CONSTITUTIONAL PROVISIONS AND PROBLEMS OF INTERPRETATION

P. K. Tripathi

The constitutional provisions guaranteeing the fundamental rights presented at the outset three problems of interpretation. It appears that even after the lapse of nearly two decades of constitutional interpretation, each one of the problems remains as complex and unresolved as at the commencement.

These three problems were: (1) to explain the relationship between the provisions of article 19(1)(f) and those of article 31; (2) to ascertain and explain the relationship between the provisions of clause (1) and clause (2) of article 31; and (3) to ascertain the extent of justiciability of the quantum of compensation the state was bound to pay in cases of expropriation. Connected with problems 1 and 2, as enuciated above, was the ancillary problem of examining if and to what extent the American constitutional doctrines of "police power" and "eminent domain" were applicable in India in situations involving the fundamental rights relating to property. The object of this paper is to examine in what manner and to what extent the Supreme Court has been able to propound solutions to these problems.

I

Before coming to the judicially propounded doctrines and theories in regard to the right to property and the nature and extent of permissible state-control, it will perhaps help a clearer understanding to have a look at the constitutional provisions concerned.

As we shall see later, much difficulty appears to have been created by the location of clause (1) of article 31 at a place subsequent to article 19. We should like to look at the provisions in the following order:

First of all we take clause (1) of article 31 which impliedly provides that authority of law is necessary for any governmental action depriving a person of his property. This is no more than an assertion of the English principle of rule of law in regard to property. Perhaps it is better, therefore, to put this provision for our consideration even before the provisions of article 19.

Next the provision in article 19(1)(f) may be considered. This is a guarantee of a fundamental right to acquire, hold and dispose of property,

and this guarantee is confined only to Indian citizens. This guarantee is subject to the legislative power of the state to impose reasonable restrictions in the public interest as provided in clause (5). In the absence of the right in sub-clause (f) there would have been no limitation on the power of the state to impose any restrictions; that is to say, restrictions for any purposes and going to any length on the right of the citizens to acquire, hold or to dispose of his property could have been imposed. It should be remembered that even in the absence of sub-clause (f) it would require a law to deprive any person, whether citizen or not, of his right to property. That is the import of clause 1 of article 31. What sub-clause (f) of article 19 has done is to take the matter a little further. Because of this sub-clause not only a law is required in cases of deprivation but the law has to satisfy the conditions laid down in clause (5) insofar as it affects the property of a citizen. As for foreigners the law need not satisfy those conditions.

The right in sub-clause (f) of clause (1) of article 19 is not a right confined to acquiring property or to disposing of property or to choosing freely the modes of acquiring and disposing it of. It is a full-fledged fundamental right to acquire, to hold and to dispose of property. It is submitted with great respect that in a number of pronouncements, as we shall see later, attempt has been made to limit the scope of this sub-clause almost to a nullity by assuming that this right "postulates the existence of the property" and that it is not applicable in those cases where property is directly and completely expropriated. It is submitted that article 19(1)(f), read with clause (5) of article 19, is not subject to any such limitation. The right includes the right to hold property and restrictions placed upon it, irrespective of whether they amount to complete destruction of the right or not, must satisfy the conditions of clause (5). In this view—which is in respectful agreement with one aspect of the views of Subba Rao J., as he then was, in *Kochuni* v. *State of Madras and Kerala*[1]—restrictions contemplated by clause (5) are not confined to those falling short of deprivation; on the contrary any restrictions inclusive of those which amount to deprivation are restrictions falling within the perview of clause (5) of article 19, and, must satisfy the requirements of public purpose and reasonableness.

There is nothing revolutionary in this proposition. All that this reading of clause (1) of article 31 and article 19 comes to is: (1) for any deprivation of property there should be legislative authorization, whether the deprivation is suffered by a citizen or by an alien; (2) when legislation seeks to impose restrictions on the property rights of the citizens—whether these

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

restrictions amount to deprivation or not—the law should further satisfy the conditions laid down in clause (5); and (3) that no such conditions laid down in clause (5), which follows as a consequence of above 2, need be satisfied where the restrictions are imposed on the property rights of foreigners.

The final observation which we would like to make before we proceed to examine judicial treatment of the rights relating to property is in regard to clause (2) of article 31. That clause, it is submitted, purported to deal, from the very commencement of the Constitution, with those cases where not only did the restriction on the right to property amount to a total deprivation but also to cases where this deprivation was the result of an acquisition of property or rights in property by the state; in other words the clause dealt with cases where state got enrichment by depriving the proprietor. It is quite understandable that in such cases the Constitution made no distinction between citizen and alien. The alien could be prevented from acquiring property because he had no fundamental right to acquire it. In the absence of any law prohibiting him from acquiring property he was free to acquire property; but his right to hold and to dispose of property so acquired depended entirely on the mercy of the state who could by legislation either put restrictions on his capacity to hold and to dispose of that property or even completely expropriate him . He had no right to examine the reasonableness or propriety of such legislation because he had no fundamental right in this matter. But even in his case if the state acquires his property compensation must be given to him.

The citizen's position is different inasmuch as he is not only entitled to compensation when his property is acquired but he is also entitled, by article 19, to question reasonableness of any legislation adversely affecting his property rights whether to the extent of deprivation or short of it, and whether by reason of the state acquiring the property, or the state merely extinguishing his rights without acquiring them.

It will be plain that on the above view the constitutional provision in part III which comes closest to the American doctrine of "police powers" is the provision in clause (5) of article 19 and the provision that comes closest to the American doctrine of "eminent domain" is the provison in clause (2) of article 31. As far as clause (1) of article 31 is concerned, it is submitted that this clause is comprehensive enough to include both these doctrines. That is why, in fact, we have treated this clause ahead of article 19 also. It is submitted that the location of the provision in this clause after article 19 and the before clause (2) of article 31 has been very misleading. As it will be presently submitted, it has mislead S. R. Das J., as he then was, to read only the doctrine of police powers in this

clause. It has also mislead Patanjali Sastri J. in reading only the doctrine of "eminent domain" in the clause.

This is not to say that there is any necessity to locate in the Indian Constitution provisions corresponding to these American doctrines. We are in respectful agreement with Jagannadhas J., who observe in *State of West Bengal v. Subodh Gopal*[2] that the provisions of the Constitution should be interpreted in terms of the constitutional text itself, and without unduly straining the language to fit into these provisions any foreign constitutional doctrines. Yet, these doctrines themselves are nothing but judicially developed principles to deal with cases involving the fundamental right to property and governmental authority to put restrictions on this right and to extinguish this right by expropriation or otherwise. It is only natural, therefore, that whether we incorporate those doctrines bodily in the Constitution or not, on account of the very similarity of our institution some of our constitutional provisions are bound to correspond more or less to these doctrines. It is in that view, it is submitted, that it will be unrealistic to think of ignoring a discussion of these doctrines altogether.

II

Though S. R. Das J. gave indications of his views in regard to the interpretation of articles 19 and 31 in *Charanjit Lal* v. *Union of India*,[3] as early as in the year 1951, a full-fledged discussion on the rights is to be found for the first time only in the *Subodh Gopal* case.[4]

The petitioners in this case by purchasing lands at a revenue sale had acquired under the law then existing, certain valuable rights including, *inter alia,* the right to eliminate certain sub-tenures. A later legislation, the constitutional validity of which was in question, sought to take away this right of eliminating the sub-tenures. The petitioners complained that this legislation, taking away the right to eliminate the sub-tenures, violated their fundamental rights under articles 19(1)(f) and 31.

Broadly speaking, Patanjali Sastri J., with whom Mahapan and Ghulam Hasan J. seemed to have agreed, took the view that article 19 did not apply to the situation and that only article 31 was applicable. The reason for excluding article 19 was that this article "declares the citizen's right to own property and has no reference to the right to the property owned by him, which is dealt with in article 31."[5]

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

3. A.I.R. 1951 S.C. 41.

4. *State of West Bengal* v. *Subodh Gopal,* A.I.R. 1954 S.C. 92.

5. *Id.* at 95.

His lordship, applying article 31, held that clause (2) of article 31 deals with nothing else but "deprivation" of property though the word "deprivation" is not to be found in that clause. "Acquisition," requisition" and "taking possession" of property — the expression used in clause (2)— amounted precisely to "deprivation" as contemplated in clause (1). On the basis of this reasoning his lordship held that clauses (1) and (2) of article 31 together dealt with the same subject property. These two sub-clauses, his lordship observed, incorporated the American doctrine of "eminent domain."

S. R. Das J. in a separate opinion, propounded the theory that clauses (1) and (2) of article 31 dealt with two distinct and separate subjects. According to him clause (1) dealt with the American doctrine of "police powers" because that clause, read positively, only meant that the state had the power by legislation to deprive a person of his property. Clause (2), on the other hand, according to the learned Judge, dealt with the doctrine of "eminent domain."

Interestingly enough, S. R. Das J. seemed to be in complete agreement with the Chief Justice in holding that article 19(1)(f) was irrelevant to the situation in hand. This had to be so because his lordship read the doctrine of "eminent domain" in clause 2 and the "police powers" in clause (1). That seemed to exhaust all that was needed by the state in this regard; and, no wonder that his lordship treated article 19(1)(f) as a mere superfluity. At any rate his lordship did not have any use for the article in dealing with the matter in hand.

It is submitted with great respect that had clause (1) not been placed after article 19(1)(f) and before clause (2) of article 31 as it happens to be in the scheme of part III of the Constitution, S. R. Das J. would have had no difficulty in seeing that it was in clause (1) of article 31 that the "police powers" of the state were contemplated; but, that they were contemplated in clause (5) of article 19, instead. What is the "police power" of the state? It is the power of the state to impose restrictions —of varying intensity—for the purposes of health, morals, safety and other purposes of the community, including, sometimes, even aesthetics. The power to impose these restrictions is not contemplated in clause (1) of article 31 but in clause (5) of article 19. Clause (1) of article 31, as already submitted, does no more than to state the inaucuous doctrine of "rule of law" in regard to property. That doctrine does not put any restrictions on the legislative power. His lordship, like the learned Chief Justice, is constantly worried as to why the right in article 19 is guaranteed only to citizens. But that need not create any difficulty or confusion. The right in article 19(1)(f), which is the principal constitutional right in regard to property, can be given only to citizens. Foreigners cannot

tell the legislature that it should put no restrictions on their right to acquire property or to hold it or to dispose it of. The foreigner is entirely subject to the will of the legislature in these matters. But even he is entitled to the humanitarian right of receiving compensation when the state acquires his property. And, even in his case, legislative authority is necessary for deprivation of property. That explains why clause (1) of article 31. applies to all persons, whereas sub-clause (f) of clause (1) of article 19 applies only to citizens.

Deprivation does not necessarily mean total deprivation. Deprivation is an impairment of the right to property which may amount to total destruction of the right or may not. All deprivation, therefore, is covered by clause 5 of article 19. There is no need to arm the state with any constitutional power for depriving the foreigner of his property rights because a foreigner has no fundamental right with respect to property corresponding to the rights the citizens has by virtue of article 19(1)(f). That is the reason why the "police powers" in regard to the property rights of aliens are present by implication, whereas those in regard to the property rights of the citizens are expressly provided for in clause (5) of article 19.

It is submitted, therefore, that both the learned Judges in the *Subodh Gopal* case failed to appreciate the significance of article 19(1)(f), and relegated the article to a position of redundance because of a common failure. That was to recognize that clause (1) of article 31 did no more than reiterate the doctrine of "rule of law" in regard to property and, that the "deprivation" contemplated in the clause could result either as a consequence of restrictions in the nature of police powers contemplated by clause (5) of article 19 or as a consequnce of acquisition as contemplated in clause (2) of article 31, *i.e.*, it could result either from the exercise of the police powers or from the exercise of the right of eminent domain by the state.

Patanjali Sastri J., in our submission, was quite right in holding that article 31 dealt with the right of "eminent domain." But, we respectfully disagree with his theory that clause (2) of article 31 is comprehensive enough to cover all cases of "deprivation," or that all cases of deprivation attract the constitutional provisions regarding compensation. Actually, in propounding this theory his lordship has considerable difficulty in explaining away the deliberate difference in of article 31 had not been deceptive his lordship would not have, it is submitted, strained the language of clause (2) in attempting to bring it on all fours with that of clause (1).

On the other hand, we respectfully agree with S. R. Das J. that clause (2) does not contemplate all cases of deprivation but only those where there

is acquiring, requisitioning or taking possession of the property by the state. This is what the constitutional amendment also, later, established by adding the explanatory provisions of clause 2(a) to the article. But he too is mislead by the vicinity of clause (1).

We respectfully disagree with S. R. Das J in his theory that clause (1) of article 31 embodies and exhausts the doctrine of police power in the Indian Constitution. Like the Chief Justice, S. R. Das J. also had to strain the text of the constitution to read in clause (1) a power instead of a limitation for the state. Also, his lordship, like the learned Chief Justce, was constrained to ignore and explain away the provisions of article 19 in order to sustain his own theory. It is really remarkable that in a case like *Subodh Gopal* where both the learned Judges came to the conclusion that there was no total deprivation of property, they should agree that article 19(1)(f) was not at all applicable. It would appear, though, that the *Subodh Gopal* case presented an ideal illustration of the application of article 19. Because, what was involved in this case was a legisative restriction on the right of a citizen to hold and to enjoy his property.

In *State of Bombay*. v. *Bhanji Munji*[6] a final stamp of authority was given to the doctrine that article 19(1)(f) and article 31 (1) are mutually exclusive in application. In that case it was held that when a restriction on the right to property did not amount to a total deprivation it was only article 19 that applied, whereas, when the restriction amounted to a total deprivation article 31 alone was applicable.

It was only in *Kochuni* v. *State of Madras and Kerala,*[7] that Subba Rao J., as, then was, speaking for a unanimous court, demolished this doctrine. The learned Judge pointed out that any analogy drawn from the relationship between articles 19 and 21 (on the basis of observations in the *Gopalan case*[8]) would be faulty in dealing with the relationship between articles 19 and 31. The learned Judge pointed out that article 19(1) (d) dealing with the right to move throughout the territory of India (which figured in the arguments in the *Gopalan* case) dealt with a different "concept" than article 21. Whereas, in the case of articles 19 and 31 the concept was common, each article dealt with the right to property.

After the *Kochuni* case, for some time, there have been no cases dealing with the relations *inter se* between articles 19 and 31 on the one hand and those between clauses (1) and (2) of article 31, on the other. It would appear, therefore, that the position on these matters is where

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6. A.I.R. 1955 S.C. 41.
7. A.I.R. 1960 S.C. 1080.
8. *A. K. Gopalan* v. *State of Madras,* A.I.R. 1950 S.C. 27.

it was left in the *Kochuni* case. In other words, there has been no clear demarcation of the boundaries between the two articles and the two clauses of article 31. Also, the question of application of the doctrines of "police powers" and "eminent domain" seems to have been given up in utter confusion.

It is submitted with great respect that if the several provisions are read as suggested there should be no confusion.

III

The question of compensation presented itself in two facets. First, in what cases of acquisition by the state is compensation required by the Constitution to be paid? And, second, was the quantum of the compensation provided by the legislature a justiciable issue?

Before the fourth amendment to the Constitution, the Supreme Court had held in *State of West Bengal* v. *Mrs. Bela Bannerjee*[9] that the compensation contemplated in clause (2) of article 31 was a "just equivalent" of the value of the property acquired. After the fourth amendment, however, clause (2) of article 31 seemed to overrule the decision in *Bela Banerjee*. The amended clause, while still requiring the legislatures to provide for compensation in the laws authorizing acquisition of property, clearly laid down that "no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate." It was thought that this amendment had taken the question of compensation entirely outside the scope of justiciability.

However, in *Vajravelu* v. *Special Deputy Collector,*[10] a bench consisting of five Judges speaking through Subba Rao J, as he then was, made observations which indicated clearly that the Court was not going to allow legislation to pass through unless the compensation contemplated for the expropriated owner was, by and large, a "just equivalent" of the property acquired by the state. The Court laid emphasis on the fact that coming after the decision in the *Bela Bannerjee* case the fourth amendment had deliberately retained the word "compensation" in clause (2) of article 31. This, said the Court, clearly established that the amendment intended that the legislature must pay compensation as understood in the *Bela Bannerjee* case in all cases where property was acquired by the state. The Court, further clarified that where just equivalent of property was proposed to be given by the legislature, or, where principles for arriving at a just equivalent were laid down by the legislature the Court will not interfere on the ground of alleged "inadequacy".

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

10. A.I.R. 1965 S.C. 1017.

However, the Court will consider it a duty to examine whether the principles laid down by the legislature were in fact principles relevant and proper arriving at a just equivalent. And if the legislature laid down principles that were "not relevant to the property acquired or to the value of the property at or about the time it is acquired,"[11] the Court will not hesitate to hold that there was no compensation, and, consequently, that the provisions of article 31 were violated.

In the *Vajravelu* case, however, the Court did not turn down the legislation on that ground. But, soon after, in *Union of India* v. *The Metal Corporation of India*[12] the Court, speaking again through Subba Rao C. J. applied the principles mentioned in the *Vajravelu* case and turned down as violative of article 31, an act of Parliament providing for the acquisition by the Union of India of an undertaking called the Metal Corporation of India Limited. The act provided for compensation for the plant and machinery of the corporation to be calculated on the basis of its actual cost in the case of equipment which had not been used and on the basis of its written down value for the purposes of the Income Tax Act, 1961, in the case of plant and machinery which had been in use. Applying the tests laid down in the *Vajravelu* case the Court found that the actual cost of the machinery when purchased several years ago was not relevant for ascertaining what should be the "just equivalent" to be paid on its expropriation. The Court also found that in the case of machinery in use the written down value for the purposes of income tax was not relevant inasmuch as such value, far from being the real value of the machinery, was a fictitious value the object of which was to give relief to the tax payer. Thus, coming to the conclusion that the principles of compensation relevant for the purpose of determining the "just equivalent" of the property expropriated, the Court held that the act violated article 31 and was, therefore, invalid.

On the question, what kind of property must, on acquisition, be compensated the fourth amendment to the Constitution had excluded from the purview of article 31(2) a number of items of property mentioned in article 31A. One of the items so excluded was "acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights." In the *Kochuni* case, already referred to, the Supreme Court, speaking through Subba Rao J., as he then was, limited the scope of this sub-clause by confining it to those laws which aimed at the national programmes of "agrarian reform." In *K. Kanhikoman* v. *State of Kerala*,[13] a majority of the Court, speaking through

11. *Id.* at 1024.
12. Civil Appeal No. 1222-N of 1966.
13. (1962) S.C.J. 510.

Wanchoo J. limited the scope of the sub-clause even further by excluding from its purview lands held under the *ryotwari* tenure in the State of Madras and in such areas in the states adjoining the State of Madras as had been parts of the State of Madras at the commencement of the Constitution.

It will be seen, therefore, that a kind of tussel has been going on between the legislatures and the Court over the question of compensation for property acquired by the state and it is difficult to say where ultimately the final lines of adjustment will lie.

A word may also be mentioned about the requirement of public purpose under clause (2) of article 31. In the *Bhanji Munji* case the Supreme Court had held that the requirement of public purpose extended to acquiring houses for accommodating employees of the Corporation. That seemed to be the farthest limit to which government and legislatures could be accommodated in this regard. However, in the case of *Barkya Thakur* v. *State of Bombay*[14] the Court appears to have gone too far in this direction. The Court there held that acquiring property for the purposes of a private industrialist was also protected by the doctrine of "public purpose."

It is submitted with great respect that if such a broad view of public purpose is taken, there will be hardly anything which will not be covered under public purpose. Perhaps, it may be suggested that no object which is not in direct fulfilment of a duty cast upon the executive directly by legislation should be regarded within the purview of public purpose under article 31 clause (2). In any case, the scope of public purpose in that article should not extend to cover each and every thing which the government likes or approves of or which is directly or indirectly connected with objects supposed to be encouraged by a statue. Such a relationship with a statue is far too tenuous to justify acquisition of private property. In the *Barkya Thakur* case the industrialist concerned could have as well negotiated with the owners of the land and purchased the property from them; or, if the owners were not willing to sell the property, perhaps their wishes had to be respected if ownership of property is to have any meaning.

Perhaps, with the insistence of the Supreme Court now on a "just equivalent" based on "relevant principles" for determining that equivalent, the temptation for acquiring private property for a fake public purpose will not remain too great.

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14. A.I.R. 1960 S.C. 1203.