

# Constitutional Law, Social Justice and the Redistribution of Land

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## I. Introduction

This chapter examines the interplay between human rights, constitutional law, the compulsory redistribution of land and the forces of globalisation. Rural poverty and gross inequality seem to compel state intervention in land ownership, and yet a strong right to property can entrench the very interests that governments wish to challenge. This is especially acute in the developing world, where a right to full compensation for land taken for redistribution can make it financially impossible for governments to take significant action. This chapter therefore concentrates on two states — India and the Philippines — where politicians and judges have frequently dealt with the tension between the egalitarianism and relief of poverty, on one side, and the right to property on the other. In both countries, promises of redistribution and agrarian reform have been part of political life since World War II, if not before. At one time, such promises were very much the norm for post-colonial nations.<sup>1</sup> Many hoped that implementing promises of ‘land to the tiller’ would address both inequality and poverty, and that compulsion would be necessary for meaningful action. However, in recent decades, most states have moved away from redistribution. In the Philippines, the national programme of land acquisition that was initiated in 1987 is drawing to a close; in India, there is even less activity. Yet, in both countries, the level of inequality in the distribution of land remains high and success has been only partial, at best.

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<sup>1</sup> See generally, M Lipton, *Land Reform in Developing Countries: Property Rights and Property Wrongs* (Oxford, Routledge, 2009); P Krugman, ‘Inequality and Redistribution’ in N Serra and JE Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford, Oxford University Press, 2008).

In these countries, land reform has featured in constitutional law, both in specific provisions and as a key consideration in the framing of rights to property. The courts in both countries have produced rich jurisprudence on the interpretation of relevant constitutional clauses. From independence, the highest courts in India and the Philippines maintained a requirement of full compensation for land taken for redistribution (and other purposes). There have been interludes where the courts allowed greater flexibility but, as this chapter demonstrates, the general trend is for full compensation. The impact on the cost of redistribution has made it more difficult to implement reform, and helps to explain why the achievement is less than anticipated. Indeed, the Indian and Philippine record on redistribution contrasts sharply with that of Japan, Taiwan and South Korea.<sup>2</sup> These countries carried out the most comprehensive post-World War II programmes for land reform and redistribution in Asia (leaving aside the socialist nations). Moreover, as in India and the Philippines, land redistribution was implemented through the use of legal powers of compulsory acquisition, rather than consensual, market-led reform or the confiscatory methods of the socialist governments. However, the cost of compensation was significantly lower: in Japan, Taiwan and South Korea, compensation was based on the value of rents or crop yields, and generally fell well below market values. As explained below, proposals for such compensation standards were brought forward in India and the Philippines. However, they were either dismissed before they could be implemented, or they were subject to constitutional challenges that restored the market standard. Arguably, these constitutional

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<sup>2</sup> See generally J Putzel, *A Captive Land: The Politics of Agrarian Reform in the Philippines* (London, Catholic Institute for International Relations, 1992) 101–05; J-S You, ‘Inequality and Corruption: The Role of Land Reform in Korea, Taiwan, and the Philippines’ Annual Conference of the *Association for Asian Studies*, Atlanta, Georgia, 3–6 April 2008; H-C Tai, *Land Reform and Politics: A Comparative Analysis* (London, University of California Press, 1974); on each country, see NL Nathanson, ‘Constitutional Adjudication in Japan’ (1958) 7 *American Journal of Comparative Law* 195; A YC Koo, *The Role of Land Reform in Economic Development: A Case Study of Taiwan* (New York, Praeger, 1968); Y-D Jeon and Y-Y Kim, ‘Land Reform, Income Redistribution, and Agricultural Production in Korea’ (2000) 48 *Economic Development and Cultural Change* 253, 254–58.

differences had the effect of making extensive land redistribution far more difficult to achieve.

Of course, factors other than compensation have been important. External forces have played a crucial role: it is worth noting, for example, that the United States supported redistribution in Japan, Taiwan and South Korea.<sup>3</sup> Both the American and the national governments were fearful that, without land reform, the peasants would support communist insurgencies. In India, the United States had less influence, and in any case the communist threat was much weaker. However, in the Philippines, where American influence has been greater, the focus has been on military action, rather than social measures aimed at winning over the rural peasantry. More recently, the World Bank urged the Philippine government to abandon its programme of compulsory redistribution in favour of market-led, voluntary transfers.<sup>4</sup>

Whilst external forces are undoubtedly important, this chapter concentrates on the internal forces of globalisation, and in particular on the tendency of judges to frame their reasons for supporting full compensation by reference to comparative law. The chapter demonstrates that, so far as the judges are concerned, comparative law has almost invariably pointed them in the direction of the liberal model of state power and property. By this view, the right to property is an integral element of personal liberty: the rights of property describe a part of individual autonomy that deserves the same level of protection as (for example)

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<sup>3</sup> Putzel, *ibid* 96–99, 127–37, 283–303 (Putzel also discusses the World Bank’s brief period of support for more radical reforms: *ibid*, 287–90); SM Borrás Jr, D Carranza Jr, C Franco and MA Manahan, *Anti-Land Reform Land Policy?: The World Bank’s Development Assistance to Agrarian Reform in the Philippines*, [focusweb.org/sites/www.focusweb.org/files/WORLDBANK-Boras-Carranza-Franco-Manahan.pdf](http://focusweb.org/sites/www.focusweb.org/files/WORLDBANK-Boras-Carranza-Franco-Manahan.pdf), 9–12.

<sup>4</sup> Borrás et al, *ibid*. An extensive literature examines the relationships between the national laws on the protection of property and international capital flows: See eg DS Law and M Versteeg, ‘The Evolution and Ideology of Global Constitutionalism’ (2011) 99 *California Law Review* 1163; DS Law, ‘Globalization and the Future of Constitutional Rights’ (2007) 102 *Northwestern University Law Review* 1277; DA Farber, ‘Rights as Signals’ (2002) 31 *Journal of Legal Studies* 83; M Tushnet, ‘The Inevitable Globalization of Constitutional Law’ (2009) 49 *Virginia Journal of International Law* 985; R Dixon and EA Posner, ‘The Limits of Constitutional Convergence’ (2010–2011) 11 *Chicago Journal of International Law* 399; T Moustafa, ‘Law versus the State: The Judicialization of Politics in Egypt’ (2003) 28 *Law & Social Inquiry* 883, 885.

rights to freedom of expression and conscience.<sup>5</sup> This is not to say that property is immune from expropriation in the public interest. However, where this does occur, the owner has no obligation to shoulder a greater part of the burden of serving the public interest than any other citizen. In constitutional and human rights law, this is expressed through provisions that guarantee full compensation for the compulsory acquisition of property. This ensures that the owner suffers no economic loss beyond the additional tax burden in funding compensation that falls on all citizens.

This has had two main doctrinal implications. First, the courts of India and the Philippines have generally interpreted constitutional property clauses as requiring full compensation for taking, even where there is some doubt that the plain language or original intention would justify such a reading. Second, in cases related to property, the courts have given little to no weight to constitutional provisions on social justice, egalitarianism and land reform. In the Philippines, the result is that redistribution cannot proceed unless the landowners are paid full compensation for their land. In effect, the option of providing below-market compensation, as in Taiwan, Japan and South Korea, has not been available. The situation in India is more complex: the right to property normally requires full compensation, but it does allow exceptions. Moreover, there are recognised mechanisms by which the legislature may narrow the scope of judicial review. Nevertheless, the ideology of property remains liberal.

The chapter begins by considering the framing of constitutional rights to property in each country at independence, and the subsequent rise of the liberal interpretation of compensation guarantees. It then follows the weakening of the liberal position through the 1970s and 1980s before considering the revival of the liberal model in more recent years.

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<sup>5</sup> See RA Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge MA, Harvard University Press, 1985).

Throughout, it shows how comparative law has been utilised to justify support for the liberal model. It closes with an examination of the comparative methodology of the courts, by asking whether it is a form of judicial learning from comparator models, a type of signalling (and if so, the intended audience), or a means of legitimating socially conservative judgments intended to support a landed elite.

As this collection concentrates on human rights and property, it may appear that a chapter on constitutional law is out of place. However, the judicial analysis of the right to property under international human rights law, especially that of the European Convention on Human Rights, is very similar to that of constitutional law in these countries. In practical terms, the rights to property in the constitutional law of India and the Philippines provide a similar constraint on state power as the right contained in Article 1 of the First Protocol to the Convention. Indeed, the Indian Supreme Court has increasingly referred to the judgments of the European Court of Human Rights on the European right to property in its constitutional jurisprudence.<sup>6</sup> It is not surprising that this is the case: in Europe, India and the Philippines, the rights to property — constitutional or international — are treated as safeguards of individual freedom and human dignity in the face of state power. Hence, for this collection, it makes sense to concentrate on the national jurisprudence of constitutional property rights when seeking to identify global trends on human rights and property.

## II. Liberal, Socialist and Social Democrat Constitutional Theories at Independence

Liberal views on land ownership had a strong influence on the framing of the colonial constitutions of both India and the Philippines. In India, as in England itself, questions were

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<sup>6</sup> See eg *KT Plantation Pvt Ltd v State of Karnataka* [2011] 13 (ADDL) SCR 636 [85].

frequently raised over the legitimacy of land laws that allowed and sustained the concentration of holdings.<sup>7</sup> In much of India, these patterns of concentrated ownership were created by the British.<sup>8</sup> In the late eighteenth century, the British East India Company sought to create a landholding system that would secure it a satisfactory level of income and, ideally, provide incentives for the further development of agriculture. Their solution lay in the creation of a near-feudal system of tenure, under which a group of tax collectors and administrators were allocated territory over which they had the right to set and collect rents from tenants. In exchange, they were required to make a fixed annual payment to the Company. This arrangement, known as the Permanent Settlement of 1793, effectively transformed the tax collectors, or ‘*zamindars*’, into private owners of extensive tracts of land. The system did not apply throughout the country, and by the early nineteenth century the British had decided not to extend it to the remaining parts of India under their jurisdiction. It became increasingly unpopular through the twentieth century, with growing demands for tenancy reform or outright abolition of the system. However, the *zamindars* supported British rule, and hence the British were reluctant to embark on reforms that would diminish their property rights. This was demonstrated in 1934: the Parliamentary Joint Committee on Indian Constitutional Reform rejected Indian demands for a bill of rights whilst recommending a right to property ‘in order to quiet doubts which have been aroused in recent years by certain Indian utterances’.<sup>9</sup> These proposals were incorporated in the Government of India Act,

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<sup>7</sup> See generally I Packer and L George, *Liberalism and the Land: The Land Issue and Party Politics in England, 1906–1914* (London, Royal Historical Society Studies in History New Series, 2001); A Offer, *Property and Politics, 1870–1914: Landownership, Law, Ideology, and Urban Development in England* (Cambridge, Cambridge University Press, 1981).

<sup>8</sup> PK Agrawal, *Land Reforms in India: Constitutional and Legal Approach (with Special Reference to Uttar Pradesh)* (New Delhi, MD Publications, 1993) 1–18; HCL Merillat, *Land and the Constitution in India* (New York, Columbia University Press, 1970) ch 1.

<sup>9</sup> The Joint Committee on Indian Constitutional Reform, *Report of the Joint Committee on Indian Constitutional Reform* (1934), Vol 1, Pt 1, para 366. See also Merillat, *ibid*, and T Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge, Cambridge University Press, 2000) 43–46.

1935.<sup>10</sup> By expressing the constitutional issue in terms of property, rather than political or social power, a special status was reserved for a group of landowners whose claim to ownership and influence was coming under attack.

The use of constitutional law to support a landed elite was also found in the Philippines. The United States took over the Philippines from Spain under the Treaty of Paris (1898), but without the intention of making it a colony on a permanent basis. It became a Commonwealth in 1935 and fully independent in 1946. When the United States took power, the Catholic Church owned most of the private land, with tenant farmers in a position of servitude.<sup>11</sup> The territorial government intended to redistribute land, and indeed it acquired lands held by the Church for this purpose. However, to cover the cost of acquisition, it offered the land for resale at prices that most tenant farmers could not afford. Consequently, the concentration of holdings remained, although with a different group of owners. The United States then made it very difficult for Philippine governments to give serious consideration to further acquisitions for redistribution, as it entrenched property rights in the constitution of the territory. Section 5 of the Philippines Bill of 1902,<sup>12</sup> which set up the territorial government, included the due process guarantee of the Fifth Amendment of the United States Constitution: ‘no law shall be enacted in said Islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein

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<sup>10</sup> Government of India Act, 1935, s 299. The key provisions required legislation to state the principles on which compensation would be determined (s 299(2)), and also required prior sanction of the Governor General or Governor for the introduction of such legislation in the legislature (s 299(3)).

<sup>11</sup> See Putzel (n 2) 43–66 and WG Wolters, ‘The Development of Property Rights to Land in the Philippines, 1850–1930’ in Toon van Meijl and Franz von Benda-Beckmann (eds), *Property Rights and Economic Development: Land and Resources in Southeast Asia and Oceania* (London and New York, Kegan Paul International, 1999) 110, 113–38 for the history of land ownership under the territorial government and before; see also JM Riedinger, *Agrarian Reform in the Philippines: Democratic Transitions and Redistributive Reform* (Stanford, Stanford University Press, 1995); TM Hanstad, ‘Philippine Land Reform: The Just Compensation Issue’ (1988) 63 *Washington Law Review* 417; ALA Martin, ‘Philippine Land Reform Cycles: Perpetuating US Colonial Policy’ (1999) 47 *Philippine Studies* 181.

<sup>12</sup> See generally EM Fernando, ‘An Asian Perspective on the American Constitutional Influence in Asia: Its Impact on the Philippine Legal System’ (1976) 18 *Malaya Law Review* 281.

the equal protection of the laws'. The Fifth Amendment also incorporates the 'takings clause', which adds the provision 'nor shall private property be taken for public use, without just compensation' to the due process clause. Under American law, the due process clause only provides protection in respect of the procedural aspects of an interference with property. The takings clause guarantees 'just compensation'. Crucially, this only applies to 'takings'; in broad terms, an American 'taking' is equivalent to a compulsory acquisition of property under British law.

At first glance, the omission of the takings clause from the Philippines Bill would appear to be a significant matter. However, section 63 of the Bill delegated the power of eminent domain to the Government of the Philippines (under American law, the power to compulsorily acquire property is known as the power of eminent domain). Section 74 then provided that the Government could further delegate the power of eminent domain, but only subject to the condition 'That no private property shall be taken for any purpose under this section without just compensation paid or tendered therefor'. Subsequently, the Philippine Autonomy Act of 1916 repeated the property provisions of the 1902 Bill, and added a takings clause based on the corresponding clause of the Fifth Amendment.<sup>13</sup> All the subsequent constitutions (1935, 1973 and 1987, excluding the Japanese occupation) include both due process and takings clauses.<sup>14</sup>

The colonial constitutions of both countries therefore ensured that the dependent legislatures had the power to acquire and redistribute land, whilst providing constitutional protection for the special status of a small class of landowners. Independence therefore provided an opportunity to reconsider the constitutional position of property in both

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<sup>13</sup> S 3; s 28 included the clause regarding delegation of the power of eminent domain.

<sup>14</sup> Constitution of the Republic of the Philippines, 1935, Art III, s 1.1 and 1.2; Constitution of the Republic of the Philippines, 1973, Art IV, s 1, s 2; Constitution of the Republic of the Philippines, 1987, Art III, s 1, s 9.



jurisdictions, especially in relation to compensation on expropriation. However, this only occurred in India. In the Philippines, the process for achieving independence was set up by the Philippine Independence Act of 1934.<sup>15</sup> The Act authorised a convention to draft a proposed constitution for approval by the President of the United States. Approval would not be given unless the Act included a bill of rights.<sup>16</sup> Not only did the Convention's proposal include the due process and takings clauses, but it added a new section 4: 'The Congress may authorize, upon payment of just compensation, the expropriation of lands to be subdivided into small lots and conveyed at cost to individuals'. The proposed text was certified by President Roosevelt on 23 March 1935.

The new Constitution came into effect at a crucial point in American history. The legislative programme of President Roosevelt's New Deal was in progress, but many aspects were subject to constitutional challenge. In a line of cases including the famous *Lochner v New York* (1905), the Supreme Court of the United States invoked the Bill of Rights, including the Fifth Amendment, to strike down social legislation as an interference with liberty.<sup>17</sup> The New Deal reflected the social democrat belief that human dignity was at stake in periods of economic crisis, and that the protection of human rights could require active intervention in markets.<sup>18</sup> Plainly, this challenged narrower characterisation of individual freedom and liberalism in the form expressed in *Lochner*. In the Philippines, President Quezon also sought to enact legislation in pursuit of social justice, not unlike President Roosevelt.<sup>19</sup> However, the constitutional concerns were similar: in *People v Pomar*, the

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<sup>15</sup> Public Law 73–127 (1934; US); see generally Fernando (n 12).

<sup>16</sup> Public Law 73–127, s 3.

<sup>17</sup> *Lochner v New York* (1905) 198 US 45; S Choudhry, 'The Lochner Era and Comparative Constitutionalism' (2004) 2 *International Journal of Constitutional Law* 1.

<sup>18</sup> See S Berman, *The Primacy of Politics: Social Democracy and the Making of Europe's Twentieth Century* (Cambridge, Cambridge University Press, 2006).

<sup>19</sup> Putzel (n 2) 57–59.

Philippine Supreme Court followed *Lochner* and related cases.<sup>20</sup> In both countries, the majority of cases concerned labour laws and the contracts clause of the Bill of Rights, rather than the right to property. Nevertheless, the *Lochner* jurisprudence came to be regarded, both within the United States and internationally, as an illustration of the potential impact of the constitutional protection of property on legislative programmes for social and economic change.<sup>21</sup> The liberal doctrines of the *Lochner* line of cases were coming under challenge when the 1935 Constitution was approved, but would not be reversed until *West Coast Hotel Co v Parrish* (1937)<sup>22</sup> and *United States v Carolene Products* (1938).<sup>23</sup> Given the potential obstacle of the *Lochner/Pomar* doctrines, the framers of the 1935 Constitution added a ‘Declaration of Principles’ on social justice. Section 5 provided that ‘The promotion of social justice to insure the well-being and economic security of all the people should be the concern of the State’.

Plainly, the Constitution of the United States has no provision corresponding to section 5, and it was uncertain how it would be received by the Philippine Supreme Court. Oddly, section 5 first arose as an argument for the continuation of the *Lochner* doctrine. In *Calalang v Williams* (1940),<sup>24</sup> the petitioner argued that a restriction on use of animal-drawn carts in Manila was unconstitutional because it affected his economic well-being and therefore it did not promote social justice. Laurel J rejected the argument, stating that social justice reflects ‘the fundamental and paramount objective of the state of promoting the health, comfort, and quiet of all persons, and of bringing about “the greatest good to the greatest

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<sup>20</sup> *People v Pomar* (1924) GR No L-22008: The Philippine Supreme Court applied American cases on due process to strike down legislation on maternity leave.

<sup>21</sup> Choudhry (n 17).

<sup>22</sup> *West Coast Hotel Co v Parrish* (1937) 300 US 379.

<sup>23</sup> *United States v Carolene Products* (1938) 304 US 144.

<sup>24</sup> *Calalang v Williams* (1940) 70 Phil 726, GR No 47800.

number”<sup>25</sup> In other cases of that period on the relationship between constitutional law and economic policy, the Court did not even raise section 5, but preferred to rely on the American jurisprudence.<sup>26</sup>

At this time, alternatives to the liberal ideology were being put forward in the Indian debates on property and land reform. The Constituent Assembly convened on 9 December 1946; the Constitution was agreed on 26 November 1949 and took effect on 26 January 1950.<sup>27</sup> The Indian National Congress (‘Congress’), which held the majority of seats, had traditionally emphasised liberal ideas of individual liberty and equality. As early as 1928, in the report of the Committee Appointed by the All Parties’ Conference (‘Nehru Report’), Congress put forward constitutional principles for self-government, with a declaration of fundamental rights.<sup>28</sup> The declaration included a right to property: Recommendation 4(ii) provided that ‘No person shall be deprived of his liberty nor shall his dwelling or property be entered, sequestered or confiscated, save in accordance with law.’ Other aspects of the Report also reflected the interests of the *zamindars*, as it rejected the inclusion of tenancy rights.<sup>29</sup> In addition, it reassured investors that ‘It is inconceivable that there can be any discriminating legislation against any community doing business lawfully in India’.<sup>30</sup> Overall, it appeared that Congress would do little to challenge the landed interests.

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<sup>25</sup> *ibid*, 734.

<sup>26</sup> See *Leyte Land Transportation Company, Inc v Leyte Farmer's and Laborer's Union* (1948) GR No L-1377; *Antamok Goldfields Mining Company v Court of Industrial Relations* (1940) GR No L-46892.

<sup>27</sup> G Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford, Oxford University Press, 1966) 84–99; G Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford, Oxford University Press, 2003); Merillat (n 8); HCL Merillat, ‘The Indian Constitution: Property Rights and Social Reform’ (1960) 21 *Ohio State Law Journal* 616.

<sup>28</sup> Committee Appointed by the All Parties’ Conference 1928, *The Nehru Report: An Anti-Separatist Manifesto* (New Delhi, Michiko & Panjathan, 1928 reprinted 1975).

<sup>29</sup> *ibid*, 90.

<sup>30</sup> *ibid*, 11.

The situation changed within a short period. By the 1930s, it was obvious that Congress would not win popular support unless it took a stronger line on land reform. On the left, communist and radical movements were gathering support; on the right, the rural poor were being drawn into religious or caste conflicts, often provoked by the landed elite as a way of suggesting that the solution to rural poverty lay anywhere but in tenure reform.<sup>31</sup> Jawarharlal Nehru, a rising figure in the Party, expressed his disappointment with the Nehru Report's recommendations on property.<sup>32</sup> Under his influence, the Party swung to the left and secured a dominant position in Indian politics following independence.

These tensions between social change and stability continued to the convening of the Constituent Assembly, and after.<sup>33</sup> Ultimately, the Indian Assembly expressed the economic and social aspirations of the newly independent nation in Part IV of the Constitution, entitled the 'Directive Principles of State Policy'. There are clear parallels with section 5 of the 1935 Philippine Constitution, although there is no evidence that the Indian framers were aware of the Philippine provision. The Directive Principles require the State to secure a 'social order in which justice, social, economic and political, shall inform all the institutions of the national life'.<sup>34</sup> The State was also charged to 'strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.' The Directive Principles did not specifically require land reform or redistribution; however, they required the State to ensure 'that the ownership and control of

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<sup>31</sup> DA Low, 'Congress and Mass Contacts, 1936–37: Ideology, Interests, and Conflict over the Basis of Party Representation' in R Sisson and S Wolpert (eds), *Congress and Indian Nationalism: The Pre-Independence Phase* (Berkeley, University of California Press, 1988) 134.

<sup>32</sup> S Bhattacharya, 'Swaraj and the Kamgar: The India National Congress and the Bombay Working Class, 1919–1931' in Sisson and Wolpert, *ibid*, 223, 237.

<sup>33</sup> Austin, *Indian Constitution* (n 27); Merillat (n 8).

<sup>34</sup> Constitution of India, Art 38(1).

the material resources of the community are so distributed as best to subserve the common good'<sup>35</sup> and that the 'operation of the economic system does not result in the concentration of wealth and means of production to the common detriment'.<sup>36</sup> Many state governments had already begun to move on land reform, which immediately raised questions regarding the desirability of incorporating a right to property in the Constitution's chapter on fundamental rights.

The central issue in the Assembly concerned the amount of compensation (if any) to be provided for *zamindars*. As in the Philippines, the large landowners employed liberal arguments to protect their position. After lengthy debate, the Indian Assembly settled on a right to property that would leave the legislature the freedom to determine compensation. As originally enacted, Article 31 of the Constitution provided as follows:

- (1) No person shall be deprived of his property save by authority of law.
- (2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principle on which, and the manner in which, the compensation is to be determined and given.

These provisions were very similar to those of the Government of India Act, 1935.

Ironically, provisions that were originally intended to protect the landowners were now employed to protect legislative power.<sup>37</sup> However, in the independence Constitution, it would be the President, acting on the advice of the Prime Minister, who would give assent to legislation. Under the Government of India Act 1935, the Governor General was not responsible to the Indian provincial legislatures, and it was expected that he would exercise his discretion in favour of the landowners. In the independence Constitution, the combination

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<sup>35</sup> Constitution of India, Art 39(b).

<sup>36</sup> Constitution of India, Art 39(c).

<sup>37</sup> See Government of India Act, s 299(1) and (2); Art 31(3) was similar to s 299(3), except that the President held the power of approval previously held by the Governor General.

of Article 31 and responsible government meant that the provisions were seen as sufficiently open to allow state legislatures to pursue land reform without full compensation. Nehru stated that ‘Eminent lawyers have told us that on a proper construction of this clause, normally speaking, the Judiciary should not and does not come in’.<sup>38</sup> The courts would become involved only where ‘there has been a gross abuse of the law, where, in fact, there has been a fraud on the Constitution’.<sup>39</sup>

In summary, the constitutional position on property in India differed greatly from that in the Philippines.<sup>40</sup> Politically, the rural peasantry were better able to command attention in India. Moreover, the educated urban classes that dominated the Congress Party leadership were relatively independent: their power did not depend on the landed elite, the former colonial power or foreign investors. Moreover, the Party itself was not ideologically bound to a specific position on economics and property. The liberal values of individual autonomy and equality were certainly important, especially as they challenged the systems of colonial and caste privilege that had held back many Congress members. However, social democracy and socialism were also attractive: a strong public sector, run by Indians, offered prospects for advancement that had not been available during the colonial period. By contrast, in the Philippines, the United States, as colonial power, held a veto over constitutional proposals; whilst it allowed the introduction of section 5, it also insisted on the retention of the takings clause.<sup>41</sup> In any case, the peasantry lacked the organisation and influence to counterbalance the power of the landed elite over national politics. Consequently, property was not subject to the same kind of challenge as seen in India.

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<sup>38</sup> Constituent Assembly Debates, vol IX, p 31, 10 Sept 1949.

<sup>39</sup> *ibid.*

<sup>40</sup> See Austin, 1966 (n 27), for a general review.

<sup>41</sup> Putzel (n 2) 43–66; Wolters (n 11); Riedinger (n 11).

Despite these differences, there was an important common feature: neither group of framers found a way to integrate social justice with a right to property. In India, the initial solution was, in essence, to take questions relating to both social justice and property away from the courts, as neither the Directive Principles nor compensation were justiciable. In the Philippines, the opposite route was taken: both compensation and social justice were justiciable. In essence, the framers of both constitutions were aware of, and drew on, the international debates on liberalism, social democracy and socialism, as well as their own national values. However, as subsequent events would show, they struggled in their effort to pull them together in a coherent structure.

### III. Judicial Interpretation of the Property Clauses after Independence

After achieving independence, both countries pursued land reform and redistribution, with varying degrees of commitment and success. The territorial government did attempt to break up concentrations of land ownership; however, it worked on the principle of full compensation, and the cost soon put the programme beyond the government's financial capacity.<sup>42</sup> The possibility of reducing compensation was then put beyond reach by the Supreme Court: in 1915, in *Manila Railroad Company v Velasquez, Allarey and Maligalig*, the Court held that 'There is no question but that the compensation to which a defendant owner is entitled is the market value of the condemned property'.<sup>43</sup> Arguably, the addition of section 5 in the 1935 Constitution, with its emphasis on the promotion of social justice, invited a re-examination of the meaning of 'just' compensation in cases of land reform. This was tested after World War II, in relation to Commonwealth Act No 539 (1940), which

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<sup>42</sup> Putzel, *ibid*, 83–101; Riedinger, *ibid* 91–98.

<sup>43</sup> *Manila Railroad Company v Velasquez, Allarey and Maligalig* (1915) GR No L-10278 (the case is concerned with a statutory requirement for 'just compensation', but has been taken as valid interpretation of the constitutional standard: see eg *Province of Tayabas v Perez* (1938) 66 Phil 467, GR No 44778 (1938).

allowed the President to acquire large estates for subdivision and transfer to tenants. In line with the takings clause, full compensation was paid to the owners. However, in a post-War case on Act No 539, *Republic of the Philippines v Gonzales*,<sup>44</sup> the Supreme Court suggested that ‘just’ compensation may require *more* than full compensation in redistribution cases, because the purpose was primarily private. Unlike a taking for a public amenity, the owner would not benefit from the subsequent use of the land. There was no re-examination in the light of section 5 and no consideration of the intended social impact of the legislation. Not surprisingly, the Act had very little impact on land distribution.<sup>45</sup> The Court may have left behind some of the *Lochner* era doctrine, but not the commitment to property nor the requirement for full compensation. It seemed that the constitutional provisions on social justice would have no impact on the rights of landlords.

This was confirmed with subsequent programmes. The Land Reform Act of 1955 only applied to only a small proportion of agricultural land, with less than 0.4 per cent of farmland redistributed in the six years following its enactment.<sup>46</sup> Another attempt at redistribution was launched with the Agricultural Land Reform Code of 1963, but it also suffered from limited scope and ineffective implementation.<sup>47</sup> The Supreme Court avoided political controversy: as noted above, *Republic of the Philippines v Gonzales* favoured the landowners, but the lack of political will over redistribution was more important in practice. Indeed, the peasant movements gained strength in the post-World War II period but, crucially, police and military action became more important than land reform in suppressing

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<sup>44</sup> *Republic of the Philippines v Gonzales* (1954) GR No L-4918.

<sup>45</sup> Riedinger (n 11) 96–97.

<sup>46</sup> Putzel (n 2) 83–101; Riedinger, *ibid* 87–91.

<sup>47</sup> Putzel, *ibid* 114–18; Riedinger, *ibid* 91–98.



rebellion. This was supported by the United States, which was now turning away from the policy of encouragement that it pursued in Japan, Taiwan and South Korea.<sup>48</sup>

In India, as the states began to abolish the *zamindar* system, the constitutional structure of property and social justice came under judicial examination. Some state courts held that the Constitution did not allow the amount of compensation to be scaled to the size or nature of the holding, as land reform legislation in Japan, Taiwan and South Korea had done.<sup>49</sup> Parliament then enacted the First Amendment to the Constitution, which insulated land reform legislation from review under the provisions guaranteeing fundamental rights.<sup>50</sup> This should have resolved the controversy, but the Court held, in *State of West Bengal v Bela Banerjee*, that Article 31(2) sets a 'basic requirement of full indemnification of the expropriated owner'.<sup>51</sup> Legislation 'must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of'.<sup>52</sup> Separately, it indicated that the exclusions granted by the First Amendment would be narrowly construed.<sup>53</sup> Parliament then sought to reverse *Bela Banerjee* by the Fourth Amendment (1955), which altered Article 31.<sup>54</sup> However, the Supreme Court interpreted the amended

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<sup>48</sup> EB Kapstein, 'Land and Rebellion: Lessons for Counter-insurgency' (2014) 56 *Survival: Global Politics and Strategy* 109.

<sup>49</sup> *Maharajahdiraja Sir Kameshwar Singh Darghanga v State of Bihar*, AIR 1951 Patna 91; *State of Bihar v Maharajahdiraja Sir Kameshwar Singh Darghanga*, (1952) 1975 AIR 1083 the Supreme Court allowed an appeal (in part) on the basis that the First Amendment excluded review (the Supreme Court judgment was not reported until 1975, although decided in 1952).

<sup>50</sup> Constitution (First Amendment) Act, 1951, ss 4, 5. The First Amendment added Art 31A to protect land reform legislation from review. Art 31B added the Ninth Schedule to the Constitution; the Schedule constituted a list of enactments that were specifically excluded from judicial review for violations of fundamental rights.

<sup>51</sup> *State of West Bengal v Bela Banerjee* 1954 SCR 558, 563 (the legislation authorised land expropriation, but lay outside the exclusion of the First Amendment).

<sup>52</sup> *ibid*, 563.

<sup>53</sup> *State of Bihar v Maharajahdiraja Sir Kameshwar Singh Darghanga* (n 49).

<sup>54</sup> Constitution (Fourth Amendment) Act, 1955, s 2.

provisions so as to reinstate the guarantee of full compensation.<sup>55</sup> Further amendments followed; in each case, the Supreme Court would reinstate the compensation guarantee through increasingly strained interpretation of the amended provisions.<sup>56</sup>

The conflicting views between Parliament and the Supreme Court over the compensation issue became increasingly important in political life. In the 1971 election campaign, Indira Gandhi and her Congress Party blamed the Court for the lack of progress on land reform.<sup>57</sup> However, it is difficult to judge the real impact of the Court's defence of property on redistribution. The exclusions of the First Amendment allowed the abolition of the *zamindar* system to proceed, and it was largely complete by 1960.<sup>58</sup> However, a second phase of reform was intended to impose ceilings on holdings and redistribute the surplus to tenants. Very little progress was made from this point, but it seems that political forces were more important than judicial decisions in thwarting land redistribution. Landowners had become more adept at exerting influence through local political institutions. As Chibber puts it:

The very institutions that were supposed to implement government policy — the Congress party machine and the local state organizations — were thoroughly penetrated by groups hostile to agrarian policy. Even the halting attempts at reform tried by Nehru foundered against their resistance.<sup>59</sup>

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<sup>55</sup> *Vajravelu Mudaliar v Special Deputy Collector*, West Madras 1965 SCR (1) 614; *Karimbil Kunhikoman v State of Kerala* 1962 SCR Supl (1) 829; *Rustom Cavasjee Cooper v Union of India* 1970 SCR (3) 530.

<sup>56</sup> Constitution (Seventeenth Amendment) Act, 1964, ss 2, 3; Constitution (Twenty-Fifth Amendment) Act, 1971, s 3.

<sup>57</sup> Austin, *Working a Democratic Constitution* (n 27) 232–33; WH Morris-Jones, 'India Elects for Change -- and Stability' (1971) 11 *Asian Survey* 719, 728–29.

<sup>58</sup> Tai (n 2) 214–18.

<sup>59</sup> V Chibber, 'Organized Interests, Development Strategies, and Social Policies' in R Nagaraj (ed), *Growth, Inequality and Social Development in India: Is Inclusive Growth Possible?* (Basingstoke, Palgrave Macmillan, 2012) 170; see also A Kohli, 'State and Redistributive Development in India' in R Nagaraj (ed), *Growth, Inequality and Social Development in India: Is Inclusive Growth Possible?* (Basingstoke, Palgrave Macmillan, 2012); Tai (n 2) 93–97; J Harriss, 'Politics and Redistribution in India' in A Kohli & P Singh (eds) *Routledge Handbook of Indian Politics* (London, Routledge, 2013).

Against this background, the immediate effect of the Supreme Court's judgments may have been marginal. At most, the Court merely provided another mechanism for the landed elite to protect its interests.

As the highest courts began to develop their jurisprudence on property, a common trend emerged. In both countries, the early post-independence judgments were characterised by lack of engagement with social justice and indeed with local conditions. Comparative law was part of this. In the Philippines, the Supreme Court treated American law as though it were binding. Consequently, there was no room to bring section 5 into the interpretation of 'just compensation', or indeed any other cases, as it had no American counterpart. In India, the leading cases reveal very little interest in local conditions and the reasons for land reform. In some of the leading cases, such as *Dwarkadas Shrinivas of Bombay v The Sholapur Spinning and Weaving Co*, American authorities were cited on almost every point by all of the judges.<sup>60</sup> In the early cases, the judges did not seek to place the right to property within a specifically Indian context.<sup>61</sup> Indeed, in both countries, the highest courts situated the constitutional protection of property within an international context that transcended national politics. Why the judges did so is unclear: it may have been that the international, comparative approach provided a kind of credibility or legitimacy to politically contentious decisions in favour of landowners. There was no reference to international sources that might have led the judges to allow land reform programmes to proceed. Social democrat ideas seemed to have little influence on the courts, whether in the form of the social justice provisions of each constitution or in the broader international conceptions of human rights

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<sup>60</sup> *Shrinivas of Bombay v The Sholapur Spinning and Weaving Co* 1954 SCR 674; U Baxi, 'The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment' (1974) 1 *Supreme Court Cases* (Jour) 45.

<sup>61</sup> In some cases, the reasoning is based entirely on the 'plain meaning' of Art 31. In *Bela Banerjee*, above n 51, the Court relied entirely on a brief analysis of the language of Art 31. There was no citation of comparative law, but equally there was no discussion of local conditions.

that underpinned those provisions. Arguably, there was a kind of globalism in evidence, but more in the form of an internal body looking to global values (and only one set of values) to bolster its domestic position.

#### IV. The (Temporary) Decline of Liberalism

If the 1950s and 1960s were the high point of the liberal ideology of the property in the courts, the 1970s and 1980s represent its weakest point. By the 1970s, the liberal model of constitutions and property had become increasingly out of touch with changing international developments. The rise of the non-aligned movement and the adoption of the New International Economic Order were the global movements of importance, and this was reflected in the national debate on property. In India, the Janata Government brought the Forty-Fourth Amendment through Parliament in 1978. It was intended to resolve issues over compensation, as it deleted the right to property from the list of fundamental rights. A new right to property was enacted as Article 300A.<sup>62</sup> However, as it stated only that ‘No person shall be deprived of his property save by authority of law’,<sup>63</sup> it appeared that there was no guarantee of compensation; more generally, there seemed to be no scope for judicial review of legislation that authorised takings. Instead, it seemed that property owners were only protected from unlawful administrative action.<sup>64</sup>

After the Forty-Fourth Amendment, the Supreme Court retreated from its earlier dogmatism on compensation. For example, in a case on old right to property, Iyer J stated

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<sup>62</sup> Arts 30(1A) and 30A (1) remained in place; they contain guarantees for religious property and certain smallholders.

<sup>63</sup> Constitution (Forty-Fourth Amendment) Act, 1978, s 34.

<sup>64</sup> See the explanation of the Law Minister in the Rajya Sabha, 28 Aug 1978, col 54 (the Rajya Sabha is the upper house of India’s Parliament). Moreover, Art 300A was not enacted as a fundamental right, but merely as a ‘legal’ or ‘constitutional’ right. As such, petitioners would not have direct access to the Court for redress. Art 32 of the Constitution gives petitioners a right of direct access to the Supreme Court for their vindication of their fundamental rights.

that 'short of paying a "farthing for a fortune" the question of compensation is out of bounds for the court to investigate'.<sup>65</sup> Property could be taken 'not for a return, but for almost free, if the justice of the situation commended itself to the legislation to take it that way.'<sup>66</sup> He dismissed a separate argument based on the right to equality (that is, that the owner of extensive landholdings should be compensated at the same rate per acre as a smallholder), asking 'Which is more basic? Eradication of die-hard, deadly and pervasive penury degrading all human rights or upholding of the legal luxury of perfect symmetry and absolute equality attractively presented to preserve the status quo ante?'<sup>67</sup> Iyer J came close to ridiculing the Court's earlier position for ignoring the realities of Indian life. Moreover, by casting human rights in terms of human dignity in the face of poverty and economic uncertainty, he challenged the Court's earlier liberal tendency to narrow the focus of justice on the specific harm to the owner, without consideration of the broader social context of ownership.

In the Philippines, the Supreme Court also retreated from its earlier position. After declaring martial law in 1972, Ferdinand Marcos adopted populist policies on land reform. Presidential Decree No 27 imposed an upper ceiling on land ownership and declared that tenants would be deemed to own the land that they cultivated. Landlords would be compensated at a rate of two-and-a-half times the value of the average annual yield. This formula was borrowed from the Taiwan land reform programme of the post-War period.<sup>68</sup> It would not have withstood scrutiny under the interpretation of the takings clause seen in cases such as *Manila Railroad Company v Velasquez, Allarey and Maligalig* and *Republic of the Philippines v Gonzales*. However, along with the due process and takings clauses, the 1973

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<sup>65</sup> *Bhim Singh v Union of India* 1985 SCR Supl (1) 862, 881 (the claim arose before the Forty Fourth Amendment came into effect; hence, the Court decided it against the prior law).

<sup>66</sup> *ibid*, 883.

<sup>67</sup> *ibid*, 890.

<sup>68</sup> See Putzel (n 2) 123–27 on the formulation of the programme.

Constitution also included a declaration that all decrees issued by the President were valid law.<sup>69</sup> Implicitly, the doctrine on full compensation was no longer good law, at least in respect of takings under Presidential Decree No 27. The Constitution also added to the provisions on social justice, with the following:

The State shall promote social justice to ensure the dignity, welfare, and security of all the people. Towards this end, the State shall regulate the acquisition, ownership, use, enjoyment, and disposition of private property, and equitably diffuse property ownership and profits. *And* The State shall formulate and implement an agrarian reform program aimed at emancipating the tenant from the bondage of the soil and achieving the goals enunciated in this Constitution.<sup>70</sup>

In *Chavez v Zobel*,<sup>71</sup> the Court upheld the provisions of Presidential Decree No 27 deeming the tenants to be owners and in *Association of Rice and Corn Producers v National Land Reform Council*, it upheld the principle that ‘just compensation’ did not necessarily equate with full market value compensation.<sup>72</sup> The case did not turn on the 1973 provisions, but Fernando J remarked of section 5 of the 1935 Constitution that ‘[i]ts philosophy is a repudiation of laissez-faire’.<sup>73</sup>

In both India and the Philippines, constitutional law of the 1970s and 1980s followed the international trend of the 1960s and 1970s in favour of greater state control over natural resources in the developing nations. Whilst the international statements such as the New International Economic Order (NIEO) were aimed more at foreign ownership of resources than internal concentrations of property, they did challenge the principle of full compensation for all takings. Indeed, scepticism over the value of entrenching the judicial protection of property rights was also seen outside the developing world. For example, in the early 1980s, Canada rejected economic and property rights in the Canadian Charter of Rights and

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<sup>69</sup> Constitution of the Republic of the Philippines, 1973, Art XVII, s 3, para. (2).

<sup>70</sup> Constitution of the Republic of the Philippines, 1973, Art XIV, s 12.

<sup>71</sup> *Chavez v Zobel* (1974) GR No L-28609.

<sup>72</sup> *Association of Rice and Corn Producers v National Land Reform Council* (1982) GR No L-29007.

<sup>73</sup> *ibid* [2].

Freedoms. In Europe, the European Court of Human Rights had not yet begun its expansion of the right to property that would continue to the present day,<sup>74</sup> and there were no signs that the socialist nations of Eastern Europe, the Soviet Union and Asia would move toward market economies. Hence, to some extent, the judicial relaxation of the constitutional standards in India and the Philippines in the 1980s was consistent with global developments. However, by the time the courts in India and the Philippines had accepted the shift away from the guarantees of full compensation, the liberal ‘Washington Consensus’ was gaining force externally and their governments had largely abandoned any commitment to internal land reforms. By the end of the decade, the international trend would shift back to bring pressure on governments to incorporate compensation guarantees at national level.

## V. Revival of the Liberal Right to Property

The weakening of the right to property did not last long in either country; moreover, it did not contribute to greater progress on redistribution. In the Philippines, Presidential Decree No 27 did not have a significant impact. This was partly due to its limited scope, as it only applied to rice and corn lands, thereby omitting the large sugar plantations. In any case, implementation was marred by extensive corruption, as Marcos often targeted the land of his political opponents for expropriation and redistribution.<sup>75</sup> By the 1986 revolution, dissatisfaction over land reform helped to bring together the rural poor and the landed elite in a loose anti-Marcos alliance. For the poor, the Marcos regime represented a failure to honour promises of redistribution; for the landowners, Presidential Decree No 27 was part of a

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<sup>74</sup> See T Allen, ‘Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights’ (2010) 59 *International and Comparative Law Quarterly* 1055.

<sup>75</sup> Putzel (n 2) 137–43; Riedinger (n 11).

general breakdown of a constitutional order that had protected their interests. Both groups had an interest in finding a new constitutional settlement on land reform.<sup>76</sup>

As the negotiations went forward, it became clear that the liberal vision of property would be restored. At an early stage, the Committee on Social Justice proposed ‘a fair and progressive system of compensation’, with payment of a lower proportion of market value for larger estates. The Constitutional Commission, dominated by the landed interests, overruled the Committee and made the land reform provisions subject to the ‘just compensation’ standard of the takings clause.<sup>77</sup> As explained above, the Supreme Court had interpreted the clause so as to allow below-market compensation in *Association of Rice and Corn Producers v National Land Reform Council*. However, following the revolution, it restored the market standard as the measure of ‘just compensation’, even in respect of Presidential Decree No 27. In *Association of Small Landowners in the Philippines v Hon Secretary of Agrarian Reform*<sup>78</sup> the Court stated that

Just compensation is defined as the full and fair equivalent of the property taken from its owner by the expropriator. It has been repeatedly stressed by this Court that the measure is not the taker’s gain but the owner’s loss. The word ‘just’ is used to intensify the meaning of the word ‘compensation’ to convey the idea that the equivalent to be rendered for the property to be taken shall be real, substantial, full, ample.<sup>79</sup>

The Supreme Court not only restored the earlier doctrine, but also the emphasis on American law. This passage is taken from a 1915 authority, *City of Manila v Estrada and Estrada*, which in turn takes it from *Virginia and Truckee R R Co v Henry*, a nineteenth century Nevada state court judgment.<sup>80</sup> *City of Manila v Estrada and Estrada* and *Virginia and Truckee R R Co v Henry* concerned takings by private railway companies under

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<sup>76</sup> Hanstad (n 11).

<sup>77</sup> Putzel (n 2).

<sup>78</sup> *Association of Small Landowners in the Philippines v Hon Secretary of Agrarian Reform* (1989) 256 Phil 777 (1989); recently affirmed in *Land Bank of the Philippines v Honeycomb Farm* (2012) GR No 169903.

<sup>79</sup> *Ass’n of Small Landowners*, *ibid*, 812.

<sup>80</sup> *City of Manila v Estrada* (1913) 25 Phil 208; the Nevada source is *Virginia and Truckee R R Co v Henry* (1873) 8 Nev 165, 165 (1873) (the Nevada case was not cited on this point in *Estrada*).



delegated powers of eminent domain. The Court in *Philippines v Hon Secretary of Agrarian Reform* did not consider whether such cases provide a useful guide to land redistribution. Indeed, the Court made numerous approving references to social justice and land reform, but none to the potential impact of full compensation on the cost and prospects for implementation.

The 1986 Constitution also included new provisions on social justice. Section 6 of Article XII, ‘National Economy and Patrimony’, included a provision on the social conception of ownership:

The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands.

Section 1 of Article XIII, on ‘Social Justice and Human Rights’, directs Congress to

give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.

Sections 4 to 10 lay out detailed principles on agrarian and urban land reform, including a specific right ‘of farmers and regular farmworkers who are landless, to own directly or collectively the lands they till’.

These provisions are stronger than the provisions of the 1973 Constitution that the Court relied on in *Association of Rice and Corn Producers v National Land Reform Council*, where it held that social justice could allow for a departure from a strict reading of ‘just compensation’ standard.<sup>81</sup> However, the post-revolutionary conception of social justice turned back to liberal, individualist conceptions of justice. The following statement by Mr Justice Isagani Cruz, made as a member of the 1986 Constitution Commission, has been quoted in a number of cases:

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<sup>81</sup> Above (n 73).

social justice — or any justice for that matter — is for the deserving, whether he be a millionaire in his mansion or a pauper in his hovel. It is true that, in case of reasonable doubt, we are called upon to tilt the balance in favor of the poor, to whom the Constitution fittingly extends its sympathy and compassion. But never is it justified to prefer the poor simply because they are poor, or to reject the rich simply because they are rich, for justice must always be served, for poor and rich alike, according to the mandate of the law.<sup>82</sup>

Following this approach, the Court has rejected the argument that the nature and importance of agrarian reform, and its separate treatment in the Constitution, justifies an exceptional approach.<sup>83</sup> In *Apo Fruits Corporation and Hijo Plantation, Inc v Land Bank of the Philippines*, it stated that ‘nothing is inherently contradictory in the public purpose of land reform and the right of landowners to receive just compensation for the expropriation by the State of their properties’.<sup>84</sup> Any tension between the rights of property and the rights of the tenants must be resolved in favour of the landowner: ‘That the petitioners are corporations that used to own large tracts of land should not be taken against them’.<sup>85</sup>

*Apo Fruits* examined the Comprehensive Agrarian Reform Program,<sup>86</sup> which was enacted in 1988. As *Apo Fruits, Association of Small Landowners v Secretary of Agrarian Reform and Land Bank of the Philippines v Honeycomb Farm* confirm, the guarantee of full compensation to all owners lies at its core. The land is bought by a government agency for resale to tenants at an affordable price, with the State expected to absorb the difference (as

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<sup>82</sup> The statement appears in the Record of the Constitutional Commission, Volume III, 7 August 1986, 17, and has been repeated by Justice Cruz in his judicial capacity (see eg *Gelos v Court of Appeals and Alzona* (1992) GR No 86186.

<sup>83</sup> For the contrary argument, see Hanstad (n 11) and Fr JG Bernas, *The 1987 Constitution of the Philippines, A Commentary*, 2003 edn (Manila, Rex Book Store, 2003) 1203:

In trying to determine just compensation for purposes of agrarian reform, we must remember that we have to look at this in the context of the Article where it is. It is in the Article on Social Justice, and the thrust of this Article is precisely to make it easier for the disadvantaged to be able to obtain land.

<sup>84</sup> *Apo Fruits Corporation and Hijo Plantation, Inc v Land Bank of the Philippines* (2011) GR No 164195.

<sup>85</sup> *ibid.*

<sup>86</sup> Republic Act No 6657. For assessments of its implementation, see T Adamopoulos and D Restuccia, ‘Land Reform and Productivity: A Quantitative Analysis with Micro Data’, Working Paper 509, University of Toronto Department of Economics, 04 April 2014; J Adam, ‘Land Reform, Dispossession and New Elites: A Case Study on Coconut Plantations in Davao Oriental, Philippines’ (2013) 54 *Asia Pacific Viewpoint* 232; RV Fabella, ‘Comprehensive Agrarian Reform Program (CARP): Time to Let Go’ Discussion Paper No 2014-02, University of the Philippines School of Economics.

well as all other costs). In this respect, there is no change from the previous land redistribution schemes, as the cost of the programme quickly exceeded the capacity of the public treasury. It is worth noting, however, that section 17 of the legislation states that ‘just compensation’ should include consideration of ‘The social and economic benefits contributed by the farmers and the farmworkers’. However, the administrative agency charged with implementing the law has set a valuation formula that does not appear to take this into account,<sup>87</sup> and the Supreme Court has upheld its approach.<sup>88</sup>

A further point concerns control over the large estates. Section 4, Article XIII of the Constitution requires the State to ‘undertake an agrarian reform program founded on the right of farmers and regular farmworkers who are landless, to own directly or collectively the lands they till’. Section 31 of the Comprehensive Agrarian Reform Program then stated that landowners could transfer their estates to corporations, which would then distribute stock to farm workers. This, it was argued, would satisfy the Constitution, although the workers would own shares rather than the land itself. Moreover, the law allows the holding company to limit the workers’ aggregate share in the company to the proportion of agricultural land held by the company.<sup>89</sup> Hence, in the case of *Hacienda Luisita, Inc v Presidential Agrarian Reform Council*,<sup>90</sup> the company argued that the agricultural land only constituted about one-third of the value of its assets, with the result that the tenants collectively would not have a controlling share in the company. The Supreme Court upheld this arrangement, although it appears contrary to the principle of direct peasant ownership. Together, the enactment of the

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<sup>87</sup> DAR in Administrative Order No 6, Series of 1992, as amended by DAR Administrative Order No 11, Series of 1994:  $LV = (CNI \times 0.6) + (CS \times 0.3) + (MV \times 0.1)$ , where LV = Land Value; CNI = Capitalised Net Income; CS = Comparable Sales; MV = Market Value (as declared by the owner for other purposes).

<sup>88</sup> *Land Bank of the Philippines v Banal and Arenas-Banal* (2004) GR No 143276; *Land Bank of the Philippines v Celada* (2006) GR No 164876; *Land Bank of the Philippines v Lim and Cabochan* (2007) GR No 171941.

<sup>89</sup> See A Sawchenko, ‘Choosing a Mechanism for Land Redistribution in the Philippines’ (2000) 9 *Pacific Rim Law & Policy Journal* 681, 703.

<sup>90</sup> *Hacienda Luisita, Inc v Presidential Agrarian Reform Council* (2011) GR No 171101.

1987 Constitution and its interpretation by the Supreme Court has reinstated the liberal compensation guarantees of the earlier period. Once again, the social justice provisions have been given very little real significance. Moreover, as it did in the pre-Marcos era, the Court has justified its position by reference to the American constitutional law. Indeed, American cases are cited as though there is no distinction between American and Philippine law. Not only does this apply to compensation, but in the leading case on regulatory takings, the Supreme Court cited more American cases than Philippine cases (and the Philippine cases that were cited themselves relied on American authorities).<sup>91</sup>

In India, the conflict over compensation and property subsided after the Forty-Fourth Amendment. This was largely due to the declining importance of land redistribution in Indian politics: unlike the Philippines, no significant programmes for redistribution were announced in the 1980s or after. This is not to say that redistribution did not continue in some States: indeed, cases are still reaching the Supreme Court on the scope and application of land reform legislation that was first enacted in the 1960s or 1970s.<sup>92</sup> Moreover, by the mid-1990s, the Supreme Court began to revive the constitutional standards of the earlier period. It first focused on the guarantee in Article 14 against arbitrary state action. In *State of Tamil Nadu v Ananthi Ammal*, on the acquisition of land for Harijan housing sites, the Court held that statutory provisions for the payment of compensation by instalment were contrary to Article 14 because they were ‘unreasonable’ (no further explanation was offered).<sup>93</sup> Subsequently, the Court developed a right to compensation under Article 300A. As explained above, Article 300A appears to provide only procedural safeguards in respect of takings. However, in the leading case *KT Plantation Pvt Ltd v State of Karnataka*, the Court stated that although

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<sup>91</sup> *City of Manila v Laguio and Malate Tourist Development Corporation* (2005) GR 118127.

<sup>92</sup> *IR Coelho v State of Tamil Nadu*, judis.nic.in/supremecourt/imgs1.aspx?filename=28469; *Glanrock Estate Ltd v The State of Tamil Nadu*, 9 Sept 2010, judis.nic.in/supremecourt/imgst.aspx?filename=36827.

<sup>93</sup> *State of Tamil Nadu v Ananthi Ammal* 1995 AIR 2114 [17].

Article 300A ‘enables the State to put restrictions on the right to property by law’, it was also the case that a ‘limitation or restriction [on property] should not be arbitrary or excessive or what is beyond what is required in public interest. The limitation or restriction must not be disproportionate to the situation or excessive’.<sup>94</sup> In practice, a taking of property is ‘arbitrary’, ‘excessive’, or ‘disproportionate’ if compensation is not paid.

The Supreme Court of India has therefore followed a similar path to its Philippine counterpart, in reinstating a right to compensation. However, in *KT Plantation*, the Court stated that the legislature has some flexibility to adapt compensation standards to the context. The Court did not elaborate, except to say that:

Measures designed to achieve greater social justice, may call for lesser compensation and such a limitation by itself will not make legislation invalid or unconstitutional or confiscatory. ... in each case, the scheme of the impugned Act, its object, purpose as also the question whether payment of nil compensation or nominal compensation would make the impugned law unjust, unfair or unreasonable in terms of other provisions of the Constitution as indicated above.<sup>95</sup>

Although the Indian law allows greater latitude to the legislature than in the Philippines, there is another significant point of similarity. In *KT Plantation*, the Court again returned to comparative law to justify its position, just as the Supreme Court of the Philippines did in *Association of Small Landowners in the Philippines v Hon Secretary of Agrarian Reform*. However, the Indian Court began to look to other comparative sources. In particular, it borrowed from the doctrine on the right to property contained in the First Protocol to the European Convention on Human Rights. As drafted, the Protocol did not guarantee compensation; however, the European Court of Human Rights has interpreted it so as to require compensation in most cases. In the leading cases *Sporrong and Lönnroth v Sweden*,<sup>96</sup> *James v United Kingdom*<sup>97</sup> and *Lithgow v United Kingdom*,<sup>98</sup> the Court of Human

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<sup>94</sup> *KT Plantation Pvt Ltd v State of Karnataka* (n 6) [122].

<sup>95</sup> *ibid* [121], [122].

<sup>96</sup> *Sporrong and Lönnroth v Sweden* Series A No 52 (1983) 5 EHRR 35.

Rights held that the Protocol requires States to strike a ‘fair balance’ between private and public interests. From this, it concluded that ‘the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable’ under the Protocol<sup>99</sup> There is some flexibility in cases of social or economic justice: in *James v UK*, the Court held that legislation giving residential tenants on long leases the right to buy the freehold at below-market rates did not violate the Convention, on the basis that

Legitimate objectives of ‘public interest’, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.<sup>100</sup>

In *KT Plantation*, the Supreme Court briefly referred to the European right to property, although not specifically in relation to the standard for compensation.<sup>101</sup> However, the language employed by the Supreme Court is so close to that of *James v UK* that it seems likely that it borrowed directly from the European judgments. The Court also referred to constitutional principles from the United States, Germany, Australia, Canada, and the United Kingdom, as well as the historic writers Grotius, Pufendorf, Locke, Rousseau and Blackstone, to demonstrate that some form of compensation requirement is universal amongst the nations that adhere to the rule of law.<sup>102</sup>

In terms of the rhetoric, the Court has restored the post-independence approach. In terms of doctrine, there are some differences. In particular, it seems that Indian law now accommodates the flexibility of some European constitutions and European human rights law. However, it is worth noting that the European Court of Human Rights has itself begun to

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<sup>97</sup> *James v United Kingdom* Series A No 98 (1986) 8 EHRR 123.

<sup>98</sup> *Lithgow v United Kingdom* Series A No 102 (1986) 8 EHRR 329.

<sup>99</sup> *James v UK* (n 97), [54]; *Lithgow v UK*, *ibid* [121].

<sup>100</sup> *James v UK*, *ibid* [54].

<sup>101</sup> *KT Plantation Pvt Ltd v State of Karnataka* (n 6) [87].

<sup>102</sup> *KT Plantation Pvt Ltd v State of Karnataka*, *ibid* [84]–[91].

restrict legislative discretion in areas of social justice.<sup>103</sup> The Court is settling on the liberal view that the burden for alleviating poverty and achieving social justice is borne solely by the State. In principle, this view allows exceptions to the general rule of full compensation, but increasingly the exceptions arise only where there are specific concerns over the conduct of the owner in acquiring property.<sup>104</sup> This is much narrower than a general conception of social obligation, and significantly closer to the liberal vision of property and the constitution. Whether the Supreme Court in *KT Plantation* was aware of this trend is not clear, but it does suggest that the Indian law will retain its liberal focus.

## VI. Globalism, Comparative Law and the Right to Property

Judgments on property and compensation in the Philippines and India are regularly justified by reference to American and European authorities. It is easy to understand why the courts did so in their early periods, especially in the Philippines: American judges sat on its Supreme Court, and interpreted clauses taken from the Bill of Rights of the United States. However, by now, one might have expected the Philippine Court to have developed its own jurisprudence on property and the constitution. One might have expected that, if American cases are cited, there would be a clear sense of the purpose for doing so, the weight to be given to them, and how they help (or hinder) the understanding of the issues. This has not been the case, however.

The situation in India is similar. Whilst the use of comparative law by the Supreme Court across all cases has declined since independence,<sup>105</sup> it remains important in property

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<sup>103</sup> Allen (n 74).

<sup>104</sup> *ibid*; compare *Jahn v Germany* ECHR 2005-VI (GC); *Kozacioğlu v Turkey* (App No 2334/03) (2009).

<sup>105</sup> AM Smith, 'Making Itself a Home — Understanding Foreign Law in Domestic Jurisprudence: The Indian Case' (2006) 24 *Berkeley Journal of International Law* 218, 239–41.

cases. The Supreme Court has been more willing to look beyond American authorities, but there is very little discussion of comparative methodology. Neither court considers the relevance of the broader context of comparative analysis. American sources are frequently cited, and yet none of the American states have engaged in land redistribution on anything like the scale attempted in India or the Philippines. The provisions on social justice in the constitutions of India and the Philippines have no counterpart in the United States, yet it seems that the courts in India and the Philippines see no need to examine national differences or the context in which takings occur and constitutional principles evolve. Constitutional models that integrate ideas of social obligation, public power and individual autonomy within a right to property are rarely cited; even when they are cited, as in *KT Plantation*, there is no discussion of the differences in approach.<sup>106</sup> In *KT Plantation*, the Court even acknowledged that the constitutional systems of Canada and the United Kingdom do not provide a justiciable right to property, but without explaining how its consideration of these systems affected its analysis of Indian law.<sup>107</sup>

The superficiality of the analysis leads to the question: what purpose does comparative law serve? An earlier generation of comparativists argued that comparative law provides an opportunity to improve domestic law, on the basis that the analysis of laws of different systems on a specific issue helps to identify the best solution to a legal problem.<sup>108</sup> However, whatever the merits and limitations of this approach may be, especially in the

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<sup>106</sup> Indeed, in *KT Plantation*, the Court incorrectly stated that the German Basic Law bars uncompensated takings: above (n 6), [84] and compare to *Jahn v Germany*, above (n 104).

<sup>107</sup> *KT Plantation*, *ibid.*

<sup>108</sup> See Dixon and Posner (n 4) 411–14. Ernst Rabel's work on the codification of the law on international sales of goods is an example (although it was aimed at perfecting national law rather than drafting a uniform law): See E Rabel, 'A Draft of an International Law of Sales' (1937–1938) 5 *University of Chicago Law Review* 543, 563–65 and E Rabel, 'The Hague Conference on the Unification of Sales Law' (1952) 1 *American Journal of Comparative Law* 58, 67–68. On Rabel's comparativism, see DJ Gerber, 'Sculpting the Agenda of Comparative Law: Ernst Rabel and the Facade of Language' in A Riles (ed), *Rethinking the Masters of Comparative Law* (Oxford and Portland, Hart Publishing, 2000) 190.



judicial context, it has not been the purpose of using comparative law in either country. At best, the use of comparative law is observational rather than analytical, as the Philippine and Indian courts do little more than offer brief summaries of the law in other jurisdictions. No function for law is identified, and there is no discussion of the operation of the law within the host system or its practical impact in serving that function. Indeed, where there are different approaches across the comparators, there is no attempt to determine a ‘best solution’ from amongst them.<sup>109</sup>

An alternative view is held by those who argue that comparative law has little impact on legal change.<sup>110</sup> Change in law, and specifically the convergence of law, is driven by structural forces that are beyond the control of lawmakers. For example, the prominence of land reform is likely to be affected by population movements and markets for labour and land. In recent years, it could be argued that the international convergence on a liberal right to property has been driven less by judicial borrowing than by global factors such as the decline of socialism and the increased flow of international capital into land. Internally, the framing and interpretation of a right to property may have involved a comparative analysis of different models, but it would be a mistake to treat the comparative analyses as the cause for the adoption of a right to property or indeed of a liberal right to property. Hence, in India and the Philippines, one might argue that the judicial discussion of comparative law shows that the courts have favoured the liberal model of a right to property, but it does not explain why they do so.

Although these two models suggest that comparative law is either significant or irrelevant to legal change, the lack of any real functional analysis suggests that the conclusion is the same: comparative analysis has not been a driver for change. Comparative law in the

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<sup>109</sup> See eg *KT Plantation Pvt Ltd v State of Karnataka* (n 6).

<sup>110</sup> See Dixon and Posner (n 4) 408–11.

courts is, at most, evidence of choices made for other reasons. However, as Daniel Farber has shown, it may serve an important function in signalling those choices to relevant audiences.<sup>111</sup> Indeed, the practice of citing without analysis suggests that comparative law does serve this function. To the courts, it seems that it is enough to show that a right to property is found in the constitutional systems of developed states. By itself, this does not seem especially compelling, but, as Adam M Smith points out, it appeals to specific aspirations in India:

Foreign law and precedent come into judgments in the form of culturally persuasive (even if not legally relevant) support for a change that coheres with the judges' views of the type of culture to which their state aspires.<sup>112</sup>

In India, this may explain why many of the discussions of comparative law in the leading cases on property are more observational than analytical. As he notes, Indians have 'desperately wished to join' the international, developed community.<sup>113</sup> Hence, there is receptiveness to measures that help to place India within the international community of states that respect individual rights. Indeed, this has been a central aspiration of Indian national leaders from the drafting of the Nehru Report in 1928.<sup>114</sup> Accordingly, if a right to property is found in the constitutions of liberal states that respect human rights, a similar right should be 'found' within the Indian system, if at all possible. This is certainly evident in *KT Plantation*: the purpose, language and intention underlying Article 300A do not provide room for the kind of guarantee constructed by the Court, unless one assumes that the compensation guarantees simply must exist somewhere within the Constitution.

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<sup>111</sup> Farber (n 4).

<sup>112</sup> Smith (n 105) 265.

<sup>113</sup> *ibid.*

<sup>114</sup> US Mehta, 'Constitutionalism' in NG Jayal and PB Mehta (eds), *The Oxford Companion to Politics in India* (Oxford, Oxford University Press, 2010) 16: Debates in the Constituent Assembly were characterised by an 'intense concern with India's standing in the world'.

If comparative law is used as a form of signalling, who is the audience? Eyal Benvenisti has argued that, in some cases, it may be aimed at other national courts, as a means of co-ordinating responses to certain forces of globalisation.<sup>115</sup> One example is environmental law: some national courts have challenged the failure of governments to control pollution, especially by powerful multinational actors. However, for this to work effectively, some degree of co-ordination between national courts is essential to avoid a ‘race to the bottom’. The citation of comparative law can be helpful in this regard:

Courts that wish to signal readiness to cooperate [with courts of other countries] will tend to use the language that other courts understand: comparative law (primarily comparative constitutional law) and international law.<sup>116</sup>

Benvenisti argues that this can be seen in Indian environmental cases.<sup>117</sup> However, there is little evidence that has happened with the right to property. Indeed, as Part III shows, the weakest point in both countries for the protection of property came during the 1970s and early 1980s, when co-operation between governments in the developing world on the nationalisation of property was at its high point. The national courts in India and the Philippines in this period did not act as a counterbalance to their governments; rather, by weakening the protection of property, they tracked government policy. More recently, there has been a considerable level of concern over land grabs.<sup>118</sup> National and local governments have often acquiesced in the displacement of vulnerable people. Arguably, there is room for transnational co-operation between courts along the lines suggested by Benvenisti, but it has not occurred in the property cases.

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<sup>115</sup> E Benvenisti, ‘Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts’ (2008) 102 *American Journal of International Law* 241.

<sup>116</sup> *ibid*, 251.

<sup>117</sup> *ibid*, 258–62.

<sup>118</sup> See Borrás et al (n 3); J Baka, ‘Biofuels and Wasteland Grabbing: How India’s Biofuel Policy is Facilitating Land Grabs in Tamil Nadu, India’, Paper presented at the International Conference on Global Land Grabbing 6–8 April 2011, Institute of Development Studies, University of Sussex; O De Schutter, ‘The Green Rush: The Global Race for Farmland and the Rights of Land Users’ (2011) 52 *Harvard International Law Journal* 503.

Arguably, any signalling through comparative law is aimed more at investors than the courts of other countries. Indeed, there is an extensive literature on the role of constitutional law in attracting investment. There is evidence that judges in both countries cite comparative law to assure investors that national standards are similar to international standards, and hence that there is no greater political risk to capital than elsewhere.<sup>119</sup> In *KT Plantation*, the Indian Supreme Court not only cited numerous comparative examples, but explicitly acknowledged the importance of building investor confidence in its legal system.<sup>120</sup> The choice of comparators also provides some evidence of this. The Philippine Supreme Court relies more on American legal authority than its Indian counterpart; arguably, this reflects the historic dependence of the Philippines on American investment and support. Moreover, neither court engages in any discussion of the law of other developing nations, or of nations that do not guarantee compensation for expropriation. Such comparators could provide more potential for judicial learning, but would not send the same signal to investors.

Finally, at least some of the cases raise the suspicion that comparative law provides a claim for legitimacy for socially conservative policies. In particular, the language of liberal right to property, within a broader scheme of internationally recognised human rights, gives a privileged minority a credible case for maintaining their position. Comparative law in the courts almost invariably supports a liberal theory of property; one of the key features of the liberal theory that emerges from comparative law is its abstraction from the local context. For example, cases from both jurisdictions demonstrate that the courts have resisted arguments that land reform requires a different approach to compensation. It is, of course, difficult to

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<sup>119</sup> See the material cited above n 4.

<sup>120</sup> Above (n 6), [142].

judge how far the courts participate in constitutional clientelism, as judges are unlikely to say that their decisions are guided by class loyalties rather than legal principle.<sup>121</sup>

Of the two courts, it seems more likely that this is the case in the Philippines. Not only has constitutional interpretation favoured landed interests, but the statutory interpretation of the Comprehensive Agrarian Reform Program legislation has done so as well. At no point has it challenged the legislature in the ways seen in India. Hence, the citation of American constitutional law provides a convenient rhetoric to justify the limits on land reform, for audiences at home and abroad. The global aspect of comparative law lacks the local or even historical context that the opponents of agrarian reform do not wish to acknowledge. Indeed, it seems that that is its attraction: it shifts the focus outward and away from local conditions, and by doing so, it undermines the case for reform. In India, the picture is more complex because the Supreme Court accepted the constitutionality of the amendments that excluded judicial review from most land reform legislation. Nevertheless, the use of comparative law has allowed the Court to maintain the separation of the right to property from social justice, as it treats the ownership of land as a matter of private law. In effect, comparative law has restricted the vocabulary for debating agrarian reform, and the global, transnational nature of liberal property has indirectly legitimated the demands of the elite for constitutional protection.

## VII. Conclusion

Governments in both India and the Philippines have made grand promises about agrarian reform and land redistribution at various points in their history. Both countries have achieved

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<sup>121</sup> See NG Quimpo, 'The Limits of Post-Plunder Reform in the Philippines' Oligarchic Democracy' in ESK Fung and S Drakeley (eds), *Democracy in Eastern Asia: Issues, Problems and Challenges in a Region of Diversity* (Abingdon, Routledge, 2013) on constitutional clientelism in the Philippines.

some success, but the general picture is one of a series of failed plans. This paper has highlighted the judicial role in these successes and failures, especially in terms of the globalising aspect of the use of comparative law. With the exception of a brief period in the 1970s and 1980s, the highest courts have taken a liberal position on redistribution and compensation. To be sure, there are differences between them: currently, the Indian Supreme Court is more flexible in terms of the standard for compensation and in the recognition of specific exclusions of judicial review than the Philippine court. The Indian court has also come into conflict with Parliament over constitutional interpretation and amendment, whereas the Philippine court's relationship with governments and the legislature has been comparatively calm. Nevertheless, there is a striking similarity in their use of comparative law and its relationship with the liberal model of property.

