URBANIZATION AND THE FREEDOM TO DEAL WITH PROPERTY : THE JUDICIAL PERSPECTIVE

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I

The traditional concept of "property" as the sole and despotic dominion of man over external things,[1] includes the twin notion of owner's freedom from any interference by others in the enjoyment of such dominion over things and his freedom for such despotic control of the thing as it admits and the holder is capable of exercising. The former consists of legally imposed prohibitlons against others qualified by regulated permissions to such others to interfere with the enjoyment of the thing, and the latter is a vaccum defined and delimited by legally imposed prohibitions on the owner, within which he is free to do what he can. Art. 19(1)(*f*) of our Constitution enshrines this notion as the citizen's fundamental right 'to acquire, hold and dispose of property' subject to the power of the State to impose reasonable restrictions on its exercise in the interests of general public or scheduled tribes.

The deliberations of the Constituent Assembly disclose little about the nature of this right perhaps, because the process of its incorporation was comparatively subtle.[2] This, together with the broadly drawn contours of permissible State infraction of this right, make it quite a promising avenue for display of judicial talent in aiding intelligent solution of pressing 'here and now' problems within the constitutional framework. This paper seeks to outline role of the judiciary in dealing with the problems arising in this area in the context of urbanization.

Urbanization causes radical changes in the pattern of distribution of population in the country. The following table[3] shows that an increasing

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1. Blackstone, *Commentaries 2.*
2. The provision for this freedom was the consequence of the adoption of an amendment proposed by Mr. K. M. Munshi that had the effect of deleting the guarantee against discrimination augmenting at the same time the freedom to acquire property into the freedom to acquire, hold and dispose of property. It may also be added that initially the proposal for its incorporation was aligned with unrestricted power of the State to impose restrictions on the exercise of this freedom in the interest of the general public, but the requirement of reasonability was introduced later. See 3C. A.D., 452-53, 7C.A.D. 730.
3. Government of India, *India*, 1966, p. 21, Table 16 (Publication Division).

percentage of the total population of this country has come to live in urban areas :

Percentage of population	1921	1931	1941	1951	1961
Rural	88.8	88.0	86.1	82.7	82
Urban	11.2	12.0	13.9	17.3	18.0

Total urban population stood at 7.89 crores at the time of 1961 census, but 21.4% of this population was concentrated only in seven towns. This concentration leads to increased demands on urban resources as an increasingly large number of people seek accommodation for residential, commercial, industrial, educational or other purposes within a limited area, creating a sharp upward trend in the market value of land and landed property as well as other amenities. This has a tendency to divert property from existing 'uses' to 'uses', yielding greater return, causing strains on existing use-pattern. On the one hand urbanisation increases the economic potential of urban property, on the other it threatens existing uses with extermination or increased cost. This is sought to be met, in part, by imposing restrictions on the rights of the urban-property owner curtailing the ambit of his freedom to deal with his property. Such restrictions must satisfy the twin constitutional requirement of reasonability and the interest of general public, and the three areas in which the exercise of State power in this direction has received judicial attention are :

(1) Relation of landlord and tenant;

(2) Planned urban development;

(3) Maintenance of healthy and decent surroundings.

II. Relation of Landlord and Tenant

Ordinarily landlord-tenant relations are governed by contract, or in absence thereof by the general provision of the Transfer of Property Act, 1882 relating to leases ; but urban growth has necessitated special legislation for that purpose. Such legislation restricts the freedom of the property owner to deal with his property mainly in the following ways : firstly, it does not permit him to let the property lie unused; secondly, it does not permit him to choose the tenant; thirdly, it does not permit him to lay down the terms of tenancy; fourthly, it does not permit him to bring the tenancy to an end as and when he wants ; and finally, it crystallizes the exchange-value of the property by fixing the remunerative capabilities of the beneficial interest of the owner of the property. As some 53.6% of the total urban

dwellings are rented out to tenants,[4] the constitutional propriety of such restrictions has received keen judicial attention. Two different approaches are discernible. The courts have either held that they meet the constitutional requirement or have denied that the right was at all infringed. The choice, as we would see later, depends on the extent and intensity of the restrictions.

The first approach is well illustrated by an unanimous opinion of the Supreme Court in *Jyoti Pershad case*.[5] There the petitioner who was the owner of a building, had obtained a decree of ejectment against his tenants on the ground that the building occupied by such tenants was old and was intended to be rebuilt by the landlord. Pending execution of this decree the Slum Areas (Improvement and Clearance) Act, 1956 was enacted. Sec. 19 of this enactment prohibited the execution of ejectment decrees against tenants in slum areas except with the prior permission of a competent authority created by the legislation. Such permission was refused to the petitioner; and the refusal was confirmed on appeal on the grounds that the building was not totally unfit for human dwelling and the only purpose served by its rebuilding would be to increase the income of the landlord from the building.

In denying that the restrictions were unconstitutional the Court first precisely isolated the nature of the claim made by the landlord holding that the landlord sought to improve on the 'exchange-value' of the property, though in fact, its 'use-value' *qua* tenants, would be depreciated as the new construction would only consist of three rooms as against the present eleven rooms. Next it examined the nature, extent, and manner of operation of the restrictions, concluding that the restriction was imposed for the purpose of confining and checking the spread of slums, and was hence, essentially, temporary, though its duration was necessarily unpredictable. It also found that the competent Authority was required to hear the landlord, and an appeal against its decision was also envisaged. These safeguards, it held, assured that the power conferred on the authority was not likely to be misused. The Court further took judicial notice of the influx of people to the Capital since Independence and that the natural extension of available facilities through building development was utterly inadequate to meet :

> Finally the court added policy considerations when it observed :
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> If law failed to take account of unusual situations of pressing urgency arising in the country, and of the social urges generated by the patterns of thought-evolution and of social consciousness which we witness in the second half of this century, it would have to be written down as having failed in the very purpose of its existence...
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> In the construction of such laws and particularly in judging of their validity the Courts have necessarily to approach it form the point of view of

4. Figures based on 1961 census.
5. *Jyoti Pershad* v. *Union Territory of Delhi*, A.I.R. 1961 S. C. 1602.

> furthering the social interest which it is the purpose of the legislation to promote, for the courts are not, in these matters functioning as it were in vacuo but as parts of a society which is trying, by enacted law, to solve its problems and achieve social concord and peaceful adjustment and thus furthering the moral and material progress of the community as a whole.[6]

The foregoing observation reveals an inversion in values with respect to the role of the judiciary. The traditional concept of an impartial arbiter of conflicts between competing interests is substituted by one of active participation in the social effort for progress. That such a frank avowal of this radical change should come in the wake of urbanization attests to the profound social impact of urbanization, as also to the judicial awareness of it. Add to this the existing realization of the ethical involvement of the requirement of 'reasonableness'[7] and we have quite an efficient tool to enable realization of all that was cherished by the framers of the constitution.

A similar approach has been made to the meaning of the expression 'interest of general public'. The Courts have not insisted on any mechanical test or, on a showing that a numerically large number of persons would be benefitted. Instead they have taken a broader view in which the eradication of any abuse or any grievance causing dissatisfaction in society though confined in its incidence to a few or even one person, may also be in the interests of general public. This 'grievance theory', while admitting that the expression 'interest of general public' means the interest of all the people in this country, has minimised its arithmetical rigour by presuming that all persons are interested in just and good government, which obviously is a hypothesis, and the *a priori* nature of which matches well with the need to create juridical concepts suitable for the translation of the idealism of the framers of our Constitution into life. The following extract from the opinion of Calcutta High Court, which has been subsequently quoted with approval by the Supreme Court[8] also, is representative :

> It is in the interest of general public...that all classes of the citizens of India are content and that their grievance should be removed. It is in the public interest that persons should be governed justly and well and removal of hardship and grievance of a particular class is...clearly a matter of public interest.[9]

In this context it is not surprising that we have not come across a single reported case where the Courts might have struck down such restrictions imposed for the welfare of tenants as unconstitutional. The Courts

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6. *Ibid.*, p. 1613.
7. Cf. Shastri, C. J. in *State of Madras* v. *V. G. Row*, A.I.R. 1952 S. C. 196 at p. 200.
8. *K.K. Kochuni* v. *States of Madras and Kerala*, A.I.R. 1960 S.C. 1080 at p. 1104.
9. *Ishwari Prasad* v. *N. R. Sen*, A.I.R. 1952 Calcutta 272 at p. 273.

have always taken a sympathetic view of the misery of the tenants. The few cases that have been decided by the Courts fall in four classes :

(*i*) Relief to tenants against ejectment for non-payment of rent.[10]

(*ii*) Denial of the right of landlord to have a tenant of his own choice.[11]

(*iii*) Non-recognition of ownership so as to avoid ejectment of tenants.[12]

(*iv*) Exemptions from restrictions and duties imposed by law upon tenants.[13]

The attitude of the Courts has always been to uphold such restrictions as are intended to prevent the landlords from taking an advantage of the situation created by the lack of supply to meet the demand. This is amply brought out by cases falling in the last of the above four classes. The power to exempt buildings from the operation of rent control legislation has been considered constitutionally valid principally on the ground that such exemptions were made only in favour of buildings owned by local authorities or other public bodies which would not indulge in exploitation of tenants. Again, the refusal of the Courts to consider such requirement as a deposit by the tenant of the amount of outstanding rent claimed by the landlord before he could contest a suit for ejectment on ground of non-payment of rent, unreasonable, seeks to strike a balance between the freedom of the landlord and the need for control in the interests of the tenant.

The same is also illustrated by the attitude of the Courts towards legislation enabling the tenant who has obtained the lease of a site to construct a building and has constructed such building thereupon, to purchase the site that has been leased to him. The Supreme Court[14] has considered such a restriction valid on the grounds :

(*i*) that it affects a very small class of persons ;

(*ii*) that it sought to give effect to the 'implicit understanding' between the lessor and the lessee that the lessee would not be ejected ;

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10. *S. B. Trading Co.* v. *Shyamlal*, A. I. R. 1951 Calcutta 539 ; *Iswari Prasad* v. *N. R. Sen*, op. cit. supra, n. 9.

11. *Jinadathappa* v. *R. P. Sharma*, A. I. R. 1961 S. C. 1523; *Shanti Devi* v. *Dy. Comm.* A.I.R 1967 Patna 333.

12. *Ruben* v. *Naryan*, A.I.R. 1953 Bombay 174.

13. *Puttiah* v. *Mysore City Municipality*, A.I.R. 1955, Mysore 121, *Veniatavri* v. *Tenali Municipality*, A.I.R. 1956, A.P. 61; *Hardwar Singh* v. *S. K. Gupta*, A.I.R. 1967 Allahabad 305.

14. *Vajrapani* v. *N. T. C. Talkies Ltd.*, A.I.R. 1964 S.C. 1440.

(*iii*) that it comes into operation only when the lessor sought to act contrary to such 'implicit understanding' ; and

(*iv*) that it conserved building material.

The Court seems to assume that the mere fact that a person has put a valuable superstructure on a land owned by another is sufficient indication of an implicit understanding between the lessee and the lessor that the lessee shall continue to remain in possession of the site leased in perpetuity. But the impugned legislation did not make the existence of such an understanding a prerequisite, and would have been equally available even where there was an express agreement to the contrary between the lessor and the lessee. If the intention of the Court was to provide relief only in cases involving an implied agreement of the above nature, it would have held the statute invalid as it covered both valid and invalid restrictions. Inevitably then, we are led to the conclusion that the Court was using this fiction of implicit agreement to provide for the anomalous situation that vested in the owner a power to exploit the tenant, as hardly any one who has put up a valuable building would like its demolition in preference to an increase in rent. This conclusion is reinforced by the emphasis by the court on the fact that the restriction came into operation only when the landlord sought to exercise his power to terminate the lease.

This intention of the Court to curb the exploitative potential of the landlord is further evidenced by the fact that the Court refused to consider the compensation clause of the impugned legislation which provided only for the payment of the average of the market value of land prevailing during the last six years. It avoided this issue by saying that in the instant case the lessee was prepared to pay the market value of the land. It is submitted that the undertaking of a litigant in a particular instance cannot validate a legislation that offends against Art. 19(1)(*f*). It has been repeatedly laid down that there can be no waiver of fundamental rights,[15] and it does not require a crystal ball to say that had this argument been pressed before the court it would have held the legislation nonetheless valid.

Another method of reconciling extensive restriction of the freedom to deal with property especially if it involved requisition of the property by the State, used by the courts, was to deny that the freedom guaranteed by Art. (19)(1)(*f*) was infringed at all, by such legislation. This exclusion was attained by : (*a*) confining Art. 19(1)(f) to restriction as opposed to deprivation of property that such legislation involved, or (*b*) by excluding it altogether by interpreting the term 'hold' in that clause to mean 'own' rather than possess property.

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15. *Basheshwar Nath* v. *Commr. of Income Tax* A.I.R. 1956 S.C. 149; *Behram Khurshid* v. *State of Bombay*, A.I.R. 1955 S.C. 123.

(a) Art. 19(1) (f) is not available in cases of deprivation of property

This technique was founded on the distinction between 'restriction' and 'deprivation' of personal liberty made in Gopalan's case[16] and was introduced in the realm of property rights by Justice Das in *Charanjitlal's*[17] *case*. It was brought to perfection by an ununamous decision of the Supreme Court in *State of Bombay v. Bhanjee Munjee*[18] in the context of requisition of property for allotment to homeless persons in urban areas. There as a measure of expediency, administrative orders had confined the beneficial operation of this legislation to houseless 'first informers'. The Court excluded Art. 19(1)(*f*) on the ground that that clause envisaged continued existence of property which could be enjoyed by the claimant as otherwise the restrictions contemplated by Art. 19(5) could not be brought into play, and added that such existence in order to attract Art. 19(1)(*f*), must be substantial and not merely nominal as was the situation in the instant case where the right to possess and alienate had been taken away. In order to appraise the value of this technique, one has to take it together with the majority opinion of the Supreme Court in the twin cases[19] where the protection of Art. 31 was held to extend to cases where substantial deprivation of property rights, though short of taking away of the title, has taken place. These two opinions together provided a complete umbrella for protection of property rights, and hence probably the dichotomy between restriction and deprivation, though more logical than real was yet workable. But the 4th Amendment to the Constitution knocked out this basis by separating cl. (1) of Art. 31 from cl. (2) of it, and by confining the later to transfer of title or possession of the owner to the State. This change introduced an anomaly. If the State sought to restrict the freedom of the individual to deal with his property such restrictions must be reasonable and in the interests of the general public or scheduled tribes, but if it chose to deprive him of such freedom altogether it needed no more than a mere law to do so. This led to the epoch-making opinion of the majority of the Supreme Court in *Kochuni's case*[20] that held that a law falling within Art. 31(1) must also satisfy the requirements of Art. 19(1)(*f*).

Normally, this would have meant that the *Bhanji case* stood overruled, but curiously enough the same bench had held that the case no longer holds the field, followed it in another case[21] shortly after the Kochuni

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16. *A. K. Gopalan* v. *Madras*, A.I.R. 1950 S.C.
17. *Chowdhury Charnjitlal* v. *Union of India*, A.I.R. 1951 S.C. 41 at p. 60.
18. A.I.R. 1955 S.C. 41.
19. *State of West Bengal* v. *Subodh Gopal*, A.I.R. 1954 S.C. 92; *Dwarkadas Srinivas* v. *Sholapur etc. Co.*, A.I.R. 1954 S.C. 118.
20. Op. cit. supra, n. 8.
21. *Babu Barkya Thakur* v. *State of Bombay*, A.I.R. 1960 S.C. 1203 ; The Court was considering the validity of an acquisition of land for the purpose of steel factory.

decision and later reiterated it in another case where the validity of an acquisition of land was impugned that Art. 19(1) (*f*) did not apply to cases falling within the ambit of Art. 31(2).[22] There the Court observed :

> The observation in Kavalappara Kochuni's case that Bhanji Munji's case "no longer holds the field" has, therefore, to be understood as meaning that it no longer governs a case of deprivation of property by means other than requisition or acquisition by the State. Kavalappara Kochuni's case was not concerned with a law of requisition or acquisition governed by Art. 31(2), as it now stands, and did not decide the question.

This case has gone almost unnoticed, while it has been argued in some quarters that the logic of Kochuni decision inevitably involves the application of Art. 19(1) (*f*) to laws falling within Art. 31(2). In spite of much persistence with which such a view is advocated seldom has any reason been advanced for it. Perhaps the only one that could have been given was that Art. 31(1) continued to use the term 'deprivation' even after the 4th Amendment to the Constitution so that it should be given the same meaning as it had been given by the Supreme Court earlier which incidentally included acquisition and requisition. Such a view will not only be pedantic but would also defeat the very purpose of the amendment. Apart from this, it would not serve any practical purpose since a law relating to acquisition or requisition must be for a public purpose and must provide for compensation. If Art. 19(5) is now applied to it, it will merely duplicate the 'public purpose' requirements with reference to 'interest of general public', and if it is expected that the reference to 'reasonableness' might yield, market value equivalent as compensation, it only shows a failure to grasp the pervasive coverage of that extension. Far from insisting on market value it might endorse payment of a much lesser amount by bringing in all situational considerations to bear upon the question. But we may agree that those laws which are exempted from the requirement of Art. 31(2) by clause (5) thereof should fulfil the requirement of Art. 19 as in their case the Kochuni doctrine has no application because the complete code argument is not available there.

The question whether it would apply to a case like *Bhanji's* now or not, is an open one as that case has not still been formally overruled. It is submitted that apart from situations covered by Art. 31(5), requisition of a house by the State for allotment to a tenant to attract the provisions of Art. 31(2), must amount to transfer of the 'right to possess' to the State. The crucial question that would thus arise is whether such requisition operates to transfer a right of possession to the state or to the landlord. This would have to be determined on the terms of the statute and the order of requisition. If it be so phrased as to mean transfer of a right to possess to the State which then passes it on to the tenant the next question that would arise is whether the payment of rent by the tenant to the landlord makes

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22. *Sitabati Devi* v. *West Bengal*, C. A. no. 322/1961 decided on 1 December 1961.

any difference in this situation. Where the legislation gives a further right to the landlord to move for ejectment of such a tenant on non-payment of rent it would, undoubtedly, be clear that the tenant is holding from the landlord as such the action never passed any title to the State to possess. Another helpful factor might be the provision in respect of reverter of property to the landlord. If possession reverted to the landlord the allotment cannot amount to requisition ; but if it continued to vest in the State Art. 19(1)(*f*) would be excluded.

(*b*) **'Hold' only means to own and not to enjoy**

The technique of excluding Art. 19(1)(*f*) was also needed by the analytical distinction made between restriction and deprivation coupled with the fear that Art. 19(5) would not cover any deprivation of property rights. The only instance in which it was used comes from the High Court of Madhya Pradesh which held that the requisition of premises for allotment to a government servant did not infringe Art. 19(1)(*f*) as the right of ownership remained intact with the owner.[23] This approach was never followed by other courts[24] and now stands rejected by the Supreme Court[25] which has held that the right to hold includes the right to possess the property and not merely own it.

Nevertheless it has given rise to an anomalous situation regarding the rate of rent which an owner may charge from a tenant. In *Kishan Singh* v. *Rajasthan*,[26] Justice Ayyar observed :

> The fundamental right which a citizen has to hold and enjoy property imports only a right to recover reasonable rent when the lands are cultivated by a tenant, and therefore a legislation whose object is to fix fair and equitable rent cannot be said to invade that right.

Thus an implied limitation has been read into the right to hold property for which reason probably no litigation challenging the reasonableness of rate of rent has been pursued. It is submitted that such a restriction of the meaning of the expression 'hold' in Art. 19(1)(*f*) is a hangover of the stand that Art. 19 deals only with abstract rights.[27] As that has now been rejected by the Supreme Court it is only reasonable and just that such implied limitations should be done away with.

III. Planned Town Development

Planned Town Development was introduced in this country as a part of the programme for comprehensive development through planning. A

23. *Manohar Ramkrishna* v. *Desai*, A.I.R. 1951 Nagpur.
24. See op. cit. supra, no. 10.
25. See op. cit. supra, no. 5.
26. A.I.R. 1955 S.C. 795 at 798.
27. See *Raja of Bobbli* v. *State of Madras*, A. I. R. 1952 Madras 203.

In the first class of cases there are only two examples one from the Patna High Court and another from the High Court of Bombay. In both the cases the local authority had the power to require an owner to pull down any dilapidated structure including residential buildings, by serving on him a notice to do so. In the first ease[31] the High Court refused to interfere to keep one's property in such a state as to be dangerous to human beings. Perhaps, by it the learned judges meant that such restrictions were reasonable restrictions but they did not discuss it. In the Bombay case[32] the notice was challenged by tenants of such building. Their contention was that they have not been provided any opportunity for representation. The Court pointed out that the policy underlying the legislation was to ensure public safety and it held that where public safety was involved it was not reasonable to hold that merely because a person has not been heard the restrictions placed on his rights are not reasonable. It is submitted that this approach of the Court suffers from a bsic defect as it permits the landlords who may not otherwise get the building vacated, a way of achieving that by representing to the local authority that the building requires pulling down in the interest of public safety and, the local authorities being what they are, where no provision is made to insulate them from the influence of the vested interests, may not exercise such power with compunction.

The other class of cases relating to the power of the local authorities to declare certain private streets as public roads, or requiring the builder of a house to set back his building to a certain limit from the road are also few.[33] In a Gujarat case[34] the petitioner challenged the power of the local authority to declare any means of access to public places, even when it is privately owned, a public street, on the ground that the power was arbitrary. The Court made a distinction between means of access permanently available to the public and streets and means only occasionally available to the public. It held that in the former case the restrictions were valid as they impose no fresh burden, but in the latter that they were not as no hearing of the affected interests was envisaged.

V

The foregoing analysis of the judicial attitude reveals a conscious effort on part of the Courts to realize a part of the constitutional vision in respect of property relations in this country, namely that no individual can through the possession of property, have power over the lives of others.[35]

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31. *Ram Narayan* v. *Dinapore Cant. Board*, A.I.R. 1958 Patna 71.
32. *Firm Nathubhai* v. *Bombay Corpn.* A.I.R. 1959 Bombay 332.
33. *Vibhuti Narayan Singh* v. *Improvement Trust*, A.I.R. 1954 Allahabad 520.
34. *Sukhlal* v. *Surendranagar Municipality*, A.I.R. 1962 Gujarat 25.
35. See Dr. G.S. Sharma, "Property Relations : The Constitutional vision", printed in *Property Relations in Independent India*, pp. 27–35 at p. 29 (Tripathi 1965).

In the three areas where the impact of urbanization on the freedom to deal with property has received judicial attention, the Courts have consistently followed not only the policy of non-interference conceding to the State the power of devising the most efficient means to meet the problems arising out of an increase in urban population but have made conscious efforts to smoothen the paths of legislative effort in dealing with the problems of urbanization. Future trends in judicial opinion may preferably be discussed in the light of some of the other important problems arising out of the impact of urbanization on freedom to deal with property, which have not received judicial attention as yet, such as :

(1) Fixation of the rate of rent payable by a tenant.

(2) Slum Clearance and alternative allotment of residential sites.

(3) Regulation of building activity including zoning and control of land-use in urban areas with or without preplanning.