

SOME PROBLEMS OF PERSONAL LIBERTY AND EMINENT DOMAIN IN THE INDIAN CONSTITUTION

by

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I

If the Committee drafting the new Constitution of India had numbered among its members an English and a French lawyer, the first might have argued that India having in most respects followed the English legal system could dispense with the inclusion of Fundamental Rights and of the remedies for their protection in the Constitution. On the other hand the French lawyer might have advocated the adoption of a constitutional Bill of Rights while the corresponding remedies might have been left to statutory law or generally to the ordinary law of the land. If an American lawyer had sat on the committee he might have agreed with him though he might also have advised the adoption of the due process of law clause.

The Constituent Assembly of India would have agreed with none of them. It incorporated the Fundamental Rights as well as the remedies, including the common law prerogative writs and orders, in the body of the Constitution. It adopted initially the due process of law clause, at least in one of the articles of the draft constitution, but it finally dropped it. However, the Assembly following American law gave the Indian judiciary the right to declare unconstitutional any law which is inconsistent with the provisions of the chapter on Fundamental Rights, and consequently all laws offending these rights can be thrown out by the judges at the request of the person aggrieved. The principle of judicial review is thus firmly established and furthermore the remedies for the enforcement of Fundamental Rights being constitutionally guaranteed, no

ordinary law can establish any remedial finality over the head of the Constitution. These are important deviations from English law which reflect the impact of American law on constitution making in India.

In the framework of a short paper it is impossible to elaborate all the problems connected with the formulation and implementation of Fundamental Rights. There are however one or two of them which deserve special attention as at their inception and later in judicial practice the realisation of the rule of law came into conflict with other interests of the highest importance such as the security of the State or the implementation of the economic plan without which India's material progress would be in jeopardy. This applies particularly to cases in which personal liberty is bound to give way to preventive detention or private property to eminent domain whenever the requirements of public interest exceptionally demand it.

II

Personal liberty is no doubt the supreme Fundamental Right without which no individual can pursue a democratic way of life. If the arbitrary will of the executive can detain him by the exercise of discretionary powers, even in the absence of a breach of law by him—moreover if his appeal to an impartial judge cannot secure him relief, his way of life is bound to be overshadowed by the rule of force. This is certainly not a solution which the masses of the Indian people or their leaders wish to adopt. Living in the framework of a traditional community structure in which spontaneous social discipline is a dominant consideration, and having enjoyed the benefits of the English legal system for more than a century, they hardly look to a system of law in which the liberties of the individual would be sacrificed to arbitrary dogmas imposed by the State. The task before the Constituent Assembly was therefore to attempt solutions capable of reconciling the Fundamental Rights with the requirements of public interest in the particular conditions of India.

Problems of personal liberty found the highest priority in the deliberations of the assembly. It is noteworthy that according to article 21 (originally article 15) of the draft Constitution no person was to be deprived of life or liberty except according to **due process of law**. At the time when the Constituent Assembly started its work, the dark clouds which were later to gather at the outbreak of the communal upheaval had not yet appeared on the horizon and the need for extraordinary measures to preserve public order and security was not yet imminent. But as soon as the division of the sub-Continent entered its critical stage and the Hindu-Moslem conflagration had flared up, first things had to come first and political elements aiming at the disruption of the country had to be tackled with firmness. At this stage the Constituent Assembly dropped the due process of law clause from article 21 of the Constitution. Dr. Ambedkar, the Chairman of the Drafting Committee, expressed the view that effective executive action could only be taken on the lines of emergency measures, that is to say by applying a law of preventive detention apart from punitive detention. Consequently article 21 was reformulated on the pattern of article 31 of the post-war Japanese Constitution according to which no person can be deprived of life or liberty except according to **procedure established by law**. Whatever the meaning of this provision in Japanese law, its consequence was to eliminate the judiciary to a considerable extent from the picture. Had the due process of law clause remained in article 21, the judges, following American judicial practice, would have been able to declare unconstitutional any law of preventive detention on the grounds of its inconsistency with the provisions of the Constitution as well as unreasonableness, unreasonable being tantamount to unconstitutional. In these circumstances the power of the judges to strike down provisions of a Preventive Detention Act and to curtail the discretionary power of the executive would have been extensive indeed. They would have certainly insisted on making the sufficiency or reasonableness of grounds of detention in any particular case a justiciable issue. But as Sir Alladi Krishnaswamy Iyer, one of the leading cons-

titution makers observed in the Assembly, to adopt such a solution would have meant to leave it to "judicial vegaries". No doubt the Constituent Assembly did not believe in saving India from immediate chaos with legislature and executive tied to slow and protracted judicial control.

As soon as the due process of law clause was dropped from article 21 to give way to the "procedure,, formula borrowed from the Japanese Constitution, the legal situation presented itself as follows : Any person (citizen or not) could be deprived of liberty except if the procedure established by law was disregarded. As to punitive detention, there existed the procedural safeguards borrowed from English law and embodied in the Criminal Procedure Code according to which the arrested person has to be produced before a magistrate within twenty four hours and defended by a legal practitioner of his choice. But these and other safeguards (subsequently guaranteed in the Constitution) do not apply to preventive detention when a person is not detained because of being accused of the commission of an offence but simply on suspicion because he is believed to be dangerous to public order or security. In this case - the satisfaction of the executive in ordering detention not being justiciable - the only safeguard left to the detenu was the observance of the procedure established by law, law meaning *lex*, that is to say enacted law such as the Preventive Detention Act and not *jus*, in other words principles of natural justice. This, it was argued in the Assembly, could hardly be a sufficient safeguard as the executive could obtain from the legislature any procedural provisions even the least favourable to detenus. Thus a number of the members of the Assembly demanded categorically the adoption of procedural safeguards on a higher, that is to say constitutional level. The judges would then be able to strike down the provisions of the Preventive Detention Act whenever the Act disregarded the constitutional guarantees. This action for rescuing some measure of judicial control resulted in the adoption of article 22 of the Constitution which provides for the following procedural safeguards : No person can be detained for a longer period than

three months unless an Advisory Board has reported before the expiration of the above period of three months that there is in its opinion sufficient cause for such detention. The Advisory Board consists of persons who are, or have been, or are qualified to be appointed as judges of a High Court. However, Parliament can prescribe the circumstances under which, and the class of cases in which a person may be detained for a period longer than three months without the opinion of an Advisory Board. On the other hand Parliament should lay down the maximum period of preventive detention. As to the defence of the detenu, he must receive the grounds of detention as soon as possible and must be given the earliest opportunity of making a representation against the detention order. These are the most important procedural safeguards which restore to some extent judicial control in preventive detention cases. The Supreme Court of India pronounced its first verdict on the law embodied in articles 21 and 22 in the case of **A. K. Gopalan v. State of Madras** which deserves careful attention.

The petitioner, A. K. Gopalan, is one of the leaders of the Communist party of India. His activities similar to those of certain other political extremists were considered as endangering public order and security in 1950 and preventive detention was applied to him. He then applied for a writ or order of habeas corpus, one of the Common law remedies guaranteed in articles 32 and 226 of the Constitution. The Supreme Court (on appeal) was faced with vital constitutional problems relating not only to personal liberty but to the interpretation of the Constitution as a whole.

One of the most characteristic features of the judgment given against the petitioner is its reliance on the English decision in **Liversidge v. Anderson** which was passed by the House of Lords during World War II. The principles relating to habeas corpus proceedings in English law do not need to be recalled. Liversidge, the detenu, brought a habeas corpus petition against Anderson, the Home Secretary, who had sanctioned his detention on the basis of Regulation 18B made under the Emergency Powers (Defence) Act of 1939. The House of Lords

held (Lord Atkin dissenting) that in view of the prevailing war time emergency legislation and rules no objective test of reasonableness of detention could be applied in the case. Consequently it refused to enquire into the grounds of detention though it might have examined evidence of mala fides or mistaken identity. In other words the reasonableness of grounds of detention was considered non-justiciable and the detaining authority was left to its discretion. But as Lord Justice Denning has rightly pointed out in his Hamlyn lectures on "The Freedom under the Law", this was a principle applied in war-time emergency which in his words "must not be allowed to be introduced... in time of peace".

The Supreme Court of India proceeded in Gopalan's case on the same lines as the House of Lords. Following article 21 of the Constitution and acting on the provisions of the Preventive Detention Act in force, it refused to go into the grounds of detention and applied a subjective, not an objective test to the satisfaction of the detaining authority. But it may be submitted that Gopalan's case, unlike **Liversidge v. Anderson**, was not an emergency case. The Constitution of India contains in Chapter XVIII special provisions for emergency and provides for the curtailment of Fundamental Rights during a period of emergency which must be constitutionally proclaimed. No such emergency had been proclaimed by the President of India when Gopalan's case was heard. There is therefore this fundamental difference between this case and **Liversidge v. Anderson** that emergency which are applied only exceptionally according to English law were applied by the Supreme Court of India to a normal peace time case which according to the Indian Constitution was outside the legal sphere of emergency. That the principle of yielding to subjective government satisfaction in non-emergency cases was not one to the taste of the Supreme Court judges, follows from a fundamental dictum of a former Chief Justice of India (P. Sastri) in the case of the **State of Madras v. V. G. Row** where he observed that "the formula of subjective satisfaction of the government.... cannot receive judicial approval as a general pattern of reasonable restrictions

on Fundamental Rights". But he added: "The position is different since the judgment in the case of Gopalan, the reason being that the Constitution sanctions laws for preventive detention" at any time.

Some of the judges in Gopalan's case, before reaching their final conclusions, seem to have engaged in a wild goose chase of a presumed or implied due process of law in article 21 of the Constitution. One of them thought that the Japanese formula in article 21 did not exclude the application of the due process of law as the term "procedure established by law" must be presumed to have the meaning of "due procedure" in the context of the Constitution as a whole. But the majority of the judges disagreed with this view. It is also interesting to note that in doing so they admitted the debates of the Constituent Assembly or at least statements of its Drafting Committee in aid of evidence. This is obviously another deviation from English law according to which the course which a Bill followed in the legislature cannot be admitted to control the construction or the final legal enactment, the intentions of the law makers being ascertained from the words of the enactment. However, most of the judges of the Supreme Court, in order to make sure that all shadow of the due process of law clause had disappeared, could not avoid the temptation to rely on some preparatory material originating from the Assembly. Another former Chief Justice of India (Mukerjee) referred in this connexion to the American case of **Caminetti v. United States** in which "it is said that reports to Congress accompanying the introduction of proposed law may aid the courts in reaching the true meaning of the legislation in case of doubtful interpretation". Reference is here made to the problem of statutory and constitutional interpretation to emphasise that the Supreme Court in spite of its reluctance to give judgment against the detenu, seemed meticulous in following the real intentions of the Constitution makers who are now the political leaders of India. The efforts of the dissenting judges to turn the tide by interpreting the Constitution "in the spirit of the Constitution" were overruled by the majority judges who again re-

luctantly deviated from English principles of statutory interpretation otherwise observed in Indian courts. It will be interesting to compare later the attitude of the judges in this respect with that adopted by them in cases of eminent domain. The impact of American law is no doubt an important factor in this field.

It has been emphasised that after the elimination of the due process of law clause from article 21, the Constituent Assembly tried to restore some judicial control by enacting the procedural safeguards for preventive detention in article 22 of the Constitution. Subsequent case law has shown that the Supreme Court engaged in a strictly literal interpretation of this article to give as much residuary relief to detenus as possible. It insisted that detaining authority should at the earliest moment give all facilities to detenus to enable them to put up an adequate defence. It also saw to it that the grounds of detention communicated to detenus should not be vague and be sufficient to make an effective representation. A tendency prevailed among some administrative authorities to inform the detenu that his behavior was generally dangerous to public order or the security of the State. Needless to say such general communications without pointing to the details of questionable behaviour do not enable the detenu to put up a convincing defence in court. The Supreme Court counteracted efficiently against such tendencies by striking down vaguely formulated detention orders. It also gave relief to detenus whenever the detaining authority acted *mala fide* or in case of irrelevancy of grounds of detention when detention was applied for other purposes than public order, security, defence, foreign affairs and maintenance of supplies and services essential to the community (all enumerated in Schedule VII of the Constitution). The maximum period of detention extends practically to the period of validity of the particular Preventive Detention Act though detention is sometimes extended to the period of the validity of the renewal Act. However, Advisory Boards which at the beginning were excluded from certain classes of cases, are now generally operating so that any

detention beyond three months must be scrutinised by them and while Advisory Boards do so, they go (unlike the courts) into the sufficiency of grounds of detention in accordance with article 22 of the Constitution .

Constitutional lawyers who wish to read the relevant cases of the Supreme Court, are referred to **Ram Krishnan v. State of Delhi, Shridhar Singh v. State of Punjab, State of Bombay v. A. Shridar, Tarapada De v. State of West Bengal, State of Bombay v. Vaidya** and other cases.

To conclude our observations on preventive detention, Dr. Ambedkar's speech in the Constituent Assembly may be recalled when he observed that it seems uncertain whether people and parties will behave "in a constitutional manner in the matter of getting hold of power or whether they would resort to unconstitutional methods for carrying out their purposes. If all of us (he added) follow purely constitutional methods to achieve our objective, I think the situation would have been different, and probably the necessity of having preventive detention might not be there at all".

The renewals of the Preventive Detention Act since its first enactment in 1950 were the subject of protracted debates in Parliament. Strange as it may seem, the Communist Party acted as the principal defender of personal liberty. The Home Minister introducing in November 1954 a Bill extending the life of the Act by three years i. e. to the 31st December 1957, explained the policy of the Central Government which treats the Act mainly as an effective measure of psychological importance in the fight against subversive activities whenever necessary. The communal upheaval and violence in other respects have practically disappeared. The number of detenus is now negligible. Preventive detention remains mainly in reserve for extraordinary and exceptional cases. Should a serious emergency arise at any time in the future and be constitutionally proclaimed, the right to move the courts by habeas corpus petitions in defence of personal liberty might be temporarily suspended according to article 359 of the Constitution. This

would seem to be the same position as in Article I, Section IX (2) of the Constitution of the United States.

III

Before turning to eminent domain, the following additional observations relating to the due process of law in India may not be irrelevant. Though it had been eliminated from article 21, it reappeared through the back door in article 19 relating to seven freedoms reserved to citizens. One of the most important among them is the right to acquire, hold and dispose of property. The other six freedoms are freedom of speech and expression, to assemble peaceably and without arms, to form associations and unions, to move freely throughout the territory of India, to reside and settle in any part of it, and to practise any profession or to carry on any occupation, trade or business. It was originally agreed in the Constituent Assembly that the State exercising Police Power would have the right to impose restrictions on these freedoms in the public interest. Had the text stood in its original wording, its consequences would have been far reaching, exposing all the seven freedoms to considerable danger. The legislature or the executive could have imposed a wide range of restrictions on them and the judiciary would have been unable to give effective relief to persons aggrieved.

It was thanks to an amendment later introduced in the Assembly that the term "restrictions" was qualified by adding "reasonable". This enables the judges to go into the reasonableness of restrictions imposed on the seven freedoms in the public interest which in practice operates in the same way as if the due process of law had been introduced in article 19. Comparing article 19 with article 21 relating to personal liberty, it may be noted that the freedoms in article 19 enjoy beyond doubt better constitutional protection than personal liberty. In the light of the foregoing observations it is clear that the citizen can obtain relief from the judges whenever the State in the exercise of Police Power interferes unreasonably with his right to acquire, hold and dispose of property.

So far the policy of socialism initiated by Congress had not found constitutional expression. But the position is different in the field of eminent domain?

The Constituent Assembly realised that public works particularly irrigation projects on a grand scale would have to be undertaken and some redistribution of wealth effected, if India was to gain the necessary social and economic basis without which neither an adequate standard of living of the people can be achieved nor democratic institutions successfully implemented. It is for this reason that Chapter IV on the Directive Principles of State Policy embodying a charter of reforms was included in the Constitution; though these principles (unlike the Fundamental Rights) are not justiciable, they impose the obligation on legislature and executive to take immediate action. The first and most urgent of these reforms was the land reform aiming particularly at the abolition of the vast Zamindari property which dated from the period of princely feudalism. When article 31 relating to eminent domain came before the Constituent Assembly, the Prime Minister himself undertook to introduce its provisions. He explained that clause (1) of article 31 laid down that no person (citizen or not) shall be deprived of his property save by authority of law and that clause (2) empowered the State to acquire property for public purposes subject to payment of compensation. The Prime Minister remarked that "eminent lawyers have told us that on a proper construction of this clause, normally speaking, the judiciary should not and does not come in." It was generally understood in the Assembly that this observation referred to the elimination of judicial review of the adequacy of compensation. Some of the members of the Assembly insisted on the addition of the words "just" or "adequate" qualifying compensation which would have brought article 31 into line with the American and Australian Constitutions. But the Assembly rejected the amendment and the wording of article 31 followed generally that of Section 299 of the Government of India Act 1935. Thus in the light of the introduction of the article by the Prime Minister and the ensuing debates in the Assembly it se-

ems clear that the judiciary was in principle precluded from going into the adequacy of compensation, though adequate compensation should be given by the legislature and executive whenever possible.

Relying on President Roosevelt's famous dictum the Prime Minister remarked that the Supreme Court should not make itself a "third Chamber of the Legislature". He also explained that if Parliament fixed compensation or principles of compensation, it could be challenged for one reason only i. e. fraud on the Constitution. He then spoke about the revolutionary aspect of the land reform and said that it was better that Congress, pledged to the abolition of the feudal Zamindari system, should see it through than risk a reform which would come **not by law**. Sir Alladi Krishnaswami Iyer, commenting on eminent domain, expressed the same opinion in the course of the debates and made this remarkable statement: "Our ancestors never regarded the institution of property as an end in itself. Property exists for Dharma.. the law of social well being.. capitalism is alien to the root idea of our civilisation". The Assembly, as in many other cases, adopted a compromise solution adjusting eminent domain to the requirements of the Fundamental Right of property as well as to the forthcoming policy of economic reforms. But whatever the Assembly's intentions and decisions, the Supreme Court disagreed substantially with them in the interpretation of article 31.

As it is impossible to give a full account of the conflict between the Constitution makers and the judiciary in all respects, reference will be made to the problem of adequacy of compensation only. In 1951 the Allahabad High Court giving its decision in the case of **Raja Suryanal Singh v. the Government of Uttar Pradesh**, took the view that it could not be assumed that the adequacy of compensation should be finally determined by the legislature. The Court thought that this would leave the Fundamental Right in article 31 unprotected. The High Court of Rajasthan expressed *mutatis mutandis* the same view in **Nathmal v. Commisioner of Civil Supplies** and so did

Supreme Court in the **State of Bihar v. Kameshwar Singh**. But it is in the case of the **State of Bengal v. Mrs. B. Bannerjee** that the firm position of the Supreme Court became the cause of serious anxiety to the Government. The petitioner in this case complained that she had not received the just equivalent of the property taken by the State. The impugned legal enactment had limited compensation for expropriated land to its market value on the 31st December 1946, no matter the date of acquisition of the land under the Act. The Court considered this provision inconsistent with article 31 (2). It found that the land in question had considerably increased in value after the above date and held that the Act denied the owner compensation for loss in connexion with the increment in value. The Supreme Court dismissed the contention of the Attorney General that the term compensation in article 31 did not mean equivalence in value but "had reference to what the Legislature might think was a proper indemnity for the loss sustained by the owner".

It is not for the academic lawyer to discuss critically a Supreme Court decision from a point of view which is not his primary concern. However, it must be realised that as a precedent the decision in Bannerjee's case was bound to have far reaching consequences for the Government and its financial obligations in connexion with the planned reforms. The question arises whether the interpretation put by the Supreme Court on article 31 is acceptable within the general framework of Indian law. The answer must to a great extent depend on what methods of constitutional interpretation are or are going to be observed in relation to Fundamental Rights. It was shown that the Supreme Court referred in Gopalan's case, apart from all other evidence, to preparatory work originating from the Constituent Assembly. It intimated that if the due process of law clause were found in article 21, it would strike down a preventive detention order. The clause had not been finally adopted by the Assembly but the Supreme Court was not satisfied with what it found or did not find in the text of the Constitution. It pointed to the fact that the clause had been originally

accepted but later eliminated and replaced by a different formula which could not be read in the spirit of the due process of law. The Court insisted on ascertaining the intentions of the Assembly by recalling the whole process of Constitution making and particularly by making use of statements of the Drafting Committee and the debates of the Assembly. Why then, it may be asked, were the intentions of the Assembly not ascertained in the same way in B. Bannerjee's case. The texts of articles 21 and 31 were either equally clear or equally ambiguous. If the first was the case, there was no need to admit preparatory work of the Assembly in Gopalan's case. If the second was the case, there was no reason to ignore the real intentions of the Constitution makers in B. Bannerjee's case. Plausible as the defence of private property by the judges may be, there seems to be no reason to apply one method of interpretation to personal liberty and another one to eminent domain. The Assembly had omitted the expression "just" or "adequate" (compensation) from article 31 as well as the "due process of law" from article 21. In both cases its intention was not to extend judicial control beyond certain defined limits.

It has been argued by lawyers in India that as the formula in article 31 relating to compensation followed the pattern of S. 299 of the Government of India Act 1935, there was every reason to read the term compensation as implying adequate compensation as English lawyers would do. There is no doubt some force in the argument but if the most important commentaries on the Act are consulted, doubts may arise as to this sort of interpretation. Mr. Ramaswami, the author of a recent book on the Supreme Court of the United States, expressed the view that under S. 299 of the Government of India Act 1935 "the courts would be powerless to grant relief even though a party might, under the law applicable, get only a fraction of the real value of the property acquired". Moreover, Mr. Rajagopala Aiyangar in his generally acknowledged Commentary on the Act maintains that the expression "compensation" in S. 299 cannot mean full compensation, adding "what is just compensation is a matter for the Legislature to decide and has

no bearing on the validity of the legislation". He referred in this respect to the decision of the American Supreme Court in **Chicago Railway Co. v. City of Chicago** in which the Court examined the claim of the Company for compensation for the taking, under the right of eminent domain, of its right of way, and held that the sum of one dollar was just compensation. The court observed that the Fourteenth Amendment of the Constitution, under which the case was considered, would have been violated if the Company were "prevented from obtaining substantially any compensation". This was certainly neither the last say of the American Supreme Court in the matter of compensation nor does the decision lend itself to the acceptance of any general proposition, but it is nevertheless characteristic that the Court took to some extent the same attitude in the matter as the Constituent Assembly of India which distinguished "any compensation" from "adequate compensation" and extended judicial review to the first only.

Whatever the results of weighing the pros and cons in a critical discussion of B. Bannerjee's case, the Government of India, anxious to implement the intentions of the Constitution makers, introduced in December 1954 a Bill for the amendment of article 31 in the House of the People. Among other provisions, the Bill adopted a new clause (2) under which the adequacy of compensation is expressly made non-justiciable. In the course of the debates in Parliament Prime Minister Nehru recalled the views on article 31 expressed in the Constituent Assembly and observed: "The Supreme Court has completely differed from those views and we have to accept the interpretation and the only way is to change the Constitution". Parliament and the States enacting the new Amendment have in fact not changed the Constitution but rather redrafted it in order to reflect better the original intentions of the Constitution makers.

A final remark about the short history in the course of which some of the provisions of the Constitution have been drafted, enacted, interpreted and finally amended: As long as the plan for social and economic reforms as envisaged by the

Constitution makers is effectively implemented by them in their present capacity as the leaders of the country, it might be questionable whether a rigid or dogmatic interpretation of the Constitution ignoring their real intentions can justify the best intentions of the judges. No doubt the ordinary holder of property has no other way of seeking redress for his grievances against the Government than by invoking the protection of the judiciary. But if the Constitutional plan of India is going to support the expected changes, conflicts between the various repositories of power leading to frequent and unnecessary amendment of the Constitution, may seem a waste of energy. At least this is the case as long as India enjoys the lasting leadership of a democratically elected ruling party which first bore the responsibility for achieving independence and remains the nation's trustee for the improvement of its well being. The recent political fluctuations particularly those which after the recent general elections brought a communist government into power in one of the States, indicate clearly that if Congress would not insist on the implementations of reforms, even at the cost of curtailing private property in the public interest, the reforms demanded by the overwhelming majority of the people would be carried out by the extreme political left. whether this is a desirable solution is left to speculation-perhaps it is anybody's guess. These are certainly not considerations of a legal nature, but they may not be alien to judicial decision which sometimes has to sacrifice certain values to achieve the most desirable results in the service of the nation.
