

THE INDIAN CONSTITUTION: PROPERTY RIGHTS AND SOCIAL REFORM

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The first reaction of an American lawyer on looking at the provisions for amending the Indian Constitution may be that the "fundamental rights," as guarantees of judicially enforceable rights beyond the reach of ordinary legislation, are largely illusory. Under article 368, the basic amending provision of the Indian Constitution, the constitution may be amended in most respects (including fundamental rights) by a special majority of the Parliament—a majority of the total membership in each House and of not less than two-thirds of the members present and voting in each House.¹

Given the political realities of Congress Party control by large majorities at the Center in the years since independence, the fundamental rights may be readily altered at the wishes of Congress Party leaders. Thus, the durability and effectiveness of the fundamental rights in India would seem to depend little on the difficulty of amending the constitution but almost wholly on legislative and executive self-restraint and a habit of thought among influential leaders in the government and the electorate that the rights stated in the constitution are not lightly or hastily to be changed.

The article of the Indian Constitution dealing with the State's taking of private property was the most hotly controverted of the fundamental rights among the makers of the constitution. Since that article was finally hammered out, twelve years of litigation, judicial interpretation, legislation and constitutional amendment have elapsed. Experience with this article gives the student of the Indian Constitution an exceptionally rich historical background for tentative conclusions about the "fundamentalness" of the fundamental rights, the relations between the courts and Parliament (as the amending authority) in shaping the basic law of India and the growth of habits of

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¹ Two other types of amending process are provided in certain cases. Amendments of certain "federal clauses" of the constitution, dealing with such matters as the election and powers of the President, the composition and powers of the higher judiciary, and distribution of legislative powers between the Union and the states, require not only the special majority in Parliament but approval by the legislatures in at least half the states. Certain provisions of the constitution (mainly transitional or temporary provisions covering the change-over from British rule to an independent status, but also including the authority to change the boundaries of the states) may be changed by the ordinary process of legislation calling for a simple majority in Parliament. See Joshi, "Operations and Effect of the Amending Provision of the Constitution of India," *Public Law Problems in India* 108-116 (L.F. Ebb, ed. 1957).

thought which, far more than the formulae of words contained in the constitution, will determine whether there are certain ground rules of state behavior that are somewhat removed from the arena of political pressures and passions.

Moreover, the constitutional provisions regarding property rights give one important indication as to how India has dealt with the perplexing problem of assuring a more widespread sharing of economic improvement among a poor and massive population without discouraging the processes of production upon which that improvement depends.

On the one hand, with independence came hopes of the poor to become less poor, resentments of foreign control over important segments of production, demands to get rid of feudal wealth and privilege, and decision by India's new rulers that an essential element in rapid economic growth would be large-scale efforts financed and controlled by the organs of State. The directive principles of state policy in the constitution, though not justiciable in the courts, include general expressions of such aims to guide state action. Article 39, for example, provides that:

The State shall, in particular, direct its policy toward securing . . . (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

On the other hand, there was a recognition that the capital and effort essential for economic growth would be discouraged by laws unsettling property rights. Moreover, large landowners and the business community have a substantial voice in Indian political affairs. In this interplay of hopes and interests, responsible rulers must eventually decide what specific protection to property will be given and what kinds of state intervention will be authorized.

In addition, the efforts for rapid economic development have generated needs for large-scale infusions of capital from abroad. Not only the local Indian investor but the foreign investor wants to know what degree of protection he can expect for his investments. Thus the degree of constitutional protection for property rights has important implications for international relations and transactions.²

² As Professor Julius Stone has pointed out, newly independent states, formerly under foreign political and economic domination, want freedom of action to deal with debts, concessions, commercial engagements, and other obligations from the colonial past. He considers this one of the main reasons for the reluctance of the new states to accept compulsory third-party judgment "according to a traditional law which they feel generally to favour creditor states." Stone, "A Common Law for Mankind?" Inter-

The basic legal ground rules, as they have emerged in the first twelve years of independent India, are found mainly in the constitutional provisions and interpretations here discussed.

With these factors in mind, let us look at the actual history of constitutional development (and to a lesser extent, the attendant legislation in the years since independence) as they affect property rights in India.

FIRST PHASE: THE ORIGINAL CONSTITUTION AND LAND REFORM

The authors of the Indian Constitution adopted the idea of a Bill of Rights, enforceable in the courts, with which legislation and executive action must accord. The "fundamental rights" became part III of the constitution. They included the guarantee of the procedural "right to move the Supreme Court by appropriate proceedings for the enforcement of rights conferred by this part."³ Any law (including regulations, orders and the like) made by "the State" (referring to both the Union and the state legislatures and governments) abridging or taking away the fundamental rights is expressly stated to be void to the extent of the inconsistency.⁴

The two articles of the constitution bearing most directly on property rights are article 31, dealing with the compulsory acquisition of property, and article 19, guaranteeing certain "rights to freedom" to *citizens*, including the rights to acquire, hold and dispose of property and to carry on any occupation, trade or business. The exercise of the rights in article 19 is subject to "reasonable restrictions" imposed by the State "in the interests of the general public."⁵

Article 31 was one of the most hotly debated in the Constituent Assembly and, behind the scenes, in the Congress Party-caucus. The controversy centered largely on the issue of what measure of "compensation" should be paid to the zamindars and other intermediaries

national Studies 429-31 (1960) (Publication of the Indian School of International Studies, New Delhi).

³ Article 32, which empowers the Supreme Court "to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and certiorari, whichever may be appropriate for the enforcement of the fundamental rights." Article 226 confers similar but broader powers on the high courts, which may issue directions, orders, etc., not only to enforce the fundamental rights but "for any other purpose." In the first seven years of the courts' existence, 3,497 proceedings were instituted under this section, while 2,126 Civil Appeals and 794 Criminal Appeals were instituted. In the three years 1954-1956, more than 30,000 writ petitions were instituted in the high courts of the states under article 226. Reform of Judicial Administration, 14th Report of the Law Commission of India, Vol. I, 60-2 and Vol. II, 659-60 (1958).

⁴ Article 13.

⁵ For the full text of articles 19 and 31, see Appendix *infra* pp. 642-46.

between the State and the tillers of the soil. These intermediaries, who had originally been tax-farmers collecting land revenue for the Moghul and British rulers who created them, had become entrenched as landlords. The intermediary kept the difference between the amount of revenue he collected and the fixed amount he had undertaken to pay the government. He had acquired many of the attributes of a landowner, such as the right to evict tenants and fix rents.

The Congress had pledged itself to abolish the zamindari system.⁶ The battle-lines among the constitution makers were drawn mainly on the issue of what, if any, compensation to zamindars was appropriate. The controversy was settled by a compromise formula. As so often happens with a compromise, the formula meant different things to different people, and the controversy continued in the courts and in the Parliament.⁷

The article as finally drafted and included in the original constitution stated a general rule that no property shall be "taken possession of or acquired" for a public purpose unless the authorizing law provides for compensation and either fixes the amount of compensation or specifies the principles by which compensation is to be determined. Then followed certain exceptions which had the effect of exempting from the general rule land-reform legislation pending or enacted at the time the constitution came into effect, provided that the President (that is, the Government of India) had given his assent. Such legislation could not be called into question in any court of law on the ground that it violated the general rule, including the requirement for compensation.⁸

Under the constitutional distribution of legislative powers between the Center and the states, land tenures, land revenue, and related mat-

⁶ The Election Manifesto of the Congress, 1946, said: "The reform of the land system, which is so urgently needed in India, involves the removal of intermediaries between the peasant and the State. The rights of such intermediaries should therefore be acquired on payment of equitable compensation."

In the debate on the Constitution (first amendment) Bill, this exchange took place:

Prime Minister: If there is one thing to which we as a party have been committed in the past generation or so, it is the agrarian reform and the abolition of the zamindari system.

Shri Hussain Iman: With compensation.

Prime Minister: With adequate and proper compensation, not too much.

Shri Hussain Iman: "Adequate" is enough.

12 Lok Sabha Debates (hereafter referred to as L.S. Deb.) Part II, 8830 (1951).

⁷ For a fuller account of the Constituent Assembly Debates on this point, see Merrillat, "Compensation for the Taking of Property—A Historical Footnote to Bela Banerjee's Case," 1 Journal of Indian Law Institute (J.I.L.I.) 384-92 (1959).

⁸ See text in Appendix *infra*.

ters were state subjects.⁹ Thus there was no uniform pattern of zamindari-abolition laws and other land reform measures. The usual formula was to fix the rate of compensation for zamindars and similar intermediaries as a multiple of the net income, or "net assets" from their estates. Small intermediaries were generally allowed a higher multiple than larger ones. Much depended of course, on the precise items allowed as gross income or assets and the deductions required to arrive at net income.¹⁰

At the end of the first Five-Year Plan in 1956 the Planning Commission reported that "intermediaries have been abolished almost entirely throughout the country, but a few pockets remain where action is still needed." Compensation payable for the acquisition of intermediary interests was estimated at Rs.615 billion (about \$1.3 billion) including Rs.86 crores for rehabilitation grants to former intermediaries and Rs.150 crores for interest payments. These compensation payments were spread over a period of years (often in the form of payments on special bonds).¹¹

The abolition of intermediaries was only one step in a complex of land reform measures that have still not been fully enacted or carried

⁹ The principal relevant entries from List II of the Seventh Schedule, the "State List" of legislative powers, are:

Entry 18: Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

Entry 45: Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.

Entry 46: Taxes on agricultural income.

¹⁰ For example, the U.P. Zamindari Abolition and Land Reform Act, 1950 (as amended) provided for a computation of "gross assets," including actual rents payable by tenants and other under-proprietors; average annual income for ten years prior to vesting from items such as bazaars, fairs and fisheries; average annual income (for four prior years) from rents of building sites and forests; average annual income (over past 12 years) from mines and minerals. From "gross assets" deduct land revenue, land taxes, and agricultural income tax payable in the previous agricultural year; 15% of gross assets as cost of management and irrecoverable arrears of rent; average of income tax paid on royalties from mines and minerals; 95% of gross income from mines directly worked; and an adjustment for lands held in personal cultivation. These deductions from gross assets give the "net assets." Compensation is to be paid at eight times the net assets.

The State of Orissa found an ingenious device for greatly reducing the amount of compensation while adhering in form to a typical "gross income minus expenses" formula. It provided, as usual, for a deduction of agricultural income tax from "gross assets" and at the same time greatly increased the agricultural tax for the year used to reckon gross assets. This was challenged, unsuccessfully, as "colorable legislation" denying compensation in *K.C.G. Narayan Deo v. State of Orissa* (1953) S.C.R.

¹¹ Review of the First Five Year Plan, Government of India Planning Commission 314-6 (1957).

out. These include measures to protect tenants from eviction, ceilings on individual holdings, transfers of excess holdings to landless laborers, restrictions on rent increases, consolidation of scattered holdings into contiguous areas, and encouragement of co-operative farming.¹² It is beyond the scope of this article to attempt to review the extent to which these measures have been effective. Our present interest lies in the constitutional questions related to land reforms. That story starts with the efforts of zamindars to block, on constitutional grounds, state laws abolishing their interests.

The debates in the Constituent Assembly make it clear that those who hammered out the compromise formula on compensation for compulsory acquisition intended to place the zamindari abolition laws beyond challenge in the courts.¹³ The zamindars and other intermediaries, however, were quick to challenge the constitutionality of state laws affecting their interests. In the first year after the constitution came into effect, three such cases reached state high courts.¹⁴ In one of these, *Kameshwar Singh v. State of Bihar*,¹⁵ the Patna High Court held the Bihar Land Reforms Act invalid as inconsistent, not with article 31(2), but with article 14.

Article 31(4), which saved pending legislation later approved by the President, only protected the act in question against judicial review under the provisions of article 31(2). The zamindars had also invoked article 14, guaranteeing equality before the law, and the court held that the Bihar law, providing a graduated scale of compensation related to the size of the landholdings, set up an unreasonably discriminatory classification. Although the court was barred from inquiring into the adequacy of compensation, it made clear its view that compensation meant equivalent value.

The government moved quickly to head off the attacks on land reform legislation. The Prime Minister, introducing the Constitution (first amendment) Bill in the Lok Sabha (House of Peoples) on May 8, 1951, recalled that it had been the intention of the constitution-makers "to take away the question of zamindari and land reform from the purview of the courts." He was particularly scornful that the Bihar High Court had invoked article 14 to strike down the Bihar Act: "this business of the equality of the law may very well mean, as it has come to mean often enough, making rigid the existing inequities before the law. That is . . . dangerous in a changing society and it is

¹² See, Review of the First Five Year Plan, *supra*, at 317-31 and Second Five Year Plan, Planning Commission (1956) 177-213.

¹³ Merillat, *op. cit. supra* note 7.

¹⁴ See Basu, Commentary On The Constitution Of India (3d ed.) 823.

¹⁵ A.I.R. (1951) Patna 91.

completely opposed to the whole structure and method of this constitution and what is laid down in the directive principles (of state policy)."¹⁶

The first amendment was adopted. It affected land reform legislation in two ways. It added a new section (31(A)) to article 31 providing that no law affecting rights in "estates" should be considered void on the ground that it is inconsistent with *any* of the fundamental rights conferred by part III.¹⁷ Its second main provision (so far as compulsory acquisition of property was concerned), was specifically to validate, with retrospective effect, thirteen state land reform laws.¹⁸

The zamindars of Bihar attacked the validity of the first amendment itself, primarily on the ground that the Parliament which had enacted it by the special majority prescribed by the constitution was still the one-house Constituent Assembly acting as Parliament, and not the two-house Parliament contemplated by the amending provisions of the constitution. This attack failed. The Supreme Court upheld the first amendment.¹⁹

At least one of the Supreme Court justices thought that the amendment had quite definitely settled the constitutional law as it applied to land reform and that further challenges by the zamindars must fail. When the *Kameshwar Singh* case (the High Court decision which had led to the first amendment) reached the Supreme Court, Chief Justice Sastri had this to say:

The fact of the matter is the zamindars lost the battle in the last round when this Court upheld the constitutionality of (the First Amendment, which had) the object, among others, of putting an end to this litigation. And it is no disparagement to their learned counsel to say that what remained of the campaign has been fought with such weak arguments as overtaxed ingenuity could suggest.²⁰

SECOND PHASE: FROM THE FIRST AMENDMENT (1951) TO THE FOURTH AMENDMENT (1955) LAND REFORM MEASURES

The majority of his brethren did not agree with the Chief Justice's conclusion in the *Kameshwar Singh* case. Many more years of litigation showed that the zamindars' lawyers had not yet exhausted their ingenuity.

In the *Kameshwar Singh* case, three of the five-man Constitu-

¹⁶ 12 L.S. Deb., Part 2, 9083 (1951).

¹⁷ "Estates" is here used in a technical sense to describe interests relating to land tenures, varying from locality to locality with local forms of tenure.

¹⁸ See article 31B and Ninth Schedule.

¹⁹ *Sankari Prasad Singh Deo v. Union of India* (1952) S.C.R. 89.

²⁰ *Id.* at 99.

tion Bench struck down two provisions of the Bihar Land Reform in spite of the first amendment. The challenge was no longer based on article 14. The grounds of attack which the Justices accepted, in varying combinations, were that certain provisions²¹ offended (1) against an inherent need in eminent domain that an acquisition be for a "public purpose" and (2) against entry 42 in the list of concurrent Union and state legislative powers which mentioned "principles on which compensation for property acquired or requisitioned" The majority held that the entry imposed a duty to fix real principles of compensation and that this was not done in the two provisions under attack. The decision of the divided court in the *Kameshwar Singh* case was not one of the clearest in the history of the Indian Supreme Court. Nevertheless, counsel for landholders pressed on it a new round of litigation. In subsequent decisions, however, the ruling was held strictly to its special facts and other attacks on land reform legislation based on the arguments in the *Bihar* case have failed. In two companion cases, decided the same day as the *Bihar* case, the court unanimously upheld the Uttar Pradesh and Madhya Pradesh acts abolishing zamindaris and similar estates in land.²² In fact the Supreme Court, with one exception²³ has never again struck down any law abolishing intermediaries as being in conflict with the fundamental rights. Other land reform legislation reaching the Supreme Court has been upheld as constitutional including acts affecting tenants' security of tenure, regulation of rents, consolidation of holdings, and ceilings on holdings.²⁴

The first amendment to the constitution was enacted before any petitions challenging the zamindari-abolition laws and related legislation had been decided by the Supreme Court. Accordingly we can never know what decisions the court might have reached in the ab-

²¹ These provisions vested in the state 50% of arrears of rent due to the landlord and excluded from the landlord's annual income (which served as a basis for computing compensation) an arbitrary amount deemed to be required for building works for tenants.

²² *Raya Suriya Pal Singh v. State of Uttar Pradesh* (1952) S.C.R. 1056 and *Vismeshar Rao v. State of Madhya Pradesh* (1952) S.C.R. 1020.

²³ In *State of Rajasthan v. Rao Manohar Singhji* (1954) S.C.R. 279, the court held that, under article 14, the state law taking over jagir interests in certain territories in the state was invalid unless extended to all territories within the state. Most of the zamindari abolition laws have been protected by article 31(4) and (6) as intended by the constitution-makers. See statutes and cases noted by Basu, *op. cit. supra* note 14 at 362-64 and 366.

²⁴ See *Thakur Raghubir Singh v. State of Ajmer*, (1959) S. Ct. Jour. 629 and *Shri Keshan Singh v. State of Rajasthan* (1955) 2 S.C.R. 53 (control of land rents); *State of W. Bengal v. Subodh Gopal Bose* (1954) S.C.R. 587 (protection against eviction); *Atma Ram v. State of Punjab*, A.I.R. (1959) S.C. 519; *Sri Ram Ram Narain Mehdi v. State of Bombay* (1959) (ceilings on land holdings).

sence of the first amendment. In any case, whatever doubts may have existed concerning the validity of land reform legislation, they appear to have been effectively removed by that amendment.

Takings of Property Other than by Land Reform Measures

When we move away from land reform measures, however, we find a different situation. In the Constituent Assembly debates on article 31 the Prime Minister had drawn a distinction between relatively small compulsory acquisitions of the sort familiar under British rule, such as takings for public purposes under the Land Acquisition Act, and new large-scale measures of social reform such as the abolition of zamindaris:

Let us be quite clear that there is no question of any appropriation without compensation so far as this Constitution is concerned. If property is required for public use it is a well established law that it should be acquired by the State by compulsion if necessary, and compensation is paid and the law has laid down methods of judging that compensation. Now, normally speaking in regard to such acquisition—what might be called petty acquisition or acquisition of small bits of property or even relatively large bits, if you like, for the improvement of a town, etc.—the law has been clearly laid down. But more and more today the community has to deal with large schemes of social reform, social engineering etc. which can hardly be considered from the point of view of that individual acquisition of a small bit of land or structure.²⁵

As we have seen, the controversy among the constitution-makers centered largely on the question of what if any compensation should be provided in one great scheme of social reform—the abolition of zamindaris and related land reforms. These measures having been largely removed from the judicial arena by the original exceptions in article 31 and by the first amendment, it remained to determine more precisely the meaning of the general clause relating to compulsory acquisition, article 31(2).

The compromise formula adopted in the original article permitted review by the courts of laws providing for compulsory acquisition, unless they fell within one of the exceptions (designed, as noted, to protect land reform measures). There was a long controversy, however, as to just what judicial review should imply. There were differing interpretations among the constitution-makers as to the scope of judicial review conferred on the courts by article 31(2).

The Prime Minister made it clear that he took a very restrictive view of the courts' power to review the amount of compensation allowed by the legislature.²⁶ Sir Alladi Krishnaswami Ayyar, one of the

²⁵ 9 Constituent Assembly Debates (hereafter referred to as C.A.D.) 1192.

²⁶ It was in this debate that Prime Minister Nehru made his often quoted remarks

most respected and influential of the framers, appeared to think that "compensation," even apart from the excepted zamindari-abolition measures, need not always mean equivalence in value and made a bow to legislative superiority on matters within their competence. He pointed out, however, that "if the legislation is a colorable device, a contrivance to outstep the limits of the legislative power or . . . is a fraudulent exercise of the power, the court may pronounce the legislation to be invalid or *ultra vires*."²⁷

In a third major viewpoint, from Mr. K. M. Munshi who presented the compromise formula in the Constituent Assembly, there are different nuances, including specific references to compensation as an equivalent in value to the property taken.²⁸ In the end the power of the courts to review cases of compulsory acquisition in the light of article 31(2) was saved, but with a clear warning from high places that they must exercise the power with circumspection.

Some laws apart from land reform were saved by article 31(4)-(6), by virtue of having been enacted within the prescribed time and approved by the President (or because they were "existing" laws when the constitution came into effect).²⁹ A considerable number and variety of disputes involving statutes not saved by those exceptions began coming to the courts after the first amendment. Statutes involving state acquisitions or interferences with property rights that fell outside the land reform program were challenged. Even though some could hardly be said to involve "large schemes of social reform," the government felt that a growing body of adverse decisions was hampering its plans for social and economic development. It finally secured the passage of the Constitution (fourth amendment) Act in 1955, to curtail the power of the courts to review laws authorizing compulsory acquisitions or requisitions or other interferences with private property rights.

Four cases³⁰ decided within the span of a year are the landmarks

about the limited role of the judiciary in the Indian Constitutional structure:

"Within limits, no judge and no Supreme Court can make itself a third chamber. No Supreme Court and no Judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there it can point it out, but in the ultimate analysis, where the future of the community is concerned, no Judiciary can come in the way." 9 C.A.D. No. 31, 1159.

²⁷ 9 C.A.D. No. 32, 1271-2.

²⁸ For a more detailed account of the debate, see Merrillat, *op. cit. supra* note 7.

²⁹ See Basu, *op. cit. supra* note 14.

³⁰ Saghri Ahmed v. State of U.P. (1955) S.C.R. 707, A.I.R. (1954) S.C. 728, decided October 13, 1954; Dwarkadas Shrinivas v. Sholapur Spinning and Weaving Co. Ltd. (1954) S.C.R. 674, A.I.R. (1954) S.C. 119, decided December 18, 1953; State of West Bengal v. Subodh Gopal Bose (1954) S.C.R. 587, A.I.R. (1954) S.C. 92, decided Decem-

of this phase, and were primarily responsible for the government's decision to enact the fourth amendment. Many questions have arisen and continue to arise under the constitutional provisions relating to compulsory acquisitions by the State. Our inquiry here focuses on two central issues involved in the four cases: what is the meaning of "compensation," and what sort of taking or deprivation requires the payment of compensation?

What is "Compensation?"

In 1953, the Supreme Court held in the *Bela Banerjee* case that compensation as used in article 31 of the constitution meant equivalence in value.³¹ This case involved a state acquisition of lands under the West Bengal Land Development and Planning Act, under which compensation was limited to market value on December 31, 1946. That date had been chosen to prevent land speculators from benefiting by the sharp rise in land values that followed the war, independence, and the influx of refugees from Pakistan. Those whose lands had been taken for a housing development sought to have the acquisition set aside on the ground, among others, that the amount paid by the State was not compensation within the constitutional meaning of the term.

Both the High Court of Calcutta and the Supreme Court agreed with the dispossessed landowners, Harries, C. J., speaking for the High Court said that if the compensation offered "is not a proper equivalent then it is not compensation and anything which is unjust or unreasonable can never be regarded as an equivalent." He concluded:

The principles on which and the manner in which the compensation is to be determined are in my view wholly arbitrary, and the result may have no relation whatsoever to the market value of a land at the date of acquisition.³²

Chief Justice Patanjali Sastri spoke for a unanimous five-man Constitution Bench of the Supreme Court in upholding the decision of the High Court.

While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must insure that what is determined as payable must be compensation, that is, *a just equivalent of what the owner has been deprived of*.³³ (Emphasis added.)

ber 17, 1953; and *Mrs. Bela Banerjee v. State of West Bengal* (1954) S.C.R. 558, A.I.R. (1954) S.C. 170, decided December 11, 1953.

³¹ *Mrs. Bela Banerjee v. State of West Bengal* (1954) S.C.R. 558, A.I.R. (1954) S.C.

³² A.I.R. (1951) Calcutta 111, at 115.

³³ *Op. cit. supra* note 14, at 563.

The court, then, declined to interpret the original article 31 of the constitution in a way that would have given the legislature a free hand to fix any standard or amount of payment it chose. In thus checking the legislative will, it brought a quick reaction from government quarters. As already noted, the fourth amendment was enacted, forbidding the courts to review the adequacy of compensation. The amendment seemed, however, to leave open the question whether there could be "principles" for determining compensation other than something like market value or other test of actual value to the owner at the time of acquisition. In some recent decisions, the high courts have shown a disposition to hold that if no payment is made at all in respect to part of properties taken over by the State, then in that case at least no "principles of compensation" have been laid down.³⁴

What is "Deprivation?"

The *Banerjee* case was a straightforward instance of state acquisition of an isolated parcel of land, of the kind that would normally fall under the Land Acquisition Act. The State itself took title, which it turned over to a co-operative society for building purposes. In the three other major cases now under consideration, the court extended the notion of a deprivation sufficient to attract the compensation requirement to other instances in which state action substantially deprived the owner of benefits of ownership without itself formally taking possession of or acquiring title to the property in question.

In *Dwarkanadas Shrinivas v. Sholapur Spinning & Weaving Co., Ltd.*,³⁵ the court held, on the petition of a preference shareholder in the Sholapur Co., that an act placing the company in the hands of agents appointed by the government was in effect a deprivation of property without compensation and therefore invalid under article 31.

In *State of West Bengal v. Subodh Gopal* case,³⁶ a landlord had challenged a West Bengal statute depriving him of the right to evict tenants from lands he had earlier purchased at a revenue sale. The act, however, also authorized certain increases in rent, a new benefit to the

³⁴ See *Namasivaya v. State of Madras*, A.I.R. (1959) Madras 548, and cases there cited. A Madras act authorizing state acquisition of lignite bearing land provided compensation for the land itself but none for buildings on the land built after passage of the act.

³⁵ (1954) S.C.R. 674; A.I.R. (1954) S.C. 119, decided December 18, 1953. *Chiranjit Lal v. Union of India* (1950) S.C.R. 869, A.I.R. (1951) S.C. 41 involved the same act and same company. There the holder of a single ordinary share unsuccessfully challenged the validity of the state's take-over. In the *Shrinivas* case, the petitioner, a preferred shareholder, had been ordered by the government managers of the company to pay in additional capital.

³⁶ 1954 S.C.R. 587; A.I.R. (1954) S.C. 92, decided December 17, 1953.

owner which Chief Justice Sastri thought offset the deprivation of the right to evict tenants. On these facts he thought that the impairment of the property owner's enjoyment was not serious enough to call into play the requirement for compensation.

In this decision, the Chief Justice sought to formulate the test for distinguishing between cases where governmental interference with property rights would require compensation and cases where it would not. In terms that would be familiar to American lawyers, he said:

No cut and dried test can be formulated as to whether in a given case the owner is "deprived" of his property within the meaning of Article 31; each case must be decided as it arises on its own facts. Broadly speaking, it may be said that an abridgement would be so substantial as to amount to a deprivation within the meaning of Article 31 if, in effect, it withheld the property from the possession and enjoyment of the owner, or seriously impaired its use and enjoyment by him, or materially reduced its value.³⁷

In *Saghir Ahmed v. State of Uttar Pradesh*, 106 private bus operators challenged a U.P. law under which the state could take over routes previously plied by private operators under license from the state, revoking their licenses if need be. The Supreme Court, applying the doctrines of the *Subodh Gopal* and *Dwarkadas Shrinivas* cases, held that even though the state had not itself acquired the right of the bus operators, it had deprived them of valuable property (that is, their right to use the public highways for paid transportation services).³⁸ Mr. Justice Mukherjea, speaking for a unanimous court, had this to say:

The fact that the buses belonging to the appellants have not been acquired by the government is . . . not material. The property of a business may be both tangible and intangible. Under the statute the government may not deprive the appellants of their buses or any other tangible property, but they are depriving them of the business of running buses on hire on public roads.

In this cluster of decisions handed down in December, 1953, the court had pronounced that the "compensation" required by article 31 meant equivalence in value at the time an owner was deprived of his property, and that the deprivation sufficient to attract the requirement of compensation could be a substantial impairment of the fruits

³⁷ *Id.* at 618.

³⁸ *Saghir Ahmed v. State of Uttar Pradesh* (1954) S.C.R. 728. Note Mr. Justice Mukherjea's distinction at 735 between the American rule (that, although the public has the right to use streets and public ways, use for gain is "special and extraordinary" and may be prohibited or regulated) and the Indian, which does not require a franchise for the use of highways for gain, "Within the limits imposed by State regulations, any member of the public can ply motor vehicles on a public road. To that extent, he can also carry on the business of transporting passengers with the aid of the vehicles."

of enjoying property even though the State had not formally acquired or taken possession of the property. These holdings, familiar to the American constitutional lawyer within the American system, were unacceptable to the Indian Government. They considered the decisions embarrassing, and possibly fatal, to plans for the expansion of the public sector in industry and commerce and for the regulation of the economy in the general public interest. The Constitution (fourth amendment) Act was passed in 1955 to override these and other awkward decisions.

The Fourth Amendment and After

The fourth amendment, among other things, barred the application of article 31(2) to government takings or deprivations of property that do not transfer title or possession to the state. It also barred, as against an acquisition or requisition of the kinds specified in article 31A, any attack based on the "fundamental rights" embodied in article 14 ("equality before the law" and "equal protection of the law"), article 19 (the rights to acquire, hold and dispose of property and to carry on any occupation, trade or business, subject to "reasonable restrictions" on the exercise of those rights) and article 31. Thus, the amendment protected a broad range of state interventions in private business affairs and dealings in property which the government had in mind as parts of its program for economic and social advancement. Under the constitution as it now stands, there are still certain checks on the government's powers to take property. There must, presumably, be *some* degree of compensation in cases of acquisition or requisition.³⁹ The acquisition must be for a "public purpose." It must be authorized by a statute.

The government has even continued to provide a measure of indemnity in some cases where it would not be strictly required under the constitution in its new form. The Motor Vehicles Act, for example, provides for payments to private transport operators whose licenses are cancelled and routes taken over by state-owned services. These payments are based on formulae that take into account the length of the routes involved and the duration of unexpired terms of the licenses involved.⁴⁰ Some state governments, however, have shown considerable ingenuity and persistence in taking measures (some of which have been held invalid by the Supreme Court) to circumvent the statutory requirement of compensation.⁴¹

³⁹ See *Namasivaya v. State of Madras*, *supra* note 34.

⁴⁰ Clause 68-G, Motor Vehicles Act 1939 as amended by Motor Vehicles (Amendment) Act, 1956 (enacted after the fourth amendment to the constitution).

⁴¹ *E.g.*, see *Y. Mahaboob Sheriff v. Mysore State Trans. Authority*, Bangalore,

The central and state governments appear to have used their powers to fix the amount of compensation in a way reassuring to the investors, particularly where foreign interests are involved. The degree of compensation allowed in three major nationalization measures enacted after the fourth amendment has apparently been generally acceptable to the investors. The State Bank of India Act of 1955, taking over the Imperial Bank, provided compensation in a fixed amount (about 1765 rupees per share) payable in central government securities. The Life Insurance Corporation Act of 1956, taking over privately owned life insurance companies, provided three formulae for compensation designed to approximate real worth, with the right to appeal to a special tribunal in cases where insurers were dissatisfied with the determination of the new government corporation. In one major state (as distinct from Union) acquisition involving foreign interests, the Kolar Gold Mining Undertakings (Acquisition) Act of 1956 specified in the act itself the amount to be paid to the four privately owned companies taken over. According to one report, the amount was a compromise between the owners' claim and the government's offer, though much closer to the latter.⁴²

A more recent nationalization measure, The Coal Bearing Areas (Acquisition and Development) Act of 1957 authorizes the government to acquire coal-bearing lands or mining rights in such land. For the land itself, the act provides compensation at the market value of the land, excluding the value of minerals lying under the land. For rights under a mining lease, the compensation is based generally on actual expenditures incurred by the previous holder, plus interest.⁴³

At the political level, there continues to be agitation for nationalization of productive enterprise and services.⁴⁴ The present governments, however, have not only declined to move toward any wide-

A.I.R. (1960) S.C. 321; Shrinivasa Reddy v. State of Mysore, A.I.R. (1960) S.C. 350; G. Nageswara Rao v. Andhra Pradesh State Road Trans. Corp., A.I.R. (1959) S.C. 308; Moti Lal v. State of Uttar Pradesh, A.I.R. (1951) Allahabad 257.

⁴² See Friedmann, "Joint International Business Ventures in India" (A research study of Columbia University Law School, 1959) 42. The same study generally discusses nationalization measures at 38-43.

⁴³ Though the information comes from hearsay, it is perhaps worth noting informal reports that the government's acquisition of mining leases has led to some troublesome negotiations with foreign interests regarding compensation.

⁴⁴ See e.g., Hindustan Times, Sept. 16, 1959 (report that government was considering nationalization of sugar mills); Times of India, Aug. 14, 1959 (government statement that it was *not* considering nationalization of the general insurance business); Statesman, Aug. 7, 1959 (government planning to state that it was *not* going to nationalize banks); Statesman, Aug. 7, 1959 (ministerial statement that nationalization of electricity undertakings is desirable, but not financially feasible except on selective basis); Times of India, Feb. 7, 1959 (ministerial assurance that private goods transport would not be nationalized).

spread scheme of nationalization but have shown restraint in using their constitutional powers to determine the amount of compensation in the few instances where nationalization has taken place. The Prime Minister took particular pains to reassure *foreign* investors when the fourth amendment was being debated.⁴⁵

Whatever assurances exist at the political level, the prospective foreign investor may want more specific assurances in a legally enforceable form. The American investor may now get this assurance through the investment guaranty agreement between the United States and India.⁴⁶ That agreement, which earlier had guaranteed the investor that his rupee earnings and capital would be convertible into dollars, was extended on December 7, 1959, to cover risks of expropriation without adequate compensation. The United States Government undertakes to reimburse in dollars an insured investor for losses that may be incurred because of expropriation and is subrogated to the rights of the investor in India. The Government of India has undertaken first to negotiate the settlement of any claims thus arising and, in case a settlement cannot be reached between the two governments, to refer the claim to a tribunal of arbitrators for a "final and binding determination." This commitment by the Government of India is presumably considered consistent with the provision of the Indian Constitution (as amended by the fourth amendment) that no law providing for compulsory acquisition or requisition shall, under article 31(2) "be called in question in any court on the ground that the compensation provided by law is not adequate."

On the occasion of signing the agreement relating to expropriation, the Indian representative issued a statement saying, among other things,

The principles embodied in the Agreement signed today by both our countries are the same as those embodied in our Constitution. This states that should at any time for any reasons an industrial enterprise be nationalized, appropriate compensation will be paid. . . . With the signing of this agreement American investment in India will have the same guarantee of safety from the American Government that it has always had from the Indian Government.⁴⁷

⁴⁵ The Prime Minister stated: "I am always surprised to hear this proposal being put forward repeatedly: confiscate or expropriate foreign capital. Anything which is more unthinkable, unthought of and unrealistic—I cannot imagine; it has no relation to reality—this kind of thing—quite apart from what we may do within our country. . . . No country wants to break its international relations or its credit in the world by doing this kind of thing in order to save some money—a few crores (tens of millions) or a few millions." 3 L.S. Deb. Part 2, 4840 (1955).

⁴⁶ Authorized by § 413(b)(4) of the Mutual Security Act of 1954, as amended.

⁴⁷ Dept. of State Press Release No. 842, December 7, 1959.

In the light of the foregoing discussion, this will be seen as a statement of intention, practice, and policy rather than as an accurate summary of Indian constitutional law. The legal protection given by the original article 31 has been greatly restricted by later amendments. Indeed, the principal remaining haven for the property owner or private businessman (if he is a citizen) who considers himself aggrieved by state intervention is now found, not in article 31, but in article 19.

THE CITIZEN'S RIGHT TO HOLD PROPERTY AND CONDUCT A
BUSINESS: ARTICLE 19(1)

Specific Interests in Property under Article 19

Two clauses of article 19(1) provide that "all citizens shall have the right . . . to acquire, hold, and dispose of property, and . . . to carry on any occupation, trade or business." These rights are qualified by later clauses enabling the State to make laws imposing "reasonable restrictions" on the exercise of the rights "in the interests of the general public."

At one time some of the Supreme Court took the view that these guarantees related to the capacity of Indian citizens to own property and carry on a business and did not protect a citizen's interest in a particular piece of property or business from state interference.⁴⁸

In a series of later cases, however, it became established doctrine that article 19(1)(f) and (g) is available to protect specific property rights of individual citizens against "unreasonable" state restrictions.⁴⁹

⁴⁸ See *State of W. Bengal v. Subodh Gopal Bose* (1954) S.C.R. 587 at 596-99. Chief Justice Sastri found some support for this view in sections 111 and 298 of the Government of India Act, 1935, which forbade the state to impose "disabilities" on British subjects in India or Indian subjects to hold property or carry on business on grounds of religion, place of birth, descent or color. In the Indian Constitution, however, protection against discrimination on these grounds is found in articles 15 and 16.

See also Basu, *op. cit. supra* note 14, at 227-29 who, writing in 1955, concluded that "the uncertainty of the boundary between article 19(1)(f) and article 31(1) continues."

⁴⁹ See *Diwan Sugar and General Mills (Private) Ltd. v. Union of India* A.I.R. (1959) S.C. 626; *Express Newspapers, Ltd. v. Union of India* A.I.R. (1958) S.C. 578; *Bombay Dyeing & Mfg. Co. v. State of Bombay* A.I.R. (1958) S.C. 328; *M.C.V.S. Arunachala Nadar v. State of Madras*; *Ch. Tikuramji v. State of Uttar Pradesh* (1956) S.C.R. 393; *Bijay Cotton Mills v. State of Ajmer* (1955) S.C.R. 752; *Comm'r Hindu Religious Endowments, Madras v. Swamiar of Sri Shirar Mut, (1954) S.C.R. 1005*; *Harishankar Bagla v. Madhya Pradesh* (1955) S.C.R. 380; *Messrs. Dwarka Prasad Laxmi Narain v. State of U.P.* (1954) S.C.R. 803; *State of Rajasthan v. Nath Mal* (1954) S.C.R. 982, A.I.R. (1954) S.C. 307; *Saghir Ahmed v. State of Uttar Pradesh*, A.I.R. (1954) S.C. 728; *Raghubir Singh v. Court of Wards, Ajmer*, A.I.R. (1953) S.C. 373; *Mohammad Yasin v. The Town Area Committee, Jalalabad* (1952) S.C.R. 572.

"Restriction" and "Deprivation"

Clearly, on this view of article 19, there might be considerable overlap with article 31. An aggrieved property owner or businessman (if he was a citizen) might, and often did, claim both that a particular state intervention had deprived him of his property without compensation (under article 31) and had unreasonably restricted his right to hold property or carry on a trade or business (under article 19).

Initially, the Supreme Court tended toward the conclusion that if a "restriction" (the article 19 term) on the exercise of a property right or conduct of a business was so severe as to be "total," and therefore a "deprivation" (the article 31 term), then its constitutionality must be tested under article 31. Article 19 would not apply. This rather conceptualist approach got its start in the decision in *Gopalan's* case,⁵⁰ decided early in 1950 shortly after the constitution came into effect. The case involved the question of whether the Preventive Detention Act was inconsistent with the citizen's rights guaranteed by article 19(1), particularly the right to freedom of movement "throughout the territory of India." The court held that the "reasonable restrictions" on rights authorized by that article were different from the "deprivation" of personal liberty mentioned in article 21. In so holding, one of the Justices went further in a dictum to state that if a citizen was deprived of his property within the meaning of article 31, he could not complain that his rights under article 19 had been infringed, for he had no property right that could be considered as "restricted."⁵¹

More than four years later, in *State of Bombay v. Bhanji Munji*,⁵² the court applied this reasoning when occupiers of leased premises were challenging a land requisition act under which they were to be ousted from their premises. The court held that article 19(1)(f) did not apply: "when there is a substantial deprivation of property which is already held and enjoyed, one must turn to Article 31 to see how that is justified."⁵³

With the enactment of the fourth amendment, barring the application of article 31 to interferences other than direct state acquisition or requisition, the possibility of applying article 19 to other substantial deprivations assumed a new importance. May a state "deprivation" of property of a kind no longer challengeable under article 31 still be attacked under article 19? For a long time after the fourth amendment, the court declined to make a direct pronouncement on

⁵⁰ A.K. Gopalan v. State of Madras (1950) S.C.R. 88; A.I.R. (1950) S.C. 27.

⁵¹ *Id.* S.C.R. at 304.

⁵² State of Bombay v. Bhanji Munji, (1955) S.C.R. 777; A.I.R. (1955) S.C. 41.

⁵³ *Id.* at 780 and 44.

the question. In the past year, however, two decisions seem to have settled the matter.⁵⁴

In *Narendra Kumar v. Union of India*,⁵⁵ the court dealt with a government order, under the Essential Commodities Act, which regulated trade in copper. One part of the order controlled the price of imported copper at a level that would make impossible a profit for middlemen between importers and industrial users. Another part forbade the acquisition of copper by anyone except under a permit issued by the Controller "in accordance with such principles as the Central Government may from time to time specify." The government later issued instructions under which permits were to be issued only to industrial users, cutting out middlemen altogether.

The court's decision turned on the failure to issue these instructions in the Official Gazette. It felt called upon, however, to decide whether the elimination of dealers through the price control order and the ban on permits to them amounted to "a mere restriction on the rights under article 19(1)(f) and 19(1)(g) or goes beyond restriction."

The court concluded, after an examination of earlier cases and the apparent intention of the drafters of the constitution, that a "prohibition" on the exercise of rights was a form of "restriction." It then went on to examine the reasonableness of the restrictions contained in the copper order under article 19(1). The court found the restrictions substantively sound (as a reasonable regulation of trade in an important scarce commodity) but procedurally bad since the government had not satisfied the legislated requirements for publishing orders under the act.

The court did not explicitly deal with the contention (which does not appear to have been developed in argument before them) that a severe restriction of the kind involved in the copper order could be regarded as a "deprivation" of property which must be considered solely in terms of article 31. It did, however, adopt the view that the issue before it could not be decided by a conceptualistic distinction between "restriction" and "prohibition."

A few months later, in *K. K. Kochunni v. State of Kerala and*

⁵⁴ The fourth amendment also materially alters the guarantees under article 19. A new article 31A provided that laws of certain specified kinds affecting rights in land, state management or regulation of the private management or regulation of the private management of companies, and rights arising under mineral leases, should not be held invalid on the ground that they are inconsistent with any of the rights conferred by articles 14, 19 or 31, subject to the requirements of Presidential assent for state acts. For full text, see appendix *infra* p. 644.

⁵⁵ Writ Petition No. 85 of 1958, decided December 3, 1959; not yet reported.

Madras,⁵⁶ the court explicitly held "that a law made depriving a citizen of his property shall be void, unless the law so made complies with the provisions of Cl. (5) of Article 19 of the Constitution." There, the court was dealing with a state law providing that a certain local form of estate in land should be deemed to be another form of estate with the result that the owner's interest would have passed to others in his joint family. The court held that this deprivation must be tested for reasonableness under article 19(5) and found it unreasonable. They distinguished the *Gopalan* case on the ground that it involved personal liberty rather than property interests. They also distinguished the *Bhanji Munji* case on the ground that the fourth amendment, by restricting the application of article 31(2) to instances where the State acquired or requisitioned property, had left other instances of deprivation to be tested by the requirement that they be authorized by "law." Such a law, in their view, must satisfy the requirements of article 19, imposing reasonable restrictions in the interest of the general public.

This far-reaching decision was reached by a Constitution Bench divided three to two. It has important implications not only for property rights but personal liberties. Would the *Gopalan* case, for example, not be decided differently, reading into the phrase "procedure established by law" a requirement that the "law" be tested for reasonableness under article 19? In the *Kochunni* case, Mr. Justice Subba Rao, speaking for the majority, commented that some of the court would now be inclined to agree with Mr. Justice Fazl Ali's dissent in the *Gopalan* case but added that the court is bound by the judgment in that case.

In any event, it may be taken for granted that litigants, in matters involving both property rights and personal liberties, will press the advantage offered by the *Kochunni* judgment. It is not unusual for the Indian Supreme Court, in close and important questions, particularly those possibly leading to important new doctrines, to constitute a special bench of all members of the court, or at least a larger number than the usual five on the Constitution Bench. Perhaps the issues in the *Kochunni* case will again be argued before a larger number of justices.

Always to be taken into account is the amending power. The decision in the *Kochunni* case is bound to be somewhat distasteful to government authorities. Will it lead to another constitutional amendment revamping the fundamental rights relating to property rights and personal liberties?

⁵⁶ Writ Petitions No. 443 of 1955 and 40 and 41 of 1956, decided May 4, 1960; not yet reported.

"Reasonable Restrictions" and Economic Regulation

Normally, of course, government restrictions on the exercise of property rights or conduct of a trade or business will fall short of "deprivation" or "total restriction." Rather they will take the form of regulatory measures. Among the most important have been the Essential Supplies (Temporary Powers) Act of 1946 and its successor, the Essential Commodities Act of 1955. A considerable body of constitutional doctrine has grown up about the application of article 19 to such regulatory measures—an important field of law that cannot be dealt with here.⁵⁷

We ought, however, at least to note briefly one important line of cases dealing with situations that border upon state deprivation of property without compensation in some of which litigants have indeed invoked article 31 along with article 19.

The Central Government has had broad powers, dating from British wartime controls, to control the purchase, sale, production, supply and distribution of essential commodities. Producers and dealers of such commodities, of course, have tested the constitutionality of these controls in the courts. The first important case to reach the Supreme Court involved a state coal control order, issued under the Essential Supplies Act of 1946. Coal dealers challenged the order on the ground that it fixed a price that was unreasonably low and that the licensing authority's power to grant and revoke licenses was arbitrary and uncontrolled by higher authority. They failed on the first point (the court finding no evidence that the prices were unjust) but succeeded on the second. The court held that uncontrolled discretion granted to the Controller was an unreasonable restriction on the dealers' right to carry on business.⁵⁸

Two months later the court held invalid a state food grains control order which authorized certain officials to freeze stocks of grain in dealers' hands and to requisition the stocks at a price fixed by the officials. The court held that the price-fixing power was too broad and unregulated, pointing out that the authorities could (as they in fact had done according to the affidavits of the grain dealers) buy the stocks at a price lower than the dealers had paid for them and then make a profit by selling at a higher controlled price. The court held the order void under both article 19(1)(g) and 31(2).⁵⁹

⁵⁷ Dr. M. P. Jain, Reader in the Delhi University Law Faculty, recently did a study of the Essential Commodities Act and its predecessor acts which may soon become available from the Indian Law Institute in New Delhi.

⁵⁸ Messrs. Dwarka, Prasad, Laxmi, Narain v. State of Uttar Pradesh (1954) S.C.R. 803, decided January 11, 1954.

⁵⁹ State of Rajasthan v. Nath Mal (1954) S.C.R. 982, decided March 13, 1954.

In later cases, however, the court has shown little disposition to interfere with the regime of regulation set up under the essential supplies acts. The court, upholding an order requiring that permits be obtained to transport cotton cloth, went on to declare valid the main authorizing sections of the act which conferred broad powers to control and regulate prices, movement, and production of essential commodities. Since then, the court has tended to uphold specific orders and notifications issued under the authority of the act, even when dealers have alleged and offered evidence that they have been forced to sell at prices lower than their cost.⁶⁰

If one may hazard a guess at the future development of law relating to commodity regulation, it would be along the following lines: (1) Improved administrative procedures may be developed to assure that control authorities take into account more definitely prescribed factors in arriving at decisions on prices, requisition of stocks and the like. (2) Parties affected by orders may be given greater opportunity to represent their views at the rule-making stage and have more recourse to administrative appeal.⁶¹

Corporations as "Citizens"

One difference between articles 31 and 19 is important for non-Indians. Article 31 applies to "persons," including aliens and corporations. Article 19 applies only to "citizens."

It would seem clear that aliens, and probably corporations, are excluded from the benefits of article 19. Part II of the constitution,

For earlier high court decisions upholding grain requisition schemes see *Atulya Kumar v. Director of Procurement and Supply*, A.I.R. (1953) Calcutta 548 and *Mohammed Anzar Husnan v. State of Bihar*, A.I.R. (1952) Patna 220. In the *Calcutta* case, Mr. Justice Sinha gave an eloquent reminder of the special situation then prevailing in India: "The stark reality confronts us that there is not enough food to go round and parts of the country are constantly verging on conditions of acute shortage and even famine. . . To talk of the fundamental right to hoard as one pleases, to profiteer as one pleases, to be the Lord of one's Manor and Fief, all this sounds edifying under certain given circumstances of peace and plenty, but it is a mockery when a man's brother sits out in the pavement naked and unfed."

⁶⁰ *Union of India v. Messrs. Bhanamal Gulzarimal Ltd.*, A.I.R. (1960) S.C. 475; *Narendra Kumar v. Union of India*, A.I.R. (1960) S.C. 430; *Diwan Sugar & Gen. Mills (Private) Ltd. v. Union of India*, A.I.R. (1959) S.C. 620; *Lord Krishna Sugar Mills Ltd. v. Union of India*, A.I.R. (1959) S.C. 1124; *N.R. Chirangi Lal v. State of Bihar*, A.I.R. (1959) Patna 268.

⁶¹ See comments of Mr. Justice Hidayatullah (now on the Supreme Court) in *State v. Haidarali*, A.I.R. (1957) Madhya Pradesh 179. But see also statement by Mr. Justice Wanchoo in the *Dirvan Sugar* case: "It is enough to say that we are here dealing with the power of the Central Government to fix prices in the interests of the general public. It is in these circumstances absurd to expect that there would be some provision by way of appeal or otherwise against this power."

dealing with citizenship, speaks only in terms of natural persons. Moreover, the recent Citizenship Act does nothing to extend the definition to include artificial persons. Some High Court and Supreme Court decisions, however, indicate that a corporation (at least one organized in India and wholly owned by Indian citizens) may be considered a citizen for the purposes of that article.

A dictum of Mr. Justice Mukherjea in *Chiranjit Lal v. Union of India*⁶² appears to have established the notion that corporations can qualify as citizens under article 19:

The fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well except where the language of the provision or the nature of the right compels the inference that they are applicable only to natural persons.

In that case, however, the rights of an individual shareholder, not of a corporation, were in issue. Moreover, article 19 is one in which "the language of the provision" would seem to exclude its application to any but natural persons. The only full judicial discussion of the point is found in *Chamarbaugwalla's* case.⁶³ Chief Justice Chagla of the Bombay High Court (now the Indian Ambassador to the United States) examined and applied Mr. Justice Mukherjea's dictum, which he interpreted to mean that one

must look at the content of the fundamental right and if you find that the nature of that right is such that it is not possible to confine it merely to natural persons, then the Court must come to the conclusion that a corporation is as much entitled to that right as an individual citizen.⁶⁴

Accordingly, he felt impelled to the conclusion that the rights conferred by article 19(1)(f) and (g) "can be enjoyed as much by a corporation as by a natural person." Chief Justice Chagla recognized a difficulty. How Indian must a corporation be to qualify as a citizen? On this he said:

Sufficient unto the day is the constitutional difficulty thereof, and I think it is sufficient to decide this case on the facts before us where all the shareholders are Indian citizens, and all the directors are Indian citizens. If a case arises where the shareholders are not citizens, then the Court may well consider whether the particular corporation is a citizen or not.⁶⁵

When the *Chamarbaugwalla* case came up on appeal, the Supreme Court reached its decision on other grounds. Only one glancing ref-

⁶² A.I.R. (1951) S.C. 41 at 44.

⁶³ *State of Bombay v. R. M. D. Chamarbaugwalla*, A.I.R. (1956) Bombay 1.

⁶⁴ *Id.* at 18.

⁶⁵ *Id.* at 19.

erence is found to the question in Chief Justice Das' judgment. It is not necessary, he said, "for us on this occasion to consider whether a company is a citizen within the meaning of Article 19 and indeed the point has not been argued before us."⁶⁶

At least two points throw some doubt on Chief Justice Chagla's conclusion on this question. At one point he seems to assume that if article 19(1)(f) and (g) did *not* apply to corporations, then they would not have a right to acquire property or carry on a business, and that such an intention could not be imputed to the Constituent Assembly. Here one wonders whether there is some confusion between corporate powers, which would be conferred by such legislation as the Companies Act, and fundamental rights. Article 19 does not confer powers; it protects powers of a citizen (or rights, if one prefers) against unreasonable invasion by the state.

Chief Justice Chagla also noted that article 11 of the constitution confers on Parliament the power "to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship." At the time of the High Court's decision in the *Chamarbaugwalla* case, Parliament had not yet exercised this power. In 1955 Parliament did enact a Citizenship Act which still dealt with the subject solely in terms of natural persons. It did not act on the invitation implied in the court's statement that "it would be perfectly competent (for Parliament) to provide that a corporation satisfying certain conditions should be deemed to be a citizen for the purposes of Article 19(1)."

In 1959, the Calcutta High Court directly held that "the petitioner, being a corporation, is not entitled to the fundamental rights granted under Article 19 which is available only to a 'citizen'."⁶⁷

The Supreme Court has never pronounced directly on the point. In a substantial number of cases, however, the court has discussed the application of article 19(1)(f) and (g) (the clauses of interest here) to corporate parties *as if* they could claim the article's protection.⁶⁸ In at least one case, the government's argument in a High

⁶⁶ A.I.R. (1957) S.C. 699 at 721.

⁶⁷ *Cherry Hosiery Mills v. S. K. Ghose* A.I.R. (1959) Calcutta 397.

⁶⁸ *Union of India v. Messrs. Bhanamal Gulziramal*, A.I.R. (1960) S.C. 475. *Messrs. Fedco Ltd. v. S. N. Bilgrami*, A.I.R. (1960) S.C. 415; *Lord Krishna Sugar Mills Ltd. v. Union of India* A.I.R. (1959) S.C. 1124; *Diwan Sugar Mills v. Union of India* A.I.R. (1960) S.C. 626. *Messrs. Fedco, Ltd. v. S. N. Bilgrami*, A.I.R. (1960) S.C. Express Newspaper (Private) Ltd. v. Union of India A.I.R. (1958) S.C. 578. *Bombay Dyeing & Mfg. Co. v. State of Bombay* A.I.R. (1958) S.C. 328. *State of Bombay v. R.M.D. Chamarbaugwalla*, A.I.R. (1957) S.C. 699. *Bijay Cotton Mills. Ltd. v. State of Ajmer* (1955) S.C.R. 752. *M. B. Cotton Association Ltd. v. Union of India*, A.I.R. (1954) S.C. 634.

Court, that corporations could *not* be considered as citizens, was not pressed before the Supreme Court.⁶⁹ It appears that the government's legal representatives have acquiesced in the application of article 19 to corporations. One could not conclude, however, that the same restraint in advocacy would be shown if a corporation's shareholders and directors were not Indian citizens.

In any event, an impressive body of precedent has developed for treating Indian-owned corporations as citizens for the purposes of article 19. Difficult questions would be bound to arise if a corporation with non-Indian attributes (such as a foreign share in the capital stock or foreign management) petitioned the court. Such difficulties, and any continuing doubts as to the status of wholly Indian corporations, might be resolved by legislation defining what, if any, persons other than natural citizens should be regarded as citizens.

CONCLUSION

Some Indians who advised on the drafting of the Government of India Act of 1935 (the direct ancestor of the Indian Constitution) pressed for the inclusion of a Bill of Rights. The British are seldom true believers in the efficacy of guaranteed fundamental rights in a written constitution, and the Joint Committee on Indian Constitutional Reform overruled the proponents. A Bill of Rights, the Committee said, would probably have to be cast in such general terms that it would be unenforceable in the courts. If drafted tightly enough to be legally effective, it would unduly hinder the legislature.⁷⁰

The drafters of the Government of India Act, however, made an important exception. In reaction to Indian political agitation for land reform and expropriation measures, they thought it wise to insert some safeguards for private property.⁷¹ Section 299 of the act became the forerunner of article 31 of the Indian Constitution. Thus, the "right to property" has had the longest history in India's constitutional experience with fundamental rights. In this field more clearly than most we see an effort to compromise between the British and American models of constitutional protection of personal liberties against state action.

There is a risk that India, seeking the best of both constitutional worlds, may get the worst. The British guarantees of citizens' rights rest on parliamentary self-restraint, reinforced by a long history that has rooted those guarantees in the national tradition and by a strong

⁶⁹ *Chamarbaugwala's case*, *supra* notes 63 and 66.

⁷⁰ 1 Report of the Joint Committee on Indian Constitutional Reform (1934) Part I, par. 366.

⁷¹ *Id.*, par. 369.

and alert opposition party in Parliament. India has not the same history. Moreover, the tradition in India is radically different from the British tradition in relation to personal liberty, growing from the need of foreign rulers to retain great discretionary and veto powers in their executive authorities. A strong opposition party which could form an alternative government based on the same basic principles has not yet developed in India.

Thus, the British model is not readily transferrable to India. The American model, on the other hand, has not been wholly adopted. The amending process, as we have seen, is little different from the ordinary legislative process, bringing fundamental rights within reach of parliamentary majorities. The brave words and ringing declarations of "fundamental rights" may give an appearance that those rights are protected by judicial process in greater degree than they actually are.

The history of the constitutional provisions regarding property rights seems at first glance to confirm these fears. The government and legislature have twice made very substantial amendments, in each instance overriding in detail court decisions embarrassing to the government and placing specific statutes beyond challenge on any grounds.

From another point of view, however, it could be said that the complicated amendments have been restricted to deal only with the effects of particular judicial interpretations which the government found would seriously embarrass its plans for India's national development.⁷² In other words, only those specific amendments have been made which the government felt it had to make in the national interest. Moreover, whatever differences of opinion there might be on the merits of the court's interpretations it can hardly be said that it has been cowed, in dealing with property rights, by the Damoclean sword of the amending power. The very large number of writ petitions that have come to the courts under the fundamental rights⁷³ attests to the nation's awareness of the protection they offer and insures a vigorous public discussion of proposed changes in press and Parliament. (It also attests to the complexity of the constitution, which led Sir Ivor Jennings to comment: "The most lucrative profession in India promises to be that of a constitutional lawyer.")⁷⁴

The history of the rights relating to property in the first decade of the Indian Constitution, while confirming the risks inherent in the easy amending clause, also shows the vitality of those rights. Indeed, one may speculate whether a more rigid constitution, in which the

⁷² See Basu, *op. cit. supra* note 14.

⁷³ See note 3 *supra*.

⁷⁴ Jennings, *Some Characteristics Of The Indian Constitution*, 50.

framers tried to prescribe once and for all the rights in this highly controversial field, might not have resulted in intolerable strains to the whole structure of rights enforceable in the courts.

APPENDIX

CONSTITUTION OF INDIA

RIGHT TO FREEDOM

19. (1) All citizens shall have the right—

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form associations or unions;
- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India;
- (f) to acquire, hold and dispose of property; and
- (g) to practice any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offense.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

- (i) the professional or technical qualification necessary for prac-

- ting any profession or carrying on any occupation, trade or business, or
- (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens, or otherwise.

RIGHT OF PROPERTY

Compulsory Acquisition of Property

31. (1) No person shall be deprived of his property save by authority of law.

(Original Constitution)

(2) No property, movable or immovable, including any interest in, or 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 principles on which, and the manner in which, the compensation is to be determined and given.

(Constitution as now Amended)

(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the 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 in any court on the ground that the compensation provided by law is not adequate.

(2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

(3) No such law as is referred to in clause (2) made by the Legislative of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect—

- (a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

- (b) the provisions of any law which the State may hereafter make—
- (i) for the purpose of imposing or levying any tax or penalty, or
 - (ii) for the promotion of public health or the prevention of danger to life or property or
 - (iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

(Added by First Amendment Act,
1951)

(As Amended by Fourth Amendment
Act 1955)

31A. *Savings of laws providing for acquisition of estates, etc.—*

(1) Notwithstanding anything in the foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part:

31A. (1) Notwithstanding anything contained in article 13, no law providing for—

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights by virtue of any agreement, lease or licence for the purpose of searching for, or win-

ning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

(Added by First Amendment Act, 1951)

(2) In this article,—

- (a) The expression “estate” shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any *jagir*, *inam* or *muafi* or other similar grant. (and in the States of Madras and Kerala, any *jannam right*);¹
- (b) the expression “rights,” in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder (raiyat, under-raiyat)¹ or other intermediary and any rights or privileges in respect of land revenue.

(Footnote 1. Inserted by Fourth Amendment Act)

31B. Validation of Certain Acts and Regulations.—

Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

Seventh Schedule

List I — Union List [Matters with respect to which Parliament has exclusive power to make laws, under Article 246].

Entry 33. Acquisition or requisitioning of property for the purposes of the Union [Ed. note: included in the original Constitution; omitted by sec. 26, Seventh Amendment Act, 1956].

List II — State List [Matters with respect to which the State Legislature have exclusive powers to make laws, under Art. 246].

Entry 36. Acquisition or requisitioning of property, except for the purposes of the Union, subject to the pro-

visions of entry 42 of List III. [Included in the original Constitution; omitted by sec. 26, Seventh Amendment Act, 1956.]

List III — Concurrent List [Matters with respect to which both Parliament and State Legislatures have power to make Laws, under Article 246].

Entry 42. Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purposes is to be determined, and the form and the manner in which such compensation is to be given.

[This entry, included in the original Constitution, was replaced by the following, under the Seventh Amendment Act, 1956.]

Entry 42. Acquisition and requisitioning of property.