CHAPTER IV
ACQUISITION OF PROPERTY – COMPARATIVE PERSPECTIVE

The mere interpretation of positive rules of law does not deserve to be called a science at all since legal studies become truly scientific only when they rise above the actual rules of any national system, a comparative study assumes importance for it has its special contribution to make. Hence, the present Chapter is devoted to a comparative evaluation of the land acquisition laws of different legal systems, prevalent in the present day.

4.1 THE UNITED STATES OF AMERICA

In U.S, the extent and limitations of State interference in private property are spelt out by the Constitution itself. The Fifth Amendment to the U.S. Constitution reads:

No person shall be…deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation.

In the United States, the government’s power to take private property is based on the concept of eminent domain: when the government determines that it needs private property for public use, it can condemn the property. In effect, it implies the purchasing of property from the owner whether the owner wants to sell it or not. This power has been recognized as an inherent power of the government. Though the

2 U.S. Constitution, Vth Amendment (1791).
3 The term ‘eminent domain’ is said to have originated by Grotius, a legal scholar of the seventeenth century, who believed that the State possessed the power to take or destroy property for the benefit of the social unit. But he stressed that when the State so acted, it was obligated to compensate the injured property owner for his losses. See generally, John Neville Figgis, Studies of Political Thought from Gerson to Grotius, 1414-1625, (2nd edn; Cambridge, 1923), Ch. 7.
Federal Constitution or most State Constitutions do not specifically grant the power, the Federal and State governments possess the power to condemn the property as an essential part of being a government\(^4\). The “taking” clause empowers the government to take private property subject to certain mandatory conditions: such taking must be for a \textit{public purpose}, only by \textit{due process} of law, and upon making \textit{just compensation}.

American courts and jurists gave a wider meaning to the phrase “due process of law” \(^5\) which can conveniently be spaced under the following heads:

1) Due process of law in general; and
2) Due process of law in particular; which can be further classified into:
   a) \textit{Procedural due process}; and
   b) \textit{Structural or Substantive due process}.

\subsection*{4.1.1 Due Process of Law}

In \textit{Hurtado v. California}\(^6\), the U.S. Supreme Court underlined that, law is nothing more than mere will exerted as an act of power and held that law must not be a special rule for a particular person or a particular case, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rule which governs society. An arbitrary power enforcing its edicts to the injury of person and property of its subjects is not law, whether manifested as the decree of a personal monarch or an impersonal multitude\(^7\).

The above decision which highlights the essential ingredient of law, requires that all laws, must have general application: all the people of the country shall come

\footnotesize{\begin{itemize}
  \item \footnote{Jay M. Feinman, \textit{Everything You Need to Know About the American Legal System}, (Oxford University Press, 2000), p. 242.}
  \item \footnote{See, 14th Amendment to the U.S Constitution which reads: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.}
  \item \footnote{110 U.S. 516 (1884).}
  \item \footnote{\textit{Ibid.} at 522.}
\end{itemize}}
under its purview irrespective of the fact that the immediate application may be against a single individual. If a law is passed against a single individual, it is considered as an intrusion of one into the rights of another. In *Yick Wo v. Hopkins*\(^8\), the court observed that: “the very idea that one may be compelled to hold his life or the means of living, or any material right essential to the enjoyment of life, at the mere will of another has been thought intolerable in any country where freedom prevails, as being the essence of slavery itself\(^9\).”

### 4.1.2 Procedural Due Process

Procedural due process means that when a litigant is adversely affected entirely as a predictable consequence of procedural grossness and not as a consequence of ulterior design by government or by its agents to utilize constitutionally impermissible substantive standards, he is in serious difficulty. The essence of his complaint is unfairness of procedural grossness itself that it builds in such a large margin of probable mistake as itself to be intolerable in a human society\(^10\).

For the protection of property interests by procedural due process, an individual must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. Property interests, of course, are not created by existing rules or understanding that stem from an independent source such as State law in rules or understandings that secure certain benefits and that support claims of entitlements to those benefits\(^11\).

Procedural due process can be viewed as a layered approach aimed at accomplishing a fundamental objective – protection against arbitrary conduct by the State\(^12\). The various rights can be looked upon as various layers intended to provide

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8 118 U.S. 356 (1886)
9 Ibid. at 360.
11 Ibid. at p. 585.
12 Supra n. 10.
an increasingly effective insulation from arbitrariness; each layer adds something to the defensive capacity to ward off an arbitrary effort to destroy a status relationship\textsuperscript{13}.

### 4.1.3 Substantive Due Process

The principle of *eminent domain* is considered as an inherent power of the sovereign. However, the power of eminent domain shall be exercised in accordance with due process of law. In *Mississippi & Run River Boom Co. v. Patterson*\textsuperscript{14} the court held that, the federal government need not be frustrated by either a State legislature or a private property holder’s refusal to sell. Congress possesses the power of *eminent domain* as an inherent attribute of sovereignty, which extends to all private property interests; subject to *just compensation* requirement of the Fifth Amendment\textsuperscript{15}. Hence the term “eminent domain” cannot be equated with “Police power”. The former permits the government to impose restrictions on private property rights for public interest e.g. in connection with health, sanitation, zoning regulation, urban planning and so on. But in the case of the latter; for instance, taxation, the owner of private property is compelled to contribute a portion of it for public purpose. The Supreme Court of India brought out the differences between regulatory exercise of the police power and *eminent domain* of deprivation of property thus:

Regulation does not acquire or appropriate the property by the State, which appropriation does. Regulation is imposed severally and individually, while expropriation applies to an individual or a group of owners of properties\textsuperscript{16}.

### 4.1.4 Just Compensation

As mentioned earlier, the power of *eminent domain* permits the government to ‘take’ property against the owner’s wishes, provided that the government shall pay just compensation, calculated on the basis of the property’s fair market value.

\textsuperscript{13} Ibid., at p. 613.
\textsuperscript{14} 98 U.S. 403 (1870).
\textsuperscript{15} *Kohl v. United States*, 91 U.S. 367 (1876).
Now the question is when is it that an action amounts to ‘taking’? Generally, ‘taking’ is effected in three different ways17:

(1) Physical invasion, occupation or seizure of private property; or
(2) Regulation of the use of private property; or
(3) Imposition of conditions on the development of private property.

4.1.5 Physical Invasion, Occupation or Seizure of Private Property

In the case of physical invasion, private property is seized by the government or third parties acting with the permission of the government. On the contrary, in case of regulation, an owner is not forced to let others use the property, but is simply restricted in the uses to which he or she puts the property. In *Webb’s Fabulous Pharmacies Inc. v. Beckwith*18, the U.S court observed that taking occurred when a county appropriated all interests that accrued on an interpleaded fund while it was deposited with the court clerk. In another case, *Loretto v. Teleprompter Manhattan CATV Corp.*19, the court found a *per se* taking when New York Statute required owners of apartment buildings to allow cable television companies to install cables in their buildings. The contentions that the cables occupied less than two cubic feet of space and did not affect the owners were rejected.

A ‘taking’ may more readily be found when there is a physical invasion than when the government is merely regulating use. This is due partly to the fact that physical invasion by the government or by third parties is more likely to seriously interfere with the use and enjoyment of property than the laws that merely restrict use. In addition, physical invasion is arguably more disruptive of an owner’s basic expectations. While we can readily anticipate limitations being placed on how we

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may use our property, we are less prepared for situations in which a stranger directly
invades and occupies our property\textsuperscript{20}.

The willingness of the courts in recognizing a ‘taking’ when there has been a
physical invasion of property, as opposed to a mere restriction on use, is reflected in
the rule that a permanent physical occupation constitutes a \textit{per se} taking. This \textit{per se}
rule is applicable regardless of the extent of loss inflicted or of the importance of the
public benefit that may result.

Through a plethora of judicial decisions, the U.S courts have settled the
proposition that the regular use of private property by the government or the public is
equivalent to a permanent physical occupation for the purposes of the \textit{per se taking}
rule. In \textit{Nollan v. California}\textsuperscript{21}, the court observed that a permanent invasion would
like wise occur if a State gives the public an easement to cross a private beach at any
hour of the day or night even though there will be times when no one is excising the
right to be there.

\textbf{4.1.6 Regulatory Taking}

In a regulatory taking, an owner is not forced to let others use the property,
but is simply restricted in the uses to which he or she may put the property. The court
is more tolerant of regulatory interference in property than it is of interference caused
by physical invasion. This stems from the fact that in an organized society, regulation
of private activity for the common good is unavoidable. If the regulation goes too far,
it will be recognized as a \textit{taking}\textsuperscript{22}.

So it is clear that despite the lack of a well founded set of formula, it appears
that the following regulations may amount to \textit{taking}:

(1) The regulation that arbitrarily singles out some persons for adverse treatment.

\textsuperscript{20} Supra n. 4.
\textsuperscript{21} 483 U.S. 825 (1987).
\textsuperscript{22} \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393, (1922).
The regulation that destroys well founded investment backed expectations.
The regulation that strips property of virtually all use or value.

If a property owner is arbitrarily singled out to bear a burden that is not imposed on other similarly situated owners, it will suffice to establish a *prima facie* taking. Destruction of investment backed expectations also amounts to *taking* i.e. if a person invests money in a specific project with prior approval of the authority and after the completion of work, if the authority refuses to issue licence to the project, then the regulation amounts to *taking*. In *Penn Central Transport Co. v. City of New York*\(^{23}\), the court held that in order to establish a taking on this basis, it must be shown that the expectations stemmed from explicit government assurances.

Similarly, any law which destroys all use or value of property, may amount to *taking*. In *Andrus v. Allard*\(^{24}\), the court ruled that there was no taking when a federal statute banning the sale of eagle feathers reduced their market value to zero, for the feathers still had non-economic value for their owners, who remained free to possess, exhibit, donate, or bequeath them.

### 4.1.7 Conditional Taking

Usually the State may impose conditions at the time of granting licence or permit to do certain business or enjoyment of property. If such conditions are imposed as a flat requirement, there is obviously no danger that the State is using its control over the permit process to avoid paying compensation and hence it does not amount to *taking*. But, if the State imposes a condition that the owner should dedicate the property for public use or submit to certain use restrictions, the condition amounts to *taking*. In the case of the so-called “exactions”, the government does not absolutely insist that the property owners be open to public use or that specific uses be

\(^{24}\) 444 U.S. 51 (1979).
prohibited. Instead, it gives the property owner a choice, to either agree to the State’s condition or to forgo the right to develop the land25.

4.1.8 Public Use

Under the American Constitution, *eminent domain* is allowed only for the projects of “public use”26. The question whether a particular intended use is a public use or not is clearly a judicial one, but the role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one. In *United States ex rel. TVA v. Welch*27, the court cast considerable doubt upon the power of courts to review the issue of public use and observed that it is the responsibility of the Congress to decide what type of taking is for a public use and to see to it that the agency authorized to do the taking may do so to the full extent of its statutory authority.

4.2 CONSTITUTION OF AUSTRALIA

In Australia, the State has the power to legislate with respect to the “acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws”28. Australian legal literature is impregnated with apex court decisions covering various aspects of land acquisition laws: section 51 (31) under Constitution, what makes terms ‘just’ and ‘acquisition on just terms’; who comes within the definition of ‘any state or person’, the meaning of ‘acquisition of land for public purpose’, the relevant concept of property, what amounts to an ‘acquisition’ (which is sometimes only another way of delimiting the

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25 In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), where the California government exacted a lateral public easement across a beach front lot in return for permitting the owners to build a larger house on their property, the court held that, if this condition had been imposed outright, it would have invaded a permanent physical invasion and a *per se* taking.


27 327 U.S 546 (1946).

28 See Section 51 (xxxi) of the Commonwealth of Australia Constitution Act, 1900 which provides: Legislative powers of the Parliament-The Parliament shall, subject to this Constitution, have power to make laws for the peace, and good government of the Commonwealth with reference to the acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws.
concept of property) when acquisition is possible, and whether there is any substance in the limitation to purposes in respect of which there is power, apart from section 51(31) itself, to make laws.

4.2.1 Meaning of Property under the Constitution of Commonwealth

The physical subject matter of property as defined in the Constitution includes land, houses, governmental and business premises and equipments, business assets and shares, a printing press, ships, fruits, wheat, wool, minerals and potentially pharmaceutical supplies. In *Minister of State for the Army v. Dalziel* it was contented that the acquisition on ‘just term’ is not applicable to possession of property for the use of the army because what was acquired is not property but possession only. However, the Court held that the word ‘property’ is not limited to formal interest; but is extended to use and possession. In another case, it was held that acquisition is valid even against a sale deed that contains provision that the balance land would not be compulsorily acquired by the Commonwealth.

4.2.2 Meaning of ‘Just Terms’

The High Court of Australia gives due weightage to the phrase, “just terms” while interpreting the Constitutional provisions. The standard of justice postulated by the expression ‘just terms’ has been held to be one of fair dealing between the

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30 See, Supra n. 28.
31 (1944) 68 C.L.R 261.
32 *Clunies-Ross v. The Commonwealth of Australia*, (1984) 155 C.L.R 193. In this case, the appellant, the owner of the Cocos (Keeling) Islands sold all his land to the Commonwealth within the Island other than that on which his house was erected. The deed contained a number of covenants by the Commonwealth preserving to the owner, his family and heirs certain rights of access and movement over the land conveyed. Subsequently the Commonwealth sought compulsory to acquire the retained land. The High Court of Australia held that the land did not contain am implied term precluding future acquisition of the retained land by the Commonwealth, and it was not a binding consensual foundation of the contract of sale that the commonwealth would neither make nor execute its laws in the future so as to deprive the owner of his home or to procure his exclusion from the Islands.
Australian nation and an Australian State or individual in relation to the acquisition of property for a purpose within the national legislative competence\textsuperscript{33}.

The South Australian Land Acquisition Act, 1969 provides for the acquisition of land on \textit{just terms}. It deals with the acquisition of private land for developmental purpose. It has no application with respect to the resumption of land under the Crown Lands Act, 1929. Issue of mandatory notice is one of the pre-requisites for the acquisition of land\textsuperscript{34}. One of the main features of the Act is the constitution of a separate board for the payment of compensation\textsuperscript{35} to the displaced person if the acquisition is on the basis of an agreement\textsuperscript{36} or not. The authority must have negotiated in good faith with interested persons about the compensation payable for the acquisition of land under this Act. The Act contains clear provisions for the redistribution of excess land by way of sale, lease or disposal\textsuperscript{37}.

\subsection*{4.2.3 Meaning of ‘Authorities’}

The word ‘authorities’ naturally imports those bodies and officers who in fact and in law exist under the authority of the Commonwealth\textsuperscript{38}. In \textit{W.H Blakeley&Co. v. The Commonwealth of Australia}\textsuperscript{39}, High Court of Australia observed that the notification issued under the Land Acquisition Act, 1906-1936 was conclusive of the actual existence of the public purpose and that it was incidental to the power granted

\begin{footnote}
\textsuperscript{33} Nelungaloo Pvt. Ltd. v. Commonwealth, (1952) 85 C.L.R 545.
\textsuperscript{34} Part 2.10, South Australia Land Acquisition Act 1969 reads: (1) If the Authority proposes to acquire land (other than native title), the Authority must give a notice of intention to acquire the land to each person whose interest in the land is subject to acquisition, or such of those persons as, after diligent inquiry, become known to the Authority.
\textsuperscript{35} Part 20A: Constitution of trust: (1) (a) negotiations under this Division lead to an agreement that an amount is to be paid by the Authority and held in trust under this section for those who ultimately establish a claim to native title in the subject land; or (b) a determination under this Division (by the Court or the Minister) requires that an amount is to be paid by the Authority and held in trust under this section for those who ultimately establish a claim to native title in the subject land. \textit{Ibid.}
\textsuperscript{36} Part 23 (1) : The Authority must negotiate in good faith with interested persons about the compensation payable for the acquisition of land under this Act. \textit{Ibid.}
\textsuperscript{37} Part 35: The Authority may sell, lease, or otherwise deal with or dispose of any land acquired pursuant to this Act that it does not require for purposes authorised by an Act. \textit{Ibid.}
\textsuperscript{38} \textit{Supra} n. 29 at p.395.
\textsuperscript{39} (1953) 87 C.L.R 516.
\end{footnote}
by the Constitution. In each notification, the statement as to the purpose of acquisition, has to be specified to satisfy the statutory requirements.

In *Adelaide Fruits*\(^{40}\), it was held that the decision of the single judge of the Supreme Court, who determined the amount of compensation payable in respect of land acquired by the Corporation of the City of Adelaide, amounts to an ‘order’ of the Court; and hence appealable under section 73 of the Constitution and section 35 of the Judiciary Act 1903-1960.

In *Tinker Tailor*\(^{41}\), it was held that the proclamation published by the Governor of New South Wales, by virtue of the provisions of the Transport (Division of Function) Act, 1932-1956 and in pursuance of the provisions of the Main Roads Act, 1924-1959, in the Government Gazette amounts to ‘notification’ within section 42 of the Public Works Act 1912. Even though the proclamation is not a notification within section 42 of the Public Works Act 1912, section 49 of the Main Roads Act evidences the intention that, when the provisions of the Public Works Act are applied *mutatis mutandis* the proclamation suffices.

### 4.2.4 Meaning of “Any Purpose”

The Commonwealth of Australia Constitution Act, 1900 empowers the State to make laws for the acquisition of property ‘for any purpose in respect of which Parliament has power to make laws’. The expression ‘for any purpose’ is doubtful and vague. The High Court clarified that the term ‘for any purpose’ refers to the use or application of the property in or towards carrying out or furthering a purpose included in some other legislative power. It covers laws with respect to the acquisition of real or personal property for the intended use of any department or officer of the Executive Government of Commonwealth in the course of administering laws made by the Parliament in the exercise of its legislative power\(^{42}\). The Australian High Court in

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\(^{40}\) *Adelaide Fruit & Produce Exchange Company Ltd. v. The Corporation of the City of Adelaide*, (1960) 105 C.L.R 429.

\(^{41}\) *Tinker Tailor Proprietary Ltd. v. The Commissioner of Main Roads*, (1960) 105 C.L.R 334.

Wurridjal v. The Commonwealth⁴³ observed that the constitutional norm also applies
to the acquisition of property by or under Territory laws.

### 4.2.5 South Australian Land Acquisition Act, 1969

South Australian Land Acquisition Act, 1969 is the general statute passed by
the Parliament to make laws with respect to the acquisition of property on just terms
from any State or person for any purpose in respect of which the Parliament has
power to make laws⁴⁴. The Act empowers the Commonwealth to acquire any land: (a)
as per the provisions of the Act and (b) for the development or use of the land⁴⁵. The
Act further provides a detailed procedure to be followed for effective acquisition⁴⁶.
The Authority has, at any time after the service of a notice of intention to acquire land
and before the publication of a notice of acquisition in respect of the land, the power
to enter into an agreement with the person whose land is acquired⁴⁷. The Act is more
transparent also. It contains provisions to raise objections against private acquisitions.
Native title parties have the right to file objection before the Minister⁴⁸. After
consultation, the Attorney-General must appoint an independent person to hear
objections⁴⁹ and decide the matter⁵⁰.

### 4.2.6 Australian Land Acquisition (Just Terms Compensation) Act, 1991

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⁴⁴ Part I.3 of South Australian Land Acquisition Act, 1969: The object of this Act is to provide for
the acquisition of land on just terms.
⁴⁵ See, Part I. 6: Acquisition project means,(a) the acquisition or proposed acquisition of land under
this Act; and (b) the development or use (or the proposed or expected development or use) of the
land following its acquisition. Ibid.
⁴⁶ See Part 2, Ibid.
⁴⁷ See Part 3. 15(1): The Authority may, at any time after the service of a notice of intention to acquire
land, and before the publication of a notice of acquisition in respect of the land, acquire the
subject land by agreement. Ibid.
⁴⁸ See, Part 2. 12 B (1): Native title parties may, by written notice to the Minister, object to a
prescribed private acquisition so far as it affects their registered native title rights. Ibid.
⁴⁹ See, Part 2. 12 B (4): The Attorney-General must, at the request of a native title party who has made an
objection under this section, appoint an independent person or body to hear the objection. Ibid.
⁵⁰ See, Part 2. 12 B (6) : If the independent person or body hearing an objection under this section
makes a determination upholding the objection, or that contains conditions about the acquisition
that relate to registered native title rights, the determination must be complied with unless:
(a) the Minister responsible for indigenous affairs is consulted; and (b) the consultation is taken
into account; and (c) it is in the interests of the State not to comply with the recommendation.
This statute guarantees just compensation to the affected parties\textsuperscript{51}. It also provides compensation at the rate of market value existing at the time of acquisition of the property\textsuperscript{52}.

From the above discussion, it is very clear that the laws in Australia had properly balanced the rights of the individual and the interest of the community.

### 4.3 ACQUISITION OF LAND IN UNITED KINGDOM

By the doctrine of Common Law, all the land in England is either in the hands of the King himself; or is held of him by his tenants \textit{in capite}. The King is, therefore styled the \textit{Lord Paramount}; as being the “sovereign lord or lord paramount, either mediate or immediate, of all and every parcel of land within realm”\textsuperscript{53}.

According to \textit{Halsbury’s Laws of England}\textsuperscript{54}, the right to take land or to injuriously affect some or all of the rights to ownership in land whether by the taking of those rights or their curtailment is a right enjoyed by the sovereign power in the State. The right may be exercised as a power to take the land or some right to or over the land or it may involve power to affect land without any taking. The power to take or affect is now obtained either directly or indirectly from the statute. Prerogative powers still exist; but even in times of war, the executive has chosen to act under statute. The powers conferred by Parliament are wider and more comprehensive.

In his commentaries, Blackstone recognizes three absolute rights possessed by all individuals in a free society, namely, (1) the right to personal security, (2) the right

\textsuperscript{51} See Section 3 (1) (b), Land Acquisition (Just Terms Compensation) Act 1991, which reads: “to ensure compensation on just terms for the owners of land that is acquired by an authority of the State when the land is not available for public sale”. \textit{Ibid}.

\textsuperscript{52} Section 3 (1) (a) : To guarantee that, when land affected by a proposal for acquisition by an authority of the State is eventually acquired, the amount of compensation will be not less than the market value of the land (unaffected by the proposal) at the date of acquisition. \textit{Ibid}.


\textsuperscript{54} \textit{Halsbury’s Laws of England}, (3rd edn.), p. 3.
to personal liberty and (3) the right to property. In England, the Magna Carta asserts that, no freeman shall be disseized or divested, of his freehold…, but by the judgment of his peers or by the law of the land. Many of the ancient laws of the country admitted that no man’s lands or goods shall be seized into the King’s hand, against the great Charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and before-judged by course of law; and if anything be done to the contrary, it shall be redressed, and holden for none.

So the maxim *audi alteram partem* that is, every subject has the right to be heard before he is deprived of his right to property by State, is applicable to all types of acquisitions by the Government. In other words, the sovereign has the right to appropriate, for purposes of public utility, lands situated within its jurisdiction but it is not deemed politic to confiscate private property for public purposes, without paying the owner its value.

When the interest in land or ownership is taken by the government without the consent or agreement of the owner, it is said to have been compulsorily acquired. The power may authorize the taking of land for an estate less than the fee simply as in the case of the compulsory hiring of land for agricultural purposes or to improve the conditions of war-damaged sites. It may authorize the taking of some right or interest in land as in the case of a power to create easements, or it may authorize the taking of possession of land only without the acquisition of any estate or interest therein apart from the possession as in the case of a power of requisitioning.

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4.3.1 Statutory Provisions in England

In England, there are two laws which provide compensation, based upon the authority who deals with the acquisition, to the affected parties. The first category of acquisitions is made by statutory authorities like Railway Company, Water Company, or Gas Company. And in the second category, the acquisitions are done by the Government departments or a local or public authority.

The right to take or affect land may be either direct or indirect. So there are many variations in the manner in which rights to ownership of land may be abridged or extinguished. But in all the cases, there is a right to receive compensation if the property is acquired by the sovereign for any public purpose. The term ‘public purpose’ is explained in the Town and Country Planning Act, 1990. Any acquisition for planning and public purposes is valid if it is suitable for and required for development, redevelopment or improvement; or is required for a purpose which it is necessary to achieve in the interest of proper planning of an area.

4.4 Acquisition of Property in France

The beginning of the French Code can be traced back to the Athenian Constitution of Aristotle, discovered in 1891; it stressed the importance of valuation of private property which was transferred to the Athenians under the settlement of a dispute between the cities of Athens and Eleusis. According to Romans, confiscation was an act of political power and, in cases where private property was

56 Section 1 (2) of the Acquisition of Land Act, 1981 provides that the provisions of the Act is applicable to following legislations: acquisitions under the Metropolitan Police Act, 1886, the Military Lands Act, 1892, the Small Holdings and Allotments Act, 1908, the Development and Road Improvement Funds Act, 1909, the Education Act, 1996 and the Small Holdings and Allotments Act, 1926.

57 See, Part II which deals with purchase by Local and Other Authorities.


seized in virtue of this power, and any compensation, direct or indirect, was made to the owner, the transaction was recognized in the law as a "forced sale."

The basis of the French legal system is in a key document originally drawn up in 1804, and is known as the Code Civil, or Code Napoléon, (Civil Code or Napoleonic Code) which laid down the rights and obligations of citizens, and the laws of property, contract, inheritance, etc. Essentially, it was an adaptation of the principles of Roman law and customary law to the needs of nineteenth century France. The Code Civil remains the cornerstone of French law to this day, though it has been updated and extended many times to take into account the changing society.

France has a dual legal system; one section, known as Droit public, or Public law, defines the principles of operation of the state and public bodies. This law is generally applied through public law courts, known as les Tribunaux administratifs. The other known as Droit privé, or private law, applies to private individuals and private bodies.

In times of war and peace, governments have felt the need to acquire legal interests from natural and legal persons, in order to satisfy some conception of the public interest. As societies became more organised, it was recognised that such disturbance of private interests needed to be controlled, both to discourage unnecessary acquisitions and to compensate where acquisitions had occurred.

63 Ibid.
64 In France, the Declaration of the Rights of Man and of the Citizen also mandates just and preliminary compensation before expropriation; and a Déclaration d’ utilité publique is commonly required, to demonstrate a public benefit.
4.5 CONSTITUTION OF CANADA

The Canadian Constitution maintains a balance between “Property and Civil Rights in the Province”\(^\text{65}\). The acquisition of property is considered as one of the most important legislative power assigned to the provincial legislatures. This is due to the fact that almost every law that is enacted by the province affects the property and civil rights of the inhabitants. The provision providing compensation under the Expropriation Act, 1996, is also based on the general principle that, after receiving compensation, the owner should be in the same economic position as before the expropriation\(^\text{66}\).

In *Canadian Federation of Agriculture v. A.G for Quebec*\(^\text{67}\), a federal law which prohibited the manufacture and sale of margarine, was held to be *ultra vires* as falling within the exclusive competency of the provincial legislatures. The prohibition in question was treated as the regulation of a particular business within particular provinces. Being a prohibition relating to civil rights in the province, the subject matter was held to be within the exclusive legislative competence of the provincial legislatures.

However, in another case\(^\text{68}\) wherein a city law prohibited the distribution of tracts in the streets, the Court held that the freedom of worship and the freedom of press are not civil rights or matters of a local or private nature in the province; and hence not within the purview of provincial legislatures.

4.6 LAND ACQUISITION IN RUSSIA

The transition of a socialist country into a democratic nation has to face many obstacles in protection of individual interest in property. Russia, part of the erstwhile

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\(^65\) See, Head 13 of Section 92 of the Constitution of Canada, 1982.

\(^66\) Section 32 of the Expropriation Act, 1996, Chapter 125 reads: “The market value of an estate or interest in land is the amount that would have been paid for it if it had been sold at the date of expropriation in the open market by a willing seller to a willing buyer”.


\(^68\) *Saumur v. Quebec*, [1953] 2 SCR 299.
U.S.S.R, is now a democratic nation and has played an important role in the protection of individual interest in acquisition of land for public purpose. It has a total area of 125 million hectares of agricultural land and low population density. It is one of the countries in the world with the largest availability of arable land and has the highest per capita extent of property i.e. 0.9 hectares per person.\(^{69}\) The land reform policy in Russia gained momentum in 1990, a year before the dissolution of the Soviet Union, and has adopted a constitutional amendment recognizing the right to private ownership of agricultural land. The same amendment imposed a ten-year moratorium on buying and selling of privately owned land.\(^{70}\) In 1992, the government transferred 10 percent of the land of kolkhoz and sovkhoz (collective and State farms) to local authorities to be distributed among peasants who are willing to establish a private family farm. During President Vladimir Putin’s first term, a new Land Code (2001) was adopted; it modified property rights for land, with the exception of agricultural land, and in 2003 the law ‘On Agricultural Land Transactions’ came into force.

During the second term of Vladimir Putin (2004-2008), rich Russian and foreign investors were allowed to buy agricultural land leading to the rapid growth of large agro holdings. The number of private family farms in Russia increased in the early stages of the transformation of the society.

In Russia, the process of land acquisition by buying land shares from every shareholder is a complicated and long process. It was problematic not only to agree on the conditions of sale, but also even to find out the legal heirs of owners who had died or had left. Due to these hassles many companies try to acquire land on the secondary land market, where they can buy a whole enterprise with land shares contributed to its authorized capital. However, land which is concentrated in the hands of one or a few owners is less available in the land market. The process of large-scale land acquisition is often accompanied by the illegal behaviour of investors, as some of the investors try to avoid complicated negotiations with numerous shareholders, or do not want to


\(^{70}\) Ibid.
pay the market price for land. The majority of the rural dwellers who own land, are not aware of the precise value of agricultural land; thus, many land investors acquire land shares at very low prices.


The Land Code of Russian Federation, 2001 guarantees the right of individuals in the case of acquisition of land for government purposes. The government has to grant equivalent plots to the displaced person if he wishes it or to pay compensation of the value of residential, production and other buildings, houses, structures located on the plots of land being taken. Compensation shall be in tune with the damage; and in particular, the lost profit. Moreover, compensation shall be calculated on the basis of market value of the property. Taking shall be effected within one year from the date of notification.

71 Article 63 of Land Code of Russian Federation 2001 reads: Land areas shall be withdrawn, including by their repayment, in state or municipal needs upon the following: (1) Granting of adequate land areas on demand of the persons, of whom such land area was withdrawn (bought out); (2) Compensation for cost of inhabited, industrial and other buildings, structures, constructions situated on the withdrawn land areas; (3) Compensation according to Article 62 of this Code for the complete volume of losses, including missed benefit.

72 See, Article 63.1 (2) Ibid.

73 Article 62: (1) The losses caused by infringement of rights of land proprietors, land users, land holders, are subject to full compensation, including missed benefit, in the procedure stipulated by civil legislation. (2) On the basis of court judgment the person guilty of infringement of rights of proprietors of land, land users, land owners and land holders, can be forced to perform a duty in kind (restoration of soil fertility, restoration of previous borders of land, erection of the demolished buildings, structures, installations, or demolition of illegally erected buildings, installations, structures, restoration of land marks and information marks, elimination of other ground offences and performance of arisen obligations). Ibid.

74 Article 63.4: The proprietor of the land, withdrawn to state or municipal needs alongside with the guarantees, stipulated by Clauses 1 and 2 of this Article, should be compensated for at a rate of the market price of the land area, unless the adequate land area was given free-of-charge in his ownership. Ibid.

75 See, Article 63.2: The proprietors of land areas, land users, land owners, land holders in one year at the latest before forthcoming withdrawal of land areas, including buyout, should be notified of that by state executive body or local self-government bodies decided on withdrawal, including buyout of land areas. Withdrawal, including buyout, of land areas before expiration of a year from receipt of the notification, is allowed by consent of proprietors of land areas, land users, land owners, land holders. Ibid.
In almost all jurisdictions; whether it be Common Law or Continental or Socialist; private property is recognised as a “social and legal institution” and the rights of individuals over the land and other properties are protected. However, the concept of ‘eminent domain’ and the principle embodied in the legal maxim, ‘Salus populi est suprema lex’ empowers the State to impose limitations upon individual interests; subject to ‘due process of law’. The Constitution of India also reflects these principles. Hence, a critical evaluation of the Indian Constitutional provisions in this regard, is attempted in the next chapter.