

# History of the Removal of the Fundamental Right to Property

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“That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint”

*Joseph Story*

These words will often haunt every person who endeavors to look into the dismal state of affairs that the property rights under our Constitution has been through since its inception. The right to property is often derided as the “least defensible” right in a socialist democracy and it happened in our country as well. It is very absorbing to note that Right to Property has induced the most number of amendments to our Constitution and also has formed the core from which some commendable and historic decisions emerged out of our judiciary. This essay intends to document the development of the legislative and judicial saga that led to the removal of Right to Property from the fundamental rights’ chapter of our Constitution. Most of the cases documented herein after have been extensively studied by every student of law in our country but sadly they have never been studied from the importance of property rights’ perspective. It seems so preposterous that the reason given for the removal of property rights was that since it induced a lot of controversy it was thought to better get rid of it. But if we look into the detailed history of right to property cases and amendments. What we really have to derive from it is the importance of property rights in a person’s life and the extreme and innovative means he could come up with to defend it. And it is also disheartening to note the attitude of our legislature towards a basic human right like property rights. Montesquieu has quoted that one would forget sooner the murderer of his father than the man who robbed him of his property.

“Where it will trouble us a thousand years, each age will have to reconsider it.”

## Pre-Constitutional Position of Right to Property

The Constitution of India derives its foundation from the Government of India Act, 1935 and the Universal Declaration of Human Rights (1948). Section 299 of the Government of India Act, 1935 secured the right to property and contained safeguards against expropriation without compensation and against acquisition for a non-public purpose. Article 17 of the Universal Declaration of Human Rights (1948) also recognises the right to private property and India is a signatory to that Declaration. The Constituent Assembly examined the constitutions of various countries, which guarantee basic rights. In “Constituent Assembly of India, Constitutional precedents (Third Series)” (1947), it is stated “Broadly speaking, the rights declared in the Constitutions relate to equality before the law, freedom of speech, freedom of religion, freedom of assembly, freedom of association, security of person and security of property. Within limits these are all well recognised rights.” The debates in the Constituent Assembly when the draft Article 19(1)(f) and Article 31 came up for discussion clearly indicate that the framers of our Constitution attached sufficient importance to property to incorporate it in the chapter of fundamental rights. The provision regarding freedom of “trade and intercourse,” which was originally in the chapter of fundamental rights, was later removed from that chapter and put into a separate part (Article 301), in view of the suggestions by some members of the Constituent Assembly. It is significant to note that similar suggestions in respect of the right to property were not accepted.

### Post Constitutional Developments

There is some misapprehension on the scope of the right to property conferred under our Constitution. An assumption by constant repetition has become a conviction in some minds that the right to property has been so entrenched in our Constitution that it is not possible without amendment to enforce the directive principles. A scrutiny of the relevant provisions of the Indian Constitution as they stood on January 26, 1950 will dispel this assumption. They are Articles 14, 19(1)(f), 19(5), 31, 32, 39(b) and (c), 226 and 265. The gist of the said provisions may be briefly stated thus: Every citizen has the individual right to acquire, to hold and dispose of property. A duty is implicit in this right, namely that it should be so reasonably exercised as not to interfere with similar rights of other citizens. The exercise of it, therefore, should be reasonable and in accordance with public interest. The Directive principles of state policy lay down the fundamental principles of state policy and the governance of the country, and through the relevant principles, the state is directed to secure that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. Indeed, the state in exercising the power to enforce this principle does in fact enforce the duty implicit in the exercise of the fundamental right. The conflict between the citizen's right and the state's power to implement the said principles are reconciled by putting limitations both on the right and the power. The said fundamental right is not absolute. It is subject to the law of reasonable restrictions in the interest of the general public. The state's power is also subject to the condition that the law made by it in so far it infringes the said fundamental right should stand the double test of reasonableness and public interest. The state also has the power to acquire the land of a citizen for a public purpose after paying compensation. It has the further power to impose taxation on a person for his property. All the laws made in exercise of the said powers are governed by the doctrine of equality subject to the principle of classification. But the question of the validity of the said laws of social control, taxation and acquisition is a justiciable issue. Shortly stated, under the said provisions, the right to property is subject to justiciable laws of social control.

The articles place the concept of the right to property in a right perspective. They definitely rejected the Russian theory of socialism but accepted the doctrine of individual right to property subject to the laws of social control. The right to property was conditioned by the social responsibility. The higher judiciary was made the arbiter to maintain the just balance between private rights and public interests. The social order visualised by the Constitution was expected to be brought about smoothly by a process of gradual judicial adjustment. The fundamental assumption of the Constitution was that every party that was elected to power should be bound by the provisions of the Constitution and should strive to bring about the new social and economic structure of the country, in the manner prescribed therein. Under the Constitution, both the means and the end were equally important in the evolution of a new society.

After the Constitution of India came into force, the following agrarian reforms were introduced:

- (1) Intermediaries were abolished
- (2) Ceiling was fixed on land holdings
- (3) The cultivating tenant within the ceiling secured permanent rights
- (4) In some states, the share of the landlord was regulated by the law
- (5) In one state, the tiller of the soil secured cultivating rights against the absentee landlord, and in some states, the rural economy was re-adjusted in such a way, that the scattered bits of land of each tenant were consolidated in one place by a process of statutory exchange.

These reforms certainly implement the Directive principles of state policy. All these agrarian reforms could have been introduced within the framework of the original Constitution, "perhaps with a little more expense that could have been re-adjusted through the laws of taxation." said Justice Subba Rao.

But on a specious plea that they could not be done within the said framework, the Constitution had been amended, on so many occasions that its philosophy had been completely subverted.

### Judiciary vs Legislature: The Tussle Begins

The saga of legislative manipulation of the right to property began with the First Amendment Act, 1951 by which the Articles 31-A and 31-B were inserted into the Constitution. Article 31-A was introduced by the Constitution First Amendment Act, 1951 wherein the Parliament defined "Estate" and continued by further amendments to extend its meaning so as to comprehend practically the entire agricultural land in the rural area including waste lands, forest lands, lands for pasture or sites of buildings. Under the said amendment, no law providing for acquisition by the state of an estate so defined or any rights therein of the extinguishment or modification of such rights could be questioned on the ground that it was inconsistent with or took away or abridged any of the rights conferred by Articles 14, 19 or 31.

Article 31-B and Schedule Nine introduced by the subsequent amendments was another attempt to usurp judicial power. It was an innovation introduced in our Constitution unheard of in any other part of democratic world. The legislature made void laws offending fundamental rights and they were included in Schedule Nine and later on the list was extended from time to time. Article 31-B declared that none of the acts or regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void on the ground that they are inconsistent with Part III, notwithstanding any judgments, decree or order of any court or tribunal to the contrary. By further amendment, the list was extended. This amendment discloses a cynical attitude to the rule of law and the philosophy underlying our Constitution. Autocratic power was sustained by democratic processes. The amendments in the realm of property substituted the Constitutional philosophy by totalitarian ideology.

This totalitarian ideology is articulated by the deliberate use of amendments to add more and more laws to the Ninth Schedule. Originally 64 laws were added to the Ninth Schedule and more acts were added by the 4<sup>th</sup>, 17<sup>th</sup> and 29<sup>th</sup> Amendment Acts ; 34<sup>th</sup> Amendment added 17 more Acts; 39<sup>th</sup> Amendment added 38 Acts; 42<sup>nd</sup> Amendment added 64 Acts; the 47<sup>th</sup> Amendment added 14 more Acts and by the end of this amendment the number of Acts in the Ninth Schedule had risen to 202; The 66<sup>th</sup> Amendment added 55 Acts raising the total to 257. The 75<sup>th</sup> Amendment Act, 1994 has been passed by the parliament, which includes Tamil Nadu Act providing for 69 percent reservation for backward classes under the Ninth Schedule. This is a clear misuse of the Ninth Schedule for political gains as the object of the Ninth Schedule of the Constitution is to protect only land reform laws from being challenged in court.

After the addition of 27 more Acts to the Schedule by the 78<sup>th</sup> Amendment Act of 1995 the total number of Acts protected by the Schedule has risen to 284. The saga did not end here, the hornet's nest had been stirred up already, the state made a consistent attempt by the process of amendment to the Constitution to remove the judicial check on the exercise of its power in a large area, and to clothe itself with arbitrary power in that regard. The history of the amendments of Article 31(1) and (2) and the adding of Articles 31(A) and (B) and the Ninth Schedule reveal the pattern. Article 31 in its first two clauses deals with the deprivation of property and acquisition of property. The Supreme Court held in a series of decisions viz. *State of West Bengal vs Mrs. Bella Banerjee*,<sup>1</sup> *W.B vs Subodh Gopal*,<sup>2</sup> *State of Madras vs Namasivaya Muralidar*,<sup>3</sup> that Article 31, clauses (1) and (2) provided for the doctrine of eminent domain and under clause (2) a person must be deemed to be deprived of his property if he was "substantially dispossessed" or his right to use and enjoy the property was

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<sup>1</sup> (1954) SCR 558.

<sup>2</sup> (1954) SCR 587.

<sup>3</sup> (1964) 6 SCR 35.

“seriously impaired” by the impugned law. According to this interpretation, the two clauses of Article 31 dealt only with acquisition of property in the sense explained by the court, and that under Article 31(1) the state could not make a law depriving a person of his property without complying with the provisions of Article 31(2). It is worth mentioning in this context that it was the decision in the *Bella Banerjee’s* case, that actually induced the government to resort to the Fourth Amendment. In this case the Apex court through this landmark decision had insisted for payment of compensation in every case of compulsory deprivation of property by the state. It was held that clause (1) and (2) of Article 31 deal with the same subject, that is, deprivation of private property. Further the court held that the word “compensation” meant “just compensation” i.e. just equivalent of “what the owner had been deprived of.” It is also worthwhile to note here that this amendment also amended Article 305 and empowered the state to nationalise any trade.

The Parliament instead of accepting the decision, by its Fourth Amendment Act, 1955 amended clause (2) and inserted clause (2-A) to Article 31. The effect of the amendment is that clause (2) deals with acquisition or requisition as defined in clause (2-A) and clause (1) covers deprivation of a person's property by the state otherwise than by acquisition or requisition. This amendment enables the state to deprive a person of his property in an appropriate case by a law. This places an arbitrary power in the hands of the state to confiscate a citizen's property. This is a deviation from the ideals of the rule of law envisaged in the Constitution. The amendment to clause (2) of Article 31 was an attempt to usurp the judicial power. Under amended clause (2), the property of a citizen could be acquired or requisitioned by law which provides for compensation for the property so acquired or requisitioned, and either fixes the amount of compensation or specifies the principles on which and the manner in which the compensation is to be determined. It was further provided that no such law could be called in question in any court on the ground that the compensation provided by that law is not adequate. This amendment made the state the final arbiter on the question of compensation. This amendment conferred an arbitrary power on the state to fix at its discretion the amount of compensation for the property acquired or requisitioned. The non-justiciability of compensation enables the state to fix any compensation it chooses and the result is, by abuse of power, confiscation may be effected in the form of acquisition.

Then came the Seventeenth Amendment Act, 1964 by which the state extended the scope of Article 31-A and Ninth Schedule to protect certain agrarian reforms enacted by the Kerala and Madras states. The word “estate” in Article 31-A now included any *jagir or inam, mauf*, or any other grant and *janmam* right in state of Kerala, Madras and also *Ryotwari* lands. It also added consequentially, the second proviso to clause (1) to protect a person of being deprived of land less than the relevant land ceiling limits held by him for personal cultivation,<sup>4</sup> except on payment of full market value thereof by way of compensation. It also added 44 more Acts to the Ninth Schedule.

The Supreme Court by various judgments considered the said amendments and restricted their scope within reasonable confines. The Supreme Court in *Kocchuni vs State of Madras*,<sup>5</sup> did not accept the plea of the state that Article 31(1) after amendments gave an unrestricted power to the state to deprive a person of his property. It held that Article 31(1) and (2) are different fundamental rights and that the expression “law” in Article 31(1) shall be valid law and that it cannot be valid law unless it amounts to a reasonable restriction in public interest within the meaning of Article 19(5). While this decision conceded to the state the power to deprive a person of his property by law in an appropriate case, it was made subject to the condition that the said law should operate as reasonable restriction in public interest and be justiciable. The Court construed the amended provision reasonably in such a way as to salvage to some extent the philosophy of the Constitution.

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<sup>4</sup> This became necessary as the definition of “estate” was simultaneously expanded to cover “Ryotwari settlements” in order to make agrarian reforms more effective.

<sup>5</sup> AIR 1960 SC 1080.

But the Supreme Court in *Srimathi Sitabai Devi vs State of West Bengal*<sup>6</sup> held that Article 31(2) i.e., the provision relating to the acquisition or requisition of land was not subject to Article 19(5). It would have been logical if the expression "law" in Article 31(2) was given the same meaning as in Article 31(1). In that event, the law of acquisition or requisition should not only comply with the requirements of Article 31(2) and (2-A), but should also satisfy those of Article 19(5). That is to say, such a law should be for a public purpose, provide for compensation and also satisfy the double test of "reasonable restriction" and "public interest" provided by Article 19(5). The reasonableness of such a law should be tested from substantive and procedural standpoints. There may be a public purpose, but the compensation fixed may be so illusory that it is unreasonable. The procedure prescribed for acquisition may be so arbitrary and therefore unreasonable. There may be many other defects transgressing the standard of reasonableness, both substantial and procedural.

But from a practical standpoint, the present dichotomy between the two decisions—*Kochini* and *Sithabathi Devi*—did not bring about any appreciable hardship to the people, for a law of acquisition or requisition which strictly complies with the ingredients of clause (2) may ordinarily also be "reasonable restriction" in "public interest." Substantive deviations from the principles of natural justice may be hit by Article 14. Provision for an illusory compensation may be struck down on the ground that it does not comply with the requirement of Article 31(2) itself. That is if the courts make it mandatory to bring 31(2) in conformity with 31(1).

The Supreme Court in *P Vajravelu Mudalier vs Special Deputy Collector*<sup>7</sup> and *Union of India Vs Metal Corporation of India*<sup>8</sup> considered Article 31(2) in the context of compensation and held that if the compensation fixed was illusory or the principles prescribed were irrelevant to the value of the property at or about the time of acquisition, it could be said that the Legislature had committed a fraud on power and therefore the law was inadequate.

The Supreme Court in three other decisions confined the bar of Article 31-A only to agrarian reforms. In *Kochini* case the Court held that requirement of Article 31-A bars an attack on the ground of infringement of fundamental right only in the case of agrarian reforms, pertaining to an estate. In *Ranjith Singh vs State of Punjab*,<sup>9</sup> it was held that the expression "agrarian reform" was wide enough to take in consolidation of holdings as it was nothing more than a proper planning of rural areas. In *Vajravelu* decision the Supreme Court explained that there is no conflict between the said two decisions and pointed out that the latter decision includes in the expression of agrarian reforms, the slum clearance and other beneficial utilisation of vacant and waste lands.

In a *Ghulabhai vs Union of India*,<sup>10</sup> the Supreme Court did not accept the contention of the state that the expression "Estate" takes in all waste lands, forest lands, lands for pastures or sites of buildings in a village whether they were connected with agriculture or not but ruled that the said enumerated lands would come under the said definition only if they were used for the purpose of agriculture or for purposes ancillary thereto.

The result of the brief survey of the provisions of the Constitution and the case law thereon as it stood then may be stated in the form of the following propositions:

- (1) Every citizen has a fundamental right to acquire, hold and dispose of the property.
- (2) The state can make a law imposing reasonable restrictions on the said right in public interest.
- (3) The said restrictions, under certain circumstances, may amount to deprivation of the said right.

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<sup>6</sup> (1967) 1 SCR 614.

<sup>7</sup> (1965) 1 SCR 614.

<sup>8</sup> (1967) 1 SCR 255.

<sup>9</sup> AIR 1965 SC 632.

<sup>10</sup> AIR 1967 SC 1110.

- (4) Whether a restriction imposed by law on a fundamental right is reasonable and in public interest or not, is a justiciable issue.
- (5) The state can by law, deprive a person of his property if the said law of deprivation amounts to reasonable restriction in public interest within the meaning of Article 19(5).
- (6) The state can acquire or requisition the property of a person for a public purpose after paying compensation.
- (7) The adequacy of the compensation is not justiciable.
- (8) If the compensation fixed by law is illusory or is contrary to the principles relevant to the fixation of compensation, it would be a fraud on power and therefore the validity of such a law becomes justiciable.
- (9) Laws of agrarian reform depriving or restricting the rights in an "estate"—the said expression has been defined to include practically every agricultural land in a village—cannot be questioned on the ground that they have infringed fundamental rights.

### The Parliament's Power to Amend Was in Deep Trouble

Another path breaking development, which is till today being considered as the most trivial phase faced by the judiciary and legislature in entire Constitutional history of our nation was triggered off by the issue of right to property. As explained herein before there was an ongoing tussle between the judiciary and the legislature regarding the Constitutional provisions of right to property. The theory was simple. The judiciary was invalidating legislative action curbing property rights in order to uphold the sanctity of the Constitution. And whenever the judiciary invalidated a law by terming it as unconstitutional the legislature would conveniently amend the Constitution in order to uphold its supremacy over the judiciary. When this saga was going on, there emerged another set of litigations which actually intended to put an end to the legislative manipulation by questioning the amending power of the Constitution itself.

These litigations were based on the relevance of Article 13(2) of the Constitution which provides that the state shall not make any law which takes away or abridges the fundamental rights and any law made in contravention of fundamental right shall to the extent of contravention, be void. So the line of argument that was put forward by the litigants in the cases to be discussed hereinafter was questioning the validity of amending power of the parliament with regard to fundamental rights.

It all began when the question whether fundamental rights can be amended under Article 368 came for consideration of the Supreme Court in *Shankari Prasad v. Union of India*.<sup>11</sup> In this case the validity of the Constitution (1<sup>st</sup> Amendment) Act, 1951, which inserted *inter alia*, Articles 31-A and 31-B of the Constitution was challenged. The Amendment was challenged on the ground that it purported to take away or abridge the rights conferred by Part III, which fell within the prohibition of Article 13 (2) and hence was void. It was argued that the "state" in Article 12 included parliament and the word "law" in Article 13 (2), therefore, must include Constitution amendment. The Supreme Court, however, rejected the above argument and held that the power to amend the Constitution including the fundamental rights is contained in Article 368, and that the word "law" in Article 13 (8) includes only an ordinary law made in exercise of the legislative powers and does not include Constitutional amendment which is made in exercise of constituent power. Therefore, a Constitutional amendment will be valid even if it abridges or takes any of the fundamental rights.

In *Sajjan Singh v. State of Rajasthan*,<sup>12</sup> the validity of the Constitution (17<sup>th</sup> Amendment) Act, 1964 was challenged. The Supreme Court approved the majority judgement given in *Shankari Prasad's* case and held that the words "amendment of the Constitution" means amendment of all the provisions of the Constitution. Gajendragadkar, C J said that if the Constitution-makers intended to exclude the

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<sup>11</sup> AIR 1951 SC 455, p 458.

<sup>12</sup> AIR 1965 SC 845.

fundamental rights from the scope of the amending power they would have made a clear provision in that behalf.

### Golaknath vs State of Punjab<sup>13</sup> Constituent Power

The Supreme Court through this landmark judgment cried a halt to the continuous erosion of fundamental rights. There, the petitioner questioned the validity of the First, Fourth and Seventeenth Amendments of the Indian Constitution on the ground that they abridge the scope of the fundamental rights guaranteed by Part III of the Constitution. The Supreme Court held that the Parliament has no power to amend the Constitution so as to take away or abridge the fundamental right of the people. But the Court held on the application of the doctrine of prospective overruling that all the amendments made by the Parliament up to the date of the judgment were and would continue to be valid. The legal basis of the judgment may briefly be stated thus: Under Article 368, the Parliament has the power to amend the Constitution. Under Article 13(2) the state is prohibited from making any law, which takes away or abridges the fundamental rights and such a law if made is void. The question is whether amendment is law. If it is law and if it takes away or abridges fundamental right, it will be invalid. It is conceded that amendment is law, in its comprehensive sense, but it is said that expression "law" in Article 13(2) is the law made in exercise of legislative power, but the amendment is made in exercise of "Constituent power" conferred on the Parliament under Article 368. Five of the six judges who expressed the majority view held that amendment to the Constitution is made in exercise of the residuary legislative power under Article 245 and that Article 368 only prescribes a special procedure and a special majority for exercising the said power and one of them held that the power to amend was implicit in Article 368 itself. It is not really important whether the power to amend is here or there. But the main question is whether the amendment is made in exercise of constituent power. If it is not in exercise of constituent power it must necessarily be an exercise of a legislative power. There is no other way of making laws. What is constituent power? It is a power to elect representatives, charged with the making or changing Constitution. This power rests with the people. They can elect a Constituent Assembly and confer the power on them. The Constituent Assembly after making the Constitution becomes *functus officio*. The said assembly cannot confer that constituent power on any institution created under the Constitution. It may confer a wide power of amendment on the Parliament, but that power of amendment is exercised under the Constitution and therefore is not a constituent power. To put in other words, amending power is a power under the Constitution, whereas the constituent power is a power outside the Constitution. The former is given to the Parliament and the latter rests with the people.

As Justice Subba Rao observed "But no matter how elaborate the provision for amendment may be, they must never, from a political view point, be assumed to have superseded the constituent power."<sup>13</sup>

Therefore as an amendment is made in exercise of the power conferred on the Parliament under the Constitution, it is clearly law and in so far as it infringes Article 13, it is void. If the Parliament seeks to take away or abridge fundamental rights, it should seek the help of the people to create a new Constituent Assembly. The Parliament in exercise of its residuary power can make a law providing for a machinery for electing a Constituent Assembly. This process enables the people to appreciate the scope of the freedom and if they choose to give up their freedom or to place them at the mercy of the transitory majority of the Parliament, they could elect such representatives who could achieve that purpose. The suggestion that the Parliament can convert itself into a Constituent Assembly would be illegal, for, by that process it does not get the requisite mandate from the people in whom the constituent power rests.<sup>14</sup>

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<sup>13</sup> AIR 1967 SC 1647.

<sup>14</sup> "Property Rights under the Constitution" (1969) 2 SCC (jour) 1.

The criticism that the judgment of the Supreme Court tied the hands of the Parliament and prevented it in future to usher in the agrarian and other economic reforms so essential for the progress and prosperity of the country is without substance. The Supreme Court held on the application of the doctrine of prospective overruling that all the amendments made by the Parliament up to the date of the judgment were and would continue to be valid with the result that all the agrarian reforms already made were sustained and the Parliament continues to have the power to introduce further agrarian reforms under the protection of the amendments already made. The state no doubt could not confiscate property for a purpose not related to agrarian reforms, but the said amendments enable the government to acquire land by paying compensation, the adequacy whereof is not justiciable. The state can also introduce further land reforms other than agrarian reforms by law imposing reasonable restrictions in public interests on the right to property. In extraordinary circumstances, when the situation demands, it can deprive a person of his property in public interests. It has also the power to impose taxes and take back money from persons with large income for social purposes. The only difference between an exercise of power in respect of agrarian reforms and in respect of other reforms is that the former cannot be questioned in a court of law, while the latter is justiciable. It will, therefore, be seen that the Parliament had still vast power, if it chooses and its exercise is essential for public good, to bring about radical changes in the realm of property law. What the judgment really saved were the other rights like right to equality, right to freedom, including rights like right to freedom of the press, right to personal liberty, right against exploitation, right to freedom of religion, cultural and educational rights and right to Constitutional remedies.<sup>13</sup>

There appeared to be some controversy in regard to the impact of the judgment on Schedule Nine of the Constitution. A view was expressed that under the judgment, the Parliament could add new acts to the Schedule and make them immune from attack on the ground that they infringe fundamental rights. As the Court held that only the amendments already made would continue to be valid and that the Parliament has no power to amend the Constitution as to take away or abridge fundamental rights, it follows that no further amendment of the Schedule would be possible by including therein acts which affect fundamental rights, for the inclusion of such new acts in the said Schedule would be the amendment of the Schedule of the Constitution, and therefore of the Constitution and as the inclusion of such acts would have the effect of abridging the fundamental rights of the people affected by such acts, the said inclusion would be void. What the amendment cannot do directly, it cannot obviously do indirectly.<sup>14</sup>

The decision given by the Apex court in the Golaknath's case seemed like the most reasonable judgement and seemed to have put issues in the right perspective. The solution to the controversy seemed more eminent than ever before. But sadly the Judiciary did not have the last word yet again.

### The Twenty-fourth Amendment Act, 1971

In order to remove difficulties created by the decision of Supreme Court in Golaknath's case, the Parliament enacted the (24<sup>th</sup> Amendment) Act. The amendment has made the following changes:

- (1) It has added a new clause (4) to Article 13, which provides that "nothing in this Article shall apply to any amendment of this Constitution made under Article 368."
- (2) It substituted a new marginal heading to Article 368 in place of the old heading "Procedure for amendment of the Constitution." The new heading is "Power of Parliament to amend the Constitution and Procedure therefore."
- (3) It inserted a new sub-section (1) in Article 368 which provides that "notwithstanding anything in this Constitution, Parliament may, in exercise of its constituent power amend by way of addition, variation, or repeal any provision of this Constitution in accordance with the procedure laid down in this Article."
- (4) It substituted the words, "it shall be presented to the President who shall give his assent to the Bill and thereupon" for the words "it shall be presented to the President for his assent and upon

such assent being given to the Bill.” Thus it makes it obligatory for the President to give his assent to the Bill amending the Constitution.

- (5) It has added a new clause (3) to Article 368, which provides that “nothing in Article 13 shall apply to any amendment made under this Article.”

Thus the 24<sup>th</sup> Amendment not only restored the amending power of the Parliament but also extended its scope by adding the words “to amend by way of the addition or variation or repeal any provision of this Constitution in accordance with the procedure laid down in this Article.”

In short the parliament redefined democracy in India as a synonym of totalitarianism. On November 5, 1971 the President of India gave his assent to the 24<sup>th</sup> Amendment. The cure for the illusion that the parliament would exercise its newly conferred power with restraint and circumspection is to look at the 25<sup>th</sup> Amendment, which came into force on April 20, 1972.

### The Twenty-fifth Amendment Act, 1971

The Twenty-fifth Amendment contained three significant provisions:

First, it amended Article 31(2) and provided that anyone’s property may be acquired on payment of an “amount” instead of “compensation.” The intention was that the citizen’s right to property should be transformed into the state’s right to confiscation and the state should be able to deprive anyone of any property in return for any amount payable at any time on any terms; and the executive action, however arbitrary or irrational, should not be subjected to the Court’s scrutiny. Such state action may have a direct impact on any of the other fundamental rights, the exercise of which would be impeded or negated by the deprivation of property without compensation, the only exception being the case of educational institutions dealt with in the proviso to Article 31(2). Publishers may be deprived of their printing presses and buildings, trade unions of their properties, professional men of their professional assets, all without compensation, and thus the fundamental rights to freedom of speech, to form unions, and to practice any profession, guaranteed by Article 19(1)(a), (c) and (g)—can be eroded or extinguished. The amended Article 31 has nothing to do with concentration of wealth, and permits any common citizen’s property, however small in value, to be acquired by the state without the payment of what would be compensation in the eye of the law.

Second, the Supreme Court had held in the Bank Nationalisation case<sup>15</sup> that the power of acquisition or requisition envisaged by Article 31(2) was subject to the citizen’s right to acquire, hold and dispose of property under Article 19(1)(f) which, in its turn, was subject under Article 19(5) to reasonable restrictions in the interests of the general public. The Twenty-fifth Amendment enacts that Article 19(1)(f) would be inapplicable to acquisition or requisition laws. Since all reasonable restrictions in the public interest are already permitted under Article 19(5), the only object of making Article 19(1)(f) inapplicable would be to enable acquisition and requisition laws to contain restrictions and procedural provisions which are unreasonable or not in the public interest. It is impossible to perceive the social content of a law, which is not reasonable, or not in the public interest. After the Twenty-fifth Amendment, any law for requisitioning or acquiring property may be passed with an express provision, which violated the rules of natural justice. The Land Acquisition Act can be amended to provide expressly that any man’s land or house can be acquired without any notice to the owner to show cause against the acquisition or to provide what “amount” should be paid to him for the property acquired. In fact, many industrial undertakings have been nationalised overnight by ordinances, which fixed, without any notice to anyone, ridiculous amounts payable by the state.

Thirdly, the Twenty-fifth Amendment inserted Article 31C which provides that “no law giving effect to the policy of the state towards securing the principles specified in clause (b) or clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any

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<sup>15</sup> R C Cooper vs Union of India [1970] 3 SCR 530, 576-77, AIR 1970 SC 564, 596-97.

of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy.”

The Directive principles of state policy set out in Article 39(b) and (c) deal with the entire economic system, and therefore, countless categories of law can claim the protection of Article 31C since most laws can be related to the economic system in one way or another.

### Subversion of Seven Essential Features of the Constitution<sup>16</sup>

Article 31C sought to subvert seven essential features of the Constitution.

First, there is a fine but vital distinction between two cases of Constitutional amendment:

- (1) Where the fundamental rights are amended to permit laws to be validly passed which would have been void before amendment; and
- (2) Where the fundamental rights remain unamended but the laws, which are void, as offending those rights are validated by a legal fiction that they shall not be deemed void.

The question is not merely of legislative device. In the first case the law is Constitutional in reality, because the fundamental rights themselves stand abridged. In the second case the law is unconstitutional in reality but is deemed by a fiction of law not to be so; with the result that Constitution breaking law is validated and there is a repudiation of the Constitution *pro tanto*.

If the second case is permissible as a proper exercise of the amending power, the Constitution could be reduced to a scrap of paper. If 31C is valid, it would be equally permissible to parliament to so amend the Constitution as to declare all laws to be valid which are passed by the parliament or state legislatures in excess of their legislative competence, or which violate any of the basic human rights in Part III or the freedom of inter-state trade in Article 301. It would be equally permissible to have an omnibus article that “notwithstanding anything in the Constitution, no law passed by the Parliament or any state legislature shall be deemed to be void on any ground whatsoever.” The insertion of one such article would toll the death-knell of the Constitution. (The fact that under the Supreme Court’s judgement in the fundamental rights case<sup>17</sup> the Constitution cannot be so amended so as to alter the basic structure, is relevant to the point considered here, viz. that a quietus is given to the supremacy of the Constitution by the omnibus protection of Constitution-breaking laws.)

Thus Article 31C clearly damages or destroys the supremacy of the Constitution, which is one of the essential features. It gives a blank charter to the parliament and to all the state legislatures to defy and ignore the Constitutional mandate regarding human rights. Second, Article 31C subordinates the fundamental rights to the Directive principles of state policy and in effect abrogated the rights as regards laws, which the legislature intends or declares to be for giving effect to the directive principles. The fundamental rights are paramount and are enforceable in the courts (Article 32 and 226), in contrast to the directive principles, which are not so enforceable (Article 37). To abrogate fundamental rights when giving effect to directive principles is to destroy another basic element of the Constitution. Ignorance and arbitrariness, injustice and unfairness, was thereafter not to be upon challenge on the touchstone of the invaluable basic rights.

Third, it is a fundamental principle of the Constitution that it can be amended only in “form and manner” laid down in Article 368 and according to that Article’s basic scheme.<sup>18</sup> This principle was repudiated by Article 31C. That Article had the effect of virtually authorising the abrogation of the fundamental rights while they still remain ostensibly in the statute book. Criticism and debate, within

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<sup>16</sup> Palkhivala, N A, *Our Constitution Defaced and Defiled*, pp 53-61.

<sup>17</sup> *Keshvananda Bharathi vs State of Kerala* AIR 1973 SC 1461.

<sup>18</sup> Cf *Attorney-General of New South Wales vs Therthtown* 1932 AC 526.

and outside parliament, which would be evoked by a proposal to abridge a particular fundamental right are avoided, while various fundamental rights are effectively silenced. The absurd situation was that, whereas amendment of a single fundamental right would require a two-thirds majority (Article 368), a law falling within 31C which overrides and violates several fundamental rights could be passed by a simple majority.

Fourth, the fundamental rights constitute an essential feature of the Constitution. Within its field Article 31C completely took away:

- the right to acquire, hold and dispose of property [Article 19(1)(f)];
- the right not to be deprived of property save by authority of law [Article 31(1)];
- the right to assert that property can be acquired or requisitioned by the state only for a public purpose [Article 31(2)]; and
- the right to receive an “amount”, however small, when the state seizes the property [Article 31(2)].

In short, Article 31C expressly authorised outright confiscation of any property, large or small, belonging to anyone, poor or rich, citizen or non-citizen.

Further, Article 31C provides for the wholesale smothering of various rights which were all together distinct from right to property and are totally irrelevant to the Directive principles of state policy laid down in Article 39(b) and (c). Even the rights to equality before law, to freedom of speech and expression, to assemble peaceably and without arms, to form associations and unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India, and to practice any profession or to carry on any occupation, trade or business which are so vital for the survival of the democracy, the rule of law, and the integrity and unity of the republic, can be violated under Article 31C under the cloak of improving the “economic system.”

Fifth, it was not even permitted to raise the question whether the proposed law will result, or is reasonably calculated to result, in securing the directive principle laid down in Article 39(b) and (c). the wrong done to the people who are deprived of their basic freedoms is worsened by protection to those laws, which may not be at all calculated to give effect to the directive principles.

The right to move the Supreme Court to enforce other fundamental rights is itself a fundamental right (Article 32) and is a basic feature of the Constitution. This right is destroyed when a fundamental right is made unenforceable against a law purporting to give effect to the directive principles and at the same time the court is precluded from considering whether the law is such that it can possibly secure any directive principle.<sup>19</sup>

Sixth, the basic principle of the Constitution is that no state legislature can amend the fundamental rights or any other part of the Constitution. This essential feature is repudiated by 31C, which empowers even state legislatures to pass laws, which virtually involve a repeal of the fundamental rights. The wholly irrational consequence is that whereas state legislatures cannot abridge a single fundamental right, it was now open to them to supercede a whole series of such rights. In substance, the power of amending or overriding the Constitution is delegated to all state legislatures, which is not permissible under Article 368.<sup>20</sup> N A Palkhivala rightly remarked in this regard “Hereafter liberty may survive in some states and not in others, depending on the complexion of the political party in

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<sup>19</sup> In *Keshvananda Bharathi vs State of Kerala* AIR 1973 SC 1461 the Supreme Court held this provision barring the Court's jurisdiction to be void.

<sup>20</sup> Cf *In re The Initiative and Referendum Act 1919* AC 935,945 (P C); *Shama Rao vs Union Territory of Pondichery* [1967] 2 SCR 650, 653-54,659-60, AIR 1967 SC 1480,1484, 1487; *Attorney General of Nova Scotia vs Attorney-General of Canada* 1951 CLR, SC, 31, 37-38.

power. The state of Meghalaya has already passed a law prohibiting the residents of other parts of India staying in Meghalaya for more than six months without permit.”

Seventh, one of the essential features of the Constitution is to provide for due protection to minorities and their cultural and educational rights. The fundamental rights under Article 14, 19 and 31, which were sought to be superseded by Article 31C are necessary to make meaningful rights of the minorities, which are, guaranteed by Articles 25 to 30. Under the guise of giving effect to the directive principles, a number of steps may be taken which may seriously undermine the position of regional linguistic, cultural and other minorities.

The proviso inserted by the 25<sup>th</sup> amendment is a very tall tale. It expressly provides that where the property of an educational institution established and administered by a minority is acquired, the amount fixed for the acquisition should be such as not to restrict or abrogate the right guaranteed under 30(1). The clear implication is that when property is acquired in any other cases, an amount can be fixed which abrogates or restricts any other fundamental rights, for instance, the right to freedom of speech and expression [Article 19(1)(a)], to form associations or unions [Article 19(1)(c)], or to practice any profession or carry out any occupation, trade or business [Article 19(1)(g)], or the right of an religious community to establish and maintain institutions for religious or charitable purposes (Article 26). Further, if a law violates the rights of the minorities under Articles 25 to 30, such law, being invalid, would be no law at all and therefore deprivation of property under such a law would violate Article 31(1) which provides that no person shall be deprived of his property save by authority of law, i.e. a valid law. But since 31(1) is one of the articles abrogated by Article 31C, minorities can be deprived of their properties held privately or upon public charitable or religious trust, by a law which is invalid.

In sum, Article 31C is a monstrous outrage on the Constitution.

In the entire history of liberty, never were so many millions of people deprived of so many fundamental rights in one sweep as by the insertion of Article 31C. De Tocqueville remarked that “nothing is more arduous than the apprenticeship of liberty.” N A Palkhivala rightly remarks with grief in this context that “It is a measure of our immaturity as a democracy and the utter apathy of our people that the betrayal of our basic freedoms excited hardly any public debate.”

The four attributes of a totalitarian state are:

- (1) Constitutional to the ruling party to favour its own members,
- (2) Denial of the right to dissent or to oppose,
- (3) Denial of various personal freedoms, and
- (4) The state’s right to confiscate anyone’s property.

All these four attributes were implicit in Article 31C. The Article had a built in mechanism for the dissolution of the true democracy that India had been so far, cession of rule of law and possible disintegration of the nation.

The government’s argument was that though the power of amending the Constitution must be held to be limitless after the 24<sup>th</sup> amendment and it can destroy human freedoms under Article 31C, the legislature will not use the power. The answer to this is contained in the words of W B Yeats “No Government has the right, whether to flatter fanatics or in mere vagueness of mind, to forge an instrument of tyranny and say that it will never be used.”

Moreover, laws characterised by stringent injustice have in fact been passed in pursuance of the amended Article 31(2) and 31C. General insurance companies have been nationalised under a law, which provided for fixed “amounts” payable on the acquisition of all their assets and liabilities, the amounts having been fixed on a basis which was not officially disclosed either to parliament or to the

public but which transpired to be positively absurd. Some companies found that the amounts they received were less than the value of their government securities and the amounts of their bank balance and of their currency notes after providing for all their liabilities; in other words, there was a blatant repudiation of national debt. One insurance company was paid Rs 10, 000 for acquisition of its net assets worth more than Rs 23,00,000. Laws for acquisition of coal mines were also passed, under which all assets of the nationalised companies were taken over but none of their liabilities; and further, all the creditors of the companies are statutorily deprived of every charge or security which had been created on the companies assets. The net result was that the banks, which had advanced money to the companies, lost their principal, interest and security; debenture holders lost their entire capital; ex-employees of the companies who retired before nationalisation lost their right to pension and other dues; and traders lost the price of the goods they had given on credit. Thus innumerable innocent citizens found their property virtually confiscated outright as a side effect of the law expropriating the colliery companies. Those companies could not discharge their liabilities because all their assets are gone and also the derisory "amounts" due to them on nationalisation was to be paid to the Commissioner of Claims who would not be appointed at all for years. Similar nationalisation laws were passed for confiscation of all assets of "sick" textile mills, with statutory abrogation of all mortgages and other securities in favour of creditors, with the same disastrous consequences for innocent third parties.

Article 31C had damaged the very heart of the Constitution. N A Palkhivala remarked "This poisonous weed has been planted... where it will trouble us a hundred years, each age will have to reconsider it."<sup>15</sup>

### Fundamental rights Case: The Decision that saved the Constitution but yet Killed the Right to Property

Kesavanada Bharathi vs State of Kerala,<sup>21</sup> was one of the milestones in the history of jurisprudence. In this case popularly known as the fundamental rights' case the petitioners had challenged the validity of the Kerala Land Reforms Act 1963. But during the pendency of the petition the impugned Act was amended in 1971 and was placed under the Ninth Schedule by the 29<sup>th</sup> Amendment Act. The petitioners were permitted to challenge the 24<sup>th</sup>, 25<sup>th</sup> and the 29<sup>th</sup> amendments also. The question was as to what was the extent of the amending power conferred by Article 368 of the Constitution?

The Government of India claimed that it had the right as a matter of law to change or destroy the entire fabric of the Constitution through the instrumentality of Parliament's amending power; and that it should be trusted to exercise this seminal right wisely but not too well. Seventy years earlier, Hitler had asserted and exercised such a right by invoking the amending power of the German legislature, and there was no judicial pronouncement to restrain that dictator.

Six senior judges of the Supreme Court (Chief Justice S M Sikri, who retired a day after the judgement; Justices J M Shelat, K S Hegde and A N Grover who, for deciding according to their conscience, were superseded for the office of the Chief Justice of India; and Justices P Jaganmohan Reddy and A K Mukherjea) held as follows:

- (1) Parliament's amending power is limited. While Parliament is entitled to abridge any fundamental right or amend any provision of the Constitution, the amending power does not extend to damaging or destroying any of the essential features of the Constitution. The fundamental rights are among the essential features of the Constitution; therefore, while they may be abridged, the abridgment cannot extend to the point of damage to or destruction of their core.
- (2) Article 31C is void since it takes away invaluable fundamental rights, even those unconnected with property. (The question of severability of the offending provisions of Article 31C, which was dealt with by one of the judges, is not referred to here.)

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<sup>21</sup> AIR 1973 SC 1461.

On the other hand, Justices A N Ray, D G Palekar, K K Mathew, M H Beg, S N Dwivedi and Y V Chandrachud held that the power of amendment is unlimited; and they held Article 31C to be valid.

Thus, six judges decided the case in favour of the citizen and six in favour of the state. Justice H R Khanna did not agree completely with any of these twelve judges and decided the case midway between the two conflicting viewpoints. He held that (a) the power of amendment is limited; it does not enable Parliament to alter the basic structure or framework of the Constitution; (b) the substantive provision of Article 31C, which abrogates the fundamental rights, is valid on the ground that it does not alter the basic structure or framework of the Constitution; and (c) the latter part of Article 31C, which ousts the jurisdiction of the Court, is void.

Thus, by a strange quirk of fate, the judgment of Justice Khanna, with which none of the other twelve judges totally agreed, has become the law of the land. This result follows from the fact that while Justice Khanna did not fully agree with the six judges who decided in favour of the citizen, he went a part of the way along with them; and the greatest common denominator between the judgments of the six judges in favour of the citizen and the judgment of Justice Khanna became the judgment of seven judges and thus constituted the majority view of the Supreme Court.

But then he spelt catastrophe to 19(1)(f), when he held that Right to Property did not pertain to the basic structure of the Constitution.

### Fundamental rights' Case and Attitude of Judges towards Right to Property

Kesavananda Bharathi case, which is undoubtedly the most significant development in the constitutional history of India, is paradoxically likely to create an illiterate Bar in this country. A decision that runs over 700 closely printed pages is most unlikely to be read by the majority of the Bar; and if read only once it is most unlikely to be understood. But a legal profession, which misses out on the liberal and legal reading of this decision, is thus likely to commit mayhem upon itself, thereby upon the development of the constitutional jurisprudence in this country. As always, the illiteracy of the literate is more pernicious for development than that of the illiterate.<sup>22</sup>

The well-known Twenty-fifth Amendment purports on its face to deprive the judiciary of any say in the matter of compensation for deprivation of property. It is based on the myth that the Supreme Court of India has been the protagonist of the right to property and an antagonist of every major attempt at an egalitarian social order through its requirement of market value compensation for acquisition of property. The myth has been carefully nurtured—intentionally or otherwise—by the targets, consumers, and students of the court. So successful has been the mythologization process that even the judiciary in the country, including some Justices like Kesavananda, have (with respect) fallen easy prey to it.

Myths do serve some constructive functions in society but it is doubtful whether this particular myth has served us well. The untenable premise of the contention is that the right to property coupled with judicial review of legislation affecting it is somehow an obstacle to the very fulfillment of the Directive principles of state policy.

The truth is that all the fundamental rights together with the majority of the directive principles elucidate the constitutional conception of social justice for India; and this conception, like all conceptions of social justice, embodies values, which cannot be fulfilled concurrently in an economy of scarcity. Choices giving priority to one or the other value from amongst all the values of equal

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<sup>22</sup> Baxi, Upendra. "The constitutional quicksand of Kesavananda Bharathi and the Twenty-fifth Amendment" (1974) 1 SCC pp 45.

moral weight have to be made. When this is grasped, it would be impossible to honestly say in the abstract, for example that preferring the standard of just compensation is always contrary to “social justice” or that confiscation is always in consonance with “social justice.”

Kesavananda has also produced (or rather revived) the institution of judicial curse. He says: “But, if despite the large powers now conceded to the parliament, the social objectives are going to be a dustbin of sentiments, then woe betide those in whom the country has placed such massive faith.”<sup>23</sup>

But mere curses, even by the highest in the land, cannot kill the myths. As Voltaire said, that you can kill a flock of sheep with curses only if you add a little bit of arsenic as well.

Kesavananda concedes that Parliament has some powers to amend the Constitution and that such power is constituent, not legislative in nature. On the scope of constituent amending power so recognised, there is no clarity at all. It is of course possible to arrive, mechanically, at the “majority” and the “minority” of Kesavananda and to say that seven judges (Sikri, C J, Shelat, Grover, Hegde, Mukherjea, Jagmohan Reddy, and Khanna, J J) assert certain limitations to the constituent amending power whereas six other judges (Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud, J J) recognise no limitations to the power.

One wishes that the matter was so simple but unfortunately it is not. So this essay only intends to take account of the holdings on the validity of 24<sup>th</sup> amendment only in so far as they clearly bear upon the question of validity of 25<sup>th</sup> amendment.

Even as regards the latter, what the court decided remains uncertain. A very cursory examination reveals the following picture:

- (1) Article 31(2), 31(2)(b) are held valid unanimously but six justices held them valid “as interpreted.” (Sikri, CJ, Shelat, Grover, Hegde, Mukherjea, Jagmohan Reddy, and Khanna, J J.; hereafter referred to as Sikri et al.)
- (2) Article 31C first half is declared valid by seven justices (Ray, Palekar, Mathew, Beg, Khanna, Dwivedi and Chandrachud. J J); Invalid by five (Sikri, CJ, Shelat, Grover, Hegde and Mukerjea, J J); and valid upon severance by Jagmohan Reddy, J.
- (3) Article 31C second half is held invalid by seven justices (Sikri, CJ, Shelat, Grover, Hegde, Mukerjea, Jagmohan, and Khanna. J J); wholly valid by four justices (Ray, Palekar, Beg and Dwivedi, J J); and valid as interpreted by two justices (Mathew and Chandrachud, J J).

Let us now look at the unanimity sustaining Article 31(2). Six judges (Sikri et al.) regard the Article valid only as bearing the interpretation they place on it. This, as will be shown below, is also the case with the remaining seven judges, even though they have not preferred to characterise their conclusions of validity by reference to their interpretations.

It is most important at the outset to ascertain whether Article 31(2) is still a fundamental right. It appears in the part III as such; but after Kesavananda whatever appears in part III, if not the entire Constitution, becomes problematic!

Six judges (Sikri, C J, et al.) explicitly recognise that Article 31(2) is a fundamental right. This recognition has certain important bearings upon its interpretation. For, while they recognise Parliament’s power to amend, and even abridge, fundamental rights they do not allow this power a scope, which would destroy these rights. The new Article 31(2) would be valid only if it did not destroy the right to property. Such destruction would indeed occur if the Article were interpreted to mean that the state has absolute discretion to fix any amount for the affected property, which may not have any relevance to such property. On this view, so long as Article 31(2) is a fundamental right, the

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<sup>23</sup> (1973) 4 SCC 225, 1005, para 2141.

Constitution does not authorise confiscation of private property that is expropriation without some reasonable recompense. The six judges acknowledge that the amount may be less than the market value and that considerations of social justice may help fix or determine the amount. Nevertheless, the right under Article 31(2) entails a corresponding duty on the state to act reasonably in the exercise of the eminent domain power.

The six judges do not derive the above stated conclusion inexorably from the premise that Article 31(2) is a fundamental right. That is only one aspect of their reasoning based upon a construction of the language of Article 31(2), to which we turn in the next section.

As against this, the remaining seven justices are not in full agreement inter se. Justice Dwivedi stands in majestic isolation in holding that Article 31(2) in effect, abrogates the right to property.<sup>24</sup> Justice Khanna seems loftily disinterested in the question whether the Amendment abrogates right to property. This is so because he has determined that the right does not pertain to the “basic framework” of the Constitution. The right to property is a mere “matter of detail” not of basic framework.<sup>25</sup> So that even if the new Article abrogated the right, it would be valid. The question whether it in effect does so does not at all interest the learned Justice.

Of the remaining five justices, Palekar, J, recognises that Article 31(2) postulates a “fundamental right to receive an amount” but this fundamental right means the right to receive what the “Legislature thinks fit.”<sup>26</sup> Justices Ray and Mathew do not speak of Article 31(2) in terms of its being a fundamental right at all. They both conclude that the legislative determination is beyond question in courts.

But unlike Ray, J, Palekar, J, would allow judicial review on the grounds of fraud on the Constitution and illusoriness.<sup>27</sup> Mathew, J, leaves the question pointedly open. And Chandrachud, J, asserts even more pointedly that the Court would have the power to question the law on the above grounds as well as, inter alia, if the principles are “wholly irrelevant for the fixation of the amount.”<sup>28</sup>

Justice Beg’s position, with great respect remains highly anomalous. He adopts on the whole question the reasons of Ray, Mathew and Dwivedi, J J, holds that there is no fundamental right to property. Ray, J, is not as clear, though it is open to argument that since Ray, J, would not allow judicial review even on the ground of illusoriness, he too by necessary implication denies the existence of the fundamental right. Functionally speaking this must be so, because there is no remedy to enforce the duty on the state to pay a reasonable amount. Payment of one paise would be adequate to oust the judicial review on the reasoning of Justice Ray.

However, Justice Beg also adopts the reasons and conclusions of Justice Mathew who in effect differs from Ray and Dwivedi, J J, by clearly leaving open illusoriness and fraud as possible grounds of judicial review. Mathematically, therefore, one would have to apportion half of Justice Beg’s agreement to Mathew, J, and half to Ray and Dwivedi, J J. If this is unreasonable, Justice Beg’s opinion on Article 31(2) will have to be altogether excluded. If this too is unreasonable, one will have the option to choose between two equally unreasonable courses.

### **The net result on this issue is as follows:**

- (1) Eight justices (Sikri et al., Chandrachud and Palekar, J J) acknowledge that the right to receive amount is a fundamental right. That is to say, Article 31(2) abridges but does not take away right to property.

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<sup>24</sup> SCC p 953, paras 1971-2.

<sup>25</sup> SCC p 794, para 1483.

<sup>26</sup> SCC p 721, para 1319.

<sup>27</sup> Ibid.

<sup>28</sup> SCC p 889, para 1754.

- (2) Two (or two and a half) Justices rule that the right to property is abrogated (Dwivedi and Ray, JJ plus a portion of Beg, J).
- (3) One Justice (or one and a half, if we include Beg J, with Mathew, J) takes a position not easy to characterise in this respect. On the one hand, judicial review is held completely excluded; on the other, judicial review on the grounds of “illusoriness” and “fraud” seems to have been left open. The significance of maintaining any degree of judicial review as to the amount payable for acquisition is that it endows the fundamental right with a legal remedy, whatever be the scope of this remedy.
- (4) One Justice (Khanna, J) adopts an approach in which the question whether the right to property is a fundamental right or not becomes a narrow academic question.
- (5) Therefore due to a quirk of fate, a decision given by Khanna J has become the law of the land and his decision explicitly excluding right to property from the purview of “Basic structure” made it convenient for the future parliamentarians to abridge property rights conveniently. But the relevance and the reasonableness of such a decision by Khanna J will be discussed later in the essay while discussing the effect of the 44<sup>th</sup> Amendment Act and also the excerpts of the views of Justice K K Mathew regarding the basic structure and right to property.

### The Forty-second Amendment Act

The 42<sup>nd</sup> Amendment Act sought to expand the scope of Article 31C by extending it to any law giving effect to the policy of the state towards securing “all or any of the principles laid down in Part IV” and that is how the Article reads today. The actual scope of this Article has, however, been considerably restricted in three respects by the process of judicial interpretation and subsequent amendment:

- (1) As above mentioned condition (I) was sought to be amended by the 42<sup>nd</sup> Amendment (1976) so as to take in all laws intended to secure not merely the objectives of Article 39 (b) or (c) but “all and any of the Directive principles of state policy laid down in part IV” but this attempt was frustrated by *Minerva Mills v. Union of India*<sup>29</sup> and the above freedom now stands restricted only to laws seeking to give effect to Articles 39 (b) or (c).<sup>30</sup>
- (2) Condition (iii) above placing a law beyond challenge under this Article if it just contains a declaration that it fulfils the first condition, has also been held unconstitutional: *Kesavananda Bharathi vs. State of Kerala*. In other words, statutory declaration of a nexus between the law and Article 37 is inconclusive and justiciable.<sup>31</sup>
- (3) Article 31D: A provision newly inserted in the Constitution in juxtaposition with Articles 31A to 31C, though has nothing to do with the right to property, may now be referred to. The insertion of Article 31D by the 42<sup>nd</sup> Amendment (1976) represents yet another attempt [like Articles 31A to 31C] to save from Constitutional challenge a group of laws intended to curb “anti national activities.”<sup>32</sup> This Article, introduced during a time when state of emergency had been declared in the country was, however, omitted, with a change in government, by the 43<sup>rd</sup> Amendment (1977).

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<sup>29</sup> AIR 1980 SC 1787, See, however, the observations made in *Sanjeev Coke Mfg. Co. vs Bharath Cooking Coal* AIR 1981 SC 271.

<sup>30</sup> One often tends to forget this as the “judicial” restriction is not to be found incorporated in the statutory language, which continues as enacted under the 42<sup>nd</sup> Amendment (1976).

<sup>31</sup> *Tinsukia Electricity company ltd. vs State of Assam* 1989 (3) SCC 709; *Assam Sillimanite vs Union of India* 1992 Supp. (1) SCC 692.

<sup>32</sup> While the broad objective of such a provision is unexceptionable, the catch in the provisions lay in the vagueness of the definitions of activities sought to be curbed.

### The Forty-fourth Amendment: The Final Trespass into Right to Property

“We decide and debate carefully and in person, all matters of policy, holding, not that words and deeds go ill together, but that acts are foredoomed to failure when undertaken undiscussed.”

*Pericles, The Funeral Oration*

These words will occur to the reader who considers the far reaching changes made in the “right to property” by the 44<sup>th</sup> Amendment without eliciting public opinion and without submitting the changes to the scrutiny of the Select Committee followed by a debate in both Houses on its report. The 44<sup>th</sup> Amendment removed the right to property from the Part III (“the Chapter on Fundamental Rights”) by deleting Articles 19(1)(f) and 31, by making consequential amendments, and by inserting in Part XII the following new chapter: “Chapter IV—Right to Property, 300A. Persons not to be deprived of property save by authority of law—no person shall be deprived of his property save by authority of law.”

These amendments are hereafter referred to as “the property amendments.” The ostensible reason for this change is given in the words of the Law Minister, Shanthi Bhushan, who has signed the Statement of Objects and Reasons for the 44<sup>th</sup> Amendment: Paragraphs 3, 4 and 5 of that Statement run as follows:

3. “In view of the special position sought to be given to fundamental rights, the right to property, which has been the occasion for more than one Amendment of the Constitution, would cease to be a fundamental right and become only a legal right. Necessary amendments for this purpose are being made to Article 19 and Article 31 is being deleted. It would however be ensured that the removal of property from the list of fundamental rights would not affect the rights of the minorities to establish and administer educational institutions of their choice.
4. Similarly, the right of persons holding land for personal cultivation and within ceiling limit to receive market compensation at the market value will not be affected.
5. Property, while ceasing to be a fundamental right, would, however, be given express recognition as a legal right, provision being made that no person shall be deprived of his property save in accordance with law.”

This explanation for the change is neither candid nor convincing. Not convincing, because the fact that the Constitution had to be amended a number of times to deal with right to property is not a sufficient reason for deleting it from the chapter on fundamental rights. Nor does the 44<sup>th</sup> Amendment give any new position to the fundamental rights, which those rights did not occupy before. This explanation is not candid, because a candid explanation would have said that the change was being made to fulfill part of the pledge given in the Janata Party Manifesto for the 1977 Parliamentary elections, namely “delete from the list of fundamental rights and instead affirm right to work.” The present Amendment implements a part of the pledge, because the right to work has not been affirmed. It seems to have been realised that right to work cannot be affirmed because no work may be available. Article 41, which is a principle of state policy, recognises this when it qualifies the duty of the state to secure work by the words “within the limits of working capacity and development.” Nor does Article 41 confer “right to work” on anyone, because Article 37 clearly makes the “rights” conferred in the Part IV (Directive principles of state policy) not enforceable in any court. An unemployed person will seek in vain to secure his “right to work” which must mean gainful employment and not slave labour.

The amendments proposed by in the Janata Party Manifesto, are now partly implemented by the 44<sup>th</sup> Amendment, have been made without realising

- (1) the close relation of property with other fundamental rights, which the Janata Party was pledged to restore;
- (2) the effect of this change on the legislative power to acquire and requisition property; and
- (3) the correlation of fundamental rights to Directive principles of state policy.

### Are the Property Amendments beyond the Amending Power as Violating “The Basic Structure” of the Constitution?”

The first question that immediately arises is whether the property amendments violate the basic structure of our Constitution and therefore void as being outside the amending power conferred by Article 368 on Parliament. Below is a brief account of the basic structure principle relevant while considering right to property:

- (1) The doctrine of basic structure as laid down in Kesavananda Bharathi case was accepted as the basis for deciding the Election case.<sup>33</sup> Before the judgments in the “Election Case” were delivered, an application was made to the Chief Justice to hear a number of writ petitions to reconsider the doctrine of the basic structure. A Bench of 13 judges was constituted for that purpose; however the Chief Justice dissolved the Bench after two days. These facts reveal that the court was against reconsidering or was not prepared to reconsider it.
- (2) Khanna J, whose judgement tipped the scale in the Kesavananda case in favour of the doctrine of basic structure, had held in that property was not part of the basic structure. The judgement had been interpreted to mean that he had held that all fundamental rights were not part of the basic structure. But he clarified his position in the Election Case by observing, it is submitted rightly, that he had not so held, and his elaborate discussion of one fundamental right, right to property, would have been wholly unnecessary if all fundamental rights were not part of the basic structure. In fact, he struck down the conclusive declaration clause of Article 31C because it prohibited even a limited judicial review, and Article 32, which is a fundamental right, clearly provides for judicial review.
- (3) In view of the clarification, it was submitted that after Election Case it would have become necessary for Khanna J to reconsider his earlier judgement, in the light of the further discussion of the amending power in the Election Case. For, the only kind of property he was called upon to consider in the fundamental rights’ case was private property acquired by the state of Kerala under the two impugned acts. In that case, neither state nor the court were called upon to consider the inter-relation of the right to property conferred by Article 19(1)(f) and Article 31(2) on the one hand and the other fundamental, and Constitutional, rights with which property is inextricably connected, on the other hand. Of the conclusive declaration clause of Article 31C which he struck down, Khanna J said:

“It seems that when incorporating the part relating to declaration in Article 31C, the sinister implications of this part were not taken into account and its repercussions on the unity of the country were not realised. In deciding the question relating to the validity of this part of Article 31C, we should not, in any opinion, take too legalistic a view. A legalistic judgement would indeed be a poor consolation if it affects the unity of the country.”<sup>34</sup>

But the unity of India of which he spoke is most effectively secured by Article 19(1) (d), (e), (f) and (g) which conferred on citizens the right to move freely throughout the territory of India; to reside and settle in any part of India; to acquire, hold and dispose of property in India and to practice any profession, or carry on any occupation, trade or business in India. That unity was also reinforced by other fundamental rights, namely, the right to freedom of religion (Articles 25 and 26) and by cultural and educational rights (Articles 29 and 30). For, the most potent source of disunity is religious intolerance and attempts to destroy the religious, cultural and educational rights of the minorities. Property is an essential ingredient of religious freedom: [Articles 26(c)], and of the free enjoyment of cultural and educational rights of minorities [Article 30(1)]. There are other provisions tending in the same direction. The freedom of trade and commerce guaranteed by Articles 301 to 304 is designed to emphasise that India is one country notwithstanding that it is divided into different states. And trade and commerce cannot be carried on without property. A common citizenship and a common electoral

<sup>33</sup> Indira Nehru Gandhi vs Raj Narain (1976) 2 SCR 347.

<sup>34</sup> (1973) SCC 1896.

roll, and the equality of the opportunity conferred on all citizens in matter of public employment regardless of caste, creed, religion, sex, descent, place of birth, residence or any of them (subject to limited exception) all emphasise the unity of India. In pursuit of their desire to secure unity of India, the framers of our Constitution were not guided merely by theoretical considerations. Since the right to acquire, hold and dispose of property was conferred only on citizens, it would appear to follow that freedom of trade, commerce and intercourse, should also be limited to citizens, and the Draft Article 16 so provided. However, experience in other countries had shown that it would hamper the free flow of trade and commerce, because at every checkpoint within, and between, the states, the citizenship of the consigner and the consignee would have to be established. Preferring a practical to a theoretical approach, the framers did not limit the freedom of trade, commerce and intercourse to citizens. As the above questions were not before the court in the fundamental rights' case, any decision that Right to Property was not the part of fundamental rights can only be limited to the kind of property that was before the court.

And if wider questions are raised, as will be raised by the property amendments, the judgement of Khanna J cannot conclude the matter as to status of property, and the whole question of property in the Constitution will be thrown wide open before the courts. It may be added that though Khanna J referred to the Directive principles of state policy, the nature of Directive principles of state policy vis-à-vis fundamental rights was not considered at length in Kesavananda case except in the context of acquisition of land under the two impugned acts. The popular conception that directive principles of state policy deal with social objectives and fundamental rights deal with selfish rights of individuals is unfounded, and that almost every objective of the Constitution is to be founded in the fundamental rights and in other provisions of the Constitution. After all, the objectives of a country can be realised only by and through its individual citizens and people. In fact, the Directive principles of state policy make no reference to the unity of India, which is secured by various provisions mentioned above.

The doctrine of basic structure has been mentioned at the threshold because the question whether property amendments violate that doctrine must depend upon the correct interpretation of the nature and effect of those amendments and their effect on fundamental rights and other basic features of the Constitution. For, it is well settled that every interpretation which would make those amendments void as being beyond the amending power of the Parliament must be rejected in favour of an interpretation, which would make them valid.

### Problems Posed by Removal of Right to Property from the Chapter of Fundamental rights

The rights conferred by Article 19(1)(f) and Article 31 read with the undernoted entries<sup>35</sup> were so closely interwoven with the whole fabric of our Constitution that those rights cannot be torn out without leaving a jagged hole and broken threads. The hole must be mended and the broken threads must be replaced so as to harmonise with the other parts of the Constitution. The task is not easy, and courts will be called upon to answer problems more formidable than those raised by the Article 31 after it was amended a number of times. However some of the problems which will arise and the probable lines of solution, are considered below.

That Articles 19(1)(f) and 31(2) dealt with a different, but connected, aspects of the right to property is clear from several Supreme Court decisions which dealt with the co relation of those two Articles. The

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<sup>35</sup> Till the Seventh Amendment, the entries ran as follows: Entry 33, List I: Acquisition and requisitioning of property for the purpose of the Union; Entry 36, List subject to the provisions of entry 42 of List III; Entry 42, List III: Principles on which compensation for property acquired or requisitioned for the purpose of the Union or the State or for any other public purpose, is to be determined, and the form and manner in which such compensation is to be given. The above entries were deleted by the Seventh Amendment which came into force from 1 November, 1956, and the following new Entry 42 was substituted in List III: "Acquisition and Requisitioning of Property."

correct view was that the two Articles were mutually exclusive. But one judgement which was soon corrected and another judgement which was a judgement *per incuriam*, to the view that Articles 19(1)(f) and 31(2) were not mutually exclusive. This judicial conflict was resolved by 25<sup>th</sup> Amendment, which introduced in Article 31 a new clause (2-B) which provided that “Nothing in Article 19(1)(f) shall effect any such law as is referred in clause (2).” The validity of this Amendment was unanimously upheld in the Kesavananda case. The reason for this mutual exclusiveness was that when property is acquired for a public purpose on payment of compensation, the right of a citizen to hold property is gone and the question of his right to hold property subject to reasonable restrictions does not arise.

Further, Article 19(1)(f) that conferred citizens the right to acquire, hold and dispose of property formed part of a group of articles under the heading “Right to Freedom.” It requires no elaborate argument to demonstrate that property is intimately connected with the right to freedom. Article 31 appeared under the heading “Right to Property”; for the right to freedom conferred by Article 19(1)(f) would be worth little if the property when acquired could be taken away by law. Hence Article 31 provided that private property could be acquired only for a public purpose and on payment of “compensation” (later “amount”). There is nothing in the Statement of Objects and Reasons to show that Parliament no longer looks upon the right to acquire, hold and dispose of property as a part of the Right to Freedom. The retention of Article 19(1)(a) to (e) and (g) is a clear indication to the contrary. That sub-clauses (d), (e) and (f) of Article 19(1)(f) were interlinked is clear from their provisions as well as from sub-Article (5) which governed each of those sub-clauses. The meaning of Article 19(1)(f) has been considered and it is being submitted that the Supreme Court correctly held that the right conferred by Article 19(1)(d) was not a right of free movement *simpliciter*, but a special right to move freely throughout the territory of India with a view to secure, among other things, the unity of India which a narrow provincialism would deny. This right of free movement was not limited to travelling throughout India, because it was accompanied by the further right conferred by Article 19(1)(e) to reside and settle in any part of India, as also the right conferred by Article 19(1)(f) to acquire, hold and dispose of property, in any part of India. But a right to settle in any part of India means not only a right to have a place to live in, but also a place to work in, for Article 19(1)(g) confers on every citizen the right to practise any profession, or to carry on any occupation, trade or business. Further, Article 19(1)(a) confers on every citizen the right to the freedom of speech and expression, which right includes the freedom of the press<sup>36</sup>—a right which is basic to democracy. But a press needs a building or buildings to house it, and movable property to work it, so that without the right to acquire, hold and dispose of property, there can be no freedom of the press. And the same is broadly true of the fundamental right conferred by Article 19(1)(c)—the right to form associations or unions—for normally the working of associations and unions involves the right to acquire, hold and dispose of property. What then is the effect of deleting Article 19(1)(f), which conferred the right to acquire, hold and dispose of property, and of deleting Article 31 which provided for the acquisition of property for public purpose on payment of compensation (later called “amount”)? To these questions the Statement of Objects and Reasons gives no answer—it is doubtful whether those who framed the property amendments were even aware of their effect on other fundamental rights retained in Article 19(1)(f)(1), and on the political unity of India which Article 19(1)(f)(1)(d), (e), (f) and (g) was intended, *inter alia*, to subserve, along with other provisions of our Constitution.<sup>37</sup> At any rate, the framers on these amendments have provided no solutions for the problem, which the property amendments inevitably raise.

One further complication must be noted here. Although Article 19(1)(f) and Article 31(2) had been made mutually exclusive by Article 31(2-B), there was no such mutual exclusiveness between Article 31(2) and the right to practise a profession or to carry on any occupation, trade or business conferred by Article 19(1)(g). This right was subject to restrictions mentioned in Article 19(1)(f)(6). But trade and business is capable of being acquired, as Section 299(2) of the Government of India Act, 1935, clearly

<sup>36</sup> Romesh Thappar vs Madras (1950) SCR 594, 597.

<sup>37</sup> Ibid. See para 14.3.

showed.<sup>38</sup> By what test is the validity of the law acquiring property, and a law acquiring trade or business, including industrial and commercial undertakings, to be judged?

The 25<sup>th</sup> Amendment inserted in Article 31 a new sub clause (2) with the following proviso:

“Provided that in making any law for the compulsory acquisition of any property of an educational institution established and administered by minority, referred to in clause (1) of Article 30, the State shall insure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.”

This proviso recognised the fact that the valuable right conferred by Article 30(1) on minorities to establish educational institutions of their choice would be destroyed if adequate compensation was not made for acquisition of the property of such institutions. Political expediency may require that minorities should not be alienated by depriving them of their cherished rights, especially when minorities are as large as they are in India. Special rights are conferred on minorities because in a democratic country with adult universal suffrage, majorities by virtue of their numbers can protect themselves. But it does seem illogical and unjust to leave out majority educational institutions from the same protection, unless it was believed that majorities, deprived of their power to oppress minorities, would not wish to oppress themselves. Thus, in *Kerala v. Mother Provincial*,<sup>39</sup> Counsel for the state told the Supreme Court that “he had instructions to say that any provision held inapplicable to minority institutions would not be enforced against the majority institutions also.”<sup>40</sup>

Again, the 17<sup>th</sup> Amendment had introduced in Article 31A(1)(e) the following proviso:

“Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.”

To take away land under personal cultivation without compensation would be unfair and unjust and the above proviso prevented such injustice being done. It would be equally unfair and unjust to take away from a person following a vocation, other than agriculture, the tools of his trade, or the property by which he earns his living. These observations have been made because the above provisos relating to property, which have been retained in the chapter on fundamental rights, recognise the injustice of confiscatory laws which impinge on fundamental rights. In the absence of any rational explanation in the Statement of Objects and Reasons for deleting the right to property from the category of fundamental rights, the relief against injustice provided by the 44<sup>th</sup> Amendment appears to have been guided by political expediency—large minorities and “tillers of the soil” have votes to give or withhold. Or it may be that the reason was more complex. The Janata Party having redeemed its pledge, it was left to the Supreme Court to determine, in the light of the provisions of our Constitution, whether the pledge can be constitutionally redeemed, and if so to what extent.

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<sup>38</sup> S 299(2): “Neither the Federal nor the Provincial legislature shall have power to make any law authorising the compulsory acquisition for public purpose, of any land or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation or specifies the principles on which, and the manner in which, it is to be determined.”

<sup>39</sup> (1971) 1 SCR 734.

<sup>40</sup> (1971) 1 SCR at p 746.

Likewise there are a lot many aspects and long term evils given rise by 44<sup>th</sup> Amendment.<sup>41</sup> In short the above discussion shows that it is easy to make an electoral promise to delete right to property from the list of fundamental rights; it is not easy to work out the consequences of that promise and embody them in a Constitution Amendment Bill. Normally, amendment proposing far reaching changes in the Constitution are submitted to a Select Committee for scrutiny, and report. If that course was not followed, it is difficult to resist the conclusion that the sponsors of the property amendments realised that those amendments would not stand the scrutiny of a Select Committee with a power to examine witnesses. The course of first redeeming an electoral promise by amending the Constitution and then leaving it to the courts to work out the consequences of the amendments, must appear attractive. And that course was followed, in the confident belief that the court would not shirk their duty of interpreting the Constitution even if Parliament preferred silence to speech as to its real intentions.

### Right to Property as the Supreme Right of All Rights

Once upon a time, it was thought that the so called personal rights like the right to vote, right to freedom of speech or personal liberty occupied a higher status in the hierarchy of values than property right. As a result the courts were more astute to strike down legislations, which impinged upon these rights, than upon property rights. But Learned Hand, a great judge, felt that the distinction between the two was unreal and said that nobody seems to have bestowed any thought on the question why property rights are not personal rights. The Supreme Court of America which once gave hospitable quarter to the distinction between personal rights and property rights and accorded a preferred position to the former, has given a decent burial both to the distinction and the preferred status of the so called personal rights or liberties in 1972 by saying “the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, not less than the right to speak or the right to travel is in truth a ‘personal’ right, whether the ‘property’ in question be a welfare cheque, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognised.”<sup>42</sup>

This again would show that if the fundamental right to freedom of speech or personal liberty pertains to basic structure, there is every reason that the fundamental right to property should also pertain to it, as the former set of rights could have no meaning without the latter. Protection of freedom depends ultimately upon the protection of independence, which can only be secured, if property is made secure. Learned Hand long ago spoke of the false hope of the courts protecting liberty if it dies in the hearts of men. One reason, which would induce its death in their hearts, is an atmosphere in which liberty derives no sustenance from a sense of security to property created by putting it beyond the outcome of the vote of shifting majorities.

Our Constitution was framed by an extraordinary body of men, a body of men whose combined virtues and talents have seldom if ever been equaled in this country. They possessed that rare quality of mind, which unites theory and practice. They understood the unique conditions of the country and the enduring needs and aspirations of the people, and they adapted their principles to the character and genius of the nation. They visualised a society in which every citizen should be the owner of some property not only as a means of sustenance but also as a zone of security from tyranny and economic oppression and they put that right above the vote of transient majority. They enacted Article 39 and enjoined upon the state to break up the concentration of property in the hands of the few and its distribution among all. There is no reason today to think that the type of society they visualised is in any way unsuited to our present condition.

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<sup>41</sup> The 44<sup>th</sup> Amendment—right to property no longer a fundamental right—H M Seervai “Constitutional Law of India” volume II, III Edition, pp 1072-92.

<sup>42</sup> Lynch vs Household Corpn. 405 US 538, 552.

Property is the most ambiguous of all categories. It covers a multitude of rights, which have nothing in common, except that they are exercised by persons and enforced by the state. It is therefore idle to present a case for or against private property without specifying the extent or value thereof. Arguments, which support or demolish certain kinds of property, have no application to others. Considerations, which are conclusive in one stage of economic development, may be irrelevant in the next. For things are not similar in quality merely because they are identical in name. If it be assumed that the fundamental right to property does not pertain to basic structure and can be amended by parliament without a referendum as proposed in the case of other fundamental rights regarding citizens; then there can be no doubt that property is durable and nondurable consumer goods, and in the means of production worked by their owners must be protected by the higher law on the same logic on which it is proposed to safeguard by that law the interest in land of small tenure holders and of agriculturists within ceiling limit.

The owners of these properties must be paid compensation based on market value in the event of the state or a corporation owned by the state acquiring them for public purpose. "While these types of property can be justified as a necessary condition of a free and purposeful life, no such considerations are available in respect of the property in the means of production not worked or directly managed by their owners as it is not an instrument of freedom since it gives power not only over things but through things over persons. It is precisely the concentration of this type of property which the framers of the Constitution wanted to break up under Article 39 and distribute among the have-nots and there is no injustice in determining the compensation payable to the deprived owners on principles of social justice."<sup>43</sup>

But this is where we have to really spare a thought—Justice K K Mathew had the most eloquent and liberal view in support of property rights. However, at the end of his pursuit of defending property rights even he seems to have got misguided by the so-called conflict between directive principles and fundamental rights. Granting absolute right to property and also having to uphold the sanctity of a directive principle against concentration of wealth becomes almost an impossible thing to rationally achieve for any fair state which emerges and thrives on the foundation of rule of law.

So let the Owl of Minerva take flight. Fundamental right to property is dead. But long live right to property.

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<sup>43</sup> K K Mathew, 1978, "Basic Structure and Fundamental Right to Property", 2 SCC pp 65.