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Protection of Right to Property: A New Legal Mechanism

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ABSTRACT

The expression "property" has been used in Article 31 of the Constitution of India in its widest connotation. Article 31 is designed to protect property in all its forms. The expression "Property", therefore must be understood both in the corporeal sense as having reference to these specific things that are susceptible of private appropriation and enjoyment as well as its juridical or legal sense of a bundle of rights which the owner can exercise under the municipal law with respect to the user and enjoyment of those things to the user and enjoyment of those things to the exclusion of others. Government has the authority to take private property when it is needed for a public purpose. Such power is an incident of sovereignty. It is an offspring of political necessity. It is often necessary for the proper performance of governmental functions to take private property for public use. If public purpose can be satisfied by not rendering common man homeless and by exploring other avenues of acquisition, the Courts, before sanctioning an acquisition, must in exercise of its power of judicial review, focus its attention on the concept of social and economic justice. While examining these questions of public importance, the Courts, especially the Higher Courts, cannot afford to act as mere umpires.

Keyword: Acquisition, Compensation, Compulsory acquisition, Eminent domain, Public purpose.

Introduction

The Land Acquisition Act, 1894 is the general law relating to acquisition of land for public purposes and also for companies and for determining the amount of compensation to be made on account of such acquisition. The provisions of the said Act have been found to be inadequate in addressing certain issues related to the exercise of the statutory powers of the State for

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involuntary acquisition of private land and property. The Act does not address the issues of rehabilitation and resettlement to the affected persons and their families.

The provisions of the Act are also used for acquiring private lands for companies. This frequently raises a question mark on the desirability of such State intervention when land could be arranged by the company through private negotiations on a "writing seller-willing buyer" basis, which could be seen to be a more fair arrangement from the point of view of the land owner. In order to streamline the provisions of the Act causing less hardships to be owners of the land and other persons dependent upon such land, it is proposed repeal the Land Acquisition Act, 1894 and to replace it with adequate provisions for rehabilitation and resettlement for the affected persons and their families.

There have been multiple amendments to the Land Acquisition Act, 1894 not only by the Central Government but by the State Governments as well. Further, there has been heightened public concern on land acquisition, especially multi-cropped irrigated land and there is no central law to adequately deal with the issues of rehabilitation and resettlement of displaced persons. As land acquisition and rehabilitation and resettlement need to be seen as two sides of the same coin, a single integrated law to deal with the issues of land acquisition and rehabilitation and resettlement has become necessary. Hence the proposed legislation proposes to address concerns of farmers and those whose livelihoods are dependent on the land being acquired, while at the same time facilitating land acquisition for industrialization, infrastructure and urbanization projects in a timely and transparent manner.

Earlier, the Land Acquisition (Amendment) Bill, 2007 and Rehabilitation and Resettlement Bill, 2007 were introduced in the Loksabha on 6th December 2007 and were referred to the Parliamentary Standing Committee on Rural Development for examination and Report. The Standing Committee presented it reports (the 39th and 40th Reports) to the Loksabha on 21st October, 2008 and laid the same in the Rajyasabha on the same day. Based on the recommendations of the Standing Committee and as a consequence thereof, official amendments to the Bills were proposed. The Bills, along with the official amendments, were passed by the Loksabha on 25th February, 2009, but the same lapsed with the dissolution of the 14th Loksabha.

It is now proposed to have a unified legislation dealing with acquisition of land, provide for just and fair compensation and make adequate provisions for rehabilitation and resettlement

mechanism for the affected persons and their families. The Bill thus provides for repealing and replacing the Land Acquisition Act, 1894 with broad provisions for adequate rehabilitation and resettlement mechanism for the project affected persons and their families.

Provision of public facilities or infrastructure often requires the exercise of powers by the State for acquisition of private property leading to displacement of people, depriving them of their land, livelihood and shelter, restricting their access to traditional resource base and uprooting them from their socio-cultural environment. These have traumatic, psychological and socio-cultural consequences on the affected population which call for protecting their rights, particularly in case of the weaker sections of the society including members of the Scheduled Castes (SCs), the Scheduled Tribes (STs), marginal farmers and their families.

There is an imperative need to recognize rehabilitation and resettlement issues as intrinsic to the development process formulated with the active participation of affected persons and families. Additional benefits beyond monetary compensation have to be provided to families affected adversely by involuntary displacement. The plight of those who do not have rights over the land on which they are critically dependent for their subsistence allowance is even worse. This calls for a broader concerted effort on the part of the planners to include in the displacement, rehabilitation and resettlement process framework, not only for those who directly lose their land and other assets but also for all those who are affected by such acquisition. The displacement process often poses problems that make it difficult for the affected persons to continue their traditional livelihood activities after resettlement. This requires a careful assessment of the economic disadvantages and the social impact arising out of displacement. There must also be holistic effort aimed at improving the all-round living standards of the affected persons and families.

The Law would apply when Government acquires land for its own use, hold and control, or with the ultimate purpose to transfer it for the use of private companies for public purpose. Only rehabilitation and resettlement provisions will apply when private companies buy land for a project, more than 100 acres in rural areas or more than 50 acres in urban areas. The land acquisition provisions would apply to the area to be acquired but the rehabilitation and resettlement provisions will apply to the entire project area even when private company approaches Government for partial acquisition for public purpose.\

“Public purpose” has been comprehensively defined, so that Government intervention in

acquisition is limited to defence certain development projects only. It has also been ensured that consent of at least 80 per cent of the project affected families is to be obtained through a period informed process. Acquisition under urgency clause has also been limited for the purposes of national defence, security purposes and Rehabilitation and Resettlement needs in the event of emergencies or natural calamities only.

To ensure comprehensive compensation package for the land owners a scientific method for calculation of the market value of the land has been proposed. Market value calculated will be multiplied by a factor of two in the rural areas. Solution will also be increased up to 100 per cent of the total compensation. Where land is acquired for urbanization, 20 per cent of the developed land will be offered to the affected land owners.

Comprehensive rehabilitation and resettlement package or land owners including subsistence allowance, jobs, house, one acre of land in cases of irrigation projects, transportation allowance and resettlement allowance is proposed. Comprehensive rehabilitation and resettlement package for livelihood losers including subsistence allowance, jobs, house, transportation allowance and resettlement allowance is proposed.

Special provisions for Scheduled Castes and the Scheduled Tribes have been envisaged by providing additional benefits of 2.5 acres of land or extent of land lost to each affected family; one time financial assistance of Rs.50, 000, twenty-five per cent additional rehabilitation and resettlement benefits for the families settled outside the district free land for community and social gathering and continuation of reservation in the resettlement area etc.

Twenty-five infrastructural amenities are proposed to be provided in the resettlement area including schools and play grounds, health centres, roads and electric connections, assured sources of safe drinking water, Panchayat Ghars, Anganwadis, places of worship, burial and cremation grounds, village level post offices, fair price shops and seed-cum-fertilizers storage facilities.

The benefits under the new law would be available in all the cases of land acquisition under the Land Acquisition Act, 1894 where award has not been made or possession of land has not been taken. Land that is not used within ten years in accordance with the purposes, for which it was acquired, shall be transferred to the State Government's Land Bank. Upon every transfer of land without development, twenty per cent of the appreciated land value shall be shared with

the original land owners.

Stringent and comprehensive penalties both for the companies and Government in cases of false information, mala fide action and contravention of the provisions of the proposed legislation have been provided.

Constitutional Background

The legal background of Article 31 is to be found in sections 299 and 300 and entries 9 and 21, schedule 7 to the Government of India Act, 1935. Sec. 299 of the Government of India Act says that no person shall be deprived of his property in British India except by authority of law.

The Federal or a provincial legislature should not have any power for compulsory acquisition of property except for any public purpose and only by paying compensation or only it that particulars law has provisions for determining compensation. It further provided that no bill or amendment for transference of any lend or extinguish or modification of any rights relating to any land shall be introduced or moved in any chamber of Federal legislature without the previous sanction of Governor General or in a chamber of provincial legislature without the previous sanction of Governor.

Statutory Right to Property

The expression "property", it will be noted, has been used in Article 31 in its widest connotation. Article 31 is designed to protect property in all its forms. The expression "Property", therefore must be understood both in the corporeal sense as having reference to these specific things that are susceptible of private appropriation and enjoyment as well as its juridical or legal sense of a bundle of rights which the owner can exercise under the municipal law with respect to the user and enjoyment of those things to the user and enjoyment of those things to the exclusion of others.

A statutory right to purchase a land is not a right to property, but the right to arrears of pension, pay and allowances annual cash maintenance grant. Constitute a property. The Supreme Court has held that concept of 'property' has to be liberally construed and any legal right which can be enforced through a court is a right in the nature of property within the meaning of Article 31.

The term 'public purpose' was incorporated in sec 299 because the taking away of one's

property on execution of a judgment in favour of other person would also come within the purview of compulsory acquisition so if the term 'public purpose' is omitted such acquisition of property would also become illegal.

Sec 300 provided for the protection of certain private property, perhaps more accurately described as 'vested interest' namely grants of lands or of tenure of land free of land revenue, or subject to partial remission of land revenue, held under various names of Taluk, inam, watan, jagir and maufi etc. such grants being either perpetual or for two or three generations. These grants had the authority of the British Government that on due observance by the grantee of specified conditions, the rights of himself and his successors would be respected for all time or for the duration of the grant.

The sanad granted by Lord canning to the Taluqdar of Oudh was an instance of a grant in perpetuity the rights conferred by the sanad being perpetuity the rights conferred by the sanad being permanent, hereditary and transferable. Sec. 300 further provides that the previous sanction of the Governor General or the Governor as the case may be to any proposal, legislative or executive, which would alter or prejudice the right of the possessor of any privilege of the find to which have referred earlier. Also Entry 9 of the Government of Indian Act deals with compulsory acquisition of land. Entry 21 describes the term land, and includes rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents transfer alienation and devolution of agricultural land : land improvement and agricultural loans, colonization; courts of wards, encumbered and attached estates, treasure trove.

In *Thakur Jagannath Baksh Singh United Provinces*[139], the plaintiff was a taluqdar of Oudh, he impugned the U.P. Tenancy Act, 1939 on the ground (i) that the provincial legislature was not competent to legislate on a crown grand (ii) that the impugned Act cut down the absolute rights claimed by the taluqdars to be comprised in the grant of their estates as evidenced by sanads and thereby contravened Sec. 299 of the government of India Act.

In the judgment, Gwyer C.J. held that the provisions of the impugned Act were covered by entry 21 list 11, schedule 7 of the Government of India Act and were not ultra vires. Once it was found that the subject matter of a crown grant was within the competence of the provincial

[139] (1934) F.C.R. 72.

legislature that legislature had full power to legislate about it, unless the constitution Act itself expressly prohibited legislation on the subject, either absolutely or conditionally.

The doctrine that a grantor may not derogate from his own grant could not be applied in such a way as to limit the legislative power. Moreover to the contention of violation of sec 299 (2), the observation of the court was that the law only regulated the land lord tenant relation and thereby diminishes the rights which the land lord has exercised in connection with his land and does not authorize the compulsory acquisition of the land for public or any other purposes and therefore the question of compensation does not arise.

In the Constituent Assembly on December 9, 1948 consideration of the draft Art 24 corresponding to Article 31 was held over. On September 10, 1949, the Prime Minister Pandit Jawaharlal Nehru, moved that a new Art 24 be substituted for the old. As regards the compensation he distinguished the petty acquisitions, compensation he distinguished the petty acquisitions, acquisitions of small bits of property or even relatively larger bits for public use for which the law had laid down a fixed - standard from acquisitions for large schemes of social reform and social engineering which acquisitions could not be looked at merely from the point of view of the individual. Equitable compensation meant equitable to the individual and to the community.

There were two views regarding the expression compensation. One was that the compensation should be equivalent to the money value of the property at the date of acquisition ie, its market value. On the other side when it refers to the law specifying the principles on which and the manner in which the compensation is to be determined. The language employed in Sec. 299 and that employed in Article 24 not in pari materia with the language employed in corresponding provisions in other constitutions referring to the compulsory acquisition of property on payment of 'just compensation'. The expression just which finds a place in the American and in the Australian constitutions is omitted in Sec. 299 and Article 24.

Article 31 as originally enacted says that no person shall be deprived of his property except by the authority of law. Acquisition can be made only for public purpose and for that compensation should be paid. Here property included commercial and industrial undertakings also. Any law made for the purpose of acquisition should be valid only if it gets assent of the president.

Art. 31(2) required that the acquisition or the taking possession of property should be for a

public purpose and on payment of compensation, the power to acquire or requisition of property was originally contained in the following entries in the three lists of sec.7. List I, entry 33 : - "Acquisition or requisition of property for the purpose of the Union", List II, entry 36 : "Acquisition or requisition of property, except for the purposes of the Union, subject to the provisions of entry 42 to List III, and List III entry 42: principles on which compensation is to be given". But by the 7th Amendment Act, 1956, deleted entries 33 and 36 in Lists I and II and inserted a new entry 42 in List III which runs "The acquisition and requisitioning of property.

Before the Amendment, there was an inclusive power in parliament to pass laws for the acquisition and requisition of property for the purposes of Union, an exclusive power on the state legislatures for the acquisition or requisition of property except for the purposes of the union, but subject to entry 42 of List III which give concurrent power to the legislatures to fix the principles of compensation for the acquisition and requisition of the property for the public or other purposes of union or state. After the constitutional Amendment acquisition and requisition became subjects of concurrent legislative power.

The fundamental right conferred by Article 31, has since the commencement of the constitution, been modified six times by amendments in the constitution. The conflict that arises due to the inclusion of Article 31 in the fundamental rights was that with regarding the term "compensation". Immediately after Independence, the first and foremost requirement before the then Government of India was abolition of Zamindari by payment of compensation.

However payment of compensation has caused numerous problems, and Government felt it beyond the financial sources of the country with a view to ensure that agrarian reform legislation did not run counter to the national objective, the constitution framers had provided for an in-built mechanism under Article 31(2) of the Constitution in as much as that provision contained the word 'compensation' without using any adjectives like 'just' or 'reasonable'. Since that provision was frequently challenged the word compensation was ultimately interpreted by the highest courts to mean 'just compensation'. Similarly, Articles 14 and 19(1)(f) came to be opening channels for litigations pertaining the Constitutional validity.

The question regarding the term Compensation' was first raised in *Kameshwar Singh V. State of Bihar.* [140]In this case, the Bihar Land Reforms Act, 1950, provided for the transference to

[140] AIR 1951 Pat. 91.

the state of the interests of proprietors and tenure holders in land including interest in trees, forests, jatkars, hats, mines and minerals provided that compensation was to be paid in certain multiples.

They varied from twenty times where the net income did not exceed Rs. 500 to three times where the net income exceeded Rs. 1 lakh. The Act was challenged on the basis of violation of Article 14 of the constitution. The Patna High Court held that the Act invalid and void for it contravened the provisions of Article 14. It was further held that Article 31 (4) would not prevent the Zamindari abolition laws from being challenged in a court on grounds other than those mentioned in clause (2) of Article 31.

The interpretation of Article 31 give rise to unanticipated difficulties and the government felt that the whole zamindari Abolition programme was endangered. To overcome the difficulty, the Constitution first Amendment Act, 1951 was enacted. It introduced two explanatory Articles 31-A and 31-B.

Article 31-A was aimed at removing social and economic disparities in the agricultural sector. This Amendment was aimed at protecting the Zamindari Abolition Acts, which says that no law providing the acquisition of any estate or right or modification of any right by the state shall be void on the ground that it is inconsistent with Article 14, 19, 31. 'Estate' in Article 31-A, broadly means "lands paying land revenue". As Article 31 was the only constitutional provision containing compensatory provisions, Article 31A means that an estate could be acquired or rights therein could be modified without paying compensation.

Article 31-B was also added. This Article purports to validate retrospectively certain specified Acts and Regulations already passed. 13 such laws were mentioned in the Ninth schedule which was to be read with Article 31-B.

Dwarakadas Shrinivas v. Sholapur Spinning and Weaving Co.[141] was a leading case on the unamended Article 31. In this case the constitutional validity of an Ordinance - The Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance, 1950 was impugned on the ground that it violated the provisions of clause (2) of Article 31, as it had no provision for paying compensation to the Sholapur spinning and weaving Co. whose property was taken over by the state. In 1949 due to the mismanagement and neglect of the company the mill closed

and an attempt to supervise the affairs of the company under the Essential supplies Emergency powers, 1946, failed. The Governor General on January 9, 1950, promulgated the impugned Ordinance under which the mills could be managed and run by directors appointed by the Central Government.

The contention of the government was that the Ordinance could not fall with in the mischief of Article 31 (2) because the state had not acquired the title in the property of the company and the possession was taken for purpose of managing the company and is not requisition for any state purpose. Court held that the Ordinance invalid on the interpretation of Article 31.

Court's view was the one agreeing with that of the interpretation of Article 31 and 19 (1) (f) in *State of W.B.v. Subodh Gopal.*[142] In this case it was made clear that the constitutional obligation of paying compensation arose only where the state action resulted in the substantial deprivation of private property of individual. The fact of the case was that the West Bengal Revenue Sales Act, 1859, was challenged on the ground of violation of Art. 19 (1) (f) and 31. In 1950 the Bengal Revenue sales Act, 1859 was amended and a new s. 37 was substituted for the old one and provided by sec. 7 that all pending suit, appeals and other proceedings which had not already resulted in delivery of possession should abate.

The respondent who had filed a suit to evict certain under-tenants under Sec. 37 of the Old Act there upon contented that Sec. 7 was void as violating Articles 19 (1) (f) and 31. It was held that Art. 19 (1) (f) dealt with abstract right to own property but the protection afforded to the concrete right to own property was contained in Article 31. The doctrines of eminent domain and police power were inapplicable to our constitution. Clauses (1) and (2) of Art 31 must be read together.

Clause (2) of Art. 31 says that compensation is payable if private property has been 'taking possession of' or 'acquired' by the state. The words 'acquisition' or 'taking possession of' used in clause (2) have the same meaning of the word 'deprivation' in Art-31 (1).

In 'acquisition' the transfer acquires full ownership of property and in the 'requisition' he gets temporary possession or use of the property. An abridgment could be so substantial as to amount to a deprivation within the meaning of Article 31, if in fact, it withheld the property from the possession and enjoyment of the owner, or seriously impaired its use and enjoyment

[142] AIR 1954 SC 92.

by him or materially reduced its value.

The requirement of payment of compensation to the owner whose property was acquired or taken possession of was considered in *State of W.B. v. Bela Banarjee*[143] The question considered was that whether compensation provided for under the west Bengal land Development and planning Act, 1948 was in compliance with the provision of Art 31 (2) of the constitution Under the State Act lands could be acquired many years after it came into force, but it fixed the market value that prevailed on December 31, 1946 as the ceiling on compensation without reference to the value of the land at the time of acquisition. The court held that provisions of the said Bengal Act fixing a ceiling on compensation without reference to the value of the land was arbitrary and therefore was not in compliance with the terms of Article 31(2) of the constitution. The decision laid down three points.

1. The compensation under Article 31 (2) shall be just equivalent of what the owner has been deprived of.
2. Principles the legislature can prescribe are only principles for ascertaining first equivalent to what the owner deprived of.
3. If the compensation is not just, then that is a justifiable issue.

With the decisions in these three cases two courses were open to the parliament. One was reform the 'Supreme Court' ad the second course was to disarm it by amending the constitution, and the second course was adopted by enacting the Constitution Fourth Amendment Act, to nullify those decisions.

In place of original Art -31 (2) the present Article 31 (2) was substituted the word 'requisitioned' for the expression "shall be taken possession of" and also made explicit, what was implicit in the Original Art. 31 (2), namely, that property could only be acquired for a public purpose. At the end of Art 31(2) a proviso was inserted which made the adequacy of compensation non - justifiable. Sub Art (2A) was designed to nullify the decision that 'deprivation' of property by itself amounted to 'acquisition' or taking possession of property, for it provided that deprivation of property which did not amount to transfer of the ownership of right to possession of any owned & controlled by the state, was not to be deemed to be acquisition or requisition of property within the meaning of sub-clause (2). Article 31 A was

[143] AIR 1954 SC 170.

amended by enlarging its scope. Schedule 9, which has to be read with Article 31 B was enlarged by adding several other Acts to it.

The co-relation of Article 31(4), 31 A and 31B was considered by Patanjali Sastri C.J. in State of Bihar v. Kameshwar Singh[144]. Art 31 (4) was at once narrower and wider that Art. 31 A. on the one hand Art. 31 (4) applied only to laws pending in the legislature at the commencement of the constitution, whereas Art. 31A applied to all laws. Art. 31 (4) excluded an attack on the ground of contravention of Art. 31 (2), whereas Art. 31 (A) excluded an attack based on the other provisions of part III as well. In fact the reason of enacting Articles 31A and 31B was that the words of Art. 31 (4) were found inapt to cover a challenge under Article 14. Article 31 (4) covered all kinds of property while Art 31 A related only to a particular kind of property - 'estates'.

Even after therefore said amendments certain other legislature measures adopted by different states for the purpose of giving effect to the agrarian policy were effectively challenged. Thus the Constitution seventeenth Amendment Act was made. Thereby the expression 'estate' in Article 31-A was amended retrospectively by a new definition given in Article 31-A (2). Another proviso was also added to 31-A (1). By this amendment forty four Acts were added to the Ninth schedule.

The constitutionality of the seventeenth Amendment itself came for attack in *I.C. 'Golak Nath v. State of Punjab*[145]. In the Golak Nath decision the Supreme Court, reversing its earlier decision, held that parliaments had no power to abridge or abrogate the fundamental rights. This rule in effect put a serious heck on the amending power of parliament. Thus in Twenty fifth Amendment in which clause (2) of Article 31 was again amended, a new clause (2-B) added and Article 31-C inserted. The amendment dropped the word 'Compensation' and instead inserted the word 'amount' in Article 31 (2) in order to avoid judicial review of compensation as just equivalent. Also a new clause (2-B) was added which provided that nothing in Article 19 (1) (f) shall affect any such law as was referred to in Article 31 (2) as amended.

Moreover Article 31-C was newly added, provides that notwithstanding anything contained in Article 13, no law giving effect to the policy of the state towards securing the principles

[144] AIR 1951 Pat. 91
[145] AIR 1967 Sc 1643

specified in Article 39 (b) or (c) shall be deemed to be void on the ground that it is inconsistent with or takes away any of the rights conferred by Article 14, Article 19 or Article 31. 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.

The validity of the twenty fifth Amendment was upheld in *Kesavananda Bharati v. State of Kerala*[146]. The majority of the Supreme Court however said that though there was no scope of judicial review on the ground of in adequacy of compensation the court could still interfere on the ground that the state has fixed no amount or if the principles laid down in determining compensation resulted in non-payment of compensation.

ARTICLE-300A

Regarding the Right to property under Indian Constitution Forty Fourth Amendment Act, 1978, is more important, since it took away the right to property from the chapter an fundamental rights it Omitted Article 19 (1) (f) and Article 31 and inserted in their place a new Article 300 - A. Also some changes were made in the list of Acts included in the Ninth Schedule by omitting entries 87, 92 and 130.

The Amendment takes away the right to property as a fundamental right and makes it only a constitutional right which will be regulated by ordinary law. Article 300-A provides that "no person shall be deprived of his property save by authority of law". Thus only condition to be complied with for the acquisition of private property under the new Art. 300-A as a law of the Legislautre. The purpose for which property will be taken away or whether any compensation will be paid (both these conditions were necessary under repealed Art. 31) will be determined by the legislature. The right will be available against the executive interference.

H.M. Seervai an eminent constitutional jurist is of opinion that the abolition of the right to property as fundamental right would destroy other fundamental rights which are embodied in the constitutional. The fundamental right to the freedom of speech and expression, (which includes freedom to press and freedom of association, the freedom to move freely throughout the territory of India etc. would be destroyed if the right to property is not guaranteed as a fundamental right and like obligation to pay, compensation for private property, acquired for

[146] AIR 1973 SC 1461

public purpose is not provided for.[147]

The effect of the Amendment is that for violation of his right to property under Art 300A, a person will not be entitled to invoke the writ jurisdiction of the Supreme Court under Article 32. But he can invoke the jurisdiction of High Courts under Article 226.

The Supreme Court in *Bishamber Dayal Chandra Mohan* v. *State of U.P*[148], explained that the term 'law' in the context of Article 300A meant an Act of parliament or of a state legislature, or a statutory order, having the force of law that is positive or state made law.

The word 'property' used in Article 300A must be understood in the content in which the sovereign power of eminent domain is exercised by the state. The expression "right to property" includes the right to use/enjoy/ manage/ consume and alienate the same.[149]

It has been held that deprivation for the purposes of Article 300-A means acquisition or taking possession of property for public purpose, in accordance with the law made by parliament or a state legislature, a rule or a statutory order having force of law. Deprivation by any other mode is not acquisition under Art. 300A".[150]

Land Acquisition

Land Acquisition may be defined as the action of the government whereby it acquires land from its owners in order to pursue certain public purpose or for any company. This acquisition is subject to payment of compensation to the owners or to persons interested in the land. Land acquisitions by the government generally are with the land.

It is thus different from a land purchase, in which the sale is made by a willing seller. The government has to follow a process of declaring the land to be acquired notify the interested persons, and acquire the land after paying due compensation. Though land is a state subject, acquisition and requisition of property falls in the concurrent list which means that both the central and the state government can make laws on the matter, there are a number of local and specific laws which provide for acquisition of land under them but the main law that deals with acquisition is the Land Acquisition Act, 1894, a century old legislation enacted in a very

[147] Seervai, The Emergency Future Safeguards in the Habeas Corpees case. A criticism pp 150, 151.
[148] AIR 1982 SC 32
[149] T. Vijayalakshmi V. Town Planning Members, (2006) Sec 502
[150] Jilubhai Nanbhai Kachar V. State of Gujarat AIR 1955, Sc 142.

different social economic and political milieu. Post-Independence, the Indian government has not fundamentally changed the acquisition policy to reflect the values and needs of our times, which has resulted in legal, social cultural economic and political fallouts.

The Act authorizes government to acquire land for public purposes such as planned development provisions for town or rural planning, provision for residential purpose to the poor or landless and for carrying out any education, housing or health scheme of the Government. It hinders speedy acquisition of land at reasonable prices, resulting in cost overruns.

The issue of compulsory land acquisition has been cropping up at regular intervals with decisive socio- economic and political consequences, acutely witnessed during the Nandigram episode. Despite the raucous noises made about the inequality of the process and outcome of land acquisition, Successive Parliamentary sessions have failed to provide a coherent policy response addressing these concerns.

Undoubtedly, growing urbanization, increasing infrastructure requirements and rapid economic development have imposed high pressure on land in India. Private land is regularly acquired for both state sponsored development and private projects which has increasingly become contentious.

Eminent domain is the power of the government to take private property when it is needed for a public purpose. Such power is an incident of sovereignty. It is an offspring of political necessity. The term eminent domain seems to have originated in 1925 by Hugo Grotious who wrote of this power in his book" De Jure Belle Et Pacis".

The Latin term *Dominum Emines* which meant the meaning "Supreme Lordship" was used in the 17th century by Grotious to describe the concept of acquiring property for the public purpose. The power of the Government to acquire a private property for a public purpose rests upon the famous maxim "*Selus Populi Est Suprema Lex"*-which means that the welfare of the people or the public is the paramount law and also on the maxim "*necessita public major est quam"* which means public necessity is greater than private.

In the content of this doctrine property includes corporeal and incorporeal, movable and immovable, tangible and intangible. Eminent domain, compulsory purchase, compulsory acquisition of expropriation in common law legal system is the power of the State to appropriate private property for its own use without the owner's consent. The term eminent

domain is used primarily in the United States, where the term was derived in the mid-19th century from a legal treatise written by the Dutch jurist Hugo Grotious in1625. The term compulsory purchase originating in England and Wales, and other jurisdictions that following the principles of English law. Originally the power of eminent domain was assumed to arrive from natural law as inherent power of the sovereign.

The importance of the power of the eminent domain to the life of the State need hardly be emphasized. It is often necessary for the proper performance of governmental functions to take private property for public use. The power is inalienable for it is founded upon the common necessity and the interest of appropriating the property of the individual members of the community to the greater interests of the whole community.

Sinha C.J, in the landmark case of *West Bengal v. Union of India*[151], observed that the power of eminent domain is an inherent attribute of sovereignty not arising even out of the Constitution but independently or it and may be exercised in respect of all property in the State for effective enforcement of authority of the Union against all private property or property of the State.

Despite conferring this wide power of acquisition on the sovereign, the concept of Eminent Domain was subject to two restrictions. While emphasizing on the Union's power to acquire, the Courts have been cautious in overstating this as an absolute license to grab property. Hence the idea of public use or public purpose has been inextricably related to an appropriate exercise of the power of Eminent Domain and is considered essential in any statement of its meaning.

The other restriction on the exercise of this power is the requirement to pay compensation. Through all the Constitutional debates on the legitimacy of Right to Property and the legitimacy of acquisitions, the courts have continuously reiterated the point that expropriation of private property would be lawful only it was required for a public purpose.

Government most commonly used the power of eminent domain when the acquisition of real property is necessary for the completion of public projects such as roads, railways, public highways, schools, colleges, universities, dams, slums, drainage etc. and for many other projects of public interest, convenience and welfare and the owner of the property is unwilling to negotiate for its sale. In many jurisdictions, power of eminent domain is with a right that just

[151] 1964 1 SCR 37.

compensation made for the appropriation. Some uses the expropriation to refer 'appropriation' under eminent domain law, and may especially be used with regard to case where no compensation made for the confiscated property.

The tem condemnation is used to describe the act of government exercise its authority of eminent domain. It is to be confused with the term of the same name that describes the legal process whereby real property, generally building is deemed legally unfit for habitation due to its physical defects. Condemnation via eminent domain indicates the government is taking property; usually the only thing that remains to be decided is the amount of compensation. Condemnation of building on grounds of health and safety hazards or grass zoning violation usually does not deprive the owner of the property condemned but requires the owner to rectify the offending situation.

The exercise of eminent domain is not limited to merely to real property; Government may also condemn the value in a contract such as franchise agreements. The power of eminent domain in English Law derives from the form of real property. Many land owners assume that their property right is absolute under the law, but this is rarely the case. The right of eminent domain is the right of the State to assert either temporarily or permanently its domain over a piece of land on account of public exigency and for public good. In the case *Coffee Board* v *Commissioner of Commercial Taxes* (1988 3 SCC 263) the Court observed that the eminent domain is an essential attribute of sovereignty of every State and authorities are universal in support of the definition of eminent personality as the power of sovereign to take property for the public purpose without the owner's consent upon making just compensation.

As pointed out by the Supreme Court of India. "Under the common law of eminent domain as recognized in the jurisprudence of all civilized countries the state cannot take the property at its subject unless such property is required for a public purpose and without compensating the owner for its loss. But when, these limitations are expressly provided for and it is further enacted that no law shall be made which takes away or abridges these safeguard, and any such law, if made shall be void.

Position in Certain other Countries

(1) <u>Position in India</u>

The doctrine of eminent domain is imbibed in the Constitution of India in clear terms. In fact,

the right to property as incorporated under the since repealed clause (f) of Article 19(1) of the Constitution was one of the Fundamental Rights under Part 3 which was later on removed from Article 19 by the 44th Constitutional (Amendment) Act, in 1978. In its place, a similar provision i.e., Article 300A was incorporated under Chapter 4 of the Constitution by the same said amendment with effect from 20.6.1979, thereby losing its nomenclature as Fundamental Right.

By the same amendment the provision relating to compulsory acquisition of property as provided for under the then Article 31 of the Constitution was deleted and Article 31A was incorporated in order to save the laws providing for acquisition of estates. Further discussion in respect of these Constitutional provisions is made elsewhere in this Book. Today, in India, there are enactments, such as the Land Acquisition Act, 1894, and the Land Requisition and Acquisition of Immovable Property Act, 1952, in force having relevance to the doctrine of eminent domain.

(2) <u>Position in USA</u>

In the United States of America (USA), the meaning and importance of the term "Eminent Domain" is similar to that of the general understanding of that term in India. In USA, "just compensation" is required to be paid when property is acquired by exercising the power of eminent domain. For the exercise of a power, "public use "of the property has to be established, as envisaged in the Fifth Amendment to the Constitution of USA. Over the years, the definition of "public use" has been expanded so as to include schemes meant for the economic development of the country such as eminent domain power to displace private homes and businesses in order to transfer the same to private developments that are mare profitable.

For instance in the judgment of the Supreme Court of Michigan, rendered in 1981 based on the precedent set in *Bermen* v. *Parker*[152], the Court permitted the neighborhood of Pole town to be taken in order to build a General Motors' plant. The US Courts in other States also relied on this decision, in spite of it being overturned as a precedent in 2004. This expansion of the doctrine has also gained importance before the Supreme Court of the United States during the fall of 2004.

It is also pertinent to note that in USA, at times the power of eminent domain has also been used by communities to take control of planning and development activities. As for example,

[152] 348 U.S. 26 (1954).

Dudley Street Initiative, a community group in Boston attained the right of eminent domain and used it to reclaim vacant properties for the purpose community development.

(3) Position in European Nations

In its application to the European Nations, the European Convention on Human Rights provides protection from appropriation of private property by the State. Article 8 of the Convention contemplates, "Everyone has the right to respect for his private and family life, his home and his correspondence", and prohibits interference with this right by the State, unless the interference is in accordance with law and is necessary for national security, public safety, economic wellbeing of the country; prevention of disorder or crime; protection of health or morals, or the rights and freedom of others.

This right is expanded by Article 1 of the First Protocol to the conventions, which envisages, "Every natural person or legal person is entitled to the peaceful enjoyment of his possessions". However , one exceptions to this right is that were the State deprives private possessions in public interest, it should be in accordance with law , and in particular, to secure payment of taxes.

(4) Position in France

In France, the "Declaration of the Rights of Man and of the citizen" contains the mandatory provision for payment of just and preliminary compensation before expropriation.

(5) Position in England and Wales

In England and Wales and such the territories that follow the principles of English law, the related term compulsory purchase of land is more commonly invoked while exercising the power of eminent domain.

(6) Position in Australia

In Australia, the power of eminent domain is recognised under the Australian Constitution. That power is vested in the Government. Under section 31 of the Australian Constitution of 1900, the Commonwealth Parliament is empowered to make law to acquire property on just terms from any State or person for any purpose in respect of which the parliament has power to make laws. The Constitution of Australia also aspires that the terms of acquisition of private

property should be just and not nearly which the Parliament may be considered to be just.

Land Acquisition Law in India

The first step in the law relating to land acquisition India was the Bengal Regulation 1 of 1824 governing all the Provinces and controlled by the Presidency of Fort William. It provided provision for enabling the officers of Government to acquire, at a fair valuation, land or other immovable property required for roads, canals or other public purposes. In 1850, some of these measures were applied to the town of Calcutta such as confirming the title to land for public purposes. This Regulation was also extended so as to include Railways.

With regard to Bombay, the Building Act of 1839 (Act No. XXVIII) was in vogue as the first legislative step providing for acquisition of land for purposes of widening or altering any existing public road, street or other thoroughfares within the Bombay and Colaba areas. This Act was extended to Railways in the year 1850.

With regard to Madras Presidency, the Madras Act XX of 1852 was passed for the purpose of acquisition of land for public purposes in the Presidency area. Railways were also brought under this Act. Prior to the present Act, law relating to the acquisition of land was governed by the since repealed Act of 1870.

The first legislative step governing the land acquisition for the whole of British India was the Land Acquisition Act (VI) of 1857, which repealed all the previous enactments. The object of this Act was to make better provisions for the acquisition of land needed for public purposes within the possession and under the governance of the East India Company and for determination of the amount of compensation to be paid for the same purpose.

This Act empowered the Collector to fix the amount of compensation by agreement so far as possible, and if there was no such an agreement, the dispute had to be referred to the arbitrators whose decision was final except where there was alleged misconduct or corruption. Since it was found that such a method of payment of compensation was unsatisfactory due to the incompetent and even corrupt arbitrative processes, and that there was no appellate mechanism against such awards, the Land Acquisition Act (X) of 1870 was enacted.

This Act provided for making a reference to the civil court for determination of the amount of

compensation where the matter could not be steeled by the Collector by an agreement, with a provision to make an appeal to the High Court. Under this Act clear procedure was provided for the acquisition of land and determination of compensation.

Since it was found that the Act of 1870 was not, in practice, as effective as it ought to be for the protection of either the person interested in the lands or the public purposes, and the requirement of making a reference by the collector in all petty difference of opinions as to value delays in disposal and more expensive disputes, excess of value of the land in disputes, problem of payment of interest, there arose a need to amend the law. As a result, the Land Acquisition Act 1894 was enacted which is still in force, with due amendments made to it from time to time as a Central Act.

The Land Acquisition Act 1894

The Land Acquisition Act 1984 is an Act to amend the law for the acquisition of land by government for public purposes and for companies, and also for determining the amount of compensation to be made on account of such acquisition. The Act was made to apply to the whole of India except the state of Jammu and Kashmir. It is a Central Act and empowers the State Governments to make appropriate amendments to the main Act. In fact, many States in India have adopted the Act and made due modifications to it according to their local needs and aspirations.

The Act is a special enactment and a complete Code covering the entire field of land acquisition in India. It is divided into VII parts and consists of 55 sections. It has some interconnection in amending, modifying, repealing and adopting, with some other Central and State Acts like Electricity Act, 1910 etc.

Public Purpose and Compensation

Assembly of land is needed for public purpose and economic development, but the present land acquisition policy deficient in many respects. Apart from procedural compliances prescribed under the Act, the primary bone of contentions the present framework relates to public Purpose, Compensation and ‘resettlement or rehabilitation.

The Land Acquisition Act, 1894, enacted for the purpose of compulsory acquiring of land required for public purpose or for purpose of companies for determination of the amount of

compensation to be paid on account of such acquisition.[153]

1. Rural development- S. 3(f) (i) covers provision of village sites, and the extension, planned development or improvement of existing village sites. S. 3(f) (ii) brings rural planning in to the ambit of public purpose.
2. Social Welfare Activities: Section (3) (f) (v) covers provision of land for residential purposes to the poor or landless, or to persons residing in areas affected by natural calamities. It also covers persons displaced or affected by reason of the implementation of any scheme undertaken by the government, any local authority or corporation owned or controlled by the State. Similarly, S. 3(f) (vi) covers of provision of land for carrying out any educational, housing, health or slum clearance schemes. Such activities may be sponsored by the government or by any such authority established by the Government for carrying out any such scheme. They may also be carried out, with the prior approval of the appropriate Government, by a local authority, or by 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. All such activities come within the definition of public purpose.

[153] . Public Purpose has been defined to be Land Acquisition Act as under:
"Section 3 (f) : The expression" "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 from public funds in pursuance of any scheme or policy of Government and subsequent disposal thereof in whole or in part in lease, assignment or outright sale worth the object of securing further development as planned.
(iv) The provision of land for a 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 to affect 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 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 of a society registered under the Societies Registration Act. 1960 (21 of 1980) 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 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 authorities.
(viii) The provision of any premises building for locating a public office

But does not include acquisition of land for companies

3. Government Activities: Sec 3(f)(iv) includes within the definition of public purpose provision of land for a corporation owned or controlled by the State. On the same lines, the provision of any premises or building for a public officer (but excluding acquisition of land for companies) is also within the definition of public purpose.
4. Other Developmental Activities: a large number of miscellaneous developmental activities carried out by the Government are included in the definition of public purpose like provision of 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. Also included is provision of land for any other scheme of development sponsored by the Government or with the prior approval of the appropriate Government by a local authority. This definition of public purpose, which is inclusive and not exhaustive, was inserted wide the 1984 amendment to the Land Acquisition Act. The bulk of litigation that the land acquisition had generated made the Government to provide a wide and general definition of public purpose to cover a wide range of activities so as to bring in any activity with even a shade of public interest within the ambit of the definition.

Public purpose will include a purpose in which the general interest of communities as opposed to the interest of an individual is directly or indirectly involved. Individual interest must give way to public interest as far as public purpose in respect of acquisition of land concerned.

In the Constitution of India, some guidelines can be traced as far as public purpose is concerned in Article 37 of the Constitution. The provisions contain in this Part (directive Principles of the state policy) shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country. It shall be the duty of the state to apply these principles in making laws.

According to Article 39 of the Constitution the State shall, in particular direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good. The laws made for the purpose of securing the Constitutional intention and spirits have to be for public purpose.

Because, 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 public purpose is and 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 direction in the matter.

In *State of Bihar v. Kameshwar Singh*[154], a Constitution Bench of the Apex Court considered the expression public purpose. In that case the court held: The expression "public purpose" is not capable of a precise definition and has not a rigid meaning. It can only be defined by a process of judicial inclusion and exclusion. In other words the definition of the expression is elastic and takes its colour from the statute in which it occurs, the concept varying with the time and sale of society and its needs. The point to be determined in each case is whether the acquisition is in general interest of the community as distinguished from the private interest of an individual.

In the *State of Bombay v.R.S. Nanji*[155], the Court observed that it is impossible to precisely define the expression 'public purpose'. In each case all the facts and circumstances will require to be closely examined in order to determine whether a public purpose has been established prima facie, the Government is the best judge as to whether public purposes is served by issuing a requisition order but it is not the sole judge. The courts have the jurisdiction and it is their duty to determine the matter whenever a question is raised whether a requisition order is or is not for a public purpose.

In the said case the court observed that the phrase 'public purpose' includes a purpose, that is an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals is direct and vitally concerned. It is impossible to define precisely the expression 'public purpose'. In each case all the facts and circumstances will require to be closely examined to determine whether a public purpose has been established. In that case the Court also referred to the following cases: The *State of Bombay v. Bhanji Munji & Another*[156] and *The State of Bombay v. Ali Gulshan*[157].

In *Arnold Rodricks v. State of Maharashtra*[158], while Justice Wanchoo and Justice Shah dissenting from judgment observed that there can be no doubt that the phrase 'public purpose'

[154] AIR 1952 SC 252.
[155] AIR 1956 SC 18.
[156] 1955 1 SCR 777.
[157] 1955 2 SCR 867.
[158] 1966 8 SCR 885.

has not a static connotation, which is fixed for all times. There can also be no doubt that it is not possible to lay down a definition of what public purpose is particularly as the concept of public purpose may change from time to time. There is no doubt however that public purpose involves in it an element of general interest of the community and whatever furthers the general interest must be regarded as a public purpose.

In *Laxman Rao Bapurao Jadhav v. State of Maharashtra*[159], this Court observed that "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 authorized 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 *Scindia Employees' Union v. State of Maharashtra and others*[160] the Court observed as under. "The very object of compulsory acquisition is in exercise of the power of eminent domain by the State against the wishes or willingness of the owner or person interested in the land. Therefore, so long as the public purpose subsists the exercise of the power of eminent domain cannot be questioned. Publication of declaration under Section 6 is conclusive evidence of public purpose. In view of the finding that it is a question of expansion of dockyard for defense purpose, it is a public purpose."

The right of eminent domain is the right of the State to reassert either temporarily or permanently its dominion over a piece of land on account of public exigency and for public good.

In the case of *His Holiness Kesavanantha Bharati Sripadagalaveru v. State of Kerala*[161], popularly known as "fundamental Rights case that any law providing for acquisition of property must be for a public purpose. Whether the law of acquisition is for public purpose or not is a justifiable issue. But the decision in that regard is not to be given by any detailed inquiry or investigation of facts.

The intention of the legislature has to be gathered mainly from the statement of Objects and Reasons of the Act and its Preamble. The matter has to be examined with reference to the

[159] 1997, 3 SCC 193.
[160] 1996, 10 SCC 150.
[161] AIR 1973 SC 1461

various provisions of the Act, its context and set up, the purpose of acquisition has to be culled out there from and then it has to be judged whether the acquisition is for a public purpose within the meaning of Article 31(2) and the law providing for such acquisition."

The Supreme Court has also made interesting observations on the concept of land acquisition and the withering of rights over land of the citizens to conclude that a strict regime was required to be implemented before the citizens could be rendered landless. In this context, the Court expressed its opinion in the following terms. (Relevant Extracts from the Judgment are furnished below):

Admittedly, the Land acquisition act, a pre-Constitutional legislation of colonial vintage is a drastic law, being expropriatory in nature as it confers on the State a power which affects person's property right. Even though right to property is no longer fundamental and was never a natural right and is acquired on a concession by the State, it has to be accepted that without right to some property, other rights become illusory. This Court is considering these questions, especially, in the context of some recent trends in land acquisition. This Court is of the opinion that the concept of public purpose in land acquisition has to be viewed from an angle which is consistent with the concept of a welfare State.

The concept of public purpose cannot remain static for all time to come. The concept, even though sought to be defined under Section 3(f) of the Act, is not capable of any precise definition. The said definition, having suffered several amendments, has assumed the character of an inclusive one. 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 defeat 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.

Conclusion

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.

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 common man homeless and by exploring other avenues of acquisition, the Courts, before sanctioning an acquisition, must in exercise of its power of judicial review, focus its attention on the concept of social and economic justice.

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