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*(Un)Constituting Property: The
Deconstruction of the 'Right to Property'
in India*

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Introduction

This paper has been motivated by a desire to enquire into the nature and content of the institutions, within which decisions that affect public policy are decided and put into effect in India. Thus, it is an attempt to engage with the nuances of institutions contained within the edifice of the State, in particular institutions that have played a role in the construction of property rights in India. This enterprise uses the notion of *rights* and the doctrine of *separation of powers* as central analytic units. Though the engagement with *rights* and the doctrine of *separation of powers* are typically rooted in the study of political philosophy, they are of interest here in relation to their location in an economy peopled with actors practicing economic calculus. I focus on these concepts in pursuance of a central theme of this paper, which develops on the idea that to understand public policy outcomes, it is essential to study the mechanisms, which locate and allocate rights in a society.

While the constitution of a country typically guarantees certain rights, such rights become operational through the acts of the three branches of the State – the legislature, the executive and the judiciary. Thus to comprehend the role of *rights* in society it is important to gain an understanding of the space over which such rights are exercised and become operational, which in turn is to study the interplay of the three branches. In the first part of this paper I spell out a heuristic analytical frame that develops an understanding of the doctrine of separation of powers. The second part of the paper traces the constitutional changes engineered by the Indian legislature in response to judicial decisions, which have shaped the contents of the 'right to property' in India. Against this background of the contest between the legislature and the judiciary, the third part of the paper uses the framework constructed in the first part to analyze the consequences of the story related in the second part of the paper.

PART I

Heuristic Analytical Framework

One cannot but appreciate the prescience of Adam Smith when he offers two 'explanations' for the doctrine of separation of powers in *The Wealth of Nations*. To quote –

'The separation of the judicial from the executive power seems originally to have arisen from the increasing business of the society, in consequence of its increasing improvement. The administration of justice became so laborious and so complicated a duty as to require the undivided attention of the persons to whom it was entrusted... When the judicial is united to the executive power, it is scarce possible that justice should not frequently be sacrificed to, what is vulgarly called politics. The persons entrusted with the great interests of the state may, even without any corrupt views, sometimes imagine it necessary to sacrifice to those interests the rights of a private man.'

The first 'explanation' is functional – the very acts of ongoing adjudication and administration lead to specialization of these tasks, while the second one is structural – concentration of power in one branch leads to the violation of rights. One needs to understand these 'explanations' not as competing with each other but rather as complements to the other. There is by now a large and growing economics literature that understands the doctrine of separation of powers in the structural sense, wherein it has been shown that separation of powers improves social welfare by reducing the quantum of rent seeking activity in the political system. [For example see Perrson, Roland and Tabellini (1997), Laffont (2000), Padovano, Sgarra and Fiorino (2003).] However, the idea of separation of powers in the functional sense is relatively unexplored – I draw on some of my previous work in this regard, where the functional aspect of separation of powers has been developed drawing on the notion of transaction costs to explore the social implications of the doctrine being breached. [Anant and Singh (2002)]

The Functional Explanation

Transaction Costs:

Following a survey on transaction costs by Allen (1999) one can associate the term *property rights* with the ability to freely exercise a choice over a good or a service and view transaction costs as the costs of establishing and maintaining property rights. If one then holds that in a particular case in point that property rights are complete, then it is equivalent to saying that there are no costs related to exercising these rights. This statement can be restated from the other end – if there are no transaction costs, the demarcation of property rights can be ignored. Of course, both these statements are nothing but the deed of stating the Coase theorem, but more importantly by making these statements one has to confront the many instances when property rights are protected and maintained, suggesting that transaction costs are endemically present. One-way of pinning down these transaction costs is to appreciate the fact that economic agents typically make decisions under some form of ignorance and therefore one can associate transaction costs with lack of information. For example it can be argued that it is to overcome unknown costs that agents gather around institutions that enhance the frequency and volume of trade and also because they want to protect their *property* they resort to negotiation, tenure agreements, contract stipulation and various other such devices. However this connection has to be made with caution because surely information problems per se can be solved by writing contingent contracts. To connect transaction costs in a sufficient manner to information is to associate transaction costs with 'uncertainty' as understood by Knight (1921) – the inability to quantify the great unknowns or the nondisclosure of private information. The response to such 'uncertainty' is surely not to write the contingent contract because it cannot be specified, but rather to create institutions.

Transaction Costs and Separation of Powers:

The bodies of the State, while making decisions surely confront endemic transaction costs as well which, in turn operate by forcing the design of institutions to be such that transaction costs are

minimized – surely also, if transaction costs did not matter the form of the state would also not matter. One could thus assert that the doctrine of separation of powers, among other things, structures governance such that the costs of making decisions within the State are minimized by delegating decision making to specialized institutions depending on the nature of the problem on hand. The broad divisions engendered by the doctrine – the legislature, the executive and the judiciary can be justified on the grounds that each branch is equipped to process different categories of information and therefore possess a different mechanism of decision-making.

To briefly describe these specializations – The representative legislature captures the aggregated preferences of the voting population and makes laws keeping in mind the impact on distribution of such legislation. The executive which executes the will of the legislature, often making technical decisions in the face of incomplete information, drawing on scientific, epidemiological and statistical studies, can be viewed as a hierarchical body that makes decisions in the face of incomplete information. The judiciary resolves disputes keeping in mind procedural, statutory and constitutional limits. Since judicial decisions necessarily need to be perceived as being fair, judicial information is gathered from contesting parties in conformity with rules of evidence and procedure, and since evidence comes in from conflicting sources courts can typically be thought of as processing imperfect information.

It can therefore be argued that an allocation problem facing the State would be ideally slotted for resolution in the appropriate branch of the State. Thus, a contest over a jointly produced surplus should appear before the court because the precise amount contributed by a party is private information, which the court translates into verifiable evidence given by each party and makes an assessment of the apportionment. The executive would process a famine because statistical, scientific and epidemiological data needs to be processed to assuage the uncertain affects of the famine. If it is accepted that the diktat of the law is essential for society to function as a cooperative endeavor then laws need to be made by an agency of the population

at large that is presumably sensitive to the distributional impact of these laws across the population – a role fulfilled by the legislature. This understanding of the doctrine of separation of powers allows one to come up with a definition of activism – Activism is the extension of a branch of the State extending its mechanism of decision making, on the grounds of privilege, onto problems that are the forte of some other branch. Thus, when the judiciary takes on the tasks of the executive, this is a case of judicial activism.¹ The consequences of such activism can be ambiguous – activism can both enhance and diminish social welfare depending on the circumstances.

Bargaining

In a recent work Cooter (2000) understands the separation of powers largely in a structural sense though it should be mentioned that he is not entirely insensitive to the functional interpretation as well. However, his analysis is innovative in pointing out that the doctrine not only separates decisions across the various branches but also requires interaction across the branches. Such interaction can be understood as a bargain – which in turn means that the interactions can be quite costly in terms of negotiating costs. These negotiation costs can be reduced with unification of powers. For instance take the case where a law passed by a legislature, is held to be unacceptable by the courts, which would then mean that the law is reframed keeping the court's objections in mind or such a law may also be impossible to frame in tune with judicial interpretation. It is not possible here to go into detail into the nature of such bargains but the point to be gathered is that the separation of powers doctrine does involve bargains across branches and therefore involve negotiation costs, which in turn mean that with high negotiation costs, the impulse towards unitary powers can win in the interest of expediency of decisions. The impulse towards unitary decision of course is expedient but with costs emerging now from the violation of the doctrine of separation of powers.

¹ See Anant and Singh (2002) for details.

Thus, it may be broadly held that from both the structural and functional perspective on the separation of powers doctrine, the violation of the doctrine can result in social costs and in addition to this the operation of the doctrine requires inter-branch interaction that is subject to the problems faced by any bargaining circumstance.

PART II

The Tale of the Constitutional Construction of Property

The Indian Constitution is an admixture of positive and negative rights.² One can think of the Fundamental Rights as being the negative component and the Directive Principles as the positive component. Much of the conflict especially in relation to property has been expressed as interplay between the positive attempt of the State to engineer a certain economic, social and political configuration resulting in the violation of negative liberties or rights as a consequence. Property has been a particular target in this contest and the outcome of this attack has delineated the distribution of powers across the three branches of the government – if not necessarily in general, then definitely with respect to the governance of property rights in relation to the State. It is important to tell this story³, because the narration of this account in itself throws up crucial problems concerning public affairs – that need to be confronted both in terms of efficiency and distribution as well.

Wrangling over Property: An Account of the Conflict between the Judiciary and the Legislature

The wrangle over property was evident even while the Constituent Assembly was framing the Constitution of India. [Austin (1966)] In framing the constituent rules on property, the Assembly had a clear model in the American Constitution in front of it. As is well known, the Fifth Amendment of the American Constitution states “...nor shall any person ... be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.” If indeed the Indian Constitution was to guarantee similar rights, the question that arose before the members of the Assembly was how to structure the frame that could constrain these rights for the social good. The key contentious issue

2 I use these terms here as understood by Berlin (196 Austin, Granville (1966)1).

3 In the account that follows, I draw heavily from Austin (1966) and Austin (1999).

here was 'due process' – many voices seem to have had reservations about the due process clause. Concern was voiced that the Judiciary and not the representatives of the people would shape the future of the country. Yet other voices invoked the argument that a large part of the litigation in the United States was centered on due process and similarly due process issues would clog the Indian courts. However some of the strongest apprehensions in this regard were in relation to property – it was felt that if such a clause were allowed, the legislative power to effect land reforms would stand diminished. In deference to such voices, it was decided to remove any direct association between due process and the right to property, a move that was further strengthened by dropping 'just' from the clause that said property could be acquired for public use only on the payment of just compensation. This process culminated in making property a Fundamental Right in the Constitution – all Indians had the right 'to acquire, hold and dispose property' – according to Article 19(1)(f), albeit a right that could be deprived under Article 31. This Article as initially constituted, said that no one could be deprived of their property except by law; the law must set a compensation or principles on which such compensation is paid; property acquisition laws must get assent of the President; police powers were provided in relation to property; and property legislation which was not subject to any subsequent judicial questioning on compensation was to be legislated in a stipulated time frame.

However, over the next thirty years these constituent rules were progressively chipped away, culminating with the Forty Fourth Amendment Act 1978 by which Articles 19(1) (f) and Article 31 were deleted from the Indian Constitution. The Forty Fourth Amendment, having removed property as a fundamental right also located it as a much weaker statutory right in Article 300-A, where it now reads, as 'No person shall be deprived of his property save by authority of law'. Among other things, a particularly profound significance of this action is that by removing the right to property as a fundamental right, no one has the right to approach the Supreme Court under Article 32 (this Article confers the right to approach the Supreme Court if it is felt that one's fundamental rights are being violated) if the right to property is violated. In other words, currently any

violation of the right to property in India cannot be questioned as a constitutional issue. Before the Forty Fourth Amendment, a series of Constitutional Amendments – the First, Fourth, Seventeenth and Twenty Fifth Amendments, to name the major alterations relating to property, preceded the apogee manifest in the Forty Fourth Amendment.

First, Fourth and Seventeenth Amendments

The broad political impulse after independence was for the ruling Congress Party to eliminate, preferably without compensation, Zamindars – rural intermediaries, who under colonial rule had gained rights over vast tracts of land in many parts of the country, and put into effect a 'socialist' Industrial Policy that gave the State a major role in controlling both private (both, through the planning process and a mandate to take over concerns in the public interest) and public industry. Such moves were challenged using the property clause of the Constitution in the courts in a series of cases. For instance, prominent among such cases were – the decision of the Bihar High Court to strike down as unconstitutional the *Bihar Management of Estates and Tenures Act 1949*, which was held to violate Articles 19(1)(f) and 31⁴; the Allahabad High Court's questioning the right of the government to take over a private motor bus concern, again on constitutional grounds; and the claim put in to the Bombay High Court by certain mill owners whose concern had been taken over by the government that their fundamental right to property was violated since they received no compensation.⁵ This judicial threat motivated the First Amendment to the Indian Constitution, which came into being with Parliament passing the First Amendment Act (1951). By this amendment, Articles 31 A, 31 B and the Ninth Schedule were added to the Constitution. Article 31 A permitted the legislation of laws to acquire estates – a term used cover the properties of Zamindars and other categories of revenue

4 Sir Kameshwar Singh (Darbhanga) v The Province of Bihar AIR 1950 Patna 392ff.

5 Dwarkadas Srinivas v The Sholapur Spinning and Weaving Company Ltd. AIR 1951 Bombay 86.

farmers, the taking over of property by the State for a limited period either in the 'public interest' or to 'secure the proper management of the property', amalgamate properties, and extinguish or modify the rights of managers, managing agents, directors, stockholders etc. and those who have licenses or agreements to search or own minerals and oil. Such laws, as per this Article cannot be declared void on grounds that they are inconsistent with Articles 19, 31 and 14⁶. Article 31 B protected the various land reform laws enacted by both the Center and the States, by stating that none of these laws, which were to be listed in the Ninth Schedule, can become void on the ground that they violated any Fundamental Right.

The First Amendment was soon followed by the Fourth Amendment made in 1953, which was again constructed as a reaction to judgments of the Supreme Court on issues of property. In this round, the major changes in the Constitution were centered on Article 31 – in particular Clause 2 of the Article and a new Clause 2A were added to the Article. Article 31 (2) as it stood originally read –

'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 authorizing 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 compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.'

After the Fourth Amendment it read as –

'No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of 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

6 Article 14 guarantees 'Equality before the law'; Article 19 guarantees freedom of speech, assembly, association, movement, property and choice of any occupation, trade or business; Article 31 covered expropriation and compensation connected with property.

question in any court on the ground that the compensation by that law is not adequate.'

As can be seen by comparing the two texts, the Fourth Amendment laid down that a court could question no law on grounds that the compensation paid for acquired property is inadequate. This change was in reaction to a Supreme Court judgment – the *Bela Banerjee* case⁷. In this case, the validity of *West Bengal Land Development and Planning Act 1948* which provided for acquisition of land after payment of compensation not exceeding the market value of the land on December 31, 1946 was challenged. The party receiving the compensation felt that the date, on which the compensation was calculated, did not result in adequate compensation. The State reacted by saying that Article 31(2) read with Entry 42 of List III (which is basically an argument that the legislature has the right to make laws on property) of the Constitution gave full discretion to the legislature in determining the measure of compensation. The Supreme Court rejected the argument put forth by the State, arguing –

"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 to 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 should guide the determination of the amount payable. Whether such 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."

In this context it is apt to note stance taken by the Select Committee that recommended the Amendment, which clearly asserts the primacy of the legislature over the courts in deciding matters of compensation. To quote –

7 *State of West Bengal v. Mrs. Bela Banerjee* AIR 1954 SC 170

"The Committee feels that although in all cases falling within the proposed clause (2) of Article 31 compensation should be provided, the quantum of compensation should be determined by the legislature, and it should not be open to the courts to go into the question on the ground that the compensation provided by it is not adequate."

Turning to the other change introduced by the Fourth Amendment – the addition of Clause 2A, which said that if property were not transferred to the State under a law then it should not be deemed to have been a compulsory acquisition even though there may have been deprivation of property. This was a clarification of police powers of the State. It may be noted that this 'clarification' was once more motivated by a Supreme Court judgment which held that stock holders of a company which had been taken over for mismanagement under police powers stipulated in Article 31 A, had to be paid compensation.⁸

In 1964 the Seventeenth Amendment, was enacted to remove certain State land reform legislation from the purview of the courts by including a number of laws in States covered by erstwhile Ryotwari inam and jagir tenures, by including them in the Ninth Schedule. This impulse again had its origin in a judgment of the Supreme Court. In 1961, the Supreme Court had held taking of lands under the *Kerala Agrarian Relations Act 1961* was unconstitutional under Article 14 because a smaller compensation was paid for large tracts than for smaller holdings.⁹ However over the next decade, the right to property was going to be reigned in further on issues that were not associated with land reforms.

Twenty Fifth Amendment

As was the persistent case, unhappiness with yet other judgments of the court, provoked the next constitutional amendment affecting property as well. In this respect, the first case of import was the

8 Dwarkadas Srinivas v The Sholapur Spinning and Weaving Company Ltd. AIR 1951 Bombay 86
9 Karimbil Kunhikoman v The State of Kerala 1962 (1) SCR 829ff.

Vajravelu Mudliar case where land had been acquired under the *Land Acquisition (Madras Amendment) Act 1961* for the purpose of building houses and this move was challenged under Articles 31 and 14.¹⁰ The stance of the Supreme Court in interpreting Article 31(2) in this case was in consonance with the Bela Banerjee case, referred to earlier.¹¹ Justice Subba Rao stated –

"It follows that a Legislature in making a law of acquisition or requisition shall provide for a just equivalent of what the owner has been deprived of or specify the principles for the purpose of ascertaining the 'just equivalent' of what the owner has been deprived of. ... If the legislature, through its ex facie purports to provide for compensation or indicates the principles for ascertaining the same, but in effect and substance takes away a property without paying compensation for it, it will be exercising power it does not possess. If the Legislature makes a law for acquiring a property by providing for an illusory compensation or by indicating the principles for ascertaining the compensation which do not relate to the property acquired or to the value of such property at or within a reasonable proximity of the date of acquisition or the principles are so designed and so arbitrary that they do not provide for compensation at all, one can easily hold that the legislature made the law in fraud of its powers. Briefly stated the legal position is as follows. If the question pertains to the adequacy of compensation fixed or principles evolved for fixing it disclose that the Legislature made the law in fraud of power in the sense we have explained, the question is within the jurisdiction of the court."

Subba Rao reiterated this view subsequently in the Metal Corporation case¹² where he stated that even if it is argued that the principles for compensation are not arbitrary and adequacy could not be questioned in a court of law, if the compensation was illusory or if the principles were irrelevant to the value of the property, it cannot be said that a compensation which is the 'just equivalent' of the property acquired is being paid – 'it could be said that the

10 Vajravelu Mudliar v. Special Deputy Collector AIR 1965 SC 1017

11 State of West Bengal v. Mrs. Bela Banerjee AIR 1954 SC 170

12 Union of India v. Metal Corporation of India Ltd. AIR 1967 SC 634

Legislature had committed a fraud on power and therefore the law is bad'¹³.

Yet, not all judges of the Supreme Court agreed to the justiciability of compensation – Justice Hidayatullah in the *Shantilal Mangaldas*¹⁴ case declared the stance taken in the previous cases judged by Subba Rao as “obiter and not binding”. In this case the validity of *Bombay Town Planning Act 1958* was challenged on the grounds that the owner was to be given market value of land at date of declaration of scheme, which was not the just equivalent of the property acquired. In response to this claim, the court stated that after the passage of the Fourth Amendment resulting in the changes to Article 31(2) thereof, any question of ‘adequacy of compensation’ could not be entertained. It was maintained that the market value of land in 1927 was ‘a good principle for payment of compensation’ in 1957!

However, this was not destined to be the last words on compensation because the Supreme Court subsequently went on to make a crucial judgment. A Special Bench consisting of eleven judges gave a majority (ten to one) judgment in the so called Bank Nationalization¹⁵ case took a position that was very much in consonance with the position taken earlier by Chief Justice Subba Rao. In this case validity of the Banking Companies (Acquisition and Transfer of Undertakings) Act 1969 was challenged on grounds of inadequate compensation after the President of India nationalized 14 Indian Banks on the recommendation of Prime Minister Mrs. Gandhi. The Act did lay down principles for determination and payment of compensation to the Banks, which was to be paid for in form of bonds, securities etc. However such compensation was

13 This is a quote from a lecture delivered in 1968 by Chief Justice K. Subba Rao (then retired) under the auspices of the Forum of Free Enterprise, Bombay where he says “The Supreme Court in *Vajravelu* and *Metal Corporation* cases considered Article 31(2) in the context of compensation and held that if the compensation fixed was illusory or the principles prescribed were irrelevant to the value of the property at or about the time of acquisition, it could be said that the Legislature had committed a fraud on power and therefore the law is bad.” (1969) 2 SCC (Jour) 1

14 *State of Gujarat v. Shantilal Mangaldas* AIR 1969 SC 624, 1969 (1) SCC 509

15 *R.C Cooper v. Union of India* 1970 (2) SCC 298

challenged on the grounds that the Act did not fulfill Article 31(2) because, it was argued, the principles for determining compensation were irrelevant for arriving at the compensation and some of the assets of the Banks particularly intangible assets such as goodwill and unexpired leases for premises etc. were not taken into account for calculating compensation. The majority of the judges accepted this view, and stated that both before and after the amendment to Article 31(2) there is a right to compensation and by giving illusory compensation the constitutional guarantee to provide compensation for an acquisition was not complied with. It was also stated that the legislature is not the final authority on compensation. To get a flavor of the judgment the following quotations are illustrative –

“The Constitution guarantees a right to compensation – an equivalent in money of the property compulsorily acquired. That is the basic guarantee. The law must therefore provide compensation, and for determining compensation relevant principles must be specified; if the principles are not relevant the ultimate value determined is not compensation.”

It is also interesting to note the principles that the court felt that must be kept in mind while determining compensation –

“The broad object underlying the principle of valuation is to award to the owner the equivalent of his property with its existing advantages and its existing potentialities. Where there is an established market for the property acquired the problem of valuation presents little difficulty. Where there is no established market for the property, the object of the principle of valuation must be to pay to the owner for what he has lost, including the benefit of advantages present as well as future, without taking into account the urgency of acquisition, the disinclination of the owner to part with the property, and the benefit which the acquirer is likely to obtain by the acquisition.”

In particular, it was held that “potential value” and “the goodwill and the value of the unexpired period of long term leases” should be taken into account to determine compensation. It appears that on account of this judgment, some change was made to Act covering Bank acquisitions and passed by Parliament with a specified amount

being given to the Banks, though more significantly it provided the critical fuel to push for the enactment of the Twenty Fifth Amendment. However before looking at this enactment yet another court case related to property must be mentioned.

Upon having a large portion of their land declared 'surplus' under the *Punjab Security of Land Tenures Act 1953*, the Golak Nath family approached the Supreme Court under Article 32 of the Constitution challenging the Act.¹⁶ They challenged the Act on the grounds that the Act denied them their Constitutional Rights to acquire and hold property and practice any profession i.e. Articles 19(1) (f) and (g) were violated, and so was their Right to equality before law under Article 14. In addition to this, they sought to have the Seventeenth Amendment (which had placed the land reform law that affected them in the Ninth Schedule), the First Amendment and the Fourth Amendment declared *ultra vires* of the Constitution. The case was heard by eleven judges and Chief Justice Subba Rao speaking for the Majority said that while the earlier Amendments would not be affected, hereafter Parliament could not take away or abridge the Fundamental Rights. Among other concerns of import which are not possible to go into here, this case introduced the notion of the 'basic structure' of the Constitution – in terms of this judgment it meant that the Fundamental Rights are a part of the basic structure of the Constitution and any Amendment to the Constitution can be made only to preserve rather than destroy these rights.

These judgments did not augur well for the political establishment, which was involved in a fury of nationalizing industry and other 'socialist' endeavors. Austin (1999) on the basis interviews held with key political and administrative participants or observers, observes that the 'political and intellectual currents at the time' were, among other things, to overcome the Fundamental Right issue raised by the Golak Nath decision, to amend the Articles associated with property (especially Article 31) to keep the courts away from acquisition and compensation issues, to take 'property' out of the Fundamental Rights and to restructure the Constitution so that the Directive Principles were given precedence over the Rights

16 I.C Golaknath and Others v State of Punjab AIR 1967 SC 1647

component of the Constitution. It is precisely this current that came to express itself in the Twenty Fourth and Twenty Fifth Amendments to the Indian Constitution.

The Twenty Fourth Amendment authorized Parliament to amend any part of the Constitution and dictated that the President "shall" give his assent to any constitutional amendment presented before him. The Twenty Fifth Amendment got rid of the legacy of all the judgments that had raised issues of paying just compensation by replacing the term 'compensation' in Article 31(2) with 'amount' and barred courts from questioning this 'amount' on grounds that it was inadequate or paid in terms other than cash. This Amendment also inserted a new Article – Article 31C, which said that no law declaring its purpose to be fulfilling the Directive Principles could be challenged in a court of law that it did not do so.

To carry forth our tale, the constitutionality of these Amendments was challenged¹⁷ – albeit unsuccessfully in the monumental Keshvananda Bharati case.¹⁸ However the majority judgment, while overruling many aspects of the Golak Nath case on amending the Constitution, did rule that a constitutional amendment could not alter the basic structure of the Constitution. It is impossible to go into the nuances of the basic structure doctrine as explicated in this judgment – the case was judged by 13 judges, who not only divided into a majority and a minority but also expressed eleven opinions. For our purposes here it needs to be noted that in relation to property the fact that it upheld all the property related Amendments, not only led to later judgments to maintain that the right to property did not pertain to the basic structure of the Constitution¹⁹, but also legitimized the Janata Government, that followed the ouster of Mrs. Gandhi, plan to remove property as a Fundamental Right and implant it as a statutory right – a move that might have been made with conviction but was also a means to garner the support of the Communists.

17 Once again this case was sourced in a takeover of church lands by land reform laws legislated in Kerala.

18 Keshvananda Bharati v State of Kerala (1973) 4 SCC 225

19 Indira Nehru Gandhi v Raj Narain 1975 Supp SCC 1

Forty Fourth Amendment

As mentioned earlier, the Forty Fourth Amendment Act 1978 deleted Articles 19(1)(f) and Article 31 from the Indian Constitution. This Amendment, having removed property as a fundamental right also located it as a much weaker statutory right in Article 300-A, where it now reads, as 'No person shall be deprived of his property save by authority of law'. The law minister [here I draw on the quote noted in Austin (1999) pg.425] at the time, Shanti Bhusan, justified the removal of property as a Fundamental Right by saying in Parliament 'vast majority' of Indians did not own extensive property 'to equate the right to property to the more important rights ... [had resulted in curbing] ... the other fundamental rights'.

The current position of the Supreme Court on property can be gleaned from a one of the few direct judgments on property after the Forty Fourth Amendment - the *Jilubhai* case.²⁰ The case dealt with mines taken by the State under legislated laws from erstwhile revenue farmers, and upheld the right of the State to do so under Article 300-A, not entertaining any discussion on adequacy of compensation.²¹ Among other things it is unequivocally held that the right to property under Article 300-A is not a 'basic feature or structure of the Constitution'. Thus it is now the law of the land that the right to property is not a fundamental right.

Land Acquisition Act

While so far the description has concentrated on the constitutional issues surrounding property in India, before moving on to the next part of the paper it is important to get a sense of the law that governs routine takeover of land by the State in India. The takeover of land by the State is governed by the Land Acquisition Act 1894 (hereafter referred to as the Act). The Act, as the accompanying date suggests was legislated during the colonial period to take over land needed for public purposes. (The Act has been amended periodically with substantial amendments being made in 1984. Though in itself it is a

20 *Jilubhai Nanbhai Khachar v. State of Gujarat* 1995 Supp (1) SCC 596, AIR 1995 SC 142

21 See Part III of this paper where this judgment has been quoted on this.

central law, various States have also made amendments to the Act in consonance with unique local conditions.) The term 'public purpose' is not defined in the Act, though such 'public purpose' is illustrated by heads such as provision of land for village sites, planned development, public offices, education, health and other schemes sponsored by the government, to name a few.²² The preamble to the Act, states categorically that individuals whose property is taken over have a right to receive compensation. The bulk of the Act is devoted to creating a regime relating to the manner in which an acquisition is to be made, the compensation to be paid and the procedures that are to be followed while pursuing these activities.

Procedures Related to Acquisition

The process of acquisition begins with a preliminary notification by the government on signaling the need to acquire the land.²³ This is followed by an investigation as to whether the land identified is suitable for the 'public purpose' it is being taken over for.²⁴ If the land is found suitable, a declaration containing the intention of the government to take over the land is issued.²⁵ The Collector of the district in which the land is located is empowered by the Act to make the order for the acquisition and is required to measure and mark out the land which is mentioned in the declaration.²⁶ The Collector then invites objections if any (to the measurement of the land), both in respect of the acquisition and the compensation to be

22 Section 3 (f)

23 This is as per Section 4, which states that the notification be published in the Gazette and two local newspapers, at least one of which is in the regional language. The notification is to be issued by the appropriate Government that is generally the State Government (or the Central Government if the land is being acquired for the purposes of the Union)[as per Section 3(ee)].

24 As per Section .4(2) of the Act, the officer has the power to do all acts to ascertain the suitability of the land for the purpose for which it is sought to be acquired, for example he can dig or bore into the subsoil, cut down any standing crop, etc.

25 As per Section 6 of the Act, the notification should contain the purpose for which the land is to be acquired i.e. for public purpose or for the benefit of a company.

26 As per Section 7 and Section 8 of the Act

paid, from the persons interested in the land.²⁷ The Collector is expected to follow principles laid down in the Act under Sections 23 and 24 (as directions to the courts for evaluating compensation – see below) in deciding the value of the compensation. On completion of the enquiry about the objections, the Collector makes an award in relation to the – true area of the land to be actually acquired; compensation to be allowed; and the manner of apportionment of the compensation among the interested persons.²⁸ After the award has been made, the Collector takes possession of the land, “which shall thereupon vest absolutely in the government, free from all encumbrances”.²⁹

The Collector has the power to acquire the land, in cases of urgency for a period of three years without following the procedure enumerated above.³⁰ The Act also empowers the Government to temporarily occupy waste or arable land for a period of three years after paying compensation to persons interested either as a lump sum or in periodical payments, with the option to make the move more permanent by following requisite steps as set out by the Act.³¹

If any interested person does not accept the award, such a person can make an application to the Collector to refer the matter to the court.³² The court shall then look into the objections both in relation to acquisition and compensation and pronounce a judgment.

Compensation

On compensation, under Section 23 of the Act it is stated that the “court shall take into consideration” the following principles in

²⁷ As per Section 9 of the Act, the persons interested include all persons claiming an interest in compensation to be made on account of the acquisition of land and if he is interested in an easement affecting the land as per Section 3(b).

²⁸ As per Section 11 of the Act, the Collector has to obtain the approval of the appropriate Government.

²⁹ Section 16 of the Act

³⁰ As per Section 17 of the Act, in which it is also provided that the Collector pay 80% of the estimated compensation to the interested persons before taking possession (introduced in 1984). The section also provides special provision for acquisition of land for the purposes of Railways.

³¹ As per Section 35 of the Act

³² S.18 of the Act

relation to the compensation awarded:

1. Market value of the land on the date of the declaration;
2. Damage sustained by the person interested by reason of destruction of standing crops and trees at the time of taking possession by the Collector;
3. Damage sustained by reason of severing the land from the interested persons, other land;
4. Damage sustained due to injury to other property or earnings;
5. Damage sustained due to change of residence or place of business warranted by the acquisition; and
6. Damage sustained due to diminution of profits between time of declaration and actual possession.

Additionally, Section 23 states that “In addition to the market-value of the land as above the Court shall in every case award a sum of fifteen per centum on such market-value, in consideration of the compulsory nature of the acquisition.” – which is referred to as *solatium* in various judgments. If the compensation claim has been adjudicated, according to Section 28, the Collector has to pay interest on the value of the compensation from the date possession has been taken and the date of the judgment.

In Section 24, the court is instructed, “not to take into consideration” the following factors in determining compensation:

1. Degree of urgency;
2. Disinclination of person interested to part with the land;
3. Damage sustained which would not have fetched damages if a private person had caused it;
4. Damage likely to be caused by the use to which the land is put after acquisition;
5. Increase in the value of land due to the new use;

6. Any increase in the value of other land of the interested person due to the new use of the acquired land;
7. Any improvements made on the land after the notification was issued; and
8. Increase in value caused by use opposed to public policy or forbidden by law.

In addition to this, the Act stipulates that a court on reference, shall not award compensation that is less than that initially ordered by the Collector. The compensation shall be apportioned as per the agreement, if any, between the interested persons or by the decision of the court in the absence of an agreement.³³

In case of acquisition of land for companies the company concerned is required to enter into an agreement with the appropriate government, which shall be published. The agreement shall contain clauses relating to the payment to be made to the appropriate government, terms on which the land shall be held by the company, the time and conditions on which the object for which the land is acquired is to be fulfilled. Generally the acquisition is done only for the purpose of Government companies and not for private companies except for the purpose of erecting of dwelling houses for the workmen employed by the private company.³⁴ The process of acquisition shall not begin unless the appropriate government has approved the acquisition for the company and the

³³ As per Section 25 of the Act, which says that the amount ordered by the Court should not exceed the amount claimed but the amount should not but should not be less than the amount set by the Collector. If the applicant has refused to or not made a claim without sufficient reason then only the latter part of the restriction above shall apply. If the claims is committed for a sufficient reason then the amount awarded should not be less but ay be more than the amount awarded by the Collector.

³⁴ S.44B of the Act (introduced in 1962).The validity of this clause has been upheld in R.L.Arora v.State of U.P.,AIR 1964 SC 1230.A government company as per section 617 of Companies Act, means a company where the government at least 51% of the paid up share capital. Though a private company is defined in that Act as one with restrictions in relation to transfer of shares, limited membership, etc and S.44B refers to that definition, it appears that S.44B refers to all companies which are not government companies

agreement mentioned above has been executed. The consent of the government shall **not be given** unless the government on an enquiry is satisfied that the land is being acquired for any of the following purposes:

- (i) Erection of dwelling houses for the workmen;
- (ii) Construction of some building or work for a company engaged in industry or work for a public purpose;
- iii) Construction of some work that is likely to prove useful to the public;

The company shall not sell, mortgage, lease or gift etc., the land except with the prior sanction of the appropriate government.

Prior to the amendment in 1984 the company itself was empowered to enter and survey the land to be acquired.

PART III

The Repercussions of (Un) Constituting Property

The tale of the constitutional construction of property in India is above all a description of the 'bargain' between the legislature and the judiciary in the sense portrayed by Cooter (2000). As the description attests, the tensions that were present at the moment of the inception of the Constitution of India came out in the open after the Indian Constitution became operational – Should takings of property by the State be subject to due process of the law? In so much so as the judicial decisions that ruled in favor of paying just compensation were a reflection of the due process, they put a physical as well as financial brake on the takings of the executive-legislature combine – acting as an impediment to the land reform and industrial policies. The way things turned out, the solution or the 'bargain' to the problem was not worked out within a framework that privileged the separation of powers, rather the solution came from establishing a unitary center of power by progressively amending the Constitution of India – the Constitution itself became the site of the bargain. The sacrifice of separation of powers in the interest of apparent expediency has resulted, apart from other costs, in social costs that have been and continue to be incurred on account of the violation of the doctrine. It is an important exercise to make a list of these costs.

Social Costs

There is by now a fairly large law and economics literature on takings. The bulk of the literature is situated within the American institutional setting – where the American Constitution determines the broad takings doctrine (eminent domain) that says that takings must be for a public purpose and just compensation should be paid for the taking.

Compensation

Ignoring the matter of the public purpose, i.e. assuming for the moment that there is a socially justified public purpose in place for

the taking, the law and economics question that has been raised is – What compensation should be paid out to ensure an efficient allocation of resources? The answer to this question has been broadly framed taking into account efficient land use decisions of private individuals whose property can be potentially taken for a public purpose. If the compensation paid out is related to the investment decision of the private individual, this creates a moral hazard – the private individual has an incentive to over invest and therefore logically should merit no compensation to ensure a socially optimal level of investment. On the other hand, paying no compensation causes the government to perceive the act of taking as being costless resulting in the overproduction of the public good. Thus, the design of an efficient level of compensation involves addressing the trade off between the moral hazard of the private individual and the 'fiscal illusion' of the government. [Miceli (1997)] Various designs have been suggested in the literature but it is beyond the scope of this paper, at the moment, to go into the matter in further detail – rather the point to be taken for the present purpose is that compensation of some form is required in the interest of social efficiency.

Given that compensation is required, the problematic that I would like to raise is who should decide this compensation – Is the decision best located in the courts or can it be efficiently located in the executive and/or the legislature? The problem on hand is one that involves a jointly determined surplus – private property is being taken over for a public purpose, a purpose which is presumably providing a surplus for all members of society including the person whose property is being taken albeit minus the loss of his property for which he should be compensated at least to maintain status quo. To make this valuation requires soliciting private information, which judicial procedures are best equipped to handle. However if the legislature or the executive were to fix compensation without the possibility of judicial review or without following judicial procedures the chances are that there is certain to be under valuation of compensation. Minimally, the under valuation of compensation is bound to perpetuate the problem of 'fiscal illusion' mentioned above resulting in an overproduction of the public purpose. Such an act would clearly be an act of legislative and or executive activism, a

violation of the doctrine of separation of powers in a functional sense. It was precisely the point of the judgments made by Subba Rao mentioned earlier, to militate against such legislative activism. To repeat one of his statements³⁵ -

"If the legislature, through its ex facie purports to provide for compensation or indicates the principles for ascertaining the same, but in effect and substance takes away a property without paying compensation for it, it will be exercising power it does not possess. *If the Legislature makes a law for acquiring a property by providing for an illusory compensation or by indicating the principles for ascertaining the compensation which do not relate to the property acquired or to the value of such property at or within a reasonable proximity of the date of acquisition or the principles are so designed and so arbitrary that they do not provide for compensation at all, one can easily hold that the legislature made the law in fraud of its powers.* Briefly stated the legal position is as follows. If the question pertains to the adequacy of compensation fixed or principles evolved for fixing it disclose that the Legislature made the law in fraud of power in the sense we have explained, the question is within the jurisdiction of the court." (My emphasis)

The contrast is evident when a judgment of the Supreme Court³⁶ more recently says

"Legislature has power to acquire the property of private person exercising the power of eminent domain by a law for public purpose. The law may fix an amount or which may be determined in accordance with such principles as may be laid therein and given in such manner as may be specified in such law. However, such law shall not be questioned on the grounds that the amount so fixed or amount determined is not adequate. ...However, when Article 31(2) has been omitted altogether, judicial interpretation should not be a tool to reinduct the doctrine of compensation as concomitance to acquisition or deprivation of property under Article 300-A."

³⁵ Vajravelu Mudliar v. Special Deputy Collector AIR 1965 SC 1017

³⁶ Jilubhai Nanbhai Khachar v. State of Gujarat 1995 Supp (1) SCC 596, AIR 1995 SC 142

While principles under the Land Acquisition Act for determining compensation (primarily market value) and the fact that within the parameters of these principles compensation can be challenged in the courts are matters far from being objectionable in themselves, there remains an element of activism in the fact that the principles themselves cannot be challenged in court of law. To repeat a quote again, it may be recalled that in the Bank Nationalization case³⁷ the Supreme Court pointed out -

"The broad object underlying the principle of valuation is to award to the owner the equivalent of his property with its existing advantages and its existing potentialities. Where there is an established market for the property acquired the problem of valuation presents little difficulty. *Where there is no established market for the property, the object of the principle of valuation must be to pay to the owner for what he has lost, including the benefit of advantages present as well as future,* without taking into account the urgency of acquisition, the disinclination of the owner to part with the property, and the benefit which the acquirer is likely to obtain by the acquisition." (My emphasis)

The principle of basing compensation on market value is particularly difficult in the case where takings are on a very large scale, for example the displacement caused by the construction of the Narmada Dam. In such cases the market value of land is hardly going to be adequate compensation for the value lost on account of the disruption of a social world. The value of small private transactions will not reflect the value of an entire way of life.

Public Purpose

In addition to the problems created by the violation of separation of powers in the functional sense, there is a violation of the doctrine in a structural sense once one considers the fact that public purpose itself is largely not subject to judicial review. The moratorium on questioning public purpose holds both at the constitutional level as well as at the local level in relation to the Land Acquisitions Act. (The details of this have not been presented here.) To make this

³⁷ R.C Cooper v. Union of India 1970 (2) SCC 298

point, following Epstein (1985) it can be argued that public purpose must open to judicial review because since takings involve a forced exchange that generates a surplus, this surplus should be divided in proportion to the investment made in the State by citizens – a requirement which is satisfied in the case of public goods. If the surplus is not divided in proportion to one's investment, then strategic enterprises in society will appropriate this surplus – creating a center for rent-seeking activity or capture in the act of takings. It is an important agenda to investigate the rent seeking activity that is encouraged in India by the fact that the power to determine public purpose lies very determinedly in the executive with the possibility of little or no judicial review.

Other Concerns

Among the many other consequences that need to be investigated in relation to the story told, for example the cost that arises on account of the fact that issues of property are often worked out through other fundamental rights such as the right to religion, there are interesting possibilities in law for so called 'new property'. Given the very broad definition of property accepted in Indian law³⁸, it is possible that any such property could be appropriated by a law made by a competent legislature in the public interest as long as the law fulfills other constitutional requirements and the weak conditions of Article 300A. Therefore, while the Patents Act, 1970 (Act 39 of 1970), could be amended to conform to the commitments already given by India under the TRIPS Agreement, the Parliament or even a state legislature could further provide, in the same law, or in another law, for stricter conditions related to importation, failure to work,

and compulsory licensing of, say, life saving drugs' patents, and, in case of any real or artificial scarcity of such drugs being created by the patent holder. In addition to enabling compulsory licenses, the law could in principle acquire patents as property (under Article 300A) by legislating suitable payment of compensation by the State. Thus, the Constitutional regime for the protection of intellectual property rights in India is far from being clear-cut, perfect, or precise, and can be said to be as yet unsettled in law.

38 A very widely quoted definition of property is given by the following passage – "Now the term property in the context of Article 31 which is designed to protect property in all its forms must be understood both in a corporeal sense, as having reference to all those specific things that are susceptible to 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 use and enjoyment of things to the exclusion of others**" (**emphasis added**)". State of West Bengal v. Subodh Gopal, AIR 1954 SC

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