FUNDAMENTAL RIGHT TO PROPERTY

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"People must come to accept private enterprise not as a necessary evil, but as an affirmative good."

— Eugene Black

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By

V. M. TARKUNDE

It is doubtful whether Mr. Justice Hidayatullah (as he then was) was justified in the view expressed by him in his judgment in the famous Golaknath case that it was an "error" on the part of our Constitution-makers to place the right of property in the category of fundamental rights. He was, however, undoubtedly justified in his further observation that, of all the fundamental rights, the light to property is the weakest.

Both liberty and property are basic concepts in the law of all countries. An essential element in the right to property is the right of its owner to prevent other persons from using it without his consent. This element operates in the case of public as well as private properties. Railways in India are a public property, but this does not enable a member of the public to use the railway without purchasing a ticket. Like any individual, the state also restricts the use of the property it owns.

However, the fact that property, like liberty is a basic legal concept does not necessarily mean that the right to property should have been included in the' category of

***This editorial from March 1971 issue of "Radical Humanist" is reproduced with kind permission of the Editor. Mr. Tarkunde is a former Judge of the Bombay High Court.**

fundamental rights. Fundamental rights are essentially such rights of individuals as deserve to be placed beyond the vagaries of legislative majorities. Fundamental rights are fundamental because, according to the makers of the Constitution, the majority of the people, through their elected representatives, should not be able to abridge them or take them away.

The necessity of safeguarding fundamental rights from the operation bf majority rule was brought home by the experience of the rise of Fascism in different European countries before the Second World War. There the basic rights of individual freedom were annihilated by the aid of majority support, which had been procured by a virulent propaganda of militant nationalism. The experience of Fascism showed that the rights of individual freedom, and not majority rule, constituted the essence of democracy. There would be little difference between democracy and Fascism if the basic rights of individual freedom were allowed to be taken away on the sanction of majority opinion. The founding fathers of our Constitution were, therefore, fully justified in placing fundamental rights in a separate category and making them incapable of being abridged by the normal legislative process.

It is, however, obvious that all the rights which are regarded fundamental in our Constitution are not of equal democratic significance. Some of the rights, such as the right to freedom of speech and expression, the right to assemble peacefully and without arms, the right to form associations and unions, and the right to equality before the law, are far more essential for the maintenance and stabilisation of democracy than other rights which are, also recognised as fundamental in the Constitution. The question is whether the right to property, which is obviously

less vital than some of the other fundamental rights, should have been included in that category at all.

In defence of the fundamental nature of the individual right to property, some liberal thinkers have advanced the view that property in material objects magnifies an individual's "sense of self" and is in essence "an extension and definition of personality". The validity of this view, however, appears to be confined to a particular stage of social development and a particular type of social organisation. A man with an insignificant amount of property may have a much bigger personality and a keener sense of self than another possessed of abundant wealth.

A more realistic, and therefore more readily acceptable, argument in support of property as a fundamental right is provided by the fact that some amount of private property is essential if an individual is to enjoy some of the other rights which are undoubtedly fundamental. Even the basic right to live cannot be enjoyed in the absence of food. clothing and shelter, nor can the freedom to move about freely be enjoyed by a person who does not have the wherewithal to do so. The right to property can thus be regarded as a fundamental right because it is a necessary complement of other rights which are unquestionably fundamental.

There is, moreover, another fundamental right which would have afforded some indirect protection to the right to property even if the latter had not been included in the category of fundamental rights. Article 14 of the Constitution guarantees to every person "equality before the law or the equal protection of laws within the territory of India." This article would prevent the legislature from encroaching on the property of one person, while saving the

property of another, if both are similarly situated. Article 14, in so far as its operation is not restricted by constitutional amendments, prevents the legislature from making arbitrary laws in regard to property, as in regard to other matters.

Property as a fundamental right has been subjected to a persistent attack from various quarters in our country on the plea that it comes in the way of progressive legislation aimed at social justice. It is mainly on this ground that a demand for amending the Constitution is voiced in the election manifestos. Before judging the justification of this demand, one must be aware of the limitations on the fundamental right to property which were either initially provided in the Constitution or were subsequently introduced by constitutional amendments, prior to the decision of the Golaknath case which put a step to further abridgment of fundamental rights within the framework of the Constitution.

In the Constitution as it was promulgated, property as a fundamental right was guaranteed by two provisions—article 19(1)(f) which recognised the right of every citizen "to acquire, hold and dispose of property" and article 31(2) which laid down that no property shall be taken possession of or acquired except for a public purpose and without providing compensation. The right to acquire, hold and dispose of property recognised by article 19(1)(f) was however subject, under clause (5) of article 19, to a limitation which enabled the legislature to impose "reasonable restrictions" on the exercise of that right "either in the interest of the general public or for the protection of the interests of any Scheduled Tribe".

Mention may be also made of a third provision which indirectly protected some of the property rights. That pro-

vision was contained in article 19(1)(g) which recognized the right of every citizen "to practise any profession, or to carry on any occupation, trade or business". The right also was subject, under clause (6) of article 19, to "reasonable restrictions" in the interest of the general public, including restrictions which prescribe professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business.

In subsequent amendments, article 19(1)(f) and the limitation thereon provided in article 19(5) have remained unaltered. The limitation on the freedom to practise any profession or to carry on any occupation, trade or business contained in article 19(6) was further extended so as to authorise laws being passed which enable the state, or a corporation owned or controlled by the state, to carry on any trade or business "whether to the exclusion, complete or partial, of citizens or otherwise". This amendment enables the state to have, by law, the monopoly of carrying on any trade, business or industry to the exclusion of citizens.

Very far-reaching constitutional amendments in respect of all property rights were brought about by amending article 31(2) and more particularly by introducing two additional articles—31A and 31B. It is no exaggeration to say that the main consequence of the amendments introduced by articles 31A and 31B was to remove a major sector of property rights from the category of fundamental rights altogether.

The amendment in article 31(2) retained the provision that no property shall be acquired by any law except for a public purpose and without providing for compensation, but added a clause that such law shall not be called in question in any court on the ground "that the compensation

provided by the law is not adequate". This amendment led to endless difficulties in judicial interpretation. Prior to the amendment, the Supreme Court had already held in a series of decisions that "compensation" meant a "just return" for the property to be acquired. The retention in the amended article 31(2) of the clause that no property shall be acquired except by a law which provides for compensation implies that it is the duty of the court, when such a law is challenged before it, to decide whether the law provides for "compensation" (i.e. a just return); on the other hand, the clause added by the amendment lays down that the adequacy of the compensation cannot be questioned before any court. This self-contradictory phraseology of the amended article 31(2) led to conflicting decisions, which were sought to be reconciled by the Supreme Court in the Bank Nationalisation case by saying that if the legislature lays down relevant and appropriate principles for determining the value of the class of property which is sought to be acquired, the court will not go into the further question whether the amount of compensation so determined is adequate. This means in effect that where article 31(2) is operative, the legislature in allowing acquisition of property must fairly try to provide a just return therefor.

Far more effective limitations on property rights were imposed by articles 31A and 31B. As noticed above, all property rights are protected, directly or indirectly, by provisions contained in articles 14, 19 and 31. Article 31A (in its final form) lays down that laws on a variety of property rights will be incapable of being challenged on the ground that they violate the fundamental rights conferred by articles 14, 19 and 31. The property rights which can be modified or abolished by the legislature by virtue of article 31A, without any apprehension of constitutional invalidity, include all rights in respect of "estates", which expression

comprises all the rights in agricultural and forest lands. Article 31A also enables the legislature to authorise (1) the taking over of the management of any property by the state for a limited period, (2) the amalgamation of two or more companies, (3) the extinguishment or modification of thb rights of managing agents, managing directors and other office-bearers of companies and even the voting rights of shareholders, and (4) the extinguishment or modification of rights relating to minerals and mineral oil. The Constitution no longer requires any compensation to be paid for the acquisition or extinguishment of these rights.

Article 31B goes even further. It provides for a separate Schedule (the Ninth Schedule) to the Constitution and lays down that none of the Acts and Regulations included in that Schedule will be capable of being challenged on the ground of violation of **any** of the fundamental rights. Thirteen Acts and Regulations were included in the Ninth Schedule by the First Constitutional Amendment, eight more Acts and Regulations by the Fourth Constitutional Amendment, and as many as forty-four more Acts and Regulations by the Seventeenth constitutional Amendment. Most, but not all, of the measures which have beep thus included in the Ninth Schedule relate to legislation on agricultural and forest lands. Notable amongst the other measures included in that Schedule is Chapter III-A of the Industries (Development & Regulation) Act, which enables the Government to take over, without payment of compensation, the management of several types of industrial undertakings which either fail to comply with Government directions or which, in the view of the Government, are run in a manner highly detrimental to public interest.

It will thus be seen that under the Constitution as it stands today, the fundamental rights to property have been

subjected to very severe limitations. Broadly speaking these limitations are of two types. In the first place laws. can be passed and have been passed to regulate the use of property, the prices and distribution of commodities, and the commencement and conducl of industrial undertakings. Laws regulating the rents of properties, the prices and allocation of goods, the starting of industrial undertakings and the manner of running them, the wages of workmen and the other conditions of their work, and several other types of measures, fall in this category. Secondly, laws have been passed and can be passed for the acquisition or modification of interests in agricultural lands, for taking up the temporary management of properties, for abolishing or modifying the rights of company managers and shareholders,—in each case by providing such compensation as the legislature thinks it fit to award or without providing any compensation whatever.

Taking the sweep of these limitations on properly rights into consideration, it would be probably right to say that, broadly speaking, while the use of properties and the starting and running of industries can be fully controlled in the public interest, and while properties of many types can also be acquired by the state or transferred from one class of persons to another. there are two types of properties which cannot be acquired by the state without providing a fair amount of compensation. These consist of (a) urban properties and (b) undertakings which are being run in an efficient manner.

The question then is: Is it necessary in the public interest to further restrict the fundamental rights to property so as to enable the state to acquire urban properties and efficiently conducted undertakings without giving a fair amount of compensation? Those who are committed to

a mixed economy consisting of both a public and a private sector must, we think, answer this question in the negative. We cannot expect the private sector to grow and to play its proper role in a mixed economy if we lay down that property which is lawfully acquired, or an undertaking which is efficiently run, can be taken over by the state without paying a fair amount of compensation. Nor is such a constitutional amendment necessary for ensuring social justice or for reducing economic inequalities.

Confiscation of lawfully acquired properties and efficiently conducted concerns is certainly not the way to reduce economic disparities. As we pointed out in the editorial of the last issue, economic disparities have grown enormously in recent years as a result of inflation and import licensing. If these causes of growing disparities of income are removed, the remaining economic inequality can be reduced to a considerable extent by suitable taxation measures, such as estate duties, wealth tax, excise duties on luxury goods, and progressive income tax on high income brackets. A more effective remedy, however, for bringing about a greater degree of economic equality is to devise and adopt a policy of full employment. In countries where the prevailing economy provides for full employment and where the demand for labour equals or exceeds the available supply, the disparities of earned incomes are automatically reduced. It was found in a recent survey that in the United States the ratio between the wage of an unskilled worker and the average salary of the supervisory and managerial staff is about 1 to 2.5, whereas in Bombay the same ratio is about 1 to 11. Thus the disparities of earned incomes in Bombay

industries are found to be about four times the disparities in the incomes of similar categories of persons in the United States. This is not because the salaries of the supervisory and managerial staff in the United States are low, but because the wage of even an unskilled worker in that country is high. Such a consummation can be achieved only in an economy of full employment.

What we have stated above about the extent of existing restrictions on fundamental property rights is not belied by the results of the Bank Nationalisation case and the rulers' de-recognition case. The first Bank Nationalisation Act was a hurried measure,. When the second Bank Nationalisation Act was passed after removing the defects of the first, it was not even challenged in any court. It was, in fact, noticed by knowledgeable people that if the compensation for the nationalisation of the banks had been fixed on the basis of a fair price of bank shares, instead of on the assumed value of bank properties, the amount payable by the exchequer would have been considerably less. As to the rulers' case, the rights in dispute were the subject of constitutional guarantees which had been voluntarily given in pursuance of solemn agreements, and instead of trying to take them away by an executive fiat, the proper way was to reduce and eventually abolish those rights by negotiation. This course can be followed even now.

This journal has consistently taken the view that no further abridgement of any fundamental right guaranteed by the Constitution should be attempted unless it is found in a concrete case that any particular aspect of a fundamental right comes in the way of a socially beneficial legislation. Such a concrete case has not arisen so far. Fundamental rights constitute the main guarantee for the preservation of freedom and democracy in our country, and any attempt to tinker with those rights without a compelling necessity deserves to be deprecated.

The views expressed in this booklet are not necessarily the views of the Forum of Free Enterprise

"What our generation has forgotten is that the system of private property is the most important guarantee of freedom, not only for those who own property, but scarcely less for those who do not. It is only because the control of the means of production is divided among many people acting independently that nobody has complete power over us, that we as individuals can decide what to do with ourselves. If all the means of production were vested in a single band. whether it be nominally that of 'society' as a whole or that of a dictator, whoever exercises this control has complete power over us. Who can seriously doubt that a member of a small racial or religious minority will be freer with no property so long as fellow members of his community have property and are therefore able to employ him, than he would be if private property were abolished and he became owner of a nominal share in the communal property. Or that the power which a multiple millionaire, who may be my neighbour and perhaps my employer, has over me is very much less than that which the smallest functionaire possesses who wields the coercive power of the state and on whose discretion it depends whether and how I am to be allowed to live or to work?"

— F. A. Hayek in "The Road to Serfdom"

"It seems obvious to me now — though I have been slow, I must say, in coming to the conclusion — that the institution of private property is one of the main things that have given man that limited amount of free and equalness that Marx hoped to render infinite by abolishing this institution. Strangely enough Marx was the first to see this. He is the one who informed us, looking backwards, that the evolution of private capitalism with its free market had been a precondition for the evolution of all our democratic freedoms. It never occurred to him, looking forward, that if this was so, these other freedoms might disappear with the abolition of the free market." — Max Eastman.

"Free Enterprise was born with man and shall survive as long as man survives."

—A D. Shroff
(1899–1965)
Founder-President,
Forum of Free Enterprise.

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Published by M. R. PAI for the Forum of Free Enterprise, "Sohrab House", 235 Dr. Dadabhai Naoroji Road. Bombay-1, and printed by H. NARAYAN RAO at H. R. MOHAN & CO. (PRESS). 9-B. Cawasjee Patel Street. Bombay-1.

10/May/1971

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