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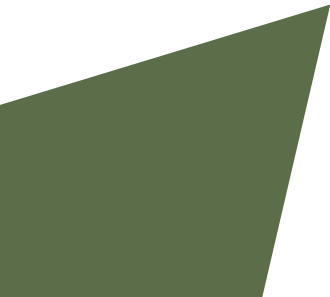
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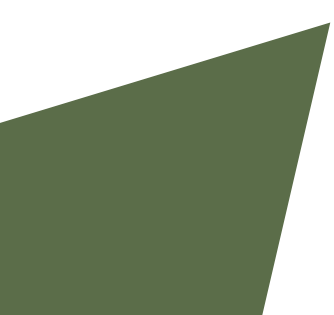
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**Protector of Law Become Grabbers of Property: Examining Diverging
Public and Private Necessity Goals in a Welfare State**

Aryan Dhingra & Akshaya Kapoor

Protector of Law Become Grabbers of Property: Examining Diverging Public and Private Necessity Goals in a Welfare State

*A myriad of distinguished academics has expressed varying opinions on the right to property, over the years. For Pufendorf and Hugo Grotius property was both a conventional and natural right in civil society. On the other hand, Rousseau was of the view that property has been exclusively a traditional civil right secondary to the interest of public. Furthermore, he asserted that it is certainly not in the interest of public to infringe them.¹ Moreover, Jefferson asserted that property rights and liberty go hand in hand. The role of property rights as a safeguard to tyranny and economic repression by the government has been recognized by different political thinkers and jurists around the world.² In fact, the U.S Supreme Court in *Lynch v. Household Finance Corpn.*³ Opined that “the right to enjoy property in the absence of unlawful deprivation, is no less than the right to speak or the right to travel, is in truth a ‘personal’ right, notwithstanding the ‘property’ in question be a welfare check, a home, or a savings account”. It is a conceded position that the State cannot be stripped off its power to acquire land for public good in its entirety. However, the major area of concern and modification is it's just, fair, and reasonable application to benefit the public without flouting private rights⁴.*

¹ *K.T Plantation (P) Ltd v. State of Karnataka*, (2011) 9 SCC 1.

² *Delhi Airtech Services (P) Ltd v. State of U.P.*, (2011) 9 SCC 354.

³ 405 US 538 (1971).

⁴ “*Law of Acquisition and Requisitioning of Land*”, 10th Report, Law Commission of India, 1958.

HISTORIC BACKGROUND TO THE CONCEPT OF ADVERSE POSSESSION

The idea of adverse possession and the productive use of land found its origin deep-rooted to the early Feudal and Roman Law.⁵ At that time, the monarch would inherit property rights and further grant land to common people, not to own, but to employ it on the king's behalf. During the colonial times, before the passing of the bill of rights, land would often be acquired by the State from private landowners without any compensation.⁶

The concept was born in England around 1275 when a person was allowed to claim "seisin" on his ancestral property. Later on, the statute of limitation was put into force in 1623 with an attempt to permit an individual to acquire title to a property which he had in possession for twenty years or more. This ancient English doctrine was intended to minimize land wastage and time-consuming litigation. Adverse possession as a concept was later implemented in the United States at a time of rising property disputes. The American doctrine exacted the English position.⁷ As for the law in India, the Hon'ble Supreme Court in *Nair Service Society v. K.C Alexander*⁸ approved the dictum by the Judicial Committee of the Privy Council in *Perry v. Clissold*⁹, incorporating the British stance in the Indian Limitation Act, 1963.

LAW GOVERNING DOCTRINE OF ADVERSE POSSESSION IN INDIA

The Hon'ble Apex Court has dealt with the doctrine in multitude of cases. In the eye of the law, lack of use of property by its holder (irrespective of the time-period) would not affect his/her title. However, the situation changes when a stranger takes possession and claims a right over it. In a gist, adverse possession is a hostile possession that impliedly or expressly refuses the true owner's title over the property.¹⁰ A combined reading and judicial interpretation of Article 27, 64 and 65 of the Limitation Act, 1963 states that a possession must be sufficient in continuity and inpublicity and should show by clear and indisputable evidence that such possession was hostile to the true owner.¹¹ Additionally, the burden lies on the defendant to prove that his possession was peaceful

⁵ John G. Sprankling, "Understanding Property Law" 436, (2000).

⁶ William Michael Treanor, Note, "The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment", 94 Yale L.J. 694, 694-695 (1985).

⁷ Andrew Dick, "Making Sense Out of Nonsense: A Response to Adverse Possession by Governmental Entities", 7 Nev. L. J. 348 (2007).

⁸ AIR 1968 SC 1165.

⁹ (1907) AC 73.

¹⁰ *Karnataka Board of Wakf v. Govt. Of India*, (2004) 10 SCC 779.

¹¹ *Annasabeh v. B.B.Patil*, AIR 1995 SC 895.

and open, which the Courts ascertain through the facts and circumstances of each case. On the other hand, onus lies on the plaintiff to validate his title within 12 years (statutory period from the date of dispossession). The “Physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusion to the real owner are the most crucial factors to be accounted in cases of this kind”.¹² The Hon’ble Supreme Court in *Gurdwara Sabib v. Gram Panchayat Village Sirthala and another*¹³ held that from a natural inference of the language used in Article 65 of the Limitation Act, 1963 it can be construed that the claim of adverse possession is a defense accessible only by a defendant (adverse possession as a shield). Moreover, no declaration can be pursued by a plaintiff with regards to his ownership on the foundation of an adverse possession (adverse possession as a shield and not as a sword).

RIGHT TO PRIVATE PROPERTY: A HUMAN RIGHT IN A WELFARE STATE

Majority of modern constitutions, barring a few communist countries have recognized its citizens right to own private property. The most understandable indication of vesting control over property to an individual is shown by his/her ability to prohibit others from access to or use of the same resource in considering the varying interpretations given to the meaning of private property in diverse legal systems.¹⁴ Consequently, a person cannot be robbed of his right to property without the due process of law.

Notwithstanding the fact that right to property was erased with regards to Article 19(1)(F) of the Constitution from Part III, vide the 44th Amendment Act, 1978. Article 300-A of the Constitution was added through the same Amendment, declaring that “no person shall be deprived of his property save by authority of law”.¹⁵ In Addition, Article 31 of the Constitution provides that law must set a compensation or principles governing it, for citizens deprived of their private property.

The House of Peers in *JA Pye (Oxford) Ltd. v. Graham*¹⁶ highlighted the paradox in the law of adverse possession. The Court found that a law which ousts an owner on the basis of passivity of 12 years is “illogical and disproportionate”. Such a law, in effect, “seem draconian to the owner” and “a windfall for the squatter”.

¹² *T. Anjanappa And Others v. Somalingappa And Another*, (2006) 7 SCC 570.

¹³ (2014) 1 SCC 669.

¹⁴ Hashmat Ali Khan, “*The Land Acquisition Policy in India with Special Reference to Property Rights: An Analysis*”, 23 ALJ (2015-16) 303.

¹⁵ *Delhi Airtech* (n 2).

¹⁶ *P.T Munichikkanna Reddy v. Revamma*, (2007) 6 SCC 59.

The Hon'ble Supreme Court has time and again found its bounded duty and responsibility to push for a relook to the archaic law of adverse possession, in the greater good of people. The Hon'ble Court in *State of Haryana v. Mukesh Kumar*¹⁷ pronounced that adverse possession allows a squatter (guilty of tortious or even a criminal liability) to gain legal title to an illegally possessed property to be logically and morally speaking, baffling. The Judges in *Hemaji Waghaji Jat v. Bhikhabhai Khengarbbhai Harijan*¹⁸ failed to understand why this law places a perk on dishonesty, impelling the owner to forgo his title only because of his inaction in seizing possession within limitation.

However, in a recent Judgment, the Hon'ble Supreme Court reinstated the faith of an Indian citizen on its judiciary as a redeemer of human rights. In *Vidya Devi v. The State of Himachal Pradesh and Ors*¹⁹, an eighty years old lady's property was forcefully secured by the State Government for the purpose of road construction (found under "public purpose" in the current Land Acquisition legislation). The appellant, being an illiterate widow from a rural background, was completely unaware of her rights and entitlement in law; failed to file for compensation for the land compulsorily acquired over by the State. The judges therein opined that forceful dispossession from private property without due procedure would be violative of a human and Constitutional right (under Article 300-A).²⁰ Furthermore, a welfare State governed by the Rule of Law cannot arrogate to itself a status beyond what the Constitution mandates. The Court was astounded by the State's argument claiming adverse possession on a land in their continuous possession for over 42 years. A critical and a vital principle/clarification was made by the Court through the following words:

"The State cannot be sanctioned to perfect its title over land by invoking the doctrine of adverse possession to grab the property of its own citizens, as has been done in the present case". Thus, the Rule of Law triumphed yet again.

In a modern democracy, the Rule of Law ought not be grounded on what English monarchs chose was in their best interest centuries ago. Adverse possession has been running in favor of governmental entities for over a hundred years now. Nothing is unique about government-owned land that justifies sovereign immunity from adverse possession.²¹ In fact, fairness mandates that if the government can acquire private land by the way of adverse possession, it should be able to

¹⁷ (2011) 10 SCC 404.

¹⁸ (2009) 16 SCC 517.

¹⁹ (2020) 2 SCC 569.

²⁰ *Hindustan Petroleum Corpn. Ltd. V. Darius Shapur Chenai*, (2005) 7 SCC 627.

²¹ Walter Quentin Impert, "Whose Land Is It Anyway: It's Time To Reconsider Sovereign Immunity From Adverse Possession", (2001) 49 UCLA Rev 447. ; *Mukesh Kumar* (n.17)

lose title under the same conditions.²² Going forth, a holistic understanding of the Indian jurisprudence on “compulsory acquisitions” requires an examination of the approach the judiciary employs in interpreting these laws, particularly with their definition of “public purpose”. The Authors deem it appropriate to delve into the Land Acquisition Act, 1894 alongside its subsequent amendments for primarily two reasons. First, most acquisitions of land in India ensue under this law; and, secondly the law is of colonial heritage, and debatably carries a certain conviction in the scope, and legitimacy of the power of the State to acquire land.²³

LAND ACQUISITION IN INDIA

The power of a state to acquire private property from its citizens for public welfare and the subsequent rights of the property owner to be compensated duly are well established rights, which are often justified by maxims such as *‘salus populi est suprema lex’* and *‘necessitas publica major est quam private’* (public good is the highest order of law and public necessity is greater than private needs). The process by which the Government of India or a particular state acquires private land for the purpose of development or urbanization of the land and provides rehabilitation the landowners is known as land acquisition.²⁴

Land acquisition laws in India have become an extremely vexing policy-making problem for lawmakers in India with the controversies and claims revolving around compensation of the property owners and the overall debate regarding right to private property in comparison to public necessity²⁵. Accumulation of land, loss of livelihood of property owners, reallocation from fertile agriculture land and the value of property ascertained by government officials are the primary debatable concerns. The origins of this dispute arise from concerns of a satisfactory alternative to the property owners and the political origin of the policy decisions²⁶. Statutes governing the right of eminent domain in India have seen a tumultuous array of amendments and ordinances in order to make it beneficial accordance to the governing party’s mandate. However, the current governing laws are still a matter of concern in many aspects and see the judiciary stepping in very often to bring a sense of equity and justice in the procedure of acquisition of private property. The archaic

²² Ibid.

²³ Krithika Ashok, Paul T. Babie, and John V. Orth, “Balancing Justice Needs And Private Property In Constitutional Takings Provisions: A Comparative Assessment of India, Australia, and the United States”, 42 Fordham Int’l L.J. 999 (2019).

²⁴ Hashmat Ali (n 14).

²⁵ Dr Chetan Upadhyay “Research Paper On Land Acquisition In India” South Asia Journal of Multidisciplinary Studies, Vol.5, 6,2015.

²⁶ Sanjoy Chakravorty, “The Price of Land: Acquisition, Conflict And Consequence”, Oxford University Press, New Delhi, 2013.

*Land Acquisition act of 1894*²⁷ was comprehensively replaced in 2013 by the RFCTLARR Act²⁸ which required prior consent of property owners, SIA²⁹ of every single project involving land acquisition to completely involve concerns of the persons whose property was being taken over. These were a few of the notable aspects of the now Amended Act. The ordinance proposed in 2014 and subsequent ratification in 2015 nullified a number of these provisions, making land available to the state with reduced obstacles. The changes evidently represent the clout of industry in policymaking which leads to those dependent on their land ultimately losing out in this contest of power.³⁰ However, the flip side would find the 2013 Act to be extremely anti-industry which made it very difficult for industries to acquire land. Some say that the 2014 Act is a welcome compromise between the 2 sides, benefitting the farmers as well as catering to the developmental demands of the country in an expeditious manner without diluting the rehabilitation and resettlement aspect.³¹

DEVELOPMENT OF LAND ACQUISITION LAWS IN INDIA

THE LAND ACQUISITION ACT, 1894

The land Acquisition Act, 1894 permitted the Government to take private property in the country. Under the statute, ‘land acquisition’ meant acquiring land for any public purpose from individual owners after compensating them with a fixed amount. The Act accorded the state as the ultimate owner of all land in the country which it had the capability to acquire from the public.³² Through various amendments in the Act, the two constant aspects that remained was the utilization of the land for public purpose and compensation based on market value³³. The Act, however, had many drawbacks such as being completely unfavorable to the landowners who depended on their property as a source of livelihood in a country that was primarily based on agriculture as it only provided compensation and improper means of rehabilitation³⁴. The Act provided for

²⁷ Land Acquisition act, 1894.

²⁸ The Right to Fair Compensation And Transparency In Land Acquisition, Rehabilitation, And Resettlement Act, 2013.

²⁹ Social Impact Assessment.

³⁰ Saxena, K. B. “*The Ordinance Amending The Land Acquisition Law (2013): Farmers Lose Out In The Unequal Contest Of Power.*” Social Change 45, no. 2 (June 2015).

³¹ Singhanian & Partners LLP, Solicitors and Advocates, “*Right To Fair Compensation And Transparency In Land Acquisition, Rehabilitation And Resettlement (Amendment) Ordinance, 2014 - Real Estate and Construction – India*”. 27 Jan. 2015, <www.mondaq.com/india/land-law-agriculture/369250/right-to-fair-compensation-and-transparency-in-land-acquisition-rehabilitation-and-resettlement-amendment-ordinance-2014>.

³² Sinha, Kritiya, and Neha Singh. “*Land Acquisition In India: History And Present Scenario.*” Journal Of Legal Studies And Research, vol. 2, issue. 4.

³³ Nandal Vikas, “*Land Acquisition Law In India: A Historical Perspective*”; International Journal of Innovative Research and Studies, Vol.3 Issue 5, 2014 Pg 468.

³⁴ Saxena K.B. (2011); “*Rehabilitation And Resettlement Of Displaced Persons*”. Chapter 3 in Development Induced Displacement, Rehabilitation and Resettlement in India.

compensation to be given at market rate, however the mechanism which was provided for ascertaining market rate would result in the owner receiving significantly low rate for his property. This was only changed when the Supreme Court intervened and asked for the owner to be paid the highest market price to give an advantage to the already disproportionately placed landowner as in the case of *Mehrawal Kbewaji Trust*.³⁵

The land could only be obtained for 'public purpose', however, the word was given such a wide ambit that it encompassed any rural or city planning projects. The specified act which was enacted by the British government was adopted by independent India, unchanged. Consequently, it could not meet the evolving requirements and resulted in problems in carrying out projects.

LAND ACQUISITION ACT, 2013

The new Act marked a drastic change in the land acquisition process. It narrowed down the definition of public purpose to give a concise understanding of the reasons under which land could be acquired. It promulgated the requirement of consent of landowners for a PPP³⁶ or private company project. Compensation terms were ramped up by two to four times the market price in urban and rural areas respectively³⁷ and the Act also installed a compulsory mechanism of SIA³⁸ to be conducted for every project³⁹. This resulted in increased payouts to farmers and landowners however led to massive rise in project prices for industries and received major backlash in less than a year of being passed.⁴⁰

LAND ACQUISITION (SECOND AMENDMENT) BILL, 2015

The amendment sought to address the industry concerns by doing away with the SIA and consent requirement in 5 specified sectors. "(i) national security and defense, (ii) rural infrastructure including electrification, (iii) industrial corridors, (iv) affordable housing, and housing for the poor and (v) infrastructure and social infrastructure projects".⁴¹ These exceptions had a very wide scope and covered a lot of projects. The cap on the multi-crop fertile land was

³⁵ (2012) 5 SCC 432.

³⁶ Public Private Partnership.

³⁷ "*Analyzing the Act, the 2014 Amending Ordinance And The Act's Impact On The Indian Infrastructure Sector*", (2015) 5 GJLDP (July) 27.

³⁸ Social impact (n 29).

³⁹ RAMESH, JAIRAM AND MUHAMMAD ALI KHAN, "*LEGISLATING FOR EQUITY: THE MAKING OF THE 2013 LAND ACQUISITION LAW*". OXFORD UNIVERSITY PRESS", 2015.

⁴⁰ Rao, Karra kameswara, "*Land Acquisition Act – 2013 And Land Ordinances – 2014: A Mockery Of Democracy*." Bharati Law Review, April - June, no. 2016.

⁴¹ "*India's Controversial Land Acquisition Laws - Real Estate And Construction – India*". PSA , 2 apr. 2015, <<https://www.mondaq.com/india/land-law-agriculture/386234/indias-controversial-land-acquisition-laws>>.

also removed for these exempted categories. Additionally, the term ‘private company’⁴² was also replaced with private entities enabling more types of organizations to acquire property. Furthermore, authorizing acquisition for private hospitals and educational institutions. It also reduced government accountability by deleting the provision which made department heads directly liable in case of any mistakes and forced the sanction to be passed through the government which may possibly lead to increase in red-tapism. However, compensation and rehabilitation were still applicable to these exempted projects. One notable improvement was the amendment of section 105 of the Act to extend the compensation and rehabilitation benefits to property owners whose land was acquired in accordance to the previously exempted 13 central statutes.

ANALYSIS

Both the 2013 Act and the subsequent ordinance were heavily scrutinized as well as praised for its different aspects by diverse sectors. As mentioned earlier the bills were based on the prioritization of the ruling party, fluctuating between pro-farmer and Pro-Industry objectives. The 2013 Act was a landmark Act in its nature and a massive improvement from the previously applicable archaic and draconian legislation. It contained all the essential requirements of the doctrine of eminent domain within its purview, however with the extensive nature of the checks and systems put in place, it had a direct impact on the infrastructural development and manufacturing potential of India. The lawmakers finally bowed down to the manufacturing sector lobby and promoted the current legislation which was enacted after several cuts in the parliament by the opposition. The dichotomy of the situation is that on one hand, the manufacturing sector was dissatisfied with the 2013 act. On the other hand, the pro-farmer lobby was displeased with the 2014 ordinance.

The authors would like to emphasize that there is a fine balance that needs to be maintained in facilitating land acquisitions for industries while maintaining protection for property owners. The currently adopted ordinance requires further measures to protect the right to property and livelihood of the property owners, while still promoting industrial development. What is needed is adequate social protection given to all those dependent on the land and all those covered in the affected family section⁴³ should to be given all the benefits, without fault according to normative decided pattern and not according to the discretion of the collector in charge of the project. The land being acquired in most cases is fertile agricultural land that provides for many people while barren land lays waste. priority should be given to utilization of wasteland before agricultural land.

⁴² The Companies Act, 2013.

⁴³ The Right To Fair Compensation And Transparency In Land Acquisition, Rehabilitation And Resettlement Act, 2013, s 2.

The principle which should guide the government in its approach of tweaking the acquisition laws should be the economic concept of ‘Pareto Efficiency’⁴⁴ (when compared to the original status at least one person is made better and none are made worse) which can only be implemented by creating adequate safety nets and comprehensive scrutiny of each acquisition.

CONCLUSION

The dilemma and debate surrounding balancing public and private necessity and the just, fair and reasonable application of State powers still subsists.⁴⁵ Although the laws regarding land acquisition have transitioned from being completely coercive in nature, there still remain a plethora of infirmities with the law.⁴⁶ Although the Act terms the ‘affected persons’ as ‘partners in development’⁴⁷, the nature of acquisition at heart still remains compulsory and flouts this so called partnership of consent. The extent of resettlement packages only attempts on reducing the immediate damage suffered by the people rather than improving their socio-economic condition. The overall essence of rehabilitation offered in the Act shifts an individual from self-sustenance to dependence. Even occupational opportunities offered fail to fulfill their purpose as most of the displaced do not end up benefiting the offers.⁴⁸

The cost-benefit analysis approach adopted by the government fails to live up to its promise of making those affected, partners in development. While dealing with rehabilitation as a one-time affair it falls short of aiding people in re-establishing their lives at the site of resettlement. The development so carried out through the operation of law has wreaked havoc to those left displaced for the so-called purpose of public development. If the state can derive such great utility out of the land obtained, why has it not been able to disburse the benefits to those displaced as it should under its title of a welfare State. The land acquisition laws have removed the aspect of dialogue between those whose land is taken and the facet of social assessment has only been reduced to a method of gauging the destruction caused by the project and not the public utility derived.⁴⁹ The role of a welfare State is an extremely crucial one, which it must perform while still respecting private property. Although the mechanism may have changed, the approach embedded in the new Act still show signs of an ideology adopted in pre-independent India. As mentioned in the analysis

⁴⁴ Ghatak, Maitreesh and Dilip Mookherjee. “*Land Acquisition For Industrialization And Compensation Of Displaced Farmers.*” Journal of Development Economics, North-Holland, 11 Jan. 2013.

⁴⁵ *Law of Acquisition* (n 4).

⁴⁶ Amita Punj, “*Participation Under the New Land Acquisition Legislation: A Paradigm Shift Or A Safety Valve*”, 9 RMLNLUJ (2017).

⁴⁷ “*Partners In Development Under The New Land Acquisition Law: A Misnomer*”, 59 JILI (2017).

⁴⁸ Gautam Khagesh, “*Holdout Problems And Private Takings India, The Comparative Constitutional Law And Administrative Law Quarterly*”, 3.2 CALQ (2017) 7.

⁴⁹ *Law of Acquisition* (n 4).

section above, a fine balance must be maintained to usher in the era of development and public welfare while still keeping in mind respect of private property and careful assessment and provisions for those heavily dependent on that property for their survival.