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**FINDING VALUE IN REGULATION AND ACQUISITION OF
PRIVATE PROPERTY: A Quantitative Case Law Analysis**

Rohan Karan Mehta

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FINDING VALUE IN REGULATION AND ACQUISITION OF PRIVATE PROPERTY: A Quantitative Case Law Analysis

Rohan Karan Mehta*

*"A man's home is his castle. You can't just walk in and steal our homes".*¹

[Abstract: The Indian State has the power of eminent domain where it acquires property by paying compensation. However, it also has police powers where it does not acquire property but merely regulates it without paying compensation. The distinction between the two is not clear, that is what acts of the State are just regulations and when does it become an acquisition. This question is essential because it determines whether compensation would be paid or not. In this article, a non-exhaustive study has been made since 2011 to analyze what factors have the Courts considered when answering this question. Through this, it is found that there is currently inconsistency in the judiciary's approach along with a focus on public interest. It is also argued that public interests along with value theory should be used to better balance competing interests. Value theory is a unique way of looking at property law which emphasizes the stability of ownership.]

I

Introduction

To this excerpt from the movie *Castle* (1997), the Indian State will reply "Oh yes, we can!". It can acquire private property through its power of eminent domain but it has to be for a public purpose and compensation has to be paid.² But sometimes, the State does not compensate. This is possible through its 'police powers'.³ Through this, the State

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¹ Rob Sitch, *THE CASTLE* (1997).

² M.P. Jain, *INDIAN CONSTITUTIONAL LAW* (7th ed., 2014); *Jilubhai Nanbhai Khachar v. State of Gujarat*, 1995 Supp (1) SCC 596.

³ *Sooraram Pratap Reddy and Ors. v. District Collector, Ranga Reddy Distt. and Ors.* (05.09.2008, SC), MANU/SC/3817/2008 [62]; *Deputy Commissioner and Collector, Kamrup and Ors. v. Durga Nath Sarma* (15.09.1967, SC), MANU/SC/0269/1967[14].

does not acquire the property but merely fetters or regulates some of the owner's rights.⁴ This dichotomy leads to scenarios, where the Courts have to decide whether State action merely regulates some rights or has the State acquired the property. This is an important question because it decides whether the owner will receive compensation.

Through this paper, I argue that the Judiciary should consider value theory when deciding whether to grant compensation or not. Value theory is a unique way to look at property law.⁵ It emphasizes the value of stable ownership. According to value theory, property owners should be granted compensation when the State interferes with the value inherent in stable ownership.⁶ The reason for this inclusion is that the current approach of the Judiciary is inconsistent and arbitrary when determining when to pay compensation. This is shown through a non-exhaustive study of 47 cases from 2011 onwards. Currently, the one factor which is predominantly considered in such cases is 'public interest' or the benefit which the legislation accrues to society. However, what makes this approach inconsistent is that the Courts at their discretion consider multiple varying factors in such cases.

I argue that using value theory in conjunction with the public interest will increase consistency and allow the judiciary to better manage competing interests. This is similar to the stance taken by the Supreme Court in *Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd.*,⁷ that the judiciary should endeavor to create a balance between public interest and property ownership.

In Part II, I elaborate more on value theory, regulations, and acquisitions to provide a brief background. In Part III, I argue why this conjunction of value theory + public interest would be beneficial for private property holders and would also not adversely affect the state. I then deal with the practical implications of this combined approach, through a hypothetical based on a recent Supreme Court case. The quantitative study aims to verify the hypothesis that there is inconsistency in the judiciary's approach when dealing with the question of compensation. It also aims to find a judicial basis for the application of value theory in India.

⁴ *K.T. Plantation (P) Ltd. v. State of Karnataka*, (2011) 9 SCC 1 [141].

⁵ Abraham Bell and Gideon Parchomovsky, *A Theory of Property* 90 CORNELL L REV 531 (2005).

⁶ *Id.*, at 607.

⁷ 8 SCC 705; *Narayanrao Jagobaji Gowande Public Trust v. State of Maharashtra* (2016) 4 SCC 443. The topic of the Indian state using its police power to deny compensation in matters of property has not been discussed much. Though there are some scholarly articles relating police powers like Utkarsh Mishra, *State's Power to Regulate: The Use of Police Power Doctrine as a Reason for Non-Payment of Compensation in Cases of Expropriation* 8 NUALS LJ 15 (2014); Arvind P. Datar, *Privilege, Police Power and Res Extra Commercium - Glaring Conceptual Errors* 21 NATIONAL LAW SCHOOL OF INDIA REVIEW 133 (2009).

II

The Regulation-Compensation Conundrum

The essence of value theory is stable ownership.⁸ Accordingly, the main aim of property law should be the protection of property from interferences that affect this stable ownership.⁹ This has several implications and nuances. This paper focuses on one of its practical applications, namely in determining when the State has to compensate citizens.¹⁰ The reason for this focus is that this question is marred with inconsistency in India. This inconsistency is explained in Part III.¹¹

Land acquisition and compensation have been highly debated topics in India, since the colonial era.¹² However, this issue was settled by the 5-judge bench in *K.T. Plantations v. State of Karnataka*.¹³ The Supreme Court held that compensation has to be paid for the acquisition of private property. But the State bypasses this through 'police powers'. It does not acquire property but regulates it.¹⁴ As there is no acquisition it does not have to compensate. An illustration: The State, through some town management regulations, keeps a part of private property to build roads. When the property owner asks for compensation, the court rejects their plea because it is for public benefit.¹⁵

Though courts have attempted to distinguish between acquisition and regulation, the distinction is ambiguous. Thus, when property owners come to court wanting to claim compensation, the courts face a dilemma. As there is no clear distinction, they look at a

⁸ Bell and Parchomovsky (n 5) 538.

⁹ *Id.*, at 563.

¹⁰ Other uses of value theory are in determination of quantum of compensation, public nuisance. Also some implications can be towards a unified theory of property. Also refer to Bell and Parchomovsky (n 5), 600-608.

¹¹ See, Section III of the essay.

¹² A.K. Ganguli, *Right to Property: Its Evolution and Constitutional Development in India* 48 JILI 531 (2006); Gopal Sankaranarayanan, *The Fading Right to Property in India* 44 LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA 220 (2011); Namita Wahi, *The Evolution of the Right to Property in India before the Drafting of the Constitution*, CENTRE FOR POLICY RESEARCH WORKING PAPER SERIES 1 (2021); Arvind Datar and Shivprasad Swaminathan, *Police Powers and the Constitution of India: The Inconspicuous Ascent of an Incongruous American Implant* 28 EMORY INTERNATIONAL LAW REVIEW 63 (2014). See also, Constitution of India 1950, Art 300A; Land Acquisition Act, 1894.

¹³ *K.T. Plantations* (n 4) [189].

¹⁴ Samaraditya Pal, *INDIA'S CONSTITUTION - ORIGINS AND EVOLUTION*, Vol. III (1st ed., 2014).

¹⁵ *Babulal Badriprasad Varma v. Surat Municipal Corpn.*, (2008) 12 SCC 401.

variety of factors before arriving at a decision.¹⁶ This is where value theory comes into the picture.

III

The Value of this Theory

Value theory as a whole is ambiguous in its application. But two principles that can be culled out are: *firstly*, when the legislation affects the economic viability or value of the property as mentioned in *Lucas v. S.C. Coastal Council*.¹⁷ Here, the owner had brought some land, and the State, through a regulation, deprived the owner of making any construction on it. The U.S. Supreme Court termed this as effectively depriving the owner of making any economically viable use of their land.¹⁸

Secondly when the legislation directly impacts the stability of property. This can be illustrated through *Pennsylvania Coal Co. v. Mahon*.¹⁹ The state wanted to mine private property, Oliver Wendell Holmes held that this action went too far, as it affected the value of the property.²⁰ This value is not the economic value but the intangible value that a person derives from stable ownership. Interfering with this stable ownership would require compensation to be paid according to value theory. These two broad principles make up the value theory component of my suggestion.

On the other hand, Indian Courts have opted for a public interest approach.²¹ The public interest approach requires the judiciary to consider the benefit the State's action would have on society. If the public interest is greater, then the private interest can be sacrificed, without compensation.²² This benefit can be tangible or intangible but is something that improves the quality of life like sewage, electricity, and defense.²³ The problem arises

¹⁶ *Sukeshi Vijaybhai Bhatt v. State of Gujarat* (03.03.2022 - GUJHC): MANU/GJ/0601/2022; *Yogendra Pal and Ors. v. Municipality, Bhatinda and Ors.* (15.07.1994, SC), MANU/SC/0518/1994.

¹⁷ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003.

¹⁸ *Id.*, at 2893-2894.

¹⁹ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393.

²⁰ *Id.*, at 415.

²¹ Refer to Annexure, where in over 90 percent of the cases, courts have decided to look at the public benefit from the legislation/action.

²² *P. Poongothai v. The District Collector, Coimbatore and Ors* (03.03.2023, MADHC), MANU/TN/1147/2023; *Vijay Vallabhkhai Patel and Ors. v. State of Gujarat and Ors* (10.04.2015, GUJHC), MANU/GJ/0164/2015.

²³ *Elizabeth George and Ors. v. Deputy Chief Engineer and Ors* (16.07.2013, KERHC), MANU/KE/0825; *The Ministry of Defence, Government of India and Ors. v. Jayamma and Ors* (06.07.2021, KARHC), MANU/KA/3177/2021.

when along with public interest, courts consider multiple factors. Sometimes they consider principles of justice and fairness,²⁴ they also conflate regulatory powers with eminent domain,²⁵ the property as a human right,²⁶ scheme, and the purpose of the legislation.²⁷ Factors that are reminiscent of value theory are also considered.²⁸ This is the inconsistency that was referred to in part II.

This inconsistent approach leads to a lot of ambiguity. The courts have excessive discretion and their decisions can be arbitrary due to the lack of a principled position in past cases. An extreme example of this lack of principled approach would be *Dwarkadas Shrinivas of Bombay v. The Sholapur Spinning and Weaving Co. Ltd.*²⁹ In this case, Bose J. outright rejected the concept of police power in India. This implied that the State cannot infringe on private property without compensation. But this is not true, as seen in recent judgments like *Tukaram Kana Joshi v. MIDC*,³⁰ where the apex court has recognized the concept of police power and its applicability in India. All this negatively impacts the owner as in some cases their property rights may be considered but, in some cases, they might be ignored.

I suggest an alternative approach. Rather than relying on different factors in every case, the judiciary should rely only on the public interest and the value theory.³¹ This approach will balance the property owner's interest and the State's actions for the public good. I argue that the combination of these two factors can balance the competing interests of different stakeholders adequately. Therefore, my suggestion would include the value theory's two principles which are the effect on economic value and stability of

²⁴ *Prem Lal v. State of H.P.*, 2015 SCC OnLine HP 2294; *Manohar Patel R. and Ors. v. Union of India and Ors.* (19.07.2022, KARHC), MANU/KA/3293/2022.

²⁵ An example of this would be *Kuldeep Kaur and Ors. v. Punjab State and Ors.* (16.05.2018, PHHC), MANU/PH/0978/2018 and *Babulal Badriprasad Varma v. Surat Municipal Corpn.*, (2008) 12 SCC 401, both have similar factual matrix, the State regulated some part of private property without compensation, in *Kuldeep* compensation was granted by terming it as eminent domain. Whereas in *Babulal* it was termed as State's regulatory power.

²⁶ *Shree Narayan Singh v. State of U.P. and Ors.* (08.10.2013, ALLHC), MANU/UP/1476/2013; *Bhimandas Ambwani v. Delhi Power Co. Ltd.*, (2013) 14 SCC 195.

²⁷ *St Reddy Veerana v. State of U.P.*, 2022 SCC OnLine SC 562; *Kalyani (Dead) through L.Rs. and Ors. v. The Sulthan Bathery Municipality and Ors* (26.04.2022, SC), MANU/SC/0547/2022.

²⁸ *Banshilal Sidar v. State of C.G. and Ors.* (19. 10. 2011, CGHC), MANU/CG/0424/2011; *Bhosawal Municipal Council v. Nivrutti Ramchandra Phalak and others*, MANU/SC/1336/2013.

²⁹ *Dwarkadas Shrinivas of Bombay v. Sholapur Spg. & Wvg. Co. Ltd.*, 1954 SCR 674.

³⁰ (2013) 1 SCC 353; In this case, though the courts recognized doctrine of police powers in India, it was not applied, and State's action was termed as violation of fundamental rights.

³¹ This proposed approach is somewhat similar to the three-pronged Penn Central Test, which is used in the USA; as laid down in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 which is also aimed to balance competing interests as held in *Andrus v. Allard*, 444 U.S. 51.

ownership. Along with that, it would use the public interest as currently used by the judiciary.

3.1 Value + Interest = Benefit

This approach is better than the current erratic stance taken by the Courts when deciding such cases. The advantages can be classified based on whom they accrue to: owners and society. I further argue that it will not adversely impact the State.

A. Owner

The owner of the property benefits from this new approach.³² Value theory emphasizes the importance of stable ownership. This is better than the current approach where Courts sometimes forget about property owners in the name of public interest.³³ Even when Courts want to grant compensation they have to turn to principles of justice and fairness.³⁴ Sometimes they equate regulatory powers to eminent domain.³⁵ Or sometimes use principles like property as a human right to grant compensation.³⁶

However, my suggestion would ensure that the value of stable ownership is always considered consistently by the courts. This would also grant the courts an avenue to grant compensation on a more principled basis. It does not guarantee compensation but it ensures better protection of property owner's rights than the current approach. The reason for this better protection of property rights is that with the inclusion of value theory, they will have to consider in every case, whether the action infringed upon ownership or affected the value of the property. This principled consideration will lead to better protection of property rights. Thus, ensuring that the property owner is given importance. This emphasis on property ownership will lead to a better balance of the property owner's interest against the public interest. Therefore, for owners of private property, this approach is better.

³² Bell and Parchomovsky (n 5) 553-558.

³³ *National Highway 1-A Affected People Action Committee of District Ramban and Ors. v. State of J&K and Ors.* (06.10.2016, JKHC), MANU/JK/0344/2016; *Gujarat State Energy Transmission Corporation Limited v. Ratilal Maganji Brahmhatt (Barot)* (06.11.2020, GUJHC), MANU/GJ/1384/2020.

³⁴ *Sarita Gupta and Ors. v. MCD* (18.09.2019, DELHC), MANU/DE/3035/2019; *Ravindra Ramchandra Waghmare v. Indore Municipal Corporation and Ors.* (29.11.2016, SC), MANU/SC/1543/2016.

³⁵ *Radhey Shyam Nathani v. State of Chhattisgarh and Ors.* (11.06.2021 - CGHC) - MANU/CG/1080/2021; *Rajiv Sarin v. State of Uttarakhand*, (2011) 8 SCC 708.

³⁶ *Hari Krishna Mandir Trust v. State of Maharashtra and Ors.* (07.08.2020, SC), MANU/SC/0580/2020; *Sayyed Ratanbhai Sayeed and Ors. v. Shirdi Nagar Panchayat and Ors.* (22.02.2016, SC), MANU/SC/0209/2016.

B. Society

This approach benefits society at large because of the better protection of property ownership that value theory offers. A society that gives better protection of an individual's ownership of property receives several tangible and intangible benefits.³⁷ This includes higher economic growth, development, etc. The reason for this is multifaceted. Coase argued that the increase in economic growth is because it helped in better decision-making, which increases efficiency and ultimately leads to growth.³⁸ This means that well-defined and better-protected property rights help individuals to negotiate and bargain better. This increases the efficiency of transactions which leads to economic growth. Similarly, other intangible benefits arise due to better protection of property with each having a different reason.³⁹ On the other hand, the current approach allows only state projects for societal welfare. Meanwhile, my suggestion while granting intangible benefits would also allow for the majority of state projects as it considers public interest. One may argue that the issues of 'public interest' and 'value theory' are placed at two ends of the spectrum, how can one achieve both the suggested beneficial consequences of it at the same time. I have illustrated this through a practical application of my suggestion in Part 3.2.

Taking the argument of benefits from value theory to its logical conclusion, one may argue that if property rights are so beneficial, then why not just opt for a value theory-based approach and remove the public interest aspect?⁴⁰ But I argue that relying solely on value theory will lead to an overflow of cases where the State has to grant compensation. This is because, on its own, the value theory is broad and vague. Even indirect acts of the State that affect the stability of ownership in any way also come under its ambit.⁴¹ This will lead to the State granting compensation for virtually every action it carries which even remotely affects property like reducing police force in a region.⁴² This will act as a restraint on the State to take action for public welfare. Thus, relying solely on value theory is not ideal and there needs to be an approach that can balance the needs of the different stakeholders.

Another counter-argument could be that the current approach granted courts flexibility in different circumstances. This discretion allows the courts to make decisions for the benefit of society more easily as compared to my rigid two-factor approach. While this

³⁷ R.H. Coase, *The Problem of Social Cost* 3 THE JOURNAL OF LAW & ECONOMICS 1–44 (1960).

³⁸ *Id.*, at 15-16.

³⁹ For more benefits refer to Laura Tuck & Wael Zakout, *7 Reasons for Land and Property Rights to be at the Top of the Global Agenda*, available at: <https://blogs.worldbank.org/voices/7-reasons-land-and-property-rights-be-top-global-agenda> (last visited Jul., 15, 2022)..

⁴⁰ Bell and Parchomovsky actually supported this approach in *A Theory of Property* for similar reasons.

⁴¹ Bell and Parchomovsky (n 5) 606.

⁴² *Id.*

may be true as my suggestion will reduce judicial discretion and flexibility, I argue that the two factors are, as shown above, broad enough, that the courts still have a fair amount of leeway when deciding. Thus, taking all these arguments into account, this combined approach is better than the status quo.

C. State

The inclusion of value theory will not adversely affect the State. Though it may look as though the inclusion of a value-based approach would lead to more compensation. This is not necessarily true. The courts are usually very liberal in granting compensation.⁴³ Only in rare cases, the State can avoid compensation. They have granted compensation in over 80 percent of the cases. This percentage remains almost the same whether they consider value theory-based factors or not. Therefore, they may not necessarily have to pay more compensation. Thus, the inclusion of value theory does not adversely affect the State while also being beneficial to society and private property owners. An argument could be that a high percentage of cases where compensation is due to the current approach. Here, Courts use a variety of factors in addition to value theory-based factors and the same may not be replicated through my suggestion. I argue that even though the exact trend may not be replicated, the cases where the Courts grant compensation would remain similar. The reason is that currently the Courts are essentially engaged in a balancing act between 'public interests' and property owner's rights. As stated above for property owner's rights they consider a variety of factors. My suggestion also maintains this balancing act, the key difference is that it grants the judiciary an avenue to grant compensation on a principled basis, which would help to remove some inconsistency and arbitrariness.

It might even benefit the State. Though this is speculative, the inclusion of value theory might help the State to gain more clarity about its powers. This is because the inclusion of value theory will help to create a distinction between acquisition and regulation. After considering the public interest, if legislation infringes upon private property or affects its economic value, then according to value theory, compensation has to be paid. In other words, it is an acquisition. The opposite is true for regulations. This clarity will aid the State to know the limits of its police powers and eminent domain. This may be beneficial as the State would be able to make efficient use of these powers. To test this let's take a hypothetical.

⁴³ Karishma D Dodeja, *Belling the Cat: The Curious Case of the Ninth Schedule in the Indian Constitution* 28(1) NATIONAL LAW SCHOOL OF INDIA REVIEW (2016); Indira Jaising, *Ninth Schedule: What the Supreme Court Judgment Means*, REDIFF (11 Jan., 2007), available at: <https://www.rediff.com/news/2007/jan/11indira.htm> (last visited Apr., 12, 2023).

IV

Practical Implication

Imagine you own an apartment in a large residential society. Due to some complex legal regulations, society has to give some part of its land to the State. Though the land was being used as a road, the society signed the deed because it would be developed as a recreational park. But after 20 years the park has not been constructed. Rather it has been used as a dumping yard. This has not only affected the ease of movement but also the aesthetics of the property which makes it harder to sell the property. Aggrieved by this you decided to file a case.

The Courts would not allow the land to be used as a dumping yard due to it being against the regulations where it has to be converted to a park. But they also would not grant compensation because the land is after all set aside for public welfare. This hypothetical scenario and verdict are similar to what happened in *Assn. of Vasanth Apartments' Owners v. V. Gopinath*.⁴⁴ But using value theory in conjunction with this approach would yield better results.

As mentioned above, whenever there is interference with ownership, compensation should be granted. One might think that the apartment owners would have to be compensated for the State's act of taking the land. But this is not the case, as this also takes into account the public interest. The residents had agreed to giving the land for a park, the State does not have to compensate for this. This highlights that the inclusion of value theory will not always result in compensation; as it considers the State's actions for societal good.

But in this scenario, they have to compensate for using the land as a dumping yard. The action of the State using the land as a dumping yard needs to be compensated for. When the state regulated the property for building a park for the public benefit it was an exercise of its police powers. As it did not adversely affect the stability of ownership or the economic value. Using that same land as a dumping yard may also be in some public interest. However, as mentioned above the action affected the economic viability of the property. This makes the act an acquisition in nature, therefore, needing compensation. This highlights how the combined approach can be used to effectively differentiate between regulation and acquisition. It also helps to more effectively answer the question of when the State has to pay compensation than the current approach. This also illustrates how one can achieve the benefits of the two components of my suggestion as mentioned in the previous part. Here, through my combined approach, the State has the freedom to undertake activities for societal welfare like creating parks. On the other hand, it also accords greater protection to property owners as they would be granted

⁴⁴ 2023 SCC OnLine SC 137, Paras 20, 148, 150, 184.

compensation for the usage of land as a dumping yard. Therefore, it showcases the *value* of this combined approach over the status quo.

V

Conclusion

Counsel Lawrence argued in *The Castle*, that utilitarianism cannot outweigh a family's right to live in their home. Similarly, the judiciary needs to rethink its approach. I have suggested that Courts should use a combined approach that takes into account the currently used public interest approach along with the value theory. This approach is beneficial for the owner, and the society. Moreover, it does not adversely affect the State. It is a better way to balance competing interests. One may argue that either of the two prongs, standalone would be better. However, this combined approach allows for the benefits of both and covers the lacunae that using them individually may have. Though this balancing act is difficult to achieve, the judiciary must strive to achieve it.