politics, rural voters and caste politics offer immense challenges to the eminent domain law. Although the Bill aptly addresses the issues of public purpose and fair compensation, it ignores the pending project site litigation (Bandyopadhyay and Roy 2012: 22-25).

From the political economy perspective, Dhanmanjiri Sathe remarks that the introduction of the 2011 Bill is an attempt to introduce negotiations among diverse factions. Sathe engages developmental economics and political economy to uncover the land acquisition issues. Although farmers of the developed areas, as compared to those in the backward regions, are more interested in selling their land for a

reasonable amount, the State has failed to create conducive conditions (Sathe 2011: 151-155). Avinash Kumar highlights the failure of the political parties to evolve a consensus on the political economy of land acquisition. On the issue of land acquisition, political parties have been merely interested in electoral gains. For instance, he cites the case of the Bhatta Parsaul land acquisition in Uttar Pradesh, where the Congress party politicized the issue for political gains, in spite of the fair compensation that was being offered to the farmers by the ruling Bahujan Samaj Party (BSP) government. Kumar argues that the debate on land acquisition merely focused on compensation, rather than undertaking a scrutiny of the entire acquisition process (Kumar 2011: 20-23).

In another study, Ram Singh – on the basis of two sets of data collected from the Additional District Judge, Delhi and the Punjab and Haryana High Court – argues that the 1894 Act intrinsically generated excessive litigation. Such excessive litigations were socially inefficient and regressive in their effect as they favoured the rich than the poor. Singh pointed out that the regulatory impediments under the 1894 Act obstructed voluntary land transactions. Even the 2011 Bill does not offer any solution to the pending litigations. He suggests two reforms to overcome the excessive litigation and to promote voluntary transactions. First, there should be a promotion of collective bargaining with the owners and, second, a substantial enhancement of compensation determined by an independent and representative agency (Singh 2012: 46-53). Maitreesh Ghatak and Parikshit Ghosh believe that the compensation determined on the basis of market value under the 1894 Act was flawed. Both social justice and the efficient use of resources were at stake. Even the 2011 Bill follows the same flawed criteria. As an alternative, they proposed land auction criteria to ensure just compensation and to reduce politicisation of the issue. Land auction involves an auction of land within the project site and its surrounding area. The government could avail the cheapest land. The landowners participating in the auction will receive compensation in cash. Those who do not participate, despite their land bring included under the project site category, should be compensated with plots of land acquired outside the project site (Ghatak and Ghosh 2011: 65-72).

From a jurisprudential perspective, Usha Ramanathan (2011: 10-14) believes that the 1894 Act institutionalized involuntary acquisition. Although the 2011 Bill incorporates adjectives such as ‘humane, participatory, informed’, it lacks coherent

procedure and entitlements. In spite of lexical priority, industrialization will continue with mass displacement. From an institutional perspective, Colin Gonsalves (2010: 37-42) and Mihir Desai point out the hands-off approach adopted by the judiciary. Both studies have highlighted the dichotomy of the application of Part II and Part VII of the 1894 Act. The land acquisition for private companies under Part VII has been overlooked, mainly due to the liberal interpretation of the courts. The net result was the exploitation of farmers. Mihir Desai argues that even public purpose has been liberally interpreted to such an extent that the landowners have not been allowed to question it (Desai 2011: 95-100). On the other hand, Mahalingam and Vyas (2011: 94-102) undertake the international comparative approach,using five cases of land acquisition in India as case studies. Their paper demands the introduction of equitable negotiation methods to minimize protests and to overcome a subjective and suboptimal compensation policy. Besides, it theorizes the consultative approach of the eminent domain as put forth by the World Bank. Even the human right activists have been skeptical about the outright resolution of the eminent domain crisis. Medha Patkar viewed the Indian Government as worse than the British in the application of land acquisition policies. The British limited the acquisition only to governmental projects; the Indian Government, in the last ten years, directed more than one hundered and eighty lakh hectares of agricultural land to non-agricultural purposes. Additionally, the government since independence, has displaced around eight to twelve crore people. Patkar proposed that the Bill should democratize and decentralize the land acquisition planning to minimize the diversion of land and the destruction of agriculture (Patkar, 2012).

Clearly, the above-mentioned studies have specifically dealt with the legal framework of land acquisition of 2007 and 2011. They have focused on specific issues such as public purpose, market value and compensation from the political economy, jurisprudence and politics perspectives. They all suggested specific solutions to the bills that were provisional. Meanwhile, the final Act was passed in 2013 and came into force from January 1, 2014. After its enforcement it seemed that the debate on eminent domain was settled, but some dissenting voices particularly from the business houses were intermittently raised against the 2013 Act (Banerjee, 2014; Chakravorty, 2014). These dissenting voices received prominence after the Bharatiya Janata Party (BJP) came to power in 2014. The newly formed government realized that the 2013

Act hindered the implementation of its 'Make in India' flagship programme and other development policies (Khan and Jairam 2015: 124). As a result, the Government issued an ordinance to review the 2013 Act, which subsequently lapsed due to a severe opposition in the Parliament.

As eminent domain under the 2013 Act remained an unsettled issue, it demanded a coherent study. In this regard, Jaivir Singh (2006) undertook a more analytical perspective. He explained the relationship of eminent domain vis-à-vis the right to property from an economic perspective. Due to a series of constitutional amendments, the right to property was watered down from being a fundamental right to a mere constitutional right. This resulted in the violation of Separation of Powers that further incurred social costs. The paper viewed the Separation of Powers from the functional and structural points of view. From a structural perspective, the violation amounted to welfare losses that encouraged a rent-seeking activity. Singh argues that the efficient method for overcoming the violation of Separation of Powers and social cost can be secured through efficient bargaining between legislature, judiciary and executive. However, with the erosion of the right to property, the executive appeared supreme as there was an absence of judicial review, which undermined both public purpose and just compensation. Singh undertook an extensive study of the Supreme Court decisions and legislative amendments to portray not only the erosion of the right to property but also the systematic violation of the Separation of Powers. However, the Separation of Powers is not a formalistic concept in the Indian Constitution. It relates to the independence of judiciary and accountability.[3] Even under Article 50, the framers of the Constitution focused on the separation of the judiciary from the executive in the matter of public services.[4] As a result, besides the violation of the Separation of Powers, the other constitutional values of rule of law, accountability, etc. are equally vital and therefore necessitate a revisiting of Indian constitutionalism within the broader framework of constitutional values and then its relevance with the eminent domain law.

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[3]During the presentation of the Draft Constitution, Ambedkar rejected the classical doctrine of Separation of Powers. Under the division of powers, the Constitution incorporated the concept of Parliamentary democracy that did not separate the legislature and executive for the reason that it strived to achieve accountability more than stability (CAD VII 2009: 32-33).

[4]The members of the Constituent Assembly considered this provision significant, particularly to outlaw the colonial practice that entrusted the executive in the matters of public services with judicial powers, they considered separation to ensure the impartial delivery of justice (CAD VII 2009: 582-593).

Indian constitutionalism marks a distinct understanding as against the Western or Eurocentric constitutionalism. Many authors have pointed out this distinction, from a social transformative perspective. Upendra Baxi terms this social aspect as 'transformative constitutionalism' (Baxi 2000: 1185-1186). Uday Mehta mentions that national unity, identity, social upliftment, equality and international standing were conspicuous features of the twentieth-century constitutionalism that India incorporated (Mehta 2010: 17). Recently, few studies have partially highlighted the theory of Indian constitutionalism (Khosla and Tushnet 2015; Choudhry et al. 2016). Madhav Khosla and Mark Tushnet undertook theoretical exposition of South Asian constitutionalism under the title of 'Unstable Constitutionalism'. On the basis of Basic Structure doctrine and reservations, they termed Indian Constitutionalism as 'unstable' (Khosla and Tushnet 2015: 7). Another recent study focuses on diverse topics within the realm of Indian Constitution. It locates Indian constitutionalism within the realization of constitutional values (Chaudhry 2016: 2). Both studies do not explicitly decipher the nature of Indian Constitutionalism and its substantive realization.

Moreover, there is another shortcoming in the literature. It has failed to undertake the historical or colonial examination of the eminent domain law in India—mainly the examination of colonial practice embedded in the 1894 Act—which existed for more than a century until its repeal in 2013. In recent years, major studies in other legal subjects of criminal law, evidence law, etc. have revisited the colonial law-making to ascertain the substantive nature of the rule of law at that time (Sturman 2012; Kolsky 2010; Weiner 2009; Singha 2000). The historical examination of the eminent domain law will contribute towards understanding the reasons, objectives, features, effects, shortcomings and factors in the colonial lawmakers' intentions implementing the 1894 Act, which will further serve as a guiding force in setting the appropriate method for eminent domain use in the future.

In the post-colonial period, the 1894 Act remained static without any significant change. However, the eminent domain received a constitutional status under the Fundamental Rights category (Palkhiwala 1974). It was not an absolute exercise of power. The Constitution imposed certain limitations on the takings law (Kashyap 1978). Nevertheless, as soon as the Constitution was put into force, the right to property and eminent domain appeared to be in a tussle with each other. The tussle

was between the judiciary and the executive/legislature that ended with the passing of the Forty-Fourth Amendment Act, 1978. The Right to Property was repealed from the Fundamental Rights category, as was the eminent domain. Although, a few studies in recent times (Ananth 2015; Singh 2006; Sathe 2015) have addressed the tussle between the judiciary and legislature/executive; the shortcoming arise over its direct relationship with the overall exercise of eminent domain process under the 1894 Act and the existing 2013 Act. Additionally, the existing literature has overlooked the originalist approach of the Constituent Assembly, the reasons and aims in incorporating the Right to Property in the Fundament Rights category and its relationship with the application of eminent domain. Another major point of consideration is the role of the Supreme Court in evolving the whole eminent domain process in the pre-1978 and post-1978 existence of the Right to Property. This differentiation is also significant, mainly for the presence of the Basic Structure doctrine and its impact on the exercise of eminent domain. Even there, a gap exists in the existence of literature on the newly introduced 2013 Act.

## 1.2. Objective and Scope of the Study

The proposed research attempts to evaluate the practice of eminent domain under the repealed Land Acquisition Act, 1894 and the existing Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. It examines the law of eminent domain within the theoretical underpinnings of Indian constitutionalism. It undertakes the historical examination of the eminent domain laws passed during the colonial rule, beginning from 1824. This historical examination traces the reasons, factors, objectives, features, effects and shortcomings of the colonial law. The study highlights the existence of eminent domain law in the post-colonial period within the contours of the constitutional principles, the peculiarities of the 1894 Act with its shortcomings and the role of the apex court and legislature in regulating it. By invoking the Indian constitutionalism perspective, the study identifies the grey areas within the existing 2013 Law and its efficacy in undoing the historical wrongs generated by the 1894 Act.

## 1.3. Research Questions

On the basis of the objectives and scope of the study, the following research questions have been formulated, which the study seeks to answer:

1. What are the fundamental issues relating to land acquisition in India that are creating contrasting interests?

2. What was the historical legal trajectory and normative principles that governed the eminent domain law during the colonial period?

3. What is the constitutional status of the eminent domain law in post-colonial India? How do the constitutional machineries, particularly the judiciary and legislature, deal with the eminent domain crisis? How does the Constitution resolve the conflicting interests in the eminent domain law? What is the impact of the elimination of the Right to Property on land acquisition?

4. Does the 2013 Act resolve the dichotomy prevailing during the existence of the 1894 Act? What are the peculiar features and setbacks under the Act of 2013?

### 1.4. Research Methodology

The research materials include both primary and secondary resources. The primary resources, with respect to the colonial understanding of eminent domain, include the Privy Council and High Court decisions of the colonial period and the colonial laws passed by the East India Company and later by the Crown. In relation to the post-independence eminent domain study, the primary sources include commentaries on the Indian Constitution, the Constitution Assembly debates, Parliamentary debates, Supreme Court judgements, foreign laws, Indian laws, Statutory Committee reports and human rights laws. The secondary sources comprise books, articles from academic journals and relevant website materials. Descriptive, analytical and evaluative methods will be adopted in the study in order to draw the inferences and conclusions.

### 1.5. Chapterisation

Chapter 2 deals with the theoretical underpinnings of the eminent domain law in India within the contours of Indian constitutionalism. It begins with the Social Contract theories of Grotius, Hobbes, Locke and Rousseau that advocate establishment of a government to overcome the state of nature. Subsequently, the chapter shifts its examination to the other prominent theories viz., utilitarianism and the economist theory of the eighteenth and nineteenth centuries, respectively. Utilitarianism narrates

the positive law approach that gives prominence to the consequential and majoritarian utility approach of the State towards governance, including property and eminent domain. Economists consider eminent domain as a regulator to overcome the holdout conundrum. Meanwhile, the eminent domain received a formal constitutional recognition in the eighteenth century under the US Constitution that particularly advanced a negative constitutionalism towards the eminent domain use. As a result, later constitutions including the Indian one, followed the US precedent. It highlights both the negative and positive constitutionalism perspectives. The Indian Constitutionalism suggests that it offers a perspective distinct from that of the Western Constitutionalism. At the same time, the Constitution of India establishes an institutional accountability to the constitutional mechanisms as a means for realizing the functional character of the Constitution.

Chapter 3 traces the historical evolution of the eminent domain law in the colonial period. It deals with the legal history of the Land Acquisition Act, 1894. Before the passage of 1894 Act, there was no uniformity in the land acquisition process. The three presidential towns' viz., Bombay, Calcutta and Madras, had distinct laws. This chapter highlights the various stages that led to the consolidation of the eminent domain in 1894. It also describes the nature, reasons and objectives of the presidential laws. It also traces the systematic change introduced in the substantive and procedural frameworks of these laws at various stages. It also points out the role of the colonial lawmakers in retaining a superior authority in dealing with land acquisition. Finally, this chapter undertakes a comparative procedural and substantive law overview of the various pre-1894 laws with that of the 1894 Act. It dwells into the reasons for introducing the 1894 law. This chapter also examines the role of the apex colonial judiciary, the Privy Council and High Courts in interpreting the 1894 Act until independence, in the absence of legislative machinery.

Chapter 4 focuses on the exercise of eminent domain post-1950. The presence of the Constitution posed certain constitutional obligations on the exercise of eminent domain. This chapter highlights the various constitutional provisions that dealt with the eminent domain and the way in which it was regulated. The rule of law under the Constitution placed certain obligations on the legislature, executive and the judiciary, which had certain implications on the colonial eminent domain practice. Colonial

takings in the absence of a Constitution had entrusted a free hand to the executive. But the situation, post-1950, was altered. Moreover, from 1950 to 1978, the judiciary and legislature/executive appeared contradictory in dealing with the takings vis-à-vis the Right to Property. This chapter highlights the various decisions of the Supreme Court and the Constitutional Amendments that ultimately led to the repeal of the Right to Property. The politicization and the political economy perspective on the Right to Property formed crucial subject that are overviewed in this chapter. It also evaluates the impact of the deletion of the Right to Property on the exercise of eminent domain, post-1978.

Chapter 5 addresses the scheme of the 1894 Act. It highlights the nature, scope and objectives of the Act. At the outset, it describes the preliminary general procedure of the land acquisition. It examines the role of the Collector and of various other authorities under the general procedure. Then the Chapter highlights the land acquisition for private companies. The Act included a distinct procedure for Company under Part VII of the Act. It was mandatory for the government to comply Part VII. Further this chapter deals with the land acquisition of waste and arable land for temporary acquisition. Temporary acquisition mainly meant for the temporary purposes. Next it deals with the provisions relating to procedural rights which mainly include the rights relating to compensation. It also highlights various grounds that formed the grounds of procedural rights. These rights were justiciable. Further, it also deals with the major Land Acquisition Amendments of 1962, 1967 and 1984 introduced under the Act and its significance. In the next section, the Chapter examines the judicial practice of the Act. It undertakes examination of various decisions of the Supreme Court on public purpose, market value, compensation, land acquisition for company, acquisition of waste land for temporary purposes, urgency land acquisition, etc. It mainly deciphers the judicial attitude towards the takings until its repeal in 2013.

Chapter 6 deals with the existing 2013 Act. It describes the scheme of the 2013 Act. At the outset, it traces the nature, objectives, scope and other significant features introduced under the Act. Further, the chapter discusses the application of newly inserted principles viz., Consent clause, rehabilitation and resettlement, SIA, protection of food security, role of the government, special provisions relating to SCs

and STs, and incorporation of Offences and Penalties. Then after, the Chapter describes the procedural framework of land acquisition under the 2013 Act. It includes publication of notification, rehabilitation and resettlement award, issuance of declaration, compensation claims, and the establishment of various authorities. Further, it also examines special land acquisition proceedings in temporary occupation of land and urgency of land acquisition. Finally, it addresses the Ordinance promulgated by the Parliament to overcome certain provisions of the 2013 Act. It highlights the changes that the Ordinance intended to introduce under the Act. Finally, the chapter evaluates the nature of the 2013 vis-à-vis 1894 Act, particularly its suitability to address the historical wrongs that were committed under the 1894 Act. It also analyses the substantive nature of all the newly inserted provisions under the 2013 Act.

Finally, Chapter 7 highlights the concluding remarks on the whole subject. The Chapter discusses the application of the eminent domain within the contours of the constitutional principles.

# CHAPTER 2

# A THEORETICAL OUTLINE OF THE EMINENT DOMAIN

*"A Good Government implies two things: First, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained."*

- James Madison (Federalist Papers, Federalist No.62, February 27, 1788).

## 2.1. Introduction

Eminent Domain is the power of the government to take land for public purpose. The term eminent domain is also referred to as 'compulsory purchase' in the United Kingdom (UK); 'expropriation' in continental Europe, South Africa and Canada, and 'resumption' in Australia (Ratnapala 2009: 254; Stoebuck 1972: 554). The term eminent domain was coined by Hugo Grotius and defined as an authority of the government, particularly to seize land for public purpose. Its origin can be traced back to the Biblical times (Bell 2009: 524-525). Later, the Roman laws, the Magna Carta, the Napoleonic Code and other legal systems made some reference to the eminent domain use (Cormack 1931: 222). Western Europe, in the beginning of the twelfth century, extensively adopted the expropriation of land for the common good of local communities (Reynolds 2010: 83). During this period, England, with its common law tradition, widely practiced eminent domain. The King owned all the land and exercised wide powers over property. If the King expropriated any land from the tenant, then no compensation was paid for such land acquisition (McFarland 2004: 145).

However, it was after the mid-eighteenth century eminent domain received an express constitutional recognition. The US Constitution, for the first time, expressly recognized eminent domain. As a result, most of the literature on eminent domain is situated within the American jurisprudence (Singh 2006: 1). The US Constitution incorporated eminent domain in the Bill of Rights. The Fifth Amendment of the US Constitution states: "nor shall private property to be taken for public use without just

compensation”. Additionally, the eminent domain demands fulfilment of the due process under the Fourteenth Amendment, which reads as “nor shall any State deprive any person of life, liberty, or property, without due process of law” (McFarland 2004: 146). Ultimately, after the incorporation by the US Constitution, the eminent domain witnessed a transition from a seventeenth-century absolute sovereign authority to a constitutionally limited authority. A similar transition has also been witnessed in India. However, there is a considerable difference in its application in India vis-à-vis the US Constitution, mainly due to distinct constitutional frameworks and unique historical social experiences.

This chapter traces the theoretical underpinnings of the eminent domain law in India within the contours of Indian constitutionalism. At the outset, it explores the emergence of eminent domain in the Social Contract theories. It begins with the social contract theories of Hugo Grotius, Thomas Hobbes, John Locke and Jean-Jacques Rousseau that establish a government to overcome the state of nature. In spite of the shortcomings, the significance of the social contract theory lies in the emergence of property as a normative form and the State as the representative of the interests of the people. Subsequently, the chapter shifts its examination to other prominent theories viz., utilitarianism and the economist theory of the eighteenth and nineteenth centuries, respectively. Utilitarianism narrates the positive law approach that renders prominence to the consequential and majoritarian utility approach of the State towards governance, including property and eminent domain. Economists consider eminent domain as a regulator to overcome the holdout conundrum. Meanwhile, the eminent domain received a formal constitutional recognition in the eighteenth century under the US Constitution that particularly advanced a negative constitutionalism towards the eminent domain use. As a result, later constitutions including the one in India has followed the US precedent. However, the Constitution of India assimilated both universal and particular principles within its fold. This chapter highlights both the negative and positive constitutionalism perspectives. It traces the Indian constitutionalism that offers a distinct perspective from that of the Western Constitutionalism. The Constitution of India establishes the ‘State’ under Article 12, where it has to undertake social welfare policies to overcome the historical wrongs. The State is considered as the prime instrument to undertake social welfare initiative with a top–down approach. At the same time, the Constitution establishes the

institutional accountability of the constitutional mechanisms as a means for realizing the functional character of the Constitution. Within these constitutional means and objectives, the insertion of the eminent domain offers a distinct understanding as against the social contract theorists, utilitarians and economists.

### *2.1.1. The Social Contract Theories: Tracing the Emergence of Eminent domain*

Natural right theory believed that certain rights such as life, liberty and property existed even before the State came into existence, and all human beings possessed these rights by virtue of their nature as humans (Lenhoff 1942: 601). The naturalists have maintained that all rights emanate from the right to preserve life and such a right was inherently absolute in nature (Stoebuck 1972: 559). However, there was difference of opinion over the inalienability of property rights (Bird and Oswald 2009: 103). The emergence of property as a normative value was the significant outcome of this theory; nevertheless, the nature of property rights has been well-contested.

A true foundation of the eminent domain was laid down by Hugo Grotius in his magnum opus, *On the Law of War and Peace* (Reynolds 2010: 108). Grotius was the foremost thinker, much earlier than Hobbes and Locke, who dealt with the state of nature and eminent domain (Reynolds 2010: 100). Grotius assumed that in the 'state of nature', no law and State existed. Before property was introduced, people owned the land in common and used the things that were unoccupied. All human beings were the joint inheritors of the common stock of all things on the earth. But in this primitive stage, man unjustly occupied certain things by depriving others. In order to overcome this anarchy, citizens entered into a contract and established a civil society (Stoebuck 1978: 559). Eventually, this led to the emergence of property as a civil right (Paul 1987: 197). Under this civil society, the State—a body of free men—represented the interests of all people. As the civil society recognized two kinds of property rights—namely, individual and community rights—the State represented the whole community and possessed the absolute right to limit the individual property right for common good (Garnsey 2007: 118). Samuel von Pufendorf, a follower of Grotius, broadened the Grotian eminent domain and stated that the ruler has three rights over his citizens' private property viz., use of property as per the interest of the state, taxation and eminent domain (Paul 1987: 65). On the third right of the eminent domain, Pufendorf argued that the State has the authority to seize the property of the

individual wherever there is a public necessity (Stoebuck 1972: 559). However, any expropriation that was in excess or above the limit demanded the payment of compensation (Bertram 2004: 57). The biggest setback of Grotius and his followers was that they failed to limit the eminent domain power and did not ensure a mandatory payment of just compensation for the expropriation (Stoebuck 1978: 583).

Thomas Hobbes presented a different perspective. Hobbes described a chaotic and anarchic state of nature wherein every individual was an enemy of the other (Waldron 1988: 165). In the absence of a legal order, every person under the state of nature was free to do anything. This led to the constant fear of insecurity. In order to overcome this fear, the individuals entered into a social contract. Under the social contract, the individuals submitted their rights of liberty and property to the absolute sovereign (Bertram 2004: 34). Hence, the property rights were restricted by the sovereign in the interest of common good. For Hobbes, the sovereign authority was supreme and exercised unfettered powers in regulating property (Reynolds 2010: 100). David Hume, influenced by Thomas Hobbes, rejected the absolute natural right of property. He believed that property rights emerged after the formation of the civil society. Property rights arise from the possession of objects that are legitimated by the rules of justice (Garnsey 2007: 155).

John Locke—a seventeenth century philosopher—considered labour as the source of property (Reynolds 2010: 101). Locke believed that when any person in the state of nature engages in physical labour or the work of his hands on certain things, it puts a certain value to that thing which amounts to property and thus, such person possessed a sole ownership on that property (Gaba 2007: 528). Eventually, to protect this laboured-on property, life and liberty, men entered into a social contract because the state of nature could not provide that protection. The government, according to Locke, was obliged to protect the property absolutely and not transgress or interfere with the property right (Stoebuck 1972: 567). Locke presents a strict interpretation of the property rights that does not render any space for governmental interference and thus, refutes the application of eminent domain. However, Locke agreed on tax regulations but only with the consent of the legislature (Reynolds 2010: 101). Even the Lockean tacit consent in the imposition of tax had many shortcomings (Epstein 1985: 17-18). The major criticism levied against the Lockean theory was that it rendered a foremost importance to the protection of individual property rights and thereby, subverted the

common or public welfare (Reynolds 2010: 101). But other natural theorists such as Grotius, Pufendorf, Heineccius, Vattel and Bynkershoek entrusted the State with the eminent domain power to safeguard the community interests. Further, the State under eminent domain was immune against any liability (Lenhoff 1942: 596). They believed that the State possessed a sovereign legitimate authority on property (Epstein 1985: 4). These natural theorists failed to provide the individual owner a right to compensation against the seizure of property (Lenhoff 1942: 596).

Similarly, Jean-Jacques Rousseau refuted the Lockean interpretation of property as sacred and absolute. Rousseau also criticized the labour theory of Locke as a source of inequality and conflict (Garnsey 2007: 160). However, Rousseau understood the inevitability of the creation of property for distribution. But this understanding of property lies in the significance of occupation for subsistence. After the formation of the political community through a social pact, the State exercised its authority through the general will of the people. The individuals held parcels of property as trustees for the public good, and not as absolute owners. Such parcel of property was subordinate to the right of community (Bertram 2004: 93). However, Rousseau did not directly address the eminent domain (Reynolds 2010: 99). Rousseau entrusted the State through the general will to protect the property-holder from his fellow citizens, foreign invaders, against economic inequality and corruption; but, the protection against the tyranny of the State was overlooked (Bertram 2004: 94). Even the description of property was in general terms (Reynolds 2010: 99). In the matter of compensation for the deprivation of property, all—Grotius, Hobbes, Locke and Rousseau—were silent (Stoebuck 1972: 585). They presented diverse and contradictory thoughts; however, one major contribution of this collective thought, among others, was the emergence of property as a normative concept within the governmental structure (Garnsey 2007: 164).

### *2.1.2 Utilitarian Consequentialism and the Economic Holdout*

Besides the above-mentioned social contract theorists, the utilitarians offered some significant thoughts on property rights. They criticized the natural theorists (Hart 1994: 187). Jeremy Bentham, the chief proponent of this theory, believed that the idea of justice was based on the maximization of utility. Utility vested in the happiness of maximum individuals, i.e., the greatest happiness of the greatest number of people

(Rescher 1966: 8-9). It advocates more pleasure and less pain. At its core, utilitarianism propounded the majoritarian principle at the cost of the minority. In other words, the minority was irrelevant until the majority was happy. The utilitarians adopted a consequential approach that believed completely in the end result (Simmonds 2008: 18). Eventually, the laws had to follow the utility principle. Rules were efficient if they maximized pleasure and minimized pain. Efficiency completely relied on the end results. Bentham considered property as a unit to satisfy the basic expectations (Rescher 1966: 11). Bentham opposed Locke's absolute property rights and was suspicious about the natural rights theory, because Bentham believed in positive law, i.e., the supremacy of the sovereign legislature to legislate laws without providing any access to the natural laws, the command of the sovereign was supreme. In terms of eminent domain, utilitarianism failed to provide any precise insights (Hart 1994: 244-45). Even if we take its majoritarian principle, it hypothetically favoured the majority and not the society as a whole. Hence, it undermined the principle of social justice or social welfare, equity and fairness (Rescher 1966: 44). This equally applies to compensation, wherein no compensation would be paid to the minority on the exercise of eminent domain if the seizure renders the majority better-off. Moreover, the utilitarians focused on ends rather than means (Rawls 1999: 25). Further, the nineteenth-century economists influenced by utilitarianism, developed the utilitarian doctrine from the economist perspective (Rescher 1966: 11).

***Economic Perspective on Eminent Domain***

The economists provide a different perspective on the application of eminent domain. From the economist perspective, the government exercises eminent domain for two reasons: firstly, to overcome holdouts and free riders and secondly, to promote a more efficient allocation of resources (Posner 1977: 40-42). The State exercises eminent domain to prevent market failure. There is a tendency that the market may not allocate the scarce resources efficiently for seeking the highest social good (Merrill 1986: 1561). Due to property rights, the individuals have monopoly over property. They possess the power to exclude and transfer the property, and this gives rise to holdout. As a result, the market appears to be imperfect. It fails to provide the needed goods. The seller creates the holdout problem as he/she strategically holds the property for a higher price than offered by the developer (Kelly 2006: 19). For instance, if the government needed large tracts of land for the construction of highways, railways,

pipelines, etc., they may face a strategic problem from the landowners, who if knowing about the project in advance, will intend to sell the land at the last moment. This will create their monopoly over the transaction and will extract the highest compensation. Such strategic behaviour increases the transaction costs and undermines the efficiency of the land use as it creates a *pareto optimal* situation. It is a condition in which one cannot be made better-off without making the other person worse-off (Benson 2005: 168). On the contrary, the State through eminent domain regulates the market to generate Kaldor-Hicks efficiency; a condition in which the transaction makes someone better-off, but does not make someone else worse-off by a greater amount. It also controls the rent-seeking activity that relates with the seller extracting economic rents from the buyer. In both holdout and rent-seeking activity, the eminent domain as an involuntary transaction economically facilitates the efficient forced sales (Alexander 2005: 960). This economic interpretation of eminent domain has certain shortcomings. From the economic perspective, eminent domain may be efficient as it overcomes the holdout, but may not be just. Owners may not be justly compensated (Ratnapala 2009: 254). Although property is merely considered as an economic right, it also possesses other attributes of social wealth and self-development for civic participation (Alexander 2005: 959). It also completely undermines the property rights from the ethical perspective of just compensation (Rescher 1966: 12).

Both the utilitarian and economist perspectives have been critically challenged by the distributive theorists of the twentieth century, which includes welfare economists (Rescher 1966: 11). Distributive theorists primarily invoked the principle of justice, equity and fairness (Rescher 1966: 165). As Michelman believes that the eminent domain crisis can be resolved by ethical compensatory measures, therefore, he invokes both the utilitarian efficiency and the John Rawls fairness criteria.[5] Although

[5] Michelman undertook the whole assessment by invoking certain costs. They were demoralization costs, settlement costs and efficiency gain. Demoralization costs (D) are the disutilities to the uncompensated users and their sympathizers and the loss of future production from the impaired incentives or social unrest that arises due to the non-payment of the compensation by the government. Settlement costs (S) were the costs that included administrative costs to operate the compensation programme, mainly to prevent demoralization. Efficiency gains are the excess gains above the demoralization and settlement costs. It follows the basic utilitarian strategy i.e. to maximize the net gains to minimize the net losses. Michelman, on the basis of the above three costs, draws a certain proposition towards the allotment of compensation. If the efficiency gains are less than the demoralization costs and settlement costs, then the government action is unjustifiable. In other words, if there is D>S>E or S>D>E, then according to the utility, the proposed action should be rejected. But, if the government action generates efficiency gains that exceed either the demoralization costs or settlement costs then the action is justified. Michelman's calculus although significant, possessed certain shortcomings.

Michelman limited his focus on compensation without rendering much importance to the public use or necessity, the engagement of the moral issue appears significant (Fischel 1995: 146; Miceli 2011: 110). Munzer, on the basis of the fairness component, demands a full compensation, which should also include some other components such as incentive effects, moral hazards, revenue costs, fiscal illusion and rational and legitimate expectation (Munzer 1990: 433). And all these measures, according to Munzer, should be part of the constitutional interpretation (Munzer 1990: 456).

Overall, the above-mentioned theorists have expressed diverse opinions. The social contract theorists unanimously agreed on the establishment of the State to overcome certain contingencies that had emerged during the state of nature. A social contract, although hypothetical, merely takes a tacit consent to establish the State that completely lacked a free consent (Dworkin 1986: 193). Hence, the absence of free consent makes the exercise of eminent domain undemocratic. All the social contract theorists as well as the utilitarians have limited the eminent domain process and left it to the discretion of the sovereign State. As Munzer suggests, the eminent domain offers unequivocal power to the State and causes moral hazards and leads to social injustice. Since the eighteenth century, the constitutional principles have started addressing these moral hazards and social injustice under eminent domain. Constitutionalism provides effective accountability mechanism over the exercise of eminent domain powers. Before undertaking the constitutionalism perspective, the next section addresses the specific theories of eminent domain.

## 2.2. Theories of Eminent Domain

Beside the above-mentioned general theories, few thinkers have addressed the theories of eminent domain. Mathew P. Harrington categorizes eminent domain in three theoretical frameworks—namely, the Reserved theory, Inherent Powers theory and Consent theory (Harrington 2002: 1249). The first two theories are instrumental and trace their origin within the political discourse. The ‘consent’ theory derives its origin from the ‘republicanism’ approach of the US Constitution.

The Reserved theory undertakes the Grotian interpretation that the State as a sovereign authority possesses an absolute control over ownership of its citizens. According to this theory, the State granted the right to possess a property to the

citizens and impliedly reserved the authority to seize the grant anytime. It considers that the possessor had tacitly agreed to the submission of property (Harrington 2002: 1250). It assigned no constitutional limitation over exercising the power of eminent domain. Republicanism opposed this theory on the grounds that the reservation of rights was equivalent to feudalism. Additionally, the nature of the sovereign was not absolute. It may be divided into the nation and other states as witnessed in the US (Harrington 2002: 1251). These shortcomings eventually led to the formation of the inherent theory.

According to the inherent theory, the eminent domain for public use or public necessity emanates from the inherent authority of the State to protect its subjects through police powers. The State does not undertake pre-existing property rights. The inherent theory has empowered the government to exercise eminent domain as a sovereign authority, but subjected to limitation, as imposed by the Constitution (Harrington 2002: 1251). Like the reserved theory, the inherent theory entrusted the individual only with the possessory right. It has failed to assign a right to title. Ultimately, no restraint was exerted against the sovereign exercise of eminent domain. Both theories gave the sovereign the free hand, as the individual possessed no grounds to complaint against the sovereign use of eminent domain.

The consent theory emerged from the constitutional practices of 'republicanism'. Initially, the republicanists under the US Constitution believed that the legislative virtue would act as a benevolent protector of the citizens' interests. However, with the change in economy and the widespread establishment of mills, the State extensively occupied land; as a result, the myth that the legislature will not overreach the citizenry was broken. It led to the understanding that a mere consent from the Parliament will not protect the rights of the citizens; therefore, constitutional limitations in the form of public use and compensation were declared mandatory (Harrington 2002: 1252). However, these constitutional limitations were subjected to judicial scrutiny. All the above-mentioned theories highlighted the distinction between the absolute nature of the sovereign and constitutional limitations. However, a fundamental and intrinsic approach of the eminent domain was not fully realized.

On the other hand, few studies have fundamentally assessed the components of eminent domain use. Universally, the valid exercise of eminent domain stipulated the

fulfilment of three general standards: the rule of proportionality, public use and compensation (Cormack 1931: 221; Malloy 2008: 7). In both Civil and Common Law traditions, the legislative authority exercises control over property through takings (Malloy 2008: 7). They follow the above standards for the lawful exercise of eminent domain. Firstly, the rule of proportionality refers to a rational and fair decision-making by the government. Under this rule, the government connects the intrusion on the individual right to the public objective of the physical takings. The proportionality standard attempts to overcome the disproportionate burden on the individual or group of individuals (Malloy 2008: 8).

The second standard of public purpose or public use has been widely recognized by various jurisdictions. The fundamental idea behind the principle of public use is that the government should acquire the land for public benefits and not private interests. However, there is some difference between the two terms of 'public use' and 'public purpose'. 'Public use' connotes the actual use of the land by the public. On the other hand, the 'public purpose appears' to be broad and may or may not provide a direct access for public use. Under public purpose, the government may acquire a land for slum clearance or for any industry for economic development that ultimately does not accrue any benefit to the public per se (Malloy 2008: 8). Public purpose appeared as a descriptive, rather than a prescriptive notion. It is closely linked with compensation, which for public purpose was clearly distinguished from forfeiture and taxing. Forfeiture was an involuntary taking and imposed as a penalty for the violation of law. Whereas, taxing included consent and was referred to as givings (Harrington 2002: 1299). Public purpose directly stood as the standard to ensure compensation. Further, it ensures sharing of the burden of the landowners by the whole citizenry. It also stood as the test determined by the representative form of government to provide some democratic safeguards (Harrington 2002: 1300).

Thirdly, the standard of compensation is a reimbursement of the value of the property, either to the tenant or owners. It is believed that compensation protects the discreet individual or group of individuals from a complete deprivation of the property. It is mainly argued that the imposition of compensation exerts a check on the government and forces a review of the cost and benefit of the project. It is also an essential critical component of proportionality and fair balance, as the government pays a compensation through general revenues. As a constitutional limitation, compensation

is intended to serve three purposes: Firstly, property owners invoke property rights to question the government over the value of property; Secondly, it serves as a theoretical educative function i.e. it acquaints the masses about the dangers of expropriation; and Finally, it serves as a consent-seeking criteria that the government is bound to fulfill before the expropriation. Moreover, the standard of compensation varies extensively among different jurisdictions. Sometimes, it is determined on the ground of market value or fair value. However, it varies in principle and an inconsistency exists in its determination as well; therefore, the question relates with the methodology and factors for calculating it (Malloy 2008: 8). Overall, these three standards form the crux of eminent domain.

Although the above three standards forms the fundamental core of the eminent domain practice, their significance could be realised in the manner in which they are framed and applied. For instance, the makers of the US Constitution, in order to overcome the government abuse of eminent domain, incorporated it within the bill of rights. This approach was also followed in India by the Constitution's framers under Article 31. However, it was extensively controversial. This whole controversy on Article 31 and eminent domain is dealt in Chapter 4 of this thesis. The effectiveness of the core elements of eminent domain certainly depends on the construction and interpretation of the Constitution and the statutes that it incorporates. If there is any contradiction between a principle and its application, where the application is not in the true spirit of the constitutional principles, the situation may worsen causing an immense injustice to the masses and may also become a threat to the democratic foundations. In this regard, eminent domain application presents a very peculiar situation. Before evaluating the Indian perspective, a clear view of the constitutional practice is warranted and here, the theory of constitutionalism appears pertinent. It focuses on the interplay between the legislature, the executive and the judiciary as an institutional mechanism which serves as a means and the constitutional objectives and values, which serves as ends. The presence of the principle of institutional accountability seeking the ends is the true aspect of Indian Constitutionalism and this was historically intended by the constitutional framers. Indian constitutionalism offers a different and viable perspective as against the naturalist and economic perspectives in the application of eminent domain. Moreover, eminent domain has been brought

within the purview of the Constitution, and certainly demands its examination within it.

The next section explores the definitional understanding of the following: Constitution, Constitutionalism, Western Constitutionalism and a non-Western approach.

### 2.3. Constitutionalism: An Historical Overview

A theoretical examination of eminent domain from the economic, political, and to some extent even legal perspectives have been undertaken. The legal examination forms mainly an overview of the formal structure of law that did not substantively undertake the examination of the fundamental principles of the Constitution. It is argued that the theory of Constitutionalism, if understood in a proper perspective, offers a viable solution to the eminent domain issues.

The eminent domain law in India and the issues concerning it has a direct relationship with the Constitution. Any law before its enforcement necessitates a fulfilment of the constitutional norms. These include both substantive and procedural principles. An usurpation of constitutional norms makes the law constitutionally null and void. Obviously, the eminent domain law is not an exception to these norms. Its substantive examination primarily demands an unfolding of the practice of Constitution or Constitutionalism.

The theory of constitutionalism is highly complex (Michelman 2003: 394). Complexity is not only concerned with its ultimate origin but is also related to its true nature. Many thinkers believe that constitutionalism traces its origin from the seventeenth-century Western tradition, particularly in the writings of Hobbes, Locke, Rousseau among others, and the United States Constitution (Arnason 2001: 42). However, a few studies consider the origin of constitutionalism to lie in the traditions of ancient Athens, republican Rome and renaissance Venice (Gordon 1999: 23). Irrespective of the difference in opinions, the existing modern constitutionalism draws its source and coherence from the seventeenth-century thinkers (Mcilwain 1940: 41-66). An extensive literature on constitutionalism exists in the Western thought. In recent times, besides the Western understanding, alternative perspectives on constitutionalism have emerged from Africa and Asia (Maldonado 2013: 44). In the

mid-twentieth century, many post-colonial states in Asia and Africa have evolved their own native constitutionalism. States such as India, Pakistan, Egypt, Nigeria, Sri Lanka and others have adopted written constitutions with an alternative constitutionalism (Krishna 1995: 161; Amit and Brown 1995: 184; Suberu 1995: 197; Spann 1963: 10). Even an alternative constitutionalism has drawn some inspirations and thoughts from the West. Similarly, in terms of its nature, various studies have classified constitutionalism as traditional, modern, societal, transformative, global and liberal (Arnason 2001: 39; Peters 2009). As a result, constitutionalism appears as a formal and dynamic concept (Douglas et. al 1993).

As a dynamic concept, the study on constitutionalism demands an overview of the Western thought. Historically, almost all studies suggest that constitutionalism emerged from the writings of Hobbes, Locke, and Baron de Montesquieu (Waluchow 2014: 1). Social contract was the common ground in their writings, which was a relationship between the sovereign and his subjects. Hobbes in his magnum opus *Leviathan* asserted a social contract that entrusts the government with an unlimited authority to protect the individuals from the wretched state of nature where life was solitary, poor, nasty, brutish and short (Waluchow 2007: 26). A stable government was the *raison d'être* for such unlimited power and authority. The legitimacy of the government was extinguished as soon as it failed to protect its individuals. Unlike Locke, Hobbes rejected any legal or constitutional imposition of fetters on the government and defended monarchical absolutism (Gordon 1999: 28). However, Hobbes relied on the limitation through reason, morality and prudence which were completely embedded in God's command. The sovereign was answerable to God alone for any political transgression (Waluchow 2007: 27). On the contrary, Locke suggests in *Two Treatises of Government*, the government under the "social contract" ought to protect certain rights (life, health, liberty or possessions) and the liberties of individuals. In the event of failure, the State will be ousted. It was the historical Glorious Revolution of 1688 which significantly influenced Locke to assert the separation of the monarchical executive from the legislative assembly, which further led to the independence of the judiciary (Whelan 1996: 215). Overall, Locke postulates a liberal constitutional theory that includes the rule of law at its core (Arnason 2001: 53). After Hobbes and Locke, Rousseau, irrespective of his totalitarian views, proposed a social contract in which the sovereign (absolute

monarch) will act as the executor of the *general will*—a legitimate sovereign authority of the community (Gordon 1999: 12). According to Rousseau, people possessed inalienable rights; the government acted only in accordance with the *general will.* Rousseau propounded a constitutional order based on the interest of the individual in which the State was "absolute and self-justifying" (Arnason 2001: 57). However, critics view the *general will* as a heterogeneous entity which also differed in interests and values (Gordon 1999: 12). Finally, Montesquieu in *The Spirit of the Laws*—an interpretation of the English Constitution—presented an arrangement of the constitutional order with the division of powers into different bodies for preserving the freedom of man. Montesquieu presented an explicit disposition of the constitutional form of government. After analyzing the English Constitution, Montesquieu propounded that the functions of the government should be divided into legislature, executive and judiciary (Arnason 2001: 54). He termed such a division as the Separation of Powers. Each separate body should undertake its function distinctly. This separation was mainly to overcome the despotic rule of either a monarchical or a republican government and establish power through the rule of law to ensure the individual's liberties (Dijn 2008: 29). However, Montesquieu's Separation of Powers lacked a substantive counterbalance doctrine (Gordon 1999: 281). Although he asserted a constitutional government as compared to Hobbes, Locke and Rousseau with the Separation of Powers safeguarding certain liberties, it lacked coordination between the institutions (Gordon 1999: 282). Overall, the transition of theorists from social contract to constitutional government formed an indispensible part of the enlightenment thoughts of the eighteenth century (Cassirer 1951: 234).

The above-mentioned thinkers, in particular Locke and Montesquieu, influenced the American constitutional framers. The US Constitution was the first written Constitution that stood as a benchmark for the later constitutions that emerged after the eighteenth century (Grofman et al. 2014: 50). In spite of the presence of the unwritten British common law tradition, the US Constitution has tremendously influenced constitution makers across the globe adopt certain features from it (Arnason 2001: 42-43). It has stood for the establishment of *popular sovereignty*, i.e., a government that derives its authority to govern from the people and not from the king or the aristocratic class (Grofman et al. 2014: 46). It imposes limitations on the State and ensures the protection of individual rights. It appeared as a promising model

to explain the relationship between man and government. Taking lessons from the social contract theorists and within its historical context, the emergence of the US Constitution was formally established an intrinsic relationship between the government and its subjects (McDowell and O'Neill 2006: 6). Modern constitutionalism has its roots in the US Constitution and this has been significantly highlighted in the extensive literature on this subject.

The next section deals with Western Constitutionalism. At the outset, it deciphers the definitional interpretation of Constitution and Constitutionalism. Then, it highlights the American constitutionalism as a traditional constitutionalism that believes in limiting the government.

### *2.3.1. Western Constitutionalism: The Traditional Approach of a Limited Government*

Any evaluation of constitutionalism, at the outset, necessitates a definitional understanding of the term 'Constitution'. 'Constitution' is a highly complex term and has a long history. Its origin can be traced to the writings of Plato, Aristotle, Cicero and Tacitus, but it has undergone considerable changes over the centuries (Loughlin 2010: 49). The present-day definition of Constitution draws its relevance from the Charter of Liberties and the Magna Carta of the medieval times (Grimm 2010: 6). However, the modern understanding of Constitution emerged in the eighteenth century (Billias 2009: 7). Today, as George Billias mentions, "Constitution refers to the fundamental system of principles and rules for governing a State and delimiting its power" (Billias 2009: 6). Billias further states:

> Nowadays, with few exceptions, these principles and rules are incorporated in a single written document. At the most basic level, a Constitution usually constitutes a government and outlines the framework under which it will operate (Billias 2009: 6).

Generally, it is divided into a Constitution as a text or document and a Constitution as the norms that constitute the supreme law (Perry: 1998: 99). It is a document with a physical text of supreme nature and the norms of fundamental principles. Russell Hardin considers it as a document that coordinates the populace on a set of institutions that enables them to be jointly better-off (Hardin 1999: 35). More than coordination, it intends to overcome despotic rule or the rule of tyranny and establish a basic framework for governance. It is the highest polity, therefore a source of all laws. It

strives to establish an efficacious constitutional order with collective self-rule, government, Separation of Powers and Rule of Law (Grofman et al. 2014: 47; Loughlin 2000: 190). The modern Constitution fundamentally attempts to provide a limited government. In this regard, Thomas Paine in his *Rights of Man* suggested four key elements of a Constitution that were later accepted as a part of the modern Constitution. These are: Constitution as a written document, government as a creature of the Constitution made by the people, principles that comprehensively organize the civil government and a fundamental law that cannot be altered (Loughlin 2010: 50). More recently, Dieter Grimm identified four key characteristics of the modern Constitution – a set of legal norms, regulation of public power, established with the agreement of the people and a comprehensive framework constructed on the principle of constitutional law (Grimm 2010: 16). Overall, the interpretation of the Constitution was broadly linked to overcoming the logic of an absolutist State which was being articulated in a Westernized understanding. Besides the Western understanding, some other perspectives on the interpretation of Constitution also exist— namely, the Global South and Third World perspectives. This aspect will be dealt in the next section.

The nature of the Constitution determines the constitutionalism. Constitutionalism is not a static concept, rather has altered over the years. It is highly complex. Among the Western interpretations, the concept has been defined taking into consideration the different features of the American and Euro-centric constitutions (Murphy 1995: 179). The extensive literature on constitutionalism relies on the peculiarities of the Western model (Homes and Sunstein 1995: 302). As a result, the definition appears to focus on the Western understanding of limited government. De Smith defines Constitutionalism within the Western liberal democratic model, as a proposition that includes rules with procedures to limit the powers of the government. In other words, the legislative and executive acts are confined within the prescribed limits of rules and procedures. Moreover, the observation of these rules by the respective bodies to curb the arbitrariness of discretion and to ensure individual liberty forms an essential consideration of constitutionalism (Smith 1964: 106). According to Greenberg Douglas, constitutionalism is a political process that originates from a particular cultural and historical context and resides in the public consciousness. Further, it involves an allegiance to the limitations on ordinary political power. Moreover, it

overlaps with the democracy that balances state, individual and collective rights (Douglas 1993: 21). In a more subtle exposition, Julio Faundez points out that the constitutionalism is not an intellectual commodity that can be used to sell, impose or transplant political models. Rather, constitutionalism is referred to as a device to regulate and limit democracy. In essence, it clearly embodies the anti-majoritarian principle, mainly to check the unruly electoral majority (Faundez 1993: 358). Similarly, Jon Elster too argues that constitutionalism is an anti-majoritarian principle. However, Elster elaborates it further as the limitations that should be self-imposed and brought into practice. Such limitations could be substantive or procedural—primarily to restrict or slow down the process of legislative change. Under the written constitution, limitations tend to be in the form of complicated procedures against altering the Constitution, delays and qualified majorities among others. It also includes procedural or substantive limitations in the form of electoral process and civil and political rights (Elster and Slagstad 1988: 2).

Within this prominent understanding, some authors assert a contradictory perspective. Yash Ghai asserts the positive role of the State in contemporary Western constitutionalism. Constitutionalism incorporates a welfare state that assimilates a social compactness between capital and labour to produce the accepted market system to overcome the worst social consequences and to guarantee a reasonable standard (Ghai 1993: 190). M. J. C. Vile has viewed constitutionalism as an institutional arrangement rather than a mere limitation. He argues that constitutionalism includes the advocacy of certain types of institutional arrangements with a normative element. Its object lies in the attainment of certain ends. This normative arrangement produces a belief of demonstrable dual relationship between the institutional arrangements and the production of vital values (Vile 1998: 8-9).

At the end of the twentieth century and in the early twenty-first century, some scholars have correlated constitutionalism with human rights and refered to it as “New Constitutionalism”, “Global Constitutionalism” or “Human Right Constitutionalism” (Beer 2009; Elkin and Soltan 1993; Peters 2009). In this regard, Said Arjomand mentioned that the new constitutionalism broadly includes three elements: First, majoritarian democracy with the organization of the State authority; Second, human rights; and Third, constitutional courts and/or other national and transnational organs for a judicial review of the administration and legislation. As a result, the new

constitutionalism incorporates two fundamental principles— namely, human rights and a free democratic society. These two basic principles are implemented with the help of judicial interpretation (Arjomand 2007: 51-52).

Similarly, Lawrence Beer addresses the changing nature of constitutionalism. Beer bridges a consensus between the Western and non-Western constitutional principles through a "transcultural persuasive"[6] approach (Beer 2009: 8). Moreover, he recommends the "human rights constitutionalism" rather than the Western model. Constitutionalism does not imply a commitment either to the individual rights, distribution of powers and governmental functions or to the forms of government like Republic, Monarchy, Parliamentary and Presidential. It includes a regular restraint on the sovereign power bylaw. Therefore, constitutionalism from the human right perspective includes any authority limited by rules, obedience to national constitutional values and the presence of a valid political process (Beer 2009: 16).

Finally, Larry Alexander refers to constitutionalism as the practice of establishing a Constitution for social governance. Ultimately, constitutionalism depends on the nature of the Constitution, its functions and the institutional balance it undertakes (Alexander 2005: 248). Alexander defines Constitution as an "entrenchment of rules with varying degrees" established on an agreement with a graded procedure. The entrenchment is justified on the grounds that it overcomes the "moral and prudential costs" in the form of delay, expenses, disorganization and lack of expertise (Alexander 2005: 254). Dieter Grimm views constitutionalism from the perspective of the substantive attainment of rule of law and democracy (Grimm 2010: 10). Irrespective of the above diverse and varied thoughts on Western Constitutionalism, the Western approach on constitutionalism has incorporated three significant and common features. First, constitutionalism involves the existence of the Constitution. Second, such a Constitution restricts the role of the State by subjecting it to the rule of law and ensures individual liberties through a judicial review. Finally, the State has to observe these principles.

The next section deals with the non-Western approach to constitutionalism. This approach incorporates the Global South perspective that differentiates non-Western

[6] By 'transcultural persuasive' Lawrence Beer suggests that the constitutional principles that are very general in nature which are not inherently limited to any particular country and such principles can be relevant and applicable to other cultures.

constitutionalism vis-à-vis the Western approach with its distinct historical experiences and social realities.

### *2.3.2. Non-Western Approach*

Recently, theorists of the non-Western world have criticized the limited approach of the Westernized interpretation of constitutionalism (Waldron 2009: 271). The criticism mainly revolves around two set of ideologies: First, positive and negative constitutionalism; and Second, the Global South and Global North constitutionalism.

The Western or European constitutionalism has primarily focussed only on one aspect of the Constitution i.e. limited government. This limited government is generally termed as Negative constitutionsliam (Gerstenberg 2012: 910). A negative constitutionalism arises within the understanding of an absolute State which existed during the medieval times or before the existence of the US Constitution. This absolute State necessitated a limitation against the exercise of arbitrary powers.Under the negative constitutionalism model, the Constitution imposes certain limitations on the State that includes constraints on both the legislative and executive powers through the courts. As a result, constitutional principles such as the rule of law and Separation of Powers are entrenched within the constrained model. The Separation of Powers is commonly viewed as an intrument to protect the individual liberties against the arbitrary action of the State (Barendt 1995: 599; Calabresi and Rhodes 1992: 1153). Jeremy Waldron considers the American constitutionalism model to be fundamentally flawed. Although it relies on the judges with a certain entrenchment for its enforcement, in reality it incorporates a narrow political ideology and a minimalistic approach towards state liberalism. This was evident in terms of the failure of the State to implement social benefit policies like a healthcare scheme and other poverty alleviation proagrammes (Waldron 2009: 271). As a result, the prioritization of negative constitutionalism stands against the egalitarian principle (Waldron 2009: 272). Negative constitutionalism is in tension with the State. Its structures constrain the State in safeguarding individual liberties. Negative constitutionalism renders importance to the private rights as against public welfare. Positive constitutionalism considers the Constitution to be an instrument of positive benefits that includes the welfare aspect at its core (Barber 2006: 651). Sotirios Barber

distinguishes the negative and positive constitutionalism on the basis of constitutional rights and constitutional powers. Barber argues:

> Negative constitutionalism places greater normative weight on constitutional rights than constitutional powers because it sees restraint as the principal task of popular constitutions and rights as restraints on power. Positive constitutionalists place greater, or at least equal, weight on constitutional powers because positive constitutionalists are interested in goods like national security and prosperity, and it is through power and specific powers that such ends are pursued (Barber 2006: 663).

Further, Stephen Holmes and Cass R. Sunstein view Constitutions as multifunctional. They argue:

> A constitution is not simply a device for preventing tyranny. It has several other functions as well. For instance, constitutions do not only limit power and prevent tyranny; they also construct and guide power and prevent anarchy. More comprehensively, liberal constitutions are designed to help solve a whole range of political problems: tyranny, corruption, anarchy, immobilism, collective action problems, absence of deliberation, myopia, lack of accountability, instability, and the stupidity of politicians. Constitutions are multifunctional. It is a radical oversimplification to identify the constitutional function exclusively with the prevention of tyranny (Holmes and Sunstein 1995: 302).

Having described the Constitution as multifunctional, the authors evaluate constitutionalism from the positive and negative perspectives. The anti-tyranny principle is a form of negative constitutionalism that dominates among the theorists. While addressing positive constitutionalism, Holmes and Sunstein refer to the East European constitutionalism and argue:

> This positive vision of constitutionalism is rare among constitutional specialists in Eastern Europe. Advocates of *negative constitutionalism* dominate the discussion and make it difficult to see the advantages for governmental effectiveness to be gained from constitutional channelling of sovereign power. This is unfortunate. If constitutions are designed with a primarily negative purpose, to prevent tyranny, they will probably lead to political deadlock, and thus invite tyranny. If the government cannot govern, if it cannot pass its reform program, for example, public pressure will mount to throw the hampering constitution off and govern extra-constitutionally. In short, the challenge of constitutional drafting in Eastern Europe is positive as well as negative. Theorists should therefore place greater emphasis than they have hitherto done on *positive constitutionalism* (Holmes and Sunstein 1995: 302-303).

Here, positive constitutionalism refers to the social reforms or collective good. It undertakes the building of power towards socially desirable ends and putting democracy to work (Loughlin 2000: 192).

After positive and negative constitutionalism, the second approach viz., the Global South approach completely outweighs the traditional Western constitutionalism. Daniel Maldonado offers a Global South perspective. This approach involves a review of the constitutionalism in India, South Africa and Colombia. The classification is based on the understanding that although a constitution contains ideals and principles,

it always emerges in the backdrop of the particular historical and social context of the respective State (Maldonado 2013: 44). This resonates within the discriminatory practices of India, South Africa and Colombia. Therefore, the establishment of socio-economic rights demarcates a distinct feature of the Global South perspective (Maldonado 2013: 45). Maldonado explicitly mentions:

> The Constitutions of India, Colombia, and South Africa all differ in the status they grant to socioeconomic rights, as well as in the specifics of their formulation. However, in contrast to the constitutions of France, the United States, and Canada, they share a core normative commitment towards state institutions having obligations to address the economic injustices and inequalities in their societies. These documents generally express such a commitment through recognizing a number of socioeconomic entitlements that advance the welfare of individuals in the society… Thus, these three examples suggest that one of the characteristic features of a "new" constitutionalism of the Global South is the inclusion of socioeconomic entitlements in a Constitution, thus placing a central emphasis on advancing a particular vision of distributive justice through processes of law and, in some cases, through the institution of judicial review (Maldonado 2013: 50-51) .

Maldonado argues that the constitution contains two elements: first, ideals and values, and second, structures and institutions of governance (Maldonado 2013: 78). Among these ideals, the socio-economic rights form the core and an end in itself. The institutions are the means (Maldonado 2013: 79). This realization of socio-economic rights was clearly absent in the US Constitution that strived only for civil and political rights (Maldonado 2013: 46). The presence of socio-economic rights is embedded in the social realities of the Global South, which mainly strived to overcome the practical inequalities and discrimination. In this regard Maldonado argues:

> These arguments highlight an important critique that can be lodged against the older Northern Constitutions. The background structure of law conditions the economic relations and distribution of resources that may exist within a society. Without protection for the fundamental socioeconomic interests of individuals, economic relations and the actual distribution of resources can develop in such a way that individuals are unable to survive or are only capable of living in terrible conditions. The omission of socioeconomic rights guarantees means that the Constitution, at its normative core, does not protect individuals from being allowed to sink into deep poverty. Indeed, many individuals perish from their deprivation of resources; it is hard to understand how such a situation can be said to involve treating such individuals with any importance or concern at all. A society based on respect for the equal importance of individuals must thus guarantee at least that individuals have the minimum resources to live a life of dignity. Constitutions that omit socioeconomic rights guarantees thus set up a background structure of society that can lead to a severe violation of the equal importance of individuals. The Constitutions of the Global South can be seen to correct this imbalance in Northern Constitutions and thus help advance our understanding of the principles and guarantees that should be essential elements in any decent Constitution. From an ideal point of view rooted in political philosophy, by including socioeconomic guarantees, the new constitutions of the Global South are not simply reactions to their own histories and particularities. In doing so, they assert universal principles that are highly desirable and, at least, difficult to contest at an ideal level (Maldonado 2013: 54-55).

Overall, the Global South constitutionalism offers a distributive justice perspective. It adopts the principles of justice, equity and fairness in order to overcome deepening

inequalities, both social and economic. Even the demarcation of constitutionalism as positive and negative, in the recent years, has focused on the welfare aspect of the Constitution that was clearly absent in the Western Constitutions. The presence of socio-economic rights encompasses positive constitutionalism. This socio-economic aspect is clearly visible in the Indian case that is laid down in Part IV of the Constitution. The next section deals with the Indian version of constitutionalism.

### 2.4. Indian Constitutionalism: The Combination of the Universal and Particular Approaches

The Indian constitutionalism incorporates to a certain extent, a different approach as compared to the Western or Eurocentric constitutionalism. This alternative approach has been highlighted by some authors in the recent years (Choudhry et. al 2016; Khosla and Tushnet 2015). Upendra Baxi, although not directly using the term Indian constitutionalism, referred to the Indian constitution as 'transformative' constitutionalism. Baxi differentiates Indian constitutionalism from Eurocentric constitutionalism on the ground that the Eurocentric constitutionalism lacks experience. It fails to undertake a transformative discourse of the subaltern perspectives and involves an ontological robustness (Baxi 2000: 1185-1186). Baxi argues,

> True, in a comparative perspective, the Indian constitution marks a historic break with 'modern' constitutionalism, of the colonial and Cold War genres, and its impact on the constitutionalism of the South is indeed striking, even pervasive. The normative discontinuities are, indeed, astonishingly inaugural (Baxi 2002: 55).

Baxi highlights six features of the Indian Constitution that distinguishes it from the Western constitutionalism. They are the legitimation of State power, the identification of radical evils in the Indian society, the insertion of the innovative participatory rights of the under-classes (SCs, STs and OBCs), the introduction of the international regime of human rights particularly the minority rights, a people-friendly regime of representation and the establishment of a vibrant Supreme Court (Baxi 2002: 62). Similarly, Uday Mehta differentiates between the Indian and American constitutionalism on the grounds of the political and contemporary situations that were prevailing during the framing of such a constitution. National unity, identity, social upliftment and equality and international standing were the conspicuous features of the twentieth-centuryconstitutionalism that India incorporated (Mehta

2010: 17). On the contrary, the eighteenth century American constitutionalism had to contend with the distrust of political power. Therefore, it primarily focused on imposing limitations on the sovereign and severly disregarded the practices of slavery or racial discrimination (Mehta 2010: 26-27).

The elements of social emancipation in the Indian constitutionalism distinguish it from the Western Constitutionalism. Rajeev Bhargava describes Western constitutionalism as the 'traditional' one, although attractive, but with a 'flawed idea'. The West focuses on limiting the tyranny of the non-democratic state; which is not true in the Indian case, though some limitations do appear on the State but at the same time, it is obliged to protect the marginalized and deprived sections of the society. The major significance lies in the attainment of social justice. It broke the shackles of the traditional social hierarchies like caste system and ensures justice, freedom, equality and fraternity (Bhargava 2008: 14-15). According to Granville Austin, three elements marked the significance of the Indian Constitution. They are national unity and integrity, democracy and a social revolution to uplift the downtrodden masses (Austin 2002: 319). Baxi terms this social justice approach of the Indian constitutionalism as transformative constitutionalism. Baxi elaborates the transformative character of the Indian constitutionalism as:

> To be sure, the Indian Constitution frontally addresses millennial wrongs such as untouchability; indeed, the Constitution is transformative on this normative register. It is historically the first modern constitution not merely to declare constitutionally unlawful the practice of discrimination on the 'ground of untouchability' (Article 17) and of agrestic serfdom described as a human right against exploitation (Articles 23 and 24). A unique feature of these provisions consists in the creation of constitutional offences… (Baxi 2013: 29).

This constitutional model was unique in the Indian constitutional history. Baxi states:

> No previous constitutional model envisaged such an explicit and comprehensive transformation of a 'traditional' society and installed a description of constitutionally desired social order and good life, and ways of deep contention regarding these. Even fifty years down the road, this vibrancy of vision survives (Baxi 2002: 55).

Further, Baxi argues that the three Cs constitute the idea of a Constitution, though complex and contradictory. He conceptualizes the Indian Constitution under the complex interlocking planes of C1, C2, and C3. C1 refers to the constitutional text; C2 stands for constitutional interpretation or constitutional law and C3 signifies constitutionalism. According to Baxi, 'constitutionalism' is a set of ideology that justifies/mystifies the constitutional theory and practice (Baxi 2000: 1188).

In sum, Indian Constitution possesses unique features given the incorporation of some universalistic principles of liberal constitutions within it. B. R. Ambedkar justified the incorporation of the universalistic principles on the ground of necessity that matched the Indian situation. Ambedkar argues:

> It is said that there is nothing new in the Draft Constitution, that about half of it has been copied from the Government of India Act of 1935 and that the rest of it has been borrowed from the Constitutions of other countries. Very little of it can claim originality. One likes to ask whether there can be anything new in a Constitution framed at this hour in the history of the world. More than hundred years have rolled over when the first written Constitution was drafted. It has been followed by many countries reducing their Constitutions to writing. What the scope of a Constitution should be has long been settled. Similarly what are the fundamentals of a Constitution are recognized all over the world. Given these facts, all Constitutions in their main provisions must look similar. The only new things, if there can be any, in a Constitution framed so late in the day are the variations made to remove the faults and to accommodate it to the needs of the country (Ambedkar 1994: 59).

The fundamental salient features of the Constitution among others include: (1) the establishment of a Sovereign, Socialist, Secular, Democratic, Republic order (2) a quasi-federal form of government (3) Fundamental Rights (4) Directive Principles of State Policy, (5) the establishment of an Executive, Judiciary and Legislature (6) Budgetary or Financial provisions (7) Parliamentary form of government; (8) Adult Franchise (Sathe 2006: 216-217).

Despite the theoretical and ideological commitments and legal guarantees realization of the constitutional objectives has been a challenging task. Some of the controversial subjects, among others, are those pertaining to gender and caste discrimination. Scholars of subaltern studies have consistently highlighted the existence of rampant caste discrimination and challenged the violation of constitutional objectives. Gopal Guru views atrocities against the Dalits as a failure of the constitutional values (Guru 2008: 238). Guru theoretically outlines the 'positional' and 'cultural good' in the prevention of caste violence. He argues that the Constitution has achieved limited success in the abolition of untouchability/atrocities as the upper castes have failed to take a moral lead in eliminating the social evils (Guru 2008: 237). Additionally, the constitutional provisions are inefficient for compelling the upper castes to distribute the moral and cultural resources of the public sphere that are being controlled by them (Guru 2008: 242). Although the Constitution determines positional good only, the cultural good such as recognition and dignity is not determined at all, it owes to its ill-equipped nature to generate any moral vocabulary (Guru 2008: 244). The Dalit

assertion of self-respect has consistently forced the State to introduce legal measures. Indeed, the Constitution offers no provisions to make civil society work for social justice (Guru 2008: 239). Hence, caste violence has consistently challenged the vision of social transformation.

Gender discrimination is another poignant subject of the subaltern perspective and is consistently debated in the constitutional folds. Some Indian feminists consider the approach of law and its application to gender issues as discriminatory (Agnes 2011; Baxi 2014). The courts adjudicate gender issues within the formal structure of equality, rather than keeping in view the substantive realities. This criticism is mainly based on the ground of 'difference' of being female andthe sameness approach of formal equality, which fail to take into account the actual conditions of women's subordination (Cossman and Kapur 1999: 261; Menon 1999: 285). Further, this 'difference' argument is in turn strongly challenged by the Dalit feminists. They go deeper and theorise from their experiences and argue that not just difference but 'more difference' is needed to challenge both Brahmanical social order and the caste-patriarchal discourse (Chakravarti 2013: 5; Rege 1998: 40; Rege 2006: 33; Omvedt 1994: 129).

Other than these above-mentioned substantive issues of constitutional value, some institutional crises within the Constitution have also emerged, particularly in the application of the socio-economic rights vis-à-vis the fundamental rights. It was a conflict between the Parliament and the Supreme Court. Although the entrenchment of principles that assign authority to the Parliament and judiciary are not those of negotiation, but of countervailing force. The judiciary, according to the constitutional framers, has to act as a watchdog rather than as a negotiator. Hence, it is obvious that conflict takes place. However, if the counter-checking force of judiciary and legislature merely entangle to assert legitimacy then it poses severe crises. On one hand, the Constitution authorizes the Parliament to amend it and, on the other, it places substantive constraints on the latter in the form of judicial review (Mehta 2002: 184). This countervailing force of judiciary took the form of a conflict, which was explicitly visible in the *Golaknath case*[7] and the *Kesavananda Bharati case*[8]. The Parliament equally contributed in the controversy by passing constitutional

[7]Golaknath vs. State of Punjab 1967 AIR 1643.

[8]Keshavananda Bharati vs. State of Kerala (1973) 4 SCC 225: AIR 1973 SC 1461.

amendments to counter the judicial review (Sathe 2002: 4). Although the emergence of the 'basic structure doctrine' may have limited the Parliament's authority, it is still an unsettled issue in the absence of an unequivocal exposition of the doctrine (Mehta 2002: 202). The Supreme Court after the pronouncement of the *Keshavananda Bharati case*[9] may have regained its legitimacy, but it mostly appears as a negotiator rather than a watchdog. Except few cases on the environment and Article 21,on many crucial subjects such as education, health among others it has collaborated with the legislative and executive acts (Maldonado 2013: 127).

This understanding is also visible in the other areas of contestation between the social rights and individual liberties. For instance, land reforms were part of the Directive Principles of State Policy that were being consistently challenged by individuals invoking the Right to Property enumerated under Fundamental Rights (Austin 2002: 320). Reservations for deprived sections, an affirmative action, is another instance that continued to receive setbacks from the judiciary since its inception (Austin 2002: 321). Although the Constitution incorporated compensatory discrimination for the SCs and STs as goals of social transformationsince its inception, there has been consistent debate over the fulfilment of these objectives (Galanter 1989: 195; Jaffrelot 2008: 255).

The above-mentioned issues are instances of how the constitutional values and constitutional mechanism have contested the Constitution. Hence, the institutional conflicts and prevailing social evils such as gender discrimination, caste discrimination, minority issues, etc., represent a challenge to the realization of constitutional values of justice, equality, liberty and fraternity. Overall, the Indian constitutionalism, by its celebrated features and shortcomings as mentioned above, places a dichotomy and challenges its own validity. In this binary situation, the issue at hand is to revisit the fundamental notions of Indian constitutionalism discussed in the Constituent Assembly Debates, and to trace an originalist perspective towards overcoming the social injustices and institutional crises. The next section unravels the fundamental underpinnings that the constitutional framers laid down in realizing the constitutional objectives.

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[9] Ibid.

### *2.4.1. Revisiting the Originalist Perspective*

The Constituent Assembly Debates involve extensive thoughts on the subjects of economics, sociology, political science, law, etc. Overall, the approach adopted by the Constituent Assembly was one of deliberation and coordination towards seeking a good and workable Constitution without any partisanship (Lerner 2016: 59). In laying the significance of the Constituent Assembly vis-à-vis the future Parliament to be elected under the Constitution, Ambedkar mentions:

> The Constituent Assembly in making a Constitution has no partisan motive. Beyond securing a good and workable constitution it has no axe to grind. In considering the Articles of the Constitution it has no eye on getting through a particular measure. The future Parliament if it met as a Constituent Assembly, its members will be acting as partisans seeking to carry amendments to the Constitution to facilitate the passing of party measure which they have failed to get through Parliament by reason of some Article of the Constitution which has acted as an obstacle in their way. Parliament will have an axe to grind while the Constituent Assembly has none. That is the difference between the Constituent Assembly and the future Parliament (Ambedkar 1994: 69).

However, only the originalist or historical perspective approach to the framework of the Indian constitutionalism will be traced from the objectives of the Draft Constitution and the concluding observations made during the final approval of the Constitution by Rajendra Prasad, President of the Constituent Assembly, and B.R. Ambedkar, Chairman of the Drafting Committee.

Both Prasad and Ambedkar stressed on the essential considerations with cautious notes for the successful functioning of democracy which forms the core of Indian constitutionalism. Moreover, they were concerned with the fundamental traits of the human beings who would hold a constitutional office, which would be significant in realizing the constitutional objectives. Prasad while adopting the Constitution reiterated the basic tenet of functional democracy as:

> Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. It is a trite saying that a country can have only the government it deserves. Our Constitution has provisions in it which appear to some to be objectionable from one point or another. We must admit that the defects are inherent in the situation in the country and the people at large. If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them. There is a fissiparious tendency arising out of various elements in our life (CAD X-XII 2009: 993).

Similarly, Ambedkar more explicitly elaborated the functional aspect of the Constitution which the Indians must uphold in order to realize the constitutional objectives. Ambedkar argues:

> I shall not therefore enter into the merits of the Constitution. Because I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However, bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the executive and the judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. Who can say how the people of India and their parties will behave? Will they uphold constitutional methods of achieving their purposes or will they prefer revolutionary methods of achieving them? If they adopt the prophet to say that it will fail. It is, therefore, futile to pass any judgment upon the Constitution without reference to the part which the people and their parties are likely to pay (CAD X-XII 2009: 975).

Ambedkar was of the view that the Indian Constitution not only strives for political democracy but also social democracy. For Ambedkar social democracy is situated within the trinity of liberty, equality and fraternity. He said:

> We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things (CAD X-XII 2009: 979).

Further, while presenting the First Draft of the Constitution before the Constituent Assembly, Ambedkar insightfully referred to the concept of 'Constitutional Morality'. Ambedkar did so in order to justify the incorporation of the exhaustive scheme of administrative details in the Draft Constitution. In a broader perspective, Ambedkar emphasised that the diffusion of Constitutional Morality was an indispensable condition that the government should undertake, and it is applicable not merely to the majority but for the community as whole, including the minorities. If the diffusion of Constitutional Morality failed, then the working of free institution would become impracticable (Ambedkar 1994: 60). While defining constitutional morality, Ambedkar quoted Grote as saying:

> a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst the bitterness

> of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own (Ambedkar 1994: 60).

Further, Ambedkar observed that the community as a whole lacked constitutional morality. As a result, the State was obliged to diffuse it with a top–down approach, hence the incorporation of administrative powers in the Constitution were essential. Ambedkar mentioned:

> Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic (Ambedkar 1994: 61).

Later in 1954, Ambedkar propounded five essential preconditions for the successful working of democracy—namely, the end of privileges or inequalities in society; the existence of opposition or an immediate veto on the authority of the executive in the Parliament; an equality in law and administration; the observation of constitutional morality and public conscience. While referring to constitutional morality again in 1954, Ambedkar mentioned:

> I think that democracy does require the functioning of moral order in society. Somehow, our political scientists have never considered this aspect of democracy. Ethics is something separate from politics. You may learn politics and you may know nothing about ethics as though politics can work without ethics. To mymind it is an astounding proposition. After all, what happens in democracy. Democracy is spoken of as a free government and what do we mean by free government? It means that in vast aspects of social life people are left free to carry on without interference of law, or if law has to be made, then the law maker expects that society will have enough morality in it to make the law a success (Das 1963: 101).

Moreover, according to Ambedkar, public conscience meant:

> …Public conscience means conscience which becomes agitated at every wrong, no matter who is the sufferer and it means that everybody whether he suffers that particular wrong or not, is prepared to join him in order to get him relieved (Das 1963: 102).

A failure to abide by these precedents would, according to Ambedkar, ultimately result inrevolt that would jeopardize the democratic structure (Das 1963: 103).

If the holders of constitutional offices fail to incorporate constitutional morality, no law would be democratically perfect in containing the problems; in turn, the problems would exist forever. Even the Constituent Assembly members, despite many differences, were ideologically bestowed with an immense coordination, wisdom and reason. Mehta mentions five sensibilities that the Constitutional Assembly members were bestowed with, and that was mainly due to the functional approach (constitutional morality). The members possessed the ability to work together despite differences, the ability to acknowledge the true value, a creative form of self-doubt, a

commitment to the form and institutions for building trust and a sense of judgment. These sensibilities possessed by the Constituent Assembly members were generated through the observance of constitutional morality (Mehta 2010).

Recently, constitutional morality is referred towards seeking constitutional values through collective actions. It does not allow the institutional supremacy of any organ i.e. legislature, judiciary and executive under the Constitution. Each authority should individually and collectively perform its act, irrespective of its claiming a sole legitimacy under the Constitution (Choudhry et al. 2016: 2-3). Nevertheless, it also imbibes positive actions from the constitutional machinery towards fulfilment of the constitutional values.

Kalpana Kannabiran viewed the Indian constitutionalism as 'insurgent', in that it breaks the shackles of discrimination. The insurgent constitutional morality includes an intrinsic morality within which the politics should "nourish free-ranging intellectual life and democratic political possibility" (Kannabiran 2012: 10-11). Kannabiran concludes:

> An insurgent constitutionalism based on the subaltern experience is necessary in order for non-discrimination and liberty to blossom as incontrovertible constitutional guarantees and in order for constitutional morality to actually pave the way for 'notional change' and social transformation (Kannabiran 2012: 468).

Finally, constitutional morality involves a democratic functioning of law, and it incorporates subaltern perspective that is inherent in its operation.

Under this situation, the role of the judiciary appears crucial. The judiciary in India was considered as 'an arm of the social revolution' by the constitutional framers (Austin 1966: 80). In assigning absolute judicial review powers to the Supreme Court, the constitutional framers were well aware that they were creating an *imperium in imperio*; however, they intended that the Court will act without any fear or favour of the executive (CAD VIII 2009: 397). But the question as to how well the judiciary has performed, has received a mixed review with contradictory adjectives such as 'activists', 'negotiators' and 'super legislators'. Certainly, some of the members of the Constituent Assembly did not wish that the judiciary should become super-legislative or super-executive. A. K. Ayyar believed that:

> While there can be no two opinions on the need for the maintenance of judicial independence, both for the safeguarding of individual liberty and the proper working of the Constitution, it is

> also necessary to keep in view one important principle. The doctrine of independence is not to be raised to the level of a dogma so as to enable the Judiciary to function as a kind of super-Legislature or super-Executive. The judiciary is there to interpret the Constitution or adjudicate upon the rights between the parties concerned (CAD XI 2009: 837).

Even Nehru formed a similar opinion and presumed that the judiciary would profess allegiance to the Parliament. Nehru mentioned:

> Within limits no judge and no Supreme Court can make itself a third chamber. No Supreme Court and no judiciary can stand in Judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of Parliament. But we must respect the judiciary, the Supreme Court and the other High Courts in the land. As wise people, their duty it is to see that in a moment of passion, in a moment of excitement, even the representatives of the people do not go wrong; they might. In the detached atmosphere of the courts, they should see to it that nothing is done that may be against the Constitution, that may be against the good of the country, that may be against the community in the larger sense of the term. Therefore, if such a thing occurs, they should draw attention to that fact, but it is obvious that no court, no system of judiciary can function in the nature of a third House, as a kind of Third House of correction. So, it is important that with this limitation the judiciary should function (CAD VII 2009: 1197-1198).

This assumption of Ayyar and Nehru proved false, particularly when the Constitution itself under Article 13 entrusted the apex court to declare any law unconstitutional on the ground of violation of fundamental rights. It was the *imperium in imperio* perspective that entrusted the Supreme Court to act without any fear or favour of executive, of what Ambedkar argued was the crux of Article 13 and Article 32. Eventually, the Supreme Court constitutionally nullified the unconstitutional laws. Nevertheless, the Supreme Court in the 1970s and 1980s was considered as 'activist' but later in post-1990 it came to be viewed as a 'negotiator' (Shankar 2010: 171). Many authors have questioned judicial activism itself. Some authors view Supreme Court's approach as selective, as it has merely focused on environmental issues through Public Interest Litigations (PILs), the expansion of Article 21 to incorporate some Directive Principles of State Policies in the post-1980 era and on scams or corruption (natural resource allocation) in the twenty-first century (Mehta 2015: 252). Such judicial activism emerged without seriously threatening the executive power (Mehta 2015: 248). Pre-1980, although it had significantly laid down the 'basic structure doctrine', it appeared to be very abstract without any certainty in its application (Mehta 2015: 259). It is also questioned in terms of civil rights, the validity of the Armed Forces (Special Powers) Act, 1958 and the decriminalization of homosexuality (Mehta 2015: 247). So in the words of Mehta, a strong court has created weak rights (Mehta 2015: 248). This limited approach of the judiciary is

alarming particularly when we examine the task of substantive fulfillment of constitutional socio-economic rights. On the whole, the judiciary appears as a negotiator, with selectively imparted activist role against the executive, with the intent to secure its legitimacy. Within this originalist perspective, the next section re-articulates Indian constitutionalism that undertakes both the means and ends of the Constitution.

### *2.4.2. Indian Constitutionalism: Converging the Means and Ends*

Indian Constitutionalism is a fusion of two approaches—namely, structural and objective. Structural refers to the means and objective to the ends. The means and ends of Indian constitutionalism incorporate both positive and negative constitutionalism. Negative constitutionalism overcomes the tyranny of the executive and positive constitutionalism stands for the welfare approach. The State interferes in the lives of the people to overcome discrimination and set a welfare agenda. Both negative and positive constitutionalism can be explicitly understood through the means and ends.

Firstly, the ends are constitutional objectives. They can be divided into two broad categories: ultimate ends and specific ends. However, such a division between the ends is not absolute. Specific ends are complementary to the ultimate ends. For instance, the Preamble specifies the ultimate ends or objectives of the Constitution. They are justice, liberty, equality and fraternity. These ultimate ends are further explicitly referred to establish sovereign, socialist, secular republic and a democratic nation. In order to achieve these ultimate goals, the constitutional text lays down specific ends or socio-economic rights within the Directive Principles of State Policies from Articles 36 to 51 under Part IV of the Constitution. To specify one such end, there is Article 38 which states that the State shall endeavor to overcome the concentration of wealth. Other ends include the elimination of poverty, gender discrimination, caste discrimination, safeguarding of labour rights, etc. All these ends converge to form an ultimate end. Although the constitutional framers have specified the objectives under the Directive Principles of State Policy, the Parliament can extend the list through constitutional amendments under Article 368 of the Constitution. Socio-economic rights under Part IV of the Constitution form positive constitutionalism. Whereas, the inclusion of Fundamental Rights under Part III of the

Constitution forms a negative constitutionalism as the State cannot violate these. Nevertheless, the Fundamental Rights are not absolute.

For the attainment of the above-mentioned ends, the Constitution provides the means. These means include the structures or mechanisms as propounded under the concept of Separation of Powers of the legislature, executive and the judiciary. Additionally, the Constitution specifies the powers and functions of these institutions for attaining the ends. The Separation of Powers in India is different when compared to the traditional US Constitution model. In the US model, a separation was observed between the legislature and the executive, but in India this was ruled out. The executive were the members of the legislature. It preferred to have a democratic executive subjected to a daily and a periodic accountability or responsibility rather than stability as it existed in the US (CAD VII 2009: 32-33). The Indian Separation of Power was not in watertight compartments. Only the separation between the executive and the judiciary has been laid down (Article 50). It mainly incorporates checks and balances system. It also provides a detailed description of the form of government and administration within which the executive has to function (Sathe 2006: 216). Besides the establishment of the machinery, it also lays down the principles relating to the powers and functions of such machinery established under the Separation of Powers and which the executive is obliged to follow (Pal 2016: 253). One recent study has made a passing remark on this peculiarity of the functional or value-based perspective of the Indian Constitutionalism in the following words:

> But the backdrop of those substantive aims contains two meta-aims of the Constitution, as it were, that often go unremarked. When the Constitution was enacted there was a self-conscious sense that in writing a text, India was finding a way to resolve major substantive debates and disputes over norms and values. The task of constitutionalism was a morality that transcended positions and disagreements on particular issues; indeed, its strength was that it gave a framework for having a common institutional life despite disagreements. The second aspect of constitutionalism was the ambition that while the Constitution would serve Indian needs, it would not be bound by any particular tradition. It would, rather, reflect and be in the service of a global conversation on law and values. In the debates over particular doctrines, it is easy to miss the distinctiveness of these two ambitions, and the way in which they have informed the practice of constitutionalism in India. In some ways, more than particular achievements, it is the institutionalisation of these practices, against the odds, that constitutes the greatest achievement and challenge of Indian constitutionalism (Choudhry et al., 2016: 2).

Now, the significant challenge is how the above institutions will realize the constitutional ends. In this regard, the Constitution proposes a functional aspect. It mainly strives to converge the means and ends. This convergence is mainly embedded

within the framework of accountability (Austin 1966: 126). The Constitution entrenches that accountability within its fold. It laid down the accountability of the legislature and the executive. In terms of the executive, which was made part of the legislature by the constitutional framers, it was accountable on a daily basis to the Parliament that includes the Lok Sabha and the Rajya Sabha, through the parties in the opposition (Austin 1966: 162). Article 75(3) states that the Council of Ministers shall be collectively responsible to the House of People (Lok Sabha). Further, the overall legislature including the executive was made part of a periodic accountability through fair and free elections after every five years conducted by a constitutionally established Election Commission under Article 324. Moreover, the executive has to prove its majority consistently and a loss of confidence at any time in the Parliament would invite re-elections, as per Article 83(2). Additionally, the Constitution under Article 148 establishes the Comptroller and Auditor General to assess the performance of the executive on public policies.

Apart from the above-mentioned accountability measures, the judiciary plays a significant role; in particular, the Supreme Court (Austin 1966: 80). The Supreme Court is intended to act as the watchdog over the legislative and executive acts. It is entrusted with the judicial review of laws passed by the Union and State legislatures. Both the Supreme Court and High Courts under Article 32 and 226, respectively, are empowered to issue the prerogative writs of *habeas corpus, mandamus, quo warranto, certiorari* and *prohibition.* The writs can be filed against the governmental or executive acts under a delegated legislation or quasi-judicial function that have resulted in a breach of fundamental rights or statutory authority. Moreover, under Article 13, the Constitution has entrusted the Supreme Court to declare any law unconstitutional on the grounds of the violation of Fundamental Rights under Part III of the Constitution. Article 13 refers to a judicial review of both the legislative and the executive actions. This judicial review functions under the constitutional principle of the rule of law under Article 14, includes equality before law and equal protection of law. It also includes the principles of natural justice viz., *audi alteram partem*, bias and reasoned decision. These principles have been developed within the constitutional interpretation of administrative law that includes delegated legislation and quasi-judicial functions entrusted to the executive (Sathe 2004).

This constitutional accountability needs to trickle down in both substantive and procedural laws and in all aspects of social life to achieve the constitutional ends of justice, liberty, equality and fraternity. The State has to undertake this objective (Das 1963: 101-102). However, this has been severely challenged by partisan politics. There is even a challenge being posed by the criminalization of politics (Brass 2010: 3; Madhavan 2016: 283). Moreover, the periodic accountability of the legislature through elections is not a bottom–up approach, rather it is top–down approach as the political parties determine the electoral issues (Brass 2010: 3-4). Even the issues of gender, caste, minority rights, among others, are still unsettled and have raised severe doubts about the functioning of the judiciary, executive and legislature (Shankar 2013: 108). This is mainly due to the lack of an effective exercise of accountability. The judiciary which serves as a major instrument of check on the executive and legislative powers, except in few significant decisions, has largely appeared as a negotiator (Shankar 2010: 171).

Outside this constitutional accountability, there is another way to channelize the functional aspect of the constitution or converge the means and ends, i.e., by the incorporation of constitutional morality (Choudhry et al, 2016: 2-3). Constitutional morality emanates from the constitutional principles. For social transformation, the machinery should run in a self regulatory manner under the structural framework. It should work without having any biases and especially should set aside party politics and obey and revere the constitutional principles. (Kannabiran 2012: 468). The fulfilment of constitutional morality is a challenging task. It has to be nurtured by the State. However, State and public conscience both seem to be largely underdeveloped in India (Ambedkar 1994: 61). Until such development, the constitutional accountability under checks and balances remains a point of consideration. A failure of the functional aspect of establishing constitutional accountability, whether in the areas of land reforms, gender discrimination or caste discrimination, has been suggested (Chakravarti 2013: 5; Jaisingh 2000: 288; Kohli 1987: 67).

The combination of both means and ends with functional accountability is what the Indian constitutionalism stands for. It is putting into effect both positive and negative constitutionalism. Its primary object is to eliminate discrimination, ensure a dignified

life and achieve a social revolution (Austin 1966: 27). Its ultimate object is to abjure a revolution through bloodshed (Das 1963: 103). The elimination of discrimination or ensuring a dignified life is a fundamental tool that the constitutionalism mandates the State to use. Although the State provides compensatory measures to overcome discrimination, there are legal loopholes that still remain to be fixed such as in the issues pertaining to gender, caste, minorities, homosexuality, civil liberties, etc (Mehta 2015: 247). Such loopholes relate to the substantive rights that are the end-products of the Constitution, and are reflective of procedural ineffectiveness that fails to provide a statutory accountability that in turn refers to the constitutional means. The presence of loopholes within the statutes is in direct contrast with the Constitution and mainly emerges from the failure of generating the functional aspect of constitutionalism.

Overall, Indian constitutionalism includes the following components—namely, (1) it is the combination of ends and means; (2) ends are the ultimate objectives that the Constitution secures to all its citizens—justice, liberty, equality and fraternity—for establishing a sovereign, socialist, secular, democratic republic; (3) the means include structures or institutional mechanisms in the form of Separation of Powers viz., legislature, executive and judiciary; however, the Constitution rules out an absolute separation; (4) the State under Article 12 is the prime authority to undertake social welfare policies or social interest; and (5) both the means and ends are converged together or put into practice through constitutional accountability. Moreover, from the value perspective, accountability also includes constitutional morality and public conscience. It is the realization of the rule of law, social justice and transparency. It envisages a constitution in its true spirit. In other words, constitutional accountability channelizes the institution into attaining constitutional ends. Periodic elections, opposition parties, etc., render the legislative/executive accountable. The judiciary exercises wider extensive accountability powers to nullify the unjust laws. It is intended to act freely and without favour. If the laws are unjustly framed by the legislature without addressing its accountability effectively and if the judiciary unjustly recognizes them as a ‘negotiator’ by deviating from the constitutional values, then it is a clear instance of failure of constitutionalism. Moreover, any

unconstitutional collaboration between the executive/legislature and judiciary will also undermine the constitutional ends. Both positive and negative constitutionalism are vital; the positive is required to enact, execute and adjudicate the socio-economic rights under Part IV of the Constitution and negative constitutionalism to exercise certain limitations on the State as laid down in Part III of the Constitution in order to create a just social democratic order. All these components of means, ends and accountability are together referred to as Indian constitutionalism.

### *2.4.3. Indian Constitutionalism and Eminent domain*

Eminent domain has been one of the most controversial legal subjects. At the beginning of this chapter, the various theories of eminent domain, from social contract theories to utilitarian principle to distributive justice theory, were discussed. The social contract theorists viewed the sovereign as the absolute authority for seizing any property (Reynolds 2010: 100). However, Locke pleaded for the protection of the right to property (Stoebuck 1972: 567). Grotius, who coined the term eminent domain, viewed it as the sovereign's absolute authority, but subjected its exercise to fulfilment of compensation (Paul 1987: 65). But he did not allow for the justiciability of compensation and public purpose (Lenhoff 1942: 596). Further, the utilitarians favoured an exercise of eminent domain as a consequential and majoritarian welfare principle (Simmonds 2008: 18). The economists considered it as an effective tool to overcome the holdout problem (Posner 1977: 40-42). These different perspectives justify the role of the State as the absolute and sovereign authority in exercising eminent domain. This inherent absolute authority of the State has immensely displaced and impoverished the landowners and tenants (Cernea and Mathur 2008). Although various studies have highlighted the eminent domain abuse, they have limited their approach to specific issues and distinct constitutional principles (Sarkar 2007: 1435-1442; Fernandes 2007: 203-206). As a result, two broad trends emerge from these studies viz., an issue-based approach and a structure-based approach. An issue-based approach highlights the individual issues such as public purpose, compensation, etc (Levien 2011: 66-71; Mohanty 2009: 44-50; Roy 2012: 22-25). On the other hand, a structural approach focuses on the constitutional perspective of either the rule of law, Separation of Powers or judicial review (Singh 2006: 1; Sathe

2015: 20; Kashyap 1978: 97). Sometimes, specific issues are fused with specific constitutional principles (Ananth 2015: 302). The Constitution of India provided legitimacy to the eminent domain with certain limitations, previously under Article 31, which was repealed, and then under the existing Article 300A. The State, which under Article 12 mainly includes the government, has the foremost responsibility to regulate the eminent domain process within the contours of the constitutional principles. Besides this provision, it also provides the means and ends that act as a guiding force in regulating eminent domain. It is this approach of constitutionalism for which the eminent domain demands reconsideration. The legislature under constitutional obligation enacts the statutes that vitally undertake a substantive and procedural aspect of the constitutionalism that also includes constitutional accountability (Sathe 2004). The constitutional norms of justice, equality, liberty and fraternity along with the rule of law, apply equally to the legislative laws for democratic functioning. This constitutionalism had been severely undermined in the eminent domain law of 1894. It involved issues of public purpose, compensation, rehabilitation, resettlement, among others, that were completely left unnoticed until 2013. Even these issues were consistently debated before the Supreme Court since 1950, either for compensation or for determining the public purpose. A non-consideration of the constitutional values and lack of accountability and transparency in the case of eminent domain has also resulted in enormous displacement. In the case of eminent domain, a constitutional accountability has not been established, as from 1950 to 2007, more than sixty million people have been displaced by development which also includes the deprivation of livelihood without physical relocation (Fernandes 2007: 203).

Since 1950, the Indian constitutionalism vis-à-vis eminent domain has been controversial. All the three organs of the State favoured the powerful and left the underprivileged sections suffering. The legislature did not come forward to overcome the undemocratic law of 1894; the executive utilized the law rampantly for various public purposes and by dubiously incorporating all the developmental activities in the name of public purposes they did not follow the transparent and accountable procedures that led to certain acts of gross violation of the Constitution, and these

executive acts were justified under a literal interpretation by the judiciary. The judiciary restrained itself in reviewing the substantive nature of the takings post-deletion of fundamental right to property of land in spite of the presence of a constitutional authority against the 1894 Act. The apex court applied the constitutional principles liberally. It was only in 2011 that the Supreme Court cited the Right to Property vis-à-vis the eminent domain after an enormous protest from the landowners. The Right to Property as a fundamental right proved beneficial to the rich people but could have provided an enormous relief to the underprivileged sections, comparatively. This overall combination led to the violation of accountability in the presence of weak justiciable rights under the existent constitutionalism. The individual interests of the underprivileged sections without the substantive rights of just compensation, rehabilitation and resettlement were in turn compromised for the fulfilment of the public purpose which remained undefined until the replacement of 1894 Act. The literature on eminent domain has failed to take up the legislature/executive and judicial aspect vis-à-vis the functional aspect of the Constitution. That also includes the relevance of the eminent domain in the colonial or pre-constitutional and the post-colonial periods of constitutional India. In the past, due to a non-observance of constitutionalism in the eminent domain, two major setbacks resulted. The first setback resulted in 1978 when the Right to Property was abolished from Part III of the Indian Constitution for one or the other reason. The second major setback was the inability of the legislators to introduce the 'constitutionalised' vision of the eminent domain law and retained the old colonial law. These two major setbacks ought to be undertaken within the notion of 'constitutionalism' that many authors have overlooked. In the absence of a clear-cut implementation of the constitutional values, the eminent domain crisis would exist forever, causing a grave injustice to the citizens and a fraud on the Constitution.

The 2013 Act of the Parliament was meant to undo the hardships caused by the 1894 Act. However, the 2013 Act demands reconsideration within the contours of constitutionalism of accountability and transparency of public purpose, compensation, rehabilitation, resettlement, environmental impact assessment, etc. The eminent domain has to appreciate the relevance of the substantial attainment of

constitutionalism. The accountability aspect forms a crucial one that demands a transparent procedure as the means and substantive rights as the ends, which ultimately serves the constitutional goals of the rule of law. It has to undertake the broader aspect of constitutionalism; the cohesion of both the structural and functional aspects—for instance, how the judiciary, legislature and the executivehave interpreted the eminent domain law (public purpose, compensation, rehabilitation and resettlement). A functional view takes up the relevance of constitutional accountability in terms of democratizing the eminent domain.

# CHAPTER 3

# LEGAL HISTORY OF THE EMINENT DOMAIN LAW IN COLONIAL INDIA

*"Historical facts, many of them, have an intrinsic value, a profound interest in their own account, which makes them worthy of study, quite apart from any possibility of linking them together by means of causal laws."*

- Bertrand Russell (Denonn and Egner 2009: 501)

## 3.1. Introduction

Eminent domain refers to the acquisition of land by the state for public purpose. The underlying public purpose in eminent domain is based on the maxim *Salus Populi est Suprema Lex* which means that the welfare of the people is the paramount law. Until 2013, the land acquisition process in India was governed by the Land Acquisition Act, 1894. The 1894 Act was repealed and replaced by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. Before the passage of this new legislation, a prolonged debate continued over the abuse of the power of the eminent domain in the past and the adoption of an inclusive prospective approach. However, any enquiry in these issues primarily requires a historical examination of colonial land acquisition laws. Although, contemporary studies (Beverley 2009; Sarkar 2007) have extensively highlighted eminent domain process under the 1894 Act, these have overlooked a detailed historical examination of the eminent domain law.

The application of eminent domain law in India has an extensive legal history. The existing eminent domain practice traces its origin from the British colonial rule. Colonial lawmakers in 1824 introduced the first eminent domain law. They subsequently repealed and replaced it with other laws, before settling down with the Land Acquisition Act, 1894, which remained in force till the end of the colonial rule. Even in independent India, the same colonial Act of 1894 was in force until it was repealed in 2013. The examination of colonial legal history of eminent domain

provides a substantive understanding of the nature and scope of eminent domain law, which has significantly impacted the eminent domain practice in post-colonial India.

This chapter narrates the colonial history of the eminent domain law. It highlights the evolution and application of the eminent domain law from the substantive and procedural law perspectives. It evaluates the aim, objective, nature, scope and changes introduced in the eminent domain law in the colonial period. It is divided into four sections.

The first section highlights the general understanding of the legal history of the colonial rule. It traces the emergence of the legal system and analyses the substantive nature of rule of law in the colonial India. It systematically analyses the historical transition of legal system from the company rule to the crown's parliamentary control. This transition also traces the shortcomings in the colonial legal system, particularly the absence of a written Constitution. However, attempts were made to reform the legal system through the 1892, 1909, 1919, 1935 Government of India Acts, but there were certain grey areas that this section addresses.

The second section narrates the evolution of the eminent domain law from 1824 to 1894. This period is further divided into three phases namely the early phase, consolidation phase and stability phase. This classification is mainly based on the nature of the laws. In the early phase, the presidential towns of Bengal, Bombay, and Madras were governed by distinct laws, which were subsequently consolidated and finally stabilized. This transition was not mechanical rather driven by colonial experiences. There existed substantial reasons in the introduction of the every law. This thesis argues that the transition of eminent domain law from early to stability phase marks a significant change in the substantive and procedural law practice. It is a transition from liberal to a conservative approach.

The third section addresses the colonial judicial practice of the eminent domain law from 1894 to 1950. This section undertakes an examination of the colonial judicial practice under the 1894 Act, for a period ranging from 1894 to 1950, with the following objectives: (1) to highlight the issues that were addressed by the courts; (2) to understand the judicial precedents evolved and applied in resolving the eminent domain issues; and (3) to evaluate the overall judicial trends and their interpretation. The preceding objectives are limited to the provisions relating to public purpose,

reference to the court, market value, compensation, temporary occupation of land, land acquisition for companies and withdrawal of land acquisition as these provisions were consistently debated in the colonial courts. Furthermore, the examination limits itself to the cases tried by the Privy Council and the High Court. The Privy Council, which was the highest court of appeal during the colonial rule, possessed the authority to set judicial precedents. This work argues that the Privy Council and High Courts, according to the *Statement of Objects and Reasons to the Act of 1894* were to be independent to safeguard the interests of the land owners, and retained the conservative nature of the Act through literal interpretation. The fourth and final section of the chapter is conclusion and analysis.

This chapter argues that among other outcomes the absence of a constitution and constitutionalism offered a very limited maneuverability to the landowners against the State in its exercise of eminent domain powers. Moreover the legal transition of eminent domain from 1824 to 1894 entrusted the government with absolute authority. It was a transition from liberal to controlled authority. The judicial practice on various issues supports the conservative approach.

### 3.2 General Legal History of Colonial India

The legal history of colonial India is highly complex. One reason for this was the prolonged British rule that spanned more than two centuries. This legal history can be traced back to the establishment of the East India Company—a private enterprise—under the Charter of 1600. Over the next few years, there was an increase in the Company's trading activities and it shifted its agenda from commercialization to imperialist expansion in order to secure additional economic benefits (Lenman 2002: 464). In the second half of the eighteenth century—after the Battle of Plassey—the Company acquired an administrative and sovereign control over its Indian subjects (Stern 2011: 12). In order to legitimize its commercial and administrative interests, it sought royal grants (Cohn 1996: 58). However, those royal grants entrusted only a limited legal authority to it. The English legal system was confined only to the Company officials.[10] Meanwhile, for the first time, Governor-General Warren Hastings elaborated the colonial legal system under the plan of 1772. Under this plan,

[10] During the early rule, the East India Company was not interested in establishing a full-fledged judicial system because among other reasons, it was not deemed as financially viable (Benton 2002: 127).

Hastings, influenced by the Orientalist liberal ideology, adopted a legal system which was a mixture of the colonial and the indigenous legal systems (Jaffe 2015: 48-49). A plural legal order was preferred rather than a complete acceptance of the common law principles (Benton 2002: 131-132; Cohn 1996: 61). Indigenous laws relating to religion, in force since the times of pre-colonial rulers, were validated through a distinct policy of non-interference. This plural order or a 'poly-jural'[11] system included legal dualism. Civil administration, particularly the revenue administration—a profitable venture—and the European subjects were controlled by the British (Mendelssohn 1981: 837). On the other hand, the administration of the native peoples and their affairs relating to marriage, caste and religion were assigned to the native religious heads. The Hindus' affairs were left at the behest of the pandits who were considered as the highest authority on the Sanskrit texts while the Muslim authority was assigned to the moulvis (Benton 2002: 139; Cohn 1996: 61).

However, the administrative and judicial set up was marred by extensive corruption prevailing within the colonial officialdom.[12] The trial of Warren Hastings was one such instance of corrupt practices (Dirks 2006: 252). Even the indigenous judicial system appeared to be flawed.[13] Many colonial officials contended that the Indians were misusing the law for carrying out acts of corruption (Rankin 1946: 5; Weiner 2009: 159). At the same time, the colonial construction of law had a cultural impact which was shaped particularly by caste (Bayly 1999: 370; Dirks 1987: 41). The native religious affairs were based on status rather than contract.[14] Due to widespread corruption, revenue administration came to be threatened. In order to overcome the graft and enhance the revenue administration, the British Parliament, unacquainted with the ground realities, passed the Regulating Act of 1773 and established the Crown's Supreme Court with plenary powers similar to that of the King's Court in

[11] John McLaren uses the term 'Poly-jural order' to refer to the recognition of a multiple legal order based on religion (McLaren 2010: 72).

[12] During the early colonial rule, the Company's judicial system was represented by its merchants who had no expertise in law. Even the local adjudicators were illiterate; as a result, both got involved in corrupt practices and began to amass inappropriately enormous amounts of wealth (Benton 2002: 134; Dirks 2006: 29).

[13] The application of the canonical laws of Hindus and Muslims produced at times confusing and contradictory judgements. The opinions of the pandits and moulvis differed materially (Benton 1999: 573; Rankin 1946: 5).

[14] Bernard Cohn in his anthropological study mentions that the North Indian society during the colonial rule did not fit into the contractual relationship; on the contrary it was deeply based on status relationship (Cohn 1987: 570). The social domination of caste and religion has had a significant impact on the justice delivery system since the pre-colonial times (Cohn 1987: 624).

Britain, in order to secure accountability and exercise a greater Parliamentary control over the administration of the Company (Benton 2002: 137; Cowell 1936: 37; Rankin 1946: 7). As the Supreme Court possessed plenary writ powers over the English subjects and Company employees, in the absence of clarity in jurisdiction, it created complex and contradictory jurisdictions that resulted in a direct collision between the Government of the Company and the Crown's Supreme Court (Benton 1999: 569). The reason for the dispute was that the Supreme Court repeatedly encroached upon the matters of revenue collection by the executive and that ultimately affected the overall revenue collection. This tussle was explicitly visible in the Cossijurah case[15] (1779) and the Patna case[16] (1777-79) (Benton 1999: 566; Cowell 1936: 52; Keith 1936: 86). Finally, to resolve this dichotomous situation, the British Parliament passed the Settlement Act of 1781. The Act precluded the Supreme Court from interfering in the revenue and executive matters of the Company. The Company officials were situated outside the purview of the Supreme Court and were only accountable to the European law and courts. The native people were submitted to the administration of the ancient law (Keith 1936: 88). This legal reform was primarily meant to recover the economic benefits from the Company (Keith 1936: 93). Later, Cornwallis through the Charter of 1793 introduced administrative reforms (Stokes 1989:4). Influenced by the Whig philosophy, Cornwallis under this Charter strived to establish a fixed amount of revenue and secure property rights and a separation of the executive from the judiciary. In reality, these legal reforms were meant to safeguard the zamindari rights and had no relation with substantive justice (Stokes 1989: 5-8). No interference was made into religious matters (Stokes 1989: 5).

Further, in 1833, under the influence of the utilitarian theory of Jeremy Bentham, some innovative legal reforms were introduced. A confused nature of laws and regulations, ill-defined legal authority and conflicted jurisdiction were some of the main reasons that led to the passing of the Act of 1833 (Cowell 1936: 74; Stokes 1990: 44-45). Codification was considered to be the answer to the lingering issues. As a result, a Law Commission was constituted for bringing uniformity to the divergent

[15]In the Cossijurah case, the Supreme Court issued an arrest warrant against the Raja of Cossijurah, a zamindar, for the non-payment of a private debt. However, the Governor-General's Council ruled against the arrest as the Zamindar was not subjected to the Court's jurisdiction (Keith 1936: 86).

[16]In this case, the Supreme Court ruled out the decision of the lower court and ordered the arrest of the moulvis and the nephew of Naderah Begum for fraudulently applying the religious canons against the victim (Naderah Begum). The nephew was also ordered to pay a huge compensation to her (Keith 1936: 87).

colonial laws vis-à-vis the colonial territory that the British had acquired (Banerjee 1984: 276; Rankin 1946: 17). The Law Commission, in its initial years, was mere a skeletal authority without any substantive outcomes (Keith 1936: 138). It was only after the transfer of power from the Company to the British Crown in 1858 that the 'anglicization' of law gained momentum (Galanter 1988: 412). Under the pre-colonial rule, no coherent legal system existed; the process of anglicization was meant to introduce the *lex loci* law to India (Rankin 1946: 21). The Benthamites, who had initiated codification, believed that the Indian situation was considerably suited to it. The codification process codified certain procedural and substantive laws. The Criminal Code included the Indian Penal Code and the Criminal Procedure Codes while, the Civil Code included the Civil Procedural law, the Contract Act, the Limitation Act and the Evidence Law. Other than the Indian Penal Code 1860, no other significant substantive law was made. Personal laws were codified based on religious texts and retained a cultural flavour in order to overcome the political threat as witnessed during the Mutiny of 1857 (Rankin 1946: 36; Strachey 1894: 85; Temple 1882: 105). Overall, the introduction of the Law Commission—a temporary organization—was mainly to safeguard the economic interests and to secure a uniformity vis-à-vis the British Indian territory. Further, by the end of the nineteenth century, the colonial rulers attempted some miniscule measures to introduce a permanent legislative body to replace the Law Commission which can be traced in the subsequent Government of India Acts from 1892 to 1935 (Banerjee 1984: 269-270). However, no full-fledged legislative authority was assigned to the Indian representatives. Ideologically, the British were desperate to maintain white supremacy and this was obvious in their legal strategies since their inception (Metcalf 1995: 204). Introduction of common laws through codification was a welcome strategy on the Indian soil. Nevertheless, this strategy had to address some pertinent fundamental jurisprudential questions when seen from the constitutional perspective: did the British establish a rule of law in colonial India? What was its nature? Here, the rule of law stands for the connotation placed by A. V. Dicey. Dicey's rule of law propounded the supremacy of law, equality before law and an equal protection of law and the development of a constitutional legal spirit.

In the eighteenth and nineteenth centuries, the rule of law in colonial India was not a static concept, rather a "highly tensile notion" with a "poly-jural" legal system

(McLaren 2010: 71). It was an experiment by the British to adapt institutions suited to the Oriental habits of life along with all its conflicts of opinion and interests (Cowell 1936: 3). There was a complete absence of judicial independence. Colonial judges were appointed on grounds of 'pleasure' as against the 'good behaviour' rule in Britain. The reason was that the 'pleasure' principle ensured the loyalty of the judges in favouring colonial regime.[17] In the absence of judicial independence, the law empowered the British officialdom to occupy key administrative positions for retaining power over the masses and to safeguard economic interests (McLaren 2010: 84; Thompson 1990: 263). At the same time, the law provided legal immunity to the officials against any prosecution (Keith 1936: 431-432). Even in the twentieth century, the Government of India Act 1935 retained the British supremacy of racial inequality under the rule of law (Kolsky 2010: 86; Mantena 2010: 39). A. C. Banerjee substantiated the reason for racial inequality as "No foreign race can – except under the pressure of unavoidable circumstances – admit a subject race to partnership in political power" (Banerjee 1984: 270). The supremacy of law was vested in the Victorian and the British Parliament.[18] Keith described it as follows:

> The supremacy of Parliament over British India and its power to legislate therefore or any part thereof are reasserted in the Act, in accordance with precedent, and it is expressly provided that no legislature, provincial or federal, may make any law affecting the sovereign or the royal family, or the succession to the Crown, or the sovereignty, dominion, or suzerainty of the Crown in any part of India, or the law of British nationality, or the Army Act, the Air Force Act, or the Naval Discipline Act, or the law of prize or prize courts. All these matters are issues definitely connected with sovereignty, which naturally may not be altered by a legislature definitely subordinate. …These restrictions, it will be seen, are in part directed at preventing the passing of legislation which is intended to or would discriminate against British commercial interests in India (Keith 1936: 376-378).

Similarly, Martin Weiner observed the colonial racial inequality enshrined in the law in the following words:

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[17] On the nature of the judiciary in the eighteenth and nineteenth centuries, McLaren stated, "The reason was simple. Judges, particularly chief justices, were seen as important players in colonial government in which the separation of powers was only hazily discernible. In addition to fulfilling judicial functions, they were often key members of executive and legislative councils and acted as close advisers to governors. In the absence of legal talent elsewhere in the community they were also in some instances required to draft legislation and regulations. Given these important administrative and legislative roles, it was considered imperative that they be loyal to the colonial regime in terms of political alignment" (McLaren 2010: 73).

[18] In *Veeraraghavachariar v. The Secretary of State* A.I.R. 1925 Mad.837, Justice Devadoss observed, "The Indian Legislature is a subordinate Legislature, subordinate to the Imperial Legislature composed of the Crown, the House of Lords and the House of Commons. The Indian Legislature is governed by the provisions of the Acts of Parliament. The Government of India Act of 1858, 21 and 22 Victoria Chapter VI, gives power to the India Legislature to frame laws. Under the Act of 1833, III and IV, William IV, S.43, the Governor-General-in-Council was given power to make laws and regulations and to repeal, amend, or alter any laws or regulations whatever then in force or thereafter to be enforced."

> Despite repeated professions of formal equality before the law, Europeans had always possessed advantages in the legal arena, both formal and informal. Magistrates were limited in their ability to sentence "European British" subjects (as they were not in regard to Indians) to a maximum of three months' imprisonment; Sessions Judges were limited to a maximum of one year, and only High Court Judges, sitting in the major cities, could impose anything more severe upon them. Europeans were also entitled, when tried by juries, to a majority-white jury. Apart from such legal differences, Europeans possessed both the money to buy skilled counsel and, even more important, the racial sympathy of the white magistrates, Judges, and, when they were defendants, their white jurors (Weiner 2009: 159).

Although, civil and criminal laws were codified after the mid-nineteenth century, the substantive spirit of the rule of law remained absent. In reply to the question, "how meaningful was the British commitment to the rule of law?" Martin Weiner argues that the application of rule of law in colonial India was obscured as the legal practice involved unequal rules with diverse interests (Weiner 2009: 4). The executive possessed unrestricted powers that restrained individual freedoms without judicial verdict; the law was a 'lawless law' meant for mere political necessity (Banerjee 1984: 274). At the same time, the English rulers were not responsible to the Indians, rather to the British Parliament. This belief was entrenched in the Constitutional framework of the legal system (Banerjee 1984: 271). Equality before law was differently practiced. Indians and Europeans were tried differently (Strachey 1894: 81). This differential treatment was extensively debated during the Ilbert Bill or Black Law controversy in 1882-83. The Bill was introduced to empower the Indian jury to try European British subjects. An extensive debate took place between the liberals and opponents over the Bill. The liberals favoured the 'sameness' principle on the ground of equality before law, whereas the opponents believed in the 'difference' principle on the basis of rule by conquest and not by consent (Mantena 2010: 39-41; Metcalf 1995: 204). However, mainly due to the influence of Christian missionaries, some efforts were made by Macaulay to civilize the Indian legal system by introducing Western education and transforming the indigenous law into modern law (Dirks 1992: 190-191). However, these attempts failed to ensure a fair treatment before the law. David Washbrook termed the colonial laws as mere 'legal fiction' which in practice was 'pure farce' (Washbrook 1981: 665). Overall, the rule of law embedded three contradictory practices: first, the law established racial inequality; second, this racial inequality placed Indians on an unequal footing with the British without assigning the power to challenge its unequal nature through judicial review; third, the legal system also divided the Indians on the ground of caste and religion. It validated the canonical personal laws without any reasonable examination. One reason for this was the British

fear of losing their political hold. The Indian society itself was not homogenous. Its structural and functional flaws provided space to British supremacy. In the true sense, there was an absence of the rule of law and the true object of codification was merely to produce a governable society on the colonial principles of inequality (Kolsky 2010: 106). Besides the rule of law, the courts sparingly engaged the principle of 'Justice, Equity and Good Conscience'. The British applied this principle in accordance to their convenience and suitability. This principle was applied in colonial India to the gaps in the personal, judge-made, uncodified, private and public laws and to overrule the indigenous practices that did not fit into the principle (Benton 2002: 139; Derrett 1963: 139). However, the colonial laws constantly remained outside the purview of this principle. Indeed, it assigned discretion to the judges to apply the principle as a residual law to the personal laws (Rankin 1946: 9).

Overall, a summary examination of the general understanding of India's legal history points out following findings – (1) the colonial rulers were completely driven by economic interests. Their ultimate aim was to seek profits. Therefore, the introduction of legal system was largely guided by economic interests. For instance, the civil and revenue administration was undertaken by the British themselves, whereas the criminal administration was regulated through indigenous religious texts. (2) It consistently maintained racial inequality whether it was the Ilbert Bill or Black law of 1882-83 or the Government of India Act of 1935. Extensive immunity was provided to the British officials. Although some reforms were introduced through Regulating Act 1773, Settlement Act 1771 and Law Commission 1833 but they were largely introduced to secure economic interests and uniformity in the governance of British India. (3) Immense inequality in the application of rule of law. The legal system was one of 'lawless law'. In the absence of a Constitution and democratically elected legislature, the judges were appointed according to the pleasure principle. Courts lacked judicial independence and equally failed to apply the principle of justice, equity and good conscience.

The next section deals with the legal history of eminent domain. It highlights the transition of eminent domain law from 1824 to 1894.

### 3.3. Legal History of Eminent domain

The above general understanding of the colonial legal history clearly suggests the absence of substantive rule of law that had severest effect on the framing and application of eminent domain law. Although the 1894 Act was the chief eminent domain law during the colonial rule, before it's framing a series of land acquisition laws existed in the various presidential towns. Among these, the first law came into existence in 1824. As a result, the study of the colonial laws also begins from 1824. The colonial legislative history on eminent domain is divided into three phases—1824 to 1852, 1857 to 1870, and 1894 to 1950. This division is purely based on the ground of commonalities of certain features among the laws in every specified phase. The first phase undertakes the examination of laws that existed in the various presidential towns.[19]It mainly includes the Regulation of 1824 in Bengal, the Building Act of 1839 in Bombay and the Act of 1852 in Madras. The second phase addresses laws that were less fragmented in comparison to the first phase. It was a period of consolidation. In this phase, attempts were made to consolidate the laws that were fragmented in the first phase. As a result, this phase includes the Act of 1857 and the Act of 1870. The Act of 1870 repealed the 1857 law. Both Acts were applicable to the whole of British India. The final phase focuses on the Act of 1894. The 1894 Act with certain amendments existed till the end of the colonial rule. Overall, the transition of Land Acquisition Act from 1824 to 1894 during the colonial rule involved both a substantive and a procedural alteration.

#### *3.3.1. Early Phase: Fragmentation Stage*

Before the enactment of the consolidated Land Acquisition Law in 1857 for the whole of British India, there existed distinct laws in different presidential towns: Regulation I of 1824 in Bengal, Building Act XXVIII of 1839 in Bombay and Act XX of 1852 in Madras. These different sets of laws had some unique and common features.

##### *3.3.1.1 Bengal*

Regulation I of 1824 (henceforth referred to as 'the Regulation') was the first land acquisition law enacted by the British (Parliamentary Papers 1826). It was only

[19] The British during their early rule restricted themselves to specific towns, so the laws in this phase were applicable to these areas only.

applicable to the presidential town of Bengal (Fort William). The Governor-General-in-Council of Bengal passed the regulation on January 8, 1824. It contained fifteen sections. The preamble of the Regulation stated that,

> Whereas it being necessary occasionally to require the surrender of the property of individuals, for purposes of general convenience to the community, it appears expedient distinctly to define the course of proceeding to be followed in such cases, in order, that works and arrangements of public utility may not be unduly impeded, and that at the same time, a just and full compensation may be secured to all persons, holding an interest in the property so appropriated.

According to the Preamble, the Regulation strived to define the procedure for the occasional acquisition of land for the purpose of general convenience of the community that involved public works and the arrangement of public utility. While considering the land, the Regulation offered a just and full compensation to any person having an interest in the land. A just and full compensation primarily aimed at overcoming the landowners' discontent and enhancing the smooth transition of land from the interested person to the government. The Regulation permitted the acquisition of land for the construction of public roads, buildings, canals, drains, gaols or for any other public purpose. It also provided the rules for the appropriation of land for public purposes and prescribed special rules to acquire land for salt manufacture.

Acquisition proceedings under the Regulation commenced with a private bargaining between the requisite officer and the interested individual. If the parties failed to reach an agreement, then the regulation entrusted the officer to enter the land, mark the boundary and issue notices to the people in the vicinity. Interested persons had fifteen days to file and establish a valid claim. The authorities after hearing the claim would prepare a report and forward it to the Governor-General-in-Council (Section II). On the receipt of the report, the Governor-General-in-Council exercised the final authority over the claims and land acquisition. Any decision was to be based on the exigency of the situation. If the land acquisition involved a clear and urgent public expediency, then the Governor-General-in-Council disposed the matter on discretion; but under normal circumstances, it would refer the matter to elected arbitrators. Those arbitrators then determined the just and full value of the land (Section III). But in case of a land with pending issues, brought under extensive public work on government approval, then the Governor-General-in-Council would delegate the matter to the Board Committee (Section III).

Further, the Regulation specified rules relating to the appointment and conduct of arbitrators. Arbitrators were to be impartial and respectable people. Arbitration proceedings included one umpire and four arbitrators. Among the four arbitrators, each side i.e. interested persons and the government, was represented by two arbitrators. On behalf of the government, the Judge or Magistrate or Collector appointed two arbitrators. The other two arbitrators were appointed by the parties themselves. All four arbitrators further appointed an umpire. The jurisdiction of the arbitrators was confined only to the determination of compensation. No arbitration proceedings could determine the issue of title. The arbitrators prepared a full and specific report with an award on the basis of evidence. By the end of the proceedings, they would submit the report and award to the officer. The officer would add comments on the impartiality and fairness of that report and subsequently deliver it to the Governor-General-in-Council. Finally, the report would be sent to the Government for approval (Section VI). On approval, the award would be final and binding except on the grounds of corruption or gross partiality or ultra vires exercise of power by the arbitrators (Section VI Rule 3). After approval, the magistrate would seize the property. All costs of the arbitration were payable by the Government.

Overall, the Regulation permitted an acquisition of land for the purpose of general convenience to the community. It ensured a just and full compensation to the interested person through arbitration proceedings. Though the Regulation lacked inclusiveness and coherence in terms of the arbitration proceedings, the assurance of a just and full compensation through the arbitration proceedings was significant.

#### *3.3.1.2 Bombay*

In Bombay, the British introduced land acquisition under the Building Act XXVIII of 1839 (Theobald 1844: 320-334). It was passed on December 16, 1839. The Act consisted of thirty-four Sections. It regulated construction and maintenance of buildings in the islands of Bombay and Colaba. In order to maintain and secure the public interest, the Act prevented the construction of a building, existing or prospective, beyond the statutory limits. As Section XII stated,

> Every person rebuilding any building or which any part is situated with twenty-five feet of the edge or side of any public road, street, or other thoroughfare within the Island was liable to be required for the purpose of widening such road, street or other thoroughfare to carry back his building so far and to give up so much of the site of the old building, or of the compound in

> which the same building was standing or of the unenclosed ground if any lying in front of the old building and between the same and the road.

Beside the prevention of construction and maintenance of buildings, the Act, under Section XV, authorised the State to acquire land for public purpose. Such purposes included the widening or altering or construction of any new public road, street or other thoroughfare or drain.

Under this Act, the land acquisition proceedings commenced with the endorsement of certification by the Collector of Land Revenue. However, the decision of the Court of Petty Sessions with the sanction of the Governor of Bombay-in-Council was final. Before the acquisition of the building or land, the property surveyor prepared estimates of the private interests in the property. Then the estimates were submitted to the Court of Petty Sessions. Further, the Court of Petty Sessions submitted them to the Governor-in-Council for approval. On its approval, the surveyor offered a certain amount as compensation to the owner in consideration of the seized property under Section XVI. On receipt of the sanctioned amount, the owner was divested of all private interests in the property. But if the owner refused to receive the sanctioned amount, then as per Section XVII, the Court of Petty Sessions referred the matter to the Jury which comprised twelve indifferent men. The members of the Jury were residents of the island. They analysed the property in question by utilizing all lawful means and settled the value of the property and interest. The decision of the jury was final and conclusive to all intents and purposes against all persons. These provisions were extended to the town of Calcutta by Act I of 1850, with the object:

> For confirming the title to lands in Calcutta taken for public purposes. It was further stated in the Preamble of Act I of 1850 that "the first seven Sections of Regulation I of 1824, of the Bengal Code, shall also be applicable to all lands within the town of Calcutta which shall have been declared by the governor of Bengal to be needed for any public purpose, and such declaration shall be conclusive evidence that the purpose for which the lands are needed is a public purpose.

Later in 1850, these provisions were extended by Act XVII to include the acquisition of land for railways and other works of public utility. Act XLII of 1850 extended the provision of Regulation I of 1824 of the Bengal Code so as to meet the requirements of railway construction and other works in Bengal.

Overall, the 1839 Act permitted the acquisition of land for widening roads, streets or thoroughfares and drains. Unlike the Regulation of 1824, the land acquisition procedure in 1839 Act was short, it did not ensure just and full compensation and it

also lacked coherent arbitration proceedings. However, the jury system represented by the local residents ensured the protection of rights of the interested persons in seeking compensation, as its decision was final.

#### *3.3.1.3. Madras*

After Bengal and Bombay, Madras i.e. the Presidency of Fort St. George got a separate land acquisition law. Act XX of 1852 authorised land acquisition for public purpose in Madras (Parliamentary Papers 1852). The Act came into force from March 27, 1852. It consisted of twenty Sections. It laid down the procedure of land acquisition and established the authority for settling compensation claims.

The Governor-in-Council possessed the exclusive authority to determine land acquisition. It initiated the acquisition proceedings by issuing a declaration in a minute of the council. The declaration stated that the land was needed for public purpose. Further, it was conclusive evidence that the acquisition of land involved a public purpose. After issuance, the declaration order was sent to the District Collector for execution, which involved the marking, measurement and possession of land (Section III). After the boundaries were marked, the Collector affixed the order of the Council at some conspicuous place upon the land. It was also published by proclamation in the neighbouring bazaars and villages with a citation calling all the interested personswith a 'good title' over the land to appear before the Collector and establish their claims towards compensation within thirty days from the date of citation (Section IV). If no claim was established within thirty days, then the land was absolutely vested in the Government. Any suit beyond this period was strictly dismissed by the court (Section XVIII). The Collector was the sole authority for determining compensation in the form of award (Section V). In the event of any disagreement on compensation between the Collector and interested persons, the dispute was referred to the arbitrators (Section VI).

Arbitration consisted of one umpire and four arbitrators. Each party i.e. interested persons and the government appointed two arbitrators. On behalf of the government, the Collector appointed two arbitrators. Interested persons, if more than one, unanimously appointed two arbitrators within fifteen days from the date of notice. But if no consensus was arrived at, then all the interested persons nominated one arbitrator each and out of them the Collector would select two arbitrators by lot. If the interested

parties refused, or neglected, or by reason of minority, lunacy or absence from the Presidency, failed to nominate the arbitrators within the stipulated period then the Collector was to appoint two impartial persons to arbitrate the matter (Section VII). All four arbitrators appointed an umpire. However, the Collector would appoint an umpire in the event of disagreement between the arbitrators (Section VIII).

Arbitration proceedings were to begin under the supervision of the Collector (Section X). The arbitrators issued summons to the parties and witnesses through the Collector. On a fixed date, the parties attended the proceedings. They had to furnish requisite title deeds and other essential accounts in order to establish their claims (Section XII). False deposition was to attract perjury charges (Section XI). The arbitrators delivered the award on the basis of statements, objections and evidence submitted by the interested parties and the Collector. Finally, the arbitrators or the umpire prepared a complete report. The report included the statement relating to the award and the amount of compensation. It was to undertake only such issues that were referred to the arbitration (Section XVI). The decision of the arbitrators was to be binding and conclusive on both the parties (Section XIV). The umpire was to intervene only if there was any difference of opinions or the voices were equally divided among all the arbitrators (Section IX). However, the Civil Court of the Zillah had the jurisdiction to set aside the award. Either party, within thirty days from the date of award, on the grounds of corruption against the umpire or arbitrators, could challenge the award. The charge was to be proved only after a due investigation and on the satisfaction of the Court (Section XIV). If the charge was proved, then a second set of arbitrators would be nominated. No suit or proceedings against the Government or against the award were to be tenable except for compensation (Section XVII). The Government was to pay all expenses of the arbitration (Section XIX).

The 1852 Act laid down the procedure and established the authority to settle the compensation issue. However, it failed to ensure a just and full compensation. Unlike the Acts of 1824 and 1839, this Act introduced declaration as the conclusive evidence that the land was needed for public purpose was final and could not be questioned. It also for the first time entrusted extensive authority to the Collector. Like the 1824 regulation, this Act also laid down detailed arbitration proceedings.

### *3.3.2. The Consolidation Phase*

The second phase marked a significant change in land acquisition. The fragmented laws of 1824, 1839 and 1851 of Phase I were abolished in order to introduce uniformity among the land acquisition laws. This uniformity was also necessitated by the fact that the British by the mid-nineteenth century had secured a decisive political advancement in India and thus their ubiquitous presence in the political arena demanded uniform laws. The second phase included two legislations—namely, the Act of 1857 and the Act of 1870.

#### *3.3.2.1. Act VI of 1857*

The British enacted the Act VI of 1857 as the first unified land acquisition law (Parliamentary Papers 1857). It came into force on May 1, 1857. The Act repealed all the previous presidential laws viz., Regulation I of 1824, Act XXVIII of 1839 and Act XX of 1852. The Preamble of the Act stated that:

> An Act for the acquisition of land for public purposes. Whereas it is expedient to make better provision for the acquisition of land needed for public purposes within the Territories in the possession under the Government of the East India Company, and for the determination of the amount of compensation to be made for the same.

According to the Preamble, the object of the Act was to acquire land for public purpose within the territory of the East India Company. For this purpose, it laid down the procedure and ensured compensation. Although the land was to be acquired without the landowner's consent, the latter was mandatory during the acquisition of any part of the house or other building or manufactory (Section XXXII). For the first time, the legislation introduced an interpretation clause. It defined land to include tenements and hereditaments of any tenure and all the houses, buildings, trees, or appurtenances thereupon, as well as land (Section XXXIX).

The local government initiated the land acquisition proceedings. It issued a declaration under the signature of the Secretary to acquire land for public purpose at a public expense. The declaration required a mere mention of land for public purpose. But if the land was needed for roads, canals or railways then the declaration had to specify the extent, limits or the position of land. However, it was sufficient to declare a general direction of the line of the work and the average breadth of the land (Section XXXIII). Once the declaration was issued, it was conclusive evidence that the purpose for which the land was needed did involve public utility. After the

declaration, the District Collector marked, measured and planned the land. Then, he issued a notice to the 'person interested', including an occupier. The Act defined a "person interested in land" as all persons interested in the land either for life or for years or in the remainder, reversion or succession and all mortgagees, lease holders, or tenants, not being tenants by the month or at will, of such land. Under conflicting claims two or more persons, possessor or person receiving rents were to be considered as an interested person (Section VII). The notice was affixed at some conspicuous place on the land. Additionally, an oral proclamation was to be made in the neighbouring bazaars and villages, stating that the land was to be acquired by the government for public purpose (Section IV). As soon as the notice was issued, the interested persons had to appear within fifteen days before the concerned authority and settle claims relating to compensation and interest. However, if the interested person remained absent on the date fixed then the Collector was to issue a fresh notification (Section V).On the fixed day, the Collector conducted a summary enquiry with the interested persons. The Act imposed a duty on the Collector to take all the damages into account and place an offer to remedy against them (Section XXXV). If the interested persons agreed on compensation and apportionment, then the Collector would pass the award. The award was to be final and conclusive to the value of the land and the amount of compensation (Section V). In the event of disagreement between the Collector and the interested parties, the matter was to be referred to the arbitrators for ironing out the differences (Section VI).

As soon as the matter was referred for arbitration, the parties were to appoint the arbitrators in writing (Section XI). Both the Collector and interested persons appointed a single arbitrator on agreement. Two arbitrators were to be appointed in the event of differences (Section X). These two arbitrators in turn appointed a third arbitrator within a week of their appointment. Any failure to appoint a third arbitrator would entrust the Collector with the authority to appoint such a person (Section XII). Even any disagreement among the interested persons would empower the Collector, on the orders of the Commissioner, to refer each distinct interest to a separate arbitration or to select any one of the interested persons whose interest appeared to him to qualify such a person to represent others; the person so selected, appointed an arbitrator on behalf of all the interested persons (Section X Clause II). Arbitrators would be under obligation to decide the referred matters within the stipulated time; in

the event of failure new arbitrators were to be nominated (Section XVII). The arbitrators lacked real judicial powers. For instance, they had to file an application before the Collector in order to issue summons (Sections XVI, XVIII). After the examination of witnesses on oath, the arbitrators would deliver a full and complete award by majority (Section XX). The arbitrators received reasonable fees for their services. Fees were to be paid and fixed by the Collector subject to the orders of the Commissioner or any other superior revenue authority (Section XXI).

The award specified the amount and particulars of the compensation. Also, it was to calculate the damage sustained by the interested persons with respect to any adjoining land (Section XXIV). It mentioned persons entitled to compensation and the proportions in which they were entitled. Additionally, the award specified the costs of arbitration along with the fees of the arbitrators and the share of the parties in the costs. The Government was bound to pay all the costs, if the awarded compensation was equal to or below the compensation determined by the Collector previously (Section XXII). After the arbitral award, the compensation was paid. In the case of arbitration, the possession preceded the payment of compensation. But, if the award was determined by the Collector without arbitration, the compensation was to be paid at the time of possession (Section XXVII). Matters before arbitration were to receive a six per cent per annum interest for a period between the possession of the land to the date of the final award (Section XVII). The award passed by the arbitrators was final and irreversible except on the grounds of corruption or misconduct on the part of the arbitrators. These charges against the arbitrators were to be filed before the Civil Court within three months from the date of the award (Section XXXI). If the allegations were proven right, then the matter was referred to another set of arbitrators as determined by the Act. After the finalization of the award or reference to the arbitrators, the Collector would be empowered to take an immediate possession of the land (Section VIII). In the presence of any impediments to secure an immediate possession, the Collector was to approach the Magistrate to enforce the surrender of the land (Section IX). The Act incorporated a provision for the temporary occupation of an adjacent land of any road, canal or railway not beyond one hundred yards from the centre of such road, canal or railway. Compensation was to be paid for such a temporary occupation to the interested persons (Section XXXVII). This Act was amended by Act II of 1861 which repealed the provisions relating to the temporary

occupation and use of the adjacent land; the Collector under Section IX obtained the authority to refer the matter to the Magistrate in order to enforce the surrender of the land.

Overall, the Act of 1857 was the first consolidated land acquisition law for the whole of British India. It was mainly introduced with an object to bring uniformity with the decisive political advancement of the British. Land was acquired without consent for public purpose. However, consent was needed for the acquisition of buildings. Moreover, the public was not defined. It ensured compensation; however, it did not guarantee just and full compensation. Nevertheless, for the first time it provided additional interest on the compensation. It retained the arbitration proceedings and their decision regarding compensation was deemed as final and irreversible.

#### *3.3.2.2. Act X of 1870*

The Act of 1857 did not survive for a long time. It was repealed by Act X of 1870 (Parliamentary Papers 1870). The Act of 1870 came into force on June 1, 1870. It contained fifty-nine Sections divided into eight parts. This Act introduced many principal changes. The Preamble of the Act stated:

> Whereas it is expedient to consolidate and amend the law for the acquisition of land needed for public purposes and for Companies, and for determining the amount of compensation to be made on account of such acquisition.

It defined land as things that are attached to the earth or permanently fastened to anything attached to the earth or benefits arising out of it. The Act acquired land for public purpose and additionally enlarged its scope to include companies within its ambit.

The local government was to initiate the acquisition proceedings by issuing a notification (Section 4). The notification merely specified that the land was likely to be needed for public purpose and it was published in the Local Gazette. After notification, the Collector issued a public notice in the nearby locality in which the land was situated. Then, the authorised officer was to enter the propertyfor surveying the suitability of the land for the notified public purpose (Section 4). During the survey, if the interested person suffered any loss, then the concerned officer was to compensate him for it. In this regard, the decision of the Collector was to be final (Section 5). This aforesaid process was applicable only to normal land acquisition. In

the case of a land acquisition for the Company, the process was to commence with a declaration (Section 6), rather than notification. The acquisition of land for the Company was subject to – (1) the rules of the Governor-General-in-Council; (2) The survey report conducted by the local government through an officer; (3) The consent of the local government; and (4) The execution of the agreement by the Company with the Secretary of State for India-in-Council. The local government authorised land acquisition if it was satisfied through enquiry that – (1) the acquisition involved the construction of some work; (2) the work was likely to prove useful to the public; (3) the payment to the Government of the cost of the acquisition; (4) the transfer, on such payment, of the land to the Company; (5) the terms on which the land was to be held by the Company; (6) the time within which, and the conditions on which, the work was to be executed and maintained; and (7) the terms on which the public was entitled to use the work. After the execution of the agreement, the enquiry report had to be published in the Gazette of India and the Local Official Gazette (Section 50).

A valid declaration demanded the fulfilment of certain prerequisites: (1) it required the signature of the Secretary ofthe local government; (2) it was issued only if the compensation was paid out of public revenues or the municipal fund or by a company; and (3) it was to be published in the local official gazette and had to specify the district or other territorial division in which the land was situated,its purpose, approximate area and plan. The declaration was considered as the conclusive evidence for the purpose that the land was needed for public purpose or for Company. After the issuing of the declaration, the Collector marked the land and issued two notices: one to the general public and another, a special notice to the occupier to settle claims by appearing on the specified date (Section 9). Any intentional omission to file a statement of claim under the Act was declared an offence (Section10). On the fixed date, the Collector was to conduct a summary enquiry in the presence of all the interested persons and determine the compensation (Section 11). If all the interested persons agreed on the tendered amount, then the Collector would pass an award (Section 14). Failure to reach consensus resulted in a reference to the Court. However, this did not preclude the Government from taking possession of the land. Such a possession was to be free from all encumbrances (Section 16). Reference to the court would lie if the case involved issues relating to (1) absence of claimants (2) title or conflicting claims between the interested persons (3) disagreement on compensation

between the Collector and the interested persons (Section 15). On reference, the Court issued a notice to the Collector and the interested persons to appoint two qualified assessors each (Section 19). Any failure of the parties to nominate assessors would ultimately delegate the power of nomination to the Court (Section 20). The assessors received fees for their services which did not exceed beyond five hundred rupees as determined by the judge (Section 31). Further, the proceedings were to be held in an open court (Section 23). The assessors were to assist the Judge only for determining compensation (Section 39). They were to have an indecisive voice in the judicial adjudication on the questions of law (Section 28) and title (Section 39).

The decision of the Court was final in the matters relating to – (1) the question of law or practice or usage having the force of law (Section 28); and (2) the amount of compensation determined by the judge and mutually agreed to by one or both of the assessors (Section 29). Nevertheless, an appeal was preferred against the decision of the Court, when there was a difference of opinion between the judge and both assessors as to the amount of the compensation (Section 30). Generally, the appeal was referred to the District Judge, but if the compensation amount exceeded five thousand rupees then the appeal would be filed before the High Court (Section 35). Moreover, the Court had the authority to decide only the issue of apportionment (Section 38). An appeal against apportionment would be filed before the High Court (Section 39). After the case was finally decided by the Court, the Collector was to make the payment of compensation and take the possession of land (Section 40). In case the land was acquired under urgency under Section 24(1), then the Collector in addition to the compensation was to pay an additional fifteen per cent amount on the market value (Section 42). If the possession preceded the final determination of compensation, then under such circumstances, the Collector paid an additional six per cent interest per annum on the award from the date of taking possession of the land. Costs of the judicial proceedings were either to be paid by the Collector or the interested person (Section 32). Where the compensation amount determined by the Court did not exceed the sum tendered by the Collector then the costs were to be paid by the interested person, but if the compensation exceeded the amount determined by the Collector then the Collector was to bear the costs (Section 33). Moreover, the Act specified certain norms over and above the structural framework of award; like the

award was to be in writing; it had to be signed by the judge and assessors; there was a specified amount of compensation as well as the amount of costs (Section 34).

Moreover, the Act, for the first time, under Sections 23 and 24, incorporated the elements for determining compensation. These sections addressed the relevant and non-relevant factors, respectively, for determining the compensation. Section 23 enumerated four factors that the authorities were to positively consider while awarding compensation: (1) market value at the time of awarding compensation; (2) any damage arising out of the severance of land from another land at the time of awarding compensation to the interested person; (3) any damage sustained by the interested person at the time of awarding compensation by reason of the acquisition injuriously affecting his other property, whether moveable or immoveable, in any other manner, or his earnings; and (4) reasonable expenses arising out of change in residence of the interested person as a result of the consequence of acquisition. Section 24 described seven factors that were irrelevant or not to be taken into consideration by the authorities: (1) degree of the urgency of acquisition; (2) disinclination of the owner to sell the land; (3) damage sustained by the interested person caused by a private person; (4) prospective damage arising in consequence of or the use to which the land acquired would be put to in the future; (5) increase in the value of the land acquired from the use to which it would be put; (6) increase in the value of another land from the use to which it would be put; and (7) improvements or outlay commenced or effected with the intention of enhancing the compensation.

Besides the above relevant and non-relevant factors, the Act additionally propounded three rules which the judges had to contemplate while determining compensation. These were – (1) the authorities were not to award any compensation beyond the amount claimed by the interested person and also not less than the amount tendered by the Collector; (2) where the person interested refused to make a claim or omitted to do so without sufficient reasons then the compensation to be awarded may be less than the amount tendered; and (3) if the person interested omitted the claims with sufficient reason, then the compensation was to exceed the amount tendered (Section 26). These rules were made equally understandable to the assessors before the formation of any opinion. The Collector, judge and assessors had to consider the above factors and rules while fixing the compensation.

Another change introduced by the Act was the incorporation of an urgency clause and a provision for temporary land acquisition. Under the urgency clause, the Collector acquired a waste or arable land for public purpose or for the Company after a short notice of a mere fifteen days (Section 17). Further, the Act provided a temporary acquisition of the waste and arable land for a period of three years. The Collector conducted a temporary acquisition for a public purpose or company on the order of the local government. For the occupation, use and materials, the Collector immediately issued a notice and paid compensation in gross sum or on monthly basis or other periodical payments as agreed to by the interested person in writing. Any disagreement was to result in a reference before the Court (Section 43). After reference or payment or agreement, the Collector took possession of the land. On expiration of the term of three years, he would restore the land to the interested person. But, if the land appeared permanently unfit to serve the previous purpose, the local government was to acquire it permanently for a public purpose or for Company with the consent of the interested persons (Section 44). In case of any conflict over the conditions of land, the Collector was to refer the matter to Court (Section 45). A similar provision existed in Act II of 1861; however, it prescribed the land limit to be not above one hundred yards. No land limit was laid down in the Act under discussion, except a time limit of three years. Further, Section 54, inserted later, stated that if the Government after the award or reference failed or declined to complete the acquisition then the Collector was bound to pay compensation to the interested persons (Section 54). Moreover, Section 58 declared the award as final which could not be set aside by filing fresh suits as was permitted under the previous legislations on the grounds of corruption. This explicitly indicated the proceedings under the 1870 Act as final.

Overall, the Act for the first time – proposed land acquisition for companies, introduced urgency clause, established adjudication by District court and High Court, and laid down factors for the determination of compensation. It incorporated the procedure for such an acquisition and ensured compensation. However, the compensation was neither just nor of full value. As against the previous laws, it made a significant change in the arbitration procedure. It replaced active arbitrators with passive assessors. Government possessed sole authority in determining land acquisition for company and urgency clause. With the guidelines issued to the Court

under the Act, nothing was left to the court to exercise discretionary powers.A partial shift was made from an adversarial to a non-adversarial adjudication as the Collector became more active and empowered.

### *3.3.3. Stability or the Final Phase*

The Act of 1870 was finally repealed and replaced by the Act of 1894. The Land Acquisition Act of 1894 was the final land acquisition law under the colonial rule. While introducing the 1894 Act, the colonial lawmakers in the *Statement of Objects and Reasons to the Act of 1894* cited the following reasons which had rendered the 1870 Act as insignificant: (1) The 1870 Act was enacted with the ultimate object to curb a lamentable waste of the public money. As a result, the Act attempted to stipulate the arbitrators' uncontrolled discretionary powers, in particular so that if no appeal was provided against then, then their decision would be final; it also strived to overcome the corruption and incompetency of the arbitrators that had previously existed (i.e. before 1870) due to the absence of guiding principles regarding the performance of duties. Therefore, it contained detailed instructions of relevant and non-relevant matters for the determination of compensation. In view of the foregoing apprehensions, the 1870 Act had introduced many changes which could not survive as the government felt perturbed by the unintended outcomes. (2) The outcome of the 1870 Act, according to the government, was that: it increased the cases before the court, as the Collector referred every petty difference of opinion on the value of the land and of non-appearance of any interested person before it to the court. This, in fact, frequently affected the owners of small land-holdings, as they had to bear the brunt of the costs of the court. At times, the costs exceeded the value of the land itself. (3) It was also observed that the Act encouraged the interested persons to make exorbitant and speculative claims in order to seek high compensation. This was also contributed to by the fact that the claimants had little chance of paying the costs of the court; hence, they risked challenging every order for reference including a liberal offer made by the Collector. This was equally applicable to the payment of interest as well. Eventually, this led to protracted proceedings.

With the fundamental object to overcome public expense and reduce litigation, the colonial legislators introduced the 1894 Act with the following objectives: (1) the Collector's award was declared to be final unless altered by a regular suit before the

Court. It was believed that the finality of the Collector's order would get the better of all frivolous claims instituted in the previous legislation; (2) assessors were eliminated as it raised difficulty in obtaining qualified assessors with a sound opinion on the valuation; (3) as a result, the framers invested their confidence in the Collector and the Judge while replacing the assessors. Both the Collector and the Judge, under the new Act, were believed to be perfectly competent in terms of adjudging the valuation of land. Moreover, it was also considered that the absence of assessors would not hamper the landowners' interests, as the presence of the Court or the Judge as an independent authority would safeguard them. Interested persons were entitled to challenge the Collector's decision in an appeal before the Judge.

Finally, the framers strongly assumed that the incorporation of the new law did not diminish the efficiency of the court determining the land valuation, rather it would diminish public expenses and tend to shorten the litigation process. So, with the twin objects of shortening the litigation process and reducing the public expenses, the 1894 Act was passed. Although the Preamble of the Act did not contain any of the foregoing objects, the provisions certainly intended to achieve the above-mentioned goals. The Act came into force on March 1, 1894. According to its Preamble, it was striving to achieve two objectives: (1) it amended the law for the acquisition of land needed for public purposes and for companies, and (2) it determined the amount of compensation for land acquisition.

The provincial government initiated the land acquisition proceedings. At the outset, the government conducted preliminary investigations to ascertain the suitability of the land in terms of the intended public purpose. The provincial government issued a notification and published it in the official gazette. That notification categorically mentioned that the land was required for public purpose. As soon as the notification was published, the Collector was to issue a public notice containing the substance of the notification at convenient places in the locality in which the land was situated (Section 4). That notice empowered the concerned officers to enter the land and conduct a preliminary investigation regarding the suitability of the land to the immediate public purpose mentioned in the notification issued by Provincial Government. However, before entry, a seven days' notice was to be mandatorily issued to the occupier of a land with an enclosed court or garden or a building attached to the dwelling house (Section 4). The concerned officers through a

preliminary investigation examined, marked, surveyed and determined the fitness of the land. During such entry, if any damage was caused to the property then the owner would be entitled to damages (Section 5). No objections were allowed against land acquisition until 1923, when Section 5A was inserted through the Land Acquisition Amendment Act. It empowered the interested persons to file objections against the land acquisition before the Collector after the Collector had issued a notice and rendered the opportunity of hearing to the interested persons.

After the preliminary investigation, a declaration was issued. It was made by the local government under the signature of the Secretary and published in the official gazette. It clearly signified that the land was certainly needed for a public purpose or company. The distinction between 'preliminary investigation' under Section 4 and 'declaration' under Section 6 was that the former merely relied on the likelihood or probability of public purpose but in the latter case the public purpose was certain. Further, for a valid declaration, the compensation for the seized property had to be paid by a company or drawn wholly or partly from public revenues or out of funds controlled and managed by a local authority (Section 6). In terms of composition, the declaration included a physical description of the land i.e. the name of the district or territorial division in which the land was situated, the approximate area and the purpose for which it was needed (Section 6(2)). Beyond this physical description, the declaration generated a vital consideration i.e. it was assumed and interpreted as conclusive evidence that the land acquisition involved a public purpose.

After declaration, the Collector on behalf of the local government was to initiate the land acquisition process (Section 7). First, the Collector issued a public or general notice at convenient places near to the land which stated that the government intended to take possession of land and as a result was inviting any compensation claims or any interest in the land. Additionally, it issued a special notice to the occupier to establish any claims. All interested persons including occupiers had to appear before the Collector on the fixed date either in person or through an agent. They had to establish their respective interests in the land, compensation claims and objections, if any, to the measurement of the land in writing to the Collector (Section 9). Any false claims amounted to intentional omission and attracted a penal offence under Sections 175

and 176 of the Indian Penal Code[20] (Section 10(2)). On a fixed date, the Collector would conduct an enquiry and finally pass an award. In the award, the Collector determined the true area of land, compensation and the apportionment of the said compensation (Section 11). The award was final and conclusive evidence between the Collector and the interested persons. It was irrelevant whether all interested persons respectively appeared before the Collector or not. Finally, the Collector gave an immediate notice of the award to the interested persons (Section 12(2)). However, the Act did not mention the notice to be in writing. After the award was made, the Collector took possession of the land (Section 16). Moreover, if the interested persons accepted the award without protest then the award was regarded as final on the part of the claimants also. But, if the interested persons filed an application within the specified time period to the Collector for reference, and disagreed over the award, then the award was not binding. An application for reference had to be filed before the Collector. Objections against the award can be raised on the ground of: (1) the measurement of the land, (2) the amount of the compensation, (3) persons to whom it was payable, and (4) the apportionment of compensation against the interested persons (Section 18). After the interested person(s) had filed an application for reference, the Collector submitted a statement to the Court along with reference that included the details regarding: (1) the situation and extent of land with the particulars of any trees, building or standing crops; (2) the names of the interested persons in the land; (3) the amount tendered and the amount awarded in the compensation; and (4) if the objection was related to the compensation then the grounds on which the compensation was determined (Section 19). After Collector made a reference to the court, the Court served notice to the applicant, all interested persons and the Collector who had to attend the proceedings on the fixed day (Section 20). Moreover, the inquiry under the proceedings was to be confined to the interests of the affected persons and as per the filed objections (Section 21). At the end of the inquiry, the court passed an award, which was in writing and specified the grounds of decision (Section 26). Any interested person dissatisfied with the Court's award was entitled to challenge it before the High Court. However, after Amendment XIX of 1921 the

[20]Section 175 of the Indian Penal Code provides a penalty for an intentional omission to produce or deliver up any document to any public servant. Section 176 provides a penalty for the intentional omission to give any notice or to furnish information on any subject to any public servant. In either case, the offender may be punished with a simple imprisonment for one month, or a fine not exceeding five hundred rupees, or both.

appeal from the High Court was extended furtherto His Majesty-in-Council (Section 54). As soon as the decision was finalized, the Collector would tender the payment of the amount and the interests thereof (Sections 31 and 34).

With respect to land acquisition for a company, a distinct procedure was adopted. Two important qualifications were imposed viz., (1) the company had to seek a previous consent from the local government, and (2) the company had to execute an agreement with the local government (Section 39). On the fulfilment of these two conditions, the local government would authorize any officer of the company to conduct a preliminary survey with the powers equivalent to those under Section 4 (Section 38). Additionally, the Land Acquisition Amendment in 1933 entrusted the companies to acquire land for industrial concerns such as erecting dwelling houses for workmen or for the provision of the amenities directly connected. But this power was authorized only for those companies which did not have less than a hundred workmen (Section 38-A). With regard to the consent of the local government, an enquiry conducted by it had to explicitly suggest that the land needed for some construction work was likely to prove useful to the public (Section 40). Later in 1933, the construction of dwelling houses and amenities were added. Upon satisfaction, the local government and the company entered into an agreement which was published in the official gazette. An agreement would specify the payment of money by the company to the government, the transfer of land to the company, the terms on which the company acquired the land, the time limit for the construction of work and the conditions for the execution of work and for public use (Section 41). Finally, the local government delivered the land to the company (Section 42).

Moreover, the Act also adopted a distinct land acquisition procedure in urgent or contingent situations and for a temporary occupation of a waste or arable land. On the direction of the provincial government, the Collector issued a fifteen days' notice. After a lapse of the notice period, the Collector acquired the arable or waste land for public purpose or for a company. The possession vested with the Crown. The significant feature of the urgent acquisition was the non-application of Section 5A i.e. a filing of the objections was dispensed with (Section 17). Further, under a temporary occupation of a waste or arable land for public purposes and for a company, the Collector on the directions of the provincial government issued a notice to the interested persons and occupied the land for a period not exceeding three years. The

Collector paid a compensation for the occupation and removal of the material and executed an agreement thereto. In case of any difference over compensation or apportionment, the Collector would refer the matter to the Court and was authorized to occupy the land (Section 35). On the expiry of the three-year period, the Collector restored the land to the owner. However, if the land had become permanently unfit in terms of using it for previous purposes then the provincial government would occupy the land permanently (Section 36). Any dispute on the condition of land was to be referred to the Court (Section 37).

Besides the above-mentioned procedure, the Act distinctly enumerated the relevant and irrelevant factors for the determination of compensation. The relevant factors were: (1) the market value of the land at the date of publication of the declaration under Section 6 (this ground was amended in 1923 wherein ‘declaration’ was replaced by ‘notification’ under Section 4); (2) the damage suffered by the interested person as a result of the taking of any standing crops or trees which were on the land at the time of the Collector’s taking possession thereof; (3) the damage suffered by the interested person at the time of the Collector’s taking possession of the land due to the severing of such land from another land; (4) the damage sustained by the interested person at the time of the Collector’s taking possession of the land, that injuriously affected another property belonging to him that was either movable or immovable, or earnings; (5) reasonable expenses incidental to change, if the interested person was compelled to change his residence or place of business as a result of the land acquisition; and (6) any bonafide damage that resulted from a decrease in the profits of the land between the time of the publication of the declaration under Section 6 and the time of the Collector’s taking possession of the land (Section 23).

On the other hand, the irrelevant or extraneous factors included: (1) the degree of urgency that caused the land acquisition; (2) any unwillingness or reluctance of the person interested to submit the acquired land; (3) any private damage caused by a private person to the interested person; (4) any damage caused to the acquired land after the date of the publication of the declaration under Section 6, as a result of the intended use; (5) any increase in the value of the acquired land due to the likely and prospective use of such land; (6) any increase to the value of the other land of the person interested that had risen in all likelihood from the use to which the land acquired was to be put; and (7) any outlay or improvements in the land or disposal of

the acquired landwithout the consent of the Collector after the date of publication of the declaration under Section 6 (this limitation was amended in 1923 and replaced 'declaration' with 'notification' under Section 4).

Besides the above relevant and irrelevant factors in determining compensation, the Act also established additional rules to be followed by the Court in determining compensation. They were (1) the Court was not to award any compensation above the amount claimed by the interested persons pursuant to the notification under Section 9 and not less than the amount awarded by the Collector; (2) if the interested person refused to make a claim or omitted without sufficient reasons to make it then the Court was not to award an amount above that awarded by the Collector; and (3) if the applicant had omitted to make a claim for sufficient reasons then the Court awarded the amount above that determined by the Collector (Section 25).

Overall, the 1894 Act retained certain common features of the 1870 Act such as public purpose, market value, compensation, reference to the court, land acquisition for company and a temporary purpose where the government possessed unilateral powers. The 1894 Act extensively differed with the predecessor in terms of its substantive objectives specified in the *Statement of Objects and Reasons to the Act of 1894*. It solely strived to achieve stability and curb lamentable waste of the public money. Such waste of public money was identified in following areas – (1) arbitrators viewed as incompetent, corrupt and exercised wide discretionary powers; (2) enormous increase of cases the resulted into high cost of proceedings; (3) interested persons made exorbitant and speculative claims to seek high compensation. To overcome and ensure economic efficiency, the Act: (1) entrusted the Collector with unlimited powers such as to make final award among others; (2) removed the assessors and replaced them by adversarial judges who were considered as independent to safeguard the landowners' interests; (3) shortened the litigation process.

In sum, the replacement of arbitrators by competent and independent judges appeared superfluous, since there was nothing in the 1894 Act that substantively entrusted them with any powers. The scheme of the Act of 1894 favoured imperial policies comprehensively. An economic feasibility through adversarial practice was preferred for the obvious reason of reducing the public expenses in the form of compensation

and reducing the delay in litigation matters. As a result, the system of assessors that had existed in the 1870 Act was completely eliminated under the 1894 Act. The whole transition of laws from 1824 to 1894 was from an adversarial to a non-adversarial procedure, suited as it was to the imperial rule. While maintaining stability, the 1894 Act was amended six times i.e. by Act X of 1914, Act XVII of 1919, Act XXXVIII of 1920, Act XIX of 1921, Act XXXVIII of 1923 and Act XVI of 1933.

As the *Statement of Objects and Reasons to the Act of 1894* mentioned that the presence of independent judicial authority will safeguard the interests of the landowners in absence of arbitration proceedings, the next section traces the role of judiciary in safeguarding these interests of the landowners in the interpretation of the Act from 1894 to 1950.

### 3.4. Colonial Judicial Practice and Land Acquisition Act 1894: 1894 to 1950

This section examines the decisions of the Privy Council and High Courts from 1894 to 1950. Through these decisions, this section highlights – issues that were brought before the court, judicial precedents evolved and applied in resolving eminent domain issues, and judicial trends and interpretation. Privy Council and High Courts were statutorily empowered to interpret the Act. The *Statement of Objects and Reasons to the Act of 1894* intended the judiciary to be independent enough to safeguard the interests of the landowners, but how independently the judiciary performed is the subject of enquiry of this section. Additionally, the examination also appears pertinent for the reason that the law was retained in post-independent India and so did the colonial judicial precedents.

To begin with the interpretation of the nature of the Act, the Privy Council in *Balwant Ramchandra Natu and Others v. Secretary of State*[21] and *Ezra v. Secretary of State*[22] described the true nature of the 1894 Act. The apex court mentioned that the Act embedded the principle of eminent domain. In both the cases, the Court reaffirmed the

[21](1905) I.L.R.29 Bom.480. In this case, the appellants challenged the decision of the District Court Poona that had dismissed the challenge against the government order to declare the *inam* land under the Indian Forest Act 1878 as reserved forest.

[22](1905) I.L.R.32 Cal. 605. The plaintiff challenged the land acquisition of the premises in Calcutta. The Government had proposed to acquire land for the Bank of Bengal, a company incorporated under Act XI of 1876, on agreement. The plaintiff demanded a mandatory injunction for restraining the Government against the acquisition.

doctrine of *Salus populi suprema lex* i.e. public interest prevailed over private interest as envisaged in the 1894 Act. The Government was declared as the final arbiter in determining land acquisition under the Act.[23] The courts had a limited role to play i.e. merely of effectuating the intention of the legislature.[24] Similar observations were made in *Shivram Udaram v. Kondiba Muktaji*[25] and *Sham Lal v. Hira Chand*[26]. Moreover, the judiciary termed the Act as a special law. As a result, the statutory remedy under the law was strictly interpreted in the absence of an alternative remedy.[27] Further, in *Imdad Ali Khan v. The Collector of Farakhabad*[28], Justice Straight mentioned that the Act strived for a speedy disposal of cases with a determination of compensation.[29] Moreover, Justice Mookerjee in *Bhandi Singh v. Ramadhin Roy*[30] described the exhaustive scheme and scope of the 1894 Act. He laid down three propositions underlying the Act: first, the local government was authorized to acquire land for public and for other purposes; second, a private person possessed the corresponding right to receive compensation for the confiscation of property; third, it created a special jurisdiction wherein the special Civil Court determined the measurement of land, the amount of compensation, the appropriate claimants and the apportionment of compensation.[31] However, until 1923, no landowner was expressly entitled to challenge or file objections against land acquisition. It was only after the insertion of Section 5A through amendment that the owner was entitled to file limited objections against public purpose i.e. only if the acquisition usurped the requirements laid down in Section 40. Section 40(1) specified the essential requirement for acquisition of land for companies – that it should involve

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[23] Supra 21, at 506.
[24] Supra 23, at 506.
[25] (1884) I.L.R.8 Bom.340: Legislature was the sole authority to determine the public interest. In this case, an agriculturist's interest was safeguarded from the creditors through the Dekkhan Agriculturists Relief Act 1879 that retrospectively prohibited the sale of the immovable property of the agriculturists.
[26] (1885) I.L.R.10 Bom.367: Suit instituted for the recovery of debt. The appellant challenged the recovery under the Dekkhan Agriculturist Relief Act 1879 as a special legislation with certain public interest. Although the court dismissed the appeal on the grounds of the absence of a true character of the agriculturist, the role of legislature to promote the public interest was ascertained.
[27] Hammersmith and City Rail Co. v. Brand (1869) L.R. 4 H.L. 171; Fremantle Corporation v. Annoys (1902) A.C. 213.
[28](1885) I.L.R. All. 817.
[29]In this case, the Collector's reference power to determine the title was challenged. The court allowed the appeal on the grounds that the reference was entertained on the grounds of ascertaining the compensation (819).
[30] (1906) 10 C.W.N. 991: Land acquired for the purposes of railway. The issue before the court was the sustainability of a separate civil suit vis-à-vis a reference under Section 18 for the apportionment of compensation. The court held a reference under Section 18 as an appropriate remedy for claiming the apportionment of compensation.
[31]Ibid.

any public purpose or work that in all likelihood proved to be useful to the public. Irrespective of the objections raised, Section 5A(2) rendered the decision of the provisional government as final. In the event of any dispute, the matter was referred to the Civil Court as described in *Shastri Ramchandra v. Ahmadabad Municipality*[32].

The nature of the Act, as laid down in the above cases can be summarized as – (1) the Act adopted the principle of eminent domain; (2) Government declared as the final arbiter in declaring public purpose; (3) Courts possessed limited authority. (4) Act was declared as special therefore strictly interpreted; (5) its ultimate object was to initiate speedy disposal of cases; (6) No substantive objections were permitted against the land acquisition except in accordance with the statutory provisions.

The next section deals with the provisions that were significant and extensively debated before the Privy Council and the High Court. This includes public purpose, market value, compensation, reference to the court, withdrawal of acquisition and temporary occupation of land.

### *3.4.1. Public Purpose: Nature and Scope*

Public purpose was one of the essential grounds for land acquisition under the 1894 Act. Another ground was the acquisition of land for companies. Public purpose was not exclusively defined under the Act. Section 3(f) of the Act defined public purpose as "the provision of village-sites in districts in which the provincial government shall have declared by notification in the Official Gazette that it is customary for the government to make such provision". This definition was exclusive as the provincial government was entrusted with the sole authority to determine the public purpose. The court reiterated this unilateral power of the government in various decisions. In *Ezra v. Secretary of State*[33] the Privy Council held that Section 3(f) ensured a complete discretion to the provincial government to decide the public purpose; therefore, the government was considered as the best adjudicator of the general interest.[34] General interest formed the rationale in determining public purpose. In

[32] (1900) I.L.R.24 Bom.600: A suit instituted before the High Court to seek injunction against land acquisition. The municipality acquired land to facilitate an effective use of fire-engines.
[33] Supra 22, at 605.
[34] Justice Ameer Ali and Justice Stephen of the High Court observed that, "The acquisition was needed for the purpose of constructing new buildings to afford better accommodation for the transaction of the public business. The rights of the public generally are dependent upon the Government business, and the Government have considered the conditions therein inserted as sufficiently safeguarding its

*Shastri Ramchandra v. Ahmedabad Municipality*[35], the Court determined the general interest such as widening of streets, reclamation of unhealthy localities and other measures that were likely to promote public safety, health, convenience and education as a public purpose. Further, the ambit of public purpose was widened to include general interests such as accommodation of pilgrims[36], building quarters for municipality workers[37], construction of roads[38], house sites for poor people[39] and accommodation for government servants.[40] The Act empowered the local government to acquire land for company on agreement for a public purpose particularly in terms of providing dwelling houses for workmen and other acts useful to the public. The provision of dwelling houses for workmen was inserted by the Amending Act XVI of 1933 (Section 40(1) (a)).

The provincial government enjoyed a unilateral and supreme authority in ascertaining the acquisition of land and this was mainly due to three reasons: (1) the declaration under Section 6 delegated extensive powers to the government including the authority to change public purpose; (2) the ineffective publication of notification under Section 9 of the Act; and (3) the liberal construction of objections against land acquisition under Section 5A.

Section 6 entrusted the government to publish a declaration. A declaration was an expression of the supreme will of the government. It explicitly declared that a specific land was required for a public purpose. The supremacy of the government was such that, once the government published a declaration for public purpose under Section 6, its validity remained unquestionable. This view was well recognised in *Vedlapatla Suryanarayana v. Province of Madras, represented by the Collector of West*

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interests. This Court, in our opinion, has no power to enter upon a consideration of the question how far that provision sufficiently safeguards the interests of the Government or of the public, of which they are the custodians" (615).

[35]Supra 32, at 603.

[36]Amulya Chandra Banerjee v. Corporation of Calcutta, A.I.R.1922 PC 333.

[37]Municipal Corporation of Bombay v. Ranchordas Vandravandas and Others, A.I.R.1925 Bom.HC.538.

[38]Ponnaia and Others v. Secretary of State, A.I.R. 1926 Mad.1099. The suit was against a land acquisition for the ostensible purpose of making a new road between Kallal and Managiri in the Ramnad district.

[39]Supra 18, at 837. The appellant challenged a land acquisition for the construction of a house site for the Panchamas or the farm labourers in the Tanjore District. The challenge was on the grounds that the purpose was not public and the conclusiveness of the declaration was *ultra vires* of the Indian Legislature. Both the contentions were rejected and the acquisition was termed valid.

[40]The University of Bombay v. The Municipal Commissioners of the City of Bombay, (1891) I.L.R. 16 Bom.217.

*Godawari*[41]*; Ponnaia v. Secretary of State*[42] and *Veeraraghavachariar v. Secretary of State*[43]. Public purpose was valid only if the provincial government issued a declaration. However, for a valid declaration a formal satisfaction of two conditions were necessitated: (1) the declaration to be published in the official gazette; and (2) the compensation charged wholly or partly against public revenues or the funds of local authority or the funds of company. The second requirement i.e. the source of compensation was debated before the court. The source of compensation was given a greater prominence and relevance than the quantum of compensation. Although in *Chatterton v. Cave*[44] and *Ponnaia v. Secretary of State*[45] the payment of compensation of one anna from public revenue was declared hypothetical and mere evasion of law, the decision was overruled in *Vedlapatla Suryanarayana v. Province of Madras, represented by the Collector of West Godawari*[46]. The court held that even the contribution of one anna by the government towards compensation was sufficient and a valid compliance of the requirement under Section 6 of the Act. It appears that there was no substantial and reasonable interpretation of the statutory norms.

Additionally, the declaration required to fulfil other requirements such as: the nominal description of land viz., the name of the district or other territorial divisions in which the land was situated, the purpose, the approximate area and a plan. Even these additional requirements, according to the court, were nominal and non-mandatory on the government. The Court interpreted these additional requirements liberally. In *Midnapur Zemindari Co., Ltd. v. Bengal Nagpur Railway Co. Ltd.*[47] the Court

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[41]A.I.R. (32) 1945 Mad.394. Five cents of an acre of a ryotwari land in the village of Kovvali in West Godavari District was acquired for the purpose of a construction of a water channel which was required for the irrigation of three holdings of the ryotwari land cultivated by other persons in the same village. Justice Leach held that, "Sub-Section (3) of s.6 states that the declaration shall be conclusive evidence that the land is needed for a public purpose or for a company as the case may be; and, after making the declaration, the Provincial Government may acquire the land in the manner provided by the Act. Sub-Section (3) makes it quite clear that the declaration of the Provincial Government cannot be questioned in a Court of law. Of course, if the Provincial Government in fraud of its powers directed land to be acquired a suit would no doubt lie; but where there is no charge against the Provincial Government that it has acted in fraud of its powers, its action in directing the acquisition cannot be challenged in a Court of law. In answer to a direct question put by the Court the learned counsel for the appellant very property said that it could not be said that the Provincial Government had acted in fraud of its powers (395)".

[42]Supra 38, at 1099.

[43]Supra 18, at 837.

[44](1878) 3 App.Cas. 483.

[45]Supra 38, at 1099.

[46]Supra 41, at 394.

[47](28)A.I.R.1941 Cal.465. Land at Godapiasal was acquired for the purpose of excavation of morum and laterite stone for the use of the railway company. The issue was for the enhancement of compensation that was subsequently dismissed.

validated the public purpose even in the absence of a concrete plan. While dismissing the challenge, it reasoned that the plan was mainly referred for elucidation and it cannot subordinate the text of the declaration. It completely relied on the principle of *falsa demonstratio non-nocet* i.e. a false or mistaken description did not vitiate the proceedings. Further, in *Radha Swami Satsang Sabha v. Tara Chand and other*[48] the Court observed that the declaration ought to be clear and unambiguous but did not define the principle of unambiguity and clarity and thereby by implication retained the decision of the government as final as laid down by Section 6 of the Act.

As the Court rendered the government to be the sole authority in determining public purpose through declaration under Section 6, the change in public purpose was another pertinent subject for judicial liberal construction. No land acquisition was invalid on the ground of change in public purpose. In *Parshottam Jethalal Soni and others v. Secretary of State and another*[49], the Court declared that the change in public purpose was valid even in the absence of a fresh notification. In that case, the land was acquired for the construction of an arterial road. But the land remained unused for five years and subsequently was transferred to another scheme. The Court held that there was no requirement of fresh notification after the change in public purpose. No estoppel was applied against the government after the change in public purpose. The Court justified every act of the government and bestowed a statutory allegiance. A similar observation was expressed by the Court in *Secretary of State v. Amulya*

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[48]A.I.R.1939 All.557. The land was needed for dairy pasturages, etc., by the Radha Swami Satsang Sabha. The government issued a notice to the landowners. The main contention was that since the Satsang was a company, the declaration failed to specify the acquisition for the company. The Court rejected the contention partially, as the ground at the later stage could not be availed. Justice Collister at page 562 observed that, "Since s.6(1) of the Act lays down that the declaration must state that the land is needed for a public purpose or for a company, it is obvious that the declaration ought to show clearly and unambiguously whether the land is needed for a public purpose or for a company."

[49]A.I.R. 1938 Bom.148. Appellants challenged the altered land acquisition notification on the ground of *ultra vires* and illegal. Earlier the land was needed for the Kalupur Relief Road Scheme for the construction of a new arterial road through the city from the Fort of Bhadra to the neighbourhood of the railway station. But later, the scheme was cancelled and replaced with a revised scheme. The Court validated the change in public purpose as the government notified the new purpose and provided the provincial government with an absolute authority. As Justice Broomfield at page 151 held that, "In my view, there is no ground whatever for holding that there has been any illegality. What is required for a valid notification under S.4, Land Acquisition Act, is that it should have appeared to the Local Government that the land in question was needed or likely to be needed for a public purpose. It cannot be suggested and has not in fact been suggested that Government did not take that view. Similarly, what is required for a valid notification under s.6 is that the Local Government should have been satisfied that the lands notified were needed for a public purpose. There is not the faintest reason to doubt that in the present case the Local Government was so satisfied. And as provided by sub-s.(3) of S.6, the declaration which has been made by the Local Government on that occasion is conclusive evidence that the land in question was needed for a public purpose. The conditions laid down by the Land Acquisition Act are therefore satisfied."

*Charan Banerjee and others*[50]. During the same time, in England, lands were acquired under the compulsory power of statute and no change in purpose was allowed other than the originally specified purpose in the special statute. This was well recognised in *Stockton & Darlington Railway Co., v. Brown*[51]. After an examination of the judicial position on Section 6, the publication of notification under Section 9 becomes equally relevant. Notice under Section 9 was another instance where the Court conferred the government with the supreme authority. After declaration, the Collector issued two notices, one for the public and another to the specific private individual and specified the acquisition of a certain land for public purpose. However, the failure to issue notices did not invalidate the land acquisition proceedings. This view was expressed in *Sukhdev Saran Dev v. Nipendra Narayan*[52] and *Rahimbux Haji Karimbux v. Secretary of State*[53]. Moreover, the notice prescribed a fifteen-day time period within which the interested person could file objections and claims. In *Jogesh Chandra v. Secretary of State*[54] the Court observed that the interested person had to respond to the notice and possessed no right to file a separate civil suit. The importance of the notice's time period was expressed in *Rameshwar Singh v. Secretary of State*[55]. The Court held that:

> where the statute requires that notice should give to the owner a prescribe time, after the expiry of which claims and objections might not be preferred, a notice which gives a shorter time is in contravention of the statute and is consequently defective. The principle is that no man shall have his rights determined without the opportunity to be heard in his defence and where the statute prescribes a minimum period such time cannot be allowed to be reduced.

This expression appeared extremely contradictory with the fact that in England, during the same time, colonial legislators under Section 21 of the Lands Clauses Consolidation Act 1845 were prescribing a twenty-one-day notice period.

Section 5A was another crucial area. Section 5A was added by the Land Acquisition Amendment Act XXXVIII of 1923. The insertion of this Section resulted after the

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[50] A.I.R. 1927 Cal.874: Land in question was acquired by Calcutta Corporation near the Kalighat Temple. Initially, the land was needed for the construction of new road, but later replaced for the construction of a colonnaded dharmashala.

[51](1860) 9 H.L.C. 246.

[52]76 Cal.L.J. 430.

[53]A.I.R. 1938 Sind.6. Land acquisition was acquired for the North Western Railway. The owner and the plaintiff of the land, Rahimbux Haji Karimbux, challenged the acquisition on the groundsof non-service of the notification. The Court rejected the contention and held that the proceedings conducted by the Land Acquisition Officer were not willful and hence not void.

[54]48 I.C. 702 Cal.L.J.53.

[55] (1907) I.L.R. 34 Cal. 470: A suit was filed against land acquisition for a recovery of the compensation. Land was acquired for the purpose of a railway bridge across the river Koshi.

decision of the Privy Council in *Moosa Hajee Hassan v. Secretary of State*[56] and *Hemabai Framjee v. Secretary of State*[57] wherein the Privy Council expressed a dissenting view over the supremacy of the government. Lord Dunedin in *Moosa Hajee Hassan v. Secretary of State* stated that:

> Prima facie the Government are good judges to determine public purpose. But they are not absolute judges; they cannot say *sic volo sic jubeo* but at aleast a Court would not easily hold them to be wrong.[58]

In response, the legislature inserted Section 5A to address the judiciary's dissenting view. The *Statement of Objects and Reasons of the Amendment Act* specified reasons for the insertion of Section 5A as:

> The Land Acquisition Act I of 1894 does not provide that persons having an interest in land which it is proposed to acquire, the right of objecting to such acquisition; nor is the Government bound to enquire into and consider any objections that may reach them. The Object of this Bill is to provide that a Local Government shall not declare, under Section 6 of the Act, that any land is needed for a public purpose unless time has been allowed after the notification under Section 4 for persons interested in the land to put in objections and for such objections to be considered by the Local Government.

Although the legislative approach addressed the judicial decision and offered the interested person the option to file objections against the land acquisition, Section 5A(2) rendered the government as a final authority against the objections. The reasoning was based on the presumption that the government possessed facts which induced it to declare the purpose as public.[59] Section 5A appeared toothless; objections were raised before the Provincial Government rather than the Court, and as a result the decision of the government was declared as final.[60] Moreover, it failed to specify the grounds for objections. Indeed, the government was the sole arbiter. Further, this intentionally ill-conceived statutory right (Section 5A) was not available against land acquisition under urgency under Section 17, a temporary occupation of land under Sections 35 to 37, a requisition of additional land and land acquisition under a special or local act before 1923.

Finally, public purpose was defined as an object or aim in which the general interest of the community was directly and vitally concerned as against the particular interests of individuals. Overall, the judicial determination on public purpose can be

[56](1914) 39 Bom. L.R.279.
[57]13 Bom.L.R. 1097.
[58]Supra 56, at 295.
[59]Supra 18, at 837.
[60]*Ezra v. Secretary of State* (1902) I.L.R. 30 Cal.36.

summarized as: (1) Public purpose was not defined or interpreted; (2) it was broader concept that rendered extensive discretion to the provincial government; (3) court referred it as the general interest of the community; (4) authorised the government sole authority to determine public purpose unquestionably through declaration issued under Section 6; (5)courts maintained that the declaration can be questioned on the subjective non-fulfilment of – first, the publication of declaration in official gazette and second, compensation paid out of public funds or local funds or company. Source of compensation received judicial preference than the quantum of compensation; (6) Court rendered additional requirements under Section 6 as nominal and non-mandatory by applying the principle of *falsa demonstratio non-nocet;* (7) Although court maintained that the declaration under Section 6 should be clear and unambiguous but it did not explain the nature of clarity and unambiguity. It did not apply the principle of reasonableness; (8) Court permitted unused land acquired previously under the Act to be used for another purpose without issuing fresh notification. However, contemporary British law the Lands Clauses Consolidation Act, 1845 did not allow such change in public purpose; and (9) Although the Privy Council repudiated the supremacy of the government, the latter in the pretext of allowing interested person to file objections against the land acquisition under Section 5A, rendered itself final arbiter in deciding the claims and not the court; under Section 5A(2) as a notwithstanding clause.

### *3.4.2. Judicial Access: Reference to the Court*

Access to the court under the Act was provided through 'reference' under Section 18. Such a reference was not an absolute right per se. The judicial interpretation on the reference focused on three factors, namely—(1) a reference strictly regulated on the conditions established by Section 18 and the discretion of the Collector; (2) the scope of the reference and the burden of proof were also strictly interpreted; and (3) the judiciary kept the Collector outside judicial scrutiny by labelling this post as a non-judicial body.

Any valid reference under Section 18 required the fulfilment of two conditions: the aggrieved party was not to accept the award and the aggrieved person had to file a written application with objections before the Collector. The objections were limited only to the measurement of the land or the amount of compensation or apportionment

of compensation or legal right to receive the compensation. The courts interpreted these conditions strictly.[61] For instance, in *Secretary of State v. Hakim*[62] the court validated the Collector's order of rejection of an application on the grounds of the expiry of the time limit. The aggrieved person relied completely on the Collector for reference. At the same time, another reference existed under Section 30 for issues relating to the title and apportionment of compensation.[63] But, it was also provided on the discretion of the Collector.

Even the scope of enquiry and burden of proof under reference was strictly interpreted. Section 21 extended the reference only to such matters specified in the application and the Courts interpreted it accordingly.[64] Neither the Court suo moto nor the parties had the liberty to raise the issue after the filing of the application. For instance, if the objector sought reference for compensation, then the Court had no jurisdiction to hear the person on the issue of the measurement of land. The judiciary consistently adhered to the above-mentioned rules and this was clearly mentioned in *(Rai) Pramatha Nath Mullick Bahadur v. Secretary of State*[65] and *Secretary of State v. Fakir Mohammad Mandal and others*.[66] It was also held in *Mahadeo Krishna Parkar*

[61] Mahadeo Krishna Parkar v. Mamlatdar of Alibag A.I.R.(31)1944 Bom. 200

[62] 25 I.C. 448

[63] Hazura Singh v. Sundar Singh 97 P.R. 1919

[64] E. Taylor and another v. Collector of Purnea (1887) I.L.R.14 Cal.424. The judicial trend of merely determining issues under reference had been practiced since the early times of the land acquisition law. In this case, certain plots of land in the village of Manihari of Purnea district had been acquired for the purpose of the Behar and Assam State Railway. Justice Wilson and Justice O'Kinealy at page 429 mentioned that, "It must be borne in mind that this Act confers a special and limited jurisdiction upon various classes of people to decide those questions with which the Act enables them to deal. We need not trouble ourselves with the Sections dealing with the powers of the Collector. We have to do with those Sections which affect the powers of the Judge." This case was reaffirmed in *Ramalakshmi v. The Collector of Kistna* (1893) I.L.R.16 Mad.321.

[65]A.I.R. 1930 P.C. 64. The land acquisition for public purpose was challenged before the Privy Council on the grounds that no reasonable opportunity was provided by the Indian courts and the Collector in proving the correctness of the area. The Privy Council held that the objections were only limited to compensation and were manifestly addressed by the Collector in reference. Since the objections relating to measurement were not raised at the earliest, the appeal was dismissed. The Privy Council rendered a strict interpretation of the judicial decision in the 1894 Act. As Justice Sir George Lowndes at page 65 mentioned, "Their Lordships have no doubt that the jurisdiction of the Courts under this Act is a special one and is strictly limited by the terms of these Sections. It only arises when a specific objection has been taken to the Collector's award, and it is confined to a consideration of that objection. Once therefore it is ascertained that the only objection taken is to the amount of compensation, that alone is the "matter" referred, and the Court has no power to determine or consider anything beyond it."

[66] A.I.R. 1927 Cal.415: Land needed for the construction of drainage. In an appeal before the High Court, the issue of non-payment of compensation as a result of an erroneous Revenue Survey map was raised. The Court dismissed it as the reference was not on that ground. Justice Ghose at 416 observed, "This objection as I have already stated was not taken in the application for reference, and it has been held by this Court in several previous cases that unless an objection is specifically taken with regard to a matter stated in the award of the Collector such question cannot be urged at the time of the hearing of

*v. Mamlatdar of Alibag*[67] that the failure to comply with the above-mentioned rules rendered the application invalid and thus to be subsequently rejected. A clear picture of the judicial role in terms of reference was explained by Justice R. C. Mitter in *Ananta Ram Banerjee v. Secretary of State*[68]. He mentioned that:

> When a reference comes up for consideration he must decide, if the point is raised, (1) if the reference is competent and (2) if it is, he in determining the question of compensation payable must decide what evidence is admissible and what not and whether a party by reason of special circumstances and on established principles is precluded from leading any evidence on a particular point. These are fundamental principles to be kept in view in considering the exercise of jurisdiction of a Court.

Further, after the approval of the reference by the Collector, the challenging and crucial task was that of the burden of proof. The burden of proof in reference vested on the applicant or claimant.[69] It was held in *Biswa Ranjan v. Secretary of State*[70] *and Asst. Development Officer, Trombay v. Tayaballi Allibhoy Bohori*[71] that the claimant had to produce the evidence of numerous or at least sufficiently numerous established neighbourhood sales in order to secure the enhanced compensation claims.

Finally, a considerable debate existed over the consideration and non-consideration of the post of the Collector as judicial and non-judicial body. However, the final decision favoured the Collector as a non-judicial authority. Although many decisions such as *Secretary of State v. Bhagwan Prasad and another*;[72] *Khuman Singh v. Collector of*

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the cases before the Court. Much less can this question be allowed to be raised here in this case as this question of the fact was not raised even before the Judge below."

[67] A.I.R.(31)1944 Bom. 201. Justice Beaumont observed, "It seems to me that the Court is bound to satisfy itself that the reference made by the Collector complies with the specified conditions, so as to give the Court jurisdiction to hear the reference."

[68]A.I.R.1937 Cal.685. In the instant case, the land was acquired for the road alignment of a projected street improvement scheme in Calcutta. In terms of the burden of proof, Justice Mitter at page 685 held, "It has been repeatedly held in this Court that though the proceedings before the Collector are not strictly judicial proceedings, the Court of the Special Judge on a reference made under S.18 of the Act is in effect (though not strictly in law) the Appellate Court and the claimant who has carried the matter on reference before it must show, the burden is on him, that the Collector is wrong."

[69]Ibid.

[70]11 I.C. 62.

[71]A.I.R.1933 Bom.361.theGovernment notified the land acquisition for the development scheme of the Bombay suburban area. The special object was the construction of a light railway linkingKurla with Andheri. Among other issues, the method of valuation was challenged. While stressing the burden of proof, Justice Broomfield held at page 364 that, "The party claiming enhanced compensation is more or less in the position of a plaintiff and must produce evidence to show that the award is inadequate. If he has no evidence the award must stand, and if he succeeds in showing prima facie that the award is in adequate, then government must support the award by producing evidence."

[72]A.I.R. 1929 All.769. Justice Mukerji stated, "It was for the Collector and Collector alone to decide whether he should make a reference and the "court" had no authority under the Act to throw out the reference on the objection of the very party making the reference. As regards the question of ultra vires, it cannot be denied that it is for the Collector and Collector alone to decide whether he would make the reference. Thus, the making of a reference is an act within jurisdiction and authority of the Collector.

*Raipur*[73] and *A. K. Subramania Chettiar v. Collector of Coimbatore*[74] declared the Collector as the supreme authority in determining the reference to the Court, a contradictory view also prevailed. According to it, as expressed in *The Administrative-General of Bengal v. The Land Acquisition Collector*[75]*; Krishna Das Roy v. The Land Acquisition Collector of Pabna*[76] and *Upendra Nath Rai Chowdhuri v. Province of Bengal*[77] the Collector was declared as a judicial body, resultantly under the control of the High Court. This empowered the High Court to review the decision of the Collector—in particular the reference orders. But this view was rejected in *Best & Co. v. Deputy Collector of Madras*[78]*; S. G. Sapre and others v. Collector, Saugor*[79]*; Rafuddin v. Secretary of State*[80] and *Mushtaq Ali v. Secretary of*

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No doubt, he has certain rules to guide him. If after considering the rules and the application before him, he decides to make a reference, the reference cannot be questioned by the Court. The Collector may make a mistake in the use of his discretion, but he is entitled to decide rightly or wrongly. If he decides to make a reference, his act is within his jurisdiction, for he is entitled to act either way, i.e. either to make a reference or not to make a reference. In my opinion, therefore, the action of the Collector cannot be said to be ultra vires (771)."

[73]11 C.P.L.R. 25.

[74] A.I.R.(33)1946 Mad.184.

[75](1908)12 C.W.N.241. In this case, the Collector's order of the rejection of the reference application was termed as a judicious act rather than an administrative one. Hence, such a judicious act was subject to the revision of the High Court. Justice Henderson and Justice Mitra at page 245 stated that, "It is admitted that up to and including the time of making his award the Collector was in no sense a judicial officer and that the proceedings before him were not judicial proceedings and however irregular his proceedings were, we cannot interfere with his award made under Section 11 of the Act. But when an application is made to the Collector requiring him to refer the matter to the Civil Court, the Collector may have to determine and, it seems to us, determine judicially whether the person making the application was represented or not when the award was made, or whether a notice had been served upon the applicant under Section 12(2) and what period of limitation applies whether the application is under circumstances made within time. …In our opinion the Collector in rejecting the application was a Court and acting judicially and his order is subject to revision by this Court."

[76](1912)16 C.W.N.327. In this case *Administrator-General of Bengal v. The Land Acquisition Deputy Collector, 24 Pergunnahs (1908) 12 C.W.N. 241* was followed. The Collector committed procedural irregularities that the Court pointed out.It ordered a rectification for providing a valid land acquisition. Caspersz and Chatterjee, JJ., at page 328 mentioned that, "It would, obviously, be unjust that the Deputy Collector should refuse to obey the provisions of the Act, and to provide no remedy for the correction of his mistaken action. Where the law gives a right to a party to certain procedure, it must also be deemed to give a remedy for the rectification of any irregularities committed in that connection."

[77](1941) 45 C.W.N.792. Justice Henderson reiterated the rule of interference as valid as determined in *Adiministrator-General of Bengal v. The Land Acquisition Deputy Collector, 24 Pergunnahs (1908) 12 C.W.N. 241* in spite of the conflicts over its correctness which were challenged in *Bhagaban Das Shah v. The First Land Acquisition Collector 41 C.W.N. 1301 (1937)* and in *Gopinath Shah v.The First Land Acquisition Collector, Calcutta 42 C.W.N. 212 (1937).*

[78]20 M.L.J. 388.

[79]A.I.R.1937 Nag.12. In this case, Justice Pollock referring to *Abdul Sattar Sahib v. Special Deputy Collector, Vizagapatam, Harbour Acquisition, AIR 1924 Mad.442* and *Balkrishna Daji v. Collector Bombay Suburban AIR 1923 Bom. 290* reiterated that the Collector is not subordinate to the High Court; therefore, the court should not interfere into the Collector's reference.

[80]65 P.R. 1915.

*State and another*[81]. Finally, in *Pandit Amar Nath Bhardwaj v. Governor-General in Council and others*[82], the division bench of the High Court, Dalip Singh and Din Mohammad, JJ., cited almost all the reported decisions and held that the Collector, as per the law, cannot be treated as a court and a fortiori, he is not subordinate to the High Court. Justice Din Mohammad believed that the judiciary should strictly restrict itself to adjudicatory functions. Legislature, as a competent authority, would efficiently address the issue. Justice Din Mohammad mentioned that,

> But in my view it is not for the Courts to fill up the gaps of legislation and to provide remedies not provided for otherwise. Their function is merely to administer the law as they find it and no attempt should be made by them either to add to the law or to subtract therefrom, however just and reasonable the addition or sub-traction may appear to them to be.

The Collector's supreme authority remained intact. The Act was silent in the event of the Collector refusing the matter for reference. Thus, while establishing the reference numerous burden of proof was imposed on the claimant. The Act was silent in the event Collector refused the reference. Collector, after some contradictory decisions, finally considered as non-judicial authority that subject it beyond judicial scrutiny. Although courts strictly interpreted the reference, it followed liberal approach in terms of determination of public purpose and compensation.

### *3.4.3. Dichotomy between Market Value and Compensation*

Market value and compensation were one of the other crucial areas of the colonial eminent domain process. The judicial decisions on market value and compensation generated three vital considerations: (1) in the absence of a precise definition of market value, the Collector was declared as the final authority (2) market value was not a static concept but varied extensively with other equally recognized valuations (3) in reference, if the claimant challenged the market value, then the burden of proof was on him/her to show how it was erroneous. These three considerations are discussed below.

Firstly, under the Act, Section 23 stated that compensation was to be determined on the ground of market value at the date of the publication of the notification. But the 1894 Act did not define the term 'market value'. It was left at the discretion of the

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[81]A.I.R 1930 Lah.242. Justice Jailal relied on the decision of the divisional bench in *Rafuddin v. Secretary of State (1915) 65 P.R. 1915* and the full-bench decision in *Abdul Satar v. Special Deputy Collector of Vizagapatnam A.I.R. 1924 Mad.442* and stated that the High Court is not competent to revise the order of the Collector.

[82]A.I.R. 1940 Lah.299.

Collector. The Select Committee Report (March 23, 1893) supplied reasons for not precisely defining the market value as:

> …the introduction of a specific definition would sow the field for a fresh harvest of decisions; and no definition could lay down for universal guidance in the widely divergent conditions of India any further rule by which that price should be ascertained (Aggarwala 1950: 178).

Thus, the ultimate reason for not defining the market value was to avoid future conflicts. As a result, the Act entrusted the Collector with the liberty to decide the market value. So, in the absence of a precise definition, the term 'market value' was broadly construed as "a price a willing buyer would give to willing seller" (Aggarwala 1941: 178-179). This discretionary power of determination of compensation on the grounds of market value was highly debated in the courts. In the absence of a clear-cut method for determining the market value, the issue became highly blurred in the wake of divergent and contradictory judicial precedents.

Secondly, in the pre-1894 Law, the Court had broadly construed the market value. This was explicitly observed by it in *In the matter of the Land Acquisition Act X of 1870; Munji Kiietsey*[83]. In the instant case, the Court observed that the value of the land ought not to be determined in accordance with its present disposition but should be based on the "most lucrative and advantageous way in which the owner can dispose it during the sale".[84] Again, the most lucrative test was validated in *Fink v. Secretary of State*.[85] Besides this test, some other tests like the 'utility calculated by prudent business man'[86] and the 'speculative advance of the improvements'[87] were also prevalent. The absence of any market value guaranteed no compensation. This was held by the Privy Council in *Secretary of State v. Shanmugaraya Mudaliar*[88]. Further, the term 'market value' included assumptions with all calculated interests, as observed in *Collector of Belgaum v. Bhimrao Patel*[89]. It included the advantages and particular drawbacks of the commercial value than the abstract legal rights.[90] It did

[83] (1890) 15 I.L.R. Bom.279

[84] This principle was recognised in *Premchand v. The Collector of Calcutta (1876) I.L.R. 2 Cal.103* and later followed in *The Hooghly Mills Co. v. The Secretary of State (1903) 12 C.L.J. 489* and *The Collector of Poona v. Kashinath Khasgiwala I.L.R. 10 Bom. 585.*

[85] (1907) 34 Cal.599

[86] *Rajendra Nath Banerjee v. The Secretary of State (1904) I.L.R. Cal.343*

[87] *Secretary of State for Foreign Affairs v. Charlesworth, Pilling Co. (1901) L.R. 28 I.A. 121.*

[88] (1893)16 Mad.369. Owner of the two ancient temples had no value in the market, hence was not entitled for compensation.

[89] (1908) 10 Bom. L.R. 657

[90] *Trustees for the Improvement of the City of Bombay v. Jalbhoy Ardeshir Sett (1909) Bom.L.R. 674.*

not include the improvements made to the land.[91] However, a loss of easement,[92] homestead[93] and trees[94] always formed part of the market value. But at the same time, the courts consistently mentioned that the market value could not be mathematically precise and was certainly speculative. It was a difficult task to determine it in the absence of any established market value of a particular land.[95] This interpretation was rejected by Justice Broomfield in *Assistant Development Officer, Trombay v. Tayaballi Allibhoy Bohori*[96]. He mentioned, "It is no doubt true that the valuation of immovable property is not an exact science". A liberal approach would render value to a certain definite conclusion.[97]. A similar argument was expressed by Justice Macleod in *Frenchman v. The Assistant Collector, Haveli*[98] wherein he stated that the expert or a court should adopt a liberal approach in terms of fixing the market value with a quasi-scientific guess. In the light of different valuations, the Privy Council, as an apex court, held that it would only entertain the principle and not the valuation.[99] Overall, the general consensus on the market value was in terms of the value to the owner.

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[91] *Collector of Hooghly v. Raj Kristo Mookerjee 22 W.R. 234; Secretary of State v. Kartic Chandra Ghosh 9 C.W.N. 655.*

[92] *E Taylor v.The Collector of Purnea (1887) I.L.R. 14 Cal.424.*

[93] *Fink v. Secretary of State*(1907) 34 Cal.599.

[94] *Sub-Collector of Godavari v. Seragam Subbareyadu (1907) 30 Mad. 151.*

[95] *Secretary of State v. Charlesworth Pilling and Co. (1901) I.L.R. 26 Bom.1.*In this case, the Privy Council observed, "It is quite true that in all valuations, judicial or other, there must be room for inference and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others.... In such an enquiry as the present, relating to subject abounding with uncertainties, and on which there is little experience, there is more than ordinary room for such guess-work; and it would be unfair to require an exact exposition of reasons for the conclusions arrived at."It was approved in *Secretary of State v. Altaf Hossein A.I.R.1927 Cal.827.*

[96] A.I.R.1933 Bom.361.

[97] Ibid. Justice Broomfield at page 364 observes that, "But I can call in aid the general tenor of the judgments of that learned Judge in land acquisition cases to support me when I say that the Court is bound to treat the matter judicially as far as possible and it should only guess when science or common sense will not point to a definite conclusion. The Judge ought to be liberal in the sense that he should not be too meticulous or pedantic in dealing with the evidence. The value of property should not be unduly depreciated in order that Government may acquire as cheaply as possible, and seeing that an exact calculation to annas and pies is usually impossible, the Court is justified in taking a broad view as favourable to the owner as the evidence permits. But, as in the case of any other judicial proceedings, the findings must be based upon evidence and legitimate deductions from it, and if there is an appeal, both the evidence and legitimate deductions are subject to reconsideration by the appeal Court."

[98] A.I.R. 1922 Bom.399: 24 Bom.L.R. 782.

[99] *Nowroji Rustomji Wadia v.The Government of Bombay (1925) P.C. 211.*In 1917, the Bombay Municipality acquired land for the purposes of building a hospital. The issue related to the valuation of compensation.Justice Lord Sumner stated, "The value to be placed at a given moment on a plot of land, which is not in the market or the subject of bargain and sale, but owes a large part of value it possesses to the prospective results of development work, to be undertaken thereafter at an uncertain time and at an estimated cost, is not only in its essence a question of fact but is one upon which, almost above any other, opinions will differ, without its being possible to give irrefragable reasons for any particular conclusion. Appeal in valuation cases will only be entertained on question of principle (212)."

Besides market value, certain other methods were evolved through judicial pronouncements.[100] In 1890, the court while dealing with the issue of compensation in *In the matter of the Land Acquisition Act X of 1870; Munji Kiietsey*[101] recognized three methods of valuation.[102] Later in 1907, Justice Mitra and Justice Casperz in *Harish Chunder Neogy v. Secretary of State*[103] laid down another three methods of valuation – (1) through the experts' or valuators' opinion; (2) a reasonable price paid in a bonafide transaction of the purchase of the lands acquired or the lands adjacent to the acquired land and with similar advantages; (3) a number of years' purchase of the actual or immediately prospective profit from the lands acquired.[104] The combination of two or more of these methods of valuation was presumed to offer a fair determination of compensation although it might not be practically exact.[105] Even then, the valuations of land were a hypothetical, remote, speculative and conjectural development of the land.[106] Finally, in *Hindusthan Co-operative Insurance Society Ltd. v. Secretary of State*[107] the court ruled that there cannot be a uniform rule for the determination of market value and therefore the mode of valuation was to be determined by the Collector, wherein he had to consider the nature of the property. So, other methods such as a potential value of the land, its special adaptability and the principle of re-instatement were adopted.

Thirdly, once the Collector determined the market value, his decision was regarded as final. If the interested person disagreed with the award, then a reference was provided and ultimately the burden of proof was on the claimant. Therefore, the rule of

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[100]*Amrita Lal Bysak v. Secretary of State* 22 I.C. 78.
[101]Supra 83, at 279.
[102] Justice Farran at pages 232-233 observed three methods of valuation as, "The recognised modes are: (1) If a part or parts of the land taken up has or have been previously sold, such sales are taken as a fair basis upon which, making all proper allowances for situation, and to determine the value of that taken. (2) To ascertain the net annual income of the land and to deduce its value by allowing a certain number of years purchase of such income, according to the nature of the property. (3) To find out the prices at which lands in the vicinity have been sold and purchased, and making all due allowance for situation, to deduce from such sales the price which the land in question would probably fetch if offered for sale to the public."
[103](1907) 11 C.W.N. 875.
[104] These methods of evaluation were again recited in *Karachi Municpality v. Naraindas* A.I.R. 1933 Sind 57.
[105]Supra 96, at 376.
[106]*In re Merwanji Cama (1907) 9 Bom.L.R.1232; Government of Bombay v. Merwanji Muncherji Cama (1908) 10 Bom.L.R. 907.*
[107]A.I.R.1930 Cal.230. The obiter dictum was drawn from the decisions in *Trustees for the Improvement of the City of Bombay v. Jalbhoy Ardeshir Sett (1909) 11 Bom. L.R. 674* and *Girish Chandra Roy Choudhury v. Secretary of State (1920) 24 C.W.N. 184.*

evidence played a significant role in the reference. In *Asst. Development Officer, Trombay v. Tayaballi Allibhoy Bohori*[108] Justice Broomfield mentioned that:

> ...if the award is not accepted and the matter is taken into Court, the proceedings are thenceforward judicial in character. The party claiming enhanced compensation is more or less in the position of a plaintiff and must produce evidence to show that the award is inadequate. If he has no evidence the award must stand, and if he succeeds in showing prima facie that the award is in adequate, then Government must support the award by producing evidence.

In *Harish Chunder Neogy v. Secretary of State*[109] it was held that the *onus probandi* varied according to the nature of the enquiry made by the Collector.[110] But, a minority view believed that the court should not place an undue share on the claimant and determine the valuation based on the weight of evidence.[111]

The approach of the court in dealing with market value and compensation was as follows – (1) courts interpreted market value as determined by the Collector. It did not define it precisely and followed the legislative reasoning that it will sow seeds for future conflicts; (2) Courts evolved diverse methods of evaluation of market value of such as 'price a willing buyer would give to willing seller', 'more lucrative and advantageous way in which the owner can dispose it during the sale', 'utility calculated by prudent business man', 'speculative advance of the improvements', among others. However, market value on neighbouring sales received more prominent place; (3) Undue burden of proof was imposed on the claimant, if the claimant rejects the Collector's determination of market value and the courts adopted a strict rule of interpretation in setting this burden of proof; (4) Reasonability of the compensation on the grounds of market value was not a major consideration of the Court.

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[108]A.I.R.1933 Bom.361.

[109](1907) 11 C.W.N. 875.

[110]Ibid. Mitra and Caspersz JJ., at page 877 held that, "Now the ordinary rule of *onus probandi* in these cases is that the claimant must prove that the valuation made by the Collector is insufficient. The theory is that the Collector in arriving at his award performs administrative and *quasi*-judicial functions. He may take evidence and come to a conclusion on such evidence. The award under sec.11 of the Act becomes final, if it is not challenged within a definite time before the tribunal of the Special Judge, and that Judge, therefore, fills the position to some extent of an Appellate Court. The burden of proof is thus ordinarily on the claimant in the Court of the Special Judge, but the burden must vary according to the nature of the enquiry made by the Collector. If no evidence has been taken by the Collector, and if no reasons have been given in his decision to support his conclusion, the claimant has a very light burden to discharge."

[111]*Fink v. Secretary of State* (1907) 34 Cal.599. Mitra and Caspersz, JJ.stated, "If however, he makes no enquiry or gives no grounds for his valuation, the burden of proof on the claimant is nominal. The Special Judge must decide according to the weight of evidence, irrespective of the question of *onus probandi* and without throwing on the claimant an undue share of it."

### *3.4.4. Temporary Occupation of Land and Land Acquisition for Companies*

Temporary occupation of land and acquisition of land for companies were other important provisions in the Act. However, the colonial courts seldom expressed any opinion in the application of this provision. In the case of temporary occupation, the land was acquired for a period not exceeding three years; however, it could be extended by administrative willingness. The Collector, on the orders of the Provincial Government, occupied the land. Such a temporary occupation dispensed with a notification under Section 4 and a declaration under Section 6. The Collector decided the compensation; in the event of any difference the matter was directly referred to court. Only during temporary occupation could the matter be directly referred to the court while no such option existed in the other cases. For instance, under Section 18, reference was preferred at the option of the party and the discretion of the Collector. In *Secretary of State v. Abdul Salim*[112] the court recognized the Collector's sole authority for deciding compensation.

In terms of the acquisition of land for companies, the Act allowed the taking of land for constructing dwelling houses and other amenities—but only on the consent of the Provincial Government as stipulated by Section 40. The immediate purposes were to be directly connected with the workmen employed by a company with the number of the workmen not being less than hundred. The object was to prevent the acts of private interests and resist the pressure on the local governments on behalf of the enterprises in which the public had no interests (Agarwala 1950: 415). On the nature of consent, the court in *Ezra v. Secretary of State*[113] held that, "the consent of the local government need not be express or formulated in terms". Moreover, the government consented to the acquisition only after an enquiry had been conducted. With regard to the nature of the enquiry, the Privy Council in *Ezra v. Secretary of State*[114] mentioned that:

> The nature of the enquiry under this Section is in no sense litigious and that the owners of the land are purposely ignored. It is held in the interest of the public and Government has entire control over it. The only parties concerned in the enquiry are (1) the government, the custodian of the public interest and (2) the company which has to furnish materials for the purpose of satisfying the local government. There is no provision in this Section that any other person even the owner should be summoned or required to attend at the enquiry.

[112] 37 All. 347: 30 I.C. 245
[113] 30 Cal. 36: 7 CWN 249
[114] 32 P.C. 627 (1905)

In the absence of a landowner, the Collector determined the compensation. This was again contested before the Privy Council in the same case. The Privy Council held that the interested person was entitled to challenge the compensation before the civil courts through revision; however, the Collector possessed a discretionary authority to determine compensation based on the relevant information.[115] In the same case it was also held that the absence of notice could not render the declaration or the acquisition invalid. No civil court could entertain the efficiency of the enquiry or validity of the proceedings under Section 40. After enquiry, the Provincial Government decided the acquisition.

### 3.5. Analysis and Conclusion

This Chapter began with the general understanding of the legal history of colonial India. Colonial rulers were extensively driven by economic interests and the legal system was generally meant to contribute their economic agenda. As a result, a dualist approach was adopted in regulating civil and criminal administration of justice. Besides, it also enacted laws that maintained racial inequality. Within this legal framework the general understanding of the legal history suggest that it lacked justice, equity and fairness and substantive rule of law as embedded in the modern Indian Constitutionalism. Although attempts were made to introduce some changes through the Government of India Acts but these lacked transparent procedure and substantive rights that could establish accountability of executive. This clearly impacted the legislative, executive and judicial administration of eminent domain use in colonial India.

An examination of colonial legal history of eminent domain from 1824 to 1950 was then undertaken, with a focus on the extensive legislative transition witnessed from 1824 to 1894. This period was divided into three phases namely, Early Fragmented phase, consolidated phase and Stability phase. In the first phase i.e. early and fragmented stage, Bengal, Bombay and Madras had the 1824 Act, 1839 Act and 1852 Act respectively.

The Acts of 1824, 1839 and 1852 formed the beginning of the land acquisition legislation in India. Though they differed in terms of years and places, they did

[115] Ezra v. Secretary of State 32 P.C. 629 (1905).

possess some common and unique features. The common features can be summed up as: (1) all the three acts proposed to acquire land for public purpose; (2) they ensured compensation for such a land acquisition; (3) there was the presence of a non-adversarial approach of arbitration in determining compensation; (4) only the issue of compensation was discussed and debated; (5) the decision of the arbitrators was final and conclusive and no fresh suit was allowed to be filed against the decision; (6) all expenses of the arbitration were incurred by the Government; (7) the arbitrators were to be impartial and moral; and (8) the notification issued by the Governor-General-in-Council was considered as the conclusive evidence that the purpose was indeed public.

However, the dissimilarities between these three Acts can be summed up as: (1) the 1824 Act ensured a just and full compensation to the interested persons while no such policy was incorporated in the other Acts; (2) the number of arbitrators in the 1839 Act were even, whereas it was odd (i.e. five) in the 1824 and 1852 Acts; (3) Only the 1824 Act differentiated between urgent and non-urgent matters when the land was to be acquired; (4) the detailed procedure about the arbitration proceedings was well explained in the 1852 Act; (5) the scope of public purpose was limited in the Act of 1839 to the widening of roads, streets and thoroughfares, whereas the other two incorporated a broader understanding of the public purpose; (6) publication through proclamation was mandatory only for the 1852 Act; (7) the Acts of 1824 and 1852 reversed the award on the grounds of corruption by arbitrators; the Act of 1839 was silent on this point; (8) filing of a suit after the expiry of the time limit was not only allowed by the 1852 Act but was also strictly interpreted; and (9) the 1852 Act specifically referred that only persons with a 'good title' claimed the compensation. However, there existed certain grey areas such as, the procedure was in an abridged form and required an adequate procedure in turn as no guiding principles had been laid down for the arbitration; the Acts were silent in the event of a non-consensus among the arbitrators.

In the second phase two unified laws were framed the Acts of 1857 and 1870. They were introduced to bring uniformity among the Acts of early fragmental phase. This uniformity was also necessitated by the fact that the British by the mid-nineteenth

century had secured a decisive political advancement in India and thus their ubiquitous presence in the political arena demanded uniform laws. The 1857 Act incorporated many unique principles such as: (1) it introduced for the first time the interpretation clause, and defined land and interested persons; (2) proposed land acquisition for temporary purposes; (3) the compensation was included at six per cent per annum interest for matters decided by the arbitrators; and (4) burden of the costs of proceedings was on the shoulders of the parties if the award was higher than the Collector's award. However, the Act of 1857 retained the arbitration proceeding as regards the determination of compensation. The number of arbitrators was reduced to three and they had to deliver a full and complete award. There was an absence of land acquisition for urgent purposes. Moreover, the Act described the arbitration proceedings much more profoundly as against the previous presidential Acts.

The Act of 1857 was replaced by the Act of 1870. As against the 1857 legislation, it introduced: (1) land acquisition for a company—particularly work that was useful for the general public; (2) land acquired for temporary purposes for three years; (3) the judge formed the core adjudicatory body; (4) matters of compensation were resolved by the Judge with the assistance of two assessors appointed by the contested parties; (5) the Judge's opinion on the law was final with limits on the assessors' opinion in terms of compensation; (6) it prescribed guidelines for the Collector, Judge and assessors for determining compensation; (7) the assessors were to be paid a fees not exceeding five hundred rupees; (8) the market value of the land was taken into consideration with an additional sum of fifteen per cent being paid to the Collector; (9) compensation was provided for damages due to severance, injury to another property, for the loss of earnings and for expenses of removal; (10) an appeal could be preferred to the High Court if the compensation exceeded five thousand rupees; and (11) the burden of the payment of costs could be reversed if the court awarded a compensation below the Collector's award; the burden was vested on interested persons for paying all costs and above that, the Collector paid the costs.

The Act introduced a major shift in the decision-making. All the earlier Acts had entrusted the arbitrators with the sole authority in deciding compensation issues. This was curtailed by the Act of 1870. The Act of 1870 positioned the judge as the

authority for determining all issues including compensation. Assessors in the form of arbitrators reduced their position from an active adjudicating authority to a passive body of assistance. It was suggested that the government wished to play a more rigorous role. The prime factor behind the introduction of the 1870 Act was curtail wide discretionary powers exercised by the arbitrators and to overcome exorbitant compensation being awarded to the interested persons.

The 1870 Act was finally repealed by the 1894 Act. The reasons for the repeal of the 1870 Act were – as laid down by the *Statement of Objects and Reasons to the Act of 1894* – (1) arbitrators viewed as incompetent, corrupt, and exercised wide discretionary powers; (2) there was enormous increase in cases and further resulted into high costs of proceedings; (3) many claimants made exorbitant and speculative claims. The broad changes that were inserted under the 1894 Act were (1) Collector entrusted with unlimited powers in determination of public purpose, compensation, reference to the court among others; (2) Assessors were removed and replaced by the adversarial judges; (3) incorporation of short litigation process. Additionally, the *Statement of Objects and Reasons to the Act of 1894* while replacing the 1870 Act ensured that the judiciary will act as independent and competent enough to ensure the protection of the interests of the land owners in the absence of arbitrators. However, there was nothing in the Act that structurally or functionally ensured independence of judiciary. This is also evident from the examination of judicial practice from 1894 to 1950.

The examination of the cases from 1894 to 1950 clearly suggests that: (1) the provincial government through the Collector was the sole adjudicatory authority in determining the public purpose, declaration, temporary occupation of land and even a withdrawal of the land acquisition; (2) The land owners were not entitled to file or raise substantive objections against the public purpose and compensation; (3) Undue and numerous burden of proof was imposed on the interested person to invalidate the compensation determined by Collector and reference to the court; (4)Court strictly interpreted the reference proceedings but liberal interpretation was adopted with respect to government's determination of public purpose;(5) Court exercised very

limited authority under reference. It exercised powers only when the Collector referred the matter to it.

After the perusal of the colonial laws that existed before 1894, it appears that the Acts of 1824, 1839, 1852, 1857, and to a certain extent 1870 stressed dispute resolution through the application of a non-adversarial procedure viz., arbitration in determining compensation. The method of representation through arbitrators provided a strong voice in determining compensation as the decision of the arbitrators was considered as final and binding. The process of arbitration ensured an equal representation to both parties in seeking an amicable settlement. The arbitrators included local people who understood the local needs and values in terms of land. Therefore, it could be said that at least in terms of compensation they received a just value. Moreover, the Act of 1870 decentralized the non-adversarial approach and paved the way for an adversarial approach to a certain extent.

The strict adherence to adversarial litigation under the 1894 Act clearly curtailed the voice of the litigants which had received attention in arbitration. Under the 1894 Act, the colonial legislature succeeded in securing the desired objectives: (1) the Act reduced the burden on the public money and (2) secured a speedy disposal of the cases as was mentioned in *the Statement of Object and Reasons of the 1894 Act*. On the contrary, it haphazardly put at stake two vital rights of just compensation and a fair procedure. These two vital rights that form the crux of the justice delivery system were overlooked. Even the judiciary did not make any significant inroads to overcome the governmental supremacy. It interpreted the provisions of the Act literally assuring immense authority to the government. For instance, in one case it determined contribution of one anna as a valid amount for declaring a purpose as public. The assurance expressed in the *Statement of Object and Reasons of the Act,* that the judiciary will be independent to safeguard the rights of individuals in the absence of arbitration was superfluous. Although the 1894 Act meant to overcome superfluous compensation claims made under previous Acts, it permitted the undervalued compensation on the ground that market value under the 1894 Act, remained unquestionable. Judiciary did not question the supremacy of the government neither in declaring public purpose nor in determination of the compensation.

Overall, the 1894 Law provided the executive with an enormous grip in dealing with land acquisition. This grip was consistently strengthened from the transition of the law from 1824 to 1894 and consistently contributed by the judiciary by retaining its validity from 1894 to 1950. Besides the substantive and procedural shortcomings under the 1894 Law, the absence of a Constitution and constitutionalism with substantive fundamental principle of rule of law in the presence of racial inequality, economic preferentiality and judicial passivism equally contributed to the stringent exercise of the laws of the eminent domain.

# CHAPTER 4

## RIGHT TO PROPERTY AND EMINENT DOMAIN: EXAMINING CONSTITUTIONAL STATUS

*"No Supreme Court and no judiciary will sit in judgment over the sovereign will of Parliament…. Ultimately, the whole Constitution is a creature of Parliament."*

*Jawaharlal Nehru* (CAD VII 2009: 1197-1198).

*"…Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the court."*

*Justice Patanjali Sastri*
*(State of West Bengal v. Bela Banerjee[116])*

### 4.1. Introduction

The colonial eminent domain law, as observed in the previous chapter, faced certain fundamental challenges in post-colonial India. The challenges were related with the substantive absence of rule of law or constitutionalism. The general legal history presented in the previous chapter described how the colonial legal system embedded a dualist approach that inherently maintained racial segregation in its application and was immensely driven for securing economic profits. This dualist approach was explicit in the application of civil and criminal administration of justice. This colonial approach ultimately influenced the 1894 Act that primarily aimed to minimise monetary losses by introducing short litigation process as against its predecessor Acts. It strived to seek speedy decisions and overcome speculative compensatory claims from the landowners. All these objectives were secured by entrusting the government with unilateral powers in the use of eminent domain and equally assisted by colonial judiciary through interpretations.

In independent India, the Constitution, as a fundamental document, governed social, political, and economic life of the people. It established certain set of principles that

[116] AIR 1954 SC 170

were fundamental in governance. Citizens became the focal point of governance as this was explicit in the 'Preamble' of the Constitution which begins with 'We the people of India'. It ensures justice, liberty, and equality to every citizen irrespective of any discrimination. Within this scheme, fundamental rights formed the core part of the Constitution, but no fundamental right has been absolute. Constitution imposes restrictions on the fundamental rights in the interest of social justice that are enumerated under Part IV captioned as 'Directive Principles of State Policy'. The Directive Principles of State Policy recognise 'social' or 'group rights'. Although they are non-justiciable, they serve as fundamental guiding principles for the State in the governance of the country (Ananth 2015: 303). Granville Austin describes the Indian constitutional framework as:

> The Constitution's greatest success, however, lies below the surface of government. It has provided a framework for social and political development, a rational, institutional basis for political behavior. It not only establishes the national ideals, more importantly it lays down the rational, institutional manner by which they are to be pursued- a gigantic step for a people previously committed largely to irrational means of achieving other-worldly goals (Austin 2010: 309-310).

Beside the declaration of social, economic and political goals, the Constitution also establishes structural mechanism to achieve these goals. It constitutes legislature, executive and judiciary to secure the constitutional objectives. As against the colonial rule, the Constitution of independent India establishes rule of law as the guiding principle than the 'rule of the conquest' of the colonial period. Under this constitution, constitutionalism forms the essence of the Constitution that undertakes both constitutional values and its attainment through machineries. It was the accountability of the constitutional machineries that appeared significant as these had never been achieved in India neither in the colonial period nor pre-colonial history (CAD VII 2009: 32-33).

In the post-colonial India, eminent domain received a constitutional status as a fundamental right under Article 31, resembling with Section 299[117] of the

[117] "Section 299 – Compulsory acquisition of land & c. – (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 power to make any law authorizing the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, 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

Government of India Act, 1935. However, there was considerable difference between Section 299 and Article 31. Compared to Article 31, Section 299 was merely a legal right and not a fundamental right. Colonial lawmakers supplied following reasons for its non-inclusion as a fundamental right viz., – (1) to prevent legal complication that arises from its indefiniteness; (2) to overcome legal restrictions on the legislature from undertaking progressive legislations; and (3) to prevent extreme litigiousness which might have resulted from its incorporation (Arora and Grover 1994: 227-228). Moreover, the colonial legal policy did not provide a responsible government and maintained a totalitarian state (Arora and Grover 1994: 228). On the other hand, post-colonial India under the new Constitution strived to establish a democratic and responsible government (CAD VII 2009: 32-33). As a result, the Constituent Assembly framed Article 31 to include right to property and eminent domain. It authorised the State to acquire property for public purpose but only on the payment of compensation. This completely altered the colonial practice under Section 299, particularly the presence of Article 31 as a justiciable right. As eminent domain under Article 31 became justiciable, land owners extensively challenged the eminent domain process before the Supreme Court and High Court. This mainly targeted agrarian reform laws. Due to extensive litigiousness, the Parliament by Forty-fourth Constitution Amendment Act of 1978 repealed Article 31 and replaced it with a mere constitutional right under Article 300A.

This historical transition completely altered the nature and practice of eminent domain use in the twenty-first century. It had severe impact on the lives of people, particularly after India adopted the liberalisation, globalisation and privatisation regime which began at the end of the twentieth century. As a result, the existing study on eminent domain demands reconsideration of this historical transition of right to property from fundamental right to mere constitutional or legal right to unravel the fundamental issues underlying the debate, its impact on the exercise of eminent domain, and its impact on the constitutional values and functioning of the constitutional machinery within the established constitutional norms.

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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. (4) Nothing in this Section shall affect the provisions of any law in force at the date of the passing of this Act. (5) In this Section "land" includes immovable property of every kind and any rights in or over such property, and "undertaking" includes part of an undertaking."

This historical examination of right to property begins from the Constituent Assembly debates, followed by the confrontation, from 1950 to 1978, between the legislature/executive and judiciary. This chapter is divided into three sections – (1) Constituent Assembly Debates on Right to property: Balancing the Chord; (2) Right to property from 1950-1978: Tussle between the Parliament and Judiciary; (3) Right to Property post-1978: An Era of Impassiveness.

At the outset, the first section of the chapter highlights the Constituent Assembly Debates on right to property and eminent domain. In the Constituent Assembly, Jawaharlal Nehru was at the forefront of introducing and defending this provision. This section evaluates various ideologies, arguments, issues, and objectives expressed by the members of the Assembly in support and opposition of the inclusion of the right to property. The second section of this chapter examines the trajectory of the right to property from 1950 to 1978 that includes a series of constitutional amendments introduced by the Parliament to curtail Supreme Court decisions that challenged Parliament's sovereign authority in regulating right to property. It also highlights the politics and political economy concerning this issue, as well as the divided opinions of the legal fraternity and academia on the existence and repeal of Article 31. The next section highlights the effect of the repeal of Article 31 on the land acquisition process. It discusses the nature of the Article 300A vis-à-vis Article 31 and its invocation by the Supreme Court in dealing with eminent domain cases. The final section details an analysis of the issue and presents a conclusion. This chapter argues that the relegation of fundamental right to property to mere constitutional right was an outcome of immense political and ideological differences within the legislature in implementing agrarian reforms and its confrontation with judiciary. Moreover, the legislature/executive appeared hyper sensitive against judicial review of Article 31. It did not display obedience to the judicial decision; on the contrary it framed ineffective land reform laws. Certainly, the absence of constitutional fundamental right of property has caused immense hardship to the deprived sections of the society and the future development of property rights regime. And this is equally contributed by the non-interventionist approach of judiciary in post-1978 era.

### 4.2. Constituent Assembly Debates on Right to Property: Balancing the Chord

The insertion of the right to property under the Constitution was the complete creation of the Congress Party (Ambedkar 2008: 948). Before debating the right to property on the Constituent Assembly floor, the members of the Congress party had debated the subject within the party. Within the Congress there existed four different and contradictory thoughts. First section was represented by Vallabhbhai Patel who demanded full compensation. Jawaharlal Nehru represented the second group who was against full compensation. The third section was represented by Govind Vallabh Pant that demanded the legislature should alone determine the quantum of compensation targeting zamindars. Finally, a fourth group was represented by A.K. Ayyar and T.T. Krishnamachari who opposed legislative supremacy as it would adversely affect capital and industry (Ambedkar 2008: 948; Austin 2010: 91-92). Among these contradictory sections, Vallabhbhai Patel, a prominent leader with significant voice even much greater than Nehru, prevailed and drew a consensus between these contradictory approaches. Patel convinced others that the adoption of Section 299 of the Government of India Act, 1935 offered the best solution. Moreover, Patel also promised to establish different set of principles for compensation for the expropriation of zamindars as against the expropriation for commercial and industrial undertakings. A consensus was reached and the matter was settled within the Congress (Austin 2010: 94). Austin expressed the political tussle and resolution in the congress as:

> The provision had in it everything Patel wanted and was the same time moderately satisfactory to Pant and Nehru. Others, supporter of complete review powers for the courts, like Matthai, and those in favour of unfettered power for legislatures, must have been disappointed by the compromise. So far as Patel was concerned clause (2), taken directly from Section 299, provided for his middle-of-the-road approach to land acquisition. But because legislatures had the authority to prescribe the principles of compensation, the expropriation of zamindars could be undertaken on different principles than the acquisition of commercial or industrial property – an aspect pleasing to many Assembly members. The clause reserving all property legislation for presidential assent must also have been included at Patel's demand. For it meant that so, long as he live, Patel could block any legislation that seemed to him unjust – 'the President', of course, meant the Cabinet, and in the Cabinet Patel had veto power. And Nehru, one presumes, was also not averse to the Union Executives having the opportunity to dampen unseemly zeal in the states (Austin 2010: 98).

Finally, Patel's solution was incorporated in Article 24 of the Draft Constitution and subsequently introduced before the Constituent Assembly for deliberation.

#### *4.2.1. Nehru's 'Just Compromise' Proposal*

The debate on right to property in the Constituent Assembly commenced from September 10, 1949 to September 12, 1949. Prime Minister Jawaharlal Nehru initiated the debate by introducing Article 24 (later renumbered as Article 31). At the outset, Nehru cautioned the Constituent Assembly regarding the gravity of the issue outside the Parliament and appealed for utter balance between individual and community rights. Nehru mentioned that the proposed Article 24 serves two purposes, first, as a community right it abolishes zamindari system and reforms big estates; and second, as an individual right it ensures right to property to the individuals against land acquisition. Nehru termed his formulae as 'just compromise' between the individual right and community right. He moved Article 24 as:

> Compulsory acquisition of property.
> (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 in any company owning, any commercial or industrial undertaking shall be taken possession of or acquired for public purposes under any law authorising the taking of 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 the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined.
> (3)No such law as is referred to in clause (2), of this Article made by the Legislature of a State shall have effect unless such law having been reserved for the consideration of the President has received his assent.
> (4) If any Bill pending before the Legislature of a State at the commencement of this Constitution has, after it has been passed by such Legislature, received the assent of the President, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this Article.
> (5) Save as provided in the next succeeding clause, nothing in clause (2) of this Article than affect- (a) the provisions of any existing law, or (b) the provisions of any law which the State may hereafter make for the purpose of imposing or levying any tax or penalty or for the Promotion of Public health, or the prevention of danger to life or property.
> (6) Any law of a State enacted, not more than one year before the commencement of this Constitution, may within three months from such commencement be submitted by the Governor of the State 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 provisions of clause (2) of this Article or sub-section (2) of Section 299 of the Government of India Act, 1935 (CAD IX 2009: 1193-1194).

Article 24 incorporated six clauses. The first two clauses ensured rights to the individuals such as – (1) Property will be compulsorily acquired as per the procedure established by law (clause 1); (2) Such compulsory acquisition of property ensured payment of compensation as per the principles determined by the legislature(clause 2). Further, it defined the nature of property that included movable and immovable property, including interests in company of commercial or industrial undertaking. However, the other four clauses from (3) to (6) imposed limitations on clause (2) i.e.

on the judicial review of the compensation. These clauses exempted certain laws against legal challenge on the ground of inadequacy of compensation under clause 2, only if they satisfied following conditions namely, (a) if any law referred under clause 2, received assent of the President (clause 3); (b) if the bills were pending before the State legislatures, after the commencement of the Constitution, received assent of the President (clause 4); (c) laws imposing or levying tax or penalty for promotion of public health or prevention of danger to life or property (clause 5) and; (d) if laws passed by the State legislature before the commencement of the Constitution (not above one year) and thereby certified by the President (clause 6);

After introduction of Article 24, Nehru stressed the importance of the provision and considered it one of the vital provisions. However, at the same time, the provision had many issues. He clubbed those issues under two contrasting groups viz., (1) individual right to property approach and (2) community's interest in abolition of zamindari rights. He believed that these two approaches were overlapping and had 'patty conflict'. Nevertheless, he viewed the conflict as 'fairly simple' to be resolved and moved Article 24 as the 'just compromise' between individual and community rights (CAD IX 2009: 1194).

According to Nehru, Article 24 ensured compensation to all kinds of land acquisition. He loosely classified land acquisition into two categories – first, petty land acquisition or relatively large land acquisition for town improvements or like nature purposes; the second was land acquisition for social reforms. In the latter case he justified enormous land acquisition. Nevertheless, he suspiciously maintained that the judiciary may cause trouble to the social reforms by invoking the justiciability of compensation which may result into enormous delay in securing social reforms.[118]According to him,

[118] On one occasion, while stipulating judicial review he mentioned that, "Within limits no judge and no Supreme Court can make itself a third chamber. No Supreme Court and no judiciary can stand in Judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of Parliament. But we must respect the judiciary, the Supreme Court and the other High Courts in the land. As wise people, their duty it is to see that in a moment of passion, in a moment of excitement, even the representatives of the people do not go wrong; they might. In the detached atmosphere of the courts, they should see to it that nothing is done that may be against the Constitution, that may be against the good of the country, that may be against the community in the larger sense of the term. Therefore, if such a thing occurs, they should draw attention to that fact, but it is obvious that no court, no system of judiciary can function in the nature of a third House, as a kind of Third House of correction. So, it is important that with this limitation the judiciary should function (CAD 2009: 1197-1198)."

sovereign legislature was the only competent authority that could successfully achieve social reforms such as abolition of the zamindari system. As a competent authority, it possessed the ability to act as a balancing authority in exercising land acquisition. Further, Nehru contended that the Judiciary should abstain from framing any policy. In his view, Judiciary should not function as a “Third Chamber”. He believed that, the sovereign legislature as compared to judiciary has access to public, political and other factors that are inherent in policy making (CAD IX 2009: 1195). Therefore, he supported Parliamentary supremacy in fixing either compensation or principles regulating compensation. Judiciary should only interfere when there was gross abuse of law or fraud on the Constitution. Nehru even ruled out any constitutional fraud on behalf of the Parliament, because the Parliament was the true representative of the people. Beside legislature and judiciary, Article 24 entrusted certain powers to the President that ensured immunity to the law against judicial review. It was suggested that referring the law for the President’s assent will cater to the probability of errors committed by legislature in haste. The President shall draw attention of the Parliament towards such errors (CAD IX 2009: 1195). He favoured equitable compensation but believed that the equity applies equally to the community rights also. Community rights override individual rights for ‘the most urgent and important reasons’ (CAD IX 2009: 1194).

In addition to the above rights and limitations, Nehru mentioned that the proposed provision addresses the changing nature of property that takes place due to development of human society (CAD IX 2009: 1196). It also addresses the issue of monopoly of property in few hands. Individuals with small holdings required protection against the monopoly of the rich. Even in the capitalist and socialist States, individuals are on the verge of losing their property. However, he believed, it was a difficult task to ensure right to property to individual (CAD IX 2009: 1197). Finally, he cautioned the Assembly to take cognizance of the changing nature of property particularly in relation with the abolition of zamindari rights, he points that:

> The House has to keep in mind the transitional and the revolutionary aspects of the problem, because, when you think of the land question in India today, you are thinking of something which is dynamic, moving, changing and revolutionary. These may well change the face of India either way; whether you deal with it or do not deal with it, it is not a static thing. It is something which is not entirely, absolutely the control of law and Parliaments (CAD IX 2009: 1197).

To sum up Nehru's argument in forwarding Article 24 were, (1) the State to guarantee right to property to individuals against powerful persons; (2) No absolute right guaranteed, limitation imposed by community rights in terms of abolition of zamindari rights; (3) Compensation was guaranteed against the compulsory acquisition of property, however, the compensation ought not be fair, equitable, or just; (4) Parliament solely authorised to determine manner and principles of compensation rather than the court; (5) Supreme Court not to intervene without gross violation of the Constitution. However, he failed to draw a clear cut boundary for the interference of court under the provision.

### *4.2.2. Discussion and Queries on Nehru's Proposal*

After Nehru tabled Article 24 before the Constituent Assembly for approval, ninety-seven amendments were proposed against it. The debate in the assembly focused on the justiciability of compensation vis-à-vis zamindari abolition. Broadly, the debate revolved around four major factions that had distinct arguments on the nature of right to property proposed under Article 24. They were – first, the Congress, as we viewed above, believed that Article 24 was the best compromise between individual rights and community rights. Second faction was represented by the Socialists who completely opposed payment of any compensation to the Zamindars. Another group was represented by members who were pro-zamindari. They demanded just compensation for the confiscation of property. Fourth and final group included general observers, who expressed general views on the application of right to property in future.

The previous section dealt with the Congress's (Nehru's Proposal) approach on right to property, which forms the first distinct thought on right to property. The second group comprised of Socialists. Damodar Swarup Seth strongly felt that Article 24 supported capitalism. He proposed that the compensation policy should also be extended to the expropriations carried out by the Provinces, States, Local self-governing bodies and associations serving public interests (CAD IX 2009: 1203). Another member Prof. Shibban Lal Saksena criticized Nehru for supporting zamindars, as the proposed Article gave ample scope for judicial review in determining compensation or principles thereof. He believed that the Supreme Court would act as the final authority in deciding fair and equitable compensation under the

provision. According to him, under the proposed provisions, the judiciary appeared supreme rather than the Parliament. Resultantly, he feared that no nationalisation could be gained under the proposed Article 24 (CAD IX 2009: 1204). Similarly, H. V. Kamath demanded non-justiciability of the principles and manner of compensation, except the amount of compensation to protect the interests of community (CAD IX 2009: 1215). However, K. T. Shah opposed guarantee of right to property with compensation (CAD IX 2009: 1219). He stated that any land acquisition for public purpose deserved no compensation on ethical ground. Being a socialist, he opposed Article 24 and held that except the first clause all other clauses should be removed. Any addition should be left to the will of the future legislature (CAD IX 2009: 1223). Similar views were expressed by Jadubans Sahay and P. S. Deshmukh.

The third group addressed the zamindari perspective. While addressing the interests of zamindars, Begum Aizaz Rasul opposed Article 24 on the ground of fairness and justice.[119] Begum mentioned that Article 24 stood in contravention with Article 25, where the latter entrusted Supreme Court with judicial review (CAD IX 2009: 1296). She asserted that clause (4) and (6) should not be applied only to specific regions. She urged the Assembly to safeguard the interests of zamindars and highlighted the discrimination faced by the zamindars of Uttar Pradesh, Bihar and Madras vis-à-vis zamindars of other regions due to the absence of justiciable rights. Another member Naziruddin Ahmad demanded express mention of fair, full or adequate compensation under Article 24. In fact, he asserted that all civilized nations adopted fair and full compensation policy to protect upper and middle classes. (CAD IX 2009: 1237). Moreover, he opposed the discriminatory treatment under clause (4) of Article 24, which guaranteed right to compensation after the assent of the President (CAD IX 2009: 1239). He demanded uniformity in the application of compensation law irrespective of clause (4) and (6) of Article 24 (CAD 2009: 1240). On the contrary, Kala Venkata Rao favoured the inclusion of clause (4) and (6) for the abolition of zamindari system.

[119]"…I am constrained to say that the amendment proposed by him does not lay down principles based on fairness and justice. There are two principles laid down in this Article: One is; acquisition of property, clause (1), and the second is the manner and mode of the payment of compensation, clause (2). Now, Sir, under the following Article 25(1) it is clearly laid down that every person will have the right to approach the Supreme Court. This of course is not only in regard to acquisition of property but for every purpose. But ordinarily also any person has a right to file a suit attacking an Act authorising the acquisition of property if the compensation is not proper in his opinion (CAD IX 2009: 1296)."

From a general perspective, K. T. M. Ahmed Ibrahim opposed the legislative framework of compensation or principles determining compensation. He mentioned that separate provisions should be framed for the abolition of zamindari system without compensation and the zamindari abolition should not be confused with the general idea of property and fundamental right to property (CAD IX 2009: 1251). Further he viewed clause (2) as a threat to economy and investments, as it empowered the legislature to fix the compensation value according to its sweet will and pleasure, which could further lead to absence of incentives and certainty about the value of the property (CAD IX 2009: 1250). Similar views were expressed by Prabhu Dayal Himatsingka. Another member, Mahboob Ali Baig criticised Nehru for declaring legislature as sovereign instead of the Constitution. He described the Constitution as sovereign and asserted that the legislature cannot override powers laid down in Constitution, which is binding until amended by the will of the people. He argued that Article 24 should not have been enacted (CAD IX 2009: 1260). He further asserted that the courts should determine the compensation on the principles determined by the legislature (CAD IX 2009: 1261). Similarly, Thakur Das Bhargava demanded that the futuristic law governing land acquisition other than Zamindari rights should ensure fair and equitable compensation for future acquisition with justiciable rights.[120]

On behalf of the Congress, Govind Ballabh Pant stood in favour of Article 24 and refuted all above objections. He differentiated principles for land acquisition for railway station or store house with that of land acquisition for common weal. In the latter case market value will be applied to determine compensation, whereas the same market value criteria will be denied in the former case. Relevance of the purpose and circumstances with other considerations forms the base of differentiation (CAD IX 2009: 1280). At the same time, equitable compensation requires practical considerations. He mentioned that equity cannot be defined with perfect yard-stick. State seemed incompetent and unfair in assuring equitable compensation vis-à-vis social reforms (CAD IX 2009: 1290). Nevertheless, he asserted that the market value should be more or less created by the State (CAD IX 2009: 1291). Finally, the

[120]He mentioned that, "Supposing any land or house is taken away for the purpose of a railway line or some undertaking of the Government, no doubt for a public purpose, will anyone be satisfied if he is not given full compensation, and is there any valid reason why he should not be fully compensated ? As a matter of fact no one will feel confident if you enact laws as you propose to enact that not the courts but the executive officers should be the final arbiters of the civil rights of the people, and it is not politic to undermine the confidence of the people (CAD IX 2009: 1231)."

legislature had access to all factors, hence it was considered the competent body to determine the equity of compensation.[121]

#### *4.2.3. Final Argument*

After discussion, when the closure motion was moved, K. M. Munshi replied to all queries. He declared Parliament as the supreme authority rather than the courts, in determining principles and manner of compensation. Parliament was capable enough to effectively understand the changing situations (CAD IX 2009: 1301-1302). On the issue of justiciability he found no controversy. He cited the practice in other civilized countries where every Article of the written Constitution was justiciable. Similarly, under Article 24 the phrase 'cannot be questioned in court' was itself a justiciable power vested in the court to adjudicate what cannot be questioned. Hence, justiciability inherently existed in the provision, but only when there was fraud on Constitution (CAD IX 2009: 1302-1303). He further ruled out any increase in compensation on the ground of justiciability and asserted that the future court will not apply the market value standard invariably rather favour the Parliament.[122] Finally, some amendments were accepted but they were insignificant as it did not substantially alter the true nature of Article 24 moved by Nehru (CAD IX 2009: 1304-1305). Later in the final draft, Article 24 was renumbered as Article 31[123].

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[121]But that equity is to be determined by the Legislature and not by the courts, because the Legislature alone is capable of taking that comprehensive view of factors which bear on such complicated issues. There is no justiciable material that can be placed before any court for obtaining its decision on such issues. In the circumstances no other form can possibly be found. Sometimes we may have to take into account not only domestic conditions, but even international conditions. What has happened in China for example cannot be ignored when we are considering the question of abolition of zamindari in our country. What is happening in Burma cannot be ignored. But no court can be asked to go to Burma, to make an inspection and submit a report. No Commission can be appointed for that purpose. So we have to rely on the Legislature and it we have no faith in ourselves, then I say that we cannot find any satisfaction anywhere else (CAD IX 2009: 1292).

[122]He said, "In the minds of people who fear justiciability, there is a lurking feeling that if a law laying down principles of compensation goes to Court, the Court will invariably apply the market value standard. This has never been the case, In America, as I said, where the, words in the Constitution are "just compensation" and where the 14th Amendment arms the Supreme Court with the Due Process clause, it has never been so held. In one American case--it was ail extreme and extraordinary case-one dollar was paid by way of compensation The Court held that looking to the circumstances of that case, even one dollar was just compensation. We need not assume therefore that our Supreme Court will consist of a set of stupid people who will indiscriminately apply the market value rule to every kind of acquisition (CAD IX 2009: 1303)."

[123]Article 31 stood as, Compulsory acquisition of property.

(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 in any company owning, any commercial or industrial undertaking shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for

The debate clearly mandated that the Parliament will act as supreme authority in deciding land acquisition. Principles determining compensation or manner of providing compensation will be outside the purview of judicial review. The whole debate can be summarized broadly into three points –

(1) The debate mainly focused on the abolition of zamindari system. Indeed, Nehru mentioned in clear terms that Article 24 was 'just compromise' for implementing land reforms. Another major focus of the provision was to protect zamindari abolition Acts and bills which were pending before the State Legislatures. Clause 4 incorporated the word 'bill' in order to protect Zamindari Abolition Bill in Uttar Pradesh, whereas, clause 6 incorporated 'Act' to protect Zamindari Abolition Acts passed by Bihar and Madras Legislature.

(2) As land reforms occupied the centre stage, the issue of compensation received limited approach. K.T. Shah, Jadubans Sahay, and P.S. Deshmukh opposed Nehru's proposal to ensure compensation for zamindari abolition. They believed that no compensation should be given to zamindars on ethical grounds and further contended that except the first clause all other clauses be removed and left to the discretion of the future Parliament. This approach was strongly opposed by Naziruddin Ahmed among others. Many members like Syamandan Sahaya, Jagannath Baksh Singh, Begum

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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), of this Article made by the Legislature of a State shall have effect unless such law having been reserved for the consideration of the President has received his assent.
(4) If any Bill pending before the Legislature of a State 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 has* received *his* assent of the President, *then, notwithstanding anything in this Constitution,* the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this Article.
(5) Save as provided in the next succeeding clause, Nothing in clause (2) of this Article shall affect- (a) the provisions of any existing law*other than a law to which the provisions of clause 6 apply*, or (b) the provisions of any law which the State may 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 and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property*.
(6) Any law of a State enacted not more than one year *eighteen months* before the commencement of this Constitution, may within three months from such commencement be submitted by the Governor of the State 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 provisions of clause (2) of this Article or *has contravened the provisions of* sub-Section (2) of Section 299 of the Government of India Act, 1935 (CAD IX 2009: 1313).

Aizaz Rasul explicitly demanded an express mention of full and fair compensation with justiciable rights in the provision. They vehemently criticised Nehru for restricting judicial review under clause 4 and 6 of Article 24.

(3) The third category included those, who were seriously concerned about the general right to property other than zamindari property. Members like Thakur Das Bhargava, Jaspat Roy Kapoor, K.T.M. Ahmed Ibrahim among others dealt with the wide spectrum of the right to property in general terms and the compensation for confiscation of such property in future. They clearly demanded just, fair, and equitable compensation with justiciable right.

Overall, the ultimate objective of Article 24 was twofold – First, it strived to achieve land reforms, which Nehru termed as community interests. Second, it ensured compensation for the takings of property, to which Nehru referred as individual rights. Nehru felt that the provision pleased both social reformers by introducing zamindari abolition; and the zamindars and capitalists by introducing right to property with compensation. Both objectives were to be secured by Parliament, no judicial intervention was permitted. It was believed that as Parliament represents the will of the people, it will not harm its people. As a result, Parliament was considered an ultimate authority to determine public welfare and compensation. Nevertheless, Nehru erred in understanding the true nature of the judicial review under the Constitutional framework. Judicial review under the Constitution inherently existed under Article 13 (in the final draft) of Part III 'Fundamental Right' category. Every right under part III was questionable including Article 24 (later reframed as Article 31 in the final draft). Ultimately, an understanding expressed by Nehru that the judiciary should not interfere was flawed, because the idea of non-interference was itself subject of judicial scrutiny. Moreover, a concrete solution would have been to respect judicial review. The popular belief that the Congress expressed in the assembly received a set back as soon as Article 24 (renumbered as Article31) was put into force.

The next section deals with the tussle that took place between the judiciary and Parliament over the application of Article 31 from 1950 to 1978.

### 4.3. Right to Property from 1950 to 1978: A Tussle between Parliament and Judiciary

The Right to Property under Article 31 was considered as one of the vital provisions in the Constitution. K. M. Munshi, one of the key supporters of right to property, observed after the enforcement of the Constitution that:

> Right to property is one of the pillars on which democracy rests; remove it and the structure is sure to collapse. The right may be reasonably restricted in an emergency, but once it is denied under the name of any 'ism', however glamorous, to secure social justice, individual freedom goes down with it; the citizen becomes helpless, impotent and without the means to assert his individual rights against the State. In our deliberation, the right to property was sought to be guaranteed in three ways: one by the Due Process Clause; another by including the right to "acquire, hold and dispose of property" in the fundamental freedoms guaranteed under Article 19(1); lastly, by the Right to Property as originally defined in Article 31, which now stands circumscribed by the provisions of Article 32 to 35 (Munshi 2012: 302).

Although Article 31 was vital, it was highly controversial since 1950 itself (Kashyap 1978: 97). It was extensively debated both in the court and on the political front. Due to gradual confrontation between legislature and judiciary, Parliament in 1978 repealed Article 31. This section highlights the debate between legislature and judiciary on the repeal of right to property from 1950 to 1978. It highlights various Constitutional Amendments and Supreme Court decisions along with the constitutional issues that led to the confrontation. Besides the legislative and judicial confrontation, this section also unravels the general contemporary politics, political economy, and expert opinion underlying the right to property controversy prevailing during that time. Finally, it highlights the effect of the repeal of right to property in the post-1978 eminent domain process.

#### *4.3.1. First Amendment*

At the outset, Article 31 in 1950 stood as:

> Compulsory acquisition of property.
> (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 in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of 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 the compensation, or specifies the principle 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 the State shall have effect unless such law, having been reserved for the consideration of the President, has received 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 has received his assent, then, notwithstanding anything in this constitution, the

law so assented to shall not be Called in 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, or
(b) the provisions of any law which the State may 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 and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.
(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from 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 provisions of clause (2) of this Article or has contravened the provisions of sub-section (2) of Section 299 of the Government of India, Act, 1935.

The First Constitution Amendment Act, 1951 inserted Articles 31-A and 31-B with retrospective effect.[124] It was passed on June 18, 1951. According to the 'Statement of Objects and Reasons' of the First Amendment the reasons supplied for introducing the two provisions were as:

> The validity of agrarian reform measures passed by the State Legislatures in the last three years has, in spite of the provisions of clauses (4) and (6) of Article 31, formed the subject-matter of dilatory litigation, as a result of which the implementation of these important measures, affecting large numbers of people, has been held up.

Firstly, the Parliament felt that the increase in the litigations under Article 31 challenged the effective implementation of land reforms. In order to overcome the 'dilatory litigations' the Parliament through first amendment inserted the Ninth Schedule under the Constitution. All agrarian reform laws were placed in the Ninth

[124] *31A.Saving of laws providing for acquisition of estates, etc.*- (1) Notwithstanding anything in foregoing provisions of this Part, 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 "right" in relation to an estate shall include 'any rights vesting in a proprietor, sub-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue.
*31-B. Validation of certain Acts and Regulations.* - Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provision of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the, contrary, each of the said Acts and Regulations shall, subject to-the power of any competent Legislature to repeat or amend it, continue in force'.

Schedule granting them legislative immunity against judicial review. Parliament believed that for smooth sailing of agrarian reforms non-interference of the judiciary was essential. Secondly, beside the dilatory litigation process, the other reason for passing first amendment was the decision of Patna High Court in *Kameshwar Singh v. State of Bihar*[125], in which the High Court declared the Bihar legislation 'Bihar Land Reforms Act, 1950' unconstitutional. Another reason was the minority opinion in *Charanjit Lal Chowdhury v. Union of India*[126]. In the instant case, the Supreme Court by a 3:2 majority dismissed the petition of ordinary shareholder that challenged the constitutional validity of 'Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance 2 of 1950' under Articles 14, 19 and 31. The majority held that there was no violation of fundamental rights of the shareholder as the shares were intact with the petitioner. However, the minority felt the impugned Act was void on the ground that it violated Article 14. This decision was delivered on December 4, 1950. Parliament took serious cognizance of the minority opinion and viewed Article 14 as a possible threat in future against the land reforms laws in Bihar, Madhya Pradesh, and Uttar Pradesh.

Soon in 1952, the First Constitution Amendment Act was challenged in *Shankari Prasad Singh Deo v. Union of India & State of Bihar*[127]. However, the Supreme Court upheld its validity on the ground that the Parliament under Article 368 had the right to amend Part III of the Constitution. This validity test determined in *Shankari Prasad case*[128] was applied in *State of Bihar v. Kameshwar Singh*[129]. In the instant case, the Supreme Court upheld the validity of State land reform legislations on the ground of First Constitution Amendment Act.[130]

### *4.3.2. Fourth Amendment*

The Parliament passed the Fourth Constitution Amendment Act in 1955. According to the 'Statement of Objects and Reasons of the Fourth Amendment Act, 1955', its

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[125] AIR 1951 Patna 91
[126] AIR 1951 SC 41
[127] 1952 SCR 89
[128] Ibid.
[129] AIR 1952 SC 252
[130] Supreme Court allowed the appeal of State of Bihar, Madhya Pradesh, and Uttar Pradesh. Validity of the laws included Bihar Land Reforms Act 1950, Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands Act 1950, and Uttar Pradesh Zamindari Abolition and Land Reforms Act 1950. Except Bihar legislation other two were declared completely valid. In Bihar legislation Section 4(b) and Section 23(f) were declared unconstitutional and void.

primary purpose was to nullify certain judicial decisions that imposed fetters through Articles 14, 19, and 31 against social welfare legislations of Union and State that included laws relating to zamindari abolition, urban and rural planning, management of mineral and oil resources, commercial and industrial undertaking, and company reforms. It attempted to precisely restate the power of the State concerning compulsory acquisition and requisition of private property and distinguish the regulatory power that caused deprivation of property (Clause 2 of the Bill). The two prominent cases that the Fourth Amendment meant to undo were *State of West Bengal v. Subodh Gopal Bose*[131] and *State of West Bengal v. Mrs. Bela Banerjee*[132]. Both cases were decided in the month of December 1953. The executive alleged that the above judicial pronouncements posed strong threat towards implementation of social welfare policies, as the Supreme Court declared the value of compensation under Article 31(2) as just equivalent. To overcome the conundrum, Parliament under the Fourth Constitution Amendment amended Articles 31-A, 31(2) and inserted clause 2-A. Article 31(2) was substituted as:

> (2) 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.

Whereas, newly inserted Article 31 (2A) stood as:

> (2A) 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 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.

In *Subodh Gopal Bose case*[133], the appellant filed petition before the Supreme Court against the order of the West Bengal High Court. The High Court had quashed Section 7 of the West Bengal Revenue Sales (West Bengal) Amendment Act 1950, a State legislation, as unconstitutional on the ground of violation of Article 19(1)(f) and 31(2). Before the Amendment in 1950, the Act permitted eviction of 'under-tenants'. In 1942 the respondent purchased the land at a revenue sale. After independence, it was observed that due to large scale evictions under the Act immense hardship was caused to many people including the respondent. Eventually in 1950 an Amendment

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[131] AIR 1954 SC 92
[132] Supra 116, at 170.
[133] Supra 131, at 92.

was made to the Act, which under Section 7 retrospectively stayed the ejectment to protect large sections of people. Section 7 was challenged before the Calcutta High Court, which declared it unconstitutional. However, the Supreme Court with majority allowed the appeal and reversed the decision of the High Court. While reversing the decision, Chief Justice Patanjali Sastri held that the respondent was not substantially 'deprived' of any property within the meaning of Article 31(1) as the respondent was not withheld of any possession and enjoyment or seriously impaired its use and enjoyment nor materially reduced its value. However, certain judicial opinions expressed in the decision contradicted the legislature. For instance, Chief Justice Patanjali Sastri noted at one point that:

> A fundamental right is thus sought to be protected not only against the legislative organ of the State but also against its executive organ. The purpose of Article 31, it is hardly necessary to emphasise, is not to declare the right to the State to deprive a person of his property but, as the heading of the Article shows, to protect the "right to property" of every person. But how does the Article protect the right to property? It protects it by defining the limitations on the power of the State to take away private property without the consent of the owner. It is an important limitation on that power that legislative action is a prerequisite for its exercise.

In *Bela Banerjee case*[134] the appellant challenged the Calcutta High Court decision which declared certain provisions viz., proviso (b) to Section 8 of West Bengal Land Development and Planning Act, 1948 as unconstitutional and void. The object of the Act was to settle immigrants from East Bengal who migrated into the province of West Bengal due to communal disturbances in East Bengal. The Act acquired land to settle the migrants, a public purpose. Section 8 of the Act was challenged on the ground that it retrospectively fixed anterior date for determining market value as compensation. On behalf of the State it was argued that the legislature has discretionary authority under Article 31(2) and Entry 42 of List III to determine the compensation. The Court rejected the above argument and held that the compensation should be free and full i.e. just equivalent compensation with justiciable right. To quote Chief Justice Patanjali Sastri who delivered the judgment stated that:

> While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount, to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the court.

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[134]Supra 116, at 170.

Beside the *Bela Banerjee*[135] and *Subodh Gopal Bose*[136] *cases,* there were few other cases that were shaping a judicial precedent of just compensation. In *Dwarkadas Shrinivas of Bombay v. Sholapur Spinning & Weaving Co. Ltd. and Others*[137], the appellant challenged the decision of the Bombay High Court that upheld the validity of 'Sholapur Spinning & Weaving Company (Emergency Provisions) Act, 1950'. The impugned Act authorised the government to acquire the management of the company in public interest. This case did not consider the decision in *Charanjit Lal Chowdhury v. Union of India*[138] wherein the petition was dismissed on the ground that the petitioner failed to prove that the government seized any property interest. The apex court considered *Charanjit Lal case*[139] as distinguishable and deserving no application in this case. In the instant case, the appellant was a preference shareholder with 3244 preference shares of the face value of Rs.100. He paid Rs.50 per share. Later, the statutory directors nominated by the Government under the Act, called the appellant and other preference shareholders to pay Rs.1,62,000 as the balance amount. The appellant as a representative for other preference share holders challenged the validity of the Act and the authority of government appointed directors under Articles 14, 19, and 31(2). Chief Justice Patanjali Sastri, on behalf of the majority, allowed the appeal as the Act violated Article 31(2) and did not fall in the ambit of Article 31(5)(b)(ii)[140].

In *Saghir Ahmad v. State of U.P. and Others*[141], an appeal was filed against the confiscation of private buses under the U.P. Road Transport Act, 1951. Under the Act the State government cancelled permits of private operators. It authorised State government to exclusively operate transport in the interest of general public. The Act was challenged on the ground of violation of Articles 19(1)(g) and 31(2) as no compensation was provided to the permit holders for commercial undertaking. Court allowed the appeal and set aside the decision of the High court. The Supreme Court held that:

> …having regard to the majority decision of this Court in the case of *State of West Bengal v. Subodh Gopal Bose* and *Dwarkadas Shrinivas v. Sholapur Spinning and Weaving Co. Ltd.* In

[135]Supra 116, at 170.
[136]Supra 131, at 92.
[137]AIR 1954 SC 119
[138]Supra 126, at 41.
[139] Ibid.
[140]Article 31(5)(b)(ii) mainly saved laws against the application of Article 31(2). Article 31(5)(b)(ii) suggested that laws made for the promotion of public health or for prevention of danger to life or property have been excluded from the clause 2 of Article 31.
[141]AIR 1954 SC 728

> view of that majority it must be taken to be settled now that clauses (1) and (2) of Article 31 are not mutually exclusive in scope but should be read together as dealing with the same subject namely, the protection of the right to property by means of limitations on the State's powers, the deprivation contemplated in clause (1) being no other than acquisition or taking possession of the property referred to in clause (2). …We think there that in these circumstances the legislation does conflict with the provision of Article 31(2) of the Constitution and as the requirements of that clause have not been complied with, it should be held to be invalid on that ground.

Eventually, the legislature passed the Fourth Constitution Amendment to overcome above decisions and to retain its final authority over compensation. It declared the principles determining compensation as non-justiciable. It strictly limited judicial review under Article 13 through Article 31A. Under Article 31A no law would be declared void on the ground of Articles 14, 19, and 31. Moreover, the Amendment added 'estate' under Article 31A to broaden the scope of land reforms.

### *4.3.3. Seventeenth Amendment*

In spite of the Fourth Constitution Amendment Act, 1955, Article 31 underwent further changes. The Seventeenth Constitution Amendment Act 1964 further amended Article 31. The focus was on the mention of 'estate' in Article 31A. This amendment broadened the definition of 'estate' to include other forms of land tenure like 'ryotwari' and other grants that existed in different States mainly to provide protection against judicial review under Article 31A. This was explicitly mentioned in the 'Statement of Objects & Reasons' of the Amendment as:

> Article 31A of the Constitution provides that a law in respect of the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall not 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. The protection of this Article is available only in respect of such tenures as were estates on the 26th January, 1950, when the Constitution came into force. The expression "estate" has been defined differently in different States and, as a result of the transfer of land from one State to another on account of the reorganisation of States, the expression has come to be defined differently in different parts of the same State. Moreover, many of the land reform enactments relate to lands which are not included in an estate. Several State Acts relating to land reform were struck down on the ground that the provisions of those Acts were violative of Articles 14, 19 and 31 of the Constitution and that the protection of Article 31A was not available to them. It is, therefore, proposed to amend the definition of "estate" in Article 31A of the Constitution by including therein, lands held under ryotwari settlement and also other lands in respect of which provisions are normally made in land reform enactments.

Further, for the first time, the Amendment expressly mentioned that the takings shall receive compensation equivalent to market value. Again this was mentioned in the 'Statement of Objects and Reasons' as:

> It is further proposed to provide that where any law makes a 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 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 not less than the market value thereof.

The rationale for adopting the amendment was the Supreme Court decision in *Kavalappara Kottarathil Kochuni and Others v. State of Madras and Kerala*[142]. In the instant case, three petitions were clubbed together and heard under Article 32 of the Constitution of India. Justice Subba Rao delivered the majority judgment on March 4, 1959. The petitioner had challenged the constitutional validity of the 'Madras Marumakkathayam (Removal of Doubts) Act, 1955' passed by the Madras legislature on the ground of being void and inoperative, as the Act did not affect the rights of the sthanee or his estate to any extent and was challenged for violating Articles 14, 19(1)(f), and the same not protected by clause (5) of the Article 19. Respondents defended the Act under Article 31A of the Constitution of India. After extensive deliberation, Justice Subba Rao observed that the impugned Act neither initiated any agrarian reform nor regulated any rights between landlords and tenants. Rather, it declared particular 'sthanams' to have always been 'tarwads' and their property to have always been 'tarwad' property. Justice Subba Rao allowed the appeal and held that:

> The impugned Act is only a legislative device to take the property of one and vest it in another without compensation, and therefore, on its face stamped with unreasonableness. In short, the impugned Act is expropriatory in character and is directly hit by Article 19(1)(f) and is not saved by clause (5) of Article 19.

Similarly in *Karimbil Kunhikoman v. State of Kerala*[143], the Supreme Court with majority held that the 'Kerala Agricultural Relations Act 1961' was not protected under Article 31A because lands under ryotwari patadars did not fall under the ambit of 'estate'. Difficulty emerged over the definition of Article 31A. At the same time, Supreme Court observed that determination of compensation on smaller rate could not be considered as just.

Moreover, the judiciary had struck down various State land reform laws viz., Madras Land Reforms (Fixation of Ceiling on Land) Act 1961, Rajasthan Tenancy Act 1955, and Maharashtra Agricultural Land (Ceiling and Holding) Act, 1961. The Seventeenth

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[142] AIR 1960 SC 1080

[143] AIR 1962 SC 723

Amendment included the above laws in the Ninth Schedule of the Constitution to overcome judicial scrutiny and maintain its validity to accomplish land reforms (Mirchandani 1977: 26).

#### *4.3.4. Twenty-Fifth Amendment*

As soon as, the Seventeenth Constitution Amendment was passed, it was challenged for constitutional validity in *Sajjan Singh v. State of Rajasthan*[144]. The Supreme Court upheld its validity. Nevertheless, the compensation conundrum remained unsettled as the discontents between Supreme Court and Parliament continued. In *State of Madras v. D. Namasivaya Mudaliar*[145] the State government filed an appeal before the Supreme Court against the decision of the Madras High Court. The High Court declared the compensation granted to the land owner under 'Madras Lignite (Acquisition of Land) Act, 1953' as violative of Article 31(2) on the ground that the market value was calculated at an anterior date. In the Supreme Court, Justice Shah dismissed the appeal on the ground that the impugned Act came into force before the Fourth Constitution Amendment Act, 1955. As a result, the impugned Act was governed by Article 31(2) prior to the Fourth Amendment. The apex court revisited the *Bela Benarjee*[146] decision and held that the compensation should be just and equivalent.

Again in *Union of India v. Metal Corporation of India*[147], the apex Court applied the just compensation criteria to constitutionally invalidate the law. In the instant case, the Central Government challenged the decision of the Punjab High Court. The respondent was Metal Corporation recognised under the Company Act. The Act under consideration was an ordinance which was subsequently converted into law by the Central Government. The Act authorised the government to acquire corporations. Before the High Court, the Respondent challenged the acquisition on the ground of violation of Article 31(2) and ultimately the High Court invalidated the acquisition. Even in appeal before the Supreme Court, Justice Subba Rao invalidated the Act as it failed to ensure just equivalent compensation for the acquisition of whole machinery. Justice Subba Rao held that:

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[144]AIR 1965 SC 845
[145]AIR 1965 SC 190
[146]Supra 116, at 170.
[147]AIR 1967 SC 637

> Under Art.31(2) of the Constitution, no property shall be compulsorily acquired except under a law which provides for compensation for the property acquired and either fixes the amount of compensation or specifies the principles on which and the manner in which compensation is to be determined and given. The second limb of the provision says that no such law shall be called in question in any court on the ground that the compensation provided by the law is not adequate. If the two concepts, namely, "compensation" and the jurisdiction of the court are kept apart, the meaning of the provisions is clear. The law to justify itself has to provide for the payment of a "just equivalent" to the land acquired or lay down principles which will lead to that result. If the principles laid down are relevant to the fixation of compensation and are not arbitrary, the adequacy of the resultant product cannot be questioned in a court of law.

Further, in some cases the laws were invalidated on the ground of non-involvement of agrarian reform as mandated under Article 31A. Like in *P. Vajravelu Mudaliar and Others v. Special Deputy Collector for Land Acquisition, West Madras and Another*[148], three petitions were clubbed together, the petitioners challenged the constitutional validity of 'Land Acquisition (Madras Amendment) Act, 1961' for violation of Articles 14, 19, and 31(2) of the Constitution. The respondents pleaded that the Act was saved under Article 31A, as a result, its validity cannot be questioned on the ground of Articles 14, 19, and 31(2). Justice Subba Rao delivered the majority judgment and held that the Act was unconstitutional for violating Article 14. Also, the apex court refused to apply Article 31A to the Act, as the impugned Act in reality did not strive for agrarian reforms.

In another case *Deputy Commissioner and Collector, Kamrup and Others v. Durga Nath Sarma*[149] Justice Bachawat applied the test of agrarian reform as laid down under Article 31(2). In the instant case, the constitutional validity of the 'Assam Acquisition of Land for Flood Control and Prevention of Erosion Act 1955' was challenged on the ground of non-involvement of agrarian reforms. The appellant challenged the decision of High Court that declared the Act violative of Article 31(2) and it was also not protected under Article 31A, as the Act came into force before the Constitution Fourth Amendment Act. The Supreme Court upheld the decision of the High Court as correct. The Act did not concern with agrarian reforms, rather it was related with flood control and prevention of erosion.

A contradictory position was observed in *State of Gujarat v. Shantilal Mangaldas and Others*[150]. The petitioner filed an appeal against the decision of the High Court. The High Court held that the determination of compensation was not just and equivalent

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[148] AIR 1965 SC 1017
[149] AIR 1968 SC 394
[150] (1969) 1 SCC 509

under Article 31(2). At the same time the Act was not protected under Article 31(5)(b)(ii). The High Court relied on *P. Vajravellu Mudaliar case*[151], *Bela Banerjee case*[152], and *Metal Corporation case*[153]. However, the Supreme Court Justice J.C. Shah on behalf of the majority allowed the petition and set aside the order of the High Court. The Supreme Court held that after the Fourth Constitution Amendment the issue of compensation was non-justiciable.

Very soon the *Shantilal Mangaldas case*[154] was overruled in *R.C. Cooper v. Union of India*[155] (also referred as 'Bank Nationalisation case'). In the instant case, the Supreme Court struck down the 'Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969'. An eleven judges' bench heard the matter, and the majority held that the compensation guaranteed for nationalisation of banks was unconstitutional. Method of compensation was declared as erroneous as it excluded certain relevant items such as assets and undertook consideration of irrelevant matters. Additionally, the majority held that the adequacy of compensation and the principles determining compensation laid down by legislature are justiciable. Further, the apex Court held that the acquisition or requisition of property for public purpose under any law should satisfy the requirement of Article 19 (1)(f).

Above cases including the *R.C. Cooper Case*[156] declared the issue of compensation as justiciable. Again, the Parliament came forward to nullify the above decisions, and passed the Twenty-fifth Constitutional Amendment Act, 1971. This was also explicitly mentioned in the 'Statement of Objects and Reasons'[157] which has direct

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[151] Supra 148, at 1017
[152] Supra 116, at 170.
[153] Supra 147, at 637.
[154] Supra 150, at 509.
[155] 1970 SCC (1) 248
[156] Ibid.
[157] "(2) The Bill seeks to surmount the difficulties placed in the way of giving effect to the Directive Principles of State Policy by the aforesaid interpretation. The word "compensation" is sought to be omitted from Article 31(2) and replaced by the word "amount". It is being clarified that the said amount may be given otherwise than in cash. It is also proposed to provide that Article 19(1) (f) shall not apply to any law relating to the acquisition nor requisitioning of property for a public purpose. (3) The Bill further seeks to introduce a new Article 31C which provides that if any law is passed to give effect to the Directive Principles contained in clauses (b) and (c) of Article 39 and contains a declaration to that effect, such law shall not be deemed to be void on the ground that it takes away or abridges any of the rights contained in Article 14, 19 or 31 and shall not be questioned on the ground that it does not give effect to those principles. For this provision to apply in the case of laws made by State Legislatures, it is necessary that the relevant Bill should be reserved for the consideration of the President and receive his assent."

reference to the *R.C. Cooper case*[158] and intended to overcome justiciability of compensation, the requirements of Article 19(1)(f), and to maintain Parliamentary supremacy. Firstly, with regard to justiciability, the amendment replaced the word 'compensation' by 'amount' under Article 31(2)[159]. It was mainly due to the fact that in the *R.C. Cooper case*[160], the court held that the right to compensation included money equivalent of property acquired. Now with the insertion of 'amount' the Parliament intended to overcome just compensation and regain its final authority in the determination of compensation. Secondly, to overcome the requirements of Article 19(1)(f), the amendment inserted clause 2B[161] after Article 31(2A) as the application of fundamental rights posed threats to social welfare policies like bank nationalisation. Thirdly, to retain Parliamentary supremacy over social reforms the amendment assigned primacy to the Directive Principles of State Policy over Fundamental Rights. Resultantly, the amendment inserted a new clause 31C[162] that incorporated principles laid down in Article 39 (b) and (c) of the Directive Principle of State Policy into the Fundamental Rights category. Article 31C provided constitutional immunity to social reforms against judicial review. Parliament strived to implement agrarian reforms enshrined under the Directive Principles of State Policies. Therefore, it placed reform laws under 31C to shield them against judicial review under Articles 14, 19, and 31.

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[158] Supra 155, at 248.

[159] The amendment substituted Article 31(2) as – "No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash: Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1) of Article 30, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause."

[160] Supra 155, at 248.

[161] Clause 2B after Article 31(2A) stated that, "(2B) Nothing in sub-clause (f) of clause (1) of Article 19 shall affect any such law as is referred to in clause (2).

[162] Article 31C stated that, "Saving of laws giving effect to certain directive principles.- Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39 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; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy: Provided that where such law is 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."

### *4.3.5. Forty-Fourth Amendment*

The Twenty-Fifth Constitution Amendment was again challenged in the *Keshavananda Bharati Case*[163]. The Supreme Court with majority held that the compensation was justiciable. Although the Twenty-fifth Amendment replaced the word 'compensation' by 'amount', Supreme Court held that the amount should not be illusory and therefore subjected to judicial scrutiny. With this decision in 1973, legislative plans were shattered again. Finally, the confrontation between legislature and judiciary culminated with the Forty-Fourth Constitution Amendment of 1978. Parliament as a last resort repealed Article 31 and 19(1)(f) from the Fundamental Right category. This was explicit in the 'Statement of Objects and Reasons' of the Forty-Fourth Constitution Amendment Act.[164] Two major factors were responsible for the introduction of the amendment, first, persistent tussle between the judiciary and legislature not only on the justiciability of compensation but also on the overall supremacy within the Constitutional framework; and second, the politics revolving around the whole supremacy issue among the political parties.

## 4.4. Post-Deletion of Right to Property: An Era of Impassiveness

The Forty-Fourth Constitution Amendment of 1978 deleted Article 31 and 19(1)(f) from Part III as Fundamental right and introduced Article 300A. The newly inserted provision read as:

> Persons not to be deprived of property save by authority of law. - No person shall be deprived of his property save by authority of law.

According to the "Statement of Objects and Reasons" of the Forty-Fourth Constitution Amendment, the Parliament assured that the repeal of Article 31 and 19(1)(f) will not harm the interests of the minorities, and of personal cultivators who were entitled to receive compensation on the basis of market value on the acquisition

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[163]Supra 8, at 1461.

[164] 'Statement of Objects and Reasons' mentioned that – "3. In view of the special position sought to be given to fundamental rights, the right to property, which has been the occasion for more than one amendment of the Constitution, would cease to be a fundamental right and become only a legal right. Necessary amendments for this purpose are being made to Article 19 and Article 31 is being deleted. It would however, be ensured that the removal of property from the list of fundamental rights would not affect the right of minorities to establish and administer educational institutions of their choice;4. Similarly, the right of persons holding land for personal cultivation and within the ceiling limit to receive compensation at the market value would not be affected;5. Property, while ceasing to be a fundamental right, would, however, be given express recognition as a legal right, provision being made that no person shall be deprived of his property save in accordance with law."

of their land. However, this legislative assurance appeared fragile in the absence of constitutional measures. Soon, this was explicit in *Bishambhar Dayal Chandra Mohan v. State of U.P.*[165] wherein the Supreme Court interpreted the 'authority of law' under Article 300A, as "an Act of Parliament, or of State legislature, a rule, or a statutory order, having force of law, that is positive or State made law" by adopting a non-interventionist approach. Since 1978, Supreme Court abdicated itself from examining the public purpose and compensation (Wahi 2016: 959). This non-interventionist approach has certainly led to enormous hardship to the landowners resulting into loss of livelihood and physical relocation (Fernandes 2007: 203).

In comparison with Article 31, Article 300A appeared as a bare provision without any limitations that existed under Article 31. Now it was the sole authority of the legislature to determine terms and conditions of the acquisition of property for public purpose including compensation. Further, the insertion of Article 300A curtailed the writ jurisdiction of Supreme Court under Article 32 (Jain 2010: 1865). The Forty-fourth Constitution Amendment also repealed Article 19(1)(f).[166] This clause had ensured every citizen a freedom to acquire, hold and dispose of property. But such freedom was restricted through reasonable limitation mentioned in Article 19(5). Thus, it offered protection against the arbitrary and excessive use of authority by the State. Both Article 19(1)(f) and Article 31 differed in terms of scope (Rao 1967: 586). Article 31 applied to any person irrespective of citizenship, whereas Article 19(1)(f) applied only to the citizens of India. Another difference between the two was that, under 19(1)(f) the property were not in immediate possession, whereas under Article 31 the person was already in the possession of property and then deprivation caused by the State (Rao 1967: 588). Both provisions were repealed in 1978.

While commenting on the newly inserted Article 300A, M.P. Jain mentioned:

> Though Art.300A is not a Fundamental Right, nevertheless, it does not make much of a difference except that a writ petition is not maintainable under Art.32 in the Supreme Court to vindicate the right under Art.300A. A person challenging violation of Art.300A must go to a High Court under Art.226 with his writ petition. The constitutional right to property under Art.300A is not a basic feature or structure of the Constitution. After the Forty-fourth

[165] AIR 1982 SC 33.

[166] The other reason for their repeal was that the Supreme Court consistently invoked both provisions i.e. Article 31 and 19(1)(f) against the eminent domain process. Supreme Court held in *R.C. Cooper v. Union of India 1970 SCC (1) 248* that both Article 19(1)(f) and Article 31 were mutually inclusive overruling its earlier decision of mutually exclusive in *State of Bombay v. Bhanji Munji and another AIR 1955 SC 41*. However, this mutually inclusive approach was countered by Parliament in the Twenty-Fifty Constitution Amendment Act 1971 (Khanna 2008: 326).

> Amendment of the constitution right to property is a human right and a constitutional right but not a Fundamental Right (Jain 2010: 1865).

Jain further added that:

> Article 300A ensures that a person cannot be deprived of this property merely by an executive fiat. The rights in property can be curtailed, abridged or modified by the state only be exercising its legislative power. Deprivation of property can only be done according to law. Without law, there can be no deprivation of property. No law, no deprivation of property is the principle underlying Art.300A. An executive order depriving a person of this property, without being backed by law, is not constitutionally valid. Article 300A only limits the powers of the State that no person shall be deprived of his property save by authority of law. There has to be no deprivation without any sanction of law. Deprivation by any other mode is not acquisition or taking possession under Article 300A. In other words, if there is no law, there is no deprivation. Acquisition of mines, minerals and quarries is deprivation under Article 300A (Jain 2010: 1866).

Finally, Jain suggested that:

> The crucial question however is that now that the concept of a socialist India is wearing thin, will the Supreme Court, in a creative bid, read in Article 300A a right to compensation for acquisition/deprivation of private property. There is no gain-saying the fact that for growth of wealth and capital in the society, some protection to private property is absolutely essential. A strategy which the Supreme Court can adopt for this purpose may be to link Art.300A with Art.14 and to interpret the word 'law' in Art.300A in the same sense as 'law' in Art.21 (Jain 2010: 1875-1876).

H. M. Seervai while concluding on Article 300A states that,

> …that the general rule that compensation must be a full equivalent is not undermined by allowing exceptions to be established to the satisfaction of the Court. This concept of compensation removes an arbitrary power from the Legislature and also a weapon of political black-mail from the executive. It substitutes for arbitrary power a general rule, and it prevents arbitrary departures from the rule by requiring that the need for such departure, and the extent of the departure, must be established by the State to the satisfaction of the Court. The interpretation we have given to Art.300A read with Entry 42, List III would also avoid a challenge to the property amendments on the ground that they violate the basic structure of our Constitution (Seervai 1996: 1398).

Seervai opined that the basic structure doctrine should be utilized in the application of right to property. However, that did not seem to have garnered any attention of the apex court.

After a long hiatus, in recent years, the Supreme Court has attempted to enlarge the scope of right to property under Article 300A. In *Radhy Shyam v. State of Uttar Pradesh*[167] Justices G.S. Singhvi and A.K. Ganguly, while deciding the issue of land acquisition under the urgency clause held that the principle of *audi alteram partem* under Article 14 is essential element of fair hearing and inherent principle of natural justice. The same bench made similar observation in *Greater Noida Industrial*

[167](2011) 5 SCC 553

*Development Authority v. Devendra Kumar and Others*[168]. In the instant case the land proceedings were found *mala fide*, on the ground of violation of procedure established by law. So, the scope of judicial review concerning right to property under Article 300A appeared limited. In another case *Rajiv Sarin and Another v. State of Uttarakhand*[169] the bench of five Supreme Court judges examined the scope of Article 300A. Justice Mukundakam Sharma, while delivering the unanimous decision mentioned that the Article 300A resembles Article 31(1), however, it is placed outside the Part III of the Constitution. As a result, Justice Sharma reiterated that Article 300A demands a different mindset than pre-1978. This change in mindset was expressed as:

> But even now as provided under Article 300A of the Constitution the State can proceed to acquire land for specified use but by enacting a law through State legislature or by Parliament and in the manner having force of law. When the State exercises the power of acquisition of a private property thereby depriving the private person of the property, provision is generally made in the statute to pay compensation to be fixed or determined according to the criteria laid down in the statute itself. It must be understood in this context that the acquisition of the property by the State in furtherance of the Directive Principles of State Policy was to distribute the material resources of the community including acquisition and taking possession of private property for public purpose. It does not require payment of market value or indemnification to the owner of the property expropriated. Payment of market value in lieu of acquired property is not a condition precedent or sine qua non for acquisition. It must be clearly understood that the acquisition and payment of amount are part of the same scheme and they cannot be separated. It is true that the adequacy of compensation cannot be questioned in a court of law, but at the same time the compensation cannot be illusory.

The change in mindset that Justice Sharma referred to was the change in application of Article 300A wherein the legislature was declared supreme authority in fixing compensation and not the judiciary. Once the legislature fixed it the adequacy of compensation remained unquestioned, however, Justice Sharma asserted that such compensation cannot be illusory. However, in another case, *K T Plantation Private Ltd. v. State of Karnataka* [170] a five judges' bench of Supreme Court mentioned that public purpose and compensation are conditions precedent to the application of Article 300A. However, the court was silent on the nature of compensation. It seemed that the court was more concerned over the international regime of investment, as it draws analogy between rule of law and Article 300A. Justice K. S. Radhakrishnan held that:

> Let the message, therefore, be loud and clear, that rule of law exists in this country even when we interpret a statute, which has the blessings of Article 300A. Deprivation of property may also cause serious concern in the area of foreign investment, especially in the context of International

[168](2011) 12 SCC 375
[169](2011) 8 SCC 708
[170](2011) 9 SCC 1

> Law and international investment agreements. Whenever, a foreign investor operates within the territory of a host country the investor and its properties are subject to the legislative control of the host country, along with the international treaties or agreements. Even, if the foreign investor has no fundamental right, let them know, that the rule of law prevails in this country.

Further, the Supreme Court has extended Article 300A in accordance with the international human right regime. In *P. T. Munichikkanna Reddy v. Revamma*[171] and *Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke and Chemicals*[172] the Supreme Court made general reference to the right to property from the perspective of Universal Declaration of Human Rights 1948. Article 17(1) and (2) of the Declaration refers to right to property. However, such reference was made with regard to the adverse possession that did not address any substantial issues of eminent domain.

Overall, the presence of Article 300A as compared to the repealed Article 31, affects individuals with the least property. Nehru once mentioned in the Constituent Assembly that the right to property mainly aimed to protect the weaker sections against the tyranny of rich (CAD IX 2009: 1197). Resultantly, the repeal of Article 31 curtailed the access to remedy for illiterate poor with little property. Now under Article 300A, as a constitutional right or legal right, the judicial remedies could only be sought through local courts on filing of appropriate suit with the burden of proof on the individuals themselves to prove the statutory unjustness of eminent domain (Jain 2010: 1865).

Further, confrontation between legislature and judiciary on the right to property is not unique to India. Certain foreign legal systems have successfully addressed the judicial-legislative conundrum. Although in India, the right to property under Article 31 was repealed to secure nationalisation and social welfare, in France the nationalisation process reinstated right to property. This reinstatement was initiated not by the legislature rather by the court i.e. the Conseil through judicial pronouncement in 1982 (Boyron 2013: 162). Right to property was absent in the French Constitution of 1958, but it existed in Article 17 of the Declaration of 1789. Conseil referred to Article 17[173] and extended it to the 1958 Constitution. Through right to property the Conseil imposed constitutional rules and principles to the framework of the bill that intended to initiate nationalisation. The principles drawn

[171](2007) 6 SCC 59
[172](2007) 8 SCC 705
[173]State cannot compulsorily acquire property without public interest and any purchase must pay fair and prior compensation.

from Article 17 were applied to the bill namely that the compensation was neither fair nor timely, and therefore the bill as unconstitutional (Boyron 2013: 163). Thus, French nationalisation had the prerequisite of fulfilling public interest and payment of fair and timely compensation under the right to property as a justiciable right.

The US Constitution is another vital reference regarding the constitutional justiciability of right to property and eminent domain. Many would consider the comparison between the two constitutions as impractical, for the fact that the US Constitution was drafter in 1776 i.e. more than one and half century before the Indian Constitution. In fact, the US Constitution has significantly influenced the Indian Constitutional framers (Austin 2010). Indian constitutional makers incorporated certain principles of the US Constitution, such as the principle of judicial review, Separation of Powers among others. Even in the post-Constitution era, the Indian Judiciary has consistently cited the US judicial precedents to overcome legal obscurity, including PILs, Basic Structure Doctrine, and Prospective Overruling among others (Noorani 2001). Therefore, with certain unique and common features in both the constitutions, the right to property and eminent domain comparison between the two is justified.

The US Constitution is federal in nature (Stoebuck 1972: 553). Fifth Amendment of the Federal Constitution recognizes the eminent domain principle. It states that private property can be seized for public use, with just compensation (Baude 2013: 1738). Every State Constitution has incorporated the federal principle. However, this principle has been contentious since its inception.[174] In 2005, public outcry aggravated by the decision in *Kelo v. City of New London*[175], that consolidated distrust against the eminent domain on a national platform (Underkuffler 2006: 377). According to the facts of the case, New London, a City in Connecticut was facing an economic crisis with huge unemployment. In order to overcome it, in the year 2000 the City approved a development plan. The plan projected the creation of one thousand jobs and a revival of taxes and revenue in the City. As part of a plan, privately owned land was acquired and transferred to private entities. Private owners

[174]The principle was challenged consistently in various cases. Some of the cases are Charles River Bridge v. Warren Bridge 36 U.S. 420 (1837); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Berman v. Parker, 348 U.S. 26 (1954); Poletown Neighbourhood Council v. City of Detroit (1981); Hawaii Housing Authority v. Midkiff, 467 U.S. 229; 104 S. Ct. 2321; 81 L. Ed. 2d 186 (1984).
[175] Supra 1, at 469.

opposed the transfer of land. One Susette Kelo along with other owners sued the City for abuse of eminent domain power before the Connecticut State Supreme Court. They contended that transfer of land, for the development plan, to the New Development Corporation, did not satisfy the requirement of public use under the Fifth Amendment. State Supreme Court by 4:3 majority held that the taking and transfer of land to the private entity for economic development did not violate Fifth Amendment. Finally, the matter came before the US Supreme Court. It addressed the issue, whether the City's development plan constitutes public use within the takings clause of Fifth Amendment. Supreme Court with 5:4 majority favoured the City of New London. It held that the economic development plan lies within the purview of public use. In retaliation, people protested against the decision. They demanded limitation on the exercise of eminent domain, the introduction of a constitutional amendment to dilute the Kelo's decision and payment of just compensation, as the existing compensatory measures were inadequate (Fee 2006: 783). The decision caused immense loss to the private property rights, leading the protesters' to reiterate restoration of the right to private property (Lilles 2006: 369). Succumbing to various protests, State Constitutions introduced changes (Somin 2007: 1931). This happened mainly due to the presence of justiciable Constitutional right to property. Justiciable rights ensured accountability.

### 4.5. Dissenting Voices Outside the Constitutional Fold

Beside the confrontation between the Parliament and Judiciary, the academia was also extensively divided on the position of right to property as fundamental right. The first full critique of the Supreme Court came after the decision of *Golaknath case*[176]. The academia expressed contradictory opinions over the existence of right to property. In *Golaknath case*[177] the Supreme Court restricted the Parliament from amending Article 31. Many eminent thinkers from varying fields like economics, law, and politics among others participated in the debate organized by 'Society for Democracy' on 'Property not a Fundamental Right' after the *Golaknath case*[178]. Speakers primarily responded to two questions. First, is the right to property at all a fundamental right? Second, was it an error to include the right to property in the chapter of Fundamental Rights in the Constitution? Divergent opinions were expressed. Communists like S.

[176]Supra 7, at 1643.
[177] Ibid.
[178] Ibid.

A. Dange and A. K. Gopalan pleaded for complete repeal of right to property as fundamental right from the Constitution. Dange declared right to property as anti-social and criticised the Constituent Assembly for incorporating this provision (People's Publishing House 1970: 39).

Similar observations were made by S. C. Agarwal, Jaisukh Lal Hathi, Rabi Ray, Lal Narayan Sinha, and C.N. Chittaranjan. Agrawal criticised the pro-right to property advocates for having distrust towards legislature. He questioned why similar distrust against the legislature is not expressed against the right to life and personal liberty (People's Publishing House 1970: 19-20).

Economists like A.M. Khusro, K. A. Naqvi and Amartya Sen added the economics perspective to the debate. Khusro demanded reconsideration of "empirical instruments" before abolition of right to property, stating that such abolition should not affect production (People's Publishing House 1970: 97). Naqvi suggested 'intermediate regime' to overcome the compensation dilemma (People's Publishing House1970: 99). Further, Sen viewed the right to property as 'self-contradictory' and believed that the issue of compensation could be manipulated (People's Publishing House 1970: 101). As an economist he never considered the right to property as fundamental, therefore, he believed this right should not be treated as a fundamental right (People's Publishing House 1970: 102). Hence, the economists' perspective unanimously believed that the right to property is not fundamental in nature rather restrictions are imposed on it.

Many speakers like K.S. Chawla, Ghulam Nabi Untoo, Narayan Nettar, V.A. Seyid Muhammed, A.S.R. Chari felt that the right to property should not be completely repealed rather retained through constitutional amendment under Article 368. Seyid Muhammad proposed to adopt democratic methods such as extensive regulation of right to property rather its complete removal. He cautioned that:

> Personally I believe that this can be achieved by democratic means. Apart from my earnest belief, there is the inherent right and the inherent justness of socialism, that is the only practical method. If you do not allow this, social progress will be arrested and the alternative will be revolution. Tomorrow, it may be a Brutus from the extreme right or from the extreme left and he may raise a dagger against the Constitution and say: I love you, Constitution, but I love the country more and so you must go. Such situation should not take place (People's Publishing House 1970: 73).

Untoo suggested two solutions without complete repeal of the right, namely – (1) introducing constitutional amendment, and (2) revisiting the *Golaknath case*[179] by a higher bench (People's Publishing House1970: 109).

D. L. Mazumdar and Shanti Bushan shared slightly different views. Mazumdar proposed change in the attitude towards the right to property. Such right should be viewed in modern context with relativity to society, time and circumstances (People's Publishing House 1970: 89). Mazumdar suggested the solution as:

> The important question of practice policy is, I repeat, to define our attitude towards the right to property as precisely as we can, and then to create the requisite climate of opinion which ensures that judges and legislators acknowledge the social ethos of the times (People's Publishing House 1970: 93).

Further, he believed every human being required certain amount of property for 'material well being' and 'development of mind' (People's Publishing House1970: 93). On the other hand, Bushan demanded voluntary change in the attitude of the owners (People's Publishing House1970: 113). Bushan suggested amendment of Articles 19 and 31 and appealed the Supreme Court to reconsider its position (People's Publishing House 1970: 117). Overall, all members had different thoughts but many demanded that the judiciary should function within the contours of the Constitution, with some supporting the existence of right to property as fundamental right.

Even the legal fraternity appeared highly vocal on the issue, particularly during the Indira Gandhi regime. Eminent constitutional expert Nani Palkhivala viewed right to property as the essence of 'sound body politic' and of a democracy with the object of 'economic prosperity' (Palkhivala 1974: 35). He elaborated the importance of property and its significant for human sustenance as:

> Property is necessary for the subsistence and well being of men. No man would become a member of community in which he could not enjoy the fruit of his honest labour and industry. The preservation and security of property is one of the primary objects of the social compact that induce men to unite in society. There can be no rational dispute about his proposition, though there may be different opinions as to the kind or quantum of property that a person should be allowed to hold (Palkhivala 1974: 35).

Further, the constitutional expert asserted that all democracies across the globe have recognised right to property and cited various constitutions of the world (Palkhivala 1974: 35-37). Palkhivala considered right to property as essential and effective for the

[179] Supra 7, at 1643.

exercise of other fundamental rights namely, freedoms under Article 19 (1) and freedom of religion under Articles 25 and 26 (Palkhivala 1974: 38-39) and mentioned that:

> It would be no exaggeration to say that without the right to property it would be impossible to work the Constitution (Palkhivala 1974: 39).

On the repeal of right to property Palkhivala said:

> Property has become a dirty word today. Liberty will become a dirty word tomorrow. If we permit the right to property to be abrogated, the denizens of the mansions of power will not jib at taking away the right to personal liberty (Palkhivala 1974: 39).

He highlighted the importance of right to property and cautioned against abrogation by stating that:

> Undoubtedly, the right to property must always remain subject to the need of achieving the welfare of the masses and the necessity of fair and reasonable distribution of income and wealth. But a virtual abrogation of the right would spell disaster. If the right to property were taken away, the citizens to be worst hit in the long run would be the middle classes, and also the minorities – religious, political and linguistic (Palkhivala 1974: 39).

On the contrary, another constitutional expert Subhash Kashyap argued that the Parliament possessed constituent power to amend any constitutional provisions on the ground of social and economic necessity. He explained Article 31 as:

> Ever since the commencement of the Constitution during the last 27 years of its working, however, the property provisions have remained the most contentious. They have been responsible for causing sharp confrontations and accentuating role conflicts between the legislature and the judiciary – the former regarding itself as the sole and supreme representative of the people and the latter conducting itself as the custodian of the fundamental rights of property etc. of the individual. Many important constitutional battles have been fought in Parliament and in courts on the issue of the individual's right to hold and enjoy his property vis-à-vis the State's right to acquire that property or otherwise regulate its use in public interest (Kashyap 1978: 97).

Kashyap revealed the problem underlying right to property as:

> Time and again, the right to property became a weapon in the hands of the richer classes and many pieces of socio-economic legislation like those dealing with land reforms considered vital for the welfare of the common people were struck down by the courts as being violative of the constitutional right to property and/or some other related provisions of the Constitution or stay orders were obtained from courts against the Government's progressive measures of social amelioration and continued for long durations thereby denying justice to the adversely affected poorer classes (Kashyap 1978: 97).

Hence, he believed that in order to overcome the judicial decisions Parliament passed various amendments. Kashyap states that:

> To meet the difficulties thus created and to clarify the intentions and he objectives of the Constitutional-makers, Parliament had to intervene by enacting suitable constitutional amendments in exercise of its constituent power under the Constitution (Kashyap 1978: 97).

However, the amendments did not yield the desired results as courts persistently adopted a conservative approach towards Article 31 (Kashyap 1978: 98). Owing to this conservative approach, the deletion of the right to property was the only way forward to implement social and economic policies. Similar approach was also suggested by the Maharashtra Lawyers' Conference in 1975, Justice M. Hidayatullah, and the proposal discussed in Lok Sabha on Private Members' Constitution Amendment Bill on March 26, 1976 (Kashyap 1978: 98-99). Kashyap observed that:

> In fact, more or less as a reaction to the conservative view taken by the court as to the scope and content of the right to property, a considerable volume of opinion in the country came to believe that the incorporation of the right to property as a fundamental Right in our Constitution was perhaps an error and that the only remedy was its deletion from the Constitution (Kashyap 98).

He believed that the overall controversy surrounding right to property was unnecessary and can be resolved within the harmonious interpretation of constitutional basic ideas and objectives (Kashyap 1978: 99). He presented the reasoning as:

> A democratic Constitution, after all, is not to be treated merely as a legal document the spheres of the different organs of Government, but essentially and primarily as a dynamic political instrument for the attainment of certain social goals and the fulfillment of the urges and aspirations of the people. Its various provisions have to be construed harmoniously so as to facilitate, and not obstruct, progress towards the desired objectives (Kashyap 1978: 99-100).

Kashyap further mentioned that the Article should have been harmoniously constructed taking into consideration Articles 38, 39, and 46 of the Directive Principles of State Policy, rather in isolation (Kashyap 1978: 101). While expressing his views on the right to property he said:

> Given proper understanding of the real content of the property rights under the Constitution, there need be no conflict between the rights of the individual and those of the community. The framers of the Constitution did not envisage any unregulated right to property, nor did they want property right to come in the way of socio-economic progress. In fact, an individual can enjoy his property rights only in a well engineered and balanced society where all other individuals also have the wherewithal to enjoy similar rights. Should a situation of conflict between the rights of an individual and the rights of the community arise, it was obvious that the former should yield the latter (Kashyap 1978: 102).

He argued that the Parliament added limitations to the right to property for economic development plans, land reforms legislation and national interest (Kashyap 1978: 102). He also mentioned that the Parliament possessed constituent powers to effectively address new issues as per the changing societal needs. Even the framers of the Constitution deposed faith in it and termed it as the balancing sovereign authority (Kashyap 103). He states that:

> In modern democracies, the legislature, being the highest deliberative forum of the people through which they articulate and seek to realise their objectives, has to keep abreast of the changing societal needs and problems, and it is its responsibility to take timely and proper measures to bring out, or facilitate, peaceful social changes in response to the aspirations or mandate of the people. The Legislature seeks to discharge this responsibility by enacting suitable laws, laying down appropriate policies in important matters and ensuring their proper implementation by the Executive (Kashyap 1978: 103).

On the performance of the Parliament he concluded that:

> As the principal representative institution and vehicle of social change and progress, the Indian Parliament has played a significant role in the reconciliation of the personal right to own property and the interests of the society (Kashyap 1978: 103).

The two above authors had contradictory opinions and failed to suggest any concrete approach. Another author Rajeev Dhavan extensively elaborated juristic techniques adopted by the Supreme Court judges while interpreting right to property from 1950 to 1971. Comparing and evaluating such juristic techniques with westernized techniques, the author observed that:

> As a result of inconsistent voting patterns and the lead taken by the judgment writers, the Court has collectively laid down a policy of intervention where none was intended either by the Constituent Assembly or the text of the Constitution. Further the Court has made no effort to understand the agrarian system of India, nor taken note of the fact that tradition accords to the State an extended control of the land system which the Amendments sought to preserve. The Court in an attempt to preserve its own status and cosmopolitan principles (whose relevance it has assumed without examination) has made a bid to controvert the alliance between tradition and socialism and to acquire for itself, the lawyer and the Western concept of property, a more meaningful role than any of them were intended to play (Dhavan 1976: 168).

Finally, as a major critique of the judicial approach towards right to property Dhavan concluded that:

> By using the language of Western ideas, the Court has sought to protect Western ‘concepts’ rather than property rights. Very little attempt was made to adjust these concepts to Indian purposes. Instead they have utilized Western judicial techniques, like the doctrine of colourable legislation, to test the statutes intended to be amenable to tests based on Indian law, Indian experiences and Indian hopes (Dhavan 1976: 204).

Dhavan’s thesis concluded that the uneven pattern of decision making adopted by Indian Judges is the westernized adaptation of interpretation. In another work Dhavan (1976) suggested that Supreme Court should have considered Directive Principles of State of Policy as method of interpretation. He mentioned that:

> The Supreme Court of India has treated the Directives as precepts establishing standards, rather than principles of interpretation (Dhavan 1976: 217).

He further added that:

> India has the rare advantage of having a Constitution which lays down the principles to be followed and the goals to be achieved by the nation, but the Supreme Court have given them a superficial recognition (Dhavan 1976: 224).

Dhavan argued that the Supreme Court missed 'great opportunity' in *Keshavananda Bharati case*[180] of interpreting Directive Principles of State Policy within the 'relative priority of right-based notions and goal-oriented principles' (Dhavan 1976: 228). Rather it relied on the Western principles of interpretation. It neglected the native principles embedded within the Constitution. In a nutshell, the blame was imposed on the judiciary for transgressing its constitutional limits. Other than Palkhiwala and Kashyap, Dhavan presents a concrete approach, within the perspective of Directive Principles of State Policy.

In spite of objections to the abolition of right to property as fundamental right, Article 31 was repealed for implementing the agrarian reforms. However, doubts remain as to the repeal of right to property achieved the intended objectives that the legislature and academic supporters had mentioned. This can be understood by undertaking an overview of politics and political economy over the right to property.

### 4.6. Politics and Political Economy on Right to Property

The right to property was highly politicized before its repeal. During the general elections in 1952, in order to attract the illiterate voters, political parties apparently popularized socialism as the wave to overcome poverty (Rao 1967: 570). Even the political understanding on socialism was not unanimous. Political parties had considerable differences on socialism. Bhaskaran, as cited by Rao, described this dilemmatic understanding on socialism in India as:

> Massive illiteracy and equally formidable political and economic illiteracy of the literate minority stand in the way of any national consensus on such alien and sophisticated things like democracy and socialism. But without a proper understanding of either, the masses (literate as well as illiterate) understand by democracy voting at frequent intervals, and by socialism the unlimited support of growing families on rising standards of living out of state funds. That there are prices to be paid for democracy as well as socialism is not widely recognised by the general public…. It is also true that the leaders in politics, society and administration are themselves not too well-informed in this respect…. [T]hese men had been too busy agitating before and improvising after the freedom to consider the complexities of real democratic or socialist organisation. So we have come to the stage of 'democratic socialism' as a national ideal acceptable to all with few or none to understand what it implies by way of practical or political action (Rao 1967: 570).

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[180] Supra 8, at 1461.

In spite of the shallow understanding political leaders aspired towards seeking socialism. It was this realization of socialist goals that led to the repeal of Article 31. Since 1969, the political situation over right to property became extensively vibrant and agitated (Mirchandani 1977: 48-56). The demise of Prime Minister Nehru in 1964 created a political vacuum with some drastic effects on political, social, and economic policies. Similar repercussions were observed in relation to Article 31. In this regard, Prema Adlakha's dissertation extensively highlighted the 'attitude of the major political parties' on Article 31 post-Nehru to 1976 (Adlakha 1976). It highlights the political controversy on Article 31 and argues that various political ideologies governed the debate on the right to property (Adlakha 1976: 14). After *Golaknath*[181] decision political controversy over Article 31 gained momentum. Political parties were divided into two groups. First group included Congress (R), CPI (Communist Party of India), and CPM (Communist Party of India Marxist). Another group included Jan Sangh, Swatantra Party, and Congress (O). Differentiation between the two sections was mainly drawn on the ground that, the former favoured supremacy and sovereignty of the people i.e. Parliament and the latter favoured the Supreme Court's approach in *Golaknath case*[182], giving primary importance to the fundamental right (Adlakha 1976: 14). Adlakha observed that:

> …it was precisely the political situation prevailing at that time that made the controversy as acrimonious. Each group of parties used the decision of the court and the actions which followed to buttress its political position on the national scheme (Adlakha 1976: 53)

Unrest within the Congress party, led the controversy to widen. The Congress had weakened due to the lack of quality leadership after the death of Nehru. Indira Gandhi had just begun her struggle to position of a national leader during the fourth general election. A tussle broke over power between the inexperienced Indira Gandhi who represented the political wing of Congress and the veteran leaders of the organizational wing. Differences widened and led to the bifurcation of Congress party in 1969 into Congress (O) and Congress (I). Indira Gandhi represented Congress (I) whereas, K. Kamraj, Morarji Desai among others formed Congress (O). This bifurcation removed intra-Congress opposition to the Socialist ideals espoused by Indira Gandhi, giving her the opportunity to take radical measures including nationalisation of banks, abolition of privy purses, and other similar measures (Adlakha 1976: 54-57). These measures received a setback in the courts and caused

[181] Supra 7, at 1643.
[182] Ibid.

further political unrest within Congress (I). Therefore, certain Constitutional amendments were passed to undo courts' decisions and retain Parliament's supremacy (Adlakha 1976: 60).

Moreover, due to bifurcation Congress lost its majority in the Parliament, hence mid-term elections were held. Egalitarian agendas of abolition of privy purses, nationalisation and poverty reduction among others brought Congress (I) into power again with an overwhelming majority (Adlakha 1976: 62). The practical realization of the egalitarian social policies, however, was caught in the judicial review of those policies. Hence, political differences arose to such an extent these became one of the major causes for Indira Gandhi's decision to impose national emergency in 1975. Soon after the end of emergency in 1977, elections were conducted. To secure political victory, the Janata Party declared in its manifesto that it will repeal Article 31 and achieve social reforms (Sneider 1977: 6). Besides the Janata Party's political aspirations, Indira Gandhi's unilateral supremacy during emergency and the passage of the Forty-second amendment are quoted by opponents as having undermined constitutional values and thus stood as a contributory factor in repealing Article 31. Interestingly, in 1975, on the occasion of twenty-five years of the working of Indian Constitution, the Congress government established a review committee under the Chairmanship of Swaran Singh to analyze the functioning of the Constitution (Baxi 1976; Sharma 2002). While referring to the 1976 report of this Committee, Upendra Baxi with special reference to right to property observed that:

> …the right to property remains a fundamental right and an important fundamental right. *Keshavananda* rulings still protect the property owner against outright compensation, and the Swaran Singh Committee Report seeks to achieve the very same result (Baxi 1976: 27)

The Swaran Singh Committee Report opposed deletion of right to property and referred to the 'social significance of the private property'. Exceptions were made in terms of 'social productive purposes' and for 'planned development of nation' (Baxi 1976: 27). Baxi stresses the protection of proprietary interests of the weaker sections under Article 31 as more important than those of other sections. He refers to this aspect as:

> In fact, security of private property is essential for the success of the relief programmes for the downtrodden, exploited, and destitute people. The Twenty-point Programme envisages freedom and economic rehabilitation of bonded labour, distribution of surplus land to landless labour, cancellation of rural indebtedness, help for low-income groups. These measures will lack all

significance if whatever proprietary interests that arise for the weaker Sections were at the mercy of any legislative or executive caprice (Baxi 1976: 27).

Overall, the importance of the right to property was not denied by the Swaran Singh Committee Report, but the Janata Party, after its political victory in Lok Sabha election, repealed Article 31, fulfilling the commitment set out in its election manifesto. In this political shift, the outcome of the right to property debate was explicitly a result of political ideology, with populist measures rather than legal or Constitutional understanding deciding the outcome (Adlakha 1976: 143).In this regard, Rao states that:

Had this new political consensus in the country been real, substantial and lasting in character and not just apparent and near fictitious, the task of the judges in the post-Fourth Amendment era would have been simple (Rao 1967: 570).

Eventually, Article 31 succumbed to political differences and impractical vision. But how effectively the agrarian reforms were attained after the deletion of the right to property remained a subject of enquiry. This enquiry is undertaken in the next section.

### 4.6.1. Political Economy Perspective

The post-independence Nehruvian era politics was premised on large-scale agrarian reforms. Even during the framing of the Constitution, Uttar Pradesh and Bihar Land Reform legislations were pending before respective State legislatures. Clearly, these land reform legislations were considered as part of Congress's socialist agenda. Right to property debate in the Constituent Assembly, as described above, centered on land reforms, nevertheless economic planning was also a crucial factor. Moreover, the acute scarcity of food and enhancement of agricultural productivity were the prime considerations that demanded land reforms. Uneven land distribution undermined agricultural productivity, which was evident from the first agricultural census in 1970/71 (Frankel 2005: 493-495). Eventually, there was a sharp rise in the landless labourers (Frankel 2005: 494). Frankel pointed out some of the characteristics of agricultural patterns in the early years of planning as:

(1) The first and overriding constraint was the unfavourable land-man ratio in the rural areas of about .92 acre per capita; (2) this overall scarcity of land was accompanied by extreme inequalities in the distribution of ownership. More than one-fifth of all rural households (22 per cent) owned no land at all. Another 25 per cent owned fragments of land or less than one acre. An additional 14 per cent owned uneconomic or marginal holdings of 1 acre to 2.5 acres (that is, one hectare or less). In brief, the majority of all rural households, approximately 61 per cent, either owned no land, or small fragments of land, or uneconomic and marginal holdings of one hectare or less. All of them together owned less than 8 per cent of the total area. These were the recruits in the army of the chronically unemployed and underemployed, the millions of the rural

> poor precariously subsisting just at the border or slipping below the line of poverty. They could be contrasted with what passed for large landowners in India, the upper 13 per cent of all households who had more than 10 acres and owned about 64 per cent of the entire area, and the even smaller elite of the upper 5 per cent having 20 acres or more, and owning 41 per cent of the area; (3) even so, the upper 13 per cent or so of rural households could be considered "large" landowners only from the perspective of their size relative to the mass of landless and subsistence cultivators. Among this group, for example, fewer than 1 per cent owned holdings of 50 acres or more. Even then, there were many fewer large farms than large landowners. Holdings in all size groups were subdivided into separate parcels that were scattered within and between villages. The tiniest fragments were, of course, contained in the smallest holdings. They might be sub-divided into one-quarter or one-third-acre plots. Yet, "large" holdings of 10 acres or more were commonly separated into seven or eight parcels of 2, 3, and 4 acres. "Large" landowners, therefore, tended to operate small holdings. They did not enjoy advantages associated with economies of scale; (4) this pattern of land distribution was associated with a complex system of tenurial relationships in which sharecropping played a central role. Landowners with tiny plots leased out their holdings to other cultivators, and sought additional employment outside the village. "Large" landowners leased out part of their holdings because they tended to have several scattered plots that they found impossible to manage without the aid of tenants. The incidence of tenancy was highest in the densely populated rice deltas where land-man ratios were least favorable. It was not unusual for 30 to 40 per cent of all cultivators to take some land on oral lease, or for the proportion of the area operated under such sharecropping arrangements to reach levels of 40 per cent or more (Frankel 2005: 97-98).

The clear focus of the first, second and third five year plans was to achieve land reforms with village community projects (Frankel 2005: 100-103). Ultimately, planning incorporated democratic and peaceful social change (Frankel 2005: 110). The first five year plan focused on cooperative village management and formed cooperative farming societies. However, due to the absence of desired results and growing poverty, the second five year plan proposed extensive cooperative farming to enhance agricultural productivity. The plan intended to undertake implementation of the Nagpur Resolution of 1959 and the report of the Indian delegation that visited China to study cooperative farming. However, the plan did not fully realise the resolution, which proposed joint cultivation, joint profits, and wages for labourers for contribution. However, this was strongly opposed by the members of the Congress party itself, particularly C.Rajagopalchari who later in 1959 formed the 'Swarajya Party'. As the differences widened, the Nagpur proposal remained unapproved. The third and fourth five year plans remained mute on collective farming. Finally, the Nagpur proposal was dropped altogether. Indira Gandhi's entry into politics after Nehru's death and the imposition of emergency led to some strict moves towards land reforms. While referring to land reforms in the emergency era and as part of the twenty-point programme adopted by Indira Gandhi, Frankel observed that:

> Some progress in implementation, however, was achieved. This was attributable mainly to the disability placed on landowners in moving the courts for a stay against the committee's award, and the determination of the local authorities to reduce the time lag between scrutiny of landholdings, surrender of surplus area, government takeover of the land, and distribution. This

> ability to circumvent the courts and cut down on red tape had significantly speeded up implementation in some states. Compared to 62,000 acres that had come into possession of government between 1972 and 1975, an additional 1.7 million acres had been vested in the government by the end of December 1976, and approximately 1.1 million acres had been distributed (Frankel 2005: 550).

However, this distribution of lands to the landless during emergency was meted with violence, Frankel notes that:

> Since the end of the Emergency, in number of states, a large proportion of the plots distributed to landless laborers under the Twenty-Point Program had been forcibly taken back by the landowners. Incidents of caste violence, particularly murders and other atrocities against Harijans by upper-caste Hindus angered at their attempts to assert rights to land or other benefits under the Twenty-Point Program, indicated a growing antagonism between landed and landless groups (Frankel 2005: 579).

To fully realise land distribution, the Indira Gandhi government, during emergency, curtailed recourse to the court and hastened the distribution proceedings. This further resulted into an increase in caste atrocity cases. The method of land acquisition was crucial. Nehru's method was peaceful and democratic although it lacked perfect results. On the contrary, the Indira Gandhi's attitude was forceful takings that deviated from judicial process at the cost of lives of under-privileged people. Undoubtedly, democratic process, though slow, appeared indispensable.

Moreover, there were many lacunae in dealing with land reforms. Social discrimination in the form of caste was one of the stumbling blocks that stood against the successful implementation of land reforms. In this regard Frankel stated that:

> …universal suffrage and an open electoral process by themselves could not create the conditions of popular pressure from below to accomplish peaceful implementation of social reforms. Rather, pre-existing kinship, caste, and economic ties were projected into vertical patterns of political mobilization structures that divided the poor and prevented them from using their potential power in superior numbers to pursue common economic interests (Frankel 2005: 24).

Existence of the caste system, factions and contradictory interests within the ruling Congress party, absence of bureaucratic cadre, and absence of effective land ceiling laws, among others caused significant set-back to land reforms. In this regard, Prime Minister Nehru, in one interview in 1959, mentioned that:

> …in a democracy, a leader may put forward policies he considers right, but he has to take into account the ability of his followers to implement them. In a democracy, the most important thing is not an individual (leader's) principles. The important thing is to build up the people to them. Will they accept them? A leader can have principles, but if only he has them, he will be isolated. Sometimes you have to compromise. If you compromise too much and you lose the principle, that is what we try to do, but we don't always know if we will succeed (Frankel 2005: 122).

There was also widespread lethargy in enacting laws in the true spirit and this posed the biggest impediment in achieving social reforms. Frankel contends that the land reform legislations were politically compromised with an argument that:

> The land reform laws bore obvious marks of political compromise. While they abolished the zamindari system, the provisions stopped well short of expropriating the zamindars. On the one hand, the zamindars' proprietary rights were vested in the state governments; on the other, the zamindars were permitted to keep land in their direct occupation for personal cultivation, and in most cases no ceiling was placed on the size of the "home farm" so retained. In Rajasthan and Saurashtra, where large numbers of intermediaries were absentee landlords with no land in their possession, or *Jagirdars* enjoying right of revenue collection only, the state governments went so far as to permit any intermediary to apply for an allowance of *khudhast* (land for personal cultivation) subject to a ceiling limit. The acts, moreover, conferred full ownership right on the ex-intermediaries with respect to their home farms. By contrast, tenants in direct occupation of land on resumed estates were confirmed only in the legal right they enjoyed on the date immediately preceding vesting. In Assam, Bihar, Orissa, West Bengal, and Hyderabad, the acts made no provision for tenants to acquire full ownership rights, thereby perpetuating the cultivator's inferior status in relation to former zamindars. In Uttar Pradesh, Rajasthan, and Saurashtra, occupancy tenants as well as inferior rights holders were permitted to acquire ownership or occupancy right in their holdings, but only after paying compensation to the government (Frankel 2005: 191).

Further, the land ceiling laws which were a pre-requisite to land reforms had inherent loopholes that were manipulated. Frankel points out the loopholes as:

> The principle of imposing ceilings on landholdings was first announced in 1953; detailed recommendations for legislation were not made until 1956; and most states did not actually pass enabling legislation until 1960 or 1961. The landowners, therefore, had a period of seven or eight years to arrange partitions and transfers of holdings to escape the impact of the new laws. Even while some states were still in the process of formulating legislation, the Planning Commission concluded that excessive ceilings in state laws, combined with transfers and partitions of land, "have tended to defeat the aims of the legislation." In 1961, the planner reported that ceiling legislation "was not likely to yield and appreciable surplus for redistribution." (Frankel 2005: 193)

Similar effects prevailed with regard to the tenancy acts as well. Frankel described tenancy acts as:

> The overwhelming majority of tenants discovered they held land from an owner with a holding below the ceiling level. In some cases, the ceiling legislation encouraged landowners to resume land from tenants in order to increase the size of their home farms to the permitted limit. …The most immediate obstacle to tenancy reform was the lack of reliable land records and the failure of most state governments to undertake a complete reconstruction of the record of right to establish the identity of tenants and the extent of the land held by them. …Many landlords wee, nevertheless, alarmed. Land records might be revised in the future. The safest course, therefore, was to show as much land as possible under personal cultivation. …most tenancy acts also provided that tenants could "voluntarily surrender" their holdings in favor of the land lord, and that in such cases no ceiling restriction on the right of resumption would apply (Frankel 2005: 193).

Thus, the loopholes within legislations clearly presented a dichotomy with the five year plan agendas. Political economy suggests that the economic planning was not supported by efficient laws. Land reform laws were not efficiently framed and

included many loopholes that allowed usurpation of agrarian reforms enshrined under the Constitution (Rao 1967: 571). Hence, both politics and economy contributed in creating immense disagreement between Judiciary and Parliament over the application of Article 31.

**4.7. Analysis and Conclusion**

On the whole, the transition of the Right to Property from Constituent Assembly Debates to the existing constitutional right under Article 300A involves three vital phases.

The first phase was the right to property debate in the Constituent Assembly. There were four distinct sections that debated the inclusion of right to property as fundamental right (CAD IX 2009: 1104). The first section was represented by the members of Congress party, who resolved their differences in intra-party meetings, favouring Patel's agenda of inclusion of Section 299 of the Government of Indian Act, 1935 as the right to property (Austin 2010: 98). British lawmakers, driven by economic and imperialist agenda, had refused to provide responsible government in India and, hence, had inserted Section 299 without providing any justiciable authority (Arora and Grover 1994: 227-228). The Congress under the leadership of Nehru proposed Article 24 (later reframed as Article 31) with the twin objects – to secure zamindari abolition and ensure compensation to the individuals whose property was seized. It was argued that the proposed provision maintained just compromise between community rights and individual rights (CAD IX 2009: 1194). The second group represented by socialists like K.T. Shah, Jadubans Sahay, P.S. Deshmukh, among others, who opposed payment of compensation for zamindari abolition (CAD IX 2009: 1219-1223). The third group opposed the socialist agenda of non-payment of compensation. Members such as Naziruddin Ahmed, Syamandan Sahaya, Jagannath Baksh Singh, Begum Aizaz Rasul, among others strongly opposed the Socialists and demanded just compensation for zamindari abolition (CAD IX 2009: 1240). The final and fourth section comprised of members like Thakur Das Bhargava, Jaspat Roy Kapoor and K.T.M. Ahmed Ibrahim who expressed general perspectives on the right to property other than the zamindari abolition. They demanded just, fair, and equitable compensation for the deprivation of the right to property under Article 24 (CAD IX 2009: 1250).The debate was narrowed down to land reforms. It also

expressed serious apprehension against the judiciary and viewed it as the stumbling block against community rights. However, proponents of the right to property placed Parliament above judiciary as it represented the people. But they undermined the significance of the Constitution (Chopra 2006: 27). The Indian Constitution stood against the tyranny of the legislature and executive. Judiciary under Article 13 was authorised to declare any law as unconstitutional. The insertion of right to property in Part III clearly empowered it to review the land reform laws too.

The second phase was the implementation of right to property from 1950 to 1978. In this phase there was extensive confrontation between Parliament and Judiciary over the implementation of Article 31 vis-à-vis land reforms. On one hand, the Supreme Court viewed itself as the guardian of fundamental right in *State of West Bengal v. Subodh Gopal Bose*[183] and *State of West Bengal v. Mrs. Bela Banerjee*[184]. It constitutionally invalidated the land reform laws for violating Article 31 either for the absence of land reforms, as in *Kavalappara Kottarathil and Others v. State of Madras and Kerala*[185], *P. Vajravelu Mudaliar and Others v. Special Deputy Collector for Land Acquisition West Madras and Another*[186]; or for non-involvement of just and equivalent compensation calculated on the basis of market value fixed on anterior date, as in *State of Madras v. D. Namasivaya Mudaliar*[187], *Union of India v. Metal Corporation of India*[188],or sometime for violation of Article 19(1)(f) with other grounds, as in *R.C. Cooper v. Union of India*.[189]. On the other hand, the Parliament considered itself as an elected representative of the people, hence believing that it possessed the upper hand against the judiciary in the Constitution. In order to establish its supremacy against the above-mentioned Supreme Court decisions, it passed the First Constitution Amendment Act to limit judicial review and placed agrarian reform laws under Ninth Schedule established under Article 31B against prospective judicial review; the Fourth Constitution Amendment Act to nullify the just equivalent compensation; the Seventeenth Constitution Amendment Act to enlarge the scope of agrarian reform that were declared unconstitutional by the court; the Twenty-fifth Constitution Amendment Act intended to overcome judicial

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[183]Supra 131, at 92.
[184]Supra 116, at 170.
[185]Supra 142, at 1080.
[186]Supra 148, at 1017.
[187]Supra 145, at 190.
[188]Supra 147, at 637.
[189]Supra 155, at 248.

interpretation of compensation as just equivalent by replacing it with the word 'amount' and the requirements of 19(1)(f); and finally the Forty-fourth Constitution Amendment Act to repeal both Article 31 and 19(1)(f) which were consistently cited by courts to nullify the laws. These amendments were driven by sheer apprehension rather than the practical necessity. For instance, the First Constitution Amendment among other reasons was passed to overcome the minority opinion in *Charanjit Lal Chowdhury v. Union of India*[190] as a possible threat in future.

Beside the debate on the right to property, during the same period a larger debate took place between Supreme Court and Parliament over supremacy within the Constitution under Article 13 and Article 368, respectively (Menon 2006: 60-61). Both were settled with the passing of the Forty-Fourth Amendment Act, 1978 by the Parliament and the evolution of the 'Basic Structure' doctrine by the Supreme Court. This confrontation began with the *Shankari Prasad Singh Deo v. Union of India*[191] wherein the First Constitution Amendment Act, 1951 passed by the Parliament under Article 368 was challenged for violating Article 31 (Menon 2006: 60). However, the Supreme Court dismissed the appeal and validated the First Constitution Amendment Act. The court held that the Parliament under Article 368 possessed the authority to amend Part III (Fundamental Rights) of the Constitution. After a span of sixteen years, in *Sajjan Singh v. State of Rajasthan*[192] the Parliamentary authority of constitutional amendment under Article 368 vis-à-vis Part III was revisited by challenging the constitutional validity of the Seventeenth Constitution Amendment Act, 1964. The Supreme Court declared both the Amendments and *Shankari Prasad case*[193] as valid. Then came the *C. Golaknath and Others v. State of Punjab and Another*[194] in which Parliamentary power under Article 368 was again revisited (Rao 2006: 73). In this petition, constitutional validity of First, Fourth and Seventeenth Constitution Amendments were challenged before a bench of eleven judges. The decision was delivered by majority of 6:5. Justice Subba Rao while delivering the majority decision held that the constitutional amendment under Article 368 was an ordinary law, therefore subjected to judicial review under Article 13. However, all amendments before this decision were declared valid as the court applied the US doctrine of

[190]Supra 126, at 41.
[191]Supra 127, at 89.
[192]Supra 144, at 845.
[193]Supra 127, at 89.
[194]Supra 7, at 1643.

"prospective overruling". The judicial precedent was applied prospectively (Rao 1967: 593). Soon, Parliament passed the Twenty-Fourth Amendment Act, 1971 and inserted clause 3 under Article 368 to nullify the decision (Nariman 2006: 85). Finally, in 1973, a thirteen judge full bench with 7:6 majority in *Keshavananda Bharati v. Union of India*[195] declared that the Parliament possessed the plenary power to amend any Article of the Constitution including Fundamental rights, but not the 'basic structure' of the Constitution (Nariman 2006: 81). Interestingly, while laying down the 'basic structure' doctrine the judges did not include right to property in its scope. The creation of 'basic structure' was merely a judicial act to assert its legitimacy under the Constitution without any certainty in its content and scope (Kashyap 2006: 101). The leaving out of the right to property outside the scope of 'basic structure' scheme ultimately led to its repeal under Forty-fourth Constitution Amendment in 1978. Overall, this larger debate on the supremacy of the Constitution between legislature and Supreme Court on Article 368 and Article 13 respectively, led to the demise of Article 31.

This was further contributed to by the political turmoil arising after the death of Nehru in 1964. After his death, huge political instability emerged wherein, in order to seek political control, various political parties politicized the right to property vis-à-vis agrarian reforms (Adlakha 1976: 14). For instance, in 1967 C. Rajagopalachari, a congress veteran, formed Swatantra Party and supported the right to property as fundamental right. Other grounds, such as failure of the government to eradicate poverty and uneven distribution of land, consistent criticism by the Left and Socialists against the Congress government, and consistent judicial review of land reforms legislations, also contributed to the eventual outcome. The Janata Party Manifesto in 1977 Lok Sabha election pledged to repeal the right to property once its came into power (Sneider 1977: 6). Eventually, in 1978 the Janata Party government followed its promise and repealed the right to property as fundamental right.

Thirdly, in the post-1978 period the relegation of right to property from fundamental right to mere constitutional right under Article 300A made the middle class, labourers and marginalised sections highly vulnerable (Baxi 1976: 27). In pre-1978 era, individuals could challenge confiscation of property on the ground of violation of

[195]Supra 8, at 1461.

fundamental right under Article 31, but under Article 300A the mere presence of authority of law justifies the whole eminent domain process. No justiciability of the public purpose and compensation are allowed. Now the remedy available to the aggrieved person is filing a suit rather than taking recourse to the institution of writ petition before the Supreme Court and High Court as previously available stood under Article 31 (Sathe 2015: 97). Under the existing remedy, the only examination allowed was regarding fulfilment of procedural requirements and not the substantive examination of law on the basis of constitutional values. It is only recently in *Rajiv Sarin and Another v. State of Uttarakhand*[196] that the apex court has made a passing remark towards the justiciability of compensation by describing it not to be illusory. It has also drawn some comparison with the human rights.[197] However, such comparison has not addressed any substantive relief against the eminent domain use. Further, the political economy perspective suggests that the intended objective underlying the repeal of Article 31 of seeking agrarian reforms remained unfulfilled due to ineffective construction of laws (Frankel 2005: 191-193; Rao 1967: 570). The absence of political maturity cost both land reforms and Article 31 (Adlakha 1976: 143). On the other hand, under similar circumstances France initiated socialism by retaining justiciable right to property in the Constitution, showing immense political maturity (Boyron 2013: 162). Even in the United States, the justiciability of eminent domain process has consistently been maintained in the bill of rights (Somin 2007: 1931; Stoebuck 1972: 553).

In India, both the Judiciary and the Parliament followed the wrong path on Article 31. It was the Parliament/executive which shares the higher blame in its failure to cope up with the fundamental right to property. However, post-1978 the Judiciary is completely to blame for not evolving the right to property within the fold of 'basic structure' rendering a free hand to the Parliament/executive in eminent domain process that resulted in enormous mass displacement and loss of livelihood (Fernandes 2007: 203). In true constitutional spirit, neither the Parliament nor the Judiciary is supreme, rather supremacy is vested in the Constitution (Pant 2006: 180). Constitution assigned powers to legislature, executive, and judiciary and molded them within the framework of accountability. In constructing this whole structure, a

[196]Supra 169, at 708.
[197]P.T. Munichikkanna Reddy v. Revamma (2007) 6 SCC 59

responsible government was at its core. It was mainly the constitutionalism that these institutions were lacking (Mehta 2006: 167). The framing of policy, including the Directive Principles of State Policy, was definitely the purview of legislature and the judiciary was rightly kept out (Mehta 2006: 159). However, the State legislature itself framed weak land reform laws which were not in the true constitutional spirit. Rather taking steps to correct those gaps, the legislature with distinct ideological mindset appeared impatient towards the judiciary and failed to understand vitality of that provision (Rao 1967: 570). In this regard, after the Fourth Constitution Amendment, Ambedkar was very critical of the legislature's amendments to overcome judicial decisions. He explicitly mentioned that the government should concur with the decision rather oppose it through amendments. Moreover, Ambedkar strongly maintained that compensation was necessary for any acquisition because the State deprived an individual 'from the instruments of his earning a living'. He was against the theory of "go and feed yourself". He considered such theory as barbarous (Ambedkar 2008: 953). Ambedkar was opposed the no-compensation policy of Congress and referred to the situations of Britain where nationalization was initiated by the Labour Party with full compensation. Similarly, Russia provided all human needs like employment, food, cloths, housing, etc. while establishing socialist pattern (Ambedkar 2008: 953). He believed that the legislature should have patiently followed the judicial precedents and corrective measures and this approach would have certainly benefited the future generations. The judiciary, on the other hand, in the post-1978 era, failed to evolve any limitation against the eminent domain use. In the 1980s and 1990s the apex court utterly refused to exercise the judicial review of public purpose and compensation under Article 300A (Wahi 2016: 959). Further, the apex court abdicated the responsibility to evolve Article 300A, unlike in the case of Article 21. It has enlarged the scope of Article 21 through PILs (Divan 2016: 666; Surendranath 2016: 758-759). Moreover, the Supreme Court under the 'basic structure' doctrine did not provide any relief against the eminent domain, therefore the whole creation of the doctrine vis-à-vis eminent domain appears an act of mere constitutional legitimacy and to facilitate a *modus vivendi* (Mehta 2006: 164).

The right approach to the whole tussle on right to property should have undertaken – first, a distinction between 'public purpose' and 'social purpose'. Although Constituent Assembly debate on right to property focused on abolition of zamindari

system, it also gave importance to the general significance of right to property. The zamindari system involved social discrimination as it was based on an uneven social order. Its abolition was intended to check social evils and establish egalitarian order as laid down in Directive Principles of State Policy under Part IV of the Constitution. Therefore, zamindari abolition was a 'social purpose'. Social purpose intended to achieve egalitarian social order. Thus, securing social purpose could have dispensed with equivalent compensation. On the other hand, the general seizure of property for public purpose should have ensured full, just and fair compensation. As public purpose involve developmental activity such as construction of road, railway, among others which did not target any social evils. This clear bifurcation between social purpose as implementation of Directive Principles of State Policy and public purpose as involvement of developmental activity could have safeguarded the constitutional values. The members of the Constituent Assembly inherently adopted this approach but it was not explicitly laid down, rather they warned the judiciary not to interfere in the legislative acts on eminent domain and also inefficiently and unjustly framed the agrarian reform laws. Even the judiciary could have distinguished the eminent domain on these two grounds and applied a distinct compensation value with least damages. Secondly, even in the face of court's dissenting decisions, the legislature should have patiently followed it rather than contradicting it. The essential object of the Constitution was to establish a responsible government by placing institutional accountability on the legislature and executive through judicial review. The judiciary, under the Constitution, was meant to check the tyranny of legislature and executive. Any attempt in eliminating this judicial review was a breach of constitutional accountability and in particular of constitutionalism. This certainly resulted in the elimination of right to property. Even the judiciary consistently failed to address the hardship of the citizens in post-1978 era. Nehru's proposition in the Constituent Assembly to draw fair balance between individual and community interests utterly failed with the erosion of the right to property. This, in turn, revisited the colonial reasoning expressed on Section 299 of the 1935 Act. This erosion of the right to property influenced the statutory interpretation of 1894 Act in the post-1978 era until it was replaced in 2013, which is the subject of enquiry of the next chapter.

# CHAPTER 5

# POST-COLONIAL EMINENT DOMAIN LAW IN INDIA: EXAMINING THE 1894 ACT

*"We have in truth not the Supremacy of the Courts but the Supremacy of the Constitution."*

- M. C. Setalvad (1960: 187)

## 5.1. Introduction

Land Acquisition Act 1894 (herein after referred as 1894 Act), was one of the central legislations that governed eminent domain principle in India. In chapter 3 we discussed the historical evolution of the 1894 Act during the colonial period, that began from 1824 and finally the law was settled in 1894. Overall, this colonial historical transition was marked with a transition of procedural law from non-adversarial to adversarial procedure mainly driven by economic necessity among other reasons. Then in Chapter 4, we observed the constitutional perspective on the eminent domain in the post-colonial India that focused on the right to property. It mainly received a constitutional recognition under Article 31 as against the colonial practice. However, this constitutional recognition was highly contested between legislature/executive and judiciary. This resulted into repeal of fundamental right to property under Article 31 and now it exist as a mere constitutional or legal right under Article 300A. Absence of fundamental right to property influenced the eminent domain use in the post-1978 period. The 1894 Act which was pre-colonial law was continued in the post-colonial period.

In 2013, the Act of 1894 was repealed and replaced by the 'Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013' (herein after referred as 2013 Act). The Act of 1894 almost served for 119 years, a period spanning from colonial to independent India. Over these years, the 1894 Act involved many issues as a result sometime it was termed as 'draconian' law. In fact, this proposition was the outcome of its inherent and substantive features embedded in the Act. The Act in the twenty-first century drew ire

not only from the land owners who were mainly peasants but also from the human right activists. After enormous protest against application of the 1894 Act, it was replaced by 2013 Act. The emergence of Act of 2013 was the product of vibrant politics and mass agitations that attempted to fill the vacuum created by 1894 Act. This remedial approach under the 2013 Act is the subject of inquiry of this chapter. Before the repeal of 1894 Act many studies have highlighted its inherent and substantive flaws from different perspectives. This chapter purely undertakes the examination of 1894 and 2013 Acts from the constitutional perspective.

At the outset, this chapter discusses provisions of Act of 1894. It highlights issues that emerged under the Act particularly after the framing of India Constitution. It also undertakes evaluation of series of amendments that were introduced by the legislature to the Act of 1894. In tracing these issues, this Chapter critically evaluates the approach of Supreme Court, as the custodian of the Constitution, from the reported cases. Further, the chapter connect events and reasons that led to the passage of 2013 Act. Finally, it assesses the ability of the 2013 Act to overcome the historical wrongdoings that experienced under the 1894 law and the Constitutional aspirations and principles.

### 5.2. Scheme of the 1894 Act

This section briefly discusses the provisions of Act of 1894 in the post-colonial India. According to the Preamble[198] of the Act, the Act served three purposes namely, (1) land acquisition for public purposes, (2) land acquisition for companies, and (3) determination of compensation amount for such acquisition. In order to attain these three purposes, the provisions under the Act were categorized under two heads namely, (A) Provisions relating to procedure and manner of land acquisition, and (B) provisions guaranteeing procedural rights. Moreover, the 'provisions relating to land acquisition' broadly divided into four sections viz., (1) Land acquisition under normal circumstances; (2) Land acquisition under urgent situation; (3) Land acquisition for companies; and (4) Land acquisition for temporary purposes. Finally, this section also highlights the major amendments that were introduced under the 1894 Act.

[198]An Act to amend the law for the Acquisition of Land for public purposes and for the companies. Whereas it is expedient to amend the law for the Acquisition of Land needed for public purposes and for companies and for determining the amount of compensation to be made on account of such acquisitions.

### *5.2.1. Procedure and Manner of Land Acquisition*

The Act of 1894 described procedure for land acquisition. It laid down three kinds of procedure namely (1) land acquisition under normal situation and under urgent situations; (2) land acquisition for company; (3) land acquisition for temporary occupation.

#### *5.2.1.1. General Procedure of Land Acquisition*

The general procedure of land acquisition can be broadly classified into two sections viz., first, investigative and adjudicatory powers of the administrative or executive officers; and second, adjudicatory powers of the civil courts.

#### *(a) Investigative and Adjudicatory Powers of the Executive*

Land acquisition proceedings for all purposes commenced with the issuance of notification by appropriate government[199] under Section 4 of the Act. The government passed the proposal of land acquisition only on satisfaction of the requirements viz., (1) that land[200] in the locality needed or likely to be needed for any public purpose[201], or for a company[202] (2) notification published in the Official Gazette that included two daily newspapers within the locality with one newspaper in regional language, (3)

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[199]Section 3(ee) defined appropriate government which meant in relation to acquisition of land for the purpose of the Union, the Central Government, and, in relation to acquisition of land for any other purposes, the State Government.

[200]Section 3(a) defined "land" and included benefits to arise out of land, and any things attached to the earth or permanently fastened to anything attached to the earth.

[201]Section 3(f) defined public purpose and was inserted by Act 68 of 1984. It was defined was, public purpose includes (i) the provision of village-sites, or the extension, planned development or improvement of existing village-sites; (ii) the provision of land for town or rural planning; (iii) the provision of land for planned development of land from public funds in pursuance of any scheme or policy of government and subsequent disposal thereof in whole or in part by lease, assignment or outright sale with the object of securing further development as planned; (iv) the provision of land for corporation owned or controlled by the State; (v) the provision of land for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by government, any local authority or a corporation owned or controlled by the State; (vi) the provision of land for carrying out any educational, housing, health or slum clearance scheme sponsored by government or by any authority established by government for carrying out any such scheme, or, with the prior approval of the appropriate government, by a local authority, or a society registered under the Societies Registration Act, 1860, or under any corresponding law for the time being in force in a State, or a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State; (vii) the provision of land for any other scheme of development sponsored by government, or, with the prior approval of the appropriate government, by a local authority; (viii) the provision of any premises or building for locating a public office, but does not include acquisition of land for companies.

[202]As per Section 3(e) company included companies under Section 3 of the Company Act 1956, Societies registered under Society Registration Act 1860 including state societies Acts, and Co-operative societies registered under state laws. This definition was amended by Act 68 of 1984.

that Collector issued public notice with the substance of notification at convenient places in the locality.[203] After fulfillment of the above three requirements, the government authorised the concerned officer to conduct second set of investigative proceedings. This included ascertainment of the suitability of land for the notified purpose. For this purpose, the concerned officer entrusted with power of to enter, survey, and check the levels of any land in locality by digging or boring into sub-soil and other acts.[204]

Additionally, the Collector was entrusted with adjudicatory powers. After the publication of notification, the person interested[205] had thirty days time period to raise any objection against the land acquisition before the Collector in writing.[206] As an adjudicatory authority, the Collector heard and determined the objections. The objections merely included matters related to measurement of land, value of the land at the date of the publication of the notification, and compensation.[207] However, at the same time, the Collector was authorised discretionary powers to determine award at

[203]These three requirements specifically laid down in Section 4 of the 1894 Act. Section 4 stated that, "Publication of preliminary notification and power of officers thereupon. - (1) Whenever it appears to the [appropriate Government] the land in any locality [is needed or] is likely to be needed for any public purpose [or for a company], a notification to that effect shall be published in the Official Gazette [and in two daily newspapers circulating in that locality of which at least one shall be in the regional language], and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality [(the last of the dates of such publication and the giving of such public notice , being hereinafter referred to as the date of the publication of the notification)]. (2) Thereupon it shall be lawful for any officer, either generally or specially authorized by such Government in this behalf, and for his servants and workman, - to enter upon and survey and take levels of any land in such locality; to dig or bore into the sub-soil; to do all other acts necessary to ascertain whether the land is adapted for such purpose; to set out the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made thereon; to mark such levels, boundaries and line by placing marks and cutting trenches; and, where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crop, fence or jungle; Provided that no person shall enter into any building or upon any enclosed court or garden attached to a dwelling house (unless with the consent of the occupier thereof) without previously giving such occupier at least seven days' notice in writing of his intention to do so."

[204]However, such powers were restricted to buildings, enclosed court or garden, attached to dwelling house and were subjected to consent of the occupier and seven days notice in advance. This was laid down in proviso to Section 4.

[205]Section 3(b) defined 'person interested' as, "all persons claiming an interest in compensation to be made on account of the acquisition of land under this Act and a person shall be deemed to be interested in land if he is interested in an easement affecting the land. Moreover, Section 5A(3) stated that, for the purposes of this Section, a person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act."

[206]Section 5A under the 1984 amendment made it mandatory to the Collector to provide objector an opportunity of being heard. Such hearing could be made in person, or by any authorised person, or by pleader.

[207]Section 11 expressed detail procedure of the enquiry before the Collector. 1984 Amendment made mandatory for the Collector to seek approval of the appropriate government before making award. Even more the government had the discretionary to determine matters that needed approval. At the same time, while making award collector had to adhere to the rules framed by government.

any stage of proceedings.[208] As soon as, the interested persons agreed in writing before the Collector, the award was passed. The award was final and conclusive evidence between Collector and all interested persons, whether all interested persons attended the proceedings or not.[209] After the award, the Collector took possession of the land.[210] It was binding on the Collector to make award within a period of two years from the publication of declaration, if failed then the entire acquisition proceedings were lapsed.[211] Finally, as an adjudicatory authority, the Collector vested with adjournment power, corrected clerical mistakes, issued summons against witnesses and production of documents.[212] After the passing of award, the Collector submitted its report to the Government. The report included recommendations on the objections raised by the interested persons. After the submission of report, the decision of the government was final.

Government on satisfaction of the Collector's report issued declaration.[213] However, a valid declaration had to satisfy following conditions namely – (1) mandatory publication of declaration within the stipulated time as specified under the Act.[214] (2) Payment of compensation by company wholly or partly out of public revenues or some funds controlled or managed by a local authority.[215] (3) Publication of declaration in the Official Gazette.[216] After the fulfilment of above requirements, the

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[208]This was inserted by 1984 Amendment under Section 11(2).

[209]As per Section 12 finality of award concerned with thetrue area, value of the land, and apportionment of compensation.

[210]Taking of possession of land vested government with absolute rights free from all encumbrances as laid down in Section 16.

[211]Section 11A inserted by 1984 Amendment. It excluded the time elapsed in the court for staying the proceedings or action against acquisition.

[212] These adjudicatory powers conferred under Section 13, 13A, and 14 respectively. Moreover, under Section 15A government had power to call records before the collector even before the award was made in order to satisfy itself with the legality or propriety of any findings or order.

[213]Satisfaction of the government basically based on the premise that land required for public purpose, or for company. Declaration made with the signature of a Secretary to such government. These conditions were laid down in Section 6.

[214] Proviso 6(i) stated that declaration cannot be issued after the expiry of three years from the date of notification, if the declaration issued after the commencement of the Land Acquisition (Amendment and Validation) Ordinance, 1967, but before the commencement of the Land Acquisition (Amendment) Act, 1984. Another proviso 6(ii) stated that the declaration would be invalid if published after the commencement of the Land Acquisition (Amendment) Act 1984, and made after the expiry of one year from the date of the publication of the notifications. However, time consumed under stay order of the court was excluded.

[215]Proviso clause under Section 6(1).

[216]Section 6(2) mentioned that, every declaration shall be published in the Official Gazette, and in two daily newspapers circulating in the locality in which the land is situate of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such declaration to be given at convenient places in the said locality (the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the

declaration was considered as conclusive evidence that the land was needed for a public purpose or for company.[217] After declaration the Collector commenced the acquisition proceedings.[218] Acquisition proceedings included marking, measuring, and planning of land. Then the Collector issued public notice, conveyed intention of the government, invited claims for compensation and interests.[219]

To determine compensation, the Act under Sections 23 and 24 ascertained certain guiding principles. After the award was passed under Section 11, the Collector tendered payment of compensation.[220] Besides the payment of compensation, the Collector with the sanction of the appropriate government authorised to grant limited interest in land, or grant land in the exchange of acquire land or remission of land-revenue on other lands held under the same title or any other equitable method to the interests of the parties concerned.[221] At the same time, government was at liberty to withdraw land acquisition except provided in Section 36[222].

The above general procedure was shortened during the urgent land acquisitions. As per the direction of the appropriate government, the Collector without award and after expiration of fifteen days notification under Section 9 acquired any land for public

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declaration) and such declaration shall state the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected.

[217]Section 6(3) declared the conclusive evidence of the declaration.

[218]As per Section 7 with the orders of the appropriate government collector initiated the acquisition proceedings.

[219]Section 9 of the Act laid down the structural contents of the notice. Notice included particulars of land, representation in person or by agent, demand for particulars of claims in compensation over interests that seized. Claimants had to respond in writing. Moreover, Collector served notice to occupier too.

[220]Part V with Sections 31 to 34 dealt with payment of compensation. Collector on passing on award under Section 11 made payment of compensation. But, if the matters pending before court then the payment deposited in the court. If the interested person accepted the payment then was not allowed to seek reference under Section 18.

[221]These alternatives to the compensation provided in 31(3) as notwithstanding clause.

[222]Section 36 primarily concerned about the temporary occupation of waste and arable land. Section 36 stated that, Power to enter and take possession, and compensation on restoration – (1) On payment of such compensation, or on executing of such a agreement or on making a reference under Section 35, the Collector may enter upon and take possession of the land, and use or permit the use thereof in accordance with the terms of the said notice. (2) On the expiration of the term, the Collector shall make or tender to the person interested compensation for the damage (if any) done to the land and not provided for by the agreement, and shall restore the land to the person interested therein; Provided that, if the land has become permanently unfit to be used for the purpose for which it was used immediately before the commencement of such term, and if the person interested shall so require, the appropriate government shall proceed under this Act to acquire the land as if was needed permanently for a public purpose or for a company.

purpose.[223] If the acquisition involved any building then under such circumstance the Collector issued forty-eight hour notice to remove the movable property from such building without unnecessary inconvenience. Moreover, under urgent land acquisition, Section 5A remained inapplicable.[224]

***(b) Adjudicatory Powers of the Civil Court***

The Act empowered Civil Court to exercise adjudicatory powers under the caption 'reference to the court'.[225] Reference to the court clearly meant that the civil court lacked original jurisdiction and exercised limited powers. For instance, Section 21 stated that, "the scope of the enquiry in every such proceeding shall be restricted to a consideration of the interests of the persons affected by the objection". Certain conditions were imposed on the interested person in order to qualify the reference of the court viz., (1) non-acceptance of the award, (2) submission of a written application to the Collector for referring the matter to the court for further determination, (3) any determination involve matters related to the measurement of the land, the amount of the compensation, persons to whom payable, or apportionment of compensation among the interested persons; (4) written application clearly mention the grounds of objection to the award; (5) application submitted within stipulated time.[226]

After the fulfilment of the above conditions, the Collector submitted all essential information in the form of statement to the court.[227] As soon as the Court received

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[223]Urgent situations included (1) land for railway administration, if due to sudden change in channel of any navigable river or other unforeseen emergency affected maintenance of traffic or access; (2) situation in which government felt necessary to maintain any structure or system pertaining to irrigation, water supply, drainage, road communication or electricity, this was added by 1984 Amendment.

[224]Section 5A provided hearing of objection after the issuance of notification under Section 4. Non-application of Section 5A made at the orders of the appropriate government under Section 17(4). Moreover, directly the declaration under Section 6 was issued at any time after the date of publication of notification under Section 4(1).

[225]Part III of the Act of 1894 under Section 18 dealt with reference to the court.

[226]Section 18(2)(a) prescribed time limitation of six weeks for interested person who attended proceedings before the collector from the date of award, and Section 18(2)(b) prescribed six weeks or six months from the date of notice under Section 12(2) for those who failed to attend proceedings which ever expired first.

[227]Statement to the court included information relating to (1) situation and extent of the land, with particulars of any trees, buildings or standing crops thereon; (2) the names of the persons whom collector had reasons to think interested in such land; (3) the amount awarded for damages and paid or tendered under Section 5 and 17, or either of them, and the amount of compensation awarded under Section 11; (4) the amount paid or deposited under sub-Section (3A) of Section 17; (5) if the objections be to the amount of the compensation, the grounds on which the amount of compensation was determined. These conditions were laid down by Section 19(1). Additionally it was referred by Section

statement, it issued notice to the applicant, all interested persons and to the Collector if the objection was related with the area of land or amount of compensation.[228] Finally, the court pronounced award[229] with costs[230] as per the principles determined in Section 23 and 24.

### *5.2.1.2. Acquisition of Land for Company*

The Act provided land acquisition for private company. Section 40(1)(a) specified purposes for which the land was acquired for company. The purposes were – erection of dwelling-houses for workman employed by the company or for the provision of amenities directly connected therewith.[231] Certain 'industrial concerned activities' outside the purview of the company were also incorporated under the valid purpose.[232] Beside the purposes, the Act stipulated fulfilment of certain conditions before initiation of land acquisition for company namely, (1) to seek previous consent of the appropriate government, and (2) execution of the agreement between government and company.[233] After the satisfaction of the above conditions, the

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19(2) that the collector attach schedule giving the particulars of the notice served upon, and of the statements in writing made or delivered by the parties interested, respectively.

[228]Section 20 dealt with the service of notice. Interestingly the service of notice restricted itself with the objections and called those who had direct relation with objections. After notice the proceedings began in the open court.

[229]Every award passed by the Court deemed as decree and the statement of the grounds of every such award a judgement under Civil Procedure Code 1908 expressed in Section 26(2). The award was signed by judge specifying the amount with grounds of awarding as mentioned under Section 26(1).

[230]Award determined the costs incurred by the persons. Generally under Section 27(2) if the award of the collector is not upheld, the costs were paid by the collector. But if the court felt that the applicant before the collector claimed extravagantly or negligently then certain deductions were ordered or paid collector's part amount as costs.

[231]Section 44B specified the purpose for which land for private company can be acquired. Explanation under this Section provided that, 'private company' and 'Government Company' shall have the meanings respectively assigned to them in the Companies Act 1956.

[232]Industrial concern activity was incorporated by 1984 amendment under Section 38A. Such industrial activities wherein not less than one hundred workmen owned by an individual or by an association of individuals and not being a company, desired to acquire land for the erection of dwelling house for workmen employed by the concern or for the provision of amenities directly connected therewith. Such acquisition was considered for company and regulated by Section 4, 5A, 6, 7 and 50.

[233]These two conditions expressed in Section 39. After satisfaction of two requirements Sections 6 to 16 and Section 18 to 37 (both inclusive) were put in force. Agreement to the satisfaction of the appropriate government generally included (1) payment to the appropriate government of the cost of the acquisition, (2) the transfer, on such payment, of the land to the company; (3) the terms on which the land shall be held by the company; (4) where the acquisition is for the purpose of erecting dwelling houses or the provision of amenities connected therewith, the time within which, the conditions on which and the manner in which the dwelling houses or amenities shall be erected or provided; (5) where the acquisition is for the construction of any building or work for a company which engaged or is taking steps for engaging itself in any industry or work which is for a public purpose, the time within which and the condition on which, the building or work shall be constructed or executed; (6) where the acquisition is for the construction of any other work, the time within which and the conditions on

Collector conducted enquiry particularly it examined the requirements of land for the private company and submitted a report to the appropriate government.[234] However, these conditions were inapplicable if the government was bound to provide land to the companies.[235] Finally, an agreement between government and company executed and published in the Official Gazette. Agreement restricted the company from transferring such land by sale, mortgage, gift, lease or otherwise except with the previous sanction of the appropriate government.[236]

### *5.2.2.3. Acquisition of Waste and Arable Land for Temporary Occupation*

The Act also provided land acquisition of waste and arable land for temporary occupation of public purpose or for company.[237] Temporary occupation of land was not defined by the Act. However, a stipulation of three years time period from the commencement of occupation was an established rule for procurement or use.[238] The proceedings began with the issuance of notification by Collector to the persons interested in land. Notification included terms relating to purpose, occupation, use, any other material and compensation. Any issue on compensation settled through agreement in writing. If there was any difference on compensation or apportionment such difference was referred to the Court. Finally, the land was occupied either at the instance of payment of compensation, or on execution of agreement or after the reference to the court.[239] After the temporary occupation served, the Collector restored the land back to the person interested. But before restoration, the Collector tendered interested person compensation for any damage caused to the land after it

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which the work shall be executed and maintained, and the terms on which the public shall be entitled to use the work. These conditions explicitly expressed in Section 41.

[234] Appropriate government appointed officer for conducting enquiry under Section 40(2). Such officer summoned and called witnesses for production of documents under Section 40(3). Collector's enquiry and thereon submission of report to the appropriate government, was the foundation of the government satisfaction and consent. Collector's enquiry either conducted in accordance with Section 5A(2) or as provided in Section 40(1). As per Section 40(1) Collector enquired about (a)the purpose of the acquisition of land related with erection of dwelling-houses for workman employed by the company or for the provision of amenities directly connected therewith; or (b) acquisition needed for construction of some building or work for a company engaged or taking steps for engaging itself in any industry or work for public purpose; or (c) that such acquisition needed for the construction of some work, and that such work likely to prove useful to the public.

[235]Section 43 provided that government bound to provide land through agreement for any Railway or other company, in this case Section 39 to 42 under Part VII remained inapplicable.

[236]Restriction imposed under Section 44A of the Act.

[237] Section 35 to 37 of Part VI dealt with the temporary occupation of waste and arable land.

[238]Section 35(1) demanded the appropriate government through collector regulate temporary occupation of waste or arable land for public purpose or company.

[239]Section 36(1) entrusted collector to take possession of land. After possession Collector used land in accordance with the terms set out in the notice.

was temporarily acquired and not covered under the agreement previously. Such restoration sometime received setback, if the land temporarily occupied became permanently unfit to the previous purpose before temporary occupation. Then under such circumstances, the appropriate government utilized land permanently for public purpose or company with the consent of the interested persons. If there was any difference of opinion on the condition of land, then Collector referred the difference to the court for final determination.[240]

### *5.2.2. Provisions related to Procedural Rights*

Public purpose and compensation formed core part of the 1894 Act. Except public purpose, compensation to a certain extent was justiciable. The debate over compensation before the Supreme Court will highlighted in the next section. However, the Act of 1894 specified certain guiding principles of compensation that the Collector and Court had to take into consideration while dealing with it. Matters that were relevant in determining compensation included – (i) market-value of the land at the date of publication of notification under Section 4(1); (ii) any damage caused to standing crops or trees on the land at the time of Collector's taking possession; (3) any damages resulted from severance of one land from other land; (4) damages caused during acquisition process that injuriously affected interested persons other movable or immovable property in any other manner or earnings; (5) reasonable expenses incurred from the change in residence or place of business due to the compulsion of the Collector; (6) bonafide damage resulted from the diminution of the profits of the land between time of publication of the declaration under Section 6 and time of the Collector's taking possession of the land[241].

At the same time, Act specified certain matters that were irrelevant and directed the Court not to consider it in determining compensation, namely, (i) degree of urgency

[240]Section 37 of the Act.

[241]Under Section 23(1A) it was provided that, in addition to the market-value of the land the court shall in every case award an amount calculated at the rate of twelve per centum per annum on such market value for the period commencing on and from the date of the publication of the notification under Section 4, sub-Section (1) in respect of such land to the date of the award of the Collector or the date of taking possession of the land whichever is earlier. Further, the explanation to this provision stated that, in computing the period referred to in this sub-Section, any period or periods during which the proceedings for the acquisition of the land were held up on account of nay stay or injunction by the order of any court shall be excluded.

Moreover Section 23(2) further provided that, in addition to the market-value of the land, as above provided, the court shall in every case award a sum of thirty per centum on such market-value, in consideration of the compulsory nature of the acquisition.

that led the land acquisition; (ii) disinclination of the person to part with the land acquired; (iii) damages resulted due to private person; (iv) damage caused to the land after date of publication of declaration under Section 6, by or in consequence of the use to which it will be put; (v) increase in the value of land due to the use it will be put when acquired; (vi) increase in the value of other land accrued from the use it will be put when acquired; (vii) any outlay, or improvements, or disposal of land carried after the publication of notification under Section 4(1) without the sanction of the Collector; (viii) any increase in the value of the land on account of its being put to any use which is forbidden by law or opposed to public policy[242].

Another guiding principle under Section 11 added in 1984 through amendment, mentioned that the compensation award by the Court should not be less than the amount awarded by the Collector. These guiding principles clearly restricted the Court within which judicial review was allowed. Legislative limitations had clearly drawn the line on the compensation was guaranteed whether it just or fair was left out of the purview of judicial scrutiny. Beside compensation, the procedural norms of notification and declaration also guaranteed certain procedural rights.

### *5.2.3. Amendments of 1962, 1967 and 1984: Insertion and Repeal*

In post-colonial India, three major amendments were made in the Act. They were – Land Acquisition Amendment Act 1962, Land Acquisition (Amendment and Validation) Act 1967 and Land Acquisition (Amendment) Act 1984. However, many provisions of the amendments of 1962 and 1967; and 1984 were omitted by Parliament through Act 56 of 1974 and Act of XIX of 1988 respectively. The reasons for repeal remained unclear. The Amendment of 1962, an ordinance previously, validated the land acquisition notwithstanding any judgment, order or decree of any court. Before the passage of this amendment, a writ petition *R. L. Arora v. State of U.P.*[243] was pending before the Supreme Court that challenged the land acquisition for the company on the ground that it did not benefit the public directly and therefore violated Section 40(1)(b). Immediately after the passing of 1962 Amendment, Section

[242]This eighth clause was inserted by 1984 amendment.

[243]1962 AIR 764. In this case, the appellants challenged the land acquired by the Government for a company for the purpose of setting up a textile machinery parts factory. The issue before the apex court was the consent of the government under Section 40(1)(b). The writ petition under Article 32 challenged the acquisition on the ground of Articles 14, 31(2) and 19(1). Court held that the consent to the acquisition of land for company depends on direct use of land for public purpose.

7[244] of the amending Act was also challenged in the writ petition for the violation of Articles 14, 31(2) and 19(1).

The object of the 1967 amendment was to validate certain legal impediments within the course of land acquisition that were possible threats against the implementation of public purpose. The amendment extended the time period of the declaration from two years to three years i.e. the declaration should be published within three years from the date of publication of notification. Additionally, the amending Act under Section 4 mentioned that no acquisition will be invalid on the ground that there were – one or more Collectors performing an action under Section 4(1); one or more reports under Section 5A(2); and one or more declaration under Section 6. Some of these grounds were also challenged in *R.L. Arora case*[245].

The 1984 Amendment as compared to 1962 and 1967 initiated some significant changes. According to the 'Statement of Objects and Reasons' the Amendment strived to restructure the legislative framework of land acquisition, for the reason that land acquisition causes extreme hardship to the land owner. It attempted to balance the individual right with community rights particularly in terms of guaranteeing compensation[246]. These changes were initiated on the recommendation of Law Commission, Land Acquisition Review Committee among others. The changes introduced were – (1) illustrative list of public purpose with inclusive character; (2) acquisition of land for non-government companies under part VII of the Act; (3)

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[244] Section 7 of the Amending Act stated that, "Validation of certain acquisitions. Notwithstanding any judgment, decree or order of any court, every acquisition of land for a Company made or purporting to have been made under Part VII of the principal Act before the 20th day of July, 1962 , shall, in so far as such acquisition is not for any of the purposes mentioned in clause (a) or clause (b) of sub- Section. (1) of Section 40 of the principal Act, be deemed to have been made for the purpose mentioned in clause (aa) of the said sub- Section, and accordingly every such acquisition and any proceeding, order, agreement or action in connection with such acquisition shall be, and shall be deemed always to have been, as valid as if the provisions of Sections 40 and 41 of the principal Act, as amended by this Act, were in force at all material times when such acquisition was made or proceeding was held or order was made or agreement was entered into or action was taken. Explanation.-- In this Section" Company" has the same meaning as in clause (e) of Section 3 of the principal Act, as amended by this Act.

[245] Supra 243, at 764.

[246]With the enormous expansion of the State's role in promoting public welfare and economic development since independence, acquisition of land for public purposes, industrialization, building of institutions, etc., has become far more numerous than ever before. While this is inevitable, promotion of public purpose has to be balanced with the rights of the individual whose land is acquired, thereby often depriving him of his means of livelihood. Again, acquisition of land for private enterprises ought not be place on the same footing as acquisition for the State, or for an enterprise under it. The individual and institutions who are unavoidably to be deprived of their property rights in land need to be adequately compensated for the loss keeping in view the sacrifice they have to make for the larger interests of the community. The pendency of acquisition proceedings for long periods often causes hardship to the affected parties and renders unrealistic the scale of compensation offered to them.

completion of all formalities of land acquisition between issuance of preliminary notification to declaration within one year; (4) the Collector had to seek government's consent or of higher authority before passing the award; (5) Collector was empowered to pass award without enquiry if the person interested agree in writing; (6) Collector had to make award within two years from the date of publication of declaration under Section 6 of the Act, if failed, then entire proceedings would lapse; (7) expanded the scope of urgent cases clauses wherein the possession of land taken before making the award included large variety of public purposes; (8) government was authorised to call any record for ensuring the legality or propriety of the order passed by the Collector in the form of award; (9) the solatium interest was raised from fifteen per cent to thirty per cent of the market value. It also ensured interest rates on the excess compensation later awarded by the Court. (10) additional payment of ten per cent per annum interest was declared on the amount of compensation given from issue of notification to final tender of payment; (11) in order to provide equal opportunity to poor person interested in claiming compensation, even though the poor may not have appeared the court, once the compensation value determined under Section 18 by the court, the same value would render compensation to all covered under same notification.

The Amendment catered some major issues concerning land acquisition, like delay in land acquisition. It enhanced the powers of the Collector in urgent matters. The Collector with the consent of the person interested prevented further proceedings and stipulated time limitation for making of award. Though the amendment appeared to ensure certain reforms in compensatory measures, but simultaneously, it extended the powers of the Collectors in effectuating the eminent domain process, particularly the extension of urgent acquisition in all public purposes. Interestingly, it addressed the plights of land owners as they were deprived of their livelihoods, and remedy ensured was mere increase in solatium that based on the original compensation value determined by the Collector. Any concrete procedural reforms remained unaddressed, though some issues were acknowledged via this amendment.

Overall, the scheme of the 1894, gives a general description of the procedure and the manner of land acquisition proceedings; and the description of procedural rights. Moreover, Collector exercised enormous authority under the Act. The next section describes the judicial practice on the application of the 1894 Act.

### 5.3. Supreme Court on Land Acquisition Act

In the previous chapter we discussed the role of Supreme Court vis-à-vis Article 31 and eminent domain. In this section we undertake the examination of the role of Supreme Court vis-à-vis 1894 Act. The Supreme Court perspective contributes to understand the varied issues under 1894 Act and the approach it adopted in addressing those issues.

***Grounds of Challenge***

Land acquisitions were consistently challenged before the Supreme Court. The apex court through its judicial review strictly interpreted the 1894 Act. Even before its repeal, in *Kamal Trading v. State of West Bengal*[247] Justice Ranjana P. Desai reiterated the strict construction of the Act on the ground that it was an 'expropriatory legislation'.[248] The major reasons as laid down in *State of Madhya Pradesh and Others v. Vishnu Prasad Sharma and Others*[249] were – firstly, the Act acquired land without consent of the owner and deprived such person from livelihood therefore the procedural rights were strictly implemented. Secondly, the acquisition involved public purpose that necessitated strict adherence.

Besides the constitutional grounds, the proceedings under the Act were also challenged on various statutory grounds. In the previous chapter we discussed the Constitutional grounds, particularly the right to property. In this chapter we discuss the statutory grounds that were invoked to challenge the land acquisition proceedings. Generally, the land acquisition proceedings were challenged on three grounds namely – (1) violation of notification or declaration for the non-involvement of public purpose or land acquired for company with mala fide exercise of powers; (2) violation of fair hearing under Section 5A under the application of urgency clause under Section 17; (3) inadequacy of compensation on the basis of market value. These grounds were challenged jointly and separately.

#### *5.3.1. Non-involvement of Public Purpose and mala fide Exercise of Power*

Under the 1894 Act, land primarily acquired either for public purpose or for company. The Act laid down distinct procedure under Part VII for the land acquisition for

[247](2012) 2 SCC 25
[248]Similar remarks were expressed in *Radhy Shyam v. State of U.P. (2011) 5 SCC 553.*
[249]AIR 1966 SC 1593

company. The non-involvement of public purpose on the ground of mala fide exercise of power was one of the grounds that the land owners invoked against the land acquisition process. Basically, the petitioner availed this ground to allege the whole acquisition process as null and void. The Supreme Court extensively dealt with this issue. In *Babu Barkya Thakur v. State of Bombay*[250], a writ petition was filed under Article 32 before a bench of five judges for the enforcement of fundamental rights; and to quash vexatious and malicious proceedings. The petitioner challenged the notification under Section 4 of the Act as violative of Articles 14, 19(1)(f), and 31(2); and breach of statutory ground of non-involvement of public purpose and mala fide exercise of power. The notification was issued to acquire land for a company. Chief Justice Sinha on behalf of the majority rejected the non-involvement of public purpose or mala fide exercise of power. The grounds were declared premature, as the investigation under Section 4 of the Act was pending. Therefore, the Court refused to deliver decision on mere assumption. However, it was held that the government under Part VII of the Act authorised to acquire land for company by mere issuance of declaration. Some work related to public utility fulfilled the requirement of public purpose. The land acquisition for construction of dwelling houses and providing amenities to workers under the 1894 Act by Company was a public purpose. Moreover, Article 31(5)(a) gave preeminence to such acquisitions. The notification of the acquisition of land need not require the explicit mention of public purpose. Finally, the Court felt that the investigation of the facts were in process, hence, could not form decision on the basis of assumptions on the part of the petitioner. Moreover, the court determined the requirements of land acquisition for company as – (1) consent and satisfaction of the appropriate government and (2) agreement between government and company after the payment of cost of the acquisition. For constitutional validity, it was held that the Act was a pre-constitutional law and was protected from the operation of 31(2) by the provisions of Article 31(5)(a). On the above grounds the appeal was dismissed. The principle of public purpose was used in generic sense. It included any purpose in which fraction of community benefited or interested. This case established the precedent that public purpose was broad and any government notification and declaration could justify it. Government exercised supreme authority in deciding the public purpose.

[250] AIR 1960 SC 1203

In *Somawanti v. State of Punjab*[251], a writ petition filed before the Supreme Court for the enforcement of fundamental right under Article 32 and challenged the public purpose on the ground of colorable exercise of power. Petitioner owned the land and intended to establish a paper mill for industrial purpose. However, the government issued notification under Section 4 to acquire land for setting factory to manufacture refrigeration compressors and allied equipments. At the same time, proceedings were initiated under urgency clause of Section 17 that dispensed with the Section 5A of the Act. In order to declare the industrial activity as a public purpose, Government contributed Rs.100 as public expense under Section 6(1) of the Act. Petitioner opposed the takings and argued that the land was originally meant for industrial purpose i.e. to establish a paper mill. As a result, the petitioner challenged the land acquisition for another company for industrial purpose on the following grounds – (1) the violation of Articles 19(1)(f), 19(1)(g), (2) the acquisition did not involve any public purpose; (3) Contribution of Rs. 100 towards public expense as colourable exercise of power; (4) Non-compliance of Part VII of the Act as land acquired for company; (5) the violation of Article 14 for discrimination as petitioner wished to establish paper mill industry. The Supreme Court dismissed the appeal by 4:1 majority.[252] Justice Mudholkar on behalf of the majority held that the Government has the final authority to decide public purpose. Further, the 'public purpose' was considered as inclusive.[253] Generally, the justiciability of public purpose was not guaranteed under the Act. Government on satisfaction exercised the final authority.[254]

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[251] AIR 1963 SC 151

[252] Justice Mudholkar on behalf of the majority held that, "8. The action of the State Government is said to be legal and in accordance with the provisions of the law because what was done was permissible under Sections 4 and 6 of the Act, that it was done bona fide, that part of the compensation would be paid out of the public revenues, that the declaration made by the Government is conclusive evidence under sub-Section 23 of Section 6, that the land is needed for a public purpose, that the notifications were made on different dates though they were published in the same issue of the Gazette and are perfectly valid, that the land is not being acquired for a company but for a public purpose, that, therefore, the provisions of Part VII of the Act are inapplicable and that the lands are lying vacant and their owners will be paid compensation. No question of depriving them of their fundamental rights under Article 19(l)(*f*) and (*g*) or of violation of their right under Article 14 therefore arises.

[253] Justice Mudholkar observed that, "24. This is an inclusive definition and not a compendious one and, therefore, does not assist us very much is ascertaining the ambit of the expression 'public purpose'. Broadly, speaking the expression 'public purpose' would, however, include a purpose in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned."

[254] "36. Now whether in a particular case the purpose for which land is needed is a public purpose or not is for the State Government to be satisfied about. If the purpose for which the land is being acquired by the State is within the legislative competence of the State the declaration of the Government will be final subject, however, to one exception. That exception is that if there is a colourable exercise of power the declaration will be open to challenge at the instance of the aggrieved

However, Justice Mudholkar clarified that the judicial review only warranted, if there was colourable exercise of power.[255] Further, the majority rejected violation of 31(2), 19(1)(f) and 19(1)(g).[256] Similarly, it ruled out any violation of Article 14 as the government possessed authority to prioritise public utilities.[257] Even the Court declared the contribution of Rs.100 as public expense valid, as it satisfies the requirement of law and thereby invalidated the claim of substantial contribution.[258] Justice Subba Rao expressed a minority view and particularly addressed the contribution of Rs.100 as public expense to declare the industrial purpose as public purpose under the proviso to Section 6. He considered any part or whole contribution as compensation should have some rational relation to the acquisition and not illusory.

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party. The power committed to the Government by the Act is a limited power in the sense that it can be exercised only where there is a public purpose, leaving aside for a moment the purpose of a company. If it appears that what the Government is satisfied about is not a public purpose but a private purpose or no purpose at all the action of the Government would be colourable as not being relatable to the power conferred upon it by the Act and its declaration will be a nullity. Subject to this exception the declaration of the Government will be final."

[255] "40. Though we are of the opinion that the courts are not entitled to go behind the declaration of the Government to the effect that a particular purpose for which the land is being acquired is a public purpose we must emphasise that the declaration of the Government must be relatable to a public purpose as distinct from a purely private purpose. If the purpose for which the acquisition is being made is not relatable to public purpose then a question may well arise whether in making the declaration there has been, on the part of the Government a fraud on the power conferred upon it by the Act. In other words the question would then arise whether that declaration was merely a colourable exercise of the power conferred by the Act, and, therefore, the declaration is open to challenge at the instance of the party aggrieved. To such a declaration the protection of Section 6(3) will not extend. For, the question whether a particular action was the result of a fraud or not is always justiciable, provisions such as Section 6(3) notwithstanding."

[256] It referred to the decision in *Babu Barkya Thakur v. The State of Bombay [1961]1SCR128* in which the land acquisition challenged under Article 31(2) was untenable owing to the Article 31(5)(a) that did not applied to pre-constitution law. It was held that,"21. We are not concerned here with a post-constitution law but with a pre-constitution law… which is protected from the operation of Article 31(2) by the provisions of Article 31(5)(a)". It also termed application of Article 19(1)(f) in the instant case as futile on the ground that the taking of land under 31 do not attract 19(1)(f) and to substantiate it cited *State of Bombay v. Bhanji Munji [1955]1SCR777;Lilavati Bai v. The State of Bombay[1957]1SCR721*. Finally the court held that "23. We therefore hold that since the Act provides that the declaration made by the State that a particular land is needed for public purpose shall be conclusive evidence of the fact that is so needed the Constitution is not thereby infringed."

[257] "57. Apart from that it is always open to the State to fix priorities amongst public utilities of different kinds, bearing in mind the needs of the State, the existing facilities and other relevant factors. In the State like the Punjab where there is a large surplus of fruit and dairy products there is need for preserving it. There are already in existence a number of cold storages in that State. The Government would, therefore, be acting reasonably in giving priority to a factory for manufacturing refrigeration equipment which would be available for replacement in these storages and which would also be available for equipping new cold storages."

[258] While determining Rs.100 as sufficient contribution, Court relied on *Senja Naicken v. Secretary of State* 50 Mad 308; where Madras High Court held that state's contribution of one anna out of Rs.926-8-6 for acquiring land for a road, Rs.926-7-6 having been contributed by the ryots, was sufficient compliance with Section 6(1) of the Act. Justice Mudholkar believed that the contribution of Rs. 100 satisfied requirement of law, further mentioned that, "In our opinion 'part' does not necessarily mean a substantial part and that it will be open to the court in every case which comes up before it to examine whether the contribution made by the State satisfies the requirement of the law (para 51)."

According to him, the object of the proviso was mainly to provide safeguard against the abuse of power.[259] For this reason, Justice Subba Rao favoured quashing of the notification as it violated Section 6 and allow the petition.

This case discharged the government from all forms of obligation. The Constitutional challenge and the statutory interpretation favoured the government. Public purpose, issue of declaration, application of urgency clause all left on the satisfaction of the government and declared 'colourable exercise of power' as the only ground on which the acquisition could be challenged. In this case, Judiciary on the face of record committed gross error, particularly when the declaration validated contribution of Rs.100 as substantial amount fixed with the authority of law. This was the substantial error that resulted clearly from unreasonable application of mind on the part of the majority and clearly shielded the abuse of power, by stating that the impugned Act as pre-constitutional law relied on the colonial interpretation of Act particularly the *Senja Naicken v. Secretary of State*[260], without undertaking the true spirit of the Constitution of India.

The rationale of *Somawanti v. State of Punjab*[261] was applied in *Valjibhai Muljibhai Soneji v. State of Bombay*[262], the government acquired land to construct a bus depot, office, and other buildings for the State Transport Corporation. The land acquisition was challenged before the Supreme Court on three grounds – (1) the purpose mentioned in Section 4 was indefinite and vague; (2) the proceedings initiated by the State Government were collusive; and (3) the State Transport Corporation for which the land was acquired was not a local authority, rather it was a company, to which the provisions of Part VII was not applied. Justice Mudholkar on behalf of the majority delivered the decision. On the issue of vague public purpose, Justice Mudholkar

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[259] "62. Under that Section, the Government may declare that a particular land is needed for a public purpose or for a company; and the proviso imposes a condition on the issuance of such a declaration. The condition is that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by the company or, wholly or partly, out of the public revenues. A reasonable construction of this provision uninfluenced by decisions would be that in the case of an acquisition for a company, the entire compensation will be paid by the company, and in the case of an acquisition for a public purpose the Government will pay the whole or a substantial part of the compensation out of public revenues. The underlying object of the Section is apparent: it is to provide for a safeguard against abuse of power. A substantial contribution from public coffers is ordinarily a guarantee that the acquisition is for a public purpose."

[260] 50 Mad 308

[261] Supra 251, at 151.

[262] AIR 1963 SC 1890

applied *Somawanti decision*[263] and reiterated that the government was the best judge to decide public purpose and its decision was final except colourable exercise of power and such colourable exercise of power was absent in this case. However, the third ground was allowed, wherein the court agreed that the Corporation was not a local authority, because it had no public revenue or public funds. The land was solely acquired for the corporation. This clearly mandated the application of Part VII of the Act which was completely breached in the instant case. Hence, the appeal was allowed and the land acquisition proceedings were quashed.

In another case, *State of Madhya Pradesh v. Vishnu Prasad Sharma*[264], the State challenged the decision of the High Court that quashed the notification under Section 6. The issue before the apex court was whether it is open to the appropriate government to issue successive notifications under Section 6 of the 1894 Act, with respect to the land comprised within one notification under Section 4(1) of the Act. According to the facts of the case, the matter arose out of proceedings for land acquisition in eleven villages in Madhya Pradesh for the construction of steel plant at Rourkela. The notification was issued under Section 4(1) on May 16, 1949 declaring that lands in eleven name villages were likely to be needed for a public purpose i.e. for the erection of an iron and steel plant. Thereafter, the notifications were issued under Section 6 from time to time and some lands in village Chhawani were acquired in the year 1956. In August 1960, fresh notification under Section 6 was issued for fresh land acquisition in the same village. The Supreme Court held that Section 4, 5A, and 6 of the 1894 Act were integrally connected and that acquisition always began with a notification under Section 4(1) followed by consideration of all objections thereto under Section 5A and a declaration under Section 6. Accordingly, the court held that, once a declaration under Section 6 was issued then the notification under Section 4(1) was exhausted and the latter Section was not a reservoir from which the Government might from time to time draw out land and make declaration with respect to it successively. The ultimate conclusion was that there could be no successive notification under Section 6 with respect to land in a locality specified in one notification under Section 4(1), hence the appeal of the State was dismissed. This case asserted the importance of the Section 4, 5A, and 6 and demanded that the procedural

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[263] Supra 251, at 151.
[264] AIR 1966 SC 1593

requirement be fulfilled. Moreover, the Court refused to consider the issue of public purpose.

Again in *Arnold Rodricks v. State of Maharashtra*[265]*,* the land acquisition was challenged for the non-involvement of public purpose before the bench of five judges. The court dismissed the appeal with 4:1 majority. In the instant case, the ratio of *Babu Barkya Thakur case*[266] and *Somawanti*[267] decisions were followed. In both the cases the apex court reiterated that the community interest subsists over the private interest and government's satisfaction was the final authority in deciding the public purpose. The land acquisition for the development of industrial and residential area was declared as a valid public purpose.

But in *Khub Chand v. State of Rajasthan*[268], Justice Subba Rao on behalf of the division bench held that the notification under land acquisition was mandatory. In the absence of notification the land acquisition proceedings were bad. As a result, the land acquisition proceedings were quashed.[269] Moreover, the court refused to apply the precedent of *Babu Barkya Thakur case*[270] and *Somawanti case*[271] as they were inconsistent with the facts of the instant case.

Even in *Jage Ram v. State of Haryana*[272], the apex court relied on *Somawanti decision*[273]*,* validity of the public purpose was withheld and land required for setting the factory for manufacturing China-ware and Porcelain-ware at village Kasser, Rohtak district, Haryana was considered valid. Court once again declared Government as the best judge to decide public purpose, as it involves a socio-economic issue.[274] Moreover, it followed all statutory requirements. Industrialisation

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[265] AIR 1966 SC 1788

[266] Supra 250, at 1203.

[267] Supra 251, at 151.

[268] AIR 1967 SCR 1074

[269] It is pertinent to note that, in this case, the Rajasthan Land Acquisition Act 1953 was at issue, however, its provisions were related with the central law i.e. Land Acquisition Act 1894.

[270] Supra 250, at 1203.

[271] Supra 251, at 151.

[272] (1971)1 SCC 671

[273] Supra 251, at 151.

[274] Justice K. S. Hegde for divisional bench observed that, "8. There is no denying the fact that starting of a new industry is in public interest. It is stated in the affidavit filed on behalf of the State Government that the new State of Haryana was lacking in industries and consequently it had become difficult to tackle the problem of unemployment. There is also no denying the fact that the industrialisation of an area is in public interest. That apart, the question whether the starting of an industry is in public interest or not is essentially a question that has to be decided by the Government. That is a socio-economic question. This Court is not in a position to go into that question. So long as it

of new area declared as public interest. The declaration was declared as conclusive evidence hence it was not open to challenge except on the colourable exercise of power.

Further in *Munshi Singh and Others v. Union of India*[275], the land was acquired for the planned development of the area. The petition challenged the notification issued under Section 4.[276] It was alleged that the reasonable opportunity under Section 5A was not provided, as the notification did not clearly mentioned the public purpose.[277] Finally, the appeal was quashed. This case did not follow the conventional path of literal interpretation. In all the above cases, once the notification and declaration was issued the public purpose was conclusive, however, in this case, Section 5A viewed as a right to raise objections against land acquisition. This purposive interpretation asserted a constitutional spirit in the provision that was overlooked in the previous cases.

However, in *Aflatoon and Others v. Lt. Governor of Delhi*[278], the notification merely specified the public purpose as 'planned development of Delhi' and failed to disclose

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is not established that the acquisition is sought to be made for some collateral purpose, the declaration of the Government that it is made for a public purpose is not open to challenge. Section 6(3) says that the declaration of the Government that the acquisition made is for public purpose shall be conclusive evidence that the land is needed for a public purpose. Unless it is shown that there was a colourable exercise of power, it is not open to this Court to go behind that declaration and find out whether in a particular case the purpose for which the land was needed was a public purpose or not."

[275] AIR 1973 SC 1150

[276] "**7.** Section 5A embodies a very just and wholesome principle that a person whose property is being or is intended to be acquired should have a proper and reasonable opportunity of persuading the authorities concerned that acquisition of the property belonging to that person should not be made. We may refer to the observation of this court in *Nandeshwar Prasad* v. *State of U.P.* [AIR 1964 SC 1217 : (1964) 3 SCR 425 : (1965) 1 SCJ 90] that the right to file objections under Section 5A is a substantial right when a person's property is being threatened with acquisition and that right cannot be taken away as if by a side wind. Sub-Section (2) of Section 5A makes it obligatory on the Collector to give an objector an opportunity of being heard. After hearing all objections and making further inquiry he is to make a report to the appropriate Government containing his recommendation on the objections. The decision of the appropriate Government on the objections is then final. The declaration under Section 6 has to be made after the appropriate Government is satisfied, on a consideration of the report, if any, made by the Collector under Section 5A(2). The legislature has, therefore, made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections. It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of Section 5A."

[277] Justice A.N. Grover while expressing the importance of clarity public purpose observed that, "9. ...Once it was stated that the land will be utilised for the aforesaid purpose the persons interested could certainly object effectively. But the mere words, as are to be found in the notifications here "planned development of the area" were wholly insufficient and conveyed no idea as to the specific purpose for which the lands were to be utilised. It must be remembered that the Acquisition Act is silent as to the nature of objections that could be raised. In some of the States executive instructions have been issued or rules have been framed which indicate the classes of objections which are contemplated...."

[278] AIR 1974 SC 2077

any further information. The appellants challenged the public purpose as vague. It did not specify the master plan or zonal plan. Due to vague public purpose, the appellants alleged that the right under Section 5A cannot be effectively exercised. Similar contentions were also raised before the High Court but were dismissed. The Supreme Court with majority quashed the appeal on two grounds – firstly, the appellants committed delay in challenging the notification[279] and the issue of Section 5A was not challenged before the High Court; and, secondly, the Court justified the public purpose and defended the government action on the ground that the land acquisition involved large tracts of land for different purposes therefore it was practically difficult to mention each and every purpose.[280] The decision relied on the principle that the specification of public purpose and application of Section 5A relied on the fact and circumstances of each case.[281] It appears that the Supreme Court was vitally concerned about the planned development of Delhi.[282] However, it failed to understand that the rights under the law are universal and should never be differentiated on facts rather should apply equally to all. Rules and principles cannot be applied on the convenience of facts they are inherent in the spirit of Constitution. The government was obliged to disclose all information with regard to public purpose, in the absence of which, it completely affected the prospects of interested

[279] "9. Assuming for the moment that the public purpose was not sufficiently specified in the notification, did the appellants make a grievance of it at the appropriate time? If the appellants had really been prejudiced by the non-specification of the public purpose for which the plots in which they were interested were needed, they should have taken steps to have the notification quashed on that ground within a reasonable time."

[280] "8. In the case of an acquisition of a large area of land comprising several plots belonging to different persons, the specification of the purpose can only be with reference to the acquisition of the whole area. Unlike in the case of an acquisition of a small area, it might be practically difficult to specify the particular public purpose for which each and every item of land comprised in the area is needed."

[281] "6. We think that the question whether the purpose specified in a notification under Section 4 is sufficient to enable an objection to be filed under Section 5A would depend upon the facts and circumstances of each case."

[282] "4. The influx of displaced persons in 1947 from West Pakistan into Delhi aggravated the problem of housing accommodation in Delhi. With the extension of industrial and commercial activities and the setting up of the foreign embassies, Delhi acquired enormous potential as an employment centre. The consequent increase in the population was not accompanied by an adequate expansion of housing facilities. There was haphazard and unplanned growth of houses in different areas; land also was not available at reasonable price as substantial portion of the available land, suitable for development, had passed into the hands of private enterprisers. The Government found it necessary to take effective steps to check the haphazard growth of houses and to prevent substandard construction. Therefore, the Government framed a scheme for "planned development of Delhi". It was in order to implement the scheme of planned development of Delhi that the Government decided to acquire 34,070 acres of land in 1959 and published the notification under Section 4 specifying the public purpose as "the planned development of Delhi". This shows that the land involved for the purpose was huge and that in *Munshi Singh case* comparatively meagre.

persons as they failed to prepare sound defence mainly during the shift of burden of proof.

Similarly, in *Lila Ram v. Union of India*[283], land admeasuring three thousand acres was proposed to acquire for the execution of the Interim General Plan for the Greater Delhi. The appellant challenged the notification on the ground that it specified vague public purpose. Justice H. R. Khanna on behalf of the majority dismissed the appeal and stated that the interim general plan for planned development of Delhi was a valid public purpose. Justice Khanna held that the appellant failed to raise the ground before the High Court, hence appellant waived the right before the Supreme Court.[284] The apex court established two precedents they were – (1) the challenge against land acquisition raised for the first time before the Supreme Court was unsustainable; and (2) the objection against the land acquisition on the ground of non-clarity of public purpose that involved large tracts of land was untenable.

Further, in *State of Punjab v. Gurdial Singh*[285], the public purpose was challenged on the ground of legal malice. Respondent's land was acquired for a public purpose to construct Mandi. Before the acquisition of the respondent's land, one another some

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[283] AIR 1975 SC 2112

[284] "4. In this connection we find that the judgment of the High Court shows that the appellant did not challenge the notification in question or the acquisition proceedings on the ground that the public purpose mentioned in the notification was vague. As such, the appellant, in our opinion, cannot be allowed to agitate this question for the first time in appeal. Apart from that, we are of the view that the public purpose mentioned in the notification, namely, for the execution of the Interim General Plan for the Greater Delhi, is specific in the circumstances and does not suffer from any vagueness. It is significant that the land covered by the notification is not a small plot but a huge area covering thousands of acres. In such cases it is difficult to insist upon greater precision for specifying the public purpose because it is quite possible that various plots covered by the notification may have to be utilised for different purposes set out in the Interim General Plan. No objection was also taken by the appellant before the authorities concerned that the public purpose mentioned in the notification was not specific enough and as such he was not able to file effective objections against the proposed acquisition. In the case of *Munshi Singh* the complaint of the appellant was that he was unable to object effectively under Section 5A of the Act to the proposed acquisition. The appellant in that case in that context referred to the fact that a scheme of planned development was not made available to him in spite of his application. As against that, as already mentioned, no objection was taken by the appellant that because of alleged vagueness of the public purpose he was not able to file any effective objection under Section 5A of the Act. The case of *Munshi Singh*, it may also be pointed out, was considered by the Constitution Bench of this Court in the case of *Aflatoon* v. *Lt. Governor of Delhi* [(1975) 4 SCC 285] and it was observed that in the case of acquisition of a large area of land comprising several plots belonging to different persons, the specification of the purpose can only be with reference to the acquisition of the whole area. Unlike in the case of acquisition of a small area, it might practically be difficult to specify the particular public purpose for which each and every item of land comprised in the area is needed. This Court in that case upheld the validity of the notification for the acquisition of land for "the planned development of Delhi". In a subsequent unreported case *Ratni Devi* v. *Commr.* [ Subsequently reported at (1975) 4 SCC 467] this Court reiterated after referring to *Aflatoon case* that acquisition of land for the planned development of Delhi was for a public purpose."

[285] AIR 1980 SC 319

other person's land was notified and even declaration was also issued under Section 6. After declaration, the foundation stone of the building was also laid down, but this person had influential relationship with the Minister. As a result, the acquisition was withdrawn and the land of respondent was notified. Respondent challenged this transition before the High Court and subsequently the High Court quashed the land acquisition on the ground of mala fide exercise of power as it involved Ministerial influence. However, after some years again the land of the respondent was notified under urgency clause of Section 17. Justice Krishna Iyer on the basis of previous facts quashed the appeal on the ground of mala fide exercise of power.

*Land Acquisition Collector and another v. Durga Pada Mukherjee and Others*[286], this case slightly altered the judicial position as compared to the above case. Two notifications were issued.[287] The respondent challenged the notification on two grounds namely, (1) public purpose was vague as the notification failed to specify the particulars of public purpose and as a result effective objections under Section 5A could not be exercised; (2) the notification issued with colourable or mala fide exercise of power. Both grounds of challenge did not sustained before the bench of three judges and the appeal was allowed. The court applied the rule of evidence, where the burden of proof was on the respondent to prove the colourable exercise of power, but the respondent failed to prove the allegation. The Court refused to impose the burden on the State or appellant as it was against the Section 6(3) of the 1894 Act. As a result, the conclusive presumption on the basis of conclusive evidence was accepted. At the same time, the lack of production of documents on the part of the State towards the purpose made the respondent helpless in serving the burden of proof

[286] AIR 1980 SC 1678

[287]First notification was issued on February 12, 1960 by the State of West Bengal, for the expansion of the factory of the company for public purpose, stated as, "for construction of quarters for its workers and staff and for providing other amenities directly connected therewith, such as school, playgrounds, hospitals, markets, police outposts, etc., in the villages of Sarakdih, Nadiha, Garui, Hatgaruy and Panchgachhia, jurisdiction lists Nos. 1, 2, 3, 42/3 and 34 respectively, Police Stations Asansol and Barabani, Pargana Shergarh, District Burdwan...". The expenses were to be incurred by the company. After issuance of notification, respondent filed objections under Section 5A that the land required for the company and involves fraudulent exercise of power. Then after, fresh notification was issued on November 3, 1961. Land was likely needed for, "a public purpose, not being a purpose of the Union, namely, for industrial development at Asansol in the villages of Sarakdih, Nadiha, Garui, Hatgaruy and Panchgachhia, jurisdiction lists Nos. 1, 2, 3, 78 and 34 respectively, Police Stations Asansol and Barabani, Pargana Shergarh, District Burdwan... at public expense" (para 3 and 4). The first notification was cancelled by order dated April, 26 1962.

imposed by the court.[288] The burden of proof favoured the State. Its heavy imposition on the interested person suggested lack of just rule of evidence and procedural justice.

In *Collector (D.M.) v. Raja Ram Jaiswal[289],* the mala fide exercise of power was again challenged. The respondent purchased the land to construct cinema theatre that received the approval of the District Magistrate and local municipality. The Hindi Sahitya Sammelan, a company, strongly opposed the construction. According to them, the cinema theatre severely deteriorated educational environment as the respondent's land situated in its vicinity. The Sammelan pressurized the government to cancel the approval. Thereafter, the land of the respondent was notified for the Sammelan to built museum. It was alleged that the Collector issued notification under political clout. The respondent also argued that the Sammelan had vacant land since 1910 for this purpose, but it only proposed to acquire this land out of chagrin and anguish that the theatre should not be built in the vicinity. The Court dismissed the appeal on the ground of mala fide exercise of power.[290] It believed that there was extraneous exercise of power as against the statute.[291] In this case, there was ample evidence, on

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[288] Justice A. D. Koshal for the bench of three judges, while allowing the appeal observed that, "11. Learned counsel for the respondents urged that they were really entitled to a finding of mala fides on the part of the State Government but we find ourselves wholly unable to agree with him. The burden, as he concedes, was squarely on the respondents to prove colourable exercise of power. In the face of the conclusive presumption which the court has to raise under sub-Section (3) of Section 6 of the Act about the nature of the purpose stated in the declaration being true, the onus on the respondents to displace the presumption was very heavy indeed and we do not think that the same could be said to have been discharged by a mere allegation in that behalf which has been denied by the State. If we accept the argument that it is for the State to satisfy the court about the nature of the purpose for which the land is sought to be acquired, the whole object of the provision under which the conclusive presumption has to be raised in regard to the nature of the purpose would be defeated. We cannot, therefore, hold merely on the strength of the absence of production of documentary evidence by the State that the onus (which rested heavily on the shoulders of the respondents) to prove mala fides or colourable exercise of power on the part of the State Government, has been discharged. Even so the respondents have produced no material to show that the assertion about the public purpose as stated in the third notification was incorrect for the reason that the acquired land was not suitable for any industry or that no industrial activity except that by the Company had been undertaken in the neighbourhood of the acquired area."

[289] AIR 1985 SC 1622

[290] "26. The case before us is much stronger, far more disturbing and unparalleled in influencing official decision by sheer weight of personal clout. The District Magistrate was chagrined to swallow the bitter pill that he was forced to acquire land even though he was personally convinced there was no need but a pretence. Therefore, disagreeing with the High Court, we are of the opinion that the power to acquire land was exercised for an extraneous and irrelevant purpose and it was colourable exercise of power, namely, to satisfy the chagrin and anguish of the Sammelan at the coming up of a cinema theatre in the vicinity of its campus, which it vowed to destroy. Therefore, the impugned notification has to be declared illegal and invalid for this additional ground."

[291] "26. Where power is conferred to achieve a purpose it has been repeatedly reiterated that the power must be exercised reasonably and in good faith to effectuate the purpose. And in this context "in good faith" means "for legitimate reasons". Where power is exercised for extraneous or irrelevant considerations or reasons, it is unquestionably a colourable exercise of power or fraud on power and

the face record, to suggest that there was mala fide exercise of power. Other reasons that favoured respondent were – Sammelan had access to alternative land, District Magistrate earlier permitted the construction of cinema theatre and Sammelan raised consistent objections through political influence.

In another case, *M.P. Housing Board v. Mohd. Shafi*[292], the land was acquired for residential purpose. The appeal was filed against the decision of the High Court that quashed the land acquisition proceedings. The respondent alleged that the public purpose was vague on the ground that the residential purpose conveyed no further details on accommodation. Justice A.S. Anand delivered the majority decision for bench of three judges and held that the public purpose as vague.[293] The major reason supplied was the lack of explicit mention of public purpose. It was also not visible in the submitted records that led to quash of land acquisition proceedings.

In *Bajirao T. Kote v. State of Uttar Pradesh*[294], the land including a house and hotel was acquired for the public trust Saibaba Sansthan. Its main object was to connect two temples namely, Saibaba and Dwarka Mai Mandir. The petitioner alleged that the notification was vague. It involved colourable and mala fide exercise of power. Earlier, the Charity Commissioner turned down private negotiations and observed that the purpose did not involve public purpose. The appellants argued that the acquisition will deprive right to livelihood of selling flowers and running small hotel. Justice K. Ramaswamy held that there was no mala fide exercise of power as the State Government has the liberty to acquire land for public purpose. Further, Justice Ramaswamy declared that the providing access to the temple is a public purpose.[295] It

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the exercise of power is vitiated. If the power to acquire land is to be exercised, it must be exercised bona fide for the statutory purpose and for none other. If it is exercised for an extraneous, irrelevant or non-germane consideration, the acquiring authority can be charged with legal mala fides. In such a situation there is no question of any personal ill-will or motive."

[292] (1992) 2 SCC 168

[293] Justice A. S. Anand observed that, "14. Apart from the defect in the impugned notification, as noticed above, we find that even the "public purpose" which has been mentioned in the schedule to the notification as "*residential*" is hopelessly vague and conveys no idea about the purpose of acquisition rendering the notification as invalid in law. There is no indication as to what type of residential accommodation was proposed or for whom or any other details. The State cannot acquire the land of a citizen for building some residence for another, unless the same is in "public interest" or for the benefit of the "public" or an identifiable Section thereof. In the absence of the details about the alleged "public purpose" for which the land was sought to be acquired, no one could comprehend as to why the land was being acquired and therefore was prevented from taking any further steps in the matter." Court relied on the findings of the *Munshi Singh Case and Narendrajit Singh v. State of U.P. (1970).*

[294] AIR 1995 2 SCC 442

[295] Justice K. Ramaswamy held the reasoning that, "10. …As mentioned earlier when the State Governments have exercised the power under Section 4(1) for a public purpose and the public purpose

was also stated by the bench that the private sale authorised by the Act through Land Acquisition Officer does not amount to mala fide exercise of power.[296] This case was another instance of how judiciary erroneously restrained itself from interpreting the true nature of public purpose and reiterated the government as the final authority. It clearly considered the Government as the final arbiter of the public purpose, and its decision was non-justiciable whether it was real or distorted. Clearly, the land for any religious activity should be dealt with private negotiations and at the liberty and choice of the land owner, and not by the exercise of eminent domain principle.

The authority of the government was further strengthened in *Laxmanrao Bapurao Jadhav v. State of Maharashtra*[297], as Justice K Ramaswamy reiterated that:

> Ultimately, it is for the State Government to decide whether the land is needed or is likely to be needed for a public purpose and whether it is suitable or adaptable for the purpose for which the acquisition was sought to be made. The mere fact that the authorised officer was empowered to inspect and find out whether the land would be adaptable for the public purpose, it is needed or is likely to be needed, does not take away the power of the Government to take a decision ultimately.

In *Pratibha Nema and Others* v. *State of M.P.*[298] , the dry land of the appellants was notified under Section 4 as a public purpose for the establishment of a diamond park. The acquisition was challenged on the ground of non-involvement of public purpose rather meant only to benefit a company and its associates therefore it was colourable exercise of power and ultra vires. Court dismissed the appeal and declared the acquisition as a valid public purpose because the government was satisfied with the

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was mentioned therein, the exercise of the power cannot be invalidated on grounds of mala fides or colourable exercise of power so long as the public purpose is shown and the land is needed or is likely to be needed and the purpose subsists at the time of exercise of the power. It is primarily for the State Government to decide whether there exists public purpose or not, and it is not for this Court or the High Courts to evaluate the evidence and come to its own conclusion whether or not there is public purpose unless it comes to the conclusion that it is a mala fide or colourable exercise of the power. In other words the exercise of the power serves no public purpose or it serves a private purpose.

[296] Finally, Justice K. Ramaswamy held that, "11. It is true that an attempt was made on an earlier occasion to purchase the property by negotiation but it was turned down by the Charity Commissioner and he refused to grant permission. Consequently, the trust was constrained to approach the Government requesting it to acquire the land. The Government did consider the circumstances and exercised that power. The Act does give the power to negotiate by private sale or even during pending acquisition proceedings negotiations by private sale could be made in which event the need to determine the market value under the Act would be obviated and the compensation would be determined in terms of the agreement reached between the Land Acquisition Officer and the owner of the land or person having an interest in the land, subject to the prior approval of the Government. Therefore, the failure to purchase the land by negotiation and the exercise of the power under Section 4(1) thereafter, by no stretch of imagination, be considered to be a mala fide or colourable exercise of the power. Therefore, we do not find any infirmity or illegality in the notification published under Section 4(1) warranting interference. Accordingly, the appeal is dismissed but without costs."

[297] AIR 1997 SC 334

[298] (2003) 10 SCC 626

acquisition.[299] Moreover it was held that a token amount on the part of government as compensation under Section 6(1) was enough to declare the purpose public as valid. Court rejected the contention of colourable exercise of power.[300] It validated the acquisition of land for company as public purpose under the Act.[301]

Further, the supremacy of the Government was followed in *Sooraram Pratap Reddy v. Collector*[302]. In this case, the views expressed by Justice Krishna Iyer in *State of Karnataka v. Ranganatha Reddy*[303] were reaffirmed. In that case, Justice Iyer stated that the public purpose should be liberally construed[304] and the satisfaction of the government cannot be replaced by the wishes of the Court.[305] Further, in *Daulat Singh Surana v. First Land Acquisition Collector*[306] the apex court mentioned that the public purpose was broad and the government possessed the sole right to determine it.[307]

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[299]Justice P. Venkatarama Reddy observed that, "19. These decisions establish that a public purpose is involved in the acquisition of land for setting up an industry in the private sector as it would ultimately benefit the people. However, we would like to add that any and every industry need not necessarily promote public purpose and there could be exceptions which negate the public purpose. But, it must be borne in mind that the satisfaction of the Government as to the existence of public purpose cannot be lightly faulted and it must remain uppermost in the mind of the court."

[300] "38. When no prejudice has been demonstrated nor could be reasonably inferred, it would be unjust and inappropriate to strike down the notification under Section 4(1) on the basis of a nebulous plea, in exercise of the writ jurisdiction under Article 226. Even assuming that there is some ambiguity in particularizing the public purpose and the possibility of doubt cannot be ruled out, the Constitutional Courts in exercise of jurisdiction under Article 226 or 136 should not, as a matter of course, deal a lethal blow to the entire proceedings based on the theoretical or hypothetical grievance of the petitioner. It would be a sound exercise of discretion to intervene when a real and substantial grievance is made out, the non-redressal of which would cause prejudice and injustice to the aggrieved party. Vagueness of the public purpose, especially, in a matter like this where it is possible to take two views, is not something which affects the jurisdiction and it would, therefore, be proper to bear in mind the considerations of prejudice and injustice." In para 37, it was observed by the court that the ground of objections before the Land Acquisition Officer suggest that the appellant acquainted with the purpose for the land was acquired, hence, prejudice against the acquisition on the ground of colourable exercise of power do not sustain.

[301] "20. The important point which we would like to highlight at the outset is that the acquisition under Part VII is not divorced from the element of public purpose. The concept of public purpose runs through the gamut of Part VII as well."

[302] (2008) 9 SCC 552

[303] (1977) 4 SCC 471

[304] "79. A "public purpose" is thus wider than a "public necessity". Purpose is more pervasive than urgency. That which one sets before him to accomplish, an end, intention, aim, object, plan or project, is purpose. A need or necessity, on the other hand, is urgent, unavoidable, compulsive. "*Public purpose should be liberally construed, not whittled down by logomachy*."

[305]"119. In our judgment, in deciding whether acquisition is for "public purpose" or not, *prima facie*, the Government is the best judge. *Normally*, in such matters, a writ court will not interfere by substituting its judgment for the judgment of the Government."

[306] (2007) 1 SCC 641

[307] "73. Public purpose cannot and should not be precisely defined and its scope and ambit be limited as far as acquisition of land for the public purpose is concerned. Public purpose is not static. It also changes with the passage of time, needs and requirements of the community. Broadly speaking, public purpose means the general interest of the community as opposed to the interest of an individual." "44. Public purpose is bound to vary with times and prevailing conditions in the community or locality and, therefore, the legislature has left it to the State (Government) to decide what is public purpose and

This exclusive authority of the Government was further extended to policy matters. In *Nandakishore Gupta v. State of U.P.*[308], the apex court held that the policy matters were also public purpose. In the instant case, the court declared Yamuna Expressway Corridor, an industrial policy, as a public purpose. It restrained from interfering into policy matters except on the ground of illegality or violation of law.

In 2011, the Supreme Court in *Dev Sharan v. State of U.P.*[309], slightly altered its approach on public purpose. Justice A.K. Ganguly while dealing with the application of Section 5A vis-à-vis Section 17 observed that, although the public purpose though lacks precise definition and appears inclusive definition, it has to be interpreted within the constitutional ethos. Justice Ganguly stated that:

> It must be accepted that in construing "public purpose", a broad and overall view has to be taken and the focus must be on ensuring maximum benefit to the largest number of people. Any attempt by the State to acquire land by promoting a public purpose to benefit a particular group of people or to serve any particular interest at the cost of the interest of a large section of people, especially of the common people, defeats the very concept of public purpose. Even though the concept of public purpose was introduced by pre-constitutional legislation, its application must be consistent with the constitutional ethos and especially the chapter under fundamental rights and also the directive principles.

Additionally, the reference was made to the Article 13 and Part III of the Constitution of India.[310]

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also to declare the need of a given land for the purpose. The legislature has left the discretion to the Government regarding public purpose. The Government has the sole and absolute discretion in the matter."

[308] AIR 2010 SC 3654

[309] (2011) 4 SCC 769

[310] "18. In construing the concept of public purpose, the mandate of Article 13 of the Constitution that any pre-constitutional law cannot in any way take away or abridge rights conferred under Part III must be kept in mind. By judicial interpretation the contents of these Part III rights are constantly expanded. The meaning of "public purpose" in acquisition of land must be judged on the touchstone of this expanded view of Part III rights. The open-ended nature of our Constitution needs a harmonious reconciliation between various competing principles and the overhanging shadows of socio-economic reality in this country." "19. Therefore, the concept of public purpose on this broad horizon must also be read into the provisions of emergency power under Section 17 with the consequential dispensation of right of hearing under Section 5A of the said Act. The courts must examine these questions very carefully when little Indians lose their small property in the name of mindless acquisition at the instance of the State. If public purpose can be satisfied by not rendering the common man homeless and by exploring other avenues of acquisition, the court, before sanctioning an acquisition, must in exercise of its power of judicial review, focus its attention on the concept of social and economic justice." "20. While examining these questions of public importance, the courts, especially the higher courts, cannot afford to act as mere umpires. In this context we reiterate the principle laid down by this Court in *Authorised Officer* v. *S. Naganatha Ayyar* [(1979) 3 SCC 466] , wherein this Court held: (SCC pp. 467-68, para 1)

"*1.* … It is true that Judges are constitutional invigilators and statutory interpreters; but they are also responsive and responsible to Part IV of the Constitution being one of the trinity of the nation's appointed instrumentalities in the transformation of the socio-economic order. The judiciary, in its sphere, shares the revolutionary purpose of the constitutional order, and when called upon to decode

Similarly, in *Delhi Airtech Services (P) Ltd. v. State of U.P.*[311], Justice A. K. Ganguly mentioned that the eminent domain process should be determined within the contours of constitutional principles and not in isolation.

Overall, the Supreme Court in its examination on public purpose adopted following approach – (1) It completely restrained itself from interfering into the examination of public purpose, and empowered the government solely; (2) grounds of challenge was merely restricted to the colourable exercise of power and not with the constitutional provision; (3) it placed the burden of proof on the interested person to prove the mala fide exercise of power, which was very heavy and almost impossible in the event of non-disclosure of proper facts by the government. Supreme Courts approach appeared dubious from the precedents that were applied in this span of long time. Its policy of non-interference into the policy matters created immense problems to the marginalised groups that had little property to survive. No constitutional ethos was applied until recently that to when the review of the Act was extensively debated in the public sphere. Public purpose remained a broader concept that was profoundly expanded by the Court.

### *5.3.2. Application of Urgency Clause and Violation of Section 5A*

Besides the challenge of land acquisition on the ground of non-involvement of public purpose, the urgent land acquisition under Section 17 was another major issue that was highly contested before the court. Section 17 stated that:

> 17. Special powers in case of urgency. – (1) In cases of urgency whenever the [appropriate Government], so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in Section 9, sub-section 1). [take possession of any land needed for a public purpose]. Such land shall thereupon [vest absolutely in the [Government], free from all encumbrances.
>
> (2) Whenever, owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway Administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a river-side or ghat station, or of providing convenient connection with or accesses to any such station, [or the appropriate Government considers it necessary to acquire

social legislation must be animated by a goal-oriented approach. This is part of the dynamics of statutory interpretation in the developing countries so that courts are not converted into rescue shelters for those who seek to defeat agrarian justice by cute transactions of many manifestations now so familiar in the country and illustrated by the several cases under appeal. This caveat has become necessary because the judiciary is not a mere umpire, as some assume, but an activist catalyst in the constitutional scheme." "21. In other words "public purpose" must be viewed through the prism of constitutional values as stated above." "22. The aforesaid principles in our jurisprudence compel this Court to construe any expropriatory legislation like the Land Acquisition Act very strictly."

[311] (2011) 9 SCC 354

the immediate possession of any land for the purpose of maintaining any structure or system pertaining to irrigation, water supply, drainage, road communication or electricity,] the Collector may immediately after the publication of the notice mentioned in sub-section (1) and with the previous sanction of the [appropriate Government], enter upon and take possession of such land, which shall thereupon [vest absolutely in the [Government]] free from all encumbrances :

Provided that the Collector shall not take possession of any building or part of a building under this sub-section without giving to the occupier thereof at least forty-eight hours notice of his intention so to do, or such longer notice as may be reasonably sufficient to enable such occupier to remove his movable property from such building without unnecessary inconvenience.

(3) In every case under either of the preceding sub-sections the Collector shall at that time of taking possession offer to the persons interested compensation for the standing crops and trees (if any) on such land and from any other damage sustained by them caused by such sudden dispossession and not excepted in Section 24; and, in case such offer is not accepted, the value of such crops and trees and the amount of such other damage shall be allowed for in awarding compensation for the land under the provisions herein contained.

3[(3A) Before taking possession of any land under sub-section (1) or sub-section (2), the Collector shall, without prejudice to the provisions of sub-section (3)-(a) tender payment of eighty per centum of the compensation for such land as estimated by him to the person interested entitled thereto, and (b) pay it to them, unless prevented by some one or more of the contingencies mentioned in Section 31, sub-section (2), and where the Collector is so prevented, the provisions of Section 31, sub-section (2), (except the second proviso thereto), shall apply as they apply to the payment of compensation under that Section.

(3B) The amount paid or deposited under Section (3A), shall be taken into account for determining the amount of compensation required to be tendered under Section 31, and where the amount so paid or deposited exceeds the compensation awarded by the Collector under Section 11, the excess may, unless refunded within three months from the date of Collector's award, be recovered as an arrear of land revenue].

[(4) In the case of any land to which, in the opinion of the [appropriate Government], the provisions of sub-section (1) or sub-section (2) are applicable, the [appropriate Government] may direct that the provisions of Section 5A shall not apply, and, if it does so direct, a declaration may be made under Section 6 in respect of the land at any time [after the date of the publication of the notification] under Section 4, sub-section (1).]

Land acquisition under the Act was divided into two kinds namely, first, the normal land acquisition process for non-urgent public purposes and, secondly, land acquisition in urgent cases as proposed in Section 17. The major difference between normal and urgent land acquisition was the application of Section 5A. Section 5A read as:

5A. Hearing of objections. - (1) Any person interested in any land which has been notified under Section 4, sub-section (1), as being needed or likely to be needed for a public purpose or for a Company may, [within thirty days from the date of the publication of the notification], object to the acquisition of the land or of any land in the locality, as the case may be.(2) Every objection under sub-section (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard [in person or by any person authorized by him in this behalf] or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, [either make a report in respect of the land which has been notified under Section 4, sub-section (1), or make different reports in respect of different parcels of such land, to the appropriate Government, containing his recommendations on the objections, together with the record of the proceedings held by him, for the decision of that Government]. The decision of the [appropriate Government] on the objections shall be final. (3)

For the purpose of this Section, a person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act.]

Urgent acquisition of land under Section 17 dispensed with the right to question the land acquisition ensured under Section 5A. Land acquisition under Section 17 severely affected the land owner. This severity was further enhanced by Land Acquisition Amendment Act 1984 was removed the acquisition of waste and arable land under urgency.[312] In order to understand and evaluate the approach of the apex court on urgency clause we hereby undertake examination of some of the landmark cases that addressed the urgency clause. These cases are divided into two sections – (1) cases in which urgency was declared valid; and (2) cases in which urgency was declared invalid.

***5.3.2.1. Valid Urgent Acquisitions***

In the *State of U.P.* v. *Pista Devi*[313], the land was needed for the housing scheme to provide accommodation to the residents of Meerut city under Section 17(1) and 17(4) of the 1894 Act. The appeal before divisional bench of the apex court questioned the decision of the High Court that quashed the land acquisition on the ground of delay of almost one year in issuing declaration under Section 6 as it contradicted the invocation of urgency provision. However, in the Supreme Court, Justice E. S. Venkataramiah allowed the appeal and set aside the decision of the High Court. Three reasons were supplied for the dismissal of the appeal as – (1) that the allegation of delay did not accompany with the mala fide exercise of power; (2) the apex court was satisfied with the production of reports and certificates of the State Government over the involvement of urgency, and (3) the provision of housing accommodation was a matter of national urgency. The judicial precedent determined in *Kasireddy Papaiah (died) v. Government of A.P.*[314] and *Deepak Pahwa v. Lt. Governor of Delhi*[315] of post-notification delay alone cannot survive a challenge against urgent land acquisition. It should also include the mala fide exercise of power. Even delay resulting through the inaction of bureaucracy was disapproved. Moreover, the precedent in *Narayan Govind Gavate* v. *State of Maharashtra*[316] that stipulated the

[312]Om Prakash v. State of U.P. (1998) 6 SCC 1
[313] (1986) 4 SCC 251
[314] AIR 1975 AP 269. In this case, the land was acquired for providing accommodation to the Harijans and the delay was caused due to the bureaucratic inaction which was refuted by the Court.
[315] AIR 1984 SC 1721
[316] (1977) 1 SCC 133

application of Section 17(1) to the housing accommodation was not applied on the ground that the situation changed immensely and housing appeared as essential need. Further, this judicial precedent was approved in *Rajasthan Housing Board* v. *Shri Kishan*[317].

The judicial precedent of national importance held in *Pista Devi case*[318] was followed in *Jai Narain* v. *Union of India*[319], the urgency clause was invoked to construct 'Sewage Treatment Plants' for the planned development of Delhi. It was challenged on the ground of non-involvement of any urgency before the divisional bench. Justice Kuldip Singh delivered the majority decision and held that the sewage plants were of national importance and vital as it strived to protect the environment, reduced pollution and enhanced agricultural output.[320] In this case reference was made to *Pista Devi case*[321] and the precedent of national importance was followed.[322] It also reiterated that the subjective satisfaction of the government cannot be interfered except when the decision was influenced by wholly irrelevant consideration and non-application of mind in invoking Section 17.

Similarly, in *Union of India v. Praveen Gupta*[323], the divisional bench of the Supreme Court justified the application of urgency clause for establishment of timber depots to overcome traffic congestion. The Court approved the satisfaction of the government as final. Executive satisfaction received prominence than the precedent of national importance. The Court justified the application of Section 17(4) that dispense with Section 5A.[324] At the same time, the administrative discretion received upper hand in the determination of urgent acquisition. The Court stated that,

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[317] (1993) 2 SCC 84

[318] Supra 313, at 251.

[319] (1996) 1 SCC 9

[320] Court observed that, "11. It is of utmost importance and urgency to complete the construction of the STPs in the city of Delhi. The project is of great public importance. It is indeed of national importance. We take judicial notice of the fact that there was utmost urgency to acquire the land in dispute and as such the emergency provisions of the Act were rightly invoked (pg. 17-18)."

[321] Supra 313, at 251.

[322] At the same time, the divisional bench set out the principles concerning judicial interference in urgency matters such as, "5. The emergency must be reflected in the need of the acquisition. The existence of urgency is a matter which is entirely based on the subjective satisfaction of the Government. The courts do not interfere unless the reasons given are wholly irrelevant and there is no application of mind (pg.12)."

[323] (1997) 9 SCC 78

[324] Justice K. Ramaswamy and Justice Kurdukar observed that, "7. Each case has to be considered on its own facts. The very object of enquiry under Section 5A is whether the land proposed to be acquired is needed or is likely to be needed for the public purpose mentioned in the notification and whether any

> It is now settled legal position that decision on urgency is an administrative decision and is a matter of subjective satisfaction of the appropriate Government on the basis of the material available on record. Therefore, there was no need to pass any reasoned order to reach the conclusion that there is urgency so as to dispense with the enquiry under Section 5A in exercise of power under Section 17(4).

Again in *Collector (LA)* v. *Nirodhi Prakash Ganguli*[325], the divisional bench declared urgency acquisition as valid. The land was mainly acquired for the use of National Medical College, Calcutta. The respondent pleaded that the hearing of objection under Section 5A cannot be dispensed unless there was grave emergency. At the same time, respondent argued that there was delay caused in issuance declaration under Section 6. Divisional bench rejected both contentions and allowed the appeal. It relied on the fact that the previous acquisition under normal procedure received setback from the lower court that quashed the proceedings, as a result, rising need and delay paved way for urgent acquisition. The executive's subjective satisfaction with discretion and non-consideration of post-notification delay attributed the validity. The outcome was reached only after the failure of the appellant on whom the burden to proof was placed to prove mala fide exercise of power by the government.[326] In this case, the Court mainly considered the failure of the government to acquire land previously

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other suitable land other than the acquired land is needed for the said public purpose. In this case, the entire land in two villages was acquired. It is seen that timber business is being carried on in the walled city of Old Delhi. It has become a source of traffic congestion and that it requires to be shifted urgently from the existing place to relieve the congestion by acquiring the concerned land for the public purpose, namely, establishment of timber depots. It is true that a mention was also made that unauthorised construction has been made in the area proposed to be acquired. If the enquiry was conducted, delay would defeat the very public purpose of acquisition for shifting of timber business from the walled city and establishment of the timber depots outside the walled city. Therefore, the urgency mentioned in exercising the power under Section 4(1) was justified (pg.81)."

[325] (2002) 4 SCC 160

[326] Justice G.B. Pattanaik held that, "5. Though the satisfaction under Section 17(4) is a subjective one and is not open to challenge before a court of law, except for the grounds already indicated, but the said satisfaction must be of the appropriate government and that the satisfaction must be, as to the existence of an urgency. The conclusion of the Government that there was urgency, even though cannot be conclusive, but is entitled to great weight, as has been held by this Court in *Jage Ram* v. *State of Haryana* [(1971) 1 SCC 671 : AIR 1971 SC 1033] . Even a mere allegation that power was exercised mala fide would not be enough and in support of such allegation specific materials should be placed before the court. The burden of establishing mala fides is very heavy on the person who alleges it. Bearing in mind the aforesaid principles, if the circumstances of the case in hand are examined it would appear that the premises in question were required for the students of National Medical College, Calcutta and the notification issued in December 1982 had been quashed by the Court and the subsequent notification issued on 25-2-1994 also had been quashed by the Court. It is only thereafter the notification was issued under Sections 4(1) and 17(4) of the Act on 29-11-1994, which came up for consideration before the High Court. Apart from the fact that there had already been considerable delay in acquiring the premises in question on account of the intervention by courts, the premises were badly needed for the occupation by the students of National Medical College, Calcutta. Thus, existence of urgency was writ large on the facts of the case and therefore, the said exercise of power in the case in hand, cannot be interfered with by a court of law on a conclusion that there did not exist any emergency. The conclusion of the Division Bench of the Calcutta High Court, therefore, is unsustainable (pg. 165-166)."

valid for incorporation of urgency clause later. The Court failed to consider the grounds of disapproval by the lower courts.

The application of urgency to housing was revisited in *Tika Ram* v. *State of U.P.*[327]. The land acquisition under Section 17 was challenged among others on the ground that there involved no urgency to justify the dispensation of Section 5A. The Court validated the urgency as housing was essential. It further held that no allegation of mala fide was raised before the lower court by the appellant and no evidence produced to substantiate the claim therefore it was inappropriate at the final stage to invalidate Section 17. Hence, the apex court declared that the land acquisition proceedings for housing under urgency were valid.[328] Justice V. S. Sirpurkar made following observation:

> At this juncture itself, we must also consider the argument that there was no real urgency in this matter. It cannot be ignored that this land was urgently needed for housing. Large-scale development and utilisation of acquired land after the acquisition is apparent on the face of the record. A number of houses have been constructed, third-party interests were created in whose favour the plots were allotted and the High Court has also commented while disposing of the writ petitions that the quashing of the notification at this stage will prejudice the interests of the people for whom the Schemes were evolved.

The above case was referred in *Nand Kishore Gupta* v. *State of U.P.*[329], wherein enormous land was acquired for Yamuna Expressway project and again the dispensation of Section 5A was challenged and subsequently ruled out by the Court, on the ground that government's satisfaction was final authority. Moreover, the court also observed that mere allegation of mala fide exercise of power without concrete evidence was untenable. Again in this case Justice V. S. Sirpurkar mentioned that:

> The law on this subject was thoroughly discussed in *Tika Ram* v. *State of U.P.* [(2009) 10 SCC 689] to which one of us (V.S. Sirpurkar) was a party. In that decision also, we had reiterated that the satisfaction required on the part of the executive in dispensing with the enquiry under Section 5A is a matter subject to satisfaction and can be assailed only on the ground that there was no sufficient material to dispense with the enquiry or that the order suffered from malice.

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[327] (2009) 10 SCC 689

[328] "115. While considering as to whether the Government was justified in doing away with the inquiry under Section 5A, it must be noted that there are no allegations of mala fides against the authority. No evidence has been brought before the judgment and the High Court has also commented on this. The housing development and the planned developments have been held to be the matters of great urgency by the Court in *Pista Devi case* [(1986) 4 SCC 251]. In the present case we have seen the judgment of the High Court which has gone into the records and has recorded categorical finding that there was sufficient material before the State Government and the State Government has objectively considered the issue of urgency. Even before this Court, there were no allegations of mala fides. A notice can be taken of the fact that all the lands which were acquired ultimately came to be utilised for the Scheme. We, therefore, reject the argument that there was no urgency to justify dispensation of Section 5A inquiry by applying the urgency clause."

[329] (2010) 10 SCC 282

From the perusal of above cases, it appears that the land acquisition under Section 17 regulated by government on following grounds namely – (1) government's subjective satisfaction and discretion; (2) burden of proof on the party challenging urgency to prove otherwise with evidence on the ground of mala fide exercise of power or non-application of mind; (3) the challenge of urgency on the ground of post-notification delay untenable; (4) the application of precedent differed with facts. Thus government had the final authority in deciding Section 17 and uneven balance of burden of proof further contributed the government position. The objectives involved grave urgency, no concrete precedent set out for considering this urgency. Only one aspect received prominence i.e. satisfaction of the government. As we noticed that in some cases the national importance received priority, whereas in other cases desperate need was preferred. No just and reasonable precedent was set up. Even what did subjective satisfaction incorporates was beyond questionable.

#### *5.3.2.2. Invalid Urgent Acquisition*

Besides the above valid urgent acquisition, there were few cases in which application of urgency clause was declared in valid. The urgent land acquisition was termed invalid in *Raja Anand Brahma Shah v. State of U.P.*[330]. The five judges (Subba Rao C.J., Hidayatullah, Sikri, Ramaswami, and Shelat) bench held that, if the government failed to apply mind to the urgent land acquisition under Section 17(4) such action on the part of the Government amounts to mala fide exercise of power. With regard to the invalidity of the urgent acquisition, the precedent was established in *Narayan Govind Gavate* v. *State of Maharashtra*[331] and was followed in many decisions thereafter, for the rejection of application in Section 17. In the instant case, the land was needed for the construction of residential and industrial area. Proceedings were initiated under Section 17(4) and challenged before the bench of three judges. Justice M. H. Beg delivered the majority decision. The appeal was filed against the decision of the High Court that quashed the application of urgency clause on the ground of that the particulars pertaining to urgent acquisition were vague. Justice M. H. Beg laid down the test to justify the application under Section 17 as, "Was the authority concerned acting within the scope of its powers or in the sphere where its opinion and discretion must be permitted to have full play?" Further, Justice Beg added that, after

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[330] AIR 1967 SC 1081
[331] Supra 316, at 133.

analyzing the facts on the above test, the court should determine two conditions viz., whether the authorities acted within the scope of powers and relied on some material in forming the decision even though such material appeared meager. If the two conditions were fulfilled then the court will not alter the decision.[332] Moreover, the apex court affirmatively cited the propositions of the High Court that established three grounds of judicial interference in the urgency land acquisition decision making. They were – (1) on the ground of mala fide exercise of power; (2) non-application of mind by the authorities to the material on which the opinion or satisfaction expressed; (3) the decision made without material or very insufficient material that no man could have reasonably reached the conclusion.[333]

Further, the Supreme Court discussed the burden of proof. The appellant argued that the affidavit produced by the authorities failed to produce any material record suggesting urgency, in the absence of such material they (appellant) failed to produce sound challenge against the urgent acquisition therefore burden lies on the State

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[332] It is true that, in such cases, the formation of an opinion is a subjective matter, as held by this Court repeatedly with regard to situations in which administrative authorities have to form certain opinions before taking actions they are empowered to take. They are expected to know better the difference between a right or wrong opinion than courts could ordinarily on such matters. Nevertheless, that opinion has to be based upon some relevant materials in order to pass the test which courts do impose. That test basically is: Was the authority concerned acting within the scope of its powers or in the sphere where its opinion and discretion must be permitted to have full play? Once the court comes to the conclusion that the authority concerned was acting within the scope of its powers and had some material, however meagre, on which it could reasonably base its opinion, the courts should not and will not interfere. There might, however, be cases in which the power is exercised in such an obviously arbitrary or perverse fashion, without regard to the actual and undeniable facts, or, in other words, so unreasonably as to leave no doubt whatsoever in the mind of a court that there has been an excess of power. There may also be cases where the mind of the authority concerned has not been applied at all, due to misunderstanding of the law or some other reason, to what was legally imperative for it to consider.

[333] 11. The High Court had put its point of view in the following words: "When the formation of an opinion or the satisfaction of an authority is subjective but is a condition precedent to the exercise of a power, the challenge to the formation of such opinion or to such satisfaction is limited, in law, to three points only. It can be challenged, firstly, on the ground of mala fides; secondly, on the ground that the authority which formed that opinion or which arrived at such satisfaction did not apply its mind to the material on which it formed the opinion or arrived at the satisfaction, and, thirdly, that the material on which it formed its opinion or reached the satisfaction was so insufficient that no man could reasonably reach that conclusion. So far as the third point is concerned, no court of law can, as in an appeal, consider that, on the material placed before the authority, the authority was justified in reaching its conclusion. The court can interfere only in such cases where there was no material at all or the material was so insufficient that no man could have reasonably reached that conclusion. It is not necessary to refer to the authorities which lay down these propositions because they have by now been well-established in numerous judgments and they are not in dispute before us at the Bar. In this case, however, there is no challenge on any of these three grounds. The dispute in this case therefore narrows down to the point as to the burden of proof. In other words, the dispute is whether it is the petitioner who has to bring the material before the Court to support his contention that no urgency existed or whether, once the petitioner denied that any urgency existed, it was incumbent upon the respondent to satisfy the court that there was material upon which the respondents could reach the opinion as mentioned in Section 17(4).

(respondent). The Court believed that the burden of proof was a tricky issue.[334] It analyzed Section 101 to 106 of the Evidence Act, and held that the Court should follow the rule of general and particular burden of proof including indirect inference if either fact proved or disproved.[335] It stated that the presumption too arises from the failure to produce certain evidence that goes against it. The Court observed that:

> 22. True presumptions, whether of law or of fact, are always rebuttable. In other words, the party against which a presumption may operate can and must lead evidence to show why the presumption should not be given effect to. If, for example, the party which initiates a proceeding or comes with a case to court offers no evidence to support it, the presumption is that such evidence does not exist. And, if some evidence is shown to exist on a question in issue, but the party which has it within its power to produce it, does not, despite notice to it to do so, produce it, the natural presumption is that it would, if produced, have gone against it. Similarly, a presumption arises from failure to discharge a special or particular onus.

However, such presumption should be drawn after analyzing the total facts and circumstances of the case.[336] Then the Court mentioned the principle of burden of proof as:

> 24. Coming back to the cases before us, we find that the High Court had correctly stated the grounds on which even a subjective opinion as to the existence of the need to take action under Section 17(4) of the Act can be challenged on certain limited grounds. But, as soon as we speak of a challenge we have to bear in mind the general burdens laid down by Sections 101 and 102 of the Evidence Act. It is for the petitioner to substantiate the grounds of his challenge. This means that the petitioner has to either lead evidence or show that some evidence has come from the side of the respondents to indicate that his challenge to a notification or order is made good. If he does not succeed in discharging that duty his petition will fail. But, is that the position in the cases before us? We find that, although the High Court had stated the question before it to be one which "narrows down to the point as to the burden of proof" yet, it had analysed the evidence sufficiently before it to reach the conclusion that the urgency provision under Section 17(4) had not been validly resorted to.

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[334] 13. It has been submitted on behalf of the State that we need decide nothing more than a simple question of burden of proof in the cases before us. We do not think that a question relating to burden of proof is always free from difficulty or is quite so simple as it is sought to be made out here. Indeed, the apparent simplicity of a question relating to presumptions and burdens of proof, which have to be always viewed together is often deceptive. Oversimplification of such questions leads to erroneous statements and misapplications of the law (pg. 140).

[335] 21. In judging whether a general or a particular or special onus has been discharged, the court will not only consider the direct effect of the oral and documentary evidence led but also what may be indirectly inferred because certain facts have been proved or not proved though easily capable of proof if they existed at all which raise either a presumption of law or of fact. Section 114 of the Evidence Act covers a wide range of presumptions of fact which can be used by courts in the course of administration of justice to remove lacunae in the chain of direct evidence before it. It is, therefore, said that the function of a presumption often is to "fill a gap" in evidence (pg.142-143).

[336] 23. The result of a trial or proceeding is determined by a weighing of the totality of facts and circumstances and presumptions operating in favour of one party as against those which may tilt the balance in favour of another. Such weighment always takes place at the end of a trial or proceeding which cannot, for purposes of this final weighment, be split up into disjointed and disconnected parts simply because the requirements of procedural regularity and logic, embodied in procedural law, prescribe a sequence, a stage, and a mode of proof for each party tendering its evidence. What is weighed at the end is one totality against another and not selected bits or scraps of evidence against each other (pg.143).

However, the apex Court differed from the approach of the High Court in the context of shifting the burden of proof observed that:

> 42. All schemes relating to development of industrial and residential areas must be urgent in the context of the country's need for increased production and more residential accommodation. Yet, the very nature of such schemes of development does not appear to demand such emergent action as to eliminate summary enquiries under Section 5A of the Act. There is no indication whatsoever in the affidavit filed on behalf of the State that the mind of the Commissioner was applied at all to the question whether it was a case necessitating the elimination of the enquiry under Section 5A of the Act. The recitals in the notifications, on the other hand, indicate that elimination of the enquiry under Section 5A of the Act was treated as an automatic consequence of the opinion formed on other matters. The recital does not say at all that any opinion was formed on the need to dispense with the enquiry under Section 5A of the Act. It is certainly a ease in which the recital was at least defective. The burden, therefore, rested upon the State to remove the defect, if possible, by evidence to show that some exceptional circumstances which necessitated the elimination of an enquiry under Section 5A of the Act and that the mind of the Commissioner was applied to this essential question. It seems to us that the High Court correctly applied the provisions of Section 106 of the Evidence Act to place the burden upon the State to prove those special circumstances, although it also appears to us that the High Court was not quite correct in stating its view in such a manner as to make it appear that some part of the initial burden of the petitioners under Sections 101 and 102 of the Evidence Act had been displaced by the failure of the State to discharge its duty under Section 106 of the Act. The correct way of putting it would have been to say that the failure of the State to produce the evidence of facts especially within the knowledge of its officials, which rested upon it under Section 106 of the Evidence Act, taken together with the attendant facts and circumstances, including the contents of recitals, had enabled the petitioners to discharge their burden under Sections 101 and 102 of the Evidence Act.

On the application of the above principle the court felt that, in the instant case vague public purpose as alleged by the appellant does not amount to be a promising ground for challenge, on the contrary, absence of statement relating to facts and circumstances towards the exclusion of Section 5A was reasonable ground to quash the proceedings.[337] This was further clearly stated as:

> 30. In the cases before us, if the total evidence from whichever side any of it may have come, was insufficient to enable the petitioners to discharge their general or stable onus, their petitions could not succeed. On the other hand, if, in addition to the bare assertions made by the petitioners, that the urgency contemplated by Section 17(4) did not exist, there were other facts and circumstances, including the failure of the State to indicate facts and circumstances which it could have easily disclosed if they existed, the petitioners could be held to have discharged their general onus.

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[337] 25. The High Court had remarked that the public purpose itself was vaguely stated, although it could not, in its opinion, be challenged on that ground. As we have already indicated, the purpose was sufficiently specified to be, prima facie, a legally valid purpose. We do not think that the vagueness of the purpose, as stated in the notification under Section 4(1), really affected the judgment of the High Court so much as the absence of facts and circumstances which could possibly indicate that this purpose had necessarily to be carried out in such a way as to exclude the application of Section 5A of the Act. The High Court had rightly referred to the absence of any statement of circumstances which could have resulted in such urgency that no enquiry under Section 5A of the Act could reasonably be held.

In the instant case, as per the facts the issue was mainly with regard to the non-application of mind by the Commissioner.[338] On the contrary, the Court gave prominence to the public purpose and expressed the judicial intervention in the event of administrative error.[339] The Supreme Court felt that a summary hearing under Section 5A conducted previously would have saved enough time.[340] Finally, the Supreme Court dismissed the appeal on the ground that there was no force either in the contention of the land owners or the State of Maharashtra. After the decision of dismissal, the High Court decision of invalidating the urgency was retained. In this case the Supreme Court expressed opinion on the issue of burden of proof. It clearly vested powers to the Court to apply its discretionary power to the facts and circumstances of the case. It appears that the Evidence Act further strengthened the government by placing the burden on the owner on the ground of presumption and standard proof. Heavy burden was placed on the land owners and enjoyed some relief only when there was apparent error on the face of record.

In *State of Punjab v. Gurdial Singh*[341], Justice Krishna Iyer set aside the urgent acquisition under Section 17 on the ground of mala fide exercise of power. Land was needed for the construction of Mandi. It was held that the intolerant authority exercised mala fide executive power under Section 17 for political gains. Justice Iyer

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[338]41. Again, the uniform and set recital of a formula, like a ritual or mantra, apparently applied mechanically to every case, itself indicated that the mind of the Commissioner concerned was only applied to the question whether the land was waste or arable and whether its acquisition is urgently needed. Nothing beyond that seems to have been considered. The recital itself shows that the mind of the Commissioner was not applied at all to the question whether the urgency is of such a nature as to require elimination of the enquiry under Section 5A of the Act. If it was, at least the notifications gave no inkling of it at all. On the other hand, its literal meaning was that nothing beyond matters stated there were considered.

[339]32. It is also clear that, even a technically correct recital in an order or notification stating that the conditions precedent to the exercise of a power have been fulfilled may not debar the court in a given case from considering the question whether, in fact, those conditions have been fulfilled. And, a fortiori, the court may consider and decide whether the authority concerned has applied its mind to really relevant facts of a case with a view to determining that a condition precedent to the exercise of a power has been fulfilled. If it appears, upon an examination of the totality of facts in the case, that the power conferred has been exercised for an extraneous or irrelevant purpose or that the mind has not been applied at all to the real object or purpose of a power, so that the result is that the exercise of power could only serve some other or collateral object, the court will interfere (pg.146).

[340] 43. We may also observe that if, instead of prolonging litigation by appealing to this Court, the State Government had ordered expeditious enquiries under Section 5A of the Act or even afforded the petitioners some opportunity of being heard before acting under Section 17(4) of the Act, asking them to show cause why no enquiry under Section 5A of the Act should take place at all, the acquisition proceedings need not have been held up so long. In fact, we hope that the acquisition proceedings have not actually been held up.

[341] (1980) 2 SCC 471

termed such exercise of power as 'fraud on power'.[342] In the instant case, the urgency was restricted under constitutional provisions and even the reference was made to natural justice. It was held at one point that, "At times, the natural justice is the natural enemy of intolerant authority". Commenting on constitutional provisions vis-à-vis exercise of urgency powers Justice Krishna Iyer held that:

> ...it is fundamental that compulsory taking of a man's property is a serious matter and the smaller the man the more serious the matter. Hearing him before depriving him is both reasonable and pre-emptive of arbitrariness, and denial of this administrative fairness is constitutional anathema except for good reasons. Save in real urgency where public interest does not brook even the minimum time needed to give a hearing land acquisition authorities should not, having regard to Articles 14 (and 19), burke an enquiry under Section 17 of the Act. Here a slumbering process, pending for years and suddenly exciting itself into immediate forcible taking, makes a travesty of emergency power.

The above remarks of the Justice Krishna Iyer over mala fide exercise of power and fraud on power with constitutional provisions were not applied in future in stipulating Section 17.

Further, in *Om Prakash* v. *State of U.P.*[343] large tracts of land were acquired under Section 17 for planned development of Ghaziabad. Though the divisional bench clearly witnessed the failure of the state authorities to produce relevant data as evidence to form real and genuine subjective satisfaction[344], but refused to set aside the whole proceedings after the span of six years. The Court mentioned the following reasons:

> Now after a passage of more than six years, it would not be feasible to put the clock back and permit the appellants to agitate this contention which appears to be the sole contention for opposing the acquisition proceedings in the facts of the present cases by permitting them to urge this grievance in Section 5A inquiry which according to them should be held at this stage. We will show presently that this solitary grievance of the appellants could be vindicated before the State authorities themselves by relegating the appellants to proper remedy by way of representation under Section 48 of the Act and when that remedy is available to the appellants and when that is the sole grievance of the appellants, at this stage no useful purpose would be

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[342] Fraud on power voids the order if it is not exercised bona fide for the end designed. Fraud in this context is not equal to moral turpitude and embraces all cases in which the action impugned is to effect some object which is beyond the purpose and intent of the power, whether this be malice-laden or even benign. If the purpose is corrupt the resultant act is bad. If considerations, foreign to the scope of the power or extraneous to the statute, enter the verdict or impel the action, mala fides or fraud on power vitiates the acquisition or other official act.

[343] (1998) 6 SCC 1

[344] 25. In the light of the aforesaid discussion, therefore, the conclusion becomes inevitable that the action of dispensing with inquiry under Section 5A of the Act in the present cases was not based on any real and genuine subjective satisfaction depending upon any relevant data available to the State authorities at the time when they issued the impugned notification under Section 4(1) of the Act and dispensed with Section 5A inquiry by resorting to Section 17 sub-Section (4) thereof. The first point is, therefore, answered in the negative, in favour of the appellants and against the contesting respondents.

> served by striking down the notification under Section 4(1) qua the appellants so far as invocation of Section 17(4) is concerned and the consequent notification under Section 6. That we cannot permit upsetting the entire apple-cart of acquisition of 500 acres only at the behest of 1/10th of landowners whose lands are sought to be acquired. We may also keep in view the further salient fact that all the appellants have filed references for additional compensation under Section 18 of the Act. …Consequently, despite our finding in favour of the appellants on Point 1, we do not think that this is a fit case to set aside the acquisition proceedings on the plea of the appellants about non-compliance with Section 5A at this late stage. It is also obvious that if on this point, the notifications are quashed for non-compliance of Section 5A, that would open a Pandora's box and those occupants who are uptil now sitting on the fence may also get a hint to file further proceedings on the ground of discriminatory treatment by the State authorities. All these complications are required to be avoided and hence while considering the question of exercise of our discretionary jurisdiction under Article 136 of the Constitution of India, we do not think that this is a fit for interference in the present proceedings with the impugned notifications.

In this case though the urgency was considered invalid but had no effect on the complete land acquisition. Moreover, the matter was referred to executive under Section 5A proceedings and directed the authorities to decide that whether the land was abadi or not. This case involved colourable exercise of judicial process. Facts were obvious and suggested error on the face of record, but the judiciary refused to exercise its authority. Justice was denied on the ground that six years time has lapsed so it was unfeasible to revive the proceedings.

Moreover, the interpretation of Section 17 was revisited in *Union of India v. Mukesh Hans*[345]. The issue before the court was the legality over the interpretation of Section 17(4) and relinquishment of Section 5A. Basically, the land was needed for annual ceremony of Mughal period at Mehrauli village and the proceedings were initiated under Section 17. Justice N. Santosh Hegde for bench of three judges quashed the urgency proceedings. The bench disagreed with the argument that the satisfaction of the government was final and held that the application of mind towards Section 17 was condition precedent.[346] Section 5A was declared as the substantive rights and its dispensation required application of mind.[347] Importance of Section 5A was adequately noted in *Munshi Singh v. Union of India*[348]. In the absence of material

[345] (2004) 8 SCC 14

[346]In this regard Court in the instant case relied on *Nandeshwar Prasad* v. *State of U.P.* AIR 1964 SC 1217 in which court held that, there should be application of mind to the facts of the case with special reference to Section 5A of the Act.

[347]35. At this stage, it is relevant to notice that the limited right given to an owner/person interested under Section 5A of the Act to object to the acquisition proceedings is not an empty formality and is a substantive right, which can be taken away for good and valid reason and within the limitations prescribed under Section 17(4) of the Act (pg.27).

[348] Supra 275, at 1150.

record, the Court felt that there existed no urgent situation for initiation of Section 17.[349] It also contributed by the fact that Lt. Governor failed to apply mind before initiating the proceedings under Section 17 and this was obvious from the noting that lacked reasons.[350] On the basis of these two grounds, the appeal was dismissed.

Further, Justice Shivraj Patil on behalf of the divisional bench in *Union of India* v. *Krishan Lal Arneja[351],* dismissed the application of urgency and laid down the test to govern 'real' urgency as:

> The authority must have subjective satisfaction of the need for invoking urgency clause under Section 17 keeping in mind the nature of the public purpose, real urgency that the situation demands and the time factor i.e. whether taking possession of the property can wait for a minimum period within which the objections could be received from the landowners and the inquiry under Section 5A of the Act could be completed. In other words, if power under Section 17 is not exercised, the very purpose for which the land is being acquired urgently would be frustrated or defeated.

The importance was placed on the exercise of such power only in the case of real and genuine urgency and the power exercised with due care and responsibility.[352] Further, the court held that the urgency was false when it involved administrative laxity, lethargy or lack of care. In this case, the Court relied on the precedent of *Narayan Govind Gavate case[353]*.

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[349] 37. There is no material on record to show that either the said festival has been discontinued for want of land or the owners of the land where the festival has its concluding ceremony are preventing the utilisation of that land for the said purpose.

[350] 37. We have also noticed hereinabove that an earlier attempt to acquire 40 bighas of the land for the very same purpose was allowed to be lapsed by the authorities concerned by efflux of time which was also a relevant factor to be taken note of by the Lt. Governor when he took the decision to dispense with the Section 5A inquiry but the same was not placed before him. These facts coupled with the findings of the High Court that in almost all the notings in the file there is no reference to the need for invoking Section 17(4), indicates that the Lt. Governor was not apprised of all the necessary and relevant facts before he took the decision in question. Therefore, in our opinion, the findings of the High Court that the decision of the Lt. Governor to dispense with the Section 5A inquiry suffered from the vice of non-application of mind has to be upheld. For the reasons stated above, these appeals fail and are dismissed.

[351] (2004) 8 SCC 453

[352] Normally urgency to acquire a land for public purpose does not arise suddenly or overnight but sometimes such urgency may arise unexpectedly, exceptionally or extraordinarily depending on situations such as due to earthquake, flood or some specific time-bound project where the delay is likely to render the purpose nugatory or infructuous. A citizen's property can be acquired in accordance with law but in the absence of real and genuine urgency, it may not be appropriate to deprive an aggrieved party of a fair and just opportunity of putting forth its objections for due consideration of the acquiring authority. While applying the urgency clause, the State should indeed act with due care and responsibility. Invoking urgency clause cannot be a substitute or support for the laxity, lethargy or lack of care on the part of the State administration.

[353] Supra 316, at 133.

Similarly, in *Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai*[354] Justice S. B. Sinha of divisional bench reiterated the importance of Section 5A and dismissed the appeal on the ground that the officials failed to produce any relevant document suggesting the non-application of Section 5A:

> When an order is passed by a statutory authority, the same must be supported either on the reasons stated therein or on the grounds available therefore in the record. A statutory authority cannot be permitted to support its order relying on or on the basis of the statements made in the affidavit dehors the order or for that matter dehors the records.

In *Essco Fabs (P) Ltd. v. State of Haryana*[355], the appellant challenged the land acquisition for residential, commercial and industrial purpose. Meanwhile, the appellant was engaged in export trade and purchased the land for the expansion of export unit to earn foreign exchange. Earlier an attempt was made to acquire the land but it failed as the land was not acquired within the stipulated time and eventually it led to the release of land. But after twenty years again the land was notified and the proceedings were initiated under Section 17. The invocation of urgency clause was challenged on the ground that after such long period it was not justified. A fresh notification under Section 17(4) was not issued after the lapse of proceedings for decade. The Court relied on *Mukesh Hans case*[356] and held that the absence of notification renders the urgency invalid.[357] However, it was held that authorities were free to follow normal procedure.

Further, in *Babu Ram* v. *State of Haryana* (2009) 10 SCC 115, Justice Altamas Kabir for the division bench invalidated Section 17 that sought land for the construction of sewage treatment plant. On the correctness of Section 17(4) the Court held that, the appellant should be given opportunity of being heard under Section 5A to decide the issue. Court allowed the appeal and relied on the ratio in *Gurdial Singh Case and Om*

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[354] (2005) 7 SCC 627

[355] (2009) 2 SCC 377

[356] Supra 345, at 14.

[357] 55. But as already held in *Nandeshwar Prasad* [AIR 1964 SC 1217 : (1964) 3 SCR 425] and *Mukesh Hans* [(2004) 8 SCC 14] , even in such cases, procedure required to be followed under Section 5A cannot be dispensed with unless notification under sub-Section (4) of Section 17 is issued. In *Mukesh Hans* [(2004) 8 SCC 14] the Court also held that the provision cannot be pressed in service by officers who were negligent and due to their lethargy, proceedings could not be initiated for quite a long time (pg.395).

*Prakash Case*[358]. Additionally Section 5A was viewed from the perspective of Article 14.

In *Anand Singh v. State of U.P.*[359] , the land was acquired for the developmental of residential colony at Gorakhpur and proceedings were initiated under Section 17(4) of the Act. The issue was whether the State Government could invoke Section 17(4) for the acquisition of land for a residential colony. The Court reiterated the application of mind an essential pre-requisite. Interestingly, in this case, the Court raised question over the application of Section 17 for planned development and observed that:

> In a country as big as ours, a roof over the head is a distant dream for a large number of people. The urban development continues to be haphazard. There is no doubt that planned development and housing are matters of priority in a developing nation. The question is as to whether in all cases of "planned development of the city" or "for the development of residential area", the power of urgency may be invoked by the Government and even where such power is invoked, should the enquiry contemplated under Section 5A be dispensed with invariably. We do not think so. Whether "planned development of city" or "development of residential area" cannot brook delay of a few months to complete the enquiry under Section 5A? In our opinion, ordinarily it can. The Government must, therefore, do a balancing act and resort to the special power of urgency under Section 17 in the matters of acquisition of land for the public purpose viz. "planned development of city" or "for development of residential area" in exceptional situation.

And further laid down guideline for the exercise of urgency power to planned development as:

> Use of the power by the Government under Section 17 for "planned development of the city" or "the development of residential area" or for "housing" must not be as a rule but by way of an exception. Such exceptional situation may be for the public purpose viz. rehabilitation of natural calamity affected persons; rehabilitation of persons uprooted due to commissioning of dam or housing for lower strata of the society urgently; rehabilitation of persons affected by time-bound projects, etc. The list is only illustrative and not exhaustive. In any case, sans real urgency and need for immediate possession of the land for carrying out the stated purpose, heavy onus lies on the Government to justify the exercise of such power.

The Court rejected the proceedings under Section 17 and held that the planned development deprives owner or person interested of valuable right under Section 5A and thus such planned development violates the test under Section 5A.

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[358] 31. The observations made both in *Gurdial Singh case* [(1980) 2 SCC 471] and in *Om Prakash case* [(1998) 6 SCC 1] assign a great deal of importance to the right of a citizen to file objections under Section 5A of the LA Act when his lands are being taken over under the provisions of the said Act. That in the said decisions, such right was elevated to the status of a fundamental right is in itself sufficient to indicate that great care had to be taken by the authorities before resorting to Section 17(4) of the LA Act, and that they had to satisfy themselves that there was an urgency of such nature as indicated in Section 17(2) of the Act, which could brook no delay whatsoever.

[359] (2010) 11 SCC 242

Further, a divisional bench of Supreme Court in *Dev Sharan* v. *State of U.P.*[360], revisited the validity of Section 17 for the construction of jail and issued certain guidelines as a prerequisite to urgency clause – first, urgency should consider the social and economic justice i.e. no homelessness should result from such acquisition.[361]Secondly, there should not be inordinate delay between notification and declaration. In this case, the Court invalidated Section 17 on the ground of delay that result between the notification and issue of declaration which clearly ousted the valuable right under Section 5A.[362] Delay of more than eleven months undermined the application of urgency.[363] However, the Court believed that the proceedings under Section 5A initiated for the public purpose. This case relied on the findings in *Munshi Singh Case*[364]*, Mukesh Hans Case*[365]*, Essco Fabs Case*[366]*, and Hindustan Chenai case*[367]. Similarly, in *State of West Bengal* v. *Prafulla Churan Law*[368] the urgency proceedings were quashed on the ground of delay and failure of timely action.

In, *Radhy Shyam* v. *State of U.P.*[369] , the land acquisition under urgency was challenged under Section 4(1) read with Sections 17(1) and (4) for planned industrial development of District Gautam Budh Nagar by the Greater Noida Industrial Development Authority. Justice G. S. Singhvi on behalf of divisional bench outlined certain mandatory relevant factors for the validity of planned development land acquisition under Section 17 as – (1) no delay of weeks or months should take place;

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[360] (2011) 4 SCC 769

[361] 19. Therefore, the concept of public purpose on this broad horizon must also be read into the provisions of emergency power under Section 17 with the consequential dispensation of right of hearing under Section 5A of the said Act. The courts must examine these questions very carefully when little Indians lose their small property in the name of mindless acquisition at the instance of the State. If public purpose can be satisfied by not rendering the common man homeless and by exploring other avenues of acquisition, the court, before sanctioning an acquisition, must in exercise of its power of judicial review, focus its attention on the concept of social and economic justice.

[362] 40. The valuable right of the appellants under Section 5A of the Act cannot be flattened and steamrolled on the "ipse dixit" of the executive authority. The impugned notifications under Sections 4 and 6 of the Act insofar as they relate to the appellants' land are quashed. The possession of the appellants in respect of their land cannot be interfered with except in accordance with law.

[363] 37. Thus the time which elapsed between publication of Section 4(1) and Section 17 notifications, and Section 6 declaration in the local newspapers is 11 months and 23 days i.e. almost one year. This slow pace at which the government machinery had functioned in processing the acquisition, clearly evinces that there was no urgency for acquiring the land so as to warrant invoking Section 17(4) of the Act.

[364] Supra 275, at 1150.

[365] Supra 345, at 14.

[366] Supra 355, at 377.

[367] Supra 354, at 627.

[368] (2011) 4 SCC 537

[369] Supra 167, at 553.

(2) the application of mind to the relevant factors and records; (3) any land for planned development particularly forresidential, commercial, industrial or institutional purposes should undergo judicial notice of the fact of 'planning, execution and implementation of the schemes'; (4) the Court should scrutinise the acquisition with suspicion of the records. In the course of matter, the Court believed that the arguments of the State are 'tailor-made justification' particularly the attraction of inflow of funds in the form of investment or larger opportunities to the people of the area in the absence of evidence. The Court observed that the application of Section 17 vis-a-vis of the violation of constitutional right to property under Article 300A. The Court in strong terms observed that:

> Even if planned industrial development of the district is treated as public purpose within the meaning of Section 4, there was no urgency which could justify the exercise of power by the State Government under Sections 17(1) and 17(4). The objective of industrial development of an area cannot be achieved by pressing some buttons on computer screen. It needs lots of deliberations and planning keeping in view various scientific and technical parameters and environmental concerns. The private entrepreneurs, who are desirous of making investment in the State, take their own time in setting up the industrial units. Usually, the State Government and its agencies/instrumentalities would give them two to three years to put up their factories, establishments, etc. Therefore, time required for ensuring compliance with the provisions contained in Section 5A cannot, by any stretch of imagination, be portrayed as delay which will frustrate the purpose of acquisition.

Finally, the court quashed the urgency, and held that, there was no 'real and substantive' urgency. Moreover, the authorities should have rendered proceedings with Section 5A which could have consumed merely thirty days to govern society in accordance with law, though consumed a little time.

The guidelines expressed in *Radhy Shyam case*[370] were followed in *Devender Kumar Tyagi* v. *State of U.P.*[371]. Justice H. L. Dattu delivered the decision for the divisional bench and quashed the application of Section 17(4) and declared the right in Section 5A as a valuable right. Land required for the planned development of the Leather City Project for relocating bone mills and allied industries. The Court believed that the planning, execution and implementation demanded long time period hence the urgency clause cannot be justified.[372] Justice H. L. Dattu termed the acquisition as arbitrary and stated that:

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[370] Supra 167, at 553.

[371] (2011) 9 SCC 164

[372] 25. In view of the above it is well settled that acquisition of land for public purpose by itself shall not justify the exercise of power of eliminating enquiry under Section 5A in terms of Section 17(1) and

> The directions or orders issued by this Court must be abided by within the four corners of the legal framework and statutory provisions. The State Government is not allowed to transgress the express legal provisions and procedure thereunder in the garb or guise of implementing our guidelines or directions. The directions of this Court are issued with a purpose and the said purpose is supposed to be followed in the realm of legal structure and principles. Therefore, the respondents are not justified in invoking the urgency provisions of the LA Act in an arbitrary manner by referring to our earlier directions as a defence for their illegal and arbitrary act of acquiring land without giving an opportunity of raising objections and hearing to the petitioners in terms of Section 5A of the LA Act.

Finally, in *Darshan Lal Nagpal v. Govt. (NCT of Delhi)*[373], the scope of Section 17 vis-à-vis constitutional right under Article 300A was discussed. Justice G.S. Singhvi mentioned that:

> What needs to be emphasised is that although in exercise of the power of eminent domain, the State can acquire the private property for public purpose, it must be remembered that compulsory acquisition of the property belonging to a private individual is a serious matter and has grave repercussions on his constitutional right of not being deprived of his property without the sanction of law—Article 300-A and the legal rights. Therefore, the State must exercise this power with great care and circumspection. At times, compulsory acquisition of land is likely to make the owner landless. The degree of care required to be taken by the State is greater when the power of compulsory acquisition of private land is exercised by invoking the provisions like the one contained in Section 17 of the Act because that results in depriving the owner of his property without being afforded an opportunity of hearing.

It is pertinent to note that in the instant case the precedent laid down by the Court in *Radhy Shyam case*[374] and *Anand Singh Case*[375] were applied. Section 5A was viewed equivalent with the *audi alteram partem* under natural justice. In this case the land required for the construction of electric sub-station and the proceedings were initiated under Section 17(4). The Court observed that there was no real urgency, hence quashed the legal proceedings under Section 17.[376] However, the government was free to issue fresh proceedings under Section 4 with Section 5A.

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Section 17(4) of the LA Act. The Court should take judicial notice of the fact that certain schemes or projects, such as the construction of the Leather City Project for public purpose, which contemplate the development of residential, commercial, industrial or institutional areas, by their intrinsic nature and character require the investment of time of a few years in their planning, execution and implementation. Therefore, the land acquisition for said public purpose does not justify the invoking of urgency provisions under the LA Act (pg.176).

[373] (2012) 2 SCC 327

[374] Supra 167, at 553.

[375] Supra 359, at 242.

[376] 36. It needs no emphasis that majority of the projects undertaken by the State and its agencies/instrumentalities, the implementation of which requires public money, are meant to benefit the people at large or substantially a large segment of the society. …then in all such cases the acquiring authority will be justified in invoking Section 17 of the Act and dispense with the inquiry contemplated under Section 5A, which would necessarily result in depriving the owner of his property without any opportunity to raise legitimate objection. However, as has been repeatedly held by this Court, the invoking of the urgency provisions can be justified only if there exists real emergency which cannot brook delay of even few weeks or months. In other words, the urgency provisions can be invoked only if even small delay of few weeks or months may frustrate the public purpose for which the land is sought to be acquired. Nobody can contest that the purpose for which the appellants' land and land belonging to others was sought to be acquired was a public purpose but it is one thing to say that the

Section 17 was always a highly contested issue. This was evident from various judicial decisions cited above. Although, the eminent domain did not considered the consent of land owner, but its severity was extensive under urgency clause. Under urgency no hearing was allowed. There was mere issuance of notification and declaration followed by acquisition. Urgent situation justified any land acquisition without the opportunity of hearing. The above series of cases that were discussed on the ground of validity and invalidity of urgency suggest the following findings. Validity of urgency was mainly based on the subjective satisfaction of the government. The public purpose was determined on the basis of national importance. Heavy burden of proof was placed on the interested person with little possibility of success. On the other hand, the invalidity was determined on the ground of non-application of mind to the material records produced before the court and unjustified delay in acquiring land. Emergence of these grounds, in recent years, received prominence from the principles of natural justice and its relevance has also been made to Article 300-A of the Constitution of India.

After analysing the cases, it appears that there was no straitjacket formula applied by the Supreme Court and hardly exercised an effective Constitutional position. For instance, the Supreme Court in post-1978 in majority of cases determined the ratio of government satisfaction and only if the error appeared on the face or record then it overturned the decision of application of Section 17. Though the Article 300-A existed since 1978 but never applied it vis-a-vis Section 5A and neither the *audi alteram partem* principle under Article 14. These grounds only emerged in recent years and mainly after the social unrest in the society against the mass land acquisitions under SEZ.[377] Additionally, the Court considered the application of urgency clause for the planned development in initial years as vital for the nation. As a result, the Court liberally construed the details of such planned acquisitions and validated such notification. But after 2005 the planned developments particularly

State and its instrumentality wants to execute a project of public importance without loss of time and it is an altogether different thing to say that for execution of such project, private individuals should be deprived of their property without even being heard (pg.350).

[377]Delhi Airtech Services (P) Ltd. v. State of U.P. (2011) 9 SCC 354. In spite of reference to Article 300-A and audi alteram partem made in recent years, but these principles were never applied to quash any land acquisition proceedings. Land acquisitions were left intact.

industrial developments were subjected to the limitation of Section 5A. This dubious approach of the Court led the owners to suffer for more than forty years and suffered the scourge of Section 17 immensely.

Finally, another notable point that demanded attention was the ultimate outcome of the cases in which urgency was declared invalid. Under such cases, the government merely followed the general land acquisition procedure which included the implementation of Section 5A. The implementation of general land acquisition procedure did not assign any substantive relief against the land acquisition rather it retained the government's supremacy. Hence, nothing changed with the invalidity of Section 5A, ultimately the Act secured the interest of the government. The 1894 Act served mainly to acquire land without consent.

### *5.3.3. Market Value and Compensation*

Compensation was another major issue that received extensive attention before the Supreme Court. As we observed earlier that the validity of acquisition never sustained before the Act, the persons interested left only with the option of seeking compensation as a remedy. The Act of 1894 regulated the principles of compensation under Section 23 and 24 of the Act. Section 23 and 24 laid down matters that were considered positively and negatively respectively in determining compensation. Section 23 laid down relevant factors that were positively observed in determining compensation, on the contrary, Section 24 specified factors that were irrelevant in determining compensation. Determination of compensation was completely based on the 'market value' of that land. Moreover, the non-satisfaction of market value was challenged before the Court for higher compensation based on the potentiality of land.

Supreme Court examined the 'market value' in many cases and consistently retained traditional approach. This was explicitly laid down in *Raghubans Narain Singh* v. *U.P. Govt*[378]. The bench of three judges described 'market value' as:

> Market value on the basis of which compensation is payable under Section 23 of the Act means the price that a willing purchaser would pay to a willing seller for a property having due regard to its existing condition, with all its existing advantages, and its potential possibilities when laid out in its most advantageous manner, excluding any advantage due to the carrying out of the scheme for the purposes for which the property is compulsorily acquired.

[378] AIR 1967 SC 465

This approach was consistently followed in *Kamta Prasad Singh* v. *State of Bihar*[379]; *Prithvi Raj Taneja* v. *State of M.P.*[380]; *Administrator General of West Bengal v. Collector*[381]; *Periyar & Pareekanni Rubbers Ltd.* v. *State of Kerala*[382]. Market value was based on hypothetical price.[383] The apex court in *Salaha Begaum v. Land Acquisition Officer*[384], reiterated the settled principles that determined compensation as – (1) existing geographical and use of land; (2) advantageous position of land like proximity to national or state highway or road and/or developed area; (3) and market value of other land situated in same locality or village or area or adjacent or very near to the acquired land.

Moreover in *Viluben Jhalejar Contractor* v. *State of Gujarat*[385] the Supreme Court mentioned that the compensation cannot be ascertained with mathematical accuracy and depends on certain 'positive' and 'negative' factors.[386] Overall, the determination of market value completely relied on potentiality of the land. The potentiality of land was defined in *Atma Singh v. State of Haryana*[387] as, "Potentiality means capacity or possibility for changing or developing into state of actuality". However, it was also held that potentiality of land depended on – condition, situation and to the reasonable capable use of the land to other purposes such as residential, commercial or industrial areas or institutions, access to amenities like water, electricity, development of town, or any prospective development.[388]Any failure to undertake these factors rendered

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[379] (1976) 3 SCC 772
[380] (1977) 1 SCC 684
[381] (1988) 2 SCC 150
[382] (1991) 4 SCC 195
[383]*Nelson Fernandes v. Land Acquisition Officer (2007) 9 SCC 447.*
[384] (2013) 11 SCC 426
[385] (2005) 4 SCC 789
[386]The positive factors included (1) smallness of size, (2) proximity to road, (3) frontage on a road, (4) nearness to developed area regular shape level vis-à-vis land under acquisition, (5) special value for an owner of an adjoining property to whom it may have some very special advantage. Whereas, the negative factors stated as, (1) largeness of area, (2) situation in the interior at a distance from the road, (3) narrow strip of land with very small frontage compared to depth, (4) lower level requiring the depressed portion to be filled up, (5) remoteness from developed locality, (6) some special disadvantageous factors which would deter a purchaser (para 20). Similar positive and negative factors were reiterated in *Mohd. Raofuddin v. Land Acquisition Office (2009) 14 SCC 367.*
[387] (2008) 2 SCC 568
[388]Collector v. Harisingh Thakur (1979) 1 SCC 236, Raghubans Narain Singh v. U.P. Govt. AIR 1967 SC 465 and Administrator General of W.B. v. Collector (1988) 2 SCC 150.

violation of the principles under Section 23 and 24.[389] However, the Court at regular intervals held that the above mentioned factors depended on the facts and circumstances of each case.[390] No future increase on future potentiality formed part of the compensation.[391] The Supreme Court strictly interpreted the market value under Section 23 and 24 and no discretion was allowed beyond the scope of the two provisions, this was explicitly mentioned in *Land Acquisition Officer v. Karigowda*[392]. The Court observed that:

> The statutory law as well as the judgments pronounced by the courts have consistently taken the view that compensation has to be determined strictly in accordance with the provisions of Sections 23 and 24 of the Act. The matters which are to be governed by the terms of Section 24 of the Act cannot be taken into consideration by extending discretion referable to the matters which should be considered by the courts in terms of Section 23 of the Act. To put it in another way, the court should apply the principle of literal or plain construction to these provisions, as the legislature in its wisdom has not given to the court absolute discretion in matter relating to awarding of compensation but has intended to control the same by enacting these statutory provisions.

Court interpreted compensation with the contours of Section of 23 and 24. If the interested person was dissatisfied with the compensation, then the heavy burden was on the claimant to disprove the Collector's findings.[393] The principle of burden of proof was reiterated in *Gafar v. Moradabad Development Authority*[394] as:

> As held by this Court in various decisions, the burden is on the claimants to establish that the amounts awarded to them by the Land Acquisition Officer are inadequate and that they are entitled to more. That burden had to be discharged by the claimants and only if the initial burden in that behalf was discharged, the burden shifted to the State to justify the award.

However, the scrutiny of the documents in the form of evidence was always placed on the Court and it cannot ignore that. Besides, methods determining market value of land were adopted by court as the same were not laid down by the Act. Methods like Sales statistics method[395], capitalisation of net income method[396], and agricultural

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[389] These factors were mandated in considering potential value and the same laid down in *Kausalya Devi Bogra* v. *Land Acquisition Officer* (1984) 2 SCC 324 and *Suresh Kumar* v. *Town Improvement Trust* (1989) 2 SCC 329.

[390]*N.B. Jeejabhoy* v. *District Collector, Thana AIR 1965 SC 1096; Land Acquisition Officer v. Karigowda, (2010) 5 SCC 708.*

[391]*State of Orissa v. Brij Lal Misra (1995) 5 SCC 203.*

[392] (2010) 5 SCC 708

[393]*Basant Kumar v. Union of India (1996) 11 SCC 542; Gafar v. Moradabad Development Authority (2007) 7 SCC 614; Land Acquisition Officer v. Karigowda (2010) 5 SCC 708.*

[394] (2007) 7 SCC 614

[395]Based on comparable sales, in which the proposed land situated and possess similar potential. This has been considered in *Faridabad Gas Power Project, NTPC Ltd. v. Om Prakash (2009) 4 SCC 719; Shaji kuriakose v. Indian Oil Corp. Ltd (2001) 7 SCC 650; Ravinder Narain v. Union of India (2003) 4 SCC 481.*

yield basis method[397] adopted by the court. Besides the escalation in land price too have to be considered in determining market value.[398]

The determination of compensation was completely regulated by the legislature under Section 23 and 24 of the Act. The Supreme Court consistently followed the legislative wisdom by adopting the literal interpretation of the provisions. Heavy burden of proof was imposed on the claimant to seek enhanced compensation. The Court evolved the principles but never transgressed the limits of Section 23 and 24. Market value and the potentiality of land were completely determined in accordance of the statute and the constitutional principles were not involved. Moreover, it is clearly observed that the traditional definition adopted in the colonial period was continued further till recently. There is extensive literature and debate exist on the different methods of determining market value, this section did not entered into that debate and clearly relied on the findings of the apex court.

### 5.4. Analysis and Conclusion

Overall, this section highlighted two aspects, a general scheme of the 1894 Act and its implementation before the Supreme Court. The independent Indian legislature did not make any significant change in the 1894 Act. Land was acquired for public purpose without consent.[399] In terms of judicial practice, the role of the Supreme Court, as a custodian of the Constitution was crucial particularly from the constitutionalism perspective. The second part of this section we highlighted the major issues that the Supreme Court addressed and the precedent it established on these underlying issues such as public purpose, urgent land acquisition, market value and compensation. The public purpose was extensively challenged before the apex court. The Supreme Court interpreted it liberally.[400] It included socio-economic purposes[401], industrialisation[402],

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[396]It was based on expert opinion, therefore also called as expert opinion method. *Union of India* v. *Shanti Devi* (1983) 4 SCC 542, *Executive Director* v. *Sarat Chandra Bisoi* [(2000) 6 SCC 326] and *Nelson Fernandes* v. *Land Acquisition Officer* [(2007) 9 SCC 447.

[397]Undertook the agricultural yield of the acquired land with reference to revenue records, potential, or nature of land i.e. either wet, dry, or barren land.

[398]*Ranjit Singh* v. *UT of Chandigarh* [(1992) 4 SCC 659] , *Krishi Utpadan Mandi Samiti* v. *Bipin Kumar* [(2004) 2 SCC 283] ,*Land Acquisition Officer* v. *Ramanjulu* [(2005) 9 SCC 594] , *Sardar Jogendra Singh* v. *State of U.P.* [(2008) 17 SCC 133 : (2009) 5 SCC (Civ) 822] and *Revenue Divl. Officer-cum-LAO* v. *Sk. Azam Saheb* [(2009) 4 SCC 395 : (2009) 2 SCC (Civ) 182]

[399] *State of Madhya Pradesh and Others v. Vishnu Prasad Sharma and Others* AIR 1966 SC 1593.

[400] *State of Karnataka v. Ranganatha Reddy* (1977) 4 SCC 471

[401] *Jage Ram v. State of Haryana* (1971) 1 SCC 671.

[402] Ibid.

planned development[403], religious activity[404], policy matters, among others. It consistently followed the *Somawanti case*[405] precedent, that the government has the supreme authority to determine public purpose. The only limitations were that such exercise of power should not include colourable or mala fide exercise of power, non-application of mind, irrelevant considerations.[406] These statutory grounds did not overcome the substantive abuse of law.[407] Other the public purpose, the invocation of urgency clause under section 17 was also extensively challenged before the apex court. In determining the validity of the urgency the court laid down the test of reasonability.[408] The Supreme Court in many cases justified the inordinate delay in the acquisition proceedings despite invoking the urgency clause.[409] National importance and government satisfaction were considered as the two grounds for validating the urgent land acquisitions.[410] If a petitioner had to overcome the above challenges, heavy burden of proof was imposed.[411] In the absence of information the petitioner failed to establish his/her burden that eventually led to the failure[412]. The constitutional ethos or principles were not engaged in evaluating the 1894 Act.[413] Even it was rendered the status of pre-constitutional law that did not attract the constitutional principles to which the Supreme Court agreed.[414] It served the colonial objectives in introducing the 1894 Act as they intended to secure of securing land without consent and economically efficient without any undue delay. Eventually, this added hardship to the landowners, which subsequently violently protested against the 1894 Act, which was replaced by 2013 Act. The next chapter examines the significance of the 2013 Act. It addresses the peculiar features and shortcomings of the 2013 Act.

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[403] *Aflatoon and Others v. Lt. Governor of Delhi* AIR 1974 SC 2077
[404] *Bajirao T. Kote v. State of Uttar Pradesh* AIR 1995 2 SCC 442
[405] *Somawanti v. State of Punjab* AIR 1963 SC 151
[406] Ibid.
[407] *State of Madhya Pradesh and Others v. Vishnu Prasad Sharma and Others* AIR 1966 SC 1593
[408] *Narayan Govind Gavate* v. *State of Maharashtra* (1977) 1 SCC 133
[409] *State of U.P.* v. *Pista Devi* (1986) 4 SCC 251
[410] Ibid.
[411] *Collector (LA) v. Nirodhi Prakash Ganguli* (2002) 4 SCC 160
[412] Supra 405, at 151.
[413] *Delhi Airtech Services (P) Ltd. v. State of U.P.* (2011) 9 SCC 354
[414] *Senja Naicken v. Secretary of State* 50 Mad 308

# CHAPTER 6

## THE “NEW” 2013 ACT: REFORM or RE-FORM

*“Law in the sense of enforced rules of conduct is undoubtedly coeval with society; only the observance of common rules makes the peaceful existence of individuals in society possible.”*

- F. A. Hayek (1973: 72)

### 6.1. Introduction

At the beginning of the twenty-first century, the government undertook massive land acquisition for implementing liberalised policies (Nayak and Mishra 2011: 12). In this process, the 1894 Act was extensively applied to ‘grab’ the land. As observed in chapter 5, the 1894 Act was well suited to the massive land acquisitions. It inherited the colonial practice that intended to acquire land acquisition without consent in order to secure economic efficiency and overcome delays. This was discussed in detail in chapter 3. However, in the early twenty-first century, the rush for massive land acquisition under the 1894 Act was met with enormous protests (Fernandes 2007: 203). Many violent protests were witnessed in Uttar Pradesh, West Bengal, Maharashtra, among other states. Many people lost their lives and livelihoods (Gopalakrishnan 2012: 3). As a result, the government in 2007 introduced the Land Acquisition Amendment Bill. Additionally, it also introduced the Rehabilitation and Resettlement Bill, 2007. The latter was an outcome of an extensive deliberation that began since 2003 (Choudhary 2009: 73-82). This deliberation happened as an outcome of the 2003 and 2007 Rehabilitation and Resettlement Policy. Never before 2007, had the government attempted to address the rehabilitation and resettlement issue.[415] Both the bills lapsed after the dissolution of Fourteenth Lok Sabha. Again in 2009, the Bills were redrafted, but the Department of Land Resources, Ministry of Rural Development (Government of India) observed that some new issues had emerged. Therefore, a fresh look was given and decided to have a single

[415] Under the Rehabilitation and Resettlement Bill 2007, the plights of involuntary displaced persons were addressed. It also established project specific State and National authorities to formulate, implement and monitor the rehabilitation and resettlement process. Under this Bill, the government intended to conduct SIA for large scale displacement. It also appointed Administrator for Rehabilitation and Resettlement for formulating, executing and monitoring the rehabilitation and resettlement plan. It also ensured certain benefits to the displaced families. Any grievances regarding rehabilitation and resettlement were addressed the Ombudsman and not to the Civil court.

comprehensive bill addressing all issues. As a result, a single integrated bill i.e. Land Acquisition and Rehabilitation & Resettlement Bill, 2011 was prepared. Finally, the Bill was introduced in the Lok Sabha on September 7, 2011. Meanwhile, this integrated law was also proposed by the Standing Committee on Rural Development (SCRD) in 2011.[416] Similarly, the National Advisory Council (NAC) among other recommendations[417], after consulting various stakeholders, recommended that there should be a comprehensive unified law on the land acquisition, rehabilitation and resettlement (NAC 2011: 1). After the recommendations, the integrated bill was placed before the Parliament for discussion and debate. Finally in 2013, the Parliament after extensive debate passed the 'Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act' (hereinafter referred to as the 2013 Act). The Act came into force from January 1, 2014.

This chapter undertakes an examination of the 2013 Act. It traces the objectives, features, scope, and various institutional mechanisms under the Act. At the outset, the chapter discusses the newly inserted principles under the Act such as, Consent clause, Rehabilitation, Resettlement, SIA, Food Security, provisions relating to STs and SCs, and Offences and Penalties. Then the chapter describes the procedural mechanism for land acquisition which includes description relating to notification, rehabilitation, resettlement, declaration and compensation claims. It also highlights the acquisition of land for temporary purposes and urgency cases. Further, the chapter deals with the Ordinance Act of 2015 that was promulgated to overcome certain provisions of the 2013 Act. The final section of the chapter presents an analysis and conclusion.

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[416] The Standing Committee on Rural Development addressed issues relating to – (1) land acquisition for public purpose, private corporations and Public Private Partnership; (2) Power of State and Central Government in rehabilitation and resettlement; (3) Special reference to Scheduled Areas; (4) Safeguards relating to food security; (5) Exemptions of certain Central Laws from the application; (6) Role of independent self institutions; (7) Miscellaneous provisions relation to Mines Act (SCRD 2011: para 1.10).

[417]The other recommendations that the NAC recommended were – (1) Substantive enquiry into the nature of public purpose including financial, social and environmental aspects; (2) Secure prior informed consent of the land owners for the land acquisition; (3) Compensation to Project Affected Persons (PAP) including loss of livelihoods and opportunities; (4) Social Impact Assessment (SIA) by an independent body; (5) Urgent land acquisitions to be legally actionable; (6) Shares and debentures in to the PAP; (7) Increase in solatium; (8) Return of unused land intended for the proposed project; (9) Justiciability of Rehabilitation and Resettlement entitlements; (10) land for land and alternative livelihood based rehabilitation; (11) Employment for PAPs; (12) Amenities at resettlement sites; (13) Establishment of National Commission and Auditor General of Displacement and Rehabilitation to ensure public accountability; (14) Relief to persons who have previously suffered due to various development projects once or multiple times; (15) Stringent penal provisions (NAC 2011: 1-22).

## 6.2. Application of the Newly Inserted Principles

The main object of the 2013 Act is to accommodate the least affected persons as the partners in development and achieve the cumulative outcome of compulsory acquisition. In order to achieve these objectives, the Act ensures just and fair compensation, adequate provision for rehabilitation, resettlement of owner and the affected families. The government determines the above remedies after consultation with the local self-government and Gram Sabhas constituted under the Constitution. The Preamble of the 2013 Act specifies the approach adopted under the Act as 'humane, participative, informed and transparent' towards 'industrialization, development of essential infrastructural facilities, and urbanisation'. Overall, the methodology adopted was mainly to cause 'least disturbance to the land owners and other affected families'. For the first time, the 2013 Act introduced principles relating to compensation, rehabilitation, resettlement, SIA, food security, special provisions for SCs and STs, offences and penalties, special adjudicatory authorities.

### *6.2.1. Consent clause, Rehabilitation, and Resettlement*

Section 2 of the 2013 Act describes the application of newly inserted principles namely rehabilitation, resettlement and Consent clause. It incorporates two distinct situations. The distinction is based on the application of Consent clause. Under the first situation as stated in Section 2(1), the Consent clause is inapplicable to the government land acquisition. Other principles viz., land acquisition, compensation, rehabilitation, and resettlement, however, are relevant. Government land acquisition, as per Section 2(1) incorporates purposes concerning national security[418], infrastructural projects[419], and social welfare schemes[420] (including Public Sector

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[418]Section 2(1)(a) states that, for strategic purposes relating to naval, military, air force, and armed forces of the Union, including central paramilitary forces or any work vital to national security or defence of Indi or State police, safety of the people.

[419]Infrastructural projects were mentioned in Section 2(1)(b) as, (i) all activities or items listed in the notification of the Government of India in the Department of Economic Affairs (Infrastructure Section) number 13/6/2009-INF, dated 27th March, 2012, excluding private hospitals, private educational institutions and private hostels; (ii) projects involving agro-processing, supply of inputs to agriculture, warehousing, cold storage facilities, marketing infrastructure for agriculture and allied activities such as dairy, fisheries, and meat processing, set up or owned by the appropriate Government or by a farmers' cooperative or by an institution set up under a statute; (iii) project for industrial corridors or mining activities, national investment and manufacturing zones, as designated in the National Manufacturing Policy; (iv) project for water harvesting and water conservation structures, sanitation; (v) project for Government administered, Government aided educational and research schemes or institutions; (vi) project for sports, health care, tourism, transportation or space

Undertaking and public purpose). Under government land acquisition the appropriate government specifically acquires land for its own use, hold and control. Under the second situation as expressed in Section 2(2) the Consent clause is mandatory. In this case the land is mainly acquired for – (1) Public Private Partnership projects and (2) for the private company that undertakes public purpose. In the case of Public Private Partnership the project's ownership of the land vests with the government. For projects falling under the two purposes under Section 2(2), consent of at least seventy per cent of affected families is necessitated for Public Private Partnership, whereas the land acquisition for private company involving public purpose demands consent of eighty per cent of the affected persons. Land acquisition under Section 2(1) and 2(2) clearly differs in two ways – (1) that the land is not required solely for the government's use, hold, and control; and (2) acquisition for purposes mentioned in Section 2(2) necessitates consent of the land owners. The whole consent process is determined by the appropriate government. Consent proceedings are to be initiated along with the SIA. The ultimate objective in incorporating the Consent clause, as laid down by the NAC, is to ensure participatory, transparent, and democratic process (NAC 2011: 2). However, the application of consent is not uniform as it merely applies to land acquisition for private companies and Public Private Partnerships.

Rehabilitation and resettlement, as the NAC points out, was mainly to overcome inconsistent and irregular compensation, loss of income, assets, shelters and livelihood (NAC 2011: 2-3). The rehabilitation and resettlement policy under the Act is applied to three categories. They are – (1) purposes mentioned in Section 2(1) i.e. public purposes, public sector undertakings, national security, infrastructural projects, and social welfare schemes; (2) purposes specified in Section 2(2) relating to public private partnership projects and for private companies involving public purpose; and (3) purposes specified in Section 2(3) which includes purchase of land by private company through private negotiations in rural or urban areas if such purchase is above

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programme; (vii) any infrastructure facility as may be notified in this regard by the Central Government and after tabling such notification in Parliament.

[420] Social welfare schemes included under Section 2(1)(c) to 2(1)(f) as, (c) project for affected families, (d) project for housing for such income groups, as may be specified from time to time by the appropriate government; (e) project for planned development or the improvement of village sites or any site in the urban areas or provision of land for residential purposes for the weaker Sections in the rural and urban areas; (f) projects for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by the Government, any local authority or a corporation owned or controlled by the State.

the limit specified by the appropriate government; or if a private company requests the appropriate government for partial acquisition of land for public purpose. Section 2(3)(a) clearly permits private company to acquire land for private purpose. Further, a perusal of the rehabilitation and resettlement provisions suggests that any private acquisition below the permissible limit does not attract the rehabilitation and resettlement policy.

### *6.2.2. Social Impact Assessment (SIA) and Public Purpose*

SIA is another newly inserted provision under the Act. It is based on the principle of minimum displacement and minimum acquisition (NAC 2011: 9). Chapter 2 of the 2013 Act deals with the 'determination of SIA and Public Purpose'. On public purpose, the 2013 Act, as compared to the 1894 Act, adopted a broader approach. The new Act has explicitly incorporated the private purposes under Section 2(1). The inclusion of land acquisition for private companies was extensively debated before the NAC. Some members of the NAC opposed land acquisition for private companies on the ground that it will serve private interests, but others favoured its inclusion to overcome exploitation of unorganised, small and particularly tribal cultivators from receiving pittance as compensation (NAC 2011: 4-5).

SIA undertakes the study of impact of proposed land acquisition on concerned people and its feasibility to achieve desired results. SIA incorporates primary and secondary elements specified in Section 4(4) and Section 4(5) respectively. Primary elements includes the following components –

> (a) assessment as to whether the proposed acquisition serves public purpose; (b) estimation of affected families and the number of families among them likely to be displaced; (c) extent of lands, public and private, houses, settlements and other common properties likely to be affected by the proposed acquisition; (d) whether the extent of land proposed for acquisition is the absolute bare-minimum extent needed for the project; (e) whether land acquisition at an alternate place has been considered and found not feasible; (f) study of social impacts of the project, and the nature and cost of addressing them and the impact of these costs on the overall costs of the project vis-à-vis the benefits of the project [Section 4(4)].

Secondary factors includes, livelihood of affected families; public and community properties, assets and infrastructure particularly roads, public transport, drainage, sanitation, sources of drinking water, sources of water for cattle, community ponds, grazing land, plantations, public utilities such as post offices, fair price shops, food storage godowns, electricity supply, health care facilities, schools and educational or

training facilities, anganwadis, children's parks, places of worship, land for traditional tribal institutions and burial and cremation grounds.

SIA is conducted in two stages. The first stage includes preliminary investigation for determination of social impact and public purpose and the second stage incorporate the appraisal of SIA report by an expert group. The first stage commences as soon as the government intends to acquire land for public purpose. The appropriate government issues notification and undertakes the consultation with local bodies like Panchayat, Municipality or Municipal Corporation at village level or ward level at the concerned affected area over the acquisition of land. The consultation process undertakes the consideration of primary components and secondary factors that influence the proposed land acquisition. Additionally the Act, for efficient SIA, outlines certain procedural norms that the appropriate government has to follow viz., (1) issuance of notification and its publication in local language and the same made available at all concerned local self-bodies of the affected areas including offices of District Collector, the Sub-Divisional Magistrate and the Tehsil; (2) Government has to guarantee the adequate representation to the representatives of the local self-government bodies; (3) the SIA should be completed within six months from the date of its commencement; (4) the appropriate government should prepare SIA report on the primary factors laid down in Section 4(4); and Social Impact Management Plan based on secondary factors as mentioned in Section 4(5) with the list of ameliorative measures. Both reports have to be published in local language.

In the second stage, the independent multi-disciplinary expert group evaluates the SIA report.[421] Evaluation was based on two outcomes viz., rejection and approval of the project. The expert group have to choose either of the two outcomes. The two sets of outcomes are – (1) reject the proposed project on the ground that (a) the project does not serve any public purpose; or (b) proposed project involves social costs and adverse social impacts that outweigh potential benefits; (2) approval of the project on the ground that (a) the project will serve any public purpose; and (b) potential benefits outweigh the social costs and adverse social impacts. Outcomes are mere opinions

[421] According to Section 7(2) expert group included seven members in total, amongst them one is appointed as Chairperson by appropriate government. Members were namely, (a) two non-official social scientists; (b) two representative of Panchayat, Gram Sabha, Municipality or Municipal Corporation; (c) two experts on rehabilitation; and (d) a technical expert in the subject relating to the project.

expressed in the form of recommendations to the appropriate government within two months from the date of its establishment. It should be in writing with reasons. If the expert group believes in the rejection of the project, then the recommendation should state expressly that the project is 'abandoned' and no further step be taken to acquire the land. If the expert group believes in the approval of the project, then the recommendation should expressly state that– (1) the 'absolute bare-minimum extent' of the land needed for the project; and (2) no other options of minimum displacement available. Moreover, while rejecting the expert group has to state any one of the reasons recommended in Section 4(4). But for approval the expert group is bound to provide both reasons mentioned in Section 4(5). The final authority rests with the government, for instance, if the expert group proposes the rejection of the project then proviso to Section 7(4) the government has the discretionary authority to reject such recommendation and permit the acquisition by merely stating reasons. This clearly suggests that the expert group had only 'soft powers' in terms of recommendation. Ultimately the final 'veto' is exercised by the government. Moreover, the expert opinion has to be unanimous, no provision was made for situations that might lead to divided opinion. Government acts as a final decision making authority that clearly undermines the whole SIA process. At the same time, the SIA is exempted in the case of urgency as mentioned in Section 9. The SIA has been separated from Environment Impact Assessment (EIA), as the Act clearly mentioned that one has no binding force towards other. The proviso to Section 4(4) mentions that EIA study, if any, shall be carried out simultaneously and shall not be contingent upon the completion of the SIA study'.

### *6.2.3. Protection of Food Security*

The Act introduces 'food security' as another concerned limitation on the land acquisition process. It is a safeguard to overcome large scale land acquisition of arable and fertile agricultural land which adversely affects the food production (NAC 2011: 2). In this regard, the Standing Committee considered the decline in food production. It referred to the Economic Survey 2011-12 to show the decline output of coarse grains, pulses and oilseeds by 3.7 per cent, 5.3 per cent, and 6 per cent, respectively. It viewed the decline as a matter of deep national concern, because the decline directly affected the distribution of nutrition among the poorest and the most deprived consumers in India. Moreover, the Committee observed that the non-acquisition of

'irrigated multi-cropped land' was not enough. It recommended that 'any land under agriculture cultivation' should not be acquired (SCRD 2011: para 3.59). Even during the Parliamentary debates on the Bill, most of the opposition members opposed the acquisition of any agricultural land that directly affected food security (Khan and Ramesh 2015: 148). However, the government raised the concern of the small States such as Punjab, Haryana, Bihar, Kerala among others who opposed the non-acquisition of agricultural land, as it will affect their industrial development (Khan and Ramesh 2015: 209).

However, Section 10(1) prohibits acquisition of 'irrigated multi-cropped land'. Nevertheless, there exist certain exceptions namely – (1) under 'exceptional circumstances' and as a 'demonstrable last resort' the irrigated multi-cropped land will be acquired; (2) that the irrigated multi-cropped land 'in aggregate for all projects in a district or state as notified by appropriate government does not exceed the prescribed limits under relevant specific factors and circumstances; and (3) 'linear projects relating to railways, highways, major district roads, irrigation canals, power lines and the like' are outside the purview of Section 10 as mentioned in the proviso to the Section. If the land is acquired under 'exceptional circumstances' or 'as a last resort' under Section 10(2), then an equivalent area of culturable wasteland should be developed for agricultural purpose or an equivalent amount of the value of the land deposited with appropriate government mainly for agricultural investment for enhancing food security.[422] Now this alternative remedy in the form of land for land is not bound by any specific time period or limitation, and the Act does not specify whether it should be done before acquisition or after. Even the equivalent amount has to be deposited before or after acquisition is not clearly stated. Moreover, the alternative availability of land or equivalent amount does not apply to the linear projects, as explicitly mentioned in the proviso and the same is liberally framed.[423]

### *6.2.4. Government as the Final Arbiter*

The appropriate government is the final arbiter in determining land acquisition, irrespective of the above principles. The Act of 2013 under Section 8(1) specifies

[422]Besides acquisition of agricultural land in aggregate for all projects in a district or State, that were not 'irrigated multi-cropped' should not exceed limits of the total new sown area of that district or State as notified by the appropriate government, specified in Section 10(4).

[423]The proviso states that, 'Provided that the provisions of this Section shall not apply in the case of projects that are linear in nature such as those relating to railways, highways, major district roads, irrigation canals, power lines and the like'.

certain rules governing the appropriate government's decision on land acquisition. The appropriate government has to ensure that, (a) the land acquisition involves legitimate and *bona fide* public purpose, which necessitates the acquisition of identified land; (b) the potential benefits and public purpose involved in land acquisition should outweigh social costs and adverse social impact as determined by SIA; (c) that the minimum area of land is acquired for the project; (d) no unutilized land previously acquired in the proposed area; (e) ensure that the land proposed to be acquired, is the earlier acquired land that remained unutilized land; (f) as per Section 8(2) the appropriate government, after examining the reports of the Collector, Expert Group opinion on SIA, and all other reports, should recommend the land acquisition if it results into minimum displacement of people, minimum disturbance to the infrastructure, ecology and minimum adverse impact on the individuals affected[424]; (g) Moreover, as specified in the proviso to Section 8, appropriate government should ascertain that the consent of the affected families of the proposed land acquisition under Section 2(2) has been obtained in the prescribed manner. Overall, the Act proposes certain guidelines that the appropriate government has to take into consideration and form the decision independently.

***6.2.5. Special reference to Scheduled Areas and Scheduled Castes***

For the first time, the Act gives prominence to the Scheduled Areas and SCs. This inclusion, as NAC mentioned, is mainly to recognise the rights under the Schedule Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and the Panchayats (Extension of Scheduled Areas) Act, 1996 (NAC 2011: 11). In addition to the above laws, the SCRD stressed on the protection of STs as laid down by the Bhuria Committee Report of 1995 and the Bandyopadhyay Committee Reports of 2006 and 2008. Both the reports highlighted the socio-economic deprivation and widespread tribal unrest owing to alienation of tribal land as the principal reason among others (SCRD 2011: para 3.54).

Section 41(1) as a general rule imposes limitation on the acquisition of land in the Scheduled Areas. However, the acquisition will take place only as a 'demonstrable

[424]Decision of the government based on the Collector's report and expert groups report on SIA set out in Section 8(2). Decision of the appropriate government published in local language at Panchayat, Municipality or Municipal Corporation including offices of the District Collector, the Sub-divisional Magistrate and the Tehsil, affected areas and uploaded on the website of the appropriate government as expressed in Section 8(3).

last resort' with prior consent of the concerned Gram Sabha. In case, if there is no Gram Sabha then the Panchayats or the autonomous District councils at the appropriate level in the Scheduled Areas, established under the Fifth Schedule of the Constitution, will be considered as competent authority. The Consent clause is also applicable to the urgent land acquisitions. If the land acquisition involves involuntary displacement of SC or the ST families then the acquisition authority has to prepare a Development Plan.[425] Moreover, one-third of compensation amount will be paid as the first instalment to the affected families of SCs and STs. At the same time, Section 41(7) imposes obligation on the government to resettle the affected families in a compact block in order to retain their ethnic, linguistic and cultural identity. Further, Section 41(8) states that the government provides the resettlement area inhabited by SCs and STs with free land for community and social gatherings. The above remedies cannot be availed by persons who sought the alienation of tribal land or of SCs members who were original owners, after such alienation is declared as null and void. Fishing rights of the members will be retained. The relocation of SC and ST members outside district attracts additional payment of twenty-five per cent rehabilitation and resettlement benefits to which they are entitled in monetary terms along with a one-time entitlement of fifty thousand rupees. At the same time, the reservation benefits of the SC and ST members will be retained in the resettlement area.

### *6.2.6. Incorporation of Offences and Penalties*

Offences and penalties under Chapter XII of the 2013 Act is another newly inserted chapter. The offences includes – (1) If any person provides false information or false claims through false documents then such person shall be punished with imprisonment up to six months or fine up to one lakh rupees or both. At the same time, any person who avails any rehabilitation and resettlement benefits through false claims and by fraudulent means, then the appropriate government is empowered to recover such benefits. Further, if a government servant engages in mala fide acts and is proven guilty then disciplinary authority will take disciplinary action on discretion under Section 84(3); (2) If any person contravenes any provision relating to payment

[425] According to Section 41(4) Development Plan includes details of procedure for settling land rights due, but not settled and restoring titles of the STs as well as the SCs on the alienated land by undertaking a special drive together with land acquisition. It shall also contain a programme for development of alternate fuel, fodder and non-timber forest produce resources on non-forests lands within a period of five years, sufficient to meet the requirements of tribal communities as well as the SCs under Section 41(5).

of compensation or rehabilitation and resettlement such person is liable to a sentence ranging from six months to three years mentioned under Section 85; (3) Further, the prosecution for the above offences also include members of the company including any director, manager, secretary or other officer; and the members of Government department included head of the department and other officers, for consent or connivance in any neglect under the Act. However, they will not be punished for the offence, if it is proved that the offence was committed without his knowledge or that powers were exercised with all diligence to prevent the commission of such offence.

The Act under Section 88 states that all offences are tried before Metropolitan Magistrate or Judicial Magistrate of First Class. According to Section 90 all above offences are declared as non-cognizable and its cognizance can only be taken on a complaint in writing made by the Collector or any other officer authorised by the appropriate Government or any member of the affected family.

### 6.3. Procedural Framework of Land Acquisition

The procedure of land acquisition begins with the issuance of notification. Meanwhile, the rehabilitation and resettlement is framed. It includes the passing of rehabilitation and resettlement award by various authorities newly established under the 2013 Act. It also incorporates issues relating to compensation and declaration. The procedure is further extended to temporary purposes and urgent land acquisition.

#### *6.3.1. Issuance of Notification*

After the SIA report, the land acquisition process begins with the issuance of preliminary notification.[426] The appropriate government issues notification and publishes it in the official gazette.[427] The notification includes – (1) the statement on the nature of public purpose involved; (2) the reasons for the displacement of affected

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[426]Relationship between SIA and preliminary notification set out in Section 14. It states that, after the appraisal of SIA report the notification has to be issued within twelve months, if failed then SIA report lapsed and afresh SIA has to be carried out. However, appropriate government may extend the twelve month period under if in its opinion circumstances justifies in writing and the same should be notified and uploaded on the website of the concerned authority. In doing so, the Act failed to specify the extension period and reason underlying it.

[427]Section 11(1) states that, the preliminary notification has to be published in (a) in the official gazette; (b) in two daily newspapers circulating in the locality of such area of which one shall be in the regional language; (c) in the local language in the Panchayat, Municipality or Municipal Corporation, as the case may be and in the offices of the District Collector, the Sub-divisional Magistrate and the Tehsil; (d) uploaded on the website of the appropriate Government; (e) in the affected areas, in such manner as may be prescribed.

persons; (3) the summary of the SIA report; and (4) particulars of the administrator appointed for the purpose of rehabilitation and resettlement.[428] It also specifies the details of land. After the issuance of notification, a meeting of concerned local self-governing bodies, referred to in the Sixth Schedule of the Constitution, is called to inform them of the content of notification. Preliminary notification serves three purposes – First, it serves as a prohibitory order against future transactions of the notified land and stipulates any claim against the loss suffered through wilful violation arising out of land. Second, within two months from the date of notification and before issuance of declaration, the land records of the notified land have to be updated. Third, the preliminary notification empowers the appropriate government to conduct preliminary survey of the notified land.[429] If the land owner suffers any loss during such survey, such person is entitled to receive requisite damages as determined by the Collector.

Any person interested in the land may file objections against the preliminary notification, within sixty days from the date of publication of notification, on the ground – (1) that the notified land area is not suitable for the intended purpose; (2) that the justification offered for the public purpose is not true; (3) objections against the findings of SIA report. All objections are referred to the Collector in writing and only after an opportunity of being heard are given. After the filing of objections, the Collector prepares a report with respect to different parcels of land intended to be acquired and submits its report[430] to the appropriate government. After the receipt of report the appropriate government takes the decision. According to Section 15(3) the decision of the appropriate government is final.

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[428]These four factors are laid down in Section 11(3).

[429]Preliminary survey explained in Section 12 and includes (a) to enter upon and survey and take levels of any land in such locality; (b) to dig or bore into the sub-soil; (c) to do all other acts necessary to ascertain whether the land is adapted for such purpose; (d) to set out the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made thereon; and (e) to mark such levels, boundaries and line by placing marks and cutting trenches and where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear way any part of any standing crop, fence or jungle. Every such survey held in the presence of owner with prior issuance of sixty days notice. If remained absent then presence is dispensed with.

[430]Report contained recommendations on the objections, records of the proceedings held before Collector. Moreover, a separate report containing approximate cost of land acquisition, particulars as to the number of affected families likely to be resettled. These reports are mandated by Section 15(2).

### *6.3.2. Framework of Rehabilitation and Resettlement*

After the publication of preliminary notification, the 'Administrator for Rehabilitation and Resettlement' conducts census and survey of the affected families. Section 16(1) specifies the matters covered under the survey – (1) particulars of land and immovable properties of each affected families; (2) loss of livelihoods of the land losers and landless, who are primarily dependent on the lands; (3) affected public utilities, government buildings, amenities and infrastructural facilities in the case of resettlement of affected families; (4) details of any common property resources if acquired. After conducting survey and census, the administrator drafts 'Rehabilitation and Resettlement Scheme'.[431] This scheme has to be implemented within the specified time limits. At the same time, it has to be widely publicized locally in the affected area and discussed in Gram Sabha or Municipalities as mentioned in Section 16(4). After publication, as per Section 16(5), a public hearing has to be called in the affected area. On completion of public hearing, the administrator submits the draft of the scheme for rehabilitation and resettlement at the project level along with specific report on claims and objections raised in the public hearing to the Collector. Further, the Collector reviews the draft and with suggestions forwards it to the 'Commissioner Rehabilitation and Resettlement' for approval. Upon approval of the Commissioner, the report is published.[432] However, the final decision vests with the appropriate government. If the appropriate government is satisfied with the scheme, then it receives a final approval. The final decision is conveyed through issuance of declaration to the concerned area under Section 19(1).[433] The issuance of declaration mainly conveys that the land is needed for public purpose.[434] Before undertaking an

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[431]The scheme as provided in Section 16(2) includes particulars of the rehabilitation and resettlement entitlements of each land owner and landless whose livelihoods are primarily dependent on the lands being acquired and where resettlement of affected families in livelihood then list of government building, details of public amenities and infrastructural facilities to be provided in the resettlement area.

[432] As per Section 18, approval of the Commissioner on the scheme will be made available in local language to the Panchayat, Municipality, or Municipal Corporation, including the offices of District Collector, the Sub-Divisional Magistrate and the Tehsil, affected areas, and uploaded on the website of the appropriate Government.

[433]Collector publishes the summary of the Rehabilitation and Resettlement Scheme along with declaration. As stated in Section 19(4) it is published in (a) official gazette; (b) in two daily newspapers being circulated in the locality, of such are which one shall be in the regional language; (c) in the local language in the Panchayat, Municipality or Municipal Corporation, as the case may be, and in the offices of the District Collector, the Sub-Divisional Magistrate and the Tehsil; (d) uploaded on the website of the appropriate Government; (e) in the affected areas, in such manner may be prescribed.

[434] According to Section 19(1) the declaration made under the hand and seal of a Secretary to such Government or any other requisite officer delegated for this purpose. Further, Section 19(1) states that different declarations will be made with respect to different parcels of any land covered by same preliminary notification irrespective of the number of reports made.

examination of the declaration and it nature, the next sub-section deals with the nature of rehabilitation and resettlement award and authorities engaged in the executing the rehabilitation and resettlement schemes.

### *6.3.2.1. Rehabilitation and Resettlement Award*

The 2013 Act, under Section 31(1), deals with 'Rehabilitation and Resettlement Award'. The Collector is empowered to make the 'Rehabilitation and Resettlement Award' (hereinafter will be referred as 'award') for each affected family in the form of entitlements specified in the Second Schedule. The award includes information relating to the particulars namely – (1) the rehabilitation and resettlement amount payable to the family including the bank account of such persons to whom the award is made; (2) in case of displaced families, the award should state the allotted house site and house, if any land is allotted to the displaced families then the particulars of the land; (3) the particulars of one time subsistence and transportation allowances to the displaced families; (4) the particulars of payment of cattle shed and petty shops; (5) the one-time amount paid to artisans and small traders; (5) the mandatory employment provided to the members of affected families; (6) the fishing rights, annuity, or other entitlements; (7) the particulars of special provisions for the SCs and STs.[435]

Moreover, the appropriate government through notification may increase the rehabilitation and resettlement amount payable to the affected families taking into consideration the increase in price index. Additionally, the Collector provides infrastructural facilities and basic minimum amenities in the resettlement area as specified in the Third Schedule. The award of the Collector is final and conclusive evidence.[436] The government at any time before the award may call for any record of any proceedings for the purpose of satisfying its legality or propriety of any findings. Once the award is final, the full compensation with rehabilitation and resettlement entitlements is paid to the entitled persons. According to Section 38, the compensation, rehabilitation and resettlement, and infrastructure entitlements is paid within three months, six months and eighteen months from the date of award,

[435]It is also mandated under proviso to Section 31(1) that, if any particulars specified in the impugned Section is inapplicable to any affected family, then it has to be explicitly indicated as "not applicable".
[436]After passing the award, within six months, Collector has to correct all clerical or arithmetical mistakes by giving reasonable opportunity of representation to the person interested as mentioned in Section 33(1) of the Act.

respectively. The Act places responsibility on the Collector to ensure that the rehabilitation and resettlement process is completed before the displacement of affected families. Moreover, the Act directs the Collector, if possible, to avoid multiple displacement of any family, but if it is unavoidable then the Act under Section 39 ensures additional compensation.

#### *6.3.2.2. Administrator, Commissioner, and National Monitoring Committee for Rehabilitation and Resettlement*

The State Government under Section 43(1) appoints 'Administrator' to conduct rehabilitation and resettlement, if the land acquisition causes involuntary displacement of persons.[437] Further, the State government also appoints 'Commissioner for Rehabilitation and Resettlement'. The Administrator works under the supervision of the Commissioner. Section 43(3) assigns the administrator with the formulation, execution, and monitoring of rehabilitation and resettlement scheme, but has to function under the superintendence, directions and control of appropriate government and the Commissioner. Moreover, the Commissioner is also responsible for the post-implementation social audit in consultation with the Gram Sabha in rural areas and municipality in urban areas. Besides the appointment of Administrator and Commissioner, the appropriate government under Section 45(1) constitutes 'Rehabilitation and Resettlement Committee'[438], if the notified land is equal to or more than hundred acres. The Collector acts as the Chairman of the Committee. It monitors and reviews the progress of implementation of Rehabilitation and Resettlement Scheme with post-implementation social audits in consultation with Gram Sabha in rural areas and municipality in urban areas.

Further, the Act under Section 46(1) relates to private purchase of land and the application of rehabilitation and resettlement scheme. In the case of private

[437]The Administrator shall not be below the rank of Joint Collector or Additional Collector or Deputy Collector or equivalent official of Revenue Department.

[438]According to Section 45(2) The Rehabilitation and Resettlement Committee shall include, apart from officers of the appropriate Government, the following members, namely: (a) a representative of women residing in the affected area; (b) a representative each of the SCs and the STs residing in the affected area; (c) a representative of a voluntary organization working in the area; (d) a representative of nationalized bank; (e) the Land Acquisition Officer of the project; (f) the chairpersons of the Panchayats or municipalities located in the affected area or their nominees; (g) the Chairperson of the District Planning Committee or his nominee; (h) the Member of Parliament and Member of the Legislative Assembly of the concerned area or their nominees; (i) a representative of the requiring body; and (j) Administrator for Rehabilitation and Resettlement as the Member-Convenor.

negotiations by any person other than specified person[439] for an area equal to or more than such limits as notified by the appropriate government, acquisition requires payment of Rehabilitation and Resettlement costs. Every State government under proviso to Section 46(5) has the liberty to fix the ceiling limits of land to which the rehabilitation and resettlement applies. Any person engaged in private negotiation has to file an application to the District Collector stating the – (1) intent to purchase; (2) the purpose for which such purchase is being made; (3) particulars of lands to be purchased. The Collector refers the matter to the Commissioner for the satisfaction of fulfilling the provisions of rehabilitation and resettlement. Based on rehabilitation and resettlement scheme, the Commissioner passes individual awards covering rehabilitation and resettlement entitlements. If persons other than the specified fail to comply the provisions of rehabilitation and resettlement scheme then such purchase is declared as void *ab initio.* Section 46(4) imposes limitation on land use change, it comes into force only if there is full compliance of rehabilitation and resettlement. Moreover, the rehabilitation and resettlement scheme can be quantified into monetary amount based on the Collector's satisfaction.

Further, the National Monitoring Committee for Rehabilitation and Resettlement is to be constituted by the Central Government for monitoring the national or inter-State projects under Section 48(1). The committee consists of members of the concerned ministries and departments of the Central and State Governments with eminent experts from the relevant fields. Every State government and Union territories provides relevant information concerning the land acquisition to this Committee. Simultaneously, the State Government also establishes the 'State Monitoring Committee' to review and monitoring the implementation of rehabilitation and resettlement schemes or plans specified in the Act.

### *6.3.3. Issuance of Declaration*

The declaration under the Act, as per Section 19(6) is considered as the conclusive evidence that the land is required for public purpose. The declaration mainly specifies – (1) the situation of land i.e. district or other territorial division where it's located; (2)

[439]Private negotiations under Section 46(6)(b) specifies, negotiations undertaken by person other than specified person. Specified person defined as person other than – (i) appropriate government; (ii) Government Company; (iii) association of persons or trust or society as registered under the Societies Registration Act, 1860, wholly or partially aided by the appropriate Government or controlled by the appropriate Government.

the purpose for which the land is needed with approximate area; (3) the plan at which it is inspected without any costs. However, the declaration is not issued if – (1) the summary rehabilitation and resettlement scheme is not published with declaration; (2) the requiring body has failed to deposit full or part amount prescribed by the appropriate government as the cost of land acquisition. Further, according to Section 19(7), the declaration is published within twelve months from the date of publication of preliminary notification.[440] If the declaration is not published within twelve months, then the preliminary notification is deemed as rescinded. In computing such period, time elapsed at court will not be considered. However, the government can extend the twelve month time period under justifying circumstances in writing and without reasons. After the publication of declaration, the Collector measures and marks the land. By issuing public notice the Collector invites claims to compensation and rehabilitation and resettlement for all those interested in the land from the owner or occupier or any other interested person. Any objections against the land acquisition have to be raised within the period of thirty days to six months from the date of publication of notice. The objections may relate with the true area of land, compensation, rehabilitation and resettlement award and apportionment of compensation. On the fixed date the Collector passes the award.

### *6.3.4. Compensation Claims*

Further, the Collector in determining amount of compensation takes into consideration – (1) the market value[441] determined under Section 26 and the award amount in accordance with First and Second Schedules; (2) the damage caused to the standing crops and trees; (3) the damage sustained due to the severance of land from other land of the person interested; (4) the damage to the movable or immovable

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[440]Act under Section 19(3) mentions that, in projects where land is acquired in stages, the application for acquisition itself can specify different stages for the rehabilitation and resettlement, and all declarations shall be made according to the stages so specified.

[441]Criteria for assessing and determining market value of the land includes – (a) the market value, if any, specified in the Indian Stamp Act, 1899 for the registration of sale deeds or agreements to sell, as the case may be, in the area, where the land is situated; or (b) the average sale price for similar type of land situated in the nearest village or nearest vicinity area; or (c) consented amount of compensation as agreed upon under sub-Section (2) of Section 2 in case of acquisition of lands for private companies or for public private partnership projects. However, where the market price cannot be ascertained then according to Section 26(3) State government shall specify the floor price or minimum price per unit area of the said land. Moreover, the date for determination of market value shall be date on which the notification issued. According to proviso mentioned in Section 26, Collector before initiation of any land acquisition revise and update the market value of the land on the basis of prevalent market rate in that area.

property of interested person or his earnings; (5) the compulsion to change residence and reasonable expenses incurred as a result of such change; (6) the bona fide damage due to diminution of profits of land between the time of publication of the declaration under Section 19 and the time of the Collector's taking possession of the land; (7) any other ground in the interest of equity and justice and beneficial to the affected families.[442] Moreover, the 2013 Act for the first time explicitly guarantees the Collector to seek services of various experts in determining compensation.[443] Finally, the Collector determines the final award. However, such award is made within a period of twelve months from the date of publication of declaration under Section 19. Any failure amounts to the lapse of entire land acquisition proceedings. However, the government may relax the restriction by extending the time limit of twelve months in writing, if the circumstances justify doing so upon notification under Section 25.

The amount of compensation will be calculated on the basis of market value multiplied with the factor specified in the First Schedule. Additionally, the Collector will pay solatium amount equivalent to one hundred per cent of the compensation amount and award an amount calculated at the rate of twelve per cent per annum on such market value for the period commencing on and from the date of publication of the notification of the SIA study under Section 4(2), in respect of such land till the date of the award of the Collector or the date of taking possession of the land, whichever is earlier. Further, any acquiring body may offer part compensation as shares which in no case should exceed twenty-five per cent of the value calculated compensation by Collector.

#### *6.3.5. Land Acquisition, Rehabilitation and Resettlement Authority*

The Act under Section 51(1) establishes the specialized adjudicatory authority. The appropriate government through notification establishes, one or more, 'Land Acquisition, Rehabilitation and Resettlement Authority' (hereinafter will referred as 'the authority'). Its main object is to provide speedy disposal of disputes relating to

[442]These seven factors are expressed in Section 28 of the Act.
[443]Section 29 states that, (1) for determining market value of the building and other immovable property or assets attached to the land or building avail the services of competent engineer or any other specialist in the relevant field; (2) for determining the value of the trees and plants services of experts relating to agriculture, forestry, horticulture, sericulture, or any other field; (3) for assessing the value of standing crops the services of experience person in agriculture.

land acquisition, compensation, rehabilitation and resettlement.[444] The Authority consists of one person, referred as presiding officer, either a District Judge or qualified legal practitioner for not less than seven years. The appropriate government appoints the presiding officer in consultation with the Chief Justice of the High Court, in whose jurisdiction the authority is established.[445] The appropriate government exercises supreme authority in appointing presiding officer.[446] The Authority exercises civil court powers.[447] Under Section 64 it exercises original jurisdiction over the matters that are referred to it by Collector.[448] While referring the Collector has to provide requisite information.[449] After the submission of requisite information, the notice is issued to the applicant, all persons interested in the objection and to the Collector if the objection is related with the area of the land or the amount of the compensation. The proceedings under reference are restricted only with the consideration of the interest of the persons affected by the objection under Section 67. During reference, the authority while determining the amount of compensation takes into consideration whether the Collector followed the parameters set out under Section 26 to Section 30 and the provisions under chapter V of this Act.[450] Finally,

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[444]Under Section 51(2) appropriate government determines the territorial jurisdiction of the authority. Moreover, the authority shall exercise reference jurisdiction dealt in Section 64 of the Act.

[445]The presiding officer holds office for a period of three years or until attains the age of sixty-five years whichever is earlier. Appropriate government could remove the presiding officer on the ground of proven misbehaviour or incapacity after inquiry as mentioned in Section 58(2).

[446]Section 59 states that, 'No order of the appropriate Government appointing any person as the Presiding Officer of an Authority shall be called in question in any manner, and no act or proceeding before an Authority shall be called in question in any manner on the ground merely of any defect in the constitution of an Authority'.

[447]The authority exercises powers such as, - (a) summoning and enforcing the attendance of any person and examining him on oath; (b) discovery and production of any document or other material object producible as evidence; (c) receiving evidence on affidavits; (d) requisitioning of any public record; (e) issuing commission for the examination of witnesses; (f) reviewing its decisions, directions and orders; (g) any other matter which may be prescribed.

[448]The matters under reference referred by Collector when any person interested who has not accepted the Collector's award and with written application to the collector request the objections to be decided by the authority. Objections related with the measurement of the land, the amount of compensation, person to whom it is payable, rights of Rehabilitation and Resettlement under chapter V and VI or the apportionment of the compensation among the persons interested. The collector after the receipt of application refers the matter within thirty days, if Collector fails to do so, then person interested can directly apply to the authority for making collector to forward the application for reference within thirty days.

[449] Under Section 65(1) collector provides information relating to (a) the situation and extent of the land, with particulars of any trees, buildings or standing crops thereon; (b) the names of the persons whom he has reason to think interested in such land; (c) the amount awarded for damages and paid or tendered under Section 13, and the amount of compensation awarded under the provisions of this Act; (d) the amount paid or deposited under any other provisions of this Act; and (e) if the objection be to the amount of the compensation, the grounds on which the amount of compensation was determined.

[450]Moreover, while awarding the compensation, the authority in every case award an amount calculate at the rate of twelve per cent per annum on such market value for the period commencing on and from

after hearing both the parties, the authority under Section 70 passes the award.[451] In terms of procedural application to the proceedings, Section 60(3) states that the authority will not be bound by the Civil Procedure Code 1908, but will be guided by the principles of natural justice, other provisions of the Act, and rules made under this Act. Moreover, the authority has power to regulate its own procedure.[452] Any decision of the authority can be appealed before the High court within sixty days. Section 74(2) directs the High Court to expeditiously dispose such appeal within six months from the date on which the appeal is presented to the High Court. Further, Section 60(4) binds the authority to decide the award within six months from the date of receipt of such reference.

### *6.3.6. Temporary Occupation of Land*

The appropriate government is empowered to temporary occupation of land as well. The 2013 Act, under Section 81, provides for temporary occupation of waste or arable land for any public purpose on the direction of the appropriate government. The Collector may occupy waste or arable land for a period of three years. The appropriate government determines the occupation and use of the land. By issuing notice to the person interested, the Collector pays compensation either in gross sum or monthly or periodical instalments as agreed in writing by both parties. In the event of any difference, the Collector refers the matter to the authority i.e. 'Land Acquisition, Rehabilitation and Resettlement Authority'. Mere reference to the authority or payment of compensation or execution of agreement authorises the Collector to take possession of land and thereby use the land in accordance with the established norms in the notice. On the expiration of the period for which the land was temporarily occupied, the Collector returns the land back to the persons interested. If any damage

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the date of publication of the preliminary notification under Section11 in respect of such land to the date of the award of the Collector or the date of taking possession of the land, whichever is earlier as mentioned in Section 69(2). In computing the period, judicial pendency shall be excluded. In addition solatium of one hundred per cent over the total compensation amount will also be paid under Section 69(3).

[451] Award of the authority considered as decree and shall state amount if awarded and the statement of the grounds including costs if any. Moreover, if the authority believes that the collector ought to have awarded excess compensation, then the authority pay excess amount with interest of nine per cent per annum from the date on which the possession held by the Collector. On the delivery of excess amount by the authority, those who did not applied for reference or missed can reapply within three months from the date of the award of the Authority under Section 73(1).

[452]Section 63 clearly sidelines the civil court from entertaining any dispute relating to land acquisition in respect of which the collector or the Authority is empowered by the Act. Even no injunction is allowed to be granted by any court in respect of any matter referred in the Act.

is caused to the land then the interested person is entitled to compensation, but if the land becomes permanently unfit to carry previous purpose, then under such circumstances, on the consent of the person interested, the land would be permanently occupied for public purpose by the appropriate government. Any difference over the condition of land, after the expiration of time period or any matter connected with the agreement was entertained by the authority.

### *6.3.7. Urgency Acquisitions*

The 2013 Act, under Section 40, provides for the acquisition of land in urgent cases. Urgency under the 1894 Act was highly misused. The NAC seriously considered this misuse and demanded its reasonable exercise. In order to overcome the historical misuse, it demanded that the urgency clause to be applied in the rarest of the rare case, legally actionable, and exercised on reasonable grounds (NAC 2011: 13). On the other hand, the Standing Committee on Rural Development recommended the contestation of the application of urgency acquisition through legal action (SCRD 2011: para 5.21). The appropriate government declares land acquisition under urgent cases. Under urgency clause, the Collector as per the direction of appropriate government takes possession of land for public purpose without making award. A thirty days' notice is served to the person interested. After the expiration of the time period the acquisition takes place. The application of urgency provision has certain limitations. Section 40(2) maintains that the land acquisition under urgency clause should acquire the least or minimum area of land and the purpose should only be confined to the defence of India or national security or any emergencies arising out of natural calamities or any other emergency approved by the Parliament. Moreover, while exercising powers under urgent cases, the Collector should not acquire building without prior issuing the occupier with at least forty-eight hours' notice to remove the movable property from such building without unnecessary inconvenience.

With respect to the compensation under urgent acquisition, Section 40(3) states that the Collector will tender payment of eighty per cent of the compensation for such land as estimated, including additional compensation of seventy-five per cent of the total compensation as determined under Section 27. However, the additional compensation is inapplicable to the projects that affect the sovereignty and integrity of India, the security and strategic interests of the State or relations with foreign states. The

appropriate government exercises sole powers in determining compensation under urgency clause, as specified in proviso to Section 40(5).

Moreover, Section 40(4) explicitly mentions that under urgent acquisition, government through declaration may dispense with Chapter II to VI of the Act, which relate to the determination of social impact and public purpose; Special provision to safeguard food security; notification and acquisition; rehabilitation and resettlement award; procedure and manner of rehabilitation and resettlement respectively.

**6.4. Ordinance to Water Down 2013 Act**

Soon after the passage of the 2013 Act, the government promulgated an ordinance on December 31, 2014 to introduce certain changes to the Act. This was subsequently amended and re-promulgated on April 3, 2015. But finally the ordinance lapsed on August 31, 2015 (Hebbar 2015). The ordinance intended to introduce the following changes –

1. The changes were introduced in certain provisions of the Principal Act (i.e. 2013 Act) namely, Section 2, Section 3, Chapter III, Section 24, Section 46, Section 87, Section 101, Section 105, and Section 113.

2. Section 2 of the Ordinance Act 2015 substituted the word "private entity" for "private company" wherever it existed in the 2013 Act. The ordinance under Section 4 defines 'private entity' by inserting clause (yy) to Section 3 of the 2013 Act as – "(yy) private entity means any entity other than a Government entity or undertaking and includes a proprietorship, partnership, company, corporation, non-profit organization or other entity under any law for the time being in force."

3. It inserted under Section 3 a third proviso under Section 2 (2) of the 2013 Act that completely negates the application of Consent clause to the purposes mentioned under Section 2 of the 2013 Act and projects listed under Section 10A (newly inserted under chapter IIIA by the Ordinance Act 2015).

The proviso under Section 3 of the Ordinance states that, "Provided also that the acquisition of land, for the projects listed in the Section 10A and the purposes specified therein, shall be exempted from the provisions of the first proviso to this sub-section." The proviso completely diluted the consent norm of at least 80% and

70% of the affected families to the private companies and public private partnership projects respectively.

4. Further, the ordinance newly inserted Chapter IIIA with Section 10A, which empowered the appropriate government to exempt certain projects from the application of Chapter II and Chapter III of the 2013 Act. The projects there were to be exempted under Section 10A were – (a) Such projects vital to national security or defence of India and every part thereof, including preparation for defence; or defence production; (b) rural infrastructure including electrification; (c) affordable housing and housing for the poor people; (d) industrial corridors and; (e) infrastructure and social infrastructure projects including projects under public private partnership where the ownership of land continues to vest with the government. The exemption mitigated SIA under Chapter II and food security provision under chapter III of the 2013 Act.

5. Section 6 of the Ordinance inserted a proviso clause to Section 24 of the 2013 Act. The proviso excluded the time period stayed by the court either for possession or compensation in the tribunal in computing the overall time period of land acquisition before the court. This computation was essential for application of the provisions of 2013 Act. According to Section 24, the 2013 Act will apply to the previous pending cases of five years and above, in which the possession or compensation has not been finally determined. The proviso excluded the period of stay or injunction.

6. Further, Section 10 of the ordinance completely altered Section 87 of the 2013 Act, which frames charges against the head and other officers of the concerned departments as offenders under various offences of the 2013 Act. But the ordinance water downed the provision, as it explicitly mentioned that the courts before initiating the legal proceedings ought to seek the consent of appropriate government.

7. Another major change was initiated in the area of un-utilization of land. Section 11 of the Ordinance substituted the words “a period of five years” with the words “a period specified for setting up of any project or for five years, whichever is later” in Section 101 of the 2013 Act. This Section specified that if the land remains unutilized for certain period of time, then such land should be returned back to the owner. But, the ordinance relaxed the time limitation of five years to any specified period which will be decided by the government.

8. Section 12 of the ordinance substituted Section 105(3) and omitted Section 105(4). It declared that the provision of principles determining compensation, rehabilitation and resettlement, and infrastructure amenities of the 2013 Act will be applicable to the Acts specified under Fourth Schedule of the Principal Act from January 1, 2015. Earlier, Section 105(3) mandated such application within one year from the date of the execution of the 2013 Act.

9. Section 13 of the Ordinance empowered the Central Government to issue changes via order, if any difficulty arises in giving effect to any provisions of this Act from a period of two years (earlier under the Principal Act) to five years.

Although the Ordinance Act 2015 has lapsed, the States are at liberty to initiate their own amendments. The acquisition of property is in Concurrent List III, Entry 42 of the Constitution.

## 6.5. Analysis and Conclusion

The 2013 Act is mainly introduced to overcome the discrepancies that existed in the 1894 Act. The previous chapter addressed the nature and practice of the 1894 Act, and traced the various issues under the 1894 Act such as public purpose, urgent land acquisition, market value and compensation. The Indian Parliament until 2013 did not introduce any major reform in the 1894 Act. This was equally contributed to by the Supreme Court. In the absence of any Constitutional limitations, particularly post-1978 i.e. after the repeal of right to property, the apex Court failed to generate substantive limitations against the exercise of eminent domain. Government's satisfaction was the highest law to determine land acquisition, which caused immense hardship to the land owners, which ultimately resulted into violent protests.

The 2013 Act was introduced to overcome those hardships. As observed above, the prime objective of the Act is to cause least disturbance to the owners of land and other affected families, and to engage them as the partners in development. It further maintains that it strives for 'cumulative outcome'. In ensuring these objectives, the Act offered measures that are summed as, (1) just and fair compensation, rehabilitation, and resettlement of affected families; (2) SIA of the proposed land acquisition; (3) food security measures; (4) consent of the local self-government and Gram Sabhas.

These measures are significant and prima facie offers considerable relief to the land owner which was completely missing under the previous 1894 Act. The real beneficiary under the Act is Scheduled Tribal Areas. Even the compensation as against the 1894 Act appears efficient, but it completely depends on the availability of genuine market value. Nevertheless, the 2013 Act requires acute examination. For instance, the previous principle of 'government's satisfaction' was retained under this Act as well and the same is applied in 'rehabilitation and resettlement' schemes. Similarly, the Consent clause is inapplicable to government acquisitions with purposes like national security, infrastructural projects, and social welfare schemes. Moreover, the whole consent process is determined by the appropriate government.

Further, the Rehabilitation and Resettlement scheme is inapplicable to the private companies if the land is below the limit as specified in Section 2(3). Moreover, with regard to the SIA, the expert group setup for appraisal of reports has been assigned only soft powers. The final authority lies with the appropriate government, even if the expert group recommended the rejection of land acquisition, the government is empowered to reject such recommendation and continue with the land acquisition as specified under proviso to Section 7(4). Further, the SIA does not apply to the urgent land acquisition.

The protection of food security clause states that, the 'irrigated multi-cropped land' should not be acquired and if acquired then land for land should be given. In the absence of any specific time period the remedy appears futile. Even the exceptions under Section 10 clearly permits land acquisition. So, on one hand it prohibits the acquisition of 'irrigated multi-cropped land', but on the other hand through exceptions it permits acquisition. Overall the government appears as the final arbiter under the Act and the same is laid down under Section 8(2) of the Act.

The 1894 Act had clearly empowered the government with an upper hand in determining land acquisition. Similar precedent is also followed under the 2013 Act. It has also retained the urgent acquisition and temporary occupation of land. The newly enacted Act has slightly extended the procedure by incorporating SIA, EIA, and Consent clause. However, its final authority is still vested with the Government. Thus, from a plain reading of the 2013 Act it appears that it has retained the core principles of the 1894 Act. The declaration passed by the government is final and

conclusive evidence that the land is acquired for public purpose. Now it depends on the how the judiciary interprets it, but the norm of governmental satisfaction will favour the government as in the 1894 Act. However, the major concern of the government is the presence of Consent clause, and to overcome it, the government issued an ordinance in 2015.

# CHAPTER 7

# CONCLUSION

Eminent domain is the sovereign authority of the State to acquire property for public purpose. It traces its origin from the Hugo Grotius work *De Jure Belli et paces.* In India, the eminent domain law was introduced by the colonial law makers. The existing 2013 Act replaced the colonial 1894 Act. In Chapter 3 we undertook a historical evolution of land acquisition law. The Acts of 1824, 1839, and 1852 formed the beginning of the land acquisition legislations in India. Though they differed in timeframe and intended geographical reach, all possessed many common and a few unique features.

The common features between all three Acts were – (1) acquisition of land for public purpose; (2) ensured compensation for land acquisition; (3) followed non-adversarial approach of arbitration in determining compensation; (4) decision of the arbitrators was final and conclusive and no fresh suit was allowed to be filed against their decision; (5) all expenses of the arbitration were incurred by the Government.

The dissimilarities among the Acts were – (1) the 1824 Act ensured just and full compensation to the interested persons, no such policy was followed by the other two Acts ; (2) number of arbitrators were even in number in the Act of 1839, however it was odd (i.e. five) in 1824 and 1852; (3) Only the 1824 Act differentiated acquisition between the urgent and non-urgent matters; (4) detailed procedure about the arbitration proceedings was well explained only in the Act of 1852; (5) Scope of the public purpose was limited in Act of 1839 to widening of roads, streets, thoroughfare, whereas the other two Acts incorporated broader understanding of the public purpose; (6) Both 1824 and 1852 Acts reversed the award on the ground of corruption by arbitrators, the Act of 1839 was silent on this point.

However, there existed certain grey areas under the Acts such as, (1) procedure was in abridged form and required detailed and adequate procedural guidelines, as no guiding principles were laid down for the arbitration; Acts were silent in the event of non-consensus among the arbitrators.

In 1857 Act was passed in order to insert uniform practice in land acquisition. It incorporated for the first time, the interpretation clause, defined land and interested persons, proposed land acquisition for temporary purposes, compensation included six per cent per annum interests for matters decided by arbitrators, burden of costs of proceedings was on the shoulders of parties if award was higher than the Collector's award. However, it reduced the number of arbitrators to three and had to deliver full and complete award.

Subsequently, the 1857 Act was replaced by the 1870 Act. As against the 1857 Act, it introduced – land acquired for company particularly for work useful for general public, land acquired for temporary purposes for three years, judges formed the core adjudicatory body, compensation were resolved by judges with the assistance of two assessors appointed by the contested parties, judges opinion on law was final and assessors expressed opinion only in terms of compensation, market value of the land taken into consideration with additional sum of fifteen per cent paid by the Collector, damages awarded for severance, for injury to other property, for loss of earnings and for expenses of removal; appeal preferred to High court.

The 1870 Act introduced a major shift in the decision making. All earlier Acts entrusted arbitrators sole authority in deciding compensation issues which was curtailed by the Act of 1870. It positioned the judge as the authority to determine all issues including compensation. Assessors in the form of arbitrators were relegated from active adjudicating authority to passive body of assistance. Clearly, under the 1870 Act the government intended to play a more rigorous role. It mainly curtailed the wide discretionary power entrusted to the arbitrators and thereby to check the exorbitant compensation awarded to the interested persons.

All the Acts from 1824 to 1870 incorporated non-adversarial approach of arbitration. It safeguarded the interests of the land owners at least in terms of determination of compensation. Representation through arbitrators provided strong voice to the landowners in determining compensation as the decision of arbitrators was final and binding. It ensured equal representation to both parties in seeking amicable settlement. Arbitrators included local people who understood local needs and values. Hence, at least in terms of compensation they received just value.

This non-adversarial approach of arbitration was completely eradicated by the 1894 Act. The 1894 Act strengthened the colonial legislature. The main object of the colonial legislature in introducing 1894 Act was to secure two objectives as mentioned in the *Statement of Objects and Reasons* to the Act i.e., (1) to reduce the burden on the public money; and (2) to secure speedy disposal of the cases. It haphazardly staked two vital rights, (1) just compensation; and (2) fair procedure in the absence of recognition of any fundamental right. With the aim to secure above objectives, the 1894 Act – broadened the public purpose that included land acquisition for company, wide discretionary powers entrusted to the government and Collector, it stipulated the compensation i.e. not above the demands placed by the landowners.

Moreover, the supremacy of the government to realise the above mentioned objectives of the 1894 Act were secured through the judicial practice. Both Privy Council and High Courts declared the government as the final authority without substantively reviewing the land acquisition process. This is evident from the decisions of the Privy Council and High Courts from 1894 to 1947. The decisions of the Privy Council and High Courts maintained that: (1) the government was sole adjudicatory authority in determining public purpose, declaration, temporary occupation of land and even withdrawal of land acquisition; (2) Collector exercised extensive authority and the judiciary intervened through reference only when the Collector referred the matter; (3) Interested persons enjoyed only limited rights in claiming compensation as the decision of the Collector was final.

The 1894 Act of the colonial period was retained in the independent India. However, in the post-colonial India, eminent domain received constitutional recognition. Eminent domain was recognised under Article 31, which incorporated right to property, but was repealed in 1978. Besides the understanding of right to property as a philosophical notion, it was observed that its utility and its immense association with social, economic, and politics rendered it highly controversial. Chapter 4 addressed the constitutional relationship between right to property and eminent domain from a general perspective. At the outset, this chapter addressed the debate on right to property in the Constituent Assembly. Ideologically, every member of the Assembly had expressed views on the positive nature of right to property and its future benefits, except the Socialists. The primary focus of the debate revolved around agrarian reforms i.e. abolition of zamindari system. Zamindari abolition was the prime agenda

of the Congress party since colonial period. This narrow approach of the debate on land reforms overlooked the broader picture of right to property in future. The divergent opinions of the members of the Constituent Assembly were accommodated in Article 31 under the Nehruvian formulae. It was believed that the legislature will have final say and the judiciary will follow the legislative diktat. However, the legislative supremacy received a set back after the enforcement of the Constitution, as various land reform laws were challenged in the Supreme Court. Subsequently, the tussle continued between legislature and judiciary, with former believed to possess with constituent power to limit judicial review and the latter constantly rejecting any limitation on judicial review and considering itself as the saviour of fundamental rights. The confrontation culminated in the abolition of the right to property in 1978, with the logic to removing all hindrances in undertaking socialist policies like land reforms.

From this tussle on the right to property and eminent domain, three important concluding remarks can be drawn. First, during the right to property debate in Constituent Assembly, the members of the Constituent Assembly and members of Congress party had differences on the framing of Article 31. The major concern was the abolition of zamindari system and dispensation of compensation. Socialists like K.T. Shah, Jadubans Sahay, P.S. Deshmukh among others criticised Nehru for ensuring compensation for zamindari abolition. On the other hand, members like Naziruddin Ahmed, Syamandan Sahaya, Jagannath Baksh Singh, Begum Aizaz Rasul, among others strongly opposed the Socialists and demanded just compensation for zamindari abolition. However, few members like Thakur Das Bhargava, Jaspat Roy Kapoor, K.T.M. Ahmed Ibrahim who were seriously concerned with right to property in general sense other than zamindari property demanded just, fair, and equitable compensation as a justiciable right under the right to property. Political and ideological differences amongst members confined the debate only to land reforms. This made right to property, a punching bag vis-à-vis land reforms, wherein socialists and communists demanded the repeal of Article 31, right from its inception, in the larger interest of the society. This completely overlooked the other side of the right to property. Land reforms have historically met with tragedy, as it remained unfulfilled even after the repeal of Article 31 in 1978. Clearly, the debate made a blunder up with undue focus in zamindari and failed to differentiate between 'social purpose' and

‘public purpose’. Zamindari system practiced social discrimination, with uneven distribution of land and demanded its elimination as propagated by Constitutional principles of equality and social justice. Similar social discriminations, akin to zamindari, in terms of land were prevalent during that time and members of the Assembly remained completely focused on only this aspect. On the other hand, ‘public purpose’ suggests taking of land for development purposes like constructing railways, roads, etc. rather than being confined to elimination of any discrimination. Hence, the public purpose related discussion was absent in the debate. Equitable compensation can be stipulated against social purpose but not against public purpose. Members and the framers should have differentiated this aspect and introduced separate provisions on social purpose and public purpose. This aspect would have overcome the contradictory interests prevailing at that time and even secured the rights of future generations.

Second, during the execution of the right to property from 1950 to 1978, it appears that a strong confrontation emerged between the Parliament and Judiciary. The Constitutional Amendments, such as the First, Fourth, Seventeenth, Twenty-fifth, and Forty-fourth were passed by the Parliament to overcome adverse judicial decisions. The real issue involved was the dichotomy between the Fundamental Rights of Part III and the Directive Principles of State Policy of Part IV of the Constitution. On one side, the Supreme Court viewed itself as the guardian of Fundamental Rights, however, on the other side, the Parliament, as the people’s representative, strived to implement Directive Principles of State Policies. In other words, it was a confrontation between individual rights and social rights. Inability of the Government to implement the policy of abolition of privy purses and nationalisation of banks during the Prime Ministership of Indira Gandhi ignited the debate further more with political partisanship over the matter. Political instability after the demise of Jawaharlal Nehru and the politicization of the right to property within the Congress and outside led other parties to lose their grip over planning. As in 1967, the Swatantra Party under the leadership of C Rajagopalachari opted out of Congress and supported the right to property as a fundamental right. The inaptness of the government to eradicate poverty and uneven distribution of land; and its severe criticism by the Socialists influenced the government to take certain drastic measures. This was further contributed by anti-legislative approach of the judiciary that nullified

land reform laws in various States on the ground of violation of Article 31. As a result, the Parliament appeared frustrated and consistently passed Constitutional Amendments to overcome judicial decisions.

Moreover, the confrontation between the judiciary and legislature further extended to determine who possesses the constituent powers over the Constitution. This was extensively highlighted in *Golaknath case*[453] and *Keshavananda case*[454] among others. The Supreme Court restricted the legislative supremacy through doctrines of 'Prospective overruling' and 'Basic Structure' in *Golaknath case*[455] and *Keshavananda Bharati case*[456], respectively. Surprisingly, though the judiciary constructed the 'Basic Structure' doctrine against the Parliament's plenary power of Constitution amendment, it left the right to property outside its purview. Even the 'Basic Structure' doctrine had no fixed principles. In true spirit none of them was supreme except the Constitution. The Constitution assigned powers to legislature, executive, and judiciary, framed within the checks-and-balances system. Definitely, the framing of policy under Directive Principles of State Policy was the matter of legislature and the judiciary was kept out of its purview, but the legislature was accountable to the Constitutional norms. Indian Constitutionalism primarily strives to seek accountability. If the legislature was concerned about the land reforms to achieve Directive Principles of State Policy, then why it did not enact a central law to secure it. Even the state laws on land ceiling, tenancy were poorly framed by state legislatures ensuring safe legal escape. Political impatience towards constitutional provisions ridden with ideology failed to understand the vitality of Article 31.

Third, in the post-1978 period, i.e. after the relegation of the right to property as a fundamental right, caused immense hardship to the individuals who were socially and economically deprived. It was immensely difficult for them to protect their property against the eminent domain use. No substantive constitutional safeguards existed. This can be analysed by comparing post-1978 scenario with the pre-1978 position of right to property. In pre-1978 period, individuals challenged the confiscation of property, as violation of fundamental right under Article 31 in the form of Writ petitions directly to the Supreme Court. This was the best remedy available against

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[453]Supra 7, at 1643.
[454]Supra 8, at 1461.
[455]Supra 7, at 1643.
[456]Supra 8, at 1461.

executive highhandedness. Right to property substantively offered justiciability of compensation. This was completely absent in the post-1978 reality of Article 300A, which merely existed as a constitutional or legal right. The members of the Constituent Assembly suggested that the fundamental right to property will serve as a check against the fraud on Constitution, but this was completely ruled out with the introduction of Article 300A. It is argued repeatedly that right to property is now a settled issue, however, a settlement to delimit or resist judicial review guaranteed to individual is nothing but a coercive method adopted within the democratic setup. The existing provision clearly outweighs the benefits of Article 31 of compensation and justiciability particularly in terms of remedy. The scope of remedy towards individual has been broadened placing more burden on the individual to place evidence in the lower courts in the form of suits than the Writ petitions before High Courts and Supreme Court. Under this situation, the Supreme Court was clearly vested with the least judicial power that severely affected the weaker sections against the acquisition of their property. In recent times, the Supreme Court has resorted to the principles of natural justice enshrined under Article 14 in deciding Article 300A. However, the scope was only limited to the satisfaction of procedural requirement in exercising eminent domain authority.

After analyzing the constitutional perspective of eminent domain, chapter 4 focused on the 1894 Act in post-colonial India. This chapter primarily addressed the general scheme of the 1894 Act and its interpretation by the Supreme Court. The legislature did not make any significant changes in the 1894 Act. Land was acquired for public purpose without consent. The Supreme Court established certain precedents relating to issues such as public purpose, urgent land acquisition, market value and compensation. The public purpose was extensively challenged before the Supreme Court and the apex Court interpreted it liberally. It included socio-economic purposes, industrialisation, planned development, religious activity, policy matters, among others. It consistently considered the government as the supreme authority to determine public purpose. It imposed certain limitations on the exercise of the authority such as – colourable or mala fide exercise of power, non-application of mind, and irrelevant considerations. These statutory grounds did not overcome the substantive abuse of law. Other than the public purpose, the invocation of urgency clause under Section 17 was also extensively challenged before the apex court. In

determining the validity of the urgency the court laid down the test of reasonability. The Supreme Court in many cases justified the inordinate delay in the acquisition proceedings despite the invocation of the urgency clause. National importance and government satisfaction were considered as the two main grounds for validating the urgent land acquisitions. If the petitioner had to overcome the above challenges, the heavy burden of proof was imposed on him/her. In the absence of information, the petitioner failed to establish his/her burden that eventually led to the failure. The constitutional principles such as of equality under Article 14 among others were not engaged in evaluating the 1894 Act. Even the legislature rendered the 1894 Act the status of pre-constitutional law that did not attract the constitutional principles to which the Supreme Court agreed. As the 1894 Act served colonial objectives such as securing land without consent and economically efficient acquisition without any undue delay, the same objectives were given primacy in post-colonial India. Moreover, the absence of substantive constitutional relief since post-1978 further contributed the eminent domain abuse. Eventually, it resulted in immense impoverishment to the landowners in the form of mass displacement and under-compensation. This ultimately resulted into violent protests against the application of 1894 Act. As a result, the 1894 Act was replaced by the 2013 Act.

Chapter 6 examined the nature of the 2013 Act. Its main object is to cause least disturbance to the owners of land and other affected families, and to engage them as the partners in development. It further maintains that it strives for 'cumulative outcome'. In ensuring these objectives, the Act has offered measures such as: (1) just and fair compensation, rehabilitation, and resettlement of affected families; (2) SIA of the proposed land acquisition; (3) food security measures; and (4) consent of the local self-government and Gram Sabhas.

These measures offer considerable relief to the land owners which were completely missing under the previous 1894 Act. However, it requires acute examination of these measures. For instance, the previous principle of 'government's satisfaction' was still retained under this Act and the same is applied in 'rehabilitation and resettlement' schemes. Similarly, the Consent clause is inapplicable to the government acquisitions with purposes like national security, infrastructural projects, and social welfare schemes. The whole consent process is determined by the appropriate government. Further, the rehabilitation and resettlement scheme is inapplicable to the private

companies, if the land is below the limit as specified in Section 2(3). In SIA, the expert group setup for appraisal of reports has been assigned only soft powers. The final authority lies with the appropriate government, even if the expert group recommended the rejection of land acquisition, the government is empowered to reject such recommendations and continue with the land acquisition as specified under proviso to Section 7(4). The SIA does not apply to the urgent land acquisitions.

The protection of food security clause contends that the 'irrigated multi-cropped land' should not be acquired, and if indeed acquired then land commensurate in quantity and quality should be offered in return. However, in the absence of any clear specified time period for such a remedy, it appears futile. Further, exceptions mentioned under Section 10 permit acquisition of such agriculturally-valuable land as well, with the government being the final arbiter.

The 1894 Act had vested the government with superseding powers in matters relating to land acquisition. Similar legal framework has been adopted by the 2013 Act, for provisions such as urgent acquisition, temporary occupation of land, etc. The new Act has slightly extended the procedure by incorporating SIA, EIA, Consent clause, but the final outcome in these instances are again left at the discretion of the government.

The efficiency of the eminent domain depends on the application of Constitutionalism. Chapter 2 outlines various theories of eminent domain, from social contract to the utilitarian principle to distributive justice. These studies follow two broad trends viz., an Issue-based approach and a Structure-based approach. An issue-based approach highlights the individual issues such as public purpose, compensation, etc. On the other hand, a structural approach focuses on the constitutional perspective such as the Rule of Law, Separation of Powers or Judicial Review. Sometimes, specific issues are fused with specific constitutional principles. The Constitution has provided legitimacy to the eminent domain with certain limitations, previously under Article 31 which was repealed and then under the existing Article 300A. The State has the foremost responsibility to regulate the eminent domain process within the contours of the constitutional principles. The Constitution also provides the means and ends that act as a guiding force in regulating eminent domain. It is this approach of constitutionalism which demands reconsideration. The constitutional norms of justice, equality, liberty and fraternity along with the rule of law, apply equally to the

legislative power of enacting laws. This understanding of constitutionalism had been severely undermined in the eminent domain law of 1894. Highly relevant issues of public purpose, compensation, rehabilitation, resettlement, among others, were completely left unaddressed until 2013. Even during the innumerable deliberations on these issues in the Supreme Court since 1950, the core issues of constitutional values were not addressed. This lack of accountability and transparency in the case of eminent domain in the past has resulted in enormous displacement. From 1950 to 2007, more than sixty million people have been displaced by development which also includes the deprivation of livelihood without physical relocation.

Since 1950, Indian constitutionalism vis-à-vis eminent domain has been controversial. The legislature did not come forward to overcome the undemocratic 1894 Act, and the executive utilized the law rampantly for various public purposes by dubiously incorporating all the developmental activities in the name of public purposes. The judiciary justified executive acts through literal interpretation of the Act and restrained itself in reviewing the substantive nature of the takings post-1978. The apex court applied the constitutional principles liberally. It was only in 2011 that the Supreme Court cited the Right to Property vis-à-vis the eminent domain after an enormous protest from the landowners. This overall combination led to the violation of accountability. The individual interests of the underprivileged sections without the substantive rights of just compensation, rehabilitation and resettlement were in turn compromised for the fulfilment of the public purpose which remained undefined until the replacement of the 1894 Act. In the past, non-observance of constitutionalism in the use of eminent domain caused two major setbacks. The first setback resulted in 1978 when the Right to Property was abolished from Part III of the Indian Constitution. The second major setback was the inability of the legislators to introduce the ‘constitutionalised’ vision of eminent domain law and retaining the old colonial law. In the absence of a clear-cut implementation of the constitutional values, the eminent domain crisis would exist forever, causing a grave injustice to the citizens and a fraud on the Constitution.

The 2013 Act of the Parliament is meant to undo the hardships caused by the 1894 Act. However, the success of 2013 Act depends on effective assertion of constitutionalism of accountability and transparency of public purpose, compensation, rehabilitation, resettlement, SIA, etc. The eminent domain has to appreciate the

relevance of the substantial attainment of constitutionalism. Accountability forms a crucial aspect that demands a transparent procedure as the means and substantive rights as the ends, which ultimately serves the constitutional goals of the rule of law. It has to undertake the broader aspect of constitutionalism; the cohesion of both the structural and functional aspects to secure the interests of various sections of the society.

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