STATE OF GUJARAT v. SHANTILAL: A REQUIEM FOR "JUST COMPENSATION"?

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"If it truly is important for society to subordinate its pursuit of efficiency to a discipline aimed at preventing outrages to fairness, then it may be worth asking whether the constitutional just compensation provisions present any hazard to sound social functioning. These provisions attract attention to the visible, formal expressions of society's commitment to fairness as a constraint on its pursuit of efficiency. The question is whether their magnetism is an energizing force, or mesmerizing one. If it induces the habit of waiting upon the courts to administer a fairness discipline, and if the courts are less than fully equal to the task or cannot perform it without serious damage to their effectiveness in other spheres, then there is cause for concern." 1

The guarantee of "just compensation" for acquisition of private property for public use by state is accepted as axiomatic in affluent democratic Western societies; and a "cause for concern" arises mainly over the institutional arrangements for the fulfillment of the guarantee. The essay from which the above prefatory observations are derived, for example, has as its principal thesis the argument that excessive reliance on courts for ensuring fairness or justice of the redistribution of property entailed in state action under its eminent domain powers may be dysfunctional to the accomplishment of that very goal. 2

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2. Professor Michelman feels that "the attempt to formulate rules of decision has, with suggestive consistency, yielded rules which are ethically unsatisfying" and advances the hypothesis that "decisional rules simply cannot be formulated which will yield other than a partial, imperfect, unsatisfactory solution and still be consonant with judicial action." Supra note 1 at 1171. It must be stressed that the learned Professor is concerned with the state of decisional law on "just compensation" the United States, and to highlight in that context the hazards of automatically entrusting the fairness discipline to courts" (p. 1257). When this is done, both the legislators and public administrators tend to overlook certain aspects of justice or fairness in the acquisition process.
But in an economy of subsistence such a guarantee of compensation can hardly be accepted as axiomatic. It is therefore scarcely surprising that the Indian Constitution-makers should have displayed a marked ambivalence towards the guarantee, which was ultimately incorporated in Art. 31 (2) of the Constitution.\(^3\) And the grave crises which immediately followed the adoption of this provision show that this ambivalence indeed has haunted conscientious policy-making by the Indian Supreme Court and the Parliament.\(^4\) Even to-day in the midst of the radical change in the political system, brought about by the regeneration through the division of the Congress Party, we find bold visionary pledges of abolition of the rights to property tampered quickly by sober realization of the social role of the institution of private property in a developing democratic society.\(^5\)

To be sure, the problem of institutional arrangements for the fulfillment of the guarantee of compensation for State acquisition has


5. This is vividly illustrated by the clarifications, concerning the economic policy resolution, issued by the Ruling Congress Party's working Committee on 18 January, 1970. The Congress, it said, had never "thought of ending private property" or wanted "to take away the property rights of the people, particularly poor people" (sic). A distinction was made between "right to property and right to property as a fundamental right." Right to property was a "reasonable right" but "there could be no unbridled right to own property."

See the \textit{Statesman Weekly} (Air Edition) 24 January, 1970, P. 6, Col. 1, 2 (emphasis added). It can hardly be said that the right to property as it now exists in the fundamental rights chapter amounts to such an "unbridled" right.

Similarly, when the Bank Nationalization Bill was before Parliament, the Union Law Minister defended the compensation clause "against a determined onslaught by some of the leftist spokesmen." The Hon'able Minister maintained that:

Compensation had to be paid not only because it was required by the Constitution...but also because it fitted in with the spirit of democracy which required compensation to be paid for anything taken over for the public good.


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been a constant source of concern. But this problem has so far not emerged as one of distributive justice but principally as one concerning the fine limits of the authority of the two co-ordinate branches of government—the Parliament and the Supreme Court. The right to property, embodied in Art. 31, has provided a fertile arena for dramatic conflicts between these institutions centering on what I have elsewhere called the "ultimate" (and therefore insoluble) questions concerning the limits of their power and authority over the nature, means, and limits of the transformation of the basic features of the constitutional policy.\(^6\)

In the process, the no less fundamental question concerning fairness or justice of the redistribution of community resources entailed in the exercise of eminent domain powers has remained unattended. The urgent need for a more productive (and just) reordering of agrarian landholdings has no doubt so structured the litigation before the Court, and the ensuing dialogue between it and the Parliament as to obscure this vital question.\(^7\)

\textit{State of Gujarat v. Shantilal},\(^8\) a recent decision of the Supreme Court, however, brings home to us the formidable price which continued neglect of the problems of distributive justice can begin to extract from even the most conscientious decision-makers. The aim of the present critique is to highlight some salient aspects of distributive justice which we can no longer afford to ignore and to plead within these contexts for the speediest possible reversal of \textit{Shantilal} by the Supreme Court. For the decision creates a disturbing potential by its permissiveness of state action extremely insensitive to the expectations of security of acquisitions which constitute the very basis of private property.\(^9\) Through its rationale, \textit{Shantilal} further


7. See U. Baxi, supra note 2 at 287-98.

8. A.I.R. 1969 S.C. 634 (Hereafter referred to simply as \textit{Shantilal}.)

9. "Property is nothing but a basis of expectation" wrote Bentham. "The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed according to the nature of the case..." As regards property, security consists in receiving no check, no shock, no derangement to the expectation founded on the law... Even when Indian policy-makers are not insensitive to it, and even when the tasks of justice in an economy of scarcity forbid such a high valuation of property rights, Bentham's following exhortation does seem timely:

The legislator owes the greatest respect to this expectation which he himself has founded. When he does not contradict it, he does what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil.

J. Bentham, \textit{Theory of Legislation} (Trans. R. Hildethro) 111-113 (1911).
weakens (as we shall see later) the already anaemic guarantee of 
"compensation" in Article 31(2), which has been transformed into a 
provision merely for relief from the fraudulent exercise of legislative 
power.10 In its result, by its refusal to apply even this relief in so 
appropriate a fact situation, Shantilal virtually precludes future 
challenges to manifestly unfair exercises of the eminent domain power. 
Both in its rationale and result Shantilal indeed constitutionalizes 
confiscation.

II

An adequate appreciation of Shantilal requires a backward glance 
at some recent constitutional history, though we are dispensed from 
re-telling the oft-told story of the changeful destiny of Art. 31 and 
its many extensions.11 For the present purposes, only the relatively 
less eventful career of Art. 31(2) need here be traced. Based on 
the precedent of sec. 299 of the Government of India Act, 1935,12 
the Constitution as originally adopted contained the compensation 
guarantee in the following form:

No property, moveable or immovable including any interest in, or in any 
company owning, any commercial or industrial undertaking, shall be 
taken possession of or acquired for public purposes under any law 
authorizing the taking of such possession of or such acquisition, unless 
the law provides for compensation for the property taken possession of or 
acquired and either fixes the amount of compensation, or specifies the 
principles on which, and the manner in which, the compensation is to be 
determined and given.

Although the noun "compensation" was not qualified by the 
adjective "just", the interpretation that "compensation" meant "just 
compensation" did seem to command acceptance in Constituent 
Assembly.13 The Supreme Court of India adopted the same approach 
to the meaning of "compensation" in the well-known decision in

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Bella Banerjee14 when it, confirming the decision of the Calcutta High 
Court, held that Art. 31(2) required offering a "just equivalent of 
what the owner has been deprived of."15 It was also held that 
legislative prescription of principles for compensation was "a justicia-
ble issue to be adjudicated by this Court."16 The fact-situation of the 
case did not require any further specification of the components of 
just equivalence since the impugned legislation, a permanent enact-
ment,17 prescribed that compensation for acquisition of land was not 
to exceed its market value as in December 1946 regardless of the 
actual date of acquisition. This anterior date compensation principle, 
in the Court's opinion, failed to comply with "the letter and spirit of 
Art. 31(2)."18 This seminal decision, reinforced by other decisions 
related to other aspects of Art. 31(2), stimulated Indian Parliament 
to enact the Fourth Amendment of the Constitution.

The Fourth Amendment retains the term "compensation" in 
Art. 31(2) along with the reference to "the principles on which and 
the manner in which, the compensation is to be determined and given" 
but adds the rider:

and no such law shall be called in question on the ground that the 
compensation provided by that law is not adequate.19

Calcutta High Court decision in West Bengal Settlement Kannauge Co-operative 
Society v. Mrs. Bella Banerjee, A.I.R. 1951 Cal. 111 (The Supreme Court 
decision will be hereinafter simply called Bella Banerjee).
15. Bella Banerjee at 172.
16. Ibid.
17. Although the "primary" purpose of the impugned West Bengal Land Develop-
ment and Planning Act, 1948, was to provide for resettlement of refugees 
following the Partition of India, and the tragic communal disturbances, that 
Act was not limited to this exigency alone. For a further consideration of this 
(per Saha Rao, J.)
18. Supra note 15 at 173. For a further exposition of the judgment see U. Baxi, 
"The Travails of Land Use Planning: Compensation and Urbanization" in 
19. The text of Article 31(2) now reads:

No property shall be compulsorily acquired or requisitioned save for a 
public purpose and save by authority of a law which provides for compen-
sation for property so acquired and requisitioned and either fixes the 
amount of compensation or specifies the principles on which, and the 
manner in which, the compensation is to be determined and given; and no 
such law shall be called in question on the ground that the compensation 
provided by that law is not adequate.

10. See Part II of this article, infra.
11. See supra note 4.
13. See materials cited supra note 3, and also M.V. Pylee, Constitutional Government 
in India 302-03 (2nd Rev. Ed. 1965).
14. But see contra H.M. Jain, supra note 4 who contends that the Constituent 
Assembly "in the face of vehement opposition from Zamindar-members had 
decided to keep out the word 'just' from clause (2) of Art. 31..." (at p. 160), 
and that the Bella Banerjee decision (infra note 14) "cancels" this constitution-
makers' "assumption."
It is an interesting, though unexplained, fact that this caveat in the amended Article was not in clause 1 of the Constitution (4th Amendment) Bill, 1954. But that as it may, it is clear that the caveat is clearly directed to that aspect of *Bella Banerjee* which asserted the justiciability of compensation.

It also deserves to be noted at this stage that the Statement of Object and Reasons appended to the Bill does not specifically refer to the *Bella Banerjee* decision. Paragraph (3) of the Statement refers to "serious difficulties" created by "judicial decisions interpreting Articles 14, 19, and 31 in “putting together other and equally important (as Zamindari abolition laws) social welfare legislation” and offers numerous illustrations of such legislation in its clauses (i) to (v). Only clause (ii) can be seen to implicitly refer to the fact-situation in *Bella Banerjee*. It states that "the proper planning of urban and rural areas requires the beneficial utilization of vacant and waste lands and the clearance of slum areas." In any case, this particular objective found place in the draft bill which in its version of Art. 31A (1), would have also placed under its immunity "the acquisition or requisitioning for a public purpose of any land, buildings, or huts declared in pursuance of law to constitute a slum or any vacant waste-land." It is significant that this particular clause was not enacted as part of Art. 31A (1).

Art. 31(2) as amended came for consideration before the Supreme Court in three important decisions. In *M/S Burra'kar Coal Co. v.

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20. Seervai, *Constitutional Law* page A-159 usefully reproduces the text of the Amendment Bill, with its Statement of Objects and Reasons, and draws attention to the fact noted in the text, but it is much to be regretted that the conception of its splendid work does not permit him to look for reasons and reactions accompanying the caveat. Even a recent book, solely devoted to property rights, fails to explore this aspect. See H.M. Jain, *supra* note 4.


22. Once again we do not have an analysis of the Parliamentary debates which would indicate reasons for the omission. But taken at its face value the omission seems indicative of the Parliamentary opinion that such social legislation must meet the constitutional test for its validity rather than enjoy the protection of Article 31A(1). This in turn reinforces the distinction between "agrarian reform legislation" and other economic legislation made by the Supreme Court, and highlighted in this writer’s earlier study, *op. cit., supra* note 4, at 392-97.

The exclusion of specific clause concerning among other objectives slum clearance would have provided a better argument for Mr. Justice Subba Rao in *Vajravelu v. Sp. Dy. Collector*, A.I.R. 1965 S.C. 1021 (soon to be examined in detail) than that there adopted. The counsel in this case criticized an earlier decision of the Court (K. K. Kochun v. State of Madras, A.I.R. 1960 S.C. 1080) for basing its interpretation of Article 31A(1)(a) relating only to "agrarian reform" on the ground that a part of "objects and reasons" of the Fourth Amendment Bill dealing with "slum clearance" was omitted from consideration. The Counsel contended that this omission should be remedied by *Vajravelu* and that protection of Article 31A(1)(a) be extended to the situation in that case. Mr. Justice Subba Rao preferred to explain away Kochun reference to the statement of Objects and Reasons by invoking the canon of construction which limits the use of such materials by courts in interpreting laws. Perhaps, instead of relying on such a controversial "rule," the Court could have pointed to the omission of the proposed clause (quoted in the text) from the Fourth Amendment as dispositive of the above contention.

23. A.I.R. 1961 S.C. 954 (hereafter called *Burra'kar*).


25. *Burra'kar* at 963.


27. A.I.R. 1965 S.C. 1017 (hereafter called *Vajravelu*).

28. A.I.R. 1967 S.C. 637 (hereafter called *Metal Corporation*).
precedent. And although Mr. Justice Shah (with respect) inaccurately observes in Shantilal that the "true effect of the amended Art. 31(2) fell to be determined for the first time before this Court" in Vajravelu, the net effect of Shantilal is of course to reinstate the law as stated in Burrakar. In strict law perhaps it is accurate to say that Metal Corporation having been wrongly decided in the first place, its overruling on other grounds in Shantilal was uncalled for.

This, however, is not the manner in which the decisional law has developed. The opportunity to distinguish and overrule Burrakar was not availed by Mr. Justice Subba Rao in either of the two ensuing decisions, and this indeed would have proved to be a costly lapse for the rationales he propounded therein. As it is, however, Burrakar may well not have existed at all. And indeed this is how we must regard it in the analysis that follows.

Vajravelu involved an attack on the Land Acquisition (Madras Amendment) Act of 1961 on the grounds that it violated Art. 31(2) as well as Art. 14 guaranteeing to all persons "equality before the law or the equal protection of the laws within the territory of India." Although the major part of the decision is devoted to the challenge on Art. 31(2), the final decision repels it and rests squarely on the infringement of Art. 14 guarantee. On most approaches to the doctrine of precedent, it will be accurate to suggest that the observations on Art. 31(2) do not constitute the reasons for decisions and therefore are not binding as law. Nonetheless, it must be recognized

29. And even if not so argued, it was open to Shantilal Court to so hold. And in fact Shantilal itself raises the further problem as to the Status of Vajravelu observations on Article 31(2). Mr. Justice Hidayatullah having explained his association with that decision as somewhat uncontemplated. See infra note 62.

Shantilal at 650. (emphasis added) This inaccuracy vanishes if the statement means that in no decision prior to Vajravelu the scope of the Fourth Amendment examination was so closely.

30. Burrakar could have been read by Vajravelu Court as pertaining to Article 31A (1)(c). It could have been distinguished also on the ground that it was a ruling on the limits of judicial review as far as "adequacy" of compensation was concerned whereas Vajravelu was also concerned with the meaning of "compensation" and "principles" in the Fourth Amendment. Both these methods of distinguishing Burrakar, to be sure, have their weaknesses; none-the-less, they were available for judicial use in both Vajravelu and Metal Corporation.


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that so elaborate and penetrating an analysis of the import of the amended Art. 31(2) in a unanimous judgment of five Supreme Court justices cannot be ignored on the technically correct but only formally rational characterization of the observation as mere obiter. And the Shantilal Court's determined, even if not very persuasive, attempt to refute the Vajravelu arguments on Art. 31(2) must be applauded despite the fact that it prefers to characterize Vajravelu observations as obiter.

The revolutionary aspect of Vajravelu consists in the basic premise that since the expressions "compensation" and "principles" in the amended Article were retained from the pre-existing Article, and since these expressions had prior to the amendment "received an authoritative interpretation by the highest Court in land" in Bella Banerjee, it must be presumed that Parliament did not intend to depart from the meaning given by this Court to the said expressions.

In expounding the import of the Fourth Amendment Mr. Justice Subba Rao observed:

It may be recalled that this Court in the said case defined the scope of these expressions and then stated whether the principles laid down take into account all the elements which make up the true value of the property appropriated, and exclude matters which are to be neglected, is a justifiable issue to be adjudicated by the Court. Under the amended Article, the law fixing the amount of compensation or laying down the principles governing the said fixation cannot be questioned in any court on the ground that the compensation provided by that law was inadequate. If the definition of "compensation" and question of justiciability "are kept distinct, much of the cloud raised will be dispelled. Even after the amendment, provision for determining the compensation or laying down of the principles is a condition for the making of a law of acquisition or requisition...... It follows that a Legislature in making a law of acquisition or requisition shall provide for a just equivalent of what the owner has been deprived of or specify the principles for ascertaining the just equivalent of what the owner has been deprived of."

32. Shantilal at 637 (per Hidayatullah C. J.); 651 (per Shah J. for the Court). See also infra note 62.

33. Vajravelu at 1024.

34. Ibid. Seervai calls this decision "formally correct" but feels that "in substance and effect the concept of compensation as a 'just equivalent' was abandoned when the jurisdiction of the Court to go into the question of 'adequacy of compensation' was excluded." Id., Constitutional Law at 558. Seervai's mild denigration of the formalistic reasoning in Vajravelu is justified. But the argument of "substance and effect" that the learned author advances is surely one of policy rather than one springing from self-evident meaning of the language of Article 31(2). It is only at the policy level that the real issues lie.

35. Vajravelu at 1023-24.
It is important at this stage to stress, for a proper appreciation of Vajravelu, that the Court was aware of the fact that its interpretation of the amended Art. 31(2) preserving the pre-amendment judicial construction of the term “principles” and “compensation” did have the tendency to render the Fourth Amendment “nugatory.” In a valiant effort to overcome this consequence, the Court arrived at a sharp, but not unreasonable, distinction between “just equivalent” compensation and non-illusive inadequate compensation. Owing to the rich diversity of compensation principles, just equivalent compensation may on occasions fall short of being wholly adequate. But the Fourth Amendment clearly deprived the Court's jurisdiction on the issue of adequacy. So that when the Legislature prescribes principles for compensation, the justiciable issue is whether the “principles” laid down for compensation are “relevant to the property acquired or to the value of the property at or about the time it is acquired”, regardless of the adequacy or inadequacy of the compensation arising from the application of these principles. It must immediately be noted that although the Court uses a disjunctive in formulation of the criteria of relevance, it is clear that the disjunctive is misplaced. In other words, the principles must be relevant both to the nature of the property under acquisition and also to its value at or about the time of acquisition.

Vajravelu itself attempts to provide an example of the above distinction between “just” equivalence and “adequacy.” The Amending Act there involved specified three compensation “principles.” The first principle prescribed that governmental acquisition of land for housing purposes will be accompanied by payment of compensation computed either on the value of the land as obtaining on the date of the notification of intention for its acquisition or according to its “average” marker value calculated on the basis of immediately preceding five years, whichever was less. The second principle reduced the solutium from 15% to 5%. The third principle excluded the “potential value of the land” from any calculation of compensation.

The Court held that the first provision was “a principle for ascertaining the price of land on or about the date of acquisition.” The second principle was “only for solutium” and the reduction in the percentage of the solutium was “certainly within the powers of Legislature.” The operation of both these principles for the Vajravelu Court meant that they were intended to secure the “just equivalent of what the owner was deprived of.” The statutory exclusion of the “potential value of land,” arising from the third principle, did pose a problem in that such an omission did not lead to compensation which could be regarded as a just equivalent of what the owner was deprived of. Nonetheless, the Court held that in the present case the exclusion “only pertains to the method of ascertaining compensation” with the consequence that it resulted not in unjust (in the above sense) but rather in inadequate compensation.

Simultaneous with the above determinations ran the verdict that none of these principles were such as to constitute fraud on power explained by the Court as “a use of the protection of Art. 31 in a manner in which the article is hardly intended.” Not merely then the statutory principles satisfied the test of “just compensation” but they also conformed to the proper limits of their power under the Constitution.

In the Metal Corporation case, the Government of India provided for the transfer of ownership of the Corporation by an Ordinance, followed by a statute, with a view “to exploit the fullest extent possible the zinc and lead deposits in and around the Zagar area of the State of Rajasthan” in “public interest” and to “utilize these minerals in such manner as to subsist the common good.” Section 10(2) of the Act provided that though the Schedule to the Act prescribed different principles of valuation for different aspects of acquisition, the amount of compensation to be given shall be deemed to be a single compensation to be given for the undertaking as a whole.

The Schedule contained a number of principles for valuation but only two were impugned before the Court as violative of Art.

37. Ibid. at 1024.
38. Ibid.
39. Vajravelu at 1026.
40. Ibid.
41. Ibid.
42. Ibid.
43. Vajravelu at 1025. The doctrine of “fraud” was explained as follows: When a Court says that a particular legislation is a colourable one, it means that the Legislature has transgressed its legislative powers in a covert or indirect manner; it adopts a device to outstep the limits of its power. Applying the doctrine to the instant case, the Legislature cannot make a law in derogation of Article 31 (2) of the Constitution. It can, therefore, only make a law of acquisition or requisition by providing for “compensation” in the manner prescribed in Article 31 (2) of the Constitution.
44. Metal Corporation at 639 (quoting the Preamble of the impugned Metal Corporation of India (Acquisition and Undertaking Act of 1965).
45. Ibid.
31(2). Both the impugned principles related to the machinery and other equipment. Unused but serviceable machinery was to be valued according to the purchase price originally paid for by the Corporation. Used machinery was to be valued in terms of the "written down value" determined by the provisions of the Income Tax Act, 1961. The Delhi High Court found both the principles to be arbitrary and not "just equivalent" principles. The Supreme Court, in an opinion written by Mr. Justice Subba Rao, agreed. Judged by the standard that principles of compensation to be valid under Art. 31(2) must be "such as to enable the ascertainment of (the) price at or about the time of its acquisition" the Court found both the above "principles" to be irrelevant to compensation for the property acquired.

Two insufficiency noted aspects of this decision need here be emphasized. First. Mr. Justice Subba Rao stressed the fact that the machinery and other equipment constituted an important, and even crucially so, part of the acquisition. The purported "principles" of compensation for this vital aspect of acquisition, however, attempted to accomplish the "impossible"—namely, "to predicate irrespective of [market] conditions that a particular machinery has a fixed value for all times."

Second, it was argued before the Court that the legislative scheme for compensation taken as a whole did satisfy the "just equivalent" criteria of compensation. This was due to the fact that while valuation principles for certain aspects of acquisition may be deficient in terms of these criteria, operation of other principles resulted in "excessive" compensation which cancelled the deficiencies. This argument of course had to take as its basis the premise that "just equivalent" concept of compensation had survived the Fourth Amendment. The Court negatived this argument on the ground that no evidence of the cumulative justness of the compensation under the Act was presented. Mr. Justice Subba Rao indeed felt constrained to observe that in absence of such evidence the argument can only be seen to be "purely based on a surmise." The leeways for choice

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thus presented for the future development of Art. 31(2) were, however, ignored by the Bench and the Bar, as Shantilal clearly demonstrates.

III

In Shantilal the respondent was offered Rs. 25,411/- as compensation for a plot of land measuring 2,816 sq. miles acquired by a local authority in the state of Gujarat under the Bombay Town Planning Act of 1955 continuing in force the pre-existing arrangements under the predecessor Act of 1915. The original declaration of intention to acquire the plot of land was made in 1927 under the "City Wall Improvement Town Planning Scheme." The draft Scheme was approved by the Government of Bombay sometime in 1942. The award of compensation was, however, made in 1957, under the 1955 Act, and the Scheme, sanctioned finally by the successor government of Gujarat in 1965, came in effect later in that year. The result of the operation of the Scheme is admirably described by Mr. Justice Shah as follows:

[There is a complete rescheduling of plots of land. The original plots of land are reconstituted, their shapes are altered, portions out of plots are reconstructed, lands belonging to two or more persons are combined into a single plot, new roads are laid out, old roads are diverted or closed up, and lands originally belonging to private owners are used for public purposes. In this process the whole or part of a land of one person, may go to make a reconstituted plot, and the plot so constituted may be allotted to another person, and the lands needed for public purposes may be ear-marked for these purposes.

compensation, though its component principles taken singly may not lead to this result in relation to the aspect of acquisition they govern.

Second, the decision may also be said to permit, in absence of the above showing, the inference that courts are not barred by anything in Article 31(2), as it now stands, from evaluating, and if necessary, invalidating specific principles which offend the constitutional concept of "compensation".

Third, even when a demonstration of the cumulative "justness" of compensation is undertaken, it remains possible for courts to hold that some aspects of the acquisition are so vital that principles relating to it must comply with the "just equivalence" concept. One justification for leaving open this type of possibility lies simply in the need to alert the legislative draftsmen and lawmakers to the fact that cumulative justness of a compensation scheme may not be a good defence to an arbitrary prescription of principles designed to somehow achieve the right result. For Article 31(2), as most of the other provisions in Part III, does not merely impose limits on the competence of the state (as there comprehensively defined) but also positively requires of state action a certain degree of conscientiousness in the formulation of laws.
Section 67 of the Act was “intended to make adjustment between the right to compensation for loss of land suffered by the owner” and “the liability to make contributions to the finances of the scheme” for the benefits arising to the owner of reconstituted plot as a result of the Scheme.61 The compensation was to be estimated at the market value of the land “not on the date of extinction of interest but on the date of the declaration of intention to make the Scheme.”62 Section 71 provided for compensation on the same principle to a dispossessed owner who did not receive any reconstituted plot.63 The acquisition of land by the local authority (under Section 53 (a)), on the above principles of compensation was invalidated by the Gujarat High Court since the compensation did not fulfil the “just equivalent” criteria as defined and developed in Bella Banerjee, Vajravelu, Metal Corporation and other decisions concerning pre-Fourth Amendment situations.64

In the absence of the publication of the report of the decision of the Gujarat High Court, it is necessary for us here to follow Mr. Justice Shah’s exposition of its rationale. The principal ground for declaring Sections 67 and 71 of the 1955 Act as ultra vires of Art. 31(2) of the Constitution was that compensation based on the market value may be sufficient specification of the principle of compensation within Article 31(2) only if it is a just equivalent of the land expropriated and payment computed on the

51. §67 of the Act reads:

The amount by which the total value of the plots included in the final scheme with all the buildings and works thereon allotted to a person falls short of or exceeds the total value of the original plots with all the buildings and the works thereon of such person shall be deducted from or added to, as the case may be, the contributions leviable from such persons, each of such plots being estimated at its market value at the date of the declaration of intention to make a scheme or the date of a notification under sub-section (1) of Section 24 and without reference to improvements due to the alteration of its boundaries.

52. Shantilal at 641

53. §71 of the Act is as follows:

If the owner of an original plot is not provided with a plot in the final scheme or if the contribution to be levied from him under Section 66 is less than the total amount to be deducted therefrom under any of the provisions of this Act, the net amount of his loss shall be payable to him by the local authority in cash or in such other way as may be agreed upon by the parties.


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...market value at a date many years before the date on which the land was acquired is inconsistent with the constitutional guarantee under Article 31(2).64

Apart from this offensive anterior date provision, the High Court flawed the scheme of compensation on the ground that “increases in the value of reconstituted plot” cannot be taken into account in determining compensation because it is not “relatable to the acquisition of...(the) plots” but is rather a benefit shared “in common with the other members of the community” regardless of the acquisition of their plots.66 More importantly, the increment in the value of the plot allotted to the owner is uncertain as well as irrelevant as a principle for determining compensation, since it is quite possible that no plot may be allotted to an owner of land in a town planning scheme.67

Nor did the Act give “for the original plot of land of the owner a reconstituted plot together with compensation for the loss of difference in the area between the original and the reconstituted plot.” 58 In arriving at the conclusion, the Gujarat High Court “felt itself bound by the observations made in the judgements” of the Supreme Court.59

The Supreme Court, on appeal, conceded that if the argument that for compulsory acquisition of property an owner is by the Constitution guaranteed a “just equivalent” of the property of which he is deprived of at the date of acquisition, the plea that what is provided as compensation by Sections 67 and 71 as the value to be adjusted against the amount of contribution, if any, infringes the guarantee of Art. 31(2), would be unassailable.60

But this, the Court now decides, is not so. For the revolutionary premise of Vajravelu that the “just equivalent” concept of compensation...

55. Shantilal at 642. At this juncture it becomes apparent that (with respect) Mr. Justice Shah has either introduced or merely exposed an inconsistency in the High Court decision as reported in Shantilal. For the paragraph quoted in the text defines a principle of compensation as meaning only a principle of just equivalent compensation. Nonetheless, earlier in the same context, the learned Justice observes that the High Court regarded the provision “for awarding compensation” as a “Sufficient specification of a principle of compensation within the meaning of Article 31(2).” (Emphasis added) Later in the decision (p. 645) Mr. Justice Shah reiterates this view, but the two meanings of the terms “principles” and “compensation” are mutually exclusive.

56. Shantilal at 642.

57. Ibid.

58. Ibid.

59. Ibid.

60. Shantilal at 646.
tion remains unaffected by the Fourth Amendment, Shantilal Court adopts a counter-revolutionary premise:

Whatever may have been the meaning of the expression “compensation” under the unamended Art. 31(2), when the Parliament—expressly enacted—the amended clause—it was intended clearly to exclude from the jurisdiction of the Court an enquiry that what is fixed or determined by the application of the principles specified as compensation does not award to the owner just equivalent of what he is deprived. Any other view is contrary to the plain words of the amendment; it is also contrary to the ultimate decision of the Court in P. Vajravelu Modaliar’s case, that the principles specified by the Court which did not award what may be called just equivalent were still not open to question. 61

In 1965, for a five-judge Bench the words of the Fourth Amendment were not “plain”. The Vajravelu Court (as noted earlier) had to take recourse to the hallowed canons of construction and introduction of sophisticated distinctions to clarify the meaning of the Fourth Amendment. In 1969, the same words suddenly become self-evidently “plain,” indeed so much so that the Shantilal Court is impelled to offer a “clarification” of Vajravelu! In 1965, the Supreme Court found that the Parliament could not have intended in enacting the Fourth Amendment to exclude “just equivalent” concept of compensation; precisely such an exclusion appears an unarguably “clear” legislative intent to the 1969 Court.

This reversal of judicial postures will surprise no one familiar with the vagaries and the varieties of constitutional interpretation. 62 But

61. Shantilal at 650.

62. I borrow this phrase from Professor T. E. Powell from his book of that title. This reversal is all the more striking in view of Mr. Justice Hidayatullah’s brief prefatory concurring opinion where explaining his association with Vajravelu, the learned Chief Justice says:

That case was heard with N. B. Jeejeebhoy’s case. One was a post-constitution (Fourth Amendment) case and the other a pre-Constitution case. The judgments in two cases were delivered on the same day. It appears that the reasoning in the two cases was not kept separate and the whole of the matter was discussed in a case in which it was not necessary for the ultimate conclusion. Because of the close proximity of the decisions it escaped me that the discussion was in the wrong case and the other merely followed it.

Shantilal at 637, (emphasis added)

Such a candid acknowledgement compels respect. It shows, besides candour, a humility and openness to change which are exemplary. Students of the Court everywhere will be grateful for this glimpse into the “internal” aspect of decision-making.

it is also evident that Shantilal’s purported rebuttal of Vajravelu on the above line scarcely engages the Court in a direct confrontation with the principal policy problems involved on either approach. Mr. Justice Subba Rao relied in Vajravelu on “the well-known principle of construction” expressed as follows:

Where the legislature used in an Act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted unless a contrary intention appears. 63

Mr. Justice Sulah in Shantilal in effect, though not explicitly prefers to follow a no less well known principle of construction forbidding recourse to such principles unless the language of the enactment is ambiguous or obscure. Very much the same can be said about the judicial gropings for the legislative intention, which can be shown without much difficulty to lend support to either or both the positions. 64

But while we have the benefit of knowing that Mr. Chief Justice Hidayatullah’s concurrence in Vajravelu was somewhat unconsidered, his Lordship’s above quoted observations seem to suggest the same to be the case with all the participant judges in Vajravelu. When we bear in mind that the same justices K. Subba Rao C. J., K. N. Wanchoo, M. Hidayatullah, R. Rayal, S. M. Sikri— JJ. participated in both the cases, the above suggestion gains in plausibility. On the other hand, the obvious contextual differences in the two decisions (interpretation of S. 299 (2) of the Govt. of India Act, 1935 in Jeejeebhoy—A.I.R. 1965 S.C. 1096 and of the Amended Article 31 (2) in Vajravelu makes this view rather improbable. The painstaking distinctions that Vajravelu Court evolved to justify its interpretation of “compensation” under amended Article 31 (2) makes the above suggestion even more unlikely. Accordingly, we must accept Mr. Chief Justice Hidayatullah’s observations as explaining only his Lordship’s participation in Vajravelu.

Even so, the question of the exact legal effect, if any, of the learned Chief Justice’s “explanation” persists. Does this “explanation” amount to a retrospective dissent by the learned Judge from Vajravelu observations on Article 31 (2)? If so, on the issue of Article 31 (2) only four out of the five judges could be said to have actually participated. (But at the technical level, is retrospective dissent permissible and legitimate?) Moreover, if technically Vajravelu observations on Article 31 (2) are to be regarded as those of a four-Judge Bench, then can it be said that their per incuriam character (in view of the neglect of Burrahar) is further aggravated? Of course all these perplexities become manageable by simply characterizing Vajravelu observations on Article 31 (2) as obiter, so that in the learned Chief Justices’ dissociation has the more effect of “dissenting” from dicta.

63. Vajravelu at 1024, quoting from Crales on Statute Law 167 (6th edn. 1963).

64. For a recent brilliant analysis of the problematics of determining “legislative intent” see G. C. MacCallum, Jr., “Legislative Intent,” in Essays in Legal Philosophy (Summers ed.) 237–73 (1968)
The elementary truth is that very often, if not always, judges have the somewhat painful freedom to characterize legislative language as “clear” or “equivocal.” They also have a similar freedom in discovering the so-called legislative intent. The decision to regard the language and the intention one way or the other is a policy decision, which makes a better contribution to the rational growth of law when it is conscious and articulated. Even the worst excesses of legalism pulsate with heartbeats of policy, however faint. But the more regular the beats are the better is the health of decisional law.

Before we strain to audit the beats of Shantilal, one further aspect of Mr. Justice Shah’s observations needs analysis. The concluding part of Mr. Justice Shah’s above quoted observations suggests that “the ultimate decision” in Vajravelu is in fact consistent with the interpretation of the Fourth Amendment now offered by the Court. This is so, according to the learned Justice, because Vajravelu legitimates “principles” which did not “award what may be called a just equivalent.” The use of the term “principles” in plural must carry a reference to all the three principles that were in question before the Vajravelu Court. But to that Court only the last principle—the exclusion of potential value of the condemned land—did not appear consistent with the “just equivalent” concept of compensation. To assert that all the impugned principles were so inconsistent is to misrepresent the holding in Vajravelu. It is of course quite another thing to say all the principles ought to have been found in favour of Vajravelu on a specified conception of “just equivalent compensation.”

Vajravelu Court sanctions average market value (determined on the basis of the market value for the five years immediately preceding the acquisition) “in the context of continuous rise in land prices from year to year depending upon abnormal circumstances.” In this context, the Court finds that the average value principle is within its conception of “just equivalent” compensation. There is no a priori reason for denying the Court such a conception, specially when its numerous decisions describe “just equivalent” as the value of the property prevalent on or about the time of the acquisition.

65. Vajravelu at 1026.

66. Seervai, in a formidable critique of Vajravelu, writes:

It is quite clear that the market value of a property cannot be determined by the average market value of property over a period of five years because it is well-settled law that the market value of property is that which a willing purchaser would pay to a willing seller on the date of acquisition.
much the same applies to the second principle excluding solatium payment. 67

It is the last principle—the exclusion of potential value of the condemned land—which the Vajravelu Court explicitly acknowledges to be inconsistent with its concept of just equivalence:

In awarding compensation if the potential value of the land is excluded, it cannot be said that the compensation awarded is the just equivalent of what the owner is deprived of. 68

And yet the Court does not invalidate the legislation as offending Art. 31(2). The reason offered is that this exclusion only "pertains to the method of ascertaining the compensation." 69 This is the most vulnerable part of the Vajravelu rationale; for it glosses over, in a rather facile manner, an obvious inconsistency in reasoning:

The fact that the Court left the matter without any sustained effort at clarification or reconciliation is surely a matter of regret. But it is equally regrettable that many able commentators on the decision, and now even the Shantilal Court also take these observations merely at their face value. 70 Can it be seriously suggested that such a patent inconsistency escaped the attention of the Court? It seems indeed more probable that in characterizing the exclusion of the potential value as an issue of "method" related to "adequacy," the Court was in fact suggesting that while as a matter of rule such exclusion violates the "just equivalent" compensation criteria, the fact situation of Vajravelu permitted an exception to the rule. The concept of compensation, the Court was seeking to develop, was a

67. In Assistant Collector v. Jamnadas, A.I.R. 1960 Bom. 35 Mr. Justice Shah negated the contention that "the right to fifteen per cent solatium is a right to property and cannot be taken away without providing adequate compensation for loss therefor." (at 42.) This statutory right was subject to modification by the Legislature, even to the point of extinction. We can employ this approach to suggest that solatium payment does not form a part of concept of "just equivalent" compensation.

68. Vajravelu at 1026.

69. Ibid.

70. Seervai commenting on this and allied aspects of Vajravelu suggests that it is "more satisfactory" to "admit that the scope for judicial intervention is very limited" rather than to emphasize the judicial power still retained "by the Court" because:

If the Court is powerless to grant relief from such "principles" of compensation, as the Court admittedly is, it is submitted that it is illogical to hold that if principles of compensation are laid down which are considered by the Court irrelevant but which still result in the payment of the same compensation, the Court is free to strike them.

flexible and pragmatic one, dictated inevitably by the litigational situations coming before it. Any other interpretation of this aspect of Vajravelu makes its decision on Article 31(2) issues meaningless. And if it is a salutary rule of constricting that statutes will be construed to avoid absurdity, it may perhaps not be inappropriate to plead for an extension of the same rule to the judicial decisions.

IV

The faint heartbeats of policy in Shantilal can be echoed in the view that Bella Bannerjee and its progeny "raised more problems than it solved." 71 The just equivalence concept of compensation, as articulated from Bella Bannerjee to Metal Corporation, made the enquiry "more controversial" 72 because the concept was "somewhat indefinite." 73 The existing decisional law did not indicate "the meaning of the expression 'just equivalent'" and failed to specify its components. 74

It was easier to state what was not just equivalent than to define what the just equivalent was. 75
Furthermore, Mr. Justice Shah finds, in language reminiscent of the
Statement of Objects and Reasons appended to the Fourth Amend-
ment Bill, that
..... apart from the practical difficulties, the law declared by the Court
also placed serious obstacles in giving effect to the Directive Principles of
State Policy incorporated in Article 39.  

Mr. Justice Shah’s strictures on the state of decisional law are
not wholly unmerited. It is perhaps true to suggest that hitherto the
concept of just equivalence has been expounded in a negative, rather
than a positive manner. It is also true to say that there is no clear
and comprehensive delineation in decisions of the ingredients of just
equivalent. But the indeterminacy of this key concept can scarcely

76. Ibid.  
77. Most decisions have failed to raise the issue of the components of market value.
Rather, the validity of various anterior (pre-acquisition) dates has been at
issue. See infra note 78. In these circumstances, the Court may be under-
standably reticent to lay down guidelines for determining a just market price.
Besides, even when the components have been specified, different factors—such
as the type of property acquired, and the nature of the public purpose involved
will still continue to affect decision-making.  
78. But some clarification does emerge from the decisions. In addition to Bella
Banerjee, Valmikiris, and Metal Corporation, the following two decisions also
involved some specification of just equivalence.

In State of Madras v. Namivaiya (A. I. R. 1965 S.C. 190) the land was
acquired in 1957; the market value was frozen as on 28th April 1947. All in-
crements in the value of the land in the interim period were to be disregarded.
Shah J. held that this latter exclusion could be “prima facie, regarded” as
a denial to the owner of “the true equivalent of land which is expropriated.” It
is furthermore for “the State to show that fixation of compensation on the market
value on an anterior date does not amount to a violation of the constitutional
guarantee….” (1941 emphasis added). The latter formulation almost invites in
appropriate situations the state to formulate its policy reasons before the Court
in terms of theories discussed in Part VII of this paper.

In Jejjeboy v. Assistant Collector, Than, (A. I. R. 1965 S.C. 1096) land
was acquired on 31 December 1949; the anterior date for compensation for all
acquisitions was fixed at 28th May, 1948. Subba Rao J. held: “…….the dating
back has no relevance to the matter of fixing the compensation for land. It is
not a just equivalent of what the owner has been deprived of for the value of
the land on that date may be far less than that under S. 4 of the Land Acquisi-
tion Act…” (1101) (Emphasis added)  

It follows from a survey of the above cases (and these do not exhaust the
field) that just equivalent conception requires payment of compensation which:  
(a) is reasonably related in point of time to the market value of the property
acquired;  
(b) as a rule, takes into account the potential value of the land, where land is
acquired;  
(c) does not deny to the dispossessed owner the benefit of appreciation of the
value of condemned property during the pendency of acquisition;  
(d) is based on principles relevant to the nature of property acquired (see infra
note 93 and text accompanying).  

79. Such refinements will relate to a greater specification of the constituents of
“just equivalence” concept and even formulation of different criteria of “just
equivalence” compensation depending upon the types of property acquired
and the policies underlying the acquisition. A handful of decisions of the
Court cannot perform such a task.  
80. Article 39, Ind. Constitution.

The State shall, in particular, direct its policy towards securing—  
(a) that the citizens, men and women equally, have the right to an
adequate means of livelihood;  
(b) that the ownership and control of the material resources of the
community are so distributed as best to subserve the common
good;  
(c) that the operation of the economic system does not result in the
concentration of wealth and means of production to the common
detriment;  
(d) that there is equal pay for equal work for both men and women;  
(e) that the health and strength of workers, men and women, and
the tender age of children are not abused and that citizens are
not forced by economic necessity to enter avocations unsuited
for their age or strength;  
(f) that childhood and youth are protected against exploitation and
against moral and material abandonment.
warmly to be commended for its concern with the public and scholarly criticisms of the critical impact of the Article 31(2) on the pursuit of Article 39 policies, since all its Justices, save Mr. Justice Grover, have so far participated in the developing decisional law on the compensation guarantee.

But awareness of the Supreme Court's contribution to the better implementation of the Directive Principles in general, and Article 39 in particular, must qualify any acceptance of the view that the Court may have at one stage placed 'grave obstacles' against the realization of these policies. In fact, the Court has displayed commendable sensitivity to the needs for agrarian reform in its approach to Article 31A. Even in the areas of non-agrarian economic legislation, as Vafraleva itself demonstrates, the Court has been flexible in its concretization of the concept of 'just equivalent' compensation. And one of the more recent decisions (among those available to this writer) would seem to sanction three year anterior date principle for compensation under the amended Land Acquisition Act. Finally, as we will see in the concluding sections of this article, it is by no means self evident that in a Shantilal type fact-situation, which is not typical, Article 39 is better served by the abandonment, rather than the retention of just equivalent concept of compensation.

VI

Before we venture an examination of the difficult issues of social and ethical policies, we must try to answer the question as to whether any limits on the eminent domain power survive Shantilal. The term 'compensation' no longer means a justiciable 'just equivalent' recompense to the dispossessed individual: it now means 'what the Legislature justly regards as proper and fair recompense for compulsory expropriation of property.' This is an imaginative formulation since it retains the emphasis on the justness of compensation, even when the ultimacy of the legislative determination relative to compensation is accepted. The dispossessed owner, however, stands deprived of his right to have the courts review the justice or fairness of the compensation. But the judicial abdication of the field is not intended to be

82. See Section II of this article, supra
84. Shantilal at 650.
85. Ibid. (emphasis added).
86. Ibid.
87. Illusoriness of compensation is not identical with no compensation at all. To say that compensation is illusory is to metaphorically indicate that what is offered or received is so insubstantial as to amount to no compensation at all. But this obscures to certain extent the fact that some compensation is offered. It is perhaps helpful to envisage five categories of compensation situations in order to fully grasp the 'illusory' type compensation: (i) just equivalent compensation (to be simply called 'just' compensation); (ii) inadequate but 'just' compensation; (iii) substantial but both inadequate and unjust compensation; (iv) insubstantial, inadequate, unjust compensation; (v) no compensation at all.
88. Of these categories (i) and (ii) have been held constitutionally valid; category (v) is (apart from agrarian reform legislation) simply constitutionally prohibited. Categories (iii) and (iv) pose some acute problems: but at a pinch compensation envisaged by (iii) cannot be said to be illusory; though being 'unjust' (at least under the pre-Shantilal law) it will not be constitutionally permissible. Shantilal now seems to decide that such compensation is permissible. Only category (iv) seems to well describe the notion of 'illusoriness'. When, as seems to be the case in Shantilal, the compensation offered is simply one tenth of the current market value of land, it may be open to the charge of illusoriness. Illusoriness is insubstantiality of the recompense and one clear way of measuring it is through the remoteness in time of the value offered for the property from its current market value.
adoption of a special rule of compensation resulting in no “recom-
 pense at all” may still be constitutionally valid.88

The second limitation on the eminent domain power is formulated as follows:

Principles may be challenged on the ground that they are irrelevant to
the determination of compensation but not on the ground that what is
awarded as a result of application of those principles is not a just or fair
compensation.**

This, it must be said with great respect, is a vacuous formulation.
The vacuity arises because the Court while depleting the justiciable
"just equivalent" concept of compensation has failed to offer a substitu-
tive concept with reference to which the determinations of "relev-
ance" of principles can be made. It cannot seriously be urged that
the notion of "inadequate compensation" furnishes a standard by
which the relevance of the principles for the determination of compen-
sation can be ascertained. For inadequacy is at best a negative stan-
ard; and under Shanttilal formulation all that the Courts can
ask is: Is this principle or set of principles "relevant" to the determi-
nation of the inadequate compensation? This sort of enquiry must
in the end lead to the distinction between permissible and impermissi-
ble forms of inadequacy; but a judicial enquiry into the adequacy of
compensation is forbidden by the Fourth Amendment. Shanttilal does
not rule otherwise.

Let us see how such a limit can be applied in practice. Mr. Justice
Subba Rao, in Vajravelu, clearly foresaw the Shanttilal type fact situa-
tion arising for adjudication. Among the hypothetical examples of
irrelevant principles (judged on the basis of just equivalence criteria),
his Lordship instances a situation where land "is acquired in 1950" and
the principle of valuation prescribed that market value "in 1930

88. Metal Corporation at 641. Mr. Justice Subba Rao felt that the employment of
a "notional" and "artificial" rule of depreciation, which was designed pri-
marily for the relief of taxpayers over time, for the purposes of determining
compensation for used machinery acquired by State may result in "no recom-
 pense at all.

Such a possibility was also present in Shanttilal (see text accompanying
supra note 57) and the Gujarat High Court included it as one of the bases for
invalidation of the impugned sections of the Act. The Supreme Court, how-
ever, regarded Section 71 read with Section 67 of the Act as avoiding this
possibility. Shanttilal at 645, 653. For the text of these sections, see notes 51,
53 supra.

89. Shanttilal at 650.

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should be given."90 There is little doubt that the Gujarat High Court
was right in invalidating the compensation provisions of the impugned
Act on the basis of Vajravelu.

But the Supreme Court could not arrive at that result, even if it
was, on intuitive grounds, felt to be more just or desirable, because
there was no way left open for saying that the principles of compen-
sation were not relevant to the determination of the inadequate
compensation thus offered. In its overruling of Metal Corporation
decision, this difficulty is even more transparent. Referring to the
principles there involved,92 Mr. Justice Shah observed:

The principles expressly related to the determination of compensation
payable in respect of unused machinery. The principles were set avowedly
for determination of compensation. The principles were not irrelevant.**

Of course, the principles will always appear related to the determi-
nation of the compensation; and they will always be set "avowedly"
for that purpose. And it follows "as the night the day" that hence-
forth an attack on the principles as "irrelevant" shall remain futile.
The notion of "irrelevancy" can make sense only in the light of
"just compensation" concept: the Vajravelu limits on state action can
only be purchased if we are willing to pay the price of retaining its
concept of compensation.

All this does not foreclose post Shanttilal Court from invalidating
a law on the ground that principles are irrelevant to the nature of
property acquired. Shanttilal does not refer to this sort of irrelevance:
but basis for it exists in Vajravelu.98 It is a matter of conjecture whether
the Shanttilal Court would have overruled Metal Corporation in the
manner it did, if this specific aspect had been presented to the Court.
Obviously a rule of depreciation suited to calculating relief for the
income-tax payer cannot be, per se, converted (as it was sought to be
in Metal Corporation) into a principle for the payment of compensa-
tion for used machinery of an industrial corporation. Even more
obviously, a principle offering the market price of cashewnuts for the
acquisition of castles, or the price of peanuts for acquisition of palaces,
must be deemed irrelevant in this sense.

But of course such very obvious disregard of the nature of property
is unlikely, unless the legislative conscience has totally atrophied. The

90. Vajravelu at 1024.
91. See texts accompanying notes 45; 46 supra.
92. Shanttilal at 652–53 (emphasis added.)
93. See text accompanying supra note 38
problem will arise in less self-evident manner as illustrated by Metal Corporation. It is very much to be hoped that despite its express overruling, the Court in the future will avail of this standard in measuring the relevance of the “principles” of compensation.

An allied aspect of Shantilal is the puzzling but resolute refusal by the Court to appreciate the significance of the inordinate delay in carrying out the declared intention to formulate a scheme. We may recall that the intention to make a town-planning scheme was notified in 1927, the draft-scheme was sanctioned in 1942, and the final scheme came into operation in 1965. The determination of compensation was made in 1957, on the basis of the frozen market value obtaining in 1927. All that the Court has to say about the delay is summed up in the following two observations:

It is perhaps right to say that compensation cases should not be allowed to drag on for a long time, because then the compensation paid has no relevance to the exact point of time when the extinction actually takes place. But the validity of the Act cannot ordinarily be judged in the light of the facts in a given case.*

The validity of a statute cannot depend upon whether in a given case it operates harshly.**

The factor of thirty years’ delay in the settlement of compensation and four decades’ delay in the implementation of the scheme thus stands belittled. The emphasis is rather on the doctrine, somewhat novel in the constitutional contexts of fundamental rights, prescribing that state action pursuant to a constitutionally valid law cannot be invalid, even when it results in an infringement of these rights. Whatever the source, wisdom or validity of this doctrine be, it seems further reinforced by the dominant assumption that Shantilal presented an “ordinary” situation vigorously attracting the doctrine. At this point, it becomes hard to believe that the same Supreme Court could have in 1966 so imaginatively and boldly construed a provison in the Land Acquisition Act, 1894, as to strike down one of the major sources of delay in land acquisition proceedings thus firmly rescuing the dispossessed owners from the extravagant disregard of their plight.***

94. Shantilal at 645-46.
95. Id. at 653.

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To be sure, the learned Justice is right to save from constitutional attack a statute because it operates “harshly” in a “given case”. That perhaps is the moral of the maxim “hard cases make bad law.” It certainly is inherent in the legal process that it is unable to fully predicate itself on the existential uniqueness of each individual and situation. Equal operation of law must necessarily let fall an incidence of relatively higher burdens on some particularly circumstanced persons. Perhaps, refusal to declare invalid, on constitutional grounds, the statute for its operational consequences rather than formal or substantive validity is in the ordinary course justified both in policy and law.

But from all this, it does not necessarily follow that state action under a constitutionally valid statute may never be bad in law. For if this were so, merely the text of the legislation and not the actions done in pursuance thereof will be dispositive of all attacks on the constitutionality of state action. Furthermore, fundamental rights bind all state action, the notion of state being comprehensive, for the purposes of the rights, under Article 12 of the Constitution. This makes possible a clear dichotomy between a valid law and an invalid execution thereof.

Even on its interpretation of the Fourth Amendment, it was open to Shantilal Court to hold that this delay in finalizing the scheme, and in awarding the compensation, did make the pre-acquisition market-value principle of compensation irrelevant to the acquisition. To this extent, the Scheme was violative of Article 31(2), even if the relevant sections of the Act in themselves were not.

The Court did advert to this decisional possibility. Mr. Justice Shah observed:

If the scheme came into force within a reasonable distance of time from the date on which the declaration of intention to make a scheme was notified, it could not be contended that fixation of compensation according to the scheme of Section 67 per se made the scheme invalid.****

However, in the sentence immediately following the above exposition, the learned Justice concluded:

The fact that considerable time has elapsed since the declaration of intention to make a scheme cannot be a ground for declaring the scheme ultra vires.*****

98. Shantilal 653. (emphasis added)
99. Ibid. (emphasis added)
The first observation establishes a clear and vital nexus between "reasonable" delay and correspondingly permissible anterior-date compensation. But the second observation represents the conclusion that even on this approach, the scheme cannot be declared *ultra vires*. Between the formulation of the guiding principle and the conclusion there is a tension which the *Shantilal* Court seems not to find disturbing.

One possible explanation for this tension between the formulated principle and its actual application may be that the *Shantilal* Court did regard lapse of nearly four decades as constituting a "reasonable distance of time." It is submitted, with great respect, that in absence of *bona fide* explanation for the delay by the government concerned, toleration of such a length of time as "reasonable" simply ignores and thus sacrifices, somewhat wantonly, the social interest in the constitutionally guaranteed right to property to social interest in social change through manifestly unscrupulous (in result, if not also in intention) state action. If the pre-acquisition principle of compensation can conveniently so extend to nearly four decades, and yet remain "reasonable," then surely an interval of half a century (or even a century) would thus appear reasonable. The Right to property is dead; Long live the right to property!

VII

I have so far argued that *Shantilal* is an unfortunate decision of which it could be more justly said than *Bella Banderjee* that it creates more difficulties than it solves. But the critique has so far proceeded on the basis of an intuitive moral judgment that the compensation legitimated by *Shantilal* was manifestly unfair or unjust. On this basis, I have sought to demonstrate that the Court has been a spendthrift of opportunities, existent within the decisional law, for arriving at a just result. I must now more fully articulate the felt moral judgment and examine the possibility that I might have been mistaken.

100. A closer look at the texts accompanying footnotes 98 and 99 *supra* may seem to suggest that the Court is drawing a distinction between the notions of "reasonable distance of time" and "considerable" lapse of time. But even if this is so, this verbal distinction expresses the Court's conclusion, rather than reasons for reaching it.

101. *Shantilal* at 648

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Perhaps, the best starting point for such explication and examination is to be found in Mr. Justice Shah's acknowledgment that the "law declared by the Court also placed serious obstacles in giving effect to the Directive Principles of State Policy incorporated in Article 39." That Article embodies a number of major policies of which only two appear to be directly related to the issue of just compensation. Clause (b) of Article 39 prescribes that "the ownership and control of the material resources of the community," shall be "so distributed as best to subserve the common good." And clause (c) "calls upon" the State "to direct its policy" to ensure that the operation of the economic system does not result in the concentration of wealth and the means of production to the common detriment.

The latter clause seems merely to concretize an important aspect of the pursuit of "the common good", commanded by the former.

Article 39(b) embodies a precept of distributive justice which the ethical theorists will no doubt recognize as a utilitarian maxim. The common good is one of the "older concepts" through which "utilitarianism has made its way deep into the popular folklore of democratic theorizing." We need not concern ourselves here with the concept of "the common good" in its wider, though not unrelated, aspect as providing a justification for political obligation.

It must be admitted at the outset that it is un rewarding to dwell on the notion of the "common good" in the abstract, in the absence of postulated or existent contents in which the distribution of goods is to be made. The master context for the precept embodied in Article 39(b) is simply that of the economy of scarcity or subsistence. The tasks of distributive justice in such an economy are obviously far more complex and demanding than in an economy of sufficiency, abundance or super-abundance. Western ethical theorizing seems to have as yet only marginally cognized this aspect of the problematics of


103. See *supra* note 80


distributive justice; and absence of sufficient attention to it by their counterparts in the developing societies indeed constitutes a dereliction of an important social responsibility on their part. One cannot help relating the continuing vicissitudes of Indian decision-makers, be they legislators or judges, on the right to property to the fact that their activities are as yet not adequately oriented towards the meaning and requirements of distributive justice in an economy of scarcity. It is not suggested that such an orientation will necessarily solve any problems, some of which in any case seem intractable. 108.

107. Although an exhaustive survey of such theorizing is simply out of place here, it would not be inaccurate to suggest that at the most an economy of scarcity is seen as presenting a limit situation for theories of distributive justice. Occasionally, an economy of scarcity has served as an "ideal type" model for sharpening the features of other contrasting models—such as those of societies of sufficiency, abundance and superabundance. Finally, without being exhaustive, the model of scarcity has often been used in relation to problems of distributive justice posed by "indivisible" goods, and as justifying some welfare economists' concern with production rather than distribution of goods and services. See for all these aspects, with references to literature N. Rescher, Distributive Justice 67-112, esp. 93-97, 106-08 (1966) This work will hereafter be referred to by its title.

Even in the grand theories of redistribution the problems of economy of scarcity have received only some indirect attention. For an insightful analysis see, for example, d'Arpoeulx, The Ethics of Redistribution (1951).

108. Cf. J. Rawls, "Distributive Justice: Some Addenda," 13 Nat. L. F. 51 at 53 (1968). Rawls suggests that We should be prepared to recognize that most moral questions, counting simply abstract possibilities, may have no reasonable answer... By ascending to more general matters and leaving aside particular information and knowledge of certain contingencies the problem of justice becomes more accessible.

Richard Brandt is even more positive in his emphasis:

Any discussion of the basic ethical principles of economic distribution is likely to seem abstract and utopian, unless we see that our usual abbreviated procedure for deciding questions of economic justice really does not go to the heart of the matter. Ordinarily we try to answer questions about economic justice while taking for granted a complex institutional framework, and without questioning or assessing the framework. If we do this, we overlook the main relevant principles.

R. B. Brandt, Ethical Theory 411 (1959). And see Professor Michaelman's essay note supra (hereinafter called "Property, Utility, Fairness.") In view of detailed ethical discussion, leading to proposal for an institutional, rather than merely doctrinal, change, the learned writer feels doubtful whether his analysis can be called "an essay in constitutional law." It is; and, in our opinion, one of the best.

109. N. Rescher Distributive Justice 5 (1965, hereafter referred to by author and the title.) So defined "distributive" justice includes the narrower Aristotelian conception of it as equitable distribution of honour, wealth, and other divisible assets in the community as also part of what he called "corrective justice." Id. 5-7. But see Del Vecchio, Justice 60-65 (1952).

110. N. Rescher, Distributive Justice 73-83. Distributive Justice has been "held to consist, wholly or primarily in the treatment of all people" as (a) equals; or according to their (b) needs; ability or achievements; (c) efforts and sacrifices; (d) productive contribution; (e) requirements of the common good and its equivalents; (f) a valuation of their useful economic services (the so-called "canon of supply and demand.") See also G. Vlastos, "Justice and Equality" in Social Justice (R. B. Brandt ed.) 31 at 34-35, 41-53 (1962).

111. N. Rescher, Distributive Justice 68-69. Constitutional requirement of compensation for taking may well be considered a part of such institutional procedure as outlined in facet (c) in the text. See the quotation accompanying text supra note 1. For a brief summary of types of "social decision procedures", see B. Barry, Political Argument 84-93 (1965).

112. Even normative welfare economists are moved to take feasibility into consideration. P. Samuelson rightly regards "lump sum" redistributions of wealth as impracticable. (See his, Foundations of Economic Analysis 247-8 (1947), though it has been argued that "once-for-all distribution can be achieved by lump sum measures," J. de V. Graaff, Theoretical Welfare Economics 78-9
patterns is determined from the perspectives of the group or the collectivity concerned on the assumption that the group welfare or the attainment of the common good in some ways benefits all individuals concerned and that pursuit of such welfare or good constitutes sufficient justification for the sacrifice of the individual claims. Third, it is assumed that it is possible to make meaningful judgments at the societal level concerning the propriety or justness of patterns of distribution. Each of these assumptions seems basic to the theories of distributive justice; each, however, is surrounded by doubt and debate. (1958). Samuelson has proposed "a feasibility locus" inside the conceptual "welfare frontier" of a society. It tells us: how well off it is politically feasible to make any one man, given the levels of well-being enjoyed by the others. It does not necessarily take the existing institutional set up as a datum and movements along it are not secured by imposing lump-sum measures. We move along by whatever means are for the moment regarded as feasible, changing the institutional set-up as we go.


113. See, e.g., N. Rescher, Distributive Justice 79-80, 90-93. But the concept of "the Common good" bristles with difficulties. See the fine recent analysis in B. Barry (who calls it an "aggregative" concept) Political Argument 187-206 (1965) and see infra notes 114, 115.

114. Since approaches similar to those represented by Radhakamal Mukerjee's dictum that "elements of welfare are states of consciousness" (The Political Economy of Population, 1943) have been "generally accepted," the problem of what constitutes individual welfare and now the transition from it to group welfare is to be accomplished has continued to pose very hard problems for the "New" Welfare Economics. See de Graaff, supra note 112, at 7-11 (three conceptions of group welfare) with literature there cited. See for a critical evaluation, "Comment: The General Welfare, Welfare Economics, and Zoning Variances," 38 Southern California L. Rev. 548 at 551-563 (1965). And see the note immediately following.

115. At several points the above assumptions are prone to controversy. The following list is illustrative of some major difficulties. First, while the notion of distribution is most easily understandable as regards the allocation of the material goods, this is not the only level at which it is employed in the sparse literature on distributive justice. The notion can "itself be criticized as apt to mislead in some contexts." (A.M. Honro, "Social Justice," in Essays in Legal Philosophy (R. S. Summers ed.) 61 at 75 (1968))

Second, obvious problems arise in an economy of subsistence where the totality of distributable goods proves inadequate so that feasible rational choices among alternative schemes of distribution will entail a degree of injustice to some. Are pre-existing theories of distributive justice to be altogether abandoned or suitably modified? If latter, what principles guide us in urging relevant modifications?

Third, is it possible to measure welfare? Are inter-personal comparisons of utilities possible? Both these questions have raised formidable problems for utilitarianism and the New Welfare Economics. See T.M.D. Little, A Critique of Welfare Economics 50-66 (2nd edn., 1957); J. Rothenberg, infra note 118; and recently B. Barry, (who would seem to regard the second question as rather misconceived) Political Argument 44-47 (1966).

Fourth, the hard question arises whether, at the level of ethical theory, the tension between recognition of individual good and the common good can be reconciled by following a master-principle. (See e. g. infra note 157.)

Fifth, there is the question from the standpoint of a decision-maker as to how and at what level, should he assess the impact of the proposed distributions? Is he to follow a set of principles in the expectation that the resultant situation will somehow be just for all members of the society? If not, is he to think only of the "incremental changes made within the distribution, or of the entire resultant position that exists after the distribution is made?" (Rescher, loc. cit. at 19) See, generally, B. de Jouvenal, The Ethics of Redistribution (1952).

116. The frequent use of the model of two-person (or four-person) community makes for both simplicity and cogency in theory-building. Rescher's study provides many good illustrations of this. John Rawls has consistently elaborated principles of justice on the bases of primordial social contract model.

See infra note 120.

Normative welfare economics abounds in use of mathematical models. See, e. g., de Graaff, supra note 112, passim. G. Myrdal has recently summed up the characteristic features of economic models as follows:

To observe that models are selective, abstract, and logically complete and quantifiable is to expose their limitations: they are not comprehensive but partial; they can be quite irrelevant; and they tend to neglect those factors that, at least so far, have proved difficult to quantify. They are often expressed in the language of mathematics or symbolic logic, because this makes it easier to discover inconsistencies. But it also facilitates the neglect of relevance and realism.......

G. Myrdal, A Drama in the Poverty of Nations 1941-2004 (1968) (emphasis in original) And see also infra note 118

117. Rescher, Distributive Justice 104-5
themselves afford a measure of the complexity of the contexts in which the justice of distributions is to be determined. But it must also be said that the difficulties in the “application” of the principles emerging from theories of distributive justice are also due to the rigorous methodological, the sharp divisions between “normative” and “positive” domains of social sciences, and last but not least the uncoordinated and sometimes self-frustrating division of social science labour.

Be that as it may, an examination of theories of distributive justice still remains a fruitful starting-point for our purposes. We shall here examine only two major theories, namely (i) the utilitarian and (ii) the contractarian theory. The former represents an established tradition of ethical thought, though subject to continuing refinements and restatements. The latter owes much to John Rawls, who

118. Thus one finds “normative” welfare economists referring us in the final analysis to “positive” economists, and ethical philosophers, and the latter in their turn to sociologists and psychologists. A reader who has struggled through interminable mathematical equations and formulae of welfare economics has a reason to feel disheartened if at the end he is told: “the greatest contribution of economics is likely to make to human welfare is through positive studies... rather than through normative theory itself.”


122. D. B. Lyons, Forms and Limits of Utilitarianism (1965) passim; D.H. Hodgson, Consequence of Utilitarianism 1–43 (1967). One rule-utilitarian version has formulated the utility principle thus: “Distribute according to those rules, a universal conscientious effort to follow which will maximise utility.” R. Brandt, "Ethical Theory" 419 (1959). See also id. 380–406 and the materials there cited.

123. One notable exception is N. Rescher Distributive Justice 60–61. Brandt has pointed rather well the acute predicament of act-utilitarian on the issue of the disposal of his income. An act-utilitarian’s formula directs him to spend it for the general good. If it will do more good to give half of his $ 100 per week income to charity, in place of giving his family a pleasant place to live, then he ought to do so. Nor can he argue that the incentive system will break down, that it would be bad if everyone did this. What would happen if everybody did something is irrelevant, on his theory, to whether he should do it.

R. Brandt, supra note 122, at 414 n.

124. See Rescher, Distributive Justice 5–83, and R. Brandt, supra note 122, at 422–32.
by a grossly unequal distribution—for instance, as in an efficient system of slavery—then we have to favour inequality. Equality, on utilitarian scheme, is a servant of quantity of welfare..."125 But the discord with the intuitively felt ideas of justice becomes even more acute when we shift over attention from inequality to the deprivation even of the most minimal utilities. Nicholas Rescher has recently urged:

Clearly one of the most basic elements of our concept of justice is to minimize the number of persons in a state of genuine deprivation regarding their share in the available pool of utility. Diminishing the number of those who simply do not have enough is a more fundamental element of the concept of justice than diminishing the gap between the "haves" and the "have-nots." 114

Accordingly, Rescher suggests the principle of "catastrophe-prevention" by advancing the notion of a "minimal utility floor below which no one should be pressed."127

On this basis Rescher proposes the following "overriding" principle of distributive justice designed to meet the problems of an "economy of scarcity":

The number of individuals whose share of utility falls below the "minimal" level is to be made as small as possible.119

But this prescription is limited to an economy of scarcity characterized by dire insufficiency, as contrasted with one of mere insufficiency. In the former, the above principle becomes "overriding," in the latter "the narrower principle of distributive justice as equity should be allowed to hold undisturbed sway."120 This is because while an

125. R. Brandt, supra note 122, at 415, noting however, that in another basic respect the utilitarian formula is egalitarian, since it counts "the utility or welfare of everyone as equal." This latter aspect can also serve as a basis for arguing that the utilitarian principle adheres to the Kantian idea that men are always to be treated as ends and never as means only, see J. Rawls, Addenda 64-65.

126. Rescher, Distributive Justice 29.

127. Id. at 28-30, 95-98 de Jouvenal formulates a paired concept of "floor" and "ceiling." "Floor" is the minimum income regarded as necessary and "ceiling" is the maximum income regarded as desirable. And he arrives at a "surprising" conclusion that redistribution does not merely involve a rectification of the maldistribution of wealth by taking away "ruthlessly" the riches of the highest class but also involves "debasement of even the lower middle-class standard of life." See de Jouvenal, The Ethics of Redistribution 23-28, 82-96 (Appendix) (1952).

128. Rescher, Distributive Justice at 97.

129. Id. 90-91. See also infra note 158.

130. Id. at 96-97.


132. Perhaps, "altogether" puts it too strongly. The contractarian approach is not without its analogues in the utilitarian doctrine. See the urbane analysis in J. Rawls, Addenda 68-71.


134. Id. at 59. These persons are in "an original position of equality" and "reflect the integrity and equal sovereignty of the rational persons who are the contractees."

135. Id. at 59.

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is to count...as just or unjust," in a primordial situation. Naturally, most principles thus evolved will apply to "the basic structure of society, its fundamental rights and duties" upon which "the justice of distributive shares depends." 

Rawls explains that the principles thus arising in a social contract situation will be dominated by the intuitive idea that "it is rational for a man to choose as if he were designing a society in which his enemy is to assign him a place." On this basis, the following two principles would emerge:

*first*, each person engaged in an institution or affected by it has an equal right to the most extensive liberty compatible with the like liberty of all; and

*second*, inequalities as defined by the institutional structure or fostered by it are arbitrary unless it is reasonable to expect that they will work out to everyone's advantage and provided that the positions and offices to which they attach or from which they may be gained are open to all.

In terms of distributive justice, however, both these principles lacked either clarity or completeness and from this awareness, Rawls has most recently offered what, in effect, are two additional principles. First,

Assuming the framework of institutions required by fair opportunity to obtain, the higher expectations of those better situated in the basic structure are just if and only if they work as a part of the scheme which improves the expectations of the least advantaged members of the society.

This "difference principle" is based on the intuitive idea that "social order should not establish and secure the more attractive prospect of those better off unless doing so is to the advantage of those less fortunate.

A corresponding principle is that of redressing or compensating undeserved or inevitable inequalities. The redress principle prescribes:

in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and those born into the less favourable social positions.

136. Ibid.
138. Id. at 61n.
139. Id. at 61.
142. Rawls, Addenda 59.
143. Id. at 62.

144. But even at this level it might be properly said that "after having warned us not to confuse 'justice' with an inclusive vision of a good society" Rawls himself "ends by resolving 'justice' precisely into that." J. Stone, Human Law and Human Justice 333 (1966). One wonders, however, whether it is at all possible to formulate principles of social justice without some sort of guiding vision of a good society. Stone's own carefully formulated "quasi-absolute precepts of material justice" seem to defy a similar assessment only because they are a mix of descriptive and prescriptive elements. On allied problems of the notion of "enclaves of justice" see A. R. Blackshield, "The Enclaves of Justice : The Meaning of A Jurisprudential Metaphor," 19 Maine L. Rev. 131, 136-61 (1967); I. Tammelo, "World Order" and the "Enclaves of Justice," 1 Ottawa L. R. 1 (1966).

145. The specific assumptions are that "the basic social structure" is controlled by a just constitution; (b) this Constitution guarantees "various liberties of equal citizenship" (c) the principle of legality is observed; (d) the "liberty of conscience" and "freedom of thought" prevail and (e) to the extent possible, "the political process is conducted...as a just procedure for choosing between governments and for enacting just legislation." Rawls, "Distributive Justice" 69. See also the further specification of the "framework of institutions" there delineated.

146. Id. at 69.
147. Id. at 73.
148. Ibid.
One simple way of adopting the amelioration principle is to take it at its face value and apply it to evaluate an existing or proposed pattern of distribution. (Indeed, the principle is also eminently applicable to production.) In relation to a stipulated "utility floor" or given distribution may:

(a) decrease the number of persons below that floor;
(b) increase the number below the floor;
(c) increase the number below the floor in the short run; but decrease it in the long run;
(d) decrease the number below the floor in the short run; but increase it in the long run;
(e) preserve the status quo with tendencies towards (c) or (d);
(f) remain altogether neutral towards amelioration principle.

Of these possibilities, clearly (a) must always be preferred; (b) always avoided. Possibility envisaged under (f) should always be so handled as to lead to (a); but when this does not prove feasible, it must be deemed irrelevant to a genuine distributive situation. Categories (c); (d) and (e) present the most acute problems of choice.

A common problem shared by (c) and (d), and to that extent by (e), concerns simply the meaning of the expressions "the short run" and "the long run". The latter will no doubt evoke Keynes's dictum: In the long run, we shall be dead! The above expressions may, however, be used as illustrating the horizon for policy-making. The horizon is set (among other things) by the constraints on human wisdom imposed by time and context, and the hitherto marginal powers of prediction yielded by social sciences. Thus seen, the term "long run" will exclude the Keynesian long run; and the term "short run" will always mean more than a flicker of the eye. Between these, of course, may be a whole time-span to which these terms can only be applied in the light of the social context and the nature of the policies of distribution.

154. This may appear facile and perhaps not worth saying. But there is no way of saying in the abstract as to whether a particular period of time falls under the one or the other category. Intrinsically, no period of time is either "long" or "short." Considerations of efficiency of the amelioration process, both as regards the numbers and time involved, provide baselines for the relevant determinations. One way of putting the matter is to suggest that we measure the time span in terms of the affected person's or decision-maker's "patience, imagination and ability to project a sense of continuing selfhood." See Michelman, "Property, Utility, And Fairness," at 1222.
Another common problem pertains to the number thus increased or decreased under possibilities envisaged in (c) and (d). Obviously, it infringes the amelioration principle if under (c) the increase in the numbers below the utility floor were to amount to a swell or floodtide; and if the subsequent decrease at that level was substantially disproportionate numerically to the initial increase. Similarly, (d) would pose less formidable problem if the initial decrease of numbers below the utility floor was massive; or the subsequent increase in persons at that level was minute. These possibilities are problematic only when the increase of individuals living below the utility floor were to be substantially great in any manner under (c) and (d). Again, as with the temporal dimension, the question of numbers is not susceptible to the precise quantification; a rough count in any situation will have to do, and in most situations it will have to be very rough indeed.

Categories (c) and (d) above point to the limits of the amelioration principle. The principle is valuable when options are clear: minimise number of people below the utility floor whenever you can. But the options may not always be that clearcut. When they are not (as illustrated by (c), (d), and (e), all that can be said is at a general level that the concerned policy-maker must not contemplate such possibilities lightly,155 that when a choice is between (c) and (d), policies oriented to (c) are the less offensive to the underlying rationales of the amelioration principle,156 that policies oriented to (d) call for the strongest and compelling justification, and ought not as a rule be considered. Finally, the amelioration principle may well seem to prescribe inaction preserving status quo ante rather than augmentation, even transient, of the numbers below the utility floor.

So far we have assumed that the amelioration principle can be applied in certain contexts, within a certain range of possibilities. But the invocation of this principle implies that certain prior conceptual tasks have been done. These are: (i) a more specific description of the constitutive elements of economy of scarcity; (ii) identification of a utility floor within such an economy; (iii) examination of various possibilities of escalation of the maximum number of people to any level above the utility floor, (iv) formulation of the features of an economy of scarcity which is one of dire insufficiency as contrasted with that of mere insufficiency as contrasted with that of other principles; and (v) formulation of other principles for the latter type of economy, which limit the operation of the amelioration principle. All tasks save (v), perhaps, need not (and some cannot) be fulfilled with mathematical precision; and indeed, valuable through Rescher's analysis of degrees of scarcity is, the amelioration principle which may not always entail the doing of (iv) and (v) above.157

An Indian decision-maker (whether a judge, legislator or a planner) will perhaps not be too much in error were he to conceive his economic context as one of acute scarcity; nor indeed would his intuitive fixation of a utility floor depart grossly from a more sophisticated analysis.

157. Rescher offers the distinction between justice in the narrower sense as fairness and justice in the wider sense as advowrance to the common good as "the central and most crucially important contention" of his study. The distinction is hardly novel; hence it is only the manner of its formulation and its use which give it significance.

Rescher recognizes that the determination of 'justice' "requires the appropriate conjoin coordination of these two at times—divergent factors" (i.e. fairness and the common good). (Distributive Justice 92). He does accordingly reject "the principle of primacy of the general good" as a "principle of justice" because an "individual's proper share viewed from the angle of the general good cannot be equated with his just share pure and simple. . . ." This is so since no "pre-established harmony" exists, guaranteeing that "all of the individual's legitimate claims be recognized and accorded to when the 'general good' becomes the decisive criterion;" (id. at 80).

However, later in analyzing the problem of justice of certain unfair but socially advantageous distributions, Rescher seems inclined to consider that the general good can be "overshadowed" by "considerations of justice in the wider sense," (id. at 93.) He asks pointedly: "How can the unfair possibly be condemned as unjust in a situation where its presence represents a social advantage profiting all?" (Ibid.)

But this precisely is a part of the "primacy of the general good" which Rescher has been concerned to question earlier in the analysis (id. at 79-80.) It is inconsequential whether this sort of principle is framed in terms of primacy or overshadowing. If the principle of "primacy" of the general good is unacceptable where it does or could result in "patently unjust (though socially advantageous)" disallowing of legitimate individual claims, it is difficult to follow why this should also not be the case when "the general good" overshadows these claims.

155. This is one area where Julius Stone's "Directive for Conscientious Discovery of the context of Action" seems most pertinent. See J. Stone, Human Law and Human Justice 343-43 (1966).

156. This is implied in Rescher's softening in the context of scarcity of his own criticism of the welfare economists' assistance on production. Compare his observations in Distributive Justice at pp 12-18 with those at 106-7. And this would seem to be consistent with utilitarian thinking as well. See Glossop supra note 131 at 215.
cated economic effort devoted to the same end. He may also be tolerated if he were inclined to overlook Rescher's finer theoretical dichotomy in most distributive situations. So that for him generally the amelioration principle should have a very high priority. But all this does not of course mean that one is just relieved of the duty of self education, even in what may seem to be most obvious. We will return to this aspect after a brief examination of the contractarian position.

The difference and redress principles share with the amelioration principle a specific concern with persons in a state of deprivation. The latter directs our attention to persons below the utility floor; the former set of principles invite us to make judgments of justice in light of the "expectations of the least advantaged members of the society." But while the amelioration principle arises as an exception or addition to the utilitarian master principle of maximization of good or utility, the difference redress principles in themselves form a theory of distributive justice.

Like the amelioration principle, the difference principle requires fulfillment of certain preliminary analytic tasks. First, the meaning of the terms "expectations," "improvements of expectations" and "the least advantaged members of the society" needs to be ascertained.

158. According to an estimate for the period 1955-56 half of India's population was living on 14.6 rupees or less per month (approximately ten cents in U.S. currency per day) or 175.2 rupees per year. It has been rightly observed that "the very low average income does not begin to plumb the depths of misery in India," G. Myrdal, The Asian Drama: An Enquiry into the Poverty of Nations 565 (1966). See generally id. at 529-79, and appendices 13 and 14 in volume three of the same work (pp. 2165-2187).

Indeed, it is doubtful whether in view of the Indian economic data which are "too crude and inconsistent to warrant any form of generalization" (Myrdal loc. cit. at 2128) it will, in the near future, be possible to get a full view of the wretched plight of people below the utility floor. Leading Indian economists do not disagree with Myrdal's complaints about the state of economic data. See, e.g., P.C. Mahalanobis, "The Asian Drama: An Indian View," 4 The Economic and Political Weekly 1119, 1125-27 (1969).

159. That is between economy of dire insufficiency as contrasted with that of mere insufficiency. Of course, in a specific distributional situation the above characterizations can only serve as overall orientations; it is possible, even in an economy of dire scarcity, to have sections of economy which relatively approach sufficient or even abundance.

160. Cf. Rescher, Distributive Justice 28-29, where the notion of "utility floor" is introduced as "one facile amendment of the principle of utility."

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Second, the expectations of those "better situated" in the basic structure must be identified along with the expectations of those who are adversely situated. Third, determinations have to be made as to whether the higher expectations of those "better situated" so affect the basic structure as to improve the expectations of those not so situated.

As to the first aspect, Rawls uses the term "expectations" interchangeably with "life prospects" and "well-being." The phrase "least advantaged members of the society" is used synonymously with "the least fortunate" and even "the most unfortunate representative man." So that "improvement of expectations" may mean (a) a reasonable estimate or hope of better future prospects of well-being or (b) a similar hope or estimate concerning immediate change for the better. This tolerable duality of meanings blunts the sharpness, but does not altogether remove the problems arising from deferral in realizing immediate well-being for a few people with a view to later securing well-being for the many.

But Rawls admirably confronts a related aspect of the problematics of improvements of expectations. Generally speaking expectations of people at all levels of society will be "inter-connected", on the change (improvement or deterioration) at one level will affect expectations at all levels, in some way or another. But suppose that this "chain connexion and close knottiness" do not obtain: suppose that it is possible to improve the expectations of those who are better off without at all affecting those of the least advantaged or suppose


162. Id. at 66. The general assumption here is that "it is possible to attach to each [social] position an expectation" which is "a function of the whole institutional structure." As such, expectations can be "raised or lowered by reassigning rights and duties throughout the system." Id. at 62.

In a later elaboration, Rawls makes the further assumption that "expectations are specified by the expected distribution of primary goods, that is, things rational persons may be presumed to want whatever else they want..." Men have interest in having these goods however various their more particular ends." The primary goods include "liberty and opportunity, income and wealth, health and educated intelligence," with a probable high valuation of "self-respect," Rawls, Addenda 54-55. See further infra note 167.


164. The problems thus raised are similar to those arising under the amelioration principle. See text accompanying supra notes 154-56.

165. Rawls, "Distributive Justice" 68.
that the expectations of those in the middle range can be similarly improved. Is the difference principle violated? Rawls answers in the affirmative insisting on a "stricter version" of that principle:

All inequalities should be arranged for the advantage of the most unfortunate even if some inequalities are not to the advantage of those in the middle position.166

Given the theoretical level at which Rawls' difference principle is formulated, it is not necessary for him to deal with the second and third group of tasks outlined above. But for anyone wishing to employ his principles (as I do) at the post social contract situation, they remain pertinent. Sociologically, it may be worthwhile to treat "expectations" as de facto human demands a la Roscoe Pound.167 If we regard for our purposes, a social system as constituting a hierarchy of income groups, then it may also be possible for us to identify the groups which are economically most well endowed, well endowed, tolerably well endowed, and intolerably deprived. In such a hierarchy, the difference principle calls for evaluation of those de facto demands from the standpoint of the last group. If the fulfillment of de facto demands of all the other groups results in an improvement of well-being of the last group then and then only these demands should be met.168

166. Ibid.


As formulated by Rawls, "expectations" come closer to "need" or "ideal" than "demand" or "want." See J. Stone, loc. cit.; and the recent penetrating analysis in B. Barry, Political Argument 173-86, 295-99, (1965). Also see id. 95. 287.

168. At this point, one wonders whether the present reading of the difference principle cannot be fruitfully added to Pound's theory of justice. If that theory is so amended, then it will no longer be tenable to lay the charge, often now laid with plausibility, that Pound's theory is "unduly tender to those elements in society that are vocal." J. Stone, Human Law and Human Justice 283n. (1966).

Rawls' redress principle (not discussed in the text in any detail) is strikingly similar to one of Roscoe Pound's jurid postulates prescribing that the "risk of misfortunes to individuals is to be borne by society as a whole," Pound, Social Control Through Law 116-117 (1942). See also, A.M. Honore, "Social Justice," cited supra note 115, at 88-9. Julius Stone, however, regards this as a "formative postulate" whose establishment would require a radical revision of all the five 1919 Postulates, except perhaps Postulate I. "See his Human Law and Human Justice 281 (1966). Stone's quasi-absolute directives of material justice do not embody a precept akin to the redress principle.

Judgments of justice of particular distributions thus become related to the concrete contexts of social inequalities. The only justification of inequalities on this view is the contribution they make to the improvement of the least fortunate members of the society. This may indeed be one way of saying that inequalities are justified if they contribute to "the common good,"169 but this manner of saying it is more illuminating than any other I know of. And in an economy of subsistence, I doubt if decision-makers can, in good conscience, shun this clear interpretation and revel instead in the caressingly luxurious ambiguities of the expression "the common good."

This orientation makes the task of decision-making more manageable, but not any the less difficult. Since in a way most decision-makers in a developing democracy are seeking consensus about societal values, they are not alien to the spirit of rational men who are engaged in formulating a "basic structure" of a just social order.170 On the other hand, this consensus-building activity occurs in a historically given context, where some attempt at foreseeing the impact of approved distributions upon this activity remains indispensable to any responsible decision-making. It is in this area of measuring the impact that the most conscientious policy-making may falter and fail, and even fail more often than succeed. But the attempt remains both necessary and worthwhile.

An attempt will be made in this final section to relate the thinking on distributive justice to the Shantilal-type situation. The more comprehensive task of approaching in this mood the whole range of policy-making problems (both judicial and legislative) at the level of Articles 19 and 31 must, however, be left for the future.

In the abstract, the acceptance of the amelioration or the difference principle does not entail either acceptance or rejection of the constitutional requirement of "compensation." Nor does such a result flow from the major policies of Part IV. Both the principles can be urged in support as well as against this requirement. It may be possibly...

169. See supra notes 104-5; and Roscher, Distributive Justice 79-80.

170. This perhaps is the very meaning of constitution-making in decolonizing and developing societies. The opportunity to usher in political freedom with a new constitution was seen by the Indian leaders as an opportunity to project a "constitutionally desired order," a new vision of the Indian society. For further elaboration, see U. Baxi, "The Little Done, The Vast Undone......" 9 J.I.L.I. 339-47, 357-60.
improve, the "expectations" of the "least advantaged" men in society. It is possible thus to suggest that the usual offer of some compensation accompanying most state action under the eminent domain power is precisely based on the perceived need to avoid such effects and costs, and their impact on the social framework as a whole. Likewise the judicial insistence on the constitutional impermissibility of "illusory" or "fraudulent" compensation can also be regarded as an emanation of the difference principle.\(^{173}\)

The amelioration principle may *prima facie* be more readily available to consistently deny legitimacy of "compensation". But the application of this principle regardless of its overall impact on the economy may well defeat its principal purpose. As noted, where state action involving escalation of the people living below the utility floor is linked with the manifest incapacity of the state to compensate the deprived owners of property, this principle may well sanction non-compensation. But the number of such policy measures must indeed be small because of the non-compensation practice, to serve the amelioration principle, must not merely ensure that the deprived owners do not thereby sink below the utility floor, but also that the destabilizing effects of such practice on the economy are not such as to render the escalation of sub-utility people either short-lived or only minimally beneficial to them. Widespread non-compensation policies must carry with them such potentialities which betray the principle they are supposed to serve.\(^{174}\)

To say that both the utilitarian and contractarian positions a strong case for the requirement of compensation can be made is not necessarily to say that such requirement must attract constitutional protection or be at any rate a fundamental right type of constitutional guarantee. Mr. Justice Hidayatullah’s disquieting observations in *Golak Nath* that it was an "error" to place the right to property in the chapter on the fundamental rights and that "of all the fundamental

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173. "Illusory" or "fraudulent" compensation may tend to enhance the overall uncertainty and risks to property expectations without contributing to the betterment of the life prospects of the least advantaged members of the society. Nor can precepts of distributive justice justify colourable exercise of legislative power, which must generally be regarded as unintentional on the part of the legislators.

174. See the general discussion in the previous section of this article concerning the temporal dimensions of the amelioration principle. See also the text accompanying footnotes 216-219, *infra.*
rights it is the weakest." Assume an even more disquieting significance at this level. For the precepts of justice at best direct that certain values ought to be safeguarded; but they cannot yield (except at the cost of dogmatism, clear thinking or rationalization of existing institutional patterns) any one compelling specific structuring of those safeguards. But a detailed analysis of this aspect is outside the scope of the present study.\footnote{Gokal Nath v. State of Punjab, A.I.R. 1967 S.C. 1643 at 1710. Without attempting to fully explore the complexity of this aspect, it must be said that Mr. Justice Hidayatullah’s agonizing over the fundamentalization of property rights occurred in the context of a momentous decision placing the fundamental rights beyond the reach of the amending power of Parliament. The decision highlighted legislative immutability of the surviving guarantee of “compensation” in Art. 31(2), in a context pregnant with the anticipations of the continuing struggle between the two co-ordinate authorities (the Court and the Indian Parliament). It is not surprising that a Judge so deeply conscious of problems of Indian development should question the wisdom of having the compensation guarantee as a fundamental right. What however is worth pondering is the simple fact that lack of easy amendability of the compensation guarantee does not altogether render it impervious to change. What the Parliament cannot do, the Court can. The Court can continue to narrow or widen the range of protection of that guarantee, so that Mr. Justice Hidayatullah’s *cri de coeur* is better understood as a demand that the Court develop its interpretation of that guarantee in the wider context of social and distributive justice. And see infra note 177.}  

176. Even granting that social justice is best seen as a virtue of the “basic structure” of the society, there is no a priori reason why we should be led to accept one specific model of society as the only just model. Perhaps Rawls’ analyses of justice, which are undogmatic and clear-headed, may appear to some to do little more than rationalize the existing institutions of the “free world”. Primordial rational men may, with equally rational reasons, adopt a “just” structure of society radically different from Rawls’ societal model. See, *supra* notes 144 and 145, and the note immediately following.  

177. The elevation of “compensation” guarantee to a fundamental rights status can be justified on the ground that it introduces a constitutional standard of “fairness” or “justice” in the collective decision-making. In any “decision-making system” there is need for “fairness discipline.” Ideally, such discipline must enter the decision-making process as self-imposed discipline. In fact, however, it enters only (or at any rate largely) as an external constraint. Judicial review has as one of its principal functions the administration of fairness discipline. Professor Michelman who elaborates this thesis (\footnote{Shantilal at 638.}) argues against the “attribution of the pre-eminent responsibility to the judiciary” in the area of “just compensation,” an argument often canvassed in Parliament and even before the Court. But this argument does not necessarily lead to the conclusion that the compensation guarantee should not be a fundamental right. Rather, it may involve a claim that the judges and legislators need to be continually concerned with the tasks of justice within the limits on action also imposed by precepts of justice.  

We thus return to Shantilal situation which involves a routine encounter of the law with the problems of urbanization rather than the momentous questions of redistribution of national wealth or income. The questions of justice of the town-planning measure raised in this case seem relatively more tractable but are no less significant.

The Town Planning Act had for its principal objectives the provision “for planned and controlled development and the use of land in urban areas.”\footnote{The dispossessed plaintiff whose land was utilized for the specific purpose of housing municipal employees was offered compensation on the basis of the price of land as obtaining in 1924.} One immediate difficulty in extending either the amelioration or the difference principle to Shantilal situation is the problem of identifying the economic condition of the beneficiaries of the Town Planning Scheme. Even at the more specific level of the use to which Shantilal’s land was put, it is not clear whether the provision for housing facilities for the municipal employees was made with a view to ameliorate their sub-utility plight. The fact that the provision of these facilities is significantly linked with the status of being such an employee, and therefore limited to the duration of service, would militate against the interpretation that the Scheme was an amelioration measure. At the level of Rawls’ principle, even if we identify the municipal employees as the least advantaged members of the community, it is hardly self-evident that the application of an artificial rule of compensation, resulting in under-compensation, can be regarded as negating an insidious and impermissible inequality.

One may, however, argue that the Act, including the impugned scheme under the Act, must be viewed as a whole, the Shantilal situation being merely an aspect of it. The Act envisaged as a general welfare measure must entail some beneficial consequences for those living below the utility floor. At this level, any welfare programme not specifically directed to amelioration of the plight of people living at sub-utility level, can be viewed as having some indirect nexus with their amelioration.

When, however, the argument is thus presented, it seems more directly grounded in the utilitarian concepts of “general welfare” maximization (with all its attendant difficulties) than on the specific
amendment or exception to the utilitarian approach that the amelioration principle is designed to represent. For the presupposed indirect nexus between a specific general measure and amelioration of the sub-utility plight, must, in the final analysis, rest the assumption that any increase in general social welfare somehow contributes to the more specific end of the amelioration process. And the invocation of the difference principle in this manner too would yield like results.379

Such an "integral" view of the statute does not assist us in evaluating compensation policies, which are closely related to the statutory purposes. This is one reason why Mr. Justice Shah's statement of these purposes in the early part of Shantilal seems very loosely related, if at all, to such attempt at justification the learned Justice later offers for validating the preferred meagre compensation.380

The result that the anterior date compensation (of Shantilal vintage) is constitutionally permissible does not follow from a sophisticated analysis of the social welfare purposes of the impugned town-planning legislation. Rather, the result follows from the principles concerning the principle of legislative supremacy in the area of the determination of the compensation. Such principles no doubt can be justified in terms of division of labour and economy of constitutional effort between two co-ordinate centres of government.381 It can also be justified by reference to the institutional limitations of judicial prudence the difficulties that courts may unavoidably feel in assessing the fairness of compensation practices relative to different classes of property.382 But the Shantilal Court elevates the policy of judicial non-interference to the status of a near-absolute presumption that the legislature always acts (or must be deemed to act) justly.383 In a constitutional democracy, providing the bill of rights type "compensation" guarantee, the presumption that the legislature acts justly must be rebuttable. The Shantilal Court, by defining the notion of compensation as "what the Legislature justly regards as fair and proper recompense,"384 has,

180. Compare Shah J.'s observation in Shantilal 638-40 (regarding the welfare objectives of the legislation) with the operative part of the decision at 650, 652-653.
181. For further elaboration, see Blackshield supra note 4 at 42-54; and Baxi, supra note 3 at 391-412 passim.
183. See Part VI of this article, and the note immediately following.
184. Shantilal at 650.

however, drastically curtailed (even perhaps to the point of elimination) the potency of challenges to the justice of the compensation practices.

To be sure, judicial decision-making must generally proceed on the assumption that laws are made by competent authorities acting in good faith.385 And although it is usually thought that courts are dispensers of justice, the legislative process is not unsuited to the performance of certain tasks of justice.386 Justice usually is (and indeed must remain) one of the basic goal values orientating legislative action. Some features of the town-planning legislation illustrate this justice orientation and may indeed be seen as supporting the presumption of justness of legislative action advanced by the Shantilal court. But some of these very features also serve to alert us to the perils of absolutizing such a presumption. For even when the postulated welfare goals and justice-oriented methods for their attainment are clarified, the justness of the specific compensation practice in Shantilal remains obstinately problematic. We now turn to some salient features of the impugned legislation.

First, the Shantilal town-planning legislation is not based on the principle that compensation is dysfunctional to the attainment of statutory welfare goals. Rather, Sections 67 and 71 of the Act providing for compensation, express the recognition that the reallocation or reuse of resources of the community is just, desirable or efficient, only if compensation is offered.387 This recognition sets the town-planning

185. This is well illustrated by the limited scope given to the doctrine of "fraud" see supra notes 43, 173.
186. As soon as one becomes willing to discard the naive contrasts between legislative and judicial policy-making (e.g. that former is political the latter is apolitical; the former involves compromise, the latter is "neutral" or "principled") it might even appear that major tasks of attaining social justice primary fall within the institutional capabilities and resources of legislatures rather than courts.
187. "Efficient" and "desirable" are here used interchangeably with "justice" so as to avoid attributing to the legislature any particular theory of justice.
act in a category apart from those legislative measures which involve a claim that the decision not to compensate is just or efficient.\footnote{188}

Second, however, common to both the provisions is the "anterior date principle" commanding that compensation be determined on the basis of a notional market value of the condemned property at the time of the declaration of intention to acquire it. Not today's but yesterday's market value will constitute the compensation. The anterior date principle must rest on the claim that the town-planning measure cannot both fulfil its community welfare purposes and also pay compensation according to the market value prevailing at the time of acquisition ("acquisition date principle"). The claim here is that while community welfare does not entirely justify the decision \textit{not} to compensate, it does justify a decision to \textit{under-compensate}.

Third, the decision to \textit{under-compensate} is accompanied by an attempt to maintain an equality in loss-sharing or risk-bearing. All owners exposed to deprivation or modification of their proprietary rights are to receive compensation determined by the anterior date principle. Inequalities in compensation for loss are to be avoided. The claim here seems to be that such inequalities are not consistent with justice.

The decision to \textit{under-compensate} has reference to two types of distributional situations. In the first situation (envisaged by Section 67) the deprived owner is given a "reconstituted plot". Generally the compensation to be offered to him is to be the difference between the anterior date market value of the original land notified for acquisition and the price, estimated similarly, of the "reconstituted plot" (without the benefit of improvements). In the second situation (contemplated by Section 71) the deprived owner does not receive any "reconstituted plot." For the land he thus completely transfers for community use, he obtains only the anterior date compensation.\footnote{189} Shan tilal involves merely this second variety of under-compensation.

Fourth, the authorities under the Act are not to finalize the scheme unless the affected owners of the land are permitted an opportunity to raise relevant objections to the scheme and until these objections have been heard and "disposed of."\footnote{190} This provision, perhaps designed to minimise inadvertent social costs in implementing plans solely on bases of blueprints, must in part rest on the claim that the

\footnotetext{188}{Such as the enactment impugned in Ranjit Singh v. State of Punjab, A. I. R. 1965 S.C. 632, or the measures of "police power" under Art. 31 (5) (b) (ii), 189. For the texts of the sections, see supra notes 51, 53. 190. Shan tilal at 639-}

\footnotetext{191}{For definition of "settlement costs" see text and discussion accompanying note 213 infra.}

\footnotetext{192}{Shan tilal at 642; See also supra note 55.}

\footnotetext{193}{The just "outpus" may not necessarily lead to a just "outcome," when the latter term is used as the product of the decision making process as a whole as distinguished from the product of various decisional sub-processes. See for this distinction, and further refinements, J. A. Robinson and R. R. Majack in Contemporary Political Analysis 175-88 at 185 (1967; J. C. Charlesworth ed.)}
legislature desires to attain and the types of social cost it considers acceptable (e.g. those involved in under-compensation). The relevant notification processes under the legislation concretize for particularly affected owners the operation of the anterior date principle, which is equally applicable to all affected owners. Risks to the security of property expectations are always demoralizing. They involve what are identified in utilitarian calculus as "demoralization costs." Ideally, such costs must be eliminated; practically, they can at best be minimized. If therefore under-compensation policy is in the first place deemed desirable or inevitable, then it may be argued that it is preferable that such policy be systematically imposed rather than randomly applied. Since the legislature deems full recompense impossible or undesirable for community as a whole, property-owners, in Rawlsian terms, to be able to appreciate how such decisions (to under-compensate) might fit into a consistent practice which holds forth a lesser long-term risk to people like him than would any consistent practice which is naturally suggested by the opposite decision.

Given such an appreciation on the part of the property-owners such a decision is not unfair or unjust.

On the other hand, one might wish to question the justness of any policy of systematic under-compensation. Such questioning may proceed from a variety of perspectives. One might argue that policies of compensation must be related to the welfare goals pursued by state action. Some welfare goals may be such as to justify a decision even not to compensate; others may vigorously attract policy of full (or as close to full as is possible in an economy of subsistence) acquisition date compensation. Between these two extreme ends, may range welfare goals which justify different degrees of under-compensation. Further, the welfare goals pursued by a single legislatice measure may often lend themselves to different compensation policies. On this approach, therefore, a policy of systematic under-compensation is unjust in the sense it fails to discriminate qualitatively among the goals of state action and to the extent of such failure is likely to impose unjustifiable inequalities of burdens and costs.

One central difficulty with this approach is that the criteria for assessment of the welfare goals of state action are more or less intuitively held, and seldom explicated. The explication of the relevant criteria must remain incomprehensive since welfare goals can scarcely be typified into fixed categories. Even a random formulation of salient criteria may reveal self-consistency and tension among them. Nonetheless, if this approach is to be rationally canvassed, such a formulation (which can only be attempted here most summarily) remains imperative. For the determination of suitable policies of compensation, one might assess the welfare goals by at least the following basic criteria: (a) The criterion of urgency of state action; (b) the criterion of the ameliorative function (in the sense of satisfying the "ameliorative principle") of state action; (c) the criterion of imminent harm-prevention; (d) the criterion of the temporal duration of state action; (e) the criterion of efficiency; (f) the criterion of specificity of the welfare goals.

Thus, it might be asserted that when the goals of state action are to prevent imminent public harm, state action involving modification of proprietary rights cannot be properly regarded as expropriatory or compensable. Obviously, such action will be a response to the felt urgency of the situation. It will also be restricted in terms of the temporal range. Even when legislative measures are permanent enactments, their operation is restricted to specifically defined contingencies. Both in terms of utilitarian welfare-maximization and social contractarian rationality such state action is just even when no compensation is paid for incidental modification of proprietary right.

This approach will justify state action (somewhat unhappily subsumed under the rubric "police power") under Article 31(5) (b) (ii) of the Constitution.

194. See text accompanying notes 209–11 infra.
195. But it can be equally well argued that while people can "adjust satisfactorily to random uncertainty" (e.g. by "insurance, including self-insurance") the risk of being "systematically imposed upon" is a risk of a "very different order from the risk of occasional, accidental injury." The latter risk can prove even more demoralizing. See Michelman, "Property, Utility, and Fairness," at 1217. There does not seem any other way short of an empirical investigation to establish the validity (in terms of relatively greater probability) of either of the two "behavioural suppositions."
196. Michelman, supra note 195 at 1223.
198. The recent welcome decision of the Court in Dy. Commr., Kamrup v. Durganath, A.I.R. 1968 S.C. 394 at 402 holding that the clause mentioned in the text must be "strictly construed" being an exception to clause (2) of Art. 31 was readily available to the Shantilal Court to summarily negate the curious contention that since one of the purposes of the Town-Planning Act was to promote public health, the Act was controlled by the exception to Art. 31 (2). Shantilal at 643.
Similarly, manifestly ameliorative measures may attract policies of non—or under-compensation. Agrarian economic reforms specially when directed to the elimination of large counter-productive landholdings may thus be seen to be ameliorative or indispensable to amelioration process, given always the assumption of their economic efficiency. While criteria (b) and (e) play an eminent role in justification of the compensation policies, the criteria of specificity of welfare objectives and of relatively shorter duration of the state action are also helpful.

But not all welfare goals can be regarded as pre-eminently ameliorative. Their implementation is comparatively less urgent and requires state action on sustained, if not continuing, basis. Economic efficiency does not here necessarily demand under-compensation. Most legislative measures concerning land acquisition, town-planning, urban housing, and related to land use in various other ways (such as zoning, highway building) embody welfare goals having the above-mentioned characteristics. Such welfare goals ought to be accompanied by associated measures such as tenancy reform, ceilings on (and consolidation of) holdings, may also in theory serve the ameliorative function. However, the assumption that land reform legislation is efficient—both in the sense of proper implementation and attainment of declared economic objectives—continues to be increasingly vulnerable. See, e.g., G. Myrdal, 2 Asian Drama 1301–46, 887–91 passim. Also see J. S. Uppal, “Implementation of Land Reform Legislation in India: A study of Two Villages in Punjab,” 9 Asian Survey 359–72 (1969).

Uppal points to four major factors (borne out by other studies) which have generally rendered ineffective the land reform legislation. First, “the legislation has gone far enough and has fallen short of fulfilling its objectives.” Second, “the legislation was formulated in an unsystematic and uncoordinated manner and contains technical defects and contradictions.” Third, administrative “difficulties and inadequacies” have contributed to “ineffective” implementation. Finally, “the spirit of the legislation is not consistent with the prevailing social and economic forces.” (Ibid. at 361).

Roughly speaking certain types of agrarian economic reforms, specially the abolition of intermediaries, are “one-time” jobs, not requiring sustained and continuing state action.

As to urban housing schemes (of Shantilal-type) see S. S. Tangri, “Urban Growth, Housing and Economic Development,” 8 Asian Survey 519–38 (1968). Tangri observes (at P. 536) :

The land speculator, like the landlord, is a convenient whipping boy for politicians and planners in trouble. Freezing land values does not abolish the scarcity of land in or around the cities. It is politically convenient since it obviates the need for raising taxes to pay for the increased value of land. Since governments are often unwilling or unable to raise taxes openly, freezing land values is the path of least resistance. In effect this amounts to taxing away all capital gains of holders of underdeveloped land as of a given date. This may be equitable if landholders are primarily the rich and beneficiaries primarily the poor, but such is not always the case.

Thus, Mr. Chief Justice Patanjali Sastri in Billa Bunrjee invoked primarily the fact that the impugned legislation was a “permanent enactment” in order to invalidate anterior date compensation, even when the proffered compensation was reasonably close to the acquisition date principle. And the Indian Law Commission preferred primarily to contrast the ameliorative aspect in case of “acquisition of large Zamindari and Jajir estates” with the cases “where the legislature has to deal with owners of land who are not intermediaries.” In the later (not ameliorative) situation, the Commission felt that “the community” which benefits from the acquisition must also bear the burden of justly compensating the owner. And, although there not clearly articulated, the criterion of economic efficiency was most perpectively invoked by the Supreme Court in State of M.P. v. Vishnu Prasad.

The conclusion that systematically imposed under-compensation is unjust may also be reached by another approach not stressing so much the “nature” of the welfare goals but rather the overall social cost and gains of attempting to attain welfare in this manner. All social decisions involve social costs which are considered, consciously or otherwise, as acceptable in pursuit of certain social objectives. But for a rational evaluation (as far as this is possible), of the overall social costs and gains one would need some kind of utilitarian calculus. With its help, one could identify the various social costs involved and also explain why some costs are more acceptable than others.

Professor Michelman has recently attempted to construct such a calculus in relation to the concept of “just compensation” in American
federal constitutional law. The problems he is primarily concerned with require him to mainly focus on the contrast between decisions not to compensate and those awarding a just compensation. Our context requires a search for justification of the degrees of undercompensation as well. Michelman’s analysis will therefore be adopted here, perhaps with considerable disloyalty to his analytical framework.

Michelman’s calculus involves “efficiency gains”, “demoralization costs”, and “settlement costs”. Efficiency gains consist of “excess of benefits produced by a measure over losses inflicted by it.” Benefits are to be measured by the total amount of rupees which the “prospective gainer would be willing to pay to secure adoption”; the losses by the total value of rupees “which prospective losers would insist on as the price of agreeing to its adoption.” The efficiency gains need to be weighed against the two types of costs.

The “demoralization costs” are, as it were, the invisible costs. Adopting Michelman’s definitions for our purposes, we may define them as the total of two components. First, demoralization may flow “specifically from the realization that no compensation is offered.” In this situation, demoralization costs include the rupee value “necessary to offset disutilities which accrue to losers and their sympathizers.” When under-compensation is offered, evidently the degree of demoralization will be relatively less; but some demoralization will occur, and this might be even substantial if the anterior date reaches farther back in time from the current market value of the property. We can, therefore, attempt to measure as an ingredient of the demoralization costs the rupee value necessary to “offset disutilities” which arise for the owner and his sympathizers. The second component of demoralization costs also varies according to whether no compensation is offered in contrast to under-compensation. But in both situations, this can be measured in terms of the present capitalized [rupee] value of lost future production (reflecting either impaired initiatives or social unrest) caused by demoralization of uncompensated [or under-compensated] losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subject to similar treatment on some future occasion.

Both ingredients of the demoralization costs are measured and added

207. Id. at 1214, and also see 1172-1183.
208. Id. at 1214.
209. Ibid.
210. Ibid.
210a Ibid.

by imputing “to ordinarily cognizant and sensitive members of the society” certain types of behavioural responses.” Settlement costs, as the description implies, are measured by the rupee value of “time, effort, and resources which would be required in order to avoid demoralization costs.” Furthermore, such costs would include (with some degree of acknowledged vagueness):

- costs of settling not only the particular compensation claims presented, but also those of all persons so affected by the measure in question or similar measures as to have claims not obviously distinguishable by the available settlement apparatus.

One obvious conclusion to be derived from the above description of gains and costs is that when the latter exceed the former, the measure is not efficient, as well as not just. Another conclusion is that “since either demoralization costs or settlement costs must be paid, it is the lower of these two costs which should be paid.” Accordingly, “compensation is to be paid whenever settlement costs are lower than both demoralization costs and efficiency gains.” In other words:

The correct utilitarian statement...insofar as the issue of compensability is concerned, is that compensation is due whenever demoralization costs exceed the settlement costs, and not otherwise.

On this basis, it becomes plausible to argue that systematic under-compensation policies must involve very high demoralization costs. The fact that less than full compensation is offered definitely imposes upon the deprived owner economic loss which must be absorbed by himself and his dependents and associates. This loss most obviously can lead to an impairment of economic initiative.

211. Michelman “Property, Utility, and Fairness,” at 1215-17.
212. Id. at 1214
213. Ibid. Settlement costs will include:
(a) the costs of bargaining to out-of-court settlements of all, some, or none of the claims occasioned by that measure which seem indistinguishable from the claims recognised; (b) the added (marginal) cost of operating the judicial system to settle those of the indistinguishable claims not settled by agreement; and (c) the costs of disposition, whether by agreement or judgment of all claims arising out of other measures, which claims would never have been urged had not the claim in question been recognized, reduced by any savings in the demoralization costs which those other measures would have entailed had no such claims been recognized.
214. Id. at 1215
215. Ibid.
216. Ibid. (emphasis in original)
Less obviously, the deprived and under-compensated owner and his circle of dependents and associates may see themselves as victims of capricious and inefficient (and therefore unjust) policies of re-distribution of resources. This in turn might lead to disrespect for governmental policy-making and even towards the law (for the legislatures which provide under-compensation and courts which uphold such laws). In part such disrespect may encourage the tendency to engage in illegal economic practices (e.g. blackmarketting, tax evasion). In part, they may also contribute to the social unrest, affecting the stability and effective functioning of the economy as a whole. When these, and other innumerable, consequences are perceived, the settlement costs necessary to avoid demoralization costs must appear exorbitant. Given the utilitarian calculus, therefore, not merely is under-compensation inefficient but rather full acquisition date compensation is due. This sort of reasoning incidentally, provides one rationale for retaining acquisition date marker value principle as a constitutional standard for evaluating various policies of compensation.

This approach is open to two principal lines of criticism. On the one hand, one might wish to reject altogether the utilitarian equation of justice with efficiency in welfare maximisation. On the other hand it may be argued, independently of the utilitarian concept of justice, that the utilitarian calculus is simply unworkable. Both sorts of criticisms can be meaningfully urged. The many shortcomings and difficulties with the utilitarian concept of justice are, of course, serious and may justify recourse to alternate concepts or theories.

217. When procedures for finalization of compensation take a long time, often extending to well over a decade, and when anterior dates stretch back far into time (as in Shantilal) it is hard to avoid such a perception. See, for example of inordinate delays, the statement by the Union Minister Shinde quoted in U. Baxi, "The Travails of Land Use Planning" in Law and Urbanization In India 152, at 165n (1969). Also see articles in the same volume, by M. P. Jain (153-203) and Umesh Chandra (203-10) which illustrate in detail the inescapably high settlement costs involved in elaborate administrative process under the Land Acquisition Act. See also Tangri, supra note 201.

218. It would be interesting to adopt under-compensation as a variable for specific empirical studies of illegal or extra-legal modes of economic behaviour.

219. As a standard or a principle, not as a rule. See the discussion in part VI supra of this paper. As to the conceptual distinctions involved. See R. Pound, 2 Jurisprudence 124 et seq (1959); and Baxi, "Directive Principles and Sociology of Indian Law" II J.L. & L. 245 at 258-62 (1969).


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of justice. If one were to altogether reject the utilitarian concept of justice, the present part of the discourse would become substantially, though not wholly, irrelevant.

The second line of criticism may stress a number of difficulties involved in operating such a calculus. Not all elements of the cost-benefits analysis are susceptible to measurement in monetary terms. Legislators and planners may not always have at their disposal time, skill, insight, and other resources necessary to undertake such analysis prior to the making of compensation policies. Even if administrators and legislative draftsmen were able to work out these policies in accordance with the calculus, their work would remain exposed to the rough overlay of political compromise at the legislative stage. And in constitutional litigation, involving the issue of validity and justice of compensation policies, judges cannot be expected to fully appreciate the rival estimates of social gains and costs which parties may, in an ideal utilitarian world, feel able to provide. Finally, one may wonder whether the additional settlement costs involved through attempts at following the utilitarian calculus at most, if not all, levels and types of decision-making would really be consistent with the efficient pursuit of welfare maximisation.

These difficulties are real enough, even they fall short of demonstrating that the utilitarian calculus is unworkable. But they do not yield the conclusion that under-compensation policies are impeachable in terms of justice. Rather, the presence of such difficulties may suggest that we should be wary of adopting such policies, whose social costs can be so high and far reaching. For whether or not social costs can be so accurately measured (and without a prohibitive escalation of the settlement costs) as to be conducive to best possible decision-making, some costs remain to be borne. The utilitarian calculus, even when less than scientifically employed, does not always suggest that costs will exceed the gains. But it does suggest that demoralization costs may be exorbitantly high if a systematic policy of under-compensation were to be adopted, and that incurrence of such costs ought not to be a routine, unreflective process. If indeed policy-making is to result in adoption of certain "rules of thumb", full compensation would be a better rule than under-compensation.

221. See Michelman, "Property, Utility, and Fairness," at 1180.
Some such view may well inspire the following reflection: What society cannot, indeed, afford is to impoverish itself. It cannot afford to instigate measures whose costs, including costs which remain "unsocialized", exceed their benefits. Thus, it would appear that any measure which society cannot afford, or putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all.  

Another forceful objection can be directed against the behavioural assumptions underlying some of the factors present in the notion of "demoralization costs". To be sure, consistently imposed under-compensation policies will induce certain changes in the economic behaviour of people subjected to such a policy. It is conceivable that such policies may impair economic incentives, contribute to illegal or extra-legal ways of conducting economic activities or that they might significantly contribute to social unrest endangering the stability of the system as a whole. But these, it may be said, are tenable hypotheses; not verified conclusions. Equally tenable is a hypothesis (emanating from contractarian conception) that equal and principled under-compensation, rooted in social need, creates risks that rational men can appreciate and learn to forbear. The force of this objection is somewhat diminished when we add, as we must, that this counter-hypothesis also rests on behavioural assumptions which remain to be empirically validated.

Perhaps one might suggest, without fully embracing either of the above approaches, while retaining their central insights, that at least certain types of under-compensation policies are unjust, whether justice is taken to mean efficiency or (Rawlsian) fairness. This approach does not focus on under-compensation policies as such, but rather on the temporal range of their application, specified by the anterior date compensation principles. No doubt, under-compensation policies may result from factors other than the adoption of anterior date market value principles. Thus, it is possible to follow the opposed acquisition date market value principle and yet to under-compensate, for example, by adopting principles irrelevant to the type of property acquired. It is perhaps sufficient for the purposes of the present analysis to examine merely one variety of under-compensation policies and practices.

222. Id. at 1181.
223. See text accompanying supra note 196.
224. See Part VI of this paper, Supra.

All anterior date principles share one feature in common: the market value of the property at the time of its acquisition is not regarded as the controlling standard for the determination of compensation. But they differ in terms of the resultant distance from the acquisition date and the manner of the designation of the relevant anterior date. At least three types of anterior date principles deserve brief mention here. First, the statute might itself specify (as the Bella Banerjee statute) the anterior date governing compensation. Second, the statute may leave the actual specification of the date linked to the exercise of some phasal statutory power (notification date as in Shantilal). Finally, a statute while preserving the above linkage may restrict the temporal range of the validity of such designation.

The first two types of anterior date prescriptions carry with them a potential for high demoralization costs. For example, when the statute itself designates the governing anterior date, it is possible to relate it so far back in time as to substantially devalue (for compensation purposes) the property acquired. Thus a statute enacted in 1970 may provide 1940 or 1930 as the relevant anterior date. Even when the designation of the anterior date by the statute looks from a given limited time perspective unobjectionable, high demoralization costs remain unavoidable in the long run if the statute authorizes acquisition processes unlimited in time. Thus, a statute enacted in 1970, taking 31 December 1969 as the relevant anterior date, may not seem unjust from the vantage point of early or middle seventies. But in the eighties or the year 2000, the 1969 date must indeed be regarded as a demoralizing agent.

The second type of anterior date prescription, although avoiding the "freezing" of property values, may yield similar results. As Shantilal shows. At least so far as property in land is concerned, it is possible under this method of designation of the anterior date, to complete the required formalities upon which the anterior date comes into force, without much regard for the integrity of the acquisition process and its overall social welfare objectives. This method of anterior date
designation thus becomes a strategy not directed to achieve the desired specific redistributive changes, but one directed to implement policies of under-compensation. To the extent this is so, this method must be grounded in the claim that under-compensation with a view to devalue property is a "just" social welfare objective, (in the senses of being "efficient" and "fair"), independently of the objectives of the social welfare legislation.229

An appraisal of this claim (which is perhaps more complex than it appears to be at first sight) must raise even more difficult problems for judgments of justice. Absent specific redistributive contexts, it becomes nearly impossible to ascertain what (how much, and at what cost) is being attained. Here we confront fully the problematic of "general welfare."230 Under-compensation policies, in the absence of specific social welfare objectives and efficient planning to attain them, can indeed come to be regarded as ends in themselves.231 Given the institution of property in a poor society, however, it is difficult to see how this claim can be justified.232

But this second type of anterior-date specification does not necessarily lead to the above results. If the acquisition process is properly planned, with a steady awareness of social gains and costs, this type of specification may not present problems of justification, for under-compensation policies then become components in the strategies to secure efficiently specific redistributive objectives.233

The principal attraction of the third type of anterior-date designation lies precisely in its rendering the efficiency-potential of the second method more eminent, and in substantially diminishing its cost potential. Through this method, under-compensation policies can be used as strategies for attaining specific and well-planned distributive

229. In the Shantilal context, this claim would suggest that the justification for the under-compensation offered must be looked at independently of the town-planning and related objectives of the impugned statute.


231. See Supra notes 201, 217

232. Ultimately, the claim that under-compensation is justified in the interests of general welfare, must raise the all important question about the justification of the institution of private property in an economy of subsistence. On this aspect, see Baxi, "The Little Done, The Vast Undone" 9 J.I.L.I. 323 at 404-6 and the materials there cited. Also see Michelman "Property, Utility, and Fairness," at 1202-13.

233. See Supra note 228

changes. Both in terms of utility and fairness, under-compensation thus arising comes closer to being just.234

On any of the above approaches, the specific under-compensation practice in Shantilal cannot but be regarded as unjust. The statutory policy of under-compensation may also come to be so regarded if the Shantilal situation is typical of implementation of statutory welfare objectives. For, justice (whether conceived as efficiency or fairness) demands the "assurance that society will not act deliberately so as to inflict painful burdens on some of its members unless such action is 'unavoidable' in the interests of long-run, general well-being."235 This assurance is violated in Shantilal by the severing of the nexus between compensation and efficiency.

Shantilal presented a situation which called for revival of the "just compensation" concept as constitutional standards for administering "fairness discipline". Instead of asking the question: "Is the compensation policy or practice just?", the Shantilal court asked the different (and from the justice-perspectives immediately irrelevant) question concerning the constitutional locus of the authority to make final determinations relative to compensation. But finality of decisions does not necessarily ensure their justness: and so long as the guarantee of "compensation" survives in Part III of the Constitution, the Court cannot for long evade its constitutional responsibilities for judicial review, agonizing and complex though they are.236

234. Though again analytically it is possible that the statute might provide for any anterior date period (say, two or three decades) within which the designation of the relevant date may remain operative. The trend in Indian legislation, however, is to narrow rather than extend the temporal range. See, Supra note 226.


236. And the Fourth Amendment excludes from judicial review the adequacy of compensation, not its justness. So when compensation can be regarded as unjust on grounds other than adequacy, the Court may hold it constitutionally impermissible.