PROPERTY RELATIONS
THE CONSTITUTIONAL PROVISIONS AND PROSPECTS

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I. Origin of the Idea of Property

The Roman doctrine of *occupatio* or occupancy may be treated as one of the natural modes of acquiring property at the dawn of human civilization. *Occupatio* meant taking possession of that which at the moment of its being occupied is no one's property and the person who first brought it within his control in the technical sense would be deemed to have acquired property in it for himself. The object which thus came into the dominion of the first occupant was in the language of the Roman lawyers termed *res nullius*. Among such things might be included wild animals, fishes, wild fowl and lands which were newly discovered or were never before cultivated.[1] A similar idea of occupancy is discernible in the notion of property in the early Hindu jurisprudence. Manu referes to this concept of property right when he quotes a principle to the effect that the "field belongs to him who cleared away the timber and a deer belongs to him who first wounded it with an arrow". Here we find a clear enuciation of the right of the first person who clears to the ownership of his field although in another place the notion of king's universal ownership of the soil appears to be implicit.[3] These were modes of "natural acquisitions" and in the words of Dean Roscoe Pound were 'in accord with fundamental human instinct' so much so that "discovery and occupation have stood in the books ever since substantially as Romans stated them."[4]

It is believed that the earth and its fruits were at one time common and it is through the doctrine of occupancy that the notion of individual property came into existence.[5] It is interesting that a similar idea of natural enjoyment of property is found in in the ancient Indian thought and the right of individual property comes into existence at the end of the

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1. Maine, *Ancient Law* 203 (1931-World Classic's Series).

2. See Ghoshal, *A History of Indian Political Ideas* 175 (1959).

3. *Id.* at 175. There is also a reference to the king's title to one half of ancient hoards and metals found underground. The reason is that the king is the ever lord of the soil.

4. Pound, *An Introduction to the Philosophy of Law* 109 (1954).

5. Maine, *Supra* note 1, at 208.

era of Nature. In one of his famous Dialogles Buddha refers to this as follows:

> And in as much as those beings at that time quickly incurred blame for immorality, they set to work to make huts to conceal just that immorality.

He proceeds then to say:

> Come now, let us divide off the rice fields and set boundaries thereto. And so they divided off the rice and set up boundaries round it.

In his view one of the factors which was responsible for the disintegration of the "State of resplendence" was, besides lust of man, the institution of private property. This also ultimately led to many sins like stealing, lying and, finally, punishment.

Blackstone's view regarding early evolution of the notion of property is slightly different. According to him by the law of nature and reason, he who first began to use the land acquired in it 'transient' property which would last as long as he used it. Here the right of possession was co-existensive with the duration of the possession.[6] The ground was, therefore, regarded as common land and no one acquired permanent property in it. On the contrary, "Whosoever was in occupation of a determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust and contrary to the law of nature to have driven him by force but the instant that he quitted the use or occupation of it another might seize it without injustice." The idea of "permanent dominion" came with the increase in the number of mankind.[7]

Sir Henry Maine, however, does not find himself in agreement with the thesis that occupation preceded ownership. He says:

> Occupancy is the advised assumption of physical possession and the notion that an act of this description confers a title to "res nullius", so far from being characteristic of very early societies, is in all probability the growth of a refined jurisprudence and of a settled condition of laws.[8]

Maine has elaborated this idea of mere possession of a thing followed by the fact of ownership when objects of enjoyment were brought into ownership. "Its true basis,", according to him "seemed to be, not an

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6. *Id.* at 208.

7. *Id.* at 209. For criticism of this view see, *Id.* at 210. He says: "The chances surely are that this right to possession would be exactly co-exstensive with his power to keep it ...."

For similarty of view, Maine refers to an aphorism of Savigny who had laid down that all property is founded on adverse possessions ripened by prescription. *Id* at 211.

8. *Id.* at 212.

institutive bias towards the institution of property, but a presumption arising out of the long continuance of that institution that everything ought to have an owner." Occupancy ripens into ownership because there is no better claimant to the object (res nullius) and because all things were presumed to be "somebody's property."[9]

II. Individual or Community Interest in Property

The notion of individual possession or ownership of property is, according to Maine, responsible for the basis of relationship between man and property set out above. Individual according to this view is an important and distinct part of this 'social compact.' The place of the individual is recognised in this connection both by Hobbes and Blackstone.[10] Sir Henry Maine, however, flatly repudiates this idea. According to him "Ancient law knows next to nothing of individuals."[11] The law in early times is concerned not with Individuals, but with group. He emphasises that the likely position is

> that joint-ownership, and not separate ownership, is the really archaic institution, and that the forms of property which will afford us instruction will be those which are associated with the right of families and of groups of kindred.[12]

Sir Henry Maine does not seek support for this doctrine of group ownership of property from Roman jurisprudence which in his view leads to opposite direction. He, therefore, turns his attention to early village communities in India. He proceeds to observe in support of his doctrine:

> The village community in India is at once an organized patriarchal society and an assemblage of co-proprietors. The personal relations to each other of the men who compose it are indistinguishably confounded with their proprietary rights .... The village community is known to be of immense antiquity. In whatever direction research has been pushed into Indian history, general or local, it has always found the community in existence at the farthest point of its progress.[13]

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9. *Id.* at 214. Note however the warning uttered by Dr. Diamond in his Primitive Law 260-2 (1935) and referred to in Keeton, *The Elementary Principles of Jurisprudence* 252 (2d ed. 1949).

In this connecion, Diamond's view is that the conceptions of ownership and possession are essentially the conceptions of mature systems of law and cannot be applied to early times.

10. Maine, *Supra* note 1, at 215.

11. *Id.* at 215.

12. *Id.* at 216. See Keeton, *The Elementary Principles of Jurisprudence* 353 (1959).

13. *Id.* at 219.

This community has survived conquests and revolutions and is the least destructible. Here is a reversal of the Roman or even the modern notion regarding the place assigned to the individual in relation to property. In the north of India the basis of founding the village community was a single assemblage of blood-relations. But in the south according to Mountstuart Elphinstone:

> The popular notion is that the village landholders are all descended from one or more individuals who settled the village, and that the only exceptions are formed by persons who have derived their rights by purchase or otherwise from the members of the original stock. The supposition is confirmed by the fact that, to this day, there are only single families of landholders in small villages and not many in large ones....[14]

We find in Elphinstone's examination, family as the basis of the structure of the village community which even after partition continues to be bound together as they still trace their ancestry from an 'original common parentage'. Elphinstone here points out that in the case of the extinction of a family, its share is brought back to the common stock.[15]

An interesting parallel is found in this regard in the organisation of village communities in Russia.[16] The element of community ownership as also found in the village communities of Servia, Crotia and the Austrian Sclavonia.[17] In case of the Russian village community on the analogy of the Indian village society the severance of rights of the individuals might be theoretically complete, but it was only a temporary feature. In the event of extinction of separate ownerships after the expiry of a given period, the village land was thrown into a mass and was then redistributed among the families according to their number. In the latter example the land was cultivated by the labour of the village people and the members of the village community had their share of the produce. This was based on the principle that the properties of the families could not be divided for all time.[18]

Keeton finds in this connection, that Maine's generalisation about the communal ownership of land was based on incomplete knowledge limited to a small segment of the Indian society. According to Baden-Powell with whom the editor of *Ancient Law,* Sir Frederick Pollock, agrees and

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14. History of India 71 (1905), referred to by Maine *Id.* at 218.
15. See Keeton, *Supra* note 9, at 354-55 for a criticism of Maine assumptions.
16. Maine, *Supra* note 1, at 221.
17. *Ibid.*
18. *Ibid.*

so does Sir Alfred Lyall that "the oldest form of village was not.....a group of cultivators having joint or communistic interests, but a disconnected set of families who severally owned their separate holdings." Pollock is of the view based on Baden-Powell's conclusions about the structure of the village community in India that while there could be administrative unity there was no communal ownership or tenure.[19]

Jhering according to Keeton, confirms Maine with regard to his view that those branches of the Indo-European families which settled in Europe took to agriculture "by way of joint-cultivation derived from people they found in occupation."[20]

Dean Pound is also of the view that individual property developed out of recognition of group interests.[21] He agrees that first property is group property rather than individual property. What broke this group property were the twin ideas of partition and self-acquired property. In archaic society as the household grew unwieldy partition was affected which meant partition of household and also partition of property. In this regard Roman Law and Hindu Law present a significant parallel. But in Hindu Law household ownership is still the normal condition although it is vitiated greatly by new social and economic trends resulting from a growing commercial and industrial society and modern land law. These new developments have largely upset the balance of interest in favour of the individual although the Hindu society even now at bottom adheres to the old concept.[22]

III. Some Early Theories of Property

Pound classifies these theories under six groups which may be stated as: 1. Natural-Law theories, 2. Metaphysical theories, 3. Historical theories, 4. Postive theories, 5. Psychological theories, and 6. Sociological theories. These principal groups in their turn have many forms. It is not possible to enter into an elaborate examination of these theories for the purpose of our present discussion except to note them briefly.

The Natural Law theories proceed on the principles of natural reason based on the nature of things and also on ideas of human nature. The first theory guided the Roman lawyers in building up their doctrines relating to property. The Roman lawyers derived their notion of property either by occupation or by creation by means of labour. Theories relating to

19. Keeton, *Supra* note 9, at 354.

20. *Id.* at 355.

21. Pound, *Supra* note 4, 125.

22. Pound *Supra* note 4, at 128. He says: "All legally recognized interests of subbstance in developed legal systems are normally individual interests."

human nature take three forms, 1. natural rights, 2. social contract, and 3. economic natural law. The last refers to the economic nature of man or nature of man as an economic entity. The adherents of these theories are Grotius, Pufendorf and Blackstone who influenced the legal thought in the spheres of their influence. Blackstone has in his turn influenced the Anglo-American law in regard to property. According to him earlier temporary control matured into permanent control, over what had been acquired exclusively, with the advance of civilisation.

Metaphysical theory, has among its principal adherents Kant, and Hegal. Kant's theory embodies both the idea of occupation and the idea of compace. Hegel on the other hand treats property "a realization of the idea of liberty." According to him property has relation to human will which finds expression in its realization. How this theory will reconcile itself with the shrinking of land and natural resources with the growth of population is not to be examined at this stage

Historical theories of property proceed on two assumptions: 1. The conception of private property, like the conception of individual personality, has had slow but steady development from the beginnings of law; 2. individual ownership has grown out of group rights just as individual interests of personality have been disentangled gradually from group interests.[23]

Pounds points out that the positive theory of the basis of property is the same as the metaphysical. As a matter of fact he finds that the conclusions reached on the subject of origin of property by the positivists, the metaphysical and the historical jurists are nearly the same although they follow different processes of thought to arrive at these conclusions.

The last two theories, namely, the psychological and sociological, according to Pound, relate to the twentieth century. He says that "an instinctive claim to control natural object is an individual interest of which the law must take account."[24] This instinct is the basis of psychological theories of private property. These theories may as well be combined with the historical theory giving a psychological basis to the nineteenth century metaphysical foundations of property.[25]

Of sociological theories Pound maintains, some are positivist, some psychological, and some social utilitarian . Duguit is the chief exponent of the first of these. He attributes social function to property without

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23. *Id.* at 123.
24. *Id.* at 129.
25. *Ibid.*

giving it a collectivist character. "Property" according to this view "is a social institution based upon an economic need in a society organised through division of labour."[26]

Psychological sociological theories seek the basis of property in an instinct of acquisitiveness which is marked as a social phynomenon. But social-utilitarian theories justify property as an institution which secures and satisfies maximum of interests and wants.[27]

IV. Two Contending Theories of Property in the Modern Age

According to Locke, who in this regard represents the naturalist view, property is an inalienable natural right of man. The United States Constitution embodies this view. On the contrary the Marxist view regards it as the key to the control of modern industrial society.[28] Property is looked upon in both systems as a means of power with which society is brought under control. The capitalist taking his inspiration from the naturalist view of property claims to own the means of production. The communist on the other hand, demands the transfer of ownership to the community which by means of dictatorship of the proletariat and with the help of the coercive power of the state exercises control over it.[29] A limited right of private property in a few specific articles of personal use is permitted under the Soviet system which does not negative but rather strengthens the doctrine of social or state ownership of property.[30]

It may however be assumed that sovereign rights over property vest in the state and whatever limitations exist under various systems of government operate against the government and not against the state. This concept is epitomized in the doctrine of prerogative power of the Crown dating U.S. Constitution, the doctrine of prerogative power of the Crown dating back from the days of feudalism and now substantially modified by the doctrine of sovereignty of Parliament in England. In Soviet Russia and other communist systems private property generally stands abolished and is transferrd to the state. In ancient Indian political thought right of the sovereign to expropriate property of citizens in spceified cases was recognized by Manu. This doctrine is reiterated in the *Mahabharat* by

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26. *Ibid.*
27. *Ibid.*
28. Friedmann, *Law in a Changing Society*, 65 (1954 Penguin series).
29. *Ibid.*
30. See Constitution of the Union of Soviet Socialist Republics, 1947, Article 10 relating to personal property of Soviet Citizens. But this is not a Fundamental Right.

Bhishma. Right to property in ancient Indian thought rests on the twin principle of virtue and capacity to hold property which in its turn depended on state support.[31]

It is not, at this stage, necessary to go into a detailed study of the origin of the idea of property in India and its relationship with the state. A brief reference already made to this aspect of the matter would bring out two things: 1. The property for a long stretch of time beginning from the unchartered past had its origin in community or at least group ownership, and 2. that the state had sovereign rights over the property.

V. Perspectives of the Constitution With Regard to Relation of Man to Property

The framers of the Indian Constitution were faced with the two conflicting doctrines with regard to the role of property in relation to man in free India. Whatever doctrines in this regard are epitomized in the Constitution were the result of a compromise between the two contending viewpoints. But this had led to ever-increasing confusion and conflict of views with regard to the concept of property rights as embodied in the different provisions of part III of the Constitution.[32] This has also led to conflict of views between the Parliament and the Supreme Court.

It is this variance between the legislature and the judiciary which has led to four constitutional amendments during a brief span of 15 years. As the principles on which the constitutional guarantees in regard to property rights are not yet sufficiently settled, it may be reasonably anticipated that a further divergence of views between the Parliament and Suprem Court may lead to additional amendments of the Constitution.

The fundamental rights relating to property are purported to guarantee protection to the institution of private property, but the Directive Principles of state policy envision perspectives for the future. This is in keeping with the socio-economic concepts enshrined in the preamble of the Constitution and elaborated in the directive principles. The various plans for future economic development of the country would unmistakably lead one to the conclusion that the preamble and the directive principles do not embody only a vague hope in the future socio-economic reconstruction of the Indian society on a socialistic pattern.

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31. Ghoshal, *Supra* note 2, at 175 and 210-12.

32. Article 19(1)(f) and (g) (5) and (6), and article 31 of the Constitution.

> controlled by the state, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, not withstanding that it deprives any person of his property.[43]

It is clear that the amendment accepts the minority opinion of Das J. But it is also clear that in that form of reasoning article 31(1) is completely dissociated from article 31(2). It is true that police power is a wide and dynamic concept but its exercise does not depend totally on the sweet will of the legislature. Indeed, the legislative power of police is to comply with the requirements of reasonableness and public justiciable issues. Das J. when confronted with this problem had relied on the good sense of the legislature. His advice was that we should trust the legislature as the English people trust their parliament. But it is clear that in matters of judicial interpretation the doctrine of trusting the legislature should not hold the field. The problem became real after the amendment accepted the view point of Das J. and arose with all its implications for property right in Kochuni's case.[44] Subba Rao J. (as he then was) speaking for the majority of the court was not ready to accept that the good sense of the legislature was a sufficient guarantee. He observed:

> The Constitution declares the fundamental rights of a citizen and lays down that all laws made abridging or taking away such rights shall be void. That is a clear indication that the makers of the Constitution did not think fit to give our parliament the same powers which the parliament of England has. While the Constitution contemplates a Welfare state, it also provides that it should be brought about by the legislature subject to the limitation imposed on its power. If the makers of the Constitution intended to confer unbridled power on the parliament to make any law it liked to bring about the welfare state, they would not have provided for the fundamental rights. The Constitution gives every scope for ordered progress of society towards a welfare state. The state is expected to bring about a welfare state within the frame work of the Constitution, for it is authorised to impose reasonable restrictions in the interests of the general public on the fundamental rights recognised in Art. 19. If the interpretation sought to be placed on Art. 31(1) was accepted, it would compel the importation of the entire doctrine of police power and grafting it in Art. 31(1) or the recognition of the arbitrary power in the legislature with the hope or consolation suggested that our parliament and legislatures may be trusted not to act arbitrarily. The first suggestion is not legally permissible and the second does not stand to reason for the Constitution thought fit to impose limitations on the power of the legislatures even in the case of lesser infringements of the rights of a citizen.[45]

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43. Constitution Fourth Amendment Act, 1955.
44. Cited *Supra* note 39.
45. *Id.* at 1096.

rights which is the sum total constituting the corporal property will in itself be property. The answer to this question has been dependent on the marketability and exchangeability of the right in question. If the right can be acquired, held and disposed of separately from the corpus to which it is attached, it will be property, but otherwise, not. On this reasoning the right of shareholder to vote at a general meeting was not considered property separately from the share. This demonstrates the dependence of the constitutional protection of property not only on the current ideas relating to property but also on the existing law which gives recognition to certain interests and provides for their marketability.

Dean Roscoe Pound says that the economic life of an individual in society involves four kinds of claims; and he enumerates them as 1. claims to the control of corporeal things, 2. claims to freedom of industry and commerce, 3. claims to promised advantages, and 4. claims to economically advantageous relations with each other.[36] The Supreme Court has not yet been called upon to pronounce upon the question whether all the above types of economic claims are protected as property under the Indian Constitution.

There is another aspect of the meaning of the term property which today looks more of historical interest, but in view of the tendency of the higest court to overrule its earlier decisions too frequently that question may again become alive. The fact that property has been guaranteed both under article 19(1)(f) and article 31 has been a constant source of confusion as to the extent the two articles are independent of each other. In *Subodh Gopal's* case Sastri C. J. took the view that article 19(1)(f) relates to abstract claims and capacity of a citizen to acquire, hold and dispose of property, whereas the concrete right to own property is guaranteed under article 31. That view was dissented from by Mukerjea J. in *Lakshmindra's* case and by Subba Rao J. in *S. M. Transport (P.) Ltd. v. Sankarswamigal Mutt.*[37] In the latter case, Subba Rao J. (as he then was) observed:

> "The phraseology used in Art. 19(1)(f) is wide and prima facie it takes in its sweep both abstract and concrete rights of property. To suggest that abstract rights of a citizen in property cannot be infringed by the State, but his concrete rights can be, is to deprive Art. 19(1)(f) of its real content. It would mean that the State could not make a law taking away the property acquired or held by him and preventing him from disposing it of. It would mean that the Constitution makers declared platitudes in the Constitution while they gave unrestricted liberty to

36. 2 Pound, *Jurisprudence* 101, 103 (1959).
37. A.I.R. 1963 S.C. 864.

> the legislature to interfere with impunity with property rights of citizens. If this meaning was given to Art. 19(1)(f), the same meaning would have to be given to other clauses of Art. 19(1) with the result that the legislature cannot make a law preventing generally citizens, from expressing their veiws, assembling peacefully, forming associations, and moving freely throughout the country, but can make a law curbing their activities when they are speaking, when they are assembling and when they are moving freely in the country. Such an intention shall not be attributed to the Constituent Assembly, unless the Article is clear to that effect. Indeed, the words, as we have stated, are comprehensive and take in both the rights. Though there is no final expression of opinion by this Court on this question, as has been pointed out, this court and the High Courts all through since the date of promulgation of the Constitution proceeded on the assumption that Art. 19 applies both concrete as well as to abstract rights of property.[38]

It is in the pursuit of this view that the court reiterated its view in *Kochuni* v. *State of Madras & Kerala*[39] on the point and held that article 31(1) is not otiose.

The second view is definitely the law today and it is on this assumption that the decision in *Kochuni's* case holding article 19(1)(f) and article 31(1) as interrelated rights is based. But it can be argued that the whole setting of article 19 pertains to the claims of individual to personality and the inclusion of concrete property rights in that setting cannot be justified except on the assumption that our Constitution makers believed in the philosophy that private property is an attribute of liberty.

VI. Duty of Government to Pay Compensations

The extent of the property right also depends much on the types of interference which are permitted to be made with this right and the conditions subject to which the interferences can be made. The American Supreme Court has accepted that police powers, eminent domain and taxation are the three methods of social control on the individual's right to property.

> While the police power, taxation and eminent domain are all forms of social control, and probably include all of the forms of social control known to the law, each differs from the others .... The Police power is the legal capacity of sovereignty, or one of its governmental agents, to delimit the personal liberty of persons by means which bear a substantial relation to the end to be accomplished for the protection of those social interests which reasonably need protection. Taxation is the legal capacity to sovereigny, or impose a charge upon persons or their property for the support of government and for the payment for

38. *Id.* at 873.

39. A.I.R. 1960 S.C. 1080.

> any other public purpose which it may constitutionally carry out. Eminent domain is the legal capacity of sovereignty, or one of its governmental agents, to take private property for a public use upon the payment of just compensation.[40]

In this connection the dividing line between police power, where there is no obligation to pay compensation and eminent domain, where there is an obligation to pay compensation, has been always thin. The most accepted approach in the United States of America on this issue has been the pragmatic approach as propounded and developed by Holmes J. His approach was that upto a certain extent the government has a right to regulate property but a stage may come when the regulation may amount to taking and the governmental interference instead of being confined as a valid exercise of police power becomes an exercise of the power of eminent domain and an obligation to pay compensation arises.[41]

The above view was adopted by the majority of Supreme Court in *State of West Bengal* v. *Subodh Gopal*[42] and the decisions in *Dwarkadas* and *Shagir Ahmad* cases confirmed that opinion. In these cases Supreme Court took the view that 'acquisition' and 'taken possession of' in unamended article 31(2) were merely different manifestations of deprivation and in order to be obliged to pay compensation the property whereof the individual has been deprived need not pass to the state. In effect the majority held that clauses (1) and (2) of article 31 were commulative and they laid down merely the different conditions necessary for the exercise of the power of eminent domain. On the other hand Das J., in the minority, took the view that in every case of deprivation the state need not pay compensation, the obligation to pay compensation arises only in those cases where the state has acquired the title or possession in the property. The remaining cases of deprivation must be considered as cases of exercise of police power, a concept which is so dynamic that it could not be confined merely within article 31(5)(b). He held the view that clauses (1) and (2) of article 31 concerned two different exercises of police power.

It is obvious that the majority opinion was more favourable to property holders. Parliament amended article 31 wherein a new clause was added. The newly added clause (2-A) provides that:

> Where a law does not provide for the transfer of ownership or right to possession of any property to the state or to a corporation owned or

40. Willis, *Constitutional Law of The United States* 716 (1936).

41. *Pennsylvania Coal* Co. v. Mahon, 200 U.S. 393.

42. A.I.R. 1954 S.C. 92.

> controlled by the state, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, not withstanding that it deprives any person of his property.[43]

It is clear that the amendment accepts the minority opinion of Das J. But it is also clear that in that form of reasoning article 31(1) is completely dissociated from article 31(2). It is true that police power is a wide and dynamic concept but its exercise does not depend totally on the sweet will of the legislature. Indeed, the legislative power of police is to comply with the requirements of reasonableness and public justiciable issues. Das J. when confronted with this problem had relied on the good sense of the legislature. His advice was that we should trust the legislature as the English people trust their parliament. But it is clear that in matters of judicial interpretation the doctrine of trusting the legislature should not hold the field. The problem became real after the amendment accepted the view point of Das J. and arose with all its implications for property right in Kochuni's case.[44] Subba Rao J. (as he then was) speaking for the majority of the court was not ready to accept that the good sense of the legislature was a sufficient guarantee. He observed:

> The Constitution declares the fundamental rights of a citizen and lays down that all laws made abridging or taking away such rights shall be void. That is a clear indication that the makers of the Constitution did not think fit to give our parliament the same powers which the parliament of England has. While the Constitution contemplates a Welfare state, it also provides that it should be brought about by the legislature subject to the limitation imposed on its power. If the makers of the Constitution intended to confer unbridled power on the parliament to make any law it liked to bring about the welfare state, they would not have provided for the fundamental rights. The Constitution gives every scope for ordered progress of society towards a welfare state. The state is expected to bring about a welfare state within the frame work of the Constitution, for it is authorised to impose reasonable restrictions in the interests of the general public on the fundamental rights recognised in Art. 19. If the interpretation sought to be placed on Art. 31(1) was accepted, it would compel the importation of the entire doctrine of police power and grafting it in Art. 31(1) or the recognition of the arbitrary power in the legislature with the hope or consolation suggested that our parliament and legislatures may be trusted not to act arbitrarily. The first suggestion is not legally permissible and the second does not stand to reason for the Constitution thought fit to impose limitations on the power of the legislatures even in the case of lesser infringements of the rights of a citizen.[45]

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43. Constitution Fourth Amendment Act, 1955.
44. Cited *Supra* note 39.
45. *Id.* at 1096.

Thus Subba Rao J. was not reconciled to concede the police power to the legislatures without the limitations inherent in the exercise of that power. Those limitations in the context of the Indian Constitution are found in aricle 19(5) and Subba Rao J. read article 31(1) along with article 19(1)(f) which is subject to article 19(5). In this he was deciding against an earlier Supreme Court decision in *State of Bombay* v. *Bhanji Munji*,[46] which itself was based on the rule laid down in *A. K. Gopalan* v. *State of Madras*.[47]

The burden of the reasoning of these cases has been that the restrictions under 19(2) to 19(6) presuppose that the individual has not been totally deprived of his property and there is some thing which can be restricted. *A. K. Gopalan's* case is an authority for such a reasoning on the question of relationship between article 19 and 21, whereas *Bhanji Munji's* case was authority on the relationship of article 19 and article 31. Subba Rao J., without going into the merits of such a reasoning took the view that after the 4th amendment article 31(1) does not stand in the same position as article 21. Whereas articles 20, 21 and 22 formed a complete code in themselves. Article 31(1) after being dissociated from Article 31(2) by the Amendment became a bald provision. Therefore, he found it necessary to overrule *State of Bombay* v. *Bhanji Munji* and read article 31(1) along with (1)(f) subject to article 19(5). The learned Judge observed:

> Uninfluenced by any such doctrine, the plain meaning of the clear words used in Art. 31(1) of the Constitution enables the state to discharge it's functions in the interest of social and public welfare which the state in America can do in exercise of police power. The limitation on the power of the state to make a law depriving a person of his property ...., is found in the word law and that takes us back to Art. 19 and the law made can be sustained only if it imposes reasonable restrictions in the interest of the general public.[48]

The decision in Kochuni's case is open to the following observations:
1. At any time the Supreme Court may hold that a law providing for compensation under cl. 2 article 31 is not reasonable under cl. 5 of article 9 and under Cl. 2 article 31 is not reasonable under cl. 5 of article 19 and thus frustrate the purpose of the 4th Amendment Act, 1955.

2. Doctrine of police power is denied under article 31(1) but its effects are indirectly brought in as result of dichotomy introduced in the meaning or article 31(1).

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46. A.I.R. 1955 S.C. 41.
47. A.I.R. 1950 S.C. 27.
48. A.I.R. 1960 S.C. 1080, 1095.

3. The Supreme Court's decision merely touches upon th equestion of the rights of citizens and leaves non-citizens without a constitutional remedy. A distinction between citizens and non-citizens was maintained by the Supreme Court, in *Subodh Gopal's* case.

4. Incorporation of the doctrine of police power would at least restore the balance between articles 31(1) and 31(2) and 31(2-A).

5. It splits article 31 into two mutually exclusive parts, article 31(1) and 31(2) and 31(2A). This is contrary to *Subodh Gopal* and *Dwarka Das* decisions. The amendment was designed merely to remove the vagueness surrounding the meaning of article 31(1) and (2) both and introduced two specific categories of deprivation in cl. 2-A for compensation. It does not mean that it meant to introduce a divorce between 31(1) and 31(2).

6. Meaning of law in 31(1) has been made too wide in as much as it is required to conform to whole of fundamental rights. But it would be in consonance with reason that a clear doctrine of police power with limitations inherent in it, is incorporated in article 31(1) in order that it may help the citizen and the alien alike.

VIII. Supreme Court and the Doctrine of Adequacy of Compensation

It would not be unreasonable to entertain the feeling that the attitude which the Supreme Court has disclosed in *Kochuni's* case and which they have affirmed in the case of *S.M. Transport (P) Limited*[49] with regard to the relation between article 19(1)(f) and article 31(1) might be extended to apply to other provisions relating to fundamental rights. Although the Supreme Court has not specifically said so, it has surely in matters of compensation for the property which may be acquired and requisitioned gone far beyond the intention of legislature with regard to the scope of cl. 2 of article 31 after the Constitution 4th Amendment Act, 1955, which made questions relating to adequacy of compensation non-justiciable.

In four leading cases the Supreme Court has dealt with the adequacy or justness of compensation. The framers of the Constitution unlike their counterparts in the United States did not incorporate the re-

The decision in *Bela Bannerjee*'s case proceeded on the principle

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49. A.I.R. 1963 S.C. 865, 873, paras 28 and 29.

50. Art. 31(2).

quirement of just or equivalent compensation in the body of the Constitution of India. But by the Constitution 17th Amendment Act, 1964, in cl. 2 the payment of compensation with regard to acquisition of certain land, building or structure, was determined according to its market value. But this was limited to the acquisition of 'estate' in the personal cultivation of a person falling within the ceiling limit applicable to him. The two cases relate to the pre-Constitution 4th Amendment Act period and the other two to the period subsequent to this amendment. These decisions are: (1) *The State of Bengal* v. *Mrs. Bela Banerjee,*[51] (2) *State of Madras* v. *D. Namasivaya Mudaliar,*[52] on the one hand and (1) *Vajravelu* v. *Special Deputy Collector,*[53] and (2) *Jeejeebhoy* v. *Assistant Collector*[54] on the other.
that the payment of compensation for land acquired under the West Bengal Land Development Act, 1948 should be in accordance with the market value of the property not relating to a fixed time which was December 31, 1946 in this case, but with reference to the time when the land is actually acquired by the government. The reason was that no ceiling could be fixed on compensation without reference to time as otherwise it would be arbitrary and contrary to article 31(2).

This has been applied in *Kamla Bai* v. *T. B. Desai*[55] which has been recently decided by the High Court of Bombay.

The most important case after the Constitution 4th Amendment Act 1965 is *Vajravelu* v. *Special Deputy Collector.*[56] In this case the constitutional validity of the Land Acquisition (Madras Amendment) Act, 1961 was challenged. The notifications were issued under the Land Acquisition Act, 1894 that the lands of the petitioners were needed for a public purpose. Subsequent to the notification, the Madras Legislature enacted the amending act for the acquisition of land for housing schemes and laid down principles for fixing compensation different from those prescribed in the Act of 1894. The validity of the amending act was challenged, inter alia, on the ground that it infringed article 31(2) of the Constitution.

Subba Rao J., (as he then was), speaking for the Court, referred to

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51. 1954 S.C.R. 558, 564.
52. 1964 6 S.C.R. 936, 945.
53. 1965 1 S.C.R. 614.
54. 1965 1 S.C.R. 936.
55. A.I.R. 1966 Bombay 36.
56. A.I.R. 1965 S.C. 1017.

the decisions of the Supreme Court in *Kochuni's* case and *Ranjit Singh* v. *State of Punjab*,[57] and made it clear that article 31-A applied only to a law made for acquisition by the state of any 'estate' or any rights therein or for extinguishment or modification of such rights if such acquisition, extinguishment or modification is connected with agrarian reform. The provisions o fthe amending act, he pointed out, were not confined to any agrarian reform and, therefore, did not attract article 31-A of the Constitution.

As regards the second question that the expression compensation carried a meaning different from that given to it in *State of West Bengal* v. *Bela Bannerjee*[58] and thereafter the adequacy of compensation were not justiciable under the amended article, the Court referring to the decision in *Bela Bannerjee's* case pointed out in clear terms that the amended article accepted the meaning of the expression compensation as just equivalent of what the owner had been deprived of on the construction put on the term 'principles' as 'principles for ascertaining' a 'just equivalent' of what the owner had been deprived of.

Under the amended article, the law fixing the amount of compensation or laying down the principles governing the fixation of compensation cannot be questioned in any court on the ground that the compensation provided by that law was inadequate. The Court emphasised that in order to appreciate the construction of the amended article the definition of compensation and the question of justiciability were to be kept distinct. Even under the amended article the provision for compensation or laying down of principles for determining the compensation is a condition for the making of a law of acquisition or requisition. The fact that parliament used the same expression, namely, compensation' and 'principles' as were found in article 31 before the amendment clearly showed that it accepted the meaning given by the Supreme Court in *Bela Bannerjee's* case. On this ground the Court in the instant case laid down that a law of acquisition or requisition shall provide for a just equivalent of what the owner has been deprived of or specify the principles for the purpose of ascertaining the 'just equivalent' of what the owner has been deprived of. If parliament intended to enable a legislature to make such a law without providing for compensation so defined, it would have used other expressions like price, consideration etc. This rule was arrived at by the Court with the help of the well known rule of interpretation that

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57. A.I.R. 1965 S.C. 632.

58. A.I.R. 1954 S.C. 170.

if the legislature uses a term which has received authoritative interpretation by courts, it is presumed to use the word in the sense in which it was interpreted by the Court.

The Supreme Court applied these principles to *Jeejeebhoy* v. *Assistant Controller*[59] and held that the fixation of the value of property was arbitrary. On that basis the Court held that the land Acquisition (Bombay) Amendment Act, 1948 did not satisfy the requirements of 'just equivalent of what the owner was deprived.'

This attitude of the Court is further reinforced by the recent (not yet reported) decision of the Supreme Court in *Union of India* v. *The Metal Corporation of India.*[60] The question for decision inter alia related to the payment of compensation for machinery etc. according to the market value prevailing at the time of the purchase and not at the time of acquisition. The Supreme Court after reviewing the above cases came to the following conclusions with regard to the question of compensation and the meaning of article 31(2) of the Constitution in this behalf. Subba Rao J., as he then was, observed:

> The relevant aspect of the legal position evolved by the said decisions may be stated thus: Under Art. 31(2) of the Constitution, no property shall be compulsorily acquired except under a law which provides for compensation for the property acquired and either fixes the amount of compensation or specifies the principles on which and the manner in which compensation is to be determined and given. The second limb of the provisions says that no such law shall be called in question in any court on the ground that the compensation provided by the law is not adequate. If the two concepts, namely, 'compensation' and the jurisdiction of the court are kept apart, the meaning of the provisions is clear. The law to justify itself has to provide for a payment of a 'just equivalent' to the land acquired or lay down principles which will lead to that result. If the principles laid down are relevant to the fixation of compensation and are not arbitrary, the adequacy of the resultant product cannot be questioned in a court of law. The validity of the principles, judged by the above tests, falls within the judicial scrutiny, and if they stand the tests, the adequacy of the product falls outside its jurisdiction. Judged by the said tests, it is manifest that the two principles laid down in cl. (b) of Part II of the Schedule to the Act, namely (1) compensation equated to the cost price in the case of unused machinery in good condition, and (ii) written-down value as understood in the Income-tax law is the value of the said machinery, are irrelevant to the fixation of the value of the said machinery as on the date of acquisition. It follows that the impugned Act has not provided for 'compensation' within the meaning of Art. 31(2) of the Constitution and, therefore, it is void.

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59. 1965 S.C. 636.

60. Civil Appeal No. 1222-N of 1965.

IX. Right to Property and the Future Constitutional Vision

The impact of directive principles on property rights is a subject of great constitutional importance although the Supreme Court in their decisions have at times played down the importance of these principles. The right to property as has been noted in these pages is the result of a compromise between two conflicting economic doctrines, recognition of a vested right in property, deprived from a naturalist philosophy on the one hand and *laissez faire* philosophy on the other. It may be interesting to note that although the courts do not accord a lasting value to the directive principles as they do with regard to fundamental rights the state is constitutionaly bound to treat these directives as fundamental in the governance of the country. It has therefore to pass legislation to give effect to the directive principles and also take executive action for the same.

The Constitution in clear terms provides for a welfare state in India based on socialistic and democratic principles. The constitutional rights of property are subject to an amalgam of the doctrine of eminent domain and police power of the state. The right of property is therefore never an absolute right and is not protected by unlimited power of judicial review based on a doctrine like due process of law. How long courts would be free therefore to hold up important welfare legislation based on socialistic principles is difficult to anticipate. But an ever increating number of occasions for constitutional amendment to meet judicial challenges in defence of property rights is not a happy trend. Although the costitution does not purport to embody a distinct or any particular economic philosophy the future course which our economy would follow is not difficult to envisage. The path marked out through our plans in pursuance of the dictates of the directive principles is clear and if sufficient resources in terms of foreign exchange, financial aid and capital goods can be marshalled without undue strains on our internal economic needs and resources there is little doubt that a socialistic pattern of society will be ushered in this country rather soon. In this task the judicial interpretation of the constitutional guarantees will, it may be hoped, be in line with the future pattern of our society and without recourse to needless constitutional amendment. The future constitutional prespective in this field will thus depend upon the future course the implementation of the socialistic philosophy embodied in article 39 of the constitution and the preamble may take. This will in its turn depend upon the zeal and resources with which the government of the day proceeds with this task as in the words of Mac Iyer "Every system of government sustains a corresponding system of property."[61] This could be as true about India as about any other country and its system of government.

61. Mac Iyer, *The Web of Government* 125 (1947).