

The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

Edited by R. G. KAKADE, M. A., LL. B., PH. D.,
Assistant Secretary, All-India Civil Liberties Council
Office: Servants of India Society, Poona

Editorial Committee:

N. M. JOSHI,
S. G. VAZE,

Vice-President and
Secretary respectively of
the All-India Civil
Liberties Council

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THE FOURTH AMENDMENT

VIRTUAL ABROGATION OF THE RIGHT TO PROPERTY

By S. G. VAZE

The Fourth Amendment to the Constitution makes sweeping changes in Art. 31, which was originally inserted in the Constitution for the protection of rights of private property.* These changes are mainly four. (1) Compulsory acquisition or requisitioning of property, requiring payment of compensation to the owner of the property, will now be held to take place over a severely restricted area. (2) Even in the limited number of cases in which it will be admitted that some compensation is due, on account of acquisition or requisitioning, the quantum of compensation to be awarded will be a non-justiciable matter, the courts having no jurisdiction to determine whether the compensation given is adequate or not. (3) Every other kind of interference with property rights, even if it causes substantial or total deprivation of the property concerned, will be held to entail no liability on the State to grant compensation. (4) Constitutional validity will be conferred on laws falling within five specified categories even if they are in contravention of any or all of the three Articles [viz., 14, 19 (f) and (g) and 31 (2)] relating to private property, i. e., if they denied equality before the law and were of a discriminatory nature, or violated the right to the enjoyment of property, or did not provide for compensation where it was due. The Amendment practically withdraws all constitutional protection against confiscatory legislation. We deal below with the radical changes it effects in our constitutional law.

1—Restriction of Eminent Domain

The Amendment narrows down the scope for the operation of eminent domain. That is to say, it does not limit the power of the Government, conferred by Art. 31 (2), to acquire or requisition private property for public use without the owner's consent (this power of

course must not be limited); but it provides in the new Article 31 (2-A) that, in those cases of compulsory acquisition or requisitioning in which the title to the property does not pass to the State, acquisition or requisitioning shall be treated as if it was not acquisition or requisitioning, "notwithstanding that it deprives any person of his property." The Amendment proceeds on the theory, which was put forward before the Supreme Court on behalf of the Government in the Sholapur Mill case (see the next article on the case in this issue), that it is only when a person is divested of the totality of his rights that Art. 31 (2) will apply; if, out of the bundle of rights of ownership, any right (such as the mere husk of the title to the property) is still left to the owner, he is to be supposed to be in enjoyment of his property, although the property is controlled in every respect by the State and he is completely deprived of its use. It will be assumed that in such a case the State has taken action, not under Art. 31 (2), which, being a case of the exercise of eminent domain, requires payment of compensation, but under Art. 31 (1), which, according to another theory of the Government, relates exclusively to cases of the exertion of police power, and therefore does not entail the liability to pay compensation. The practical effect of the above newly introduced Article is that, in a number of cases, the State can take over private property without having to pay for it. It is in this sense that the field for the exercise of eminent domain is now limited. The Government have freed themselves from the condition of payment of compensation in such cases.

The significance of the new Article can best be understood by keeping in view the facts of the Sholapur Mill case, which indeed the Government regard as the *raison d'être* for the Article. They contend that all they did to the Mill was to take over its management temporarily in order to put an end to the malpractices that were current; but they did not take over the Mill's assets to any extent, which were left intact, and therefore they did not dispossess the company. But since the

* At the time of writing (14th April), the Constitution (Fourth Amendment) Bill was not passed. The article assumes that the Bill will be passed in the form in which it has been recommended by the Joint Select Committee.

Government terminated altogether the company's interest in the Mill for the time being it must be treated as dispossession. In order to stop any fraud or gross mismanagement the Government could legitimately have taken action under the criminal law or the company law. But if there is dispossession, Art. 31 (2) must apply. The Government no doubt took possession of the Mill in the public interest, i. e., for the purpose of avoiding an interruption in the production of an essential commodity and averting unemployment on a large scale. But this could be done only in exercise of the power of eminent domain. The Government seem to think that because they did not take over the Mill absolutely, in which case Art. 31 (2) would have become applicable, but only for a short period, with the full intention of returning it to the owners after the public purpose was served, there was no occasion for the application of Art. 31 (2), requiring payment of compensation. But the Government forget that there is such a thing as a temporary taking of property and the conditions attaching to eminent domain hold good just as well in a temporary as in a permanent taking. Only, the compensation that becomes due in a temporary taking is, quite naturally, very different from that which becomes due in a permanent taking. While in the latter case it is the market value of the concern taken over, in the former it is the rental value for the use of the concern. But both are equally takings of property in the constitutional sense.

SEIZURE OF COAL MINES IN U. S.

This will become clear when we see what was done in the United States when the Government of that country was required to resort to the device of temporary taking of industrial concerns in order to meet war or emergency needs. In October 1946 the U. S. Government had seized a major portion of the country's coal mines under sec. 3 of the War Labour Disputes Act which authorized the seizure of any plant, mine or facility if the President found that the operation thereof was threatened by strike or that an interruption in production would impede the war effort. Because this contingency had arisen, the Government took possession of the mines and operated them itself. In *United States v. United Mine Workers of America* (1947), 830 U. S. 258, the seizure was treated by the Supreme Court as making the mines governmental facilities "in as complete a sense as if the Government held full title and ownership." The U. S. Government did not contend in this case, as our Government did in the Sholapur Mill case, that because the title to the property was not vested in it, the taking possession of the property did not amount to exercise of the power of eminent domain.

Earlier, in May 1943, the U. S. Government similarly took possession of most of the nation's coal mines, because a strike or stoppage had either occurred or was imminently threatened therein, and operated them on its

own responsibility. One of the mines in which the Government intervened by taking possession and operating control of it was the Pewee coal mine, and in a case affecting it the Supreme Court said :

Here the Government "took" Pewee's property and became engaged in the mining business. Having taken Pewee's property, the United States became liable to pay just compensation. — *United States v. Pewee Coal Company* (1951), 341 U. S. 114.

It may be noted that in the case of this coal mine the Government operated it through the mine's own officials as the Indian Government did in the case of the Sholapur Mill, but that makes no difference to the fact that the Government seized possession of the mine under eminent domain and made itself liable to pay compensation "Temporary takings can assume various forms. There may be a taking in which the owners are ousted from operation, their business suspended, and the property devoted to new uses. A second kind of taking is where (as in the Pewee case) the Government for public safety or the protection of the public welfare, 'takes' the property in the sense of assuming the responsibility of its direction and employment for national purposes, leaving the actual operation in the hands of its owners as Government officials appointed to conduct its affairs with the assets and equipment of the controlled company." Whatever the form, it is a "taking," which has to be paid for.

In the recent steel seizure case, viz., *Youngstone Sheet and Tube Co. v. Sawyer* (1952), 343 U. S. 579, when steel plants were seized by an order of the President with a view to averting a strike and the attendant stoppage of steel production (it will be noticed that in each of these cases the public purpose was the same as or very similar to that in the case of the taking over of the Sholapur Mill), Justice Douglas said :

When the United States takes over an industrial plant to settle a labour controversy, it is condemning property. The seizure of the plant is a "taking" in the constitutional sense. A permanent taking would amount to the nationalization of the industry. A temporary taking falls short of that goal. But *though the seizure is only for a week or a month*, the condemnation is complete and the United States must pay compensation for the temporary possession. (Emphasis supplied.)

It might perhaps be permissible to point out to our radical friends that the Justices who announced these decisions of the U. S. Supreme Court (like Justice Black and Justice Douglas) are themselves radical, who cannot be charged with being unduly soft to vested interests.

2.—Extension of the Police Power

What makes the ordinary man prone to favour the Fourth Amendment in spite of its nakedly confiscatory character is the statement by the Government that the

Supreme Court's judgments in cases concerning Art. 31 have made it impossible to exercise any social control over private property, which is so necessary in a regime of planned economy and a Social Welfare State, without having to pay compensation even for the mere enforcement of regulatory laws. The statement of objects and reasons annexed to the Amendment Bill says :

The deprivation of property referred to in cl. (1) [of Art. 31] is to be construed in the widest sense as including any curtailment of a right to property. Even where it is caused by a purely regulatory law and is not accompanied by an acquisition or taking possession of that or any other property right, the law, in order to be valid according to these decisions, has to provide for compensation under cl. (2) of the Article.

We have shown before how utterly unfounded this statement is. In its rulings the Supreme Court has fully recognized the distinction between a curtailment of property rights caused by a regulatory provision of law and the extinguishment of those rights caused by appropriation of private property for public use, i. e., the distinction between what in American law are called the police power and the power of eminent domain, and it has decreed that while compensation will become payable when the latter power is brought into exercise it will not be so when the former power is applied. According to the decisions of the Supreme Court, therefore, State regulation of private property is fully possible without having to pay compensation for any resulting loss to the owner of the property.

SOCIAL CONTROL AND PRIVATE PROPERTY

It cannot be otherwise, for even in the United States where non-interference with private enterprise is favoured perhaps more than anywhere else the need for social control of private property is recognized. It is a well settled principle of the U. S. constitutional law that "obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper execution of the power." A passage from a famous decision, *Nebbia v. New York* (1934), 291 U. S. 502, may be given :

Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. . . . These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and

that of the State to regulate the use of the property and the conduct of business, are always in collision. . . . But subject only to constitutional restraints the private right must yield to the public need. (Emphasis added.)

This case involved price control of milk as a phase of the police power of the state subject only to the limitations of due process of law upon arbitrary interference with liberty and property. In *Bowles v. Willingham* (1944), 321 U. S. 533, a regulation concerning the fixation of maximum rents for houses in areas in which defence activities had resulted in substantial and widespread increases in rent, the Supreme Court said :

We are not dealing here with a situation which involves a "taking" of property. . . . Of course, price control, the same as other forms of regulation, may reduce the value of the property regulated. But that does not mean that the regulation is unconstitutional.

Mr. Justice Holmes, speaking for the Court, stated in *Block v. Hirsch* (1921), 255 U. S. 135:

The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay.

Thus property rights can be abridged "without pay" by the application of police power; but, in the first place, police power must be understood "in the proper sense," as Justice Holmes says; and, in the second place, police power too has to be exerted under the limitation of due process. The Fourth Amendment ignores these essential restrictions. It proceeds on the basis that whatever falls within the orbit of Art. 31 (2-A), which concerns taking of property without the title, and of Art. 31 (1), which is supposed to concern itself with deprivation of property by means of "purely regulatory provisions of law," is a result of the application of the police power. There is no justification whatever for this assumption. Mr. Justice Das, who alone among the Supreme Court's Judges agreed with the Government's contention that Art. 31 (1) relates exclusively to the police power and that Art. 31 (2) relates exclusively to the power of eminent domain, himself pointed out in the *Sholapur Mill* case how a blind adherence to this principle, without giving proper heed to the true nature of the police power, results in the police power unduly trenching on the sphere of eminent domain. Where the doctrine of police power can legitimately be made applicable and where the doctrine of eminent domain has to be applied, i. e., where property can be taken after

payment and where it can be taken without payment, has been laid down by Justice Holmes, and his conclusions are now everywhere accepted without demur. He said in *Pennsylvania Coal Co. v. Mahon* (1922) 260 U. S. 393:

As long recognized, some values are enjoyed under an implied limitation and must yield to police power but obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases, there must be an exercise of eminent domain and compensation to sustain the act.

Where the seemingly absolute protection in respect of private property given by the Constitution is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. We are in danger of forgetting that a *strong public desire to improve public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change*, and that the general rule is that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking. (Our italics.)

A SLUM CLEARANCE CASE

An account of a very recent case, decided only on 22nd December 1954 (*Berman v. Parker*), may be given here to show how the doctrines of police power and eminent domain are interpreted by the U. S. Supreme Court. Both these doctrines were applicable in this case. The account is particularly apposite because the case concerns slum clearance, which is one of the categories of legislation in regard to which it was originally provided that acquisition of property for that object could be effected without compensation, and though this category is now omitted from Art. 31-A, it is only because it would be possible to take such property even for a purely nominal compensation if the legislature so wished.

Congress passed an Act in 1955 authorizing re-development of blighted areas in the District of Columbia (which is under the legislative jurisdiction of Congress), particularly with a view to the improvement of sub-standard housing. One of the projects that were undertaken in accordance with the Act related to the southwest portion of Washington, in which it was found that 64 per cent. of the dwellings were a danger to public health and were beyond repair. As many as 97.5 per cent. of the inhabitants of these areas are Negroes. The plan to redesign the whole of this area was proceeded with under the authority given by the police power and the real property required for carrying out the plan was to be

acquired through the exercise of eminent domain. Some owners of the property in this area objected to the whole plan on the ground that it was not in the public interest and that it violated due process of law, thus making the exertion of police power unconstitutional, and particularly objected to the appropriation of their own property, which was not a slum area, for the purposes of the plan. Mr. Douglas, speaking for a unanimous Court, ruled that Congress had final authority to sanction such a plan under the police power, saying: "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." Though the reach of the police power is here declared to be very extensive and almost illimitable, under its cloak private property cannot be acquired; the power of eminent domain has to be employed for such acquisition and the property has to be paid for. This was not called in question in this case, and on that point Justice Douglas observed: "The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."

This case shows conclusively that there is no warrant for our Government to undertake social welfare plans, applying its police power for the purpose, and then to proceed, under cover of this power, to take possession of private property, which calls the power of eminent domain into exercise. Both powers can be legitimately used, but both can be used only in proper conditions. The Government cannot pretend to act under Art. 31 (1) in order to avoid payment of compensation, where action under Art. 31 (2) is called for. But in all the five categories of legislation listed in Art. 31-A, they have taken power to do this. One of these categories relates to "the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property." This is intended to nullify the Supreme Court's decision in the *Sholapur Mill* case. All these types of laws are declared in advance to be constitutional, even if they are found to contravene not only Art. 31 (2) but also Arts. 14 and 19. This involves serious infringement of citizens' basic rights.

3.—The Judiciary Kept Out

The Fourth Amendment frees the Government, over an extensive area, from the obligation which all democracies recognize of paying compensation for the private property they may have to take for public use, and further it removes the amount of compensation to be paid, even in the limited area where liability to pay compensation is recognized, from the purview of judicial review. And since the Government have frankly declared that they cannot and do not want to pay full compensation, it follows that as a result of the power the Amendment confers, con-

confiscation will be the lot of those who happen to be deprived of their property, the extent confiscation depending upon the sweet will of the Government. Apart from the practical effect this involves, the constitutional aspect of overthrowing the principle of judicial review cannot be ignored. Dr. Sachin Sen says in the "Statesman" of 17th March :

Any political creed which accepts the absolute authority of the legislature and elbows out the judiciary can make no appeal to democratic minds. . . . In a parliamentary democracy, the power given to the legislature without a judicial brake is the power given to the executive, and the natural tendency of the executive is to overstep the limits of responsibility and democracy. Thus, it is risky to put out of order the brake of the judiciary. And when the executive functions irresponsibly and undemocratically, the dangers to society become pronounced.

At this point we would like to state the conclusion at which Dr. Sen arrives. He says that though the Amendment is intended to accelerate the pace of a socialistic pattern of society, acquisitive action such as the Amendment involves will not help this pattern. The "shorter cut" which the Amendment takes with private property "may change the social anatomy, but it may hamper production by adversely affecting the climate of investment and accentuating difficulties of capital formation."

WHY A FUNDAMENTAL RIGHT AT ALL ?

Mr. Nehru admits that to take away the power of the courts to determine the amount of compensation (he so argued in the cabinet when a Minister put forward a proposal to that effect) is to "completely nullify" the Right to Property. Mr. Nehru did not disclose whether this Minister was Mr. Pant, but Mr. Pant indicated in the Rajya Sabha even before the change was recommended by the Select Committee on the Amendment Bill that this would be the proper course, citing the example of England. In that country, he said, the Government can acquire private property without paying a single farthing by way of compensation, and if any compensation is paid it is not subject to judicial review. Why should not our Parliament (he asked) be as supreme in this matter as the British Parliament ?

Our Government, whenever they find any constitutional safeguard inconvenient to the exercise of their authority and desire the removal of the safeguard, always point to the omnipotence of the British Parliament and ask : "Why have any constitutional limitations on the power of Parliament?" It was otherwise when the Constitution was framed. Then they were all for "the great and essential rights of the people" being secured, in the words of Madison, the architect of the U. S. Constitution, "not by laws paramount to prerogative, (as in England.) but by Constitutions paramount to

laws" (as in the U. S. A.); then they were alive to the dangers of "legislative tyranny." But the burthen is now changed. They want to get rid of one constitutional limitation after another, and they ask : "Why not trust Parliament?"

Mr. Nehru asked this question at the time of the First Amendment to the Constitution which imposes drastic restrictions on Freedom of Speech. Now Mr. Pant asks the same question in connection with the Right to Property, and Mr. Nehru after a little hesitation joins in the cry. The First Amendment does not put it formally beyond the power of the judiciary to determine whether the right to free speech has been violated or not; but by deliberately making the scope of permissible restrictions embodied in the Constitution wider than the restrictions which Mr. Nehru himself admitted it would be neither wise nor justifiable to impose by law, the restrictions were made practically non-justiciable. What the First Amendment did indirectly in respect to Freedom of Speech, the Fourth does directly in respect to the Right to Property, with the result that both the rights are severely crippled and virtually disappear.

We for our part will not greatly quarrel if all Fundamental Rights are scrapped from our Constitution and our Parliament is made supreme like the British Parliament in matters affecting individual freedom, provided however that we in our conduct show that sensitive regard for civil liberty which the British people by their age-long traditions show almost instinctively. We never aspired to secure better results by way of protection of fundamental human rights by means of constitutional limitations than what the British people enjoy without such limitations. Some men will misbehave in spite of all restrictions; some others keep to the straight path without any inhibitions. Mr. Pant says the British Parliament can seize private property without paying any compensation, but does it? Did not even the Socialist Government in that country nationalise industries after paying full compensation for the industries it took over? Is there an instance in British history or in the history of the Scandinavian countries noted for democracy which have adopted the "shorter cut" of taking private property without indemnifying its owners even for carrying out social reform plans? Were the American statesmen who inserted in the Fifth Amendment payment of just compensation as an essential condition for the exercise of eminent domain indifferent to the need of social control over private property? Was Justice Holmes who so vigorously denounced the "shorter cut" a protagonist of vested interests? They all believed that freedom from arbitrary expropriation was also a civil right which deserved to be protected like freedom of person and freedom of speech.

Mr. Nehru said, in defending the First Amendment, "Is not the British Parliament competent to restrict freedom of speech in any way it pleases?" It is, but

does it do so in practice? Is it conceivable that the British Parliament will enact a law half so ominous as our Press Act? There is no constitutional prohibition in England, as there is in the United States, of suspension of habeas corpus except in a grave emergency. Being omni-competent, the British Parliament can any day repeal the Habeas Corpus Act and thus withdraw even the legislative protection that is now afforded for personal liberty. But we find in actual fact that habeas corpus was suspended only in war-time and it was restored even before the war had terminated because the danger created by the war had subsided. And even while habeas Corpus remained under suspension, the British Parliament provided stronger safeguards against unjust deprivation of personal freedom than the safeguards provided in India, where suspension of habeas corpus can constitutionally take place in peace-time and in other

non-emergent conditions (all fundamental rights being liable to be suspended and some like freedom of speech being automatically suspended in executively proclaimed emergencies). The less our rulers talk about Britain in the matter of civil liberties the better. The truth seems to be that they inserted the Fundamental Rights in our Constitution without at all realizing the obligations they cast on those who wield power. The result is, as Mr. N. C. Chatterjee very rightly says in his dissenting minute on the Amendment Bill, "slowly and steadily" they "are altering the Constitution out of shape and damaging vital parts of it." Even more significant is the conclusion of the "Statesman": "The Fundamental Rights indeed remain on the statute book, but it is difficult to see what value most of them have in practice as protection against any determined invasion by the States." What a condemnation!

SOME THOUGHTS ON THE SHOLAPUR MILLS CASE

NO JUDICIAL SUPPORT FOR THE NEW ART. 31 (2-A)

The Fourth Amendment of the Constitution not only adds to Art. 31-A various other categories of social legislation affecting property rights, but also exempts cases in which a person is deprived of his property by law but in which the ownership is not transferred to the State from the operation of Art. 31 (2) requiring payment of compensation. For justification of the Amendment the Government rely chiefly on the Sholapur Mills case, in which, according to them the Supreme Court took a perverse view. It would therefore be interesting to review some points arising out of the Court's decision in the case.

"Deprivation" of Property: When Recognized?

The Government has maintained that it is because the Supreme Court has in its rulings treated "any curtailment" of a property right as deprivation, entailing liability to pay compensation therefor, that it became necessary to amend Art. 31. It is now well known that the Supreme Court never took the view ascribed to it. But what is perhaps not so well known is the fact that the Government has taken up the position before the Supreme Court that it is only when his loss of property or "deprivation" is complete that the property owner will become entitled to compensation under Art. 31 (2). Probably the Government brought forward the amending Bill because this view was not acceptable to the Supreme Court.

In the hearing of the first Sholapur Mills case, viz., *Chiranjitlal v. Union of India*, A. I. R. 1951 S. C. 41, the Attorney-General put forward the following contention, as summarized by Mr. Justice Mukherjee in his judgment:

The word "property" as used in Art. 31, Constitution of India, connotes the entire property, that is to say, the totality of the rights which the ownership of

the object connotes. According to Mr. Setalvad, if a shareholder is not deprived of the entirety of his rights which he is entitled to exercise by reason of his being the owner or holder of the share, and some rights, however insignificant they might be, still remain with him, there cannot be any dispossession as contemplated by Art. 31 (2).

On this point His Lordship said:

It is difficult, in my opinion, to accept the contention formulated in such broad terms. The test would certainly be as to whether the owner has been dispossessed substantially from the rights held by him or the loss is only with regard to some minor ingredients of the proprietary right.

And then he quoted with approval a passage from the majority judgment of the Australian High Court in the *Minister of State for the Army v. Dalziel* (1944), 68 C. L. R. 261, viz.,

Property, in relation to land, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle. But there is nothing in the placitum [sec. 51, XXXI] of the Australian Constitution to suggest that the legislature was intended to be at liberty to free itself from the restrictive provisions of the placitum by taking care to seize something short of the whole bundle owned by the person whom it is expropriating.

What particularly deserves notice is that Mr. Justice Das too (who supported the Government's contention, placed before the Court by the Attorney-General in this case, that cl. 1 of Art. 31 contemplates deprivation of property in exercise of the "police power," for which no

payment of compensation is necessary) takes the very same view on this point as Mr. Justice Mukherjea. He too cites the authority of the above Full Bench decision of the High Court of Australia. Expressing disapproval of the Attorney-General's contention about "totality of rights," His Lordship says :

(The argument) will then permit the legislature to authorize the State to acquire or take possession, without any compensation, of almost the entire rights of the owner, leaving to him only a few subsidiary rights. This result could not, in my opinion, have been intended by our Constitution.

In my judgment, the question whether the Ordinance or the Act has deprived the shareholder of his "property" must depend for its answer on whether it has taken away the substantial bulk of the rights constituting his "property." In other words, if the rights taken away by the Ordinance or the Act are such as would render the rights left untouched illusory and practically valueless, then there can be no question that in effect and substance the "property" of the shareholder has been taken away by the Ordinance or the Act.

Was the Company Dispossessed ?

In this case it was argued on behalf of the petitioner that the Ordinance and the Act "in effect authorized the State to take possession of the undertaking and assets of the company through the new directors appointed by it without paying any compensation, and therefore such law is repugnant to Art. 31 (2) of the Constitution." The Attorney-General, on the other hand, urged that "the Mills and all other assets now in the possession and custody of the new directors who are only servants or agents of the said company are, in the eye of the law, in the possession and custody of the company and have not really been taken possession of by the State." Rejecting this argument, Mr. Justice Das pointed out that the possession of a servant or agent who has not been appointed by, is not amenable to and cannot be dismissed by, the master or principal, "can hardly, in law, be regarded as the possession of the company." His Lordship then proceeded :

In this view of the matter there is great force in the argument that the property of the company has been taken possession of by the State through directors who have been appointed by the State in the exercise of the powers conferred by the Ordinance and the Act and who are under the direction and control of the State, and this has been done without payment of any compensation. (This was no doubt done for a public purpose, viz., in order to avert unemployment.) But, as stated by Holmes J. in *Pennsylvania Coal Co. v. Mahon* (1922) 260 U. S. 393 : "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than

the constitutional way of paying for the change." Here, therefore, it may well be argued that the property of the company having been taken possession of by the State in exercise of powers conferred by a law which does not provide for payment of any compensation, the fundamental right of the company has, in the eye of the law, been infringed.

This opinion seems somewhat hesitant, but Mr. Justice Das himself in the second Sholapur case, viz., *Dwarkadas Shrinivas v. Sholapur Spinning and Weaving Co.*, A. I. R. 1954 S. C. 119, explained that "although I used the words 'there is great force in the argument' and 'it may well be argued,' the then inclination of my mind was definitely that the property of the company had been taken possession of as contemplated by Art. 31 (2)."

In this case it was argued by the Attorney-General that if there was a taking possession of the property of the company by the State, that had taken place not as an exercise of the power of eminent domain within Art. 31 (2) but as an exercise of police power under Art. 31 (1). Mr. Justice Das, although he agreed with the Government's view that Art. 31 (1) dealt exclusively with the police power and did not require payment of compensation for any deprivation of property caused thereunder, rejected this contention that the taking of possession of the company's property in this case was the result of the application of the police power and not exercise of the power of eminent domain. He said :

Although in outward form the directors are the officers of the company and are bound to act under the articles of association in so far as they are not contrary to or inconsistent with the Ordinance and the Act, nevertheless, in effect and in substance, they are the creature of the State and are answerable to the State, and it is the State that has through these directors of its choice taken possession of the undertaking of the company and has been carrying on an experiment in State management of business at the risk and expense of the company and the shareholders.

Indeed we are told that under such State management, which is going on for pretty nearly four years, the business has been running at a loss. At any rate no profit has been made or distributed as and by way of dividend during this long period — a sad commentary on the efficacy of State management — and nobody knows how long this state of affairs will continue, for the Act does not prescribe any definite time limit to this hazardous experiment.

It is, in the premises, impossible to uphold this law as an instance of the exercise of the State's police power as an emergency measure. It has far overstepped the limits of police power and is, in substance, nothing short of expropriation by way of the exercise

of the power of eminent domain, and as the law has not provided for any compensation it must be held to offend the provisions of Art. 31 (2).

Police Power and Eminent Domain

It is perhaps the impression of many that if other Judges of the Supreme Court took what the Government regard as a perverse view of Art. 31, Mr. Justice Das, at any rate, supported in his rulings the reasoning on which the Fourth Amendment is based. The above paragraphs will show that this impression is wholly unfounded. Mr. Das supports only one of the Government's contentions, viz., that Art. 31 (1) relates exclusively to the police power and that Art. 31 (2) relates exclusively to the power of eminent domain. But there he parts company with the Government. And he is careful in not lending his support to the easy way which the Government apparently contemplate of avoiding payment of compensation for the property taken by pretending that action was taken under Art. 31 (1) instead of under Art. 31 (2). He says in *State of West Bengal v. Subodh Gopal*, A. I. R. 1954 S. C. 92 :

It is easy to perceive, though somewhat difficult to express, the distinction between the two kinds of taking possession (i. e., under the police power and under the power of eminent domain) which undoubtedly exists. . . . A consideration of the ultimate aim, the immediate purpose and the mode and manner of the taking of possession and the duration for which such possession is taken, the effect of it on the rights of the persons dispossessed and other such-like elements must all determine the judicial verdict.

The task is difficult and onerous, but the Court will have to hold the scale even between social control and individual rights and determine whether, in the light of the constitutional limitations, the operation of the law is confined to the legitimate sphere of the State's police power or whether it has overstepped its limits and entered into the field of eminent domain. And in the *Sholapur* case Mr. Justice Das ruled that the legislation in question "far outstepped the limits of police power" and was expropriatory. If the Supreme Court Judges are perverse, all of them are so without exception.

Compensation : Who Determines It and How ?

Making the Expropriated Owner Whole

Where there is a taking of property for public use, whether in war or in peace, the burden of taking is the community's burden. The owner should be requited by that which satisfies the prevailing standards of social justice. This limitation upon the power of eminent domain has throughout our history been left for judicial application.

This statement by Mr. Justice Frankfurter in *United States v. Commodities Trading Corporation* (1950), 339

U. S. 121, sets forth the procedure followed in the United States in giving effect to the Fifth Amendment's mandate : "Nor shall private property be taken for public use without just compensation." In India too it was generally understood till the other day that, in the very small area which the Fourth Amendment still leaves for the operation of eminent domain, the amount of compensation that becomes constitutionally due under Art. 31 (2) was to be determined ultimately by the courts. The Government too accepted this position originally, for before the Joint Select Committee on the Amendment Bill reported to the contrary they said that while the amount of compensation for property taken under Art. 31-A would rest in the discretion of the legislature, though such a taking was constitutionally not compensable, the position would be different when property was taken under Art. 31 (2); in such cases, they said, compensation would be a justiciable matter.

In countries like the U. S. A. and Australia, whose constitutions provide that the compensation to be paid for property taken shall be "just," the determination of the amount of compensation must necessarily be a judicial function. In our Constitution, however, the compensation that requires to be paid under Art. 31 (2) is described in different terms. But the fact is that "compensation" even by itself connotes the idea of "just compensation." Mr. N. C. Chatterjee, in his inaugural address at the last Madras State Lawyers' Conference, cited an apt passage from Nichols' treatise on "Eminent Domain" in this connection :

The phrase "just compensation" means the value of the land taken and the damages, if any, to the land not taken. The adjective "just" only emphasizes what would be true if omitted—namely, that the compensation should be the equivalent of the property. It has been said in this regard that it is difficult to imagine an "unjust compensation." The word "just" is used evidently to intensify the meaning of the word "compensation."

This is only a paraphrase of the language used by the Supreme Court in *Monongahela Navigation Co. v. United States* (1893) 148 U. S. 312 :

The noun "compensation," standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done and the latter imposed by way of punishment. So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just."

Now the Fourth Amendment provides that even where the Government acquire private property with the title to it (the only sphere in which interference with property rights is under the Amendment legally compensable), it will rest with the legislature to fix the compensation, which means that it would be possible for the Government to fob off the dispossessed owners of property with very much less than reasonable compensation. Just compensation, of course, it is not intended to pay; it is because of Government's inability and also unwillingness to pay what would be just compensation that the compensation, where it is due at all, is made discretionary. The legislatures may in fact allow compensation that is not altogether too meagre. But if they were to give only a token compensation there would be no legal remedy against it, the quantum of compensation being made non-justiciable. In a way we are glad that compensation will now be non-justiciable, for the only alternative to it in the mind of the Prime Minister was apparently to bring indirect pressure on the judiciary to award the kind of compensation which the legislatures would themselves have sanctioned. When it was pointed out to him that the courts might grant larger compensation than the Government would favour if compensation was to be judicially determined, he said he hoped that the courts would sense the climate of opinion in Parliament and would grant compensation accordingly. Anyone would prefer that the Constitution itself places compensation beyond judicial review rather than the courts being coerced in this way to toe the line of the Government.

Anyhow, it would be useful to know how in the United States the requirement about compensation is interpreted. "Just compensation... means the full and perfect equivalent in money of the property taken, whereby the owner is put in as good a position pecuniarily as he would have occupied if his property had not been taken," *United States v. Miller* (1943) 317 U. S. 369. "The balance between the public's need and the claimant's loss has been struck, in most cases, by awarding the claimant the monetary 'market value' of the property taken." When payment of compensation is not made coincidentally with the taking of property, the courts add interest at a reasonable rate in order to compensate for deferred payment of the fair market value. In determining the amount of compensation, the prospective use of the property, if such use is better than the one to which it is currently put is also taken into account to a certain extent. In *Olson v. United States* (1934) 292 U. S. 246, the Supreme Court said: "The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed *in the reasonably near future* is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value when the property is

privately held." Mr. Justice Holmes had earlier warned in *New York v. Sage*, 239 U. S. 57, that prospective use may be considered "only so far as the public would have considered it;" the price was not to be "what a tribunal at a later date may think a purchaser would have been wise to give." The determination of the amount of compensation cannot however be reduced to rigid rules. In some cases market value is not a practicable standard. Then the courts take into account all the ingredients of the value of the property and compute the compensation due on the basis of the facts existing in each particular case. Market value can be a feasible standard only when property is taken permanently. But there are also temporary takings of property, in which case other standards have to be applied. In such cases, i. e., in cases when properties taken from their owners are returned to them after an interval, the value of the property's use for the intervening period or the rental value is often an appropriate standard. Anyhow it is for the judiciary to determine what compensation shall be paid; and it is agreed in principle that the compensation must be such as to make the expropriated owner whole.

REFLECTIONS ON THE AMENDMENT

Expropriation of Foreigners

Commenting on Mr. Nehru's assurances that the Government had no intention of seizing private property owned by foreigners without payment, the "Wall Street Journal" wrote on 21st March:

There is small comfort in Mr. Nehru's guarantee to foreign investors. If the right to compensation for property expropriated by the Government is removed from India's basic law, the power of the Government to seize property without payment is established for foreigners as well as for citizens of India. And if Mr. Nehru succeeds in preventing his Government from unfairly applying this power to foreign investments—well, he will not always control India's Government.

There is not much assurance that Mr. Nehru can keep his promise, powerful as he may be. The purpose of the amendment is to further his objective of creating a classless society in India and to spread what the few have among the many. In that atmosphere, it is not at all likely that foreign capital can escape. And in the end Mr. Nehru may find it too difficult to explain to his people why their property may be seized but the property of foreigners must remain untouched.

Mr. Thakad Subramania Aiyar, ex-Advocate-General of Travancore-Cochin, pointed out in a paper read at the Madras Lawyers' Conference that "in the sphere of international law, the rights of foreign nationals and their

rights over property cannot survive the large power given to the legislature." You cannot take away the private property of a citizen "and at the same time apply a different rule of law to other nationals."

How Could the Sholapur Mill have been Dealt With WITHOUT HAVING TO PAY COMPENSATION FOR TAKING IT OVER ?

The main reason which the Government have advanced for amending Art. 31 of the Constitution is that they were foiled by the Supreme Court in taking over the management of the Sholapur Mill, which was being so grossly mismanaged, without paying compensation. However, this reasoning is wholly unfounded. If they took over the Mill, as they assert, for a public purpose, viz., in order to keep up the production of an essential commodity and to avoid serious unemployment, the proper course for it would have been to use the power of eminent domain, as the United States Government on several occasions did during the last war when it took over mines and other industries for a temporary period for a similar purpose. The United States Government paid compensation to the owners of these industries on those occasions, and the Indian Government too would have had to pay compensation, if it had followed this straightforward method.

But the Government say they took over the Mill in its own interest also, i. e., for putting a stop to the continuing mismanagement of the Mill, and this ought to have become possible without having to pay compensation. Mr. H. M. Seervai, the eminent constitutional lawyer of Bombay, pointed out recently in a speech at the Rotary Club that the Government could have done it in two ways and that it was unnecessary for achieving such a purpose to abrogate in effect the rights of private property. It could have set the penal law or the Companies Act in motion against the offending directors.

He observed that since 1951 the Central Government had obtained the power by section 153 (C) and (D) of the Companies Act to apply to a court for appropriate orders, including the future management of the company where a company acts in a manner prejudicial to the interest of the company or oppresses any part of its members.

That section could not be successfully challenged because it only gave power to a court to protect property and to terminate contracts of service without compensation. And it was a well-settled law that a servant guilty of misconduct could not get any compensation. He said :

So, the Constitution does not require to be amended to punish crime and prevent mismanagement by managing agents because the Penal Code makes adequate provision for the one and the Companies Act for the other.

" Full Compensation Would Perpetuate Inequality "

The Prime Minister said, in defending the Fourth Amendment which permits confiscatory legislation, that the Government would not pay full compensation for property acquired or requisitioned even if they could do so, because to pay full compensation to the rich would have left them rich and the existing inequalities would thus be perpetuated. It is true that the present inequalities of wealth are much too great and must be gradually reduced and ultimately abolished to the utmost practicable extent. But who ever heard that in paying compensation to those whose property is taken the State can legitimately keep that object in view? Taking Mr. Nehru's cue, some members even proposed that while it should be permissible for the Government to acquire large individual properties for just a nominal compensation or for no compensation, the duty should by a definite constitutional provision be thrown on the Government to pay full compensation to the owners whose small bits of land they may take. If this is right, why not provide, e. g., that if you take an acre of land from a person you will give him twice the value of the acre, and if you take 100 acres from another, take from him in addition the value of another hundred acres? That would reduce inequalities much quicker than by withholding compensation from a wealthy landowner and giving it to a poor one. And even after the Amendment is enacted, which makes acquisition of property uncompensable over a large area, a small area will still be left in which the Government will be under the constitutional obligation to pay compensation, viz., in cases in which the title to the property taken passes to the State. Why not insert a provision in the Constitution stating that the compensation to be paid for property acquired will be in the inverse ratio of its value? The whole idea is fatuous, for the question of the acquisition of property has nothing to do with the question of inequality of wealth, however important this latter question is in itself.

Means of Establishing Social Equality

The Prime Minister said that the country was in any case unable to pay full compensation for the property the State might take. If it be really true that the country has no resources which would enable the State to reduce social inequalities to a sufficient extent, all one can say is that the State must modulate its social welfare plans in such a way as to bring them within the resources it can legitimately put together by means of taxation, but this insufficiency of such resources would not give the State a right to pay less than equitable compensation to those whose property it may seize.

Mr. Seervai in the speech above referred to pointed out the proper modes of reducing inequalities of wealth. They were direct and indirect taxation, death duties and a tax on capital. Taxation had been expressly exempted from Article 31. As regards income, penal taxation cer-

tainly diminished inequality of wealth, though whether it was wise or foolish to do so was a very different question.

As regards capital, death duties had the effect of breaking up large estates and transferring fair portions of them to the State. Mr. Seervai said :

And if the State cannot or will not wait for rich men to die, there is in the Constitution, as there was under the Government of India Act, power to levy a tax on capital.

Directive Principles and Fundamental Rights

PRECEDENCE OF THE FORMER OVER THE LATTER

The reason that Mr. Nehru advanced for the freedom that the Constitution Amendment gives to the Government to pay only a token compensation for property taken was that "if full compensation was paid, the haves would remain haves and the have-nots would remain have-nots." And this would be contrary to social equality, the establishment of which was included among the Directive Principles of State Policy embodied in the Constitution. He said :

Apart from Fundamental Rights, the Constitution also prescribed certain Directive Principles of State Policy. If there was any inherent contradiction between Fundamental Rights and Directive Principles, it was up to Parliament to remove it and make Fundamental Rights subserve the Directive Principles of State Policy.

In the first place there cannot be any contradiction between fundamental human rights and directive principles of State policy unless the latter are formulated in a wholly unreasonable way. In this particular case there is no contradiction whatever between the requirement to pay equitable compensation for property that the State may acquire and the rearing of a social structure in which there will be no great inequality of wealth. It only means that in trying to achieve the objective of social equality the State must not throw the financial burden of it on to the shoulders of a few citizens. In the second place, if there be any real inconsistency between the two, it is obvious that fundamental rights must be regarded as of greater authority than directive principles, which only point to the goal to be reached. In his presidential address to the Lawyers' Conference, Mr. Patanjali Sastri said :

While envisaging measures to prevent concentration of wealth in a few hands and to narrow down the gap between the rich and the poor, which is unfortunately wide in this country, the Constitution does not favour appropriation of private property as a legitimate means of rectifying the existing economic inequalities, but has provided for other means of redressing such inequalities, such as levying taxes and duties of various kinds. These inequalities are not sudden developments which could not have been

foreseen when the Constitution was framed, and yet the founding fathers deliberately included the protection of private property as a fundamental right in Part III and put the directive principles of State policy regarding social welfare in Part IV, so as not to override the former.

According to Mr. Nehru, however, the directive principles which, being mere aspirations for an indefinite future, were expressed in vague language, are to override the specific words used in defining fundamental rights, which are to be currently in force. Fancy anyone arguing that the Covenant on Human Rights, which is to be international law, should have precedence over a statement of broad principles embodied in the Declaration of Human Rights!

Subversive of Art. 14

By providing in Art. 31-A that no law referred to therein shall be deemed void on the ground that it takes away not only the right mentioned in Art. 31, viz., the right to receive compensation for the property taken, but also the right mentioned in Art. 14, viz., the right to equality before the law, the Fourth Amendment abrogates the important right that the Constitution conferred on all persons to be protected from unjust discrimination in all matters concerning acquisition of private property by the State. "Under Art. 14, class legislation discriminating against some and favouring others, similarly circumstanced and similarly situated, is forbidden. If the reasonableness of classification is not open to judicial review, the executive, under cover of the doctrine of supremacy of the legislature, gets the authority to make arbitrary selections." This is a most serious defect inhering in the Amendment. Referring to this topic Mr. Seervai said :

The most objectionable feature of the proposed constitutional amendments is that they introduce discrimination into the very heart of our Constitution. The law providing for the extinguishment of a shareholder's rights might extinguish those rights in one company without extinguishing them in another company of the same class.

What formidable forces of political abuse will be unleashed by this power to discriminate, forces which the makers of the Constitution wisely chained up and directed the Supreme Court to destroy if they should break loose!

Practical Effect of the Amendment

Mr. Seervai in February described in the "Times of India" the practical effect of the Amending Bill, as originally proposed, which had still retained the justiciable character of the amount of compensation in those restricted number of cases in which payment of some compensation was obligatory. He wrote :

The effect of the proposed amendments on the economic life and business morality of India will be

grave. The one tradition of India which our Governments do not want to revive is hoarding of money. But if all overt forms of property like houses, lands, shares in companies, certain licenses and leases granted to companies can be struck down without compensation, what remains except to keep currency or, better still, precious stones and metals which can be buried underground where the prying eyes of the State will not find them? If our wealth gets sterilized instead of fertilizing trade and industry, if joint stock enterprise is driven to quick returns and total distribution of profits without thought for the morrow, if foreign capital does not flow in but flows out, we ought not to be surprised.

Right to Property "Completely Nullified"

NEHRU'S OWN WORDS

"If the quantum of compensation is to be left to the discretion of the State and made non-justiciable, there will be little left of the guaranteed protection of private property." So said Mr. Patanjali Sastri with reference to Art. 31 (2-A), relating to acquisition of private property, in respect of which the bare husk of title is still left with the owner. But the Amendment Act has since undergone a change which makes compensation non-justiciable even in respect of acquisition of property in which the owner is divested of the title too. The change would justify the comment, therefore, that the Right to Property disappears as a Fundamental Right with the passing of the Amendment Act.

"The Hindu" has now quoted a remark made by Mr. Nehru in Parliament, in which he himself made this admission. When Mr. R. Vankataraman, Secretary of the Congress Parliamentary Party, drew attention to the distinction that was inherent in the original Bill between agricultural and industrial property, requiring full compensation to be paid for acquisition of the latter but little or no compensation for acquisition of the former, Mr. Nehru said, "This had been deliberately done by the cabinet after careful thought." The distinction between agricultural and industrial property rights has now been removed; as "The Hindu" says, "both will be impartially deprived of protection." But the Prime Minister at that time, in defending the Bill as it stood then, revealed what had taken place in the cabinet when they were discussing the matter.

One Minister had suggested what has now been done, viz., a simple amendment to the effect that "whatever property was taken over by the State, the question as to what compensation should be paid for it should be left to be decided by Parliament and by the Assemblies, and no Court should interfere at all." But the cabinet rejected the suggestion because, if it were to be accepted, the Courts would be completely kept out. The Prime Minister went on to explain:

This could have been done, but in that case the Fundamental Right in this regard relating to property would have been *completely nullified*. The Government could do this, but we did not think it proper to go so far.

Erosion of Fundamental Rights

COMMENT OF THE "STATESMAN"

Adversely commenting upon the latest Amendment to the Constitution, the "Statesman" says that, by first narrowly restricting the sphere in which liability to pay compensation for property taken is recognized and then keeping the amount of compensation out of the purview of judicial review, the "Right to Property" as a fundamental right is undermined, and notes further that the Government has set its feet on a road which leads to citizens being deprived of one fundamental right after another. The paper says:

The makers of the Constitution deliberately rejected a type of State such as obtains in Britain, with (under the Gown) an all-powerful legislature, preferring one limited by Fundamental Rights. In practice the reserve powers of the State were already considerable, in matters of preventive detention, the President's right to suspend legislatures or issue ordinances, and other emergency provisions. The first set of amendments laid heavy potential restrictions on expression of public opinion—unnecessarily heavy as many thought and think. The fourth is now dealing even more comprehensively with property rights. *The Fundamental Rights indeed remain on the statute book, but it is difficult to see what value most of them have in practice as protection against any determined invasion by the State; and there are plenty of noisy people, not without a following, who would avidly leap at the chance of invading them the moment they had the power to do so. (Italics ours.)*

COMMENTS

Sheikh Abdullah's Detention

A HABEAS CORPUS PETITION IN THE HIGH COURT

One Mr. Jagatram Aryan filed a habeas corpus petition with the High Court of the Kashmir State praying for the release of Sheikh Abdullah, former Premier of the State, from detention. But when the petition came for hearing before the Court, he asked for leave to withdraw the petition because he had received from the detenu a telegram saying that the detenu did not want it to be proceeded with.

Sheikh Abdullah's counsel, Mr. Tilak Raj Bhasin, referring to the part played by the petitioner, said that Mr. Aryan had gone to the Court in the garb of a friend but he was in effect no better than a foe, because in the

petition he had maligned Sheikh Abdullah and that there was indication in the petition that under the subterfuge of a prayer for release he was staging a vendetta. Asked by the Court why he still did not want justice to be done to the detenu, Mr. Tilak Raj said that the Court could only decide whether detention was legal or illegal and not whether the allegations made against him were true or not. Sheikh Abdullah would like the allegations to be proved at the bar of public opinion and not in a court of justice, which, with all its best intentions, could not go behind orders of detention with the limited powers it had.

A statement signed by Sheikh Abdullah was also filed in the Court, which said that while he did not shirk an inquiry by the Court into the legality or otherwise of his detention, he "genuinely believes that by the very nature of the proceedings before it, the honourable Court cannot go behind the veneer of the order, however manifestly thin it may be, because the criterion of the detaining authorities was satisfaction."

The Court allowed withdrawal of the application (4th April), saying that neither the applicant nor the detenu wished the application to be proceeded with, and they could not take a horse to water and force him to drink it.

South Africa's Supreme Court

NATIONALIST GOVERNMENT INTENDS TO PACK IT

The Minister of Justice in the Strydom Government announced at Capetown on 25th March the Government's intention to enlarge the Appeal Court, corresponding to the Supreme Court in this country, from five to eleven Justices for the consideration of the constitutional validity of Acts of Parliament. This is regarded in South Africa as an attempt to pack the Court so that the Nationalist Government may never find itself thwarted by an extra-Parliamentary body in getting any legislation it wants passed through Parliament.

Obviously, the immediate legislation the Government will seek is for the removal of the Coloured voters of the Cape Province from the common roll to a separate roll. The Malan Government passed such legislation in 1950, only to find it declared invalid by the Appeal Court, because it was not passed, as the Constitution Act requires, by two-thirds of all members of both Houses of Parliament sitting in joint session.

The Malan Government subsequently attempted to accomplish its objective by other means. It passed a High Court of Parliament Act making Parliament the sole judge of the constitutionality of its legislation. This Act itself was declared void by the Appeal Court. It also had the intention of having a separate section in the Appeal Court to pass on the constitutionality of laws. This project also involved a packing of the Court, but the Government thought better of it afterwards and dropped the project.

The Strydom Government is returning to the device of packing the Court. The population of mixed blood in the Cape, which it wishes to deprive of its century-old right of voting in common with the whites, is now being offered the right of electing four representatives (who shall however be white) in Parliament on the basis of a separate electoral register. The Cape Coloured voters now number some 38,000, and they are numerically strong enough to influence the election in the Cape Province, and being supposed to be mostly anti-

Nationalist, they are being robbed of their common franchise.

ACQUISITION OF LAND

Provisions for Payment of Compensation

IN A U. P. ACT DECLARED INVALID

In *H. P. Khandewal v. State of U. P., Mootham and M. L. Chaturvedi JJ.* of the Allahabad High Court on 4th February 1954 declared certain provisions concerning payment of compensation in the U. P. Land Acquisition (Rehabilitation of Refugees) Act 1948 invalid. The purpose of the Act, as stated in the preamble, is to enable land to be acquired for the rehabilitation of refugees from Pakistan and to prescribe an expeditious procedure for the determination of the compensation to be paid on account of such acquisition. Sec. 11 of the Act provides that the compensation to be paid be in accordance with certain subsections of the Land Acquisition Act, subject to two provisos the effect of which, in the words of the judgment, is that in the case of property purchased by the owner before 1-9-1939 or after 31-3-1948 the amount payable cannot exceed the market value of the property on the first of these dates, and in the case of property purchased by the owner between these dates the amount payable is the purchase price actually paid. In the case of five out of six petitioners they had purchased their properties after 1-4-1948, and therefore the compensation payable to them under the Act was limited to the market value of the properties on 1-9-1939. "It needs we think no argument," Their Lordships said, "that such a payment is not compensation within the meaning of Art. 31 (2) [of the Constitution] or sec. 299 (2) [of the Government of India Act, 1935]." Their Lordships referred to *Suryapal Singh v. U. P. Government (A. I. R. 1951 All. 674)*, in which "a Full Bench of this Court held that 'compensation' in sec. 299 (2) means the monetary equivalent of the property taken or acquired, and that the same meaning must be attached to that word in Art. 31 (2), subject to the qualification that such equivalent need not be paid in money; the relevant date in each case being the date of acquisition."

It was contended by the State that the Act could not now be challenged as cl. 5 (a) of Art. 31 saves all "existing laws" from the operation of cl. 2. The Court rejected the contention. Their Lordships said:

As we are of the opinion that the Land Acquisition Act (Rehabilitation of Refugees) Act does not provide for the payment of compensation in respect of the property acquired within the meaning of sec. 299 (2), it appears to us on a plain reading of this section that the Act was not an Act which the Provincial Legislature had power to make; and if it had not the power to make the Act then that Act was not, prior to the commencement of the Constitution, an "existing Indian law" [as defined in sec. 311 (2), Government of India Act], nor was it, after the commencement of the Constitution, an "existing law." It does not therefore come within the ambit of Art. 31 (5) (a).

This conclusion is, we think, in accordance with the intention of the framers of the Constitution, for it appears to us that the purpose of Art. 31 (5) (a) is to exempt from the application of the provisions of Art. 31 (2) a law which, although it contravenes the provisions of the latter clause, was nevertheless a valid law immediately prior to the Constitution coming into

force. We do not think that it was the intention of the Constituent Assembly, in effect, to validate a law which a Provincial Legislature had no power to make, save in the exceptional case for which special provision is made in cl. 6 of Art. 31.

ART. 14 ATTRACTED

The Act was also challenged on the ground that as regards compensation, it discriminates (1) between different persons whose property has been acquired thereunder, and (2) between persons whose property has been acquired under that Act and persons whose property has been acquired under the Land Acquisition Act. On the first point Their Lordships said:

Whether the purpose of the Act be the expeditious acquisition of property for the rehabilitation of particular refugees or the speedy settlement of claims for compensation therefor, we can find no nexus between such purpose and the payment of an amount of compensation which depends on whether the owner of the property acquired it before 1-9-1939, between that date and 1-4-1948 or at a later date. As (in our view) Art. 31 (2) has no application, compensation could have been based on the market price of the property at any specified date, but a method which adopts what appears to us to be a purely arbitrary classification divorced from the purpose of the Act cannot in our opinion be sustained.

On the second point Their Lordships said:

We do not doubt the desirability of making provision for the rehabilitation of refugees and for the avoidance of unnecessary delay. Land will not however be acquired any quicker by paying less for it, and there seems to be no justification for a classification the effect of which appears to be to throw on the shoulders of one section of the community—those persons whose land is acquired for the rehabilitation of refugees—a burden which should be shared by all. The owner of property which is acquired by the State for the purpose of erecting a school will receive therefor compensation under the Land Acquisition Act; but a person whose property is acquired for erection of a shop for the rehabilitation of refugees will under the impugned Act receive compensation at a lower rate. We can find no rational basis for holding that a man whose property is required for one purpose should receive by way of compensation a sum less in amount than the man whose property is required for the other.

HYDERABAD (ABOLITION OF CASH GRANTS) ACT

Act Declared Unconstitutional
AS CONTRAVENING ART. 31 (2).

At the Hyderabad High Court Misra C. J. and M. H. Ansari J. allowed the writ applications of Venkat Munga Bai and Pandurang Rao challenging the validity of sec. 3 of the Hyderabad (Abolition of Cash Grants) Act of 1952, under which cash grants due to them as Deshmukh and Deshpande were stopped without compensation.

After 1864-65, when under the reforms of Nawab Salar Jung the collection of revenue and the maintenance of accounts were taken over by the State from Deshmukhs

and Deshpandes respectively, the latter were given fixed "rusums" or percentage of the revenue in the form of cash grants. The 1952 Act abolished these grants without making provision for compensation. These grants had long been treated as Crown grants terminable on the death of each grantee, capable of being continued to the successor at the sole discretion of the sovereign. It was contended by the Advocate-General that that being recognized to be the nature of the grants, their resumption or stoppage did not give rise to a cause of action enforceable in a court of law. The Court rejected this contention. Their Lordships said:

If the Crown prerogative disappeared with the introduction of the Constitution the right to resume the cash grants disappeared with them.

The State could not now claim the immunity which the sovereign enjoyed before the commencement of the Constitution.

Since the inauguration of the Constitution and the consequent disappearance of arbitrary power of the sovereign, the exercise of the grantor's rights enjoyed by the Nizam is no longer permissible. As was said in *Virendra Singh v. State of U. P.* (A. I. R. 1954 S. C. 447), the absolute "muafi" grants by the rulers of the acceding States prior to the accession were not resumable by the Government of the State into which the erstwhile territory of the rulers had been merged.

In our judgment the earlier rule which governed the resumption of the grants and which was closely associated with the personal prerogative of the Nizam is no longer available to the State and if the "rusums" with which we are concerned constitute "property" within the meaning of Art. 31 relied upon by the petitioners, their resumption by the impugned statute must be held to be unwarranted.

Their Lordships pointed out that "the word 'property' occurring (in Art. 31) is not confined to immoveable property," and said: "The elements of hereditability and enjoyment of the benefit without any rendition of service seem to us to be sufficient insignia of property to invest the cash grants with the characteristic of 'property' as used in Art. 31."

BOMBAY JAGIRS ABOLITION ACT

Held Valid by the Supreme Court

The Supreme Court on 6th April dismissed 17 petitions filed under Article 32 of the Constitution by the relations of rulers of States merged in the State of Bombay challenging the constitutional validity of the Bombay Merged Territories and Areas (Jagirs Abolition) Act, 1953.

The petitioners were relations of the rulers of Idar, Chhota Udaipur, Devgad Baria, Rajpipla, Bansda, Lunawada and Mohanpur States, which had been merged in the State of Bombay in 1948.

They claimed to be hereditary jagirdars under grants made by the respective States for the maintenance of themselves, their families and dependants and held jagirs as "jiwai jagirs."

All these jagirdars had challenged the validity of the impugned Act mainly relying upon the agreement of

merger entered into by the rulers of the respective States with the Dominion of India in March 1948 and the collective letters of guarantee passed by the Ministry of States in their favour of subsequent dates, the contents of which were regarded as part of the merger agreements entered into by them with the Dominion of India.

Clause (5) of the letters of guarantee stated that pension, gratuities, annuities, and allowances, granted by the State to the members of its public services who had retired or had proceeded on leave preparatory to retirement before April 1, 1948, as also the enjoyment of the ownership of Khangri villages, lands, jagirs, grants, etc., existing on April 1, 1948, were guaranteed. It also provided that this guarantee was without prejudice to the right of the Government of Bombay to issue any legislation which did not discriminate against the States and their subjects.

Relying upon clause (5) of the letters of guarantee the contention urged before the Supreme Court by the petitioners was that the enjoyment of the ownership of the jagirs existing on April 1, 1948, was guaranteed, that this guarantee was binding on the State of Bombay, that the State of Bombay and therefore, the State Legislature had no legislative competence to enact any legislation depriving the holders of jagirs of their right of ownership over the same.

It was also contended that even though the Government of Bombay had reserved to itself the right to issue any legislation which did not discriminate against the States and their subjects, the impugned Act was ultra vires inasmuch as no legislation could be undertaken which would have the effect of depriving the holders of the jagirs of their ownership over the same.

Dealing with the argument that clause (5) of the letters of guarantee acted as a fetter on the legislature, Mr. Justice Bhagwati, who delivered the unanimous judgment of the Court, said that the limitation upon the legislative power of the State Legislature which had plenary powers of legislation within the ambit of the legislative heads specified in lists II and III of the seventh schedule to the Constitution could only be imposed by the Constitution itself and not by an obligation which had been undertaken by either the Dominion Government or the State of Bombay.

Under Article 245, His Lordship said, the State Legislature was invested with the power to legislate on the topics enumerated in lists II and III of the seventh schedule to the Constitution and this power was by virtue of Article 245 (1) subject to the provisions of the Constitution. Once the topic of legislation was comprised within any of the entries in lists II and III of the seventh schedule to the Constitution, the fetter or limitation on such legislative power had to be found within the Constitution itself and if there was no such fetter or limitation to be found there, the State Legislature had full competence to enact the impugned Act, no matter whether such enactment was contrary to the guarantee given, or the obligation undertaken by the Dominion Government or the State of Bombay.

Mr. Justice Bhagwati said that the petitioners would have legitimate grievance in the matter of deprivation of their rights of ownership of the jagir lands in so far as the States and their subjects were discriminated against, but they would not be able to have their grievances redressed by this Court for the simple reason that the State Legislature was at all events competent to enact the impugned Act, not being fettered at all by the terms of clause (5) of the letters of guarantee.

His Lordship observed that even if it could be demonstrated that the provisions of the impugned Act were confiscatory as well as discriminatory, the jagirs of the petitioners were all estates within the meaning of the term as defined in Article 31-A (2) (A) of the Constitution and, therefore, could not be challenged on the ground of violation of Articles 14, 19 and 31 (2) of the Constitution.

PRIVILEGES OF INDIAN RULERS

No Immunity in Probate Proceedings

Maharaja Indrajitsinghji Vijayasinghji, third son of the late Maharaja of Rajppla, filed a petition for letters of administration to the estate of his father left by him by a will, and the present Ruler, Maharaja Ranjendra-singhji Vijayasinghji filed a caveat and an affidavit. Consequently, the petition was converted into a suit and a summons was served on the present Ruler who contended that the suit was not maintainable as the consent of the Central Government had not been obtained by the petitioner, as required by sec. 87-B of the Civil Procedure Code. This contention was upheld by Mr. Justice Desai at the Bombay High Court, and the petition was dismissed.

Against this decision an appeal was filed which was heard by Chief Justice Mr. Chagla and Mr. Justice Tendolkar. Allowing the appeal (25th March), Their Lordships said that sec. 86 C. P. C. gave an immunity to foreign Rulers from being sued in a court except with the consent of the Central Government. Prior to independence, this section naturally applied to Rulers of Indian States. After the Indian States merged with the Union, sec. 87-B of the Code was enacted by which the immunity conferred on foreign Rulers by sec. 86 was preserved for former Rulers of Indian States.

Their Lordships said that sec. 86 conferred a substantive right on the Ruler of a foreign State and it also imposed a disability upon a litigant who wanted to sue a foreign Ruler. In their Lordships' opinion, the expression "may be sued" in the section was used in a strictly technical sense, and the Code had drawn a distinction between "suits" and "legal proceedings." Their Lordships said that in a civil court not only suits would be filed, but legal proceedings would be instituted. Realizing this, the Legislature had enacted sec. 141 in the Code according to which the procedure laid down in the Code for suits should be followed, as far as it could be made applicable, in all proceedings in any civil court. It was contended on behalf of Maharaja Rajendrasinghji that sec. 86 applied to suits and also to probate proceedings.

Their Lordships did not agree with this contention.

They said that in India there was no important departure from the rule of international law, and that was that in this country a Ruler of a foreign State could be sued with the consent of the Central Government.

It would be, therefore, an unjustifiable attempt on the part of the courts to engraft on the statutory provision, a principle of international law which the Legislature itself did not think it proper to do.

Their Lordships then discussed the nature of probate proceedings and said that on a petition for probate being filed and notice served on the next of kin, if the

latter filed a caveat and an affidavit in support, the proceedings became contentious and they were then treated as a suit.

It would be a curious application of sec. 86, Their Lordships said, if the petitioner was compelled to obtain the consent of the Central Government when a proceeding was converted into a suit, not by the action of the appellant, but by the action of the respondent.

Their Lordships found it difficult to accept the respondent's contention that the probate proceedings became a suit and that therefore sec. 86 was applicable. Here no relief was sought against the respondent. Their Lordships therefore held that the proceedings were maintainable and that no consent of the Central Government was required if the party opposing the application for a probate happened to be a Ruler of an Indian State. Their Lordships remanded the proceedings to the trial court for disposal according to law.

PUBLIC GRIEVANCES CONVENTION

Punjab Grievances Ventilated

An ad hoc Punjab Civil Liberties and Public Grievances Convention was held in Ambala City on 26th and 27th March under the presidentship of Mr. Asoka Mehta, at which vent was given to various grievances of the public in resolutions and speeches. The grievances as stated were almost unbelievable; they led the President to remark at the end that he could never believe that things could be so bad as they were in the Punjab.

For instance Pandit Sri Ram Sharma, a former Minister, alleged that the Superintendent of Police of Ambala had succeeded in tracing the culprit responsible for the disappearance of two young sisters from Yamunanagar some two years ago but that the high-ups in the Government silenced him and stopped him from proceeding in the matter.

He charged the police in the Punjab with killing innocent persons and winning laurels by putting up false stories that the killed persons were dacoits and had been shot dead in encounters with the police. The former Minister said from personal knowledge that four persons of his district had been called out from their houses by the police and shot dead and later declared to be dacoits killed in encounters.

This practice, he further added, had started from PEPSU where hundreds of innocent persons were deprived of their lives by the police.

Pandit Sharma observed that the police who had failed to combat the dacoit menace in Rohtak district, had perpetrated untold "zoolam" and atrocities including disgrace of men and women, loot and plunder. The example of the oppression now being exercised by the

police, he added, could not be found during foreign rule in India. (The report of this speech is taken from the "Tribune.")

A lengthy resolution on police administration stated that the administration still showed such features as failure of the officers-in-charge of Police Stations to record promptly and accurately reports of the commission of crimes, suppression of true cases and thereby letting guilty persons go unpunished, implication of innocent persons along with guilty persons, concoction of false cases in collusion with interested parties, receipt of bribes by the lower section of the administration, inordinate delay and resort to tactics in long-drawn and costly investigations for too prolonged periods and spoiling of cases deliberately.

In a number of cases suspects in police custody in different parts of the State had been done to death and not even a single case about those responsible had been brought to justice and this greatly had shaken the confidence of the people in the police administration.

Another resolution regretted that within recent years, section 144 of the Criminal Procedure Code had been applied too frequently without any justification in the Punjab and in some cases it had been in force almost the whole year and in most of the districts. In requesting the State Government not to resort to this weapon except in very grave and emergency circumstances, the resolution pointed out that its abuse was repugnant to the spirit of democracy and inconsistent with the fundamental rights granted under the Constitution of India, and that it suppressed and prevented the suffering people from raising their voice against the prevailing corruption and maladministration.

The convention strongly resented the continuance of the practice of punitive police posts which foreign rulers had introduced for mass reprisals, and it was of the opinion that this practice was against justice and democracy as it punished innocent people along with those guilty without the administration having to prove its charges against the guilty. The Convention therefore demanded the abolition of the system and removal of all punitive police posts established up to date and stoppage of recovery of arrears on that account.

A resolution asserted that there was widespread corruption among officials and named quite a number of departments in which it was particularly rampant. The convention urged the Government to take drastic steps to eradicate it.

The Punjab Civil Liberties Council had no part in organizing the convention and felt it necessary to announce that it would have nothing to do with a body which was going to be formed under the auspices of the convention, having the feeling that the body was intended to be a rival to itself. Mr. Asoka Mehta urged the promoters of the convention to desist from such a step.