CHAPTER X.

EPILOGUS.

Conspectus, appraisement and prospectus - Judgment of Judgments.

A. GENERAL:

It is mentioned in the introductory chapter itself that the two conventional methods of a critical study of the right to property - for that matter any other right - under the Indian Constitution, namely, clausewise analytical study of the relevant articles and doctrinal study have not been followed deliberately in this work without forgetting the importance of such a study. The conscious preference for the problem-cum-goal-oriented method of study of this important right in the constitution is made with the full understanding of the inescapable imperfections and inadequacies that attend this approach. Nevertheless, the analytical and conceptual approaches have not been ignored. Even though the cases have been classified according to the specific economic problems both big and small, each case has been studied analytically in the first instance in relation to the relevant clauses of the relevant articles, unfolding the scope of the provisions and examining their application to the issues involved and evaluating the decision subsequently only on the touchstone of its helpfulness in solving the real socio-economic problem. In the same manner the concepts and doctrines - mainly the doctrines of eminent domain with its concomitant concepts of compensation and public purpose, and the doctrines of police power and the colourable legislation have been studied critically not only in cases where ever they have been applied or misapplied by the Supreme Court but also comprehensively though briefly at culminating
stages in the evolution of those concepts in the interpretative process in judicial review by the Supreme Court. Nevertheless, in order to throw further light and to examine critically, the relevancy usefulness appropriateness and propriety in their application to the Indian context of the socio-economic structure, problems, and the revolutionary transformation that has to be made, it is attempted here to propound more relevant satisfactory modern juridical norms which will be helpful in comprehending and finding solutions to our socio-economic problems. After dealing the doctrinaire approach of the Supreme Court critically, a general evaluation of the performance of the Supreme Court in exercising its power of judicial review of the socio-economic reformatory legislation on the touchstone of the individual right to property is made, even though in the conclusion of each chapter, the role of Supreme Court with respect to a particular problem is examined. The divergent trends in the ideology of the Supreme Court have been identified which reveal the preferences of individual or groups of judges for different theories of property. The poverty of the philosophy of property and the poverty of the Supreme Court exhibited in the lines and between the lines in its prodigious production of judicial literature on right to property is brought out in this chapter. Further, in the penultimate section of this chapter, the demise of right to property as a fundamental right through the impending, 45th Amendment Bill to the Constitution of India and its consequences are studied and evaluated, incidentally examining the causes and responsibilities of the tragedy of the right to property as a fundamental right. Lastly, an idealistic pragmatic alternative constitutional framework is suggested for the retention of the right to property as a
fundamental or a mere constitutional right consistent with the power of the State to bring revolutionary changes in the socio-economic structure and the institution of right to property to do socio-economic justice without impairing the individuality, independence, dignity and flowering of individual personality by the exercise of worthy, inherent potentialities of every individual in the society.

B. DOCTRINAIRE APPROACH OF THE SUPREME COURT:

Even a cursory perusal of the leading decisions of the Supreme Court reveals unambiguously the decisive influence of the doctrines prevalent in the western societies from middle ages steeped in laissez-faire philosophy. Even the content conception and spirit of the doctrine of eminent domain is totally imported into the judicial process from the judicial precedents of England, U.S.A., Australia and Canada, even though it is realised recently that such application of foreign doctrines and precedents would not be helpful in finding solutions to our indigenous problems. Briefly, the doctrines of eminent domain, police power and colourable legislation are reviewed here suggesting alternative approaches though these doctrines are already discussed in different chapters wherever they were applied by the courts.

1. See Rajeev Dhavan: op. cit., Chapter II. An examination of the juristic techniques used by the Supreme Court and other courts in India, pp. 28-127. He says "The Court relied heavily on the Anglo-American doctrine of eminent domain" p. 151.

2. "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intentions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics". O.W.Holmes: The Common Law 1881, Indian reprint 1975.
1. THE MORIBUND DOCTRINE OF EMINENT DOMAIN:

The paramount ultimate right of the state over the land and other properties situated within the territory of the State is recognised from ancient times in almost all the political communities throughout the world. The sovereign and original right of the State over all the land within its territory is acknowledged. Even the social purpose of property was recognised in ancient times in India. Referring to Hindu Political theories Alladi Krishnaswamy observed in the Constituent Assembly that property exists for dharma and the sole end of property is 'Yagna' and to serve the social purposes. Mahatma Gandhi considered the owner of the property as the trustee of the society who should hold his proprietary rights in due subordination to the interests of the society. The superior right of the State to interfere with the right to property of the individual by regulation, requisition and acquisition is formulated and conceptualised in the doctrine of eminent domain whereas deprivation and destruction simpliciter are traced to the doctrine of police power. The origin of the doctrine in the modern form is traced to the observation of Hugo Grotious in his magnum opus, Dejure belle ac pacis, published in 1625. He observed "the property of subjects is under the eminent domain of the State so that, the State or he who acts for it may use and even alienate and even destroy such property not only in the case of extreme necessity in which even private persons have a right over the property of others but for ends of public utility to which ends who founded civil society must be supposed to have intended that private ends should give way, but it is to be added that when this is done the State is bound to make good the loss to those who
lose their property. As is already mentioned the regulatory and acquisition aspect is subsequently developed as doctrine of eminent domain and the power of deprivation and destruction is developed as the doctrine of police power.

The two aspects or conditions for the exercise of the power of eminent domain are the concepts of compensation and public purpose. The judicial processes in England and America have defined, explained and amplified the content and the conceptions of these two concepts in accordance with the capitalist development and laissez-faire economic philosophy and imperatives of their economic development. The decisions from the English and American court unequivocally and unambiguously underlined the imperative fulfillment of the absolute condition of just compensation i.e., payment equivalent to the market value of the property acquired or requisitioned at the time of such deprivation, for the exercise of the power of eminent domain. Any law in this respect is subject to the judicial review by the courts. Judicial Review extends to the second important condition of the existence of public purpose for the exercise of the power of acquisition or requisition of private property. Even regulation beyond a particular limit is deemed as acquisition and the payment of compensation is inescapable in such cases.

(i) THE PROBLEM OF LOCATION OF EMINENT DOMAIN IN THE CONSTITUTION:

The post independent constitutional history of right to property haphazardly revolved in fixed orbits round

the Anglo-American doctrines of eminent domain and police power. Divergent opinions were expressed not only with respect to contours and contents of the conceptions of these concepts but also to the location of these powers in the anatomy of the relevant articles. Every case of acquisition or requisition or taking by the State involves deprivation. This can be temporary or permanent. But the converse may not be true. Every deprivation need not involve acquisition or requisition or taking by the State. Control and regulation of private property may go to the extent of total prohibition. It may result even in total deprivation. But no acquisitions is involved directly by the State. Destruction also involves deprivation but not acquisition. The possible questions that may arise with respect to the relationship between mere deprivation, destruction, control, regulation and prohibition, and acquisition are the following:- What are the relevant provisions in Articles 31 and 19 (1) (f) and (5) that relate to the above issues? What are the relationships between Articles 19 (1) (f) and 31 (1); 19 (1) (f) and 31 (2); 31 (1) and 31 (2); 31 (1) and 31 (5) (b) (i)?

In other words what are the cases of interference by the State with right to property which attract compensation and what are the cases in which the individual's right can be interfered with including deprivation, prohibition and destruction? Who should decide this? Is it the courts on the basis of reasonability and presence or absence of public purpose or adequacy of compensation? Or is it the legislature and administration? Undoubtedly, it is a very difficult and delicate problem either for the courts or for the legislatures.

The question has come up very early in the judicial
process of the Supreme Court whether clause (1) and (2) of Article 31 would together refer to the power of eminent domain or whether clause (1) of Article 31 would relate to the police power and clause (2) would refer to the power of eminent domain. Divergent views were expressed. The controversy was resolved by the Fourth Amendment to the Constitution of India which clarified the position. Clause 2A of Article 31 added by the Fourth Amendment of the Constitution says that clause (2) postulating the conditions of compensation and public purpose is attracted only in cases where the law provides for the transfer of the ownership or the right to possession of any property to the State or to a corporation owned or controlled by the State and mere deprivation by law of any person of his property shall not be deemed to provide for the compulsory acquisition or requisition. Hence, the power of eminent domain is supposed to be contained in clause (2) of Article 31.

Divergent opinions were also expressed by the Court with respect to the relationship between Article 31 and Article 19 (1) (f) and 19 (5). According to one view both these articles relate to the right to property of an individual and the limitations on those rights, that can be imposed by the State and the conditions and qualifications on such power of the State. According to another view, Article 19 (1) (f) deals with the abstract right to property and Article 31 deals with the concrete right to property and once there is deprivation of property Article 19 (1) (f) does not come into picture. Whereas, according to the first view, every case of deprivation under Article 31 must

satisfy the conditions laid down in Article 31 (2) as well as the reasonableness under Article 19 (2). The second view prevailed for about a decade till Subba Rao, J., succeeded in making the first view as the view of the Supreme Court in Kochunni's¹ case on the ground that the Fourth Amendment made clause (1) and (2) of Article 31 disjoined and hence deprivation of property under Article 31 should satisfy the reasonableness postulated in Article 19 (5).

Sitabati Devi's² case limited the wide observations of Kochunni's case to clause (1) of Article 31 where deprivation of property otherwise than by acquisition or requisition would take place. This was reiterated in Shantilal Mangaldas clearly to the effect that Article 19 (1) (f) would not come into picture in the case of acquisition or requisition of property and the validity of such law could not be questioned under Article 19 (1) (f) read with Article 19 (5). But, in Bank Nationalisation case the Supreme Court without justification and necessity reviewed and over ruled Gopalan's case with respect to relation between Articles 19, 21 and 22 and applied it to relationship between 31 (2) and 19 (1) (f) and (5) and held that clause (5) of Article 19 and clause (1) and (2) of Article 31 were parts of a single pattern. Article 19 (1) (f) enunciates the basic right to property of the citizens and Article 19 (5) and clause (1) and (2) of Article 31 deal with limitation which may be placed by law subject to which the right may be exercised. Further, it held that the reasonableness of the procedural provisions of a law of acquisition and re-

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quisition would be judicially enquired and would be liable to be struck down under Article 19 (1) (f). The Supreme Court in the bank's case thus made a departure from the earlier decisions by mis-interpreting the Gopalan's case and misquoting Kochunni and Ranoji Rao's cases and sought to enlarge its power of judicial review with reference to right to property by over ruling, misreading and misquoting earlier decisions and nullifying earlier amendments. The Parliament in its turn by 25th amendment nullified the Bank's decision in all respects including with respect to the relationship between Article 19 (1) (f) and (5) and Article 31 (2). A new clause 2B was added by the 25th Amendment to the constitution of India that Article 19 (1) (f) shall not affect any law made under clause (2) of Article 31. As the 25th Amendment only snappedit the connection between Article 19 and Article 31 (2) which the Bank's case postulated it may be concluded that the interpretation placed by the Supreme Court in Kochunni and Ranoji Rao's cases with respect to relations between Article 19 and 31 (1) stands. It means that every lawful deprivation without acquisition contemplated in Article 31 should also satisfy the reasonableness postulated in Article 19 (5).

There is no reason why in some cases of regulation, control, prohibition or deprivation without transfer of ownership to the State the law or executive action shall be tested only on the touch stone of reasonableness. Payment of some compensation can do justice. Even in some cases covered by Article 31 (5) (b) (ii) dealing with laws for the promotion of public health or prevention of danger to property compensation has to be paid. So long as the individual cannot afford to suffer the laws he has to be

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compensated. It is undoubtedly extremely difficult to make a cut and dry rule to apply to cases of deprivation, regulation and control because justice requires payment of compensation even in some cases of mere regulation which will adversely affect a man of small means and even total deprivation may not justify payment of full compensation when the deprived person is well to do and already made enough at the expense the society.

(ii) THE CONCEPT OF PUBLIC PURPOSE IN THE CONTEXT OF SOCIALISTIC PATTERN OF SOCIETY:

The existence of public purpose is a pre-condition for the exercise of the power of eminent domain by the State ever since the doctrine of eminent domain came into vogue in the western countries. Article 31 (2) clearly mentions that no property shall be compulsorily acquired or requisitioned, save for a public purpose. Hence, it is an absolute condition for the exercise of the power of eminent domain. Any argument that the property can be acquired by the State for a private purpose without payment of compensation is illogical and any such action is illegal.

The number of decisions handed over by the Supreme Court with reference to the concept of public purpose are less when compared to compensation. There is not much controversy about the scope and extent of public purpose. The scope of public purpose gradually began to expand encompassing the Social Welfare activities of the modern State. The word's public purpose which were used in the Nineteenth Century police state was co-terminus with Governmental purpose. But, the conception of the concept of public purpose underwent a sea change in Twentieth Century where public purpose has almost become synonymous with social purpose. The Nineteenth Century concept of public purpose
is outmoded concept. The Twentieth Century conception of concept had to be wider and dynamic. There is no confrontation between the judiciary and the Parliament and the legislatures on the absence or presence or scope of public purpose. The presumption is accepted by the judiciary that every deprivation or acquisition of property by the State is for public purpose. There are very few cases where the judiciary made a law invalid on the ground of absence of public purpose. The judiciary continued the attitude taken by Privy Council in Hamabai Framjee Petit vs. Secretary of State for India1, where the question involved was whether the Government had power to refuse the possession of the land granted by it with the object of using the land for providing residential accommodation to the Government officers at moderate rates as there was acute shortage of houses in Bombay with heavy house rents. The contention that it was not meant for public at large and hence it was not a public purpose was rejected by the Privy Council. The Privy Council quoted with approval the definition given by Bachelor, J., in the judgment of the Bombay High Court, where he observed "general definitions are, I think, rather to be avoided where the avoidance is possible, and I make no attempt to define precisely the extent of the phrase 'public purpose' in the lease, it is enough to say that in my opinion, the phrase whatever else it may mean, must include a purpose, that is an object or aim in which the general interest of the community as opposed to the particular interest of the individuals is directly and vitally concerned"2. The Privy

1. Hamabai Framjee Petit vs. Secretary of State for India (1915) 39 Bom. 279.
Council dealing with this presumption of public purpose observed "Primafacie the Government are good judges of that. They are not absolute judges. They cannot say: 'Sic volo sic jubes', but at least a court would not easily hold them to be wrong". The Supreme Court of India almost followed the line of thinking of the Privy Council in a number of cases and took a very wide view and gave broad interpretation to the concept of public purpose. Many social welfare legislation and economic reformatory legislation were accepted as meant for public purpose, e.g. agrarian reform, slum clearance for housing the homeless, procuring a house for a diplomat, or an office for a state trading corporation, industrial development, planned development, housing schemes, or for a Mahatma Gandhi Memorial.

A declaration by the Government under Section 3 of the Land Acquisition Act 1974 that land is required for a public purpose is considered to be conclusive.

1. Ibid, p. 295.
in a number of cases the Supreme Court held the laws valid even though public purpose was not specifically mentioned. But there are few discordant notes and some occasions where, on technical grounds the court invalidated notifications only. Thus, the concept of public purpose did not pose as a big problem either in the Constituent Assembly or in the judicial process. However, there are few aspects on which the Supreme Court expressed reservations with respect to the scope of public purpose.

The interpretation of the Supreme Court in the Bank Nationalisation case on the relationship between Article 19 (1) (f) and (5) and Article 31 (2) as discussed earlier created a complication with respect to the public purpose also, because in Article 19 (5) interference with right to property under Article 19 (1) (f) is permitted in the interest of the general public. The words "in the interest of the general public" appear to constitute a narrower concept because purposes which cater to the needs of a section of the community may not be covered by that expression. But, this is only a matter of academic interest because the connection sought to be established in Bank's case between Article 19 and 31 (2) is snapped by the 25th Amendment to the Constitution of India. However, it holds good with respect to the relationship between Article

   Collectors Akda vs. Ramachandra A.I.R. 1968 S.C. 244.

2. In Lachmandas vs. Jalalabad Municipality, Sikri, J., agreed that providing housing accommodation for the poor was a public purpose. But, on the ground of absence of provision for alternative accommodation and provision for inadequate compensation, it was construed as absence of public purpose.

19 (1) (f) and 31 (1).

The old concept of public purpose may not be able to serve to cover the manifold multiplicity and vast enlargement of the activities and functions of the modern state in view of the radical change that took place in modern times in the concept of state. The state may have to acquire land for purposes which are not directly and totally served through the instrumentalities of the State. Sometimes there may be a token participation by the State in an industrial or commercial venture and at other times even that may not be there and some times there may not be any participation. The State may acquire land and other prospects for industrialisation, housing accommodation, education and entertainment and so on for the institutions which may be owned and managed jointly by the state and private corporations or individuals or solely by the latter or by certain sections. Though India is declared to be a socialist state by the 42nd amendment of the Constitution of India, we do not have a socialist economy under which all the instruments of production will be owned and managed by the State. We have a mixed economy in which public sector and private sector work side by side for the industrial or agricultural growth of economy and increase in production and productivity. The State prepares plans and targets of production both for public and private sectors. Necessarily the State has to extend all help including acquisition of land, provision of credit and technical knowhow for the utilisation by the private sector and public sector. This policy is enunciated in the government's industrial policy pronounced in the industrial resolutions of 1948 and 1956. Private Sector constitutes a major portion of the national enterprise and industrial output. Its importance to the economy of the country cannot be exaggerated. In this...
context of Government's interest in the promotion of private industrial enterprises for the national purpose of increase in production and employment, the question arises whether the state can acquire private land or property for the utilisation by the private sector. Further, in the context of social welfare state the question arises, whether the state can acquire land or property for charitable purposes conducted by private agencies. Section 40 (b) of the Land Acquisition Act 1894 provides for acquisitions by the State for the utilisation by a company for the construction of some work useful to the public. The company has to pay compensation. Under Section 40 (5) by an agreement with the government, the company has to complete the work within the prescribed time and maintain and follow the conditions under which the public could use the work. The words in the Land Acquisition Act useful to the public can be interpreted in many ways. It may be that the general public may use it directly or a section of the public may use it directly or the work may be useful indirectly to the public or the work may serve the needs of general public or a section of the public. It can be interpreted widely or in a narrow sense. The matter came up before the Supreme Court in the first R.L. Arora's case. The Supreme Court by a majority held that the acquisition of land by the Government for the establishment of textile mill by a private company could not be considered to be useful to the public by itself. On a technical ground it rejected the American precedent on the interpretation of the words.

"public use" in the Fifth Amendment and relied upon the agreement clause in Section 41 (5) of Land Acquisition Act by which the Public should be entitled to sue the work. The Land Acquisition Act was amended by the Parliament by adding a new section permitting the government to acquire land for construction of building or works by the private enterprise. The amendment was upheld by the Supreme Court by a majority in the second R.L. Arora's case. But an acquisition of land for accommodation of the staff of Ramakrishna Mission was held by the Supreme Court as not for public purpose in another case as it was not for public use within the meaning of Section 40 (b). In yet another case the Supreme Court upheld the acquisition of land for the Bharat Sevashram Sangarsh to maintain students, a publication department and guest houses. As the acquisition was not for actual use by the public it would have been declared invalid but for the passing of S. 40 (aa) which was passed with retrospective effect. It cannot be denied that as long as a total socialist state is not established the existence of private sector is inevitable and useful. Hence,

1. S. 40 (a) .... for the construction of some building or work for a company which is engaged or taking steps for engaging itself in any industry or work which is for a public purpose. This was made retrospective.

2. A.I.R. 1964 S.C. 1230 Ayyangar in his dissenting judgment held the statute invalid on the ground that a blanket power was given for the government to acquire land for private purpose including to build a swimming pool for the directors of a company. Ibid, p. 1241-2 but this is taking an extreme case and the public utility of private enterprise for increase in production etc. cannot be denied.


the private sector in the economy even though works for profit motive, incidentally serves a public purpose by engaging in production and providing employment the necessity and the utility of which are evident. The Government has not only to regulate the private sector but should also provide all facilities uncluding land, credit etc., because the increase in production and employment through the private sector also serves the public purpose. In order to implement Directive Principles of State Policy the state may have to interfere positively by acquiring land for the establishment of private industry or for co-operative bodies and enforcing healthy human conditions of work both in urban and rural sectors by providing for the workers working in private industry and for the workers' children residential-educational-recreational complexes for which land will be required. Hence, the society through the machinery of the state becomes interested in organising maintaining and running every source of production and employment either in private or public sector. It will have a direct bearing on the wealth, prosperity and welfare of the society.

1. To illustrate: Article 39 (f) substituted by the Constitution (Forty-Second Amendment) Act, 1976, says that the State shall, in particular, direct its policy towards securing:-(a).... (b).... (c).... (d).... (e).... (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment". Article 42: "The state shall make provision for making just and human condition of work and for maternity relief".

Section 43: The State shall endeavour to secure, by suitable legislation, or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, a living wage, condition of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis.
The Supreme Court, though rarely invalidated a legislation for acquisition of property on the ground of lack of public purpose has not developed the concept of public purpose suitable to the changed concept of a welfare state in a mixed economy with the obligation to do distributive justice simultaneously accelerating the economic growth both in public and private sectors of the economy. The Supreme Court has not shown the necessary appreciation of this national imperative. Hence, in this chapter, a new juridical norm of social purpose is suggested as part of a new concept of 'Social Macro Right to Property' replacing the outmoded medeival police state doctrine of eminent domain.

(iii) THE IMPORTATION OF OCCIDENTAL CONTROVERSIAL CONCEPTION OF THE CONCEPT OF COMPENSATION AND THE ORIENTAL IMPERATIVES OF SOCIO - ECONOMIC JUSTICE.

The second limb of the doctrine of eminent domain is the concept of compensation which has been mainly responsible for the conflict and controversy between the Supreme Court and the Parliament. It became the heart of the problem of right to property. The simple questions involved are:

Is compensation to be paid to the owner of the property when there is deprivation without acquisition? In what cases of interference by the State with the right to property of an individual by way of control, regulation or restriction compensation need to be paid? In case compensation is to be paid, what is the measure of such payment? What is the extent of the power of judicial review of the courts with respect to compensation? Is it desirable to have judicial review in this matter? What is the mode of payment of compensation? How long can it be postponed? Can it be paid by instalments? Can it be paid by bonds or in kind?
Of all the questions mentioned above the two major questions that rocked the foundations directly of the right to property and indirectly the fundamental rights chapter of the constitution are:

What is a compensation or what is the quantum of compensation? Secondly, when is it justiciable?

The Indian Constitution being drafted by those who were learned in the Western Laws and steeped deeply in the Western liberal philosophy contained conceptual contents of the Government of India Act of 1935 framed by the Briti­shers, the common law, the English Institutions, the Ameri­can doctrines, the Irish Principles and other facets of Western politico-legal institutions, systems, structures and norms.

As has already been discussed in Chapter III elaborately the Constituent Assembly gave immunity specifically to agrarian reform laws against some fundamental rights including Article 31 (2) relating to compensation and blissfully left vaguely about the justiciability of compensation by rejecting the proposals for qualifying the noun compensation by words like "equitable", 'fair or 'just'. The Supreme Court indirectly interpolated the question of non-payment of compensation by the application of the doctrine of colourable legislation and struck down some of the provisions of the Bihar Land Reforms Act in Kameshwar vs. Bihar¹. Thus it heralded the invalidity-amendment syndrome of post independent Indian Constitutional History. The first amendment to the Constitution of India nullifying the judgment was passed. The question of justiciability of the adequacy of compensation came up for consideration for the first time before the Supreme Court in Bella Banerjee vs. West Bengal².

The Supreme Court unanimously unhesitatingly unambiguously, but unreasonably opted for the Anglo American conception of the concept of compensation relevant only to the Nineteenth Century concept of police state or Twentieth Century controlled capitalism in the west without contemplating the consequences of its application to the Indian context of abysmal poverty, Himalayan economic problems and egalitarian goals at a different point in time frame continuum. It seems that it never occurred to the Supreme Court how revolutionary institutional structural changes in the Indian economy can be brought to realise the ideals and reach the goals of economic justice by implementing the directive principles of state policy. Not being unaware of the absence of any adjective qualifying the word compensation in Article 31(2) and having option to choose a non interfering judicial policy in view of the open texture of the words adopted by the Constituent Assembly, it followed the Australian model (Section 51 (XXXI), used the words "Just terms", English practice and American due process. It interpreted compensation as 'just equivalent of what the owner has been deprived of'. The Parliament did not take much time in nullifying the judgment by the Constitution (Fourth Amendment) Act 1954 and ousted the jurisdiction of the courts with respect to compensation and restored the position supposed to be correct according to the condition. For a decade the courts did not question the limitation imposed on the power of judicial review of the courts with respect to compensation. The court did not uphold the challenge against the post amendment laws even though they provided inadequate compensation. Even in the case of preamendment laws it was

1. The adjective 'Just' was mooted and other adjectives like 'fair' and equivalent were suggested by some members and all were deliberately rejected by the founders of the Constitution.

hesitant to interfere and partially applied the amended concept of compensation by adopting the view that just equivalent did not necessarily mean market value. But the seeds of destruction of the IVth amendment to the Constitution by those who did not reconcile were sown much earlier than the final below in obiter dicta. The Supreme Court found a supporting plunk in the retention of the word 'compensation' in clause (2) Article of 31 even after the 4th amendment. In, Deepchand vs. Uttar Pradesh K. Subba Rao, J., made an attempt to recapture the lost power of judicial review of the adequacy of compensation on the ground that the Constitution contained the word 'compensation' even after amendment to the constitution and hence the Parliament accepted the interpretation put by the courts on the word. Then, one may ask, what for the amendment was made? What is the meaning of the words ousting the jurisdiction of the courts with respect to the adequacy of compensation? Subba Rao, J., invoked the principle of equivalent or quid-pro-quo. Finally, after 6 years, in Vajravelu's case, Subba Rao, J. succeeded in bringing the clock back to 1954. From 1965 to 1969 excepting in a stray case in Shantilal the Supreme Court pursued this line of thinking of 'fair equivalent' and lack of provision for it amounting to illusory or colourable exercise of power, and finally reached the summit of oower of judicial review in Bank's case after reaffirming and reiterating the same in different ways in different

cases\(^1\) which were already discussed in detail. In the
Banks case the court went a step further than the earlier
cases by opting to the concept of "recognised principle"
for the concept of "just equivalent". The court has wiped
of the difference between pre-Constitution IV Amendment
cases and post constitution amendment cases with respect
to judicial review. Thus the Supreme Court showed lack of
appreciation of the gigantic problems which the country
faces, did not try to evolve indigenous concepts and followed
not merely foreign concepts but also the conceptions of
those concepts. Even in the case of choosing the foreign
doctrines and following cosmopolitan precedents the court
preferred to follow the developed or affluent countries like
U.S.A., England, and Australia rather than Afro-Asian-Latin
American countries whose problems are more similar to us.
The Court did not take into consideration the ideals adum-
brated in the preamble and principles and goals set in the
Directive principles of State policy and Fundamental Rights.
An young jurist frankly observed, "The Courts' desire to keep
within Western patterns might have been justified if it were
warranted by the text of the constitution. But the court
seems to have misused techniques of interpretation and
indulged in inconsistent voting patterns to achieve a power
of review which was clearly denied to it by the terms of
the Fourth Amendment"\(^2\).

The Parliament which had no intention to deny com-
pensation demonstrated by its retention of the word even

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after the IVth amendment was compelled to remove the word by the Constitution (Twenty-Fifth Amendment) Act, 1971. Even this does not appear to have settled the issue finally. In Kesavananda Bharathi's case in which the 25th Amendment was challenged the Supreme Court left open the question whether it would stop interfering in compensation cases short of payment of shockingly illusory amounts.

It cannot be denied that the court in 1954 and if not later has clear options on the basis of words in the constitution to choose a flexible approach or a rigid approach in this matter. The Supreme Court travelled along a single dimensional track in finding the conception of the concept of compensation, perhaps, subconsciously influenced by a single moral principle of that payment of inadequate compensation would amount to confiscation and expropriation involving a moral turpitude. It ought to have looked to another dimension of the requirements of justice and morality of good legal system. It has to take responsibility for preferring a moribund conception of a senile concept. Having power to evolve new conceptions by judicial restraint it took a rigid approach. It cannot be said that the letters in the constitution did not permit the court to take

1. "Laws require interpretation if they are to be applied to concrete cases, and once the myth which obscure the nature of the judicial process are dispelled by realistic study, it is patent, as we have shown in Chapter VI, that the open texture of law leaves a vast field for a creative activity which some call legislative". H.L.A. Hart, The Concept of Law, 1961 E.L.B.S. Edition first published 1970, p. 200.

2. "...(A) legal system must treat all human beings within its scope as entitled to certain basic protections and freedoms, is now generally accepted as a statement of an ideal of obvious relevance in the criticism of law". H.L.A. Hart, op.cit p. 201.
a different view than what it had taken. Virtually, it has imported the doctrine of due process which was rejected by the Constitution makers.

2. THE POLICE STATE DISAPPEARS BUT THE DOCTRINE OF ROLE POWER CONTINUES:

The doctrine of police power was evolved by the Supreme Court of the United State of America in its interpretation of the first part of Vth amendment to the constitution of U.S. to recognise and limit the power of the State to interfere with the right to private property by way of regulation, control, deprivation and destruction in the interest of the public. According to this doctrine no person shall be deprived of his property without due process of law. Every interference with the enjoyment of property by way of regulation is considered as deprivation. If such deprivation is in accordance with the due process of law it is permissible. It means that it should be reasonable. But, whether it is reasonable or not depends on what the court says. If the court thinks any deprivation unreasonable it will be held unconstitutional. In "Miller vs. Schoene" Sonte, J.,

1. H.L.A Hart, op.cit. p. 200. "Judicial decision, especially on matters of high constitutional import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle; for it is folly to believe that where the meaning of the law is in doubt, morality always has a clear answer to offer".

2. The Fifth amendment of the U.S. Constitution says that no person shall "be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation".

observed "where the public interest is involved preference of that interest over the property interest of the individual, to the extent of even its destruction, is one of the distinguishing characteristics of every exercise of police power which affects property". In this case the court upheld the validity of the Cedar Rust Act of Virginia which rendered liable destruction of Cedar trees affected by the plant disease known as cedar rust if they were within a certain radius of any apple orchard to save the later which was considered to me more essential for the economy. The court did not consider such a regulation as unreasonable. It did not think that it would amount to 'taking' to attract compensation. It thought that the plaintiff was deprived of his property according to due process of law. But, in another case, Pennsylvania Coal Company vs. Mahon where the State prohibited the company from excavating the coal, notwithstanding the terms of transfers to the surface dwellers who constructed houses and developed into a city the court held that the deprivation was without due process which amounted to "taking" without provision for payment of compensation. In the U.S. if compensation is provided it would be deemed as taking and the statutes will be upheld without going into reasonableness of the "taking as only very rarely the courts invalidate on the ground of absence of public purpose. Where there is excessive regulation it would be deemed as 'taking' and questioned on the ground of lack of compensation even though it is not an exercise of power of eminent domain. This kind of interpretation merges excessive exercise of police power with eminent domain. By absorbing police power into eminent domain the court can question the validity of the law not on the ground of due

1. 260 U.S. 393 (1922).
process but on the ground of compensation. One may ask the question how does it matter to the individual deprived of property whether the law is invalidated on the application of police power or eminent domain? On the fact of it, it may appear to be difficult to answer. But on close examination it can be found this policy of the courts is useful to the deprived individual as well as to the Government. It is useful to the State because even excessive exercise of police power will be saved by being absorbed by the doctrine of eminent domain if payment of compensation is provided and thus permit State action in the interest of the general public which otherwise would be held unconstitutional for violation of due process clause. It is merely a regulatory measure which will be termed as police power. The individual may be deprived of his property without compensation if the courts will not hold it unconstitutional for being unreasonable. The absorption of police power by eminent domain is termed by a jurist as constructive eminent domain.

There was divergence of opinion regarding the presence of absence and location of the police power under the Indian Constitution. Das, J., expressed the view that in view of the narrowness the police power would receive if it would be confined only to Article 31 (5) (ii) the police power should be located in Article 31 (1) also. He held that Article 31 (1) deals with "Police Power" and Article 31 (2) with "eminent domain". He reiterated this view

Referring to Article (5) (b) (ii) which authorises the making of law in the interests of public health or for preventing danger to life or property he held that it was an illustration of police power. He concluded that (5) (b) (ii) of Article 31 was added by the Constitution makers out of abundant caution. In the same case Patanjali Sastri, C.J. considered that American doctrine of Police Power as a distinct or specific legislative power was not recognised in the Indian Constitution. He said that the power of eminent domain was covered by entry 33 of List I and Entry 36 of List II. He considered that Article 31 is concerned only with the formulation of restrictions on the exercise of eminent domain. He held that Article 31 (5) (b) (ii) is a genuine exception to clause (2) of Article 31. Bose, J., wisely doubted the usefulness of American doctrine such as police power and eminent domain in interpreting the Indian Constitution. On the other hand Mahajan, J., held the view that Article 31 (5) (b) (ii) was not illustrative but comprehensive of all the cases dealing with deprivation of property without attracting compensation provision in clause (2) of Article 31. Jagannath Das went a step further and held the view that police power was covered not only by specific provisions of Article 19 (2)


2. Ibid, p. 110.

3. Both these entries were omitted by the 7th Amendment of the Constitution of India. Hence according to this view it should be now in item 42 of List III of Schedule "Acquisition and Requisitioning of Property".
Article 19 (6) and Article 31 (5) (b) (ii) but also by all specific legislative entries in the various legislative lists as an ancillary power. The confusion and controversy was ended partly by Parliament by passing 4th Amendment to the Constitution of India in 1955. It added a new clause (2) (A) to Article 31 clearly providing that where transfer of ownership or right to possession of any property to a state or to a corporation owned or controlled by the State is not made, it should not be deemed to provide for the compulsory acquisition or requisition of property even though it deprives any person of his property.

Bachawat, J., delivering the unanimous judgment of the court in the Deputy Commissioner and Collector of Kamrup vs. Durjanath Sarma dealt with the scope of Article 31 (5) (b) (ii) of the Constitution both before and after 4th Amendment to the Constitution of India which amended Article 31 (2) limiting the payment of compensation only to cases of transfer of ownership from the individual to the State.

Referring to the eminent domain and to the police power he observed following the American jurisprudence, "Under the police power many restrictions may be imposed and the property may even be destroyed without compensation being given, whereas under the power of eminent domain, the property may be appropriated to the public use on payment of

1. For a critical examination and satisfactory explanation of these divergent opinions of the judges all of whom relied on the same American doctrines, see P.K. Tripathi; Some Insights into Fundamental Rights, p. 216 to 255.
3. He quoted American Jurisprudence Second Edition Volume 16 Article 301. p. 592. It says that appropriation of property for public use without compensation cannot be done by the exercise of police power.
compensation only. He held that "clause (5) (b) (ii) did not protect laws for acquisition of property from the operation of clause (2) as it stood before the Constitution (4th Amendment) Act". He held that after the 4th Amendment a law providing for destruction of property or impairment of its value was not invalid even if it did not provide for payment of compensation. Hence, invocation of clause (5) (b) (ii) is not necessary to save such laws.

Then the question is what is the scope of clause (5) (b) (ii) after 4th Amendment? He answered "but even now clause (5) (b) (ii) is not wholly otiose. Clause (5), (b) (ii) will protect laws providing for requisitioning or temporary occupation of property strictly necessary for promotion of public health or prevention of danger to life or property. The law may authorise the state to requisition the property temporarily for abating the public menace without payment of compensation if the menace cannot be abated in some other recognised way. We hold that a law for acquisition of property is not protected by clause 5 (b) (ii) of Article 31 as it now stands after the Constitution (4th Amendment) Act. Hence, he held the impugned Assam acquisition of Land for flood control and prevention of erosion Act 1955 enabling the State Government to acquire lands for works or other development measures in connection with flood control or prevention of

1. A.I.R. 1968 S.C. 399. Referring to Chicago, Burlington and quincy Rly (vs.) People of the State of Illinois, (1906) 200 U.S. 561, he observed "in the exercise of its police power, the State may pass regulations designed to ensure public health, public morals, public safety as also public convenience or general prosperity". (A.I.R. 1968 S.C. 399)


3. Ibid., p. 403.
erosion was a law for acquisition of property and not a law for preventing danger to life or property and was not protected by clause 5 (b) (ii) from the operation of clause (2).

It shows that the police power is confined under clause (5) (b) (ii) for temporary requisition of property for prevention of danger to life and property. It means for the same purposes permanent acquisition cannot be made. It is submitted that the language of clause (5) (b) (ii) cannot be limited for a particular time because it merely says that the State can pass any law for the promotion of public health or prevention of danger to life and property and such law is immune from Article 31 (2) which stipulates payment of compensation. Strictly speaking the Court should have upheld the validity of the enactment. Because, permanent acquisition in different forms and names without payment of compensation is permitted by the Constitution. Taxation, penalty abolition of zamindaris are some of the illustrations. Some of them are found in the Western countries. Others are unique to our country like the zamindari abolition.

The court unable to accept the unpalatable constitutional position of acquisition without compensation under Article 31 (5) (b) (ii) limited it to temporary acquisitions without constitutional justification but with moral justification. Hence, it is suggested in this chapter that the doctrine of police power should be absorbed by a single new theoretical framework for state intervention with right to property.

The above analysis of the provisions of the constitution and the interpretation placed on them by the Supreme Court show very clearly that the police power is located in Article 19 (5), 31 (1) and 31 (5) (b) (ii). This leads to overlapping confusion and conflicting decisions by the Court.
3. THE NEED FOR A NEW COMPREHENSIVE DOCTRINE OF SOCIAL MACRO-POWER AND INDIVIDUAL MICRO RIGHT TO PROPERTY:

According to the doctrine of eminent domain which originated in the west the State has power to compulsorily acquire the property of a private individual for a public purpose by payment of just compensation i.e. equivalent market value of the property deprived at the time of acquisition. The two components of this doctrine are public purpose and compensation. They are the conditions which can't be violated. Any law which fails to satisfy any one of the two conditions is liable to be struck down by the courts where judicial review of legislation prevails. It is scrupulously followed in U.S.A. But it is difficult to understand how even though in practice England follows it strictly it can be valid in theory in the absence of judicial review of the legislation of sovereign Parliament. Can the Courts in England give a relief to an individual whose factory worth a million pounds is compulsorily acquired by the State paying 10 pounds as compensation under a law which lays down a principle that 1/10,000th to the market value of the property acquired shall be paid as compensation?

The Doctrine of eminent Domain in its rigid form of conception is not uniformly followed in all the western countries. This doctrine originated and fully developed, it must not be forgotten, at a time the where concept of state was a police state with the only duties of maintenance of law and order and defence against external aggression. Very rarely the state required the property of the individual. The public purpose at that time was meant mainly

Governmental purpose. It was only to construct a Government Office, to lay a public road, to organise a military establishment, to house the Governmental personnel, defence personnel, to dig a canal and limited municipal purposes. A policy of distributive economic justice was unknown. Public purpose was almost synonymous with Government purpose. The Revenue raised by taxation by State was sufficient to meet the requirements of the performance of the minimum duties of the Government. Hence, it was possible to pay full compensation at the market value on rare occasions of acquisition. But the concept of the State has undergone change from police state to that of welfare state or a socialist state of different degrees. In this context the word public purpose has received new direction and a tremendous conceptual and functional and multidimensional expansion. Public purpose has become a matter of social purpose in the sense to satisfy the needs of the community at large. When the concept of state has changed beyond recognition simultaneously other concepts relating to the powers of the police state whose requirements of acquisition were extremely meagre limited by the absence of any social function of the State also have to change.

But, this doctrine underwent stressess and strains by being stretched in the Constitutional legislation and judicial processes to encompass new dimensions under wider fields of social welfare activity of the modern state. But, in this process some times naturally the core of the concepts of compensation and public purpose—the components of the doctrine of eminent domain—did not permit elastic exercises beyond a limit and proved to be impediments because of their rigidity consequent upon their antiquity. Some times, attempts to stretch them beyond the fatigue point results in disfigurement and loss of identity of the anachronistic doctrine.
The conceptions of the compensation, public purpose and police power have undoubtedly undergone a sea change. This is beyond dispute. This is true even in the case of western liberal democracies. According to a theory the conceptions may change but the concepts may remain. Referring to American Constitution two commentators observed "One does not have to dig deeply into the literature of American Constitutionsal law to suspect that many constitutional provisions do not mean today what the framers thought they meant". Institutional practice may differ from the text of the constitution with its meaning when it was made. This duality between the sources of constitutional law in the long run, in practice and interpretative process, is inevitable. It requires reconciliation and explanation. According to Prof. Ronald Dworkin's theory of legal concepts and conceptions, the concepts are not determinable by the authors intentions and the situations in which they are made. Concepts like equality, liberty, due process compensation, public purpose are vague and their abstract contents are not determinable for ever. They are liable to change. The exact content is always disputable and is liable to be contested. The boundaries of these concepts are always indeterminable and disputable. The concept may remain for a longer duration, but the conceptions of these concepts may vary according to the needs of the society, at different times. It means that the concepts are broad generalizations, they are flexible and elastic. Thus, the concepts permit, conceptual changes, which refer to the content of concepts can themselves remain if there is a radical change.


in the conception of the concepts and in view of tremendous expansion in the content of the concepts. It is submitted that beyond a particular limit, changes in conceptions and expansion in the contents of the concepts, result in a confusion and retention of mere terminological husk does not serve any purpose. Quantitative changes, crossing the critical point will bring in qualitative changes. Hence, the concepts themselves may have to be changed, redefined, redesignated and replaced by new concepts so as to be in conformity with the reality of corresponding changes in the conceptions and contents of the concepts. Thus new concepts have to be advanced, to clarify and enlighten the turning points in the socio-legal history.

An unlimited application of doctrine of police power results in injustice. According to the doctrine of police power temporary deprivation and permanent destruction of property for saving property and life, and for public welfare is permissible without payment of compensation. This is unjust and inequitable from the point of an individual who loses his property. It matters little whether he is deprived of his property by regulation, control, destruction or by acquisition. It is immaterial whether the state is benefitted by accretion of property by acquisition or not. To the extent that danger to life and property is averted and public health protected, the society is benefitted to that extent. Irrespective of the profit or benefit to the state or society the individual who suffers a loss by State action has to be paid solatium the quantum of which depends upon number of factors mentioned above. Some times even in regulatory measures and imposition of controls, the individuals may have to be compensated depending upon the circumstances, because every regulation and control results in loss to the individual as it affects some aspect or other
of the ownership, but, generally no solatium is to be paid in purely regulatory measures in the interest of the public. The new doctrine enunciated here includes the state's power not only of acquisition but also of regulation, control, destruction and every other partial or total deprivation. There is no necessity for another doctrine of police power. The distinction between doctrine of police power and eminent domain is artificial and unnecessary. Both these doctrines are assimilated into the new doctrine of social macro-power and individual micro-right to property which conceptualises, the sovereign power of the state to satisfy the paramount needs of the society, by interference with the right to property of an individual, in variety of ways.

The new conceptualisation has to replace the doctrine of eminent domain to serve as a guideline for the performance of the functions of a modern social democratic state vis-a-vis individual right to property.

This new approach seeks to explain the modern socialist State's power to continuously acquire and requisition in a large way the private property for the social purpose of meeting most of the needs of the people, and the mandate to implement part IV of the Constitution for the prevention of concentration of wealth and utilisation of natural resources to subserve the common good and to realise the goals of economic justice and equality set in the preamble. In this view the right of the society represented by the State is paramount to the individual right to property with minimum safeguard for the individuals right to property to keep his dignity and to enjoy the fruits of his labour subject to social control. The State can acquire any property for social purpose with or without paying any amount and without being questioned in any court of law subject to the condition that whenever any property of an individual whose total "wealth" does not exceed hundred times the minimum annual
wage prescribed for a Government servant, he should be fully reimbursed for the deprivation.

This is only an extension of the principle of protection provided in the second proviso to Article 31-A by which payment of compensation equivalent to a market value has to be made if agricultural land is to be acquired from a person whose total land is below the ceiling limit and all the land is under his personal cultivation. Before the 25th amendment to the Constitution and after the revival of concept of 'equivalent of market value' as compensation, the position of non-agricultural property owners was enviable. But, after the 25th amendment the tables are turned. As the courts can now interfere only in cases of payment illusory amount non-agricultural property owners are in danger and personally cultivating agricultural land owners (the second condition of ownership of land below the ceiling limit has no significance in future as land above the ceiling would have been either acquired under land ceiling laws or the owners would have managed to transfer the balance) are in a better position. But under the new approach enunciated here, this discrimination between agricultural and non-agricultural property is eliminated and protection to all property below the national variable ceiling limit is provided by payment of equivalent to market value in all cases of deprivation by the State by either acquisition, requisition, destruction, regulation and control with the proviso that compulsory payment will be only in the case of acquisition as in other cases drawing lines is difficult. But, the legislature is supposed to do justice in all cases depending on the conditions according to its wisdom which cannot be questioned in a court of law.

The doctrine of eminent domain with its twin concepts of public purpose and compensation as is shown was subjected
to too much stress and strain resulting in confusion, in conflicting decisions, political controversies and the confrontation between the Parliament and the highest courts which led to the questioning of the ultimate principles and the basic structure of the Indian Polity. Hence, this approach is advanced with the two corresponding concepts: the concept of social purpose, replacing the concept of public purpose and secondly, the concept of relative solatium replacing the concept of compensation and the non-conceptual amount. The concept of social purpose is wider than the concept of public purpose. Even though the concept of public purpose was interpreted by the courts broadly and its presence has been assumed in every enactment, it is not sufficient to justify the economic reformatory, acquisitive and regulatory process of a socialist state with mixed economy or complete public ownership of means of production. The concept of social purpose permits the acquisition of private property by all the public bodies, for all social purposes. The purpose may not serve the general public. Even if it is required for an identifiable small section of the society who are more in need of such property it can be acquired. The benefit to the society need not be direct. Even acquisition of land or property for the establishment of important private industry subject to the social control, is permissible, excepting in cases of acquisition for purely private benefit like taking away A's property and giving it to B. All acquisitions for social use are justifiable under the concept of social purpose. The concept of relative solatium a substitute for the concept of compensation - is narrower and broader at the same time. It is narrower because in every acquisition of property by the state there need not be recompense. Payment of solatium equivalent of market value is compulsory only the case of
acquisition of property below a ceiling limit. The legislature may or may not provide for payment above the ceiling limit. The quantum in those cases is within the discretion of legislature depending upon variety of factors. The recompense has two aspects, the individual and the social. Under the individual aspect of recompense, the individual whose property is acquired by the State is to be paid a solatium which may be the market value or even more than the market value depending upon the purpose of acquisition, the nature of the property, the conferment of indirect benefit on the looser and the social gain. This is looking from the individual point of view. Viewing from the social point of view in some cases no solatium need to be paid, depending upon the benefit and the profit which the individual gained from the property or the enterprise, due to governmental aids, concessions and protectionist policies and the social losses incurred by the uninterrupted enjoyment and exploitation of the national natural resources and human labour and scientific skill. Hence, the concept is termed as relative solatium i.e., relative to the individual and society. The last word in this matter is of the legislature - the representatives of the people - which has the

1. See Ray, J., says "Just as the amount can be fixed on principles of social justice, the principles for determining the amount can be specified on the same consideration of social justice. Amount is fixed on the principles are specified by the norm of social justice in accordance with directive principles" in Kesavanand vs. State of Kerala, A.I.R. 1973 S.C. 1461 at p. 1715. Earlier he observes "If compensation means an amount determined on principles of social justice then will be general harmony between part III and part IV. Secondly, if compensation means market price then the concept of property right in part III is an absolute right to own and possess property or to receive full price, while the concept of property right in part IV is conditioned by social interest and social justice". Ibid, p. 1715.
onerous responsibility of doing economic justice by providing and maintaining decent standards of living for all the people and not only preventing but eliminating the present concentration of wealth. In some cases the compensation or the 'solatium has to be received by the society and not by the individual.' Confiscation of private property is a mode of reception of compensation by society which sustains losses at the hands of unscrupulous greedy individual propertied owners and is permissible for the elimination and prevention of concentration of wealth subject to the guarantee of a basic minimum of property i.e. upto the ceiling limit prescribed.

4. COLOURABLE DOCTRINES:

The Courts, especially in England, United States of America, Canada, Australia and other commonwealth countries in discharging the function of construction and interpretation of the constitution, statutes, rules and regulations developed number of aids in the form of theories, doctrines, principles, rules and maxims. In the field of constitutional law, the courts invented, propounded and applied the doctrines of pith and substances, severability, occupied filed, repugnancy and colourable legislation and so on. In this process inevitably the courts describe, evaluate, test and stamp legislative process for any deviation. Though these doctrines help the courts in the interpretative process, incidentally they amount to comment on the style and methodology of the legislative process.

Similarly, jurists and academic-lawyer-critics who evaluate and pass on judgments on judgments of official formal judicial decisions constitute the unofficial informal powerless judiciary. Hence, in discharging their functions they have a right to propound new theories and
doctrines as aids in the juristic critical appreciative appraisal process of judicial process. An attempt is made here critically to examine the application of the doctrine of colourable legislation by the Supreme Court of India, and then to attempt to propound a new doctrine of judicial colourable amendatory negative legislation.

(1) THE APPLICATION OF DOCTRINE OF COLOURABLE LEGISLATION AND FRAUD ON THE CONSTITUTION:

The Supreme Court of India without relevancy and necessity imported the Canadian and Australian doctrine of colourable legislation in the Kameshwar Singh's case, and struck down some of the provisions of the Bihar Land Reforms Act meant for the abolition of zamindaris. These theories which were frequently used in Australia and Canada under different constitutional and societal circumstances are inappropriate in the context of the solution to the socio-economic problems of India. There were no Bill of rights in both Australia and Canada whereas in India under the Constitution we have a comprehensive bill of rights. The Constitutions of Australia and Canada are framed by the British colonial power whereas the Indian Constitution is framed in the native land.

In the case of Australia and Canada the protection of the

1. In modern continental systems, as exemplified by French law, there is a great deal of extra judicial or jurisprudential made doctrine which is recognised as a necessary and constant factor in legal theory. Sir Carleton Kemp Allen. Law in the making, 1964 pp 360-61.

2. "The Courts' use of the doctrine of colourable legislation is equally devious".
"The Supreme Court of India treated the doctrine as a general device to prevent what the judges felt was an unwarranted exercise of power". Rajeev Dhavan: The Supreme Court of India; 1977 p. 153.

federal structure gained prominence whereas in India due to historical factors the problem of unity and integrity of the whole country has become more important by a tilt towards a strong centre. In Australia and Canada the doctrine of "colourable" legislation was used to restrain the provincial and central legislatures from impinging and encroaching into each others spheres. In Canada the doctrine means that the Constitutional limitations on a legislature's power cannot be violated by resort to colourable devices. In Australia it is applied to see that a legislature cannot do indirectly what it is forbidden to do directly. The courts are made as umpires so that the respective legislatures do no cross their lines. The assumption of this power of review by the courts is not always used strictly for the purpose of restraining the respective legislatures within their legislative spheres. This power of the court is used for invalidating Acts on the basis of the merits of the substance of the Act. As Laskin remarked a very thin line separates wisdom from validity. Any wide use of the principle of colourability must deepen suspicion that constitutional limitations are merely the formal means by which courts passed on the wisdom of legislation.

No doubt, in the Constituent Assembly debates Alladi and Nehru referred to these concepts of fraud on the constitution and colourable device in explaining the most extreme cases in which compensation would become justiciable. Mr. Munshi on the other hand used the same phrase fraud on the

1. Laskin "A Note on Canadian Constitutional Interpretation", University of Toronto Law Journal vs. (1943), 171 cited in Land and the Constitution in India, 1970 by Merillat,
2. C.A.D. 9, 32, 1272.
Constitution to make compensation justiciable in all cases where it is illusory and all cases where the compensation is not a fair equivalent being termed as illusory.

The majority in the Supreme Court in the Bihar Land Reform Case made use of the pronouncements of Nehru, Alladi, and Munshi on the concepts of fraud and 'colourable legislation' and struck down two important provisions of the legislation. Nehru and Alladi used those terms only in extreme cases of almost non-payment of compensation and not where 50% of the total value is given. The question involved is whether any provision of the Constitution is violated or not? It is a well known principle of construction that the motives behind the legislation are irrelevant and cannot be taken as ground for striking down any provision of an Act. But, in this case the court examined and attributed the motive of augmentation of revenues. To use the Australian and Canadian analogies the question of centre-state legislative conflicts has not arisen. It is a mis-application of doctrine of colourable legislation.

With respect to deduction of expenses of 12% in the largest estates from the income, Justice Mahajan said that it was artificial. But it can be argued that this deduction is necessary. Firstly, because the zamindars neglected the works of improvements on the land; secondly, in the interests of ryots and more production of food grain which is urgent in the national interest; thirdly, because of the fact that the zamindar's had enhanced and collected excessive and usurious rents for a long time; fourthly, all the arrears might not be realised. Fifthly, collection of arrears involves expenditure including litigatory proceedings.

1. This doctrine was applied later in Gajapathi NarayanDeo vs. State of Orissa, A.I.R. 1953, S.C. 375; Vajravelu Mudaliar vs. Special Deputy Collector of Land Acquisition. A.I.R.1965 S.C. 1017 and so on.
Sixthly, the State had plans for improvement of agriculture in these lands involving expenditure. Seventhly, the State had envisaged a programme for rehabilitating the small and weak zamindars which had to be taken into consideration. But, the court did not take these factors into consideration in arriving at the conclusion about the validity of the legislation.

It is submitted that the three great departments of Government namely the legislature, the executive and judiciary are equally important discharging different functions essential for the stability and progress of the society. Each one having its own dignity, they should mutually respect of each other. Public confidence in these institutions is necessary. Any attempt to erode the public confidence by undermining the dignity of any one of the institutions is hazardous. So each of these institutions should not question motives and indulge in derogatory language while examining the functions and acts of other institutions. Doctrine of colourable legislation and doctrine of fraud on the constitution are unsound from this point of view. Without inventing and invoking these doctrines the judiciary can perform the functions set for it by the constitution by examining the validity of laws on the grounds of legislative competence, conformity with the provisions of the constitution and inviolability of the fundamental rights. If there is no legislative competence the court can straight away say the enactment invalid without bringing in the doctrine of colourable legislation as the question involved is the legislative competence. Hence, it is submitted that the doctrine of colourable legislation is neither necessary nor healthy for promotion of co-operation and coordination between different departments. However, if the doctrine of colourable legislation is deemed to be necessary to describe the illegitimate legislative exercise of power the same yard stick may
have to be applied in similar cases to the judicial function also. Towards this end a conceptual framework is attempted here with the caption of doctrine of judicial colourable amendatory negative legislation.

(ii) COLOURABLE JUDICIAL AMENDATORY NEGATIVE LEGISLATION:

A doctrine of judicial colourable amendatory negative legislation may be pronounced applicable to judicial process on the analogy of doctrine of colourable legislation applicable to legislative process.

According to the doctrine of colourable legislation acts ostensibly within the powers of the legislature but really outside its powers are called colourable exercise of legislative power. It means that the legislature wants to achieve a purpose which it cannot but for the devious means of legislation. In fact it is nothing but a question of legislative competency.

P. Satyanarayana Raju, J., has correctly stated that the doctrine of colourable legislation is a variant of the
doctrine of pith and substance. If we go a step further, we find that the doctrine of pith and substance is nothing but a device to find out the presence or absence of legislative competence. If the legislature has competence, it is law even if its motive and effect are unpalatable to the judiciary. If it has no competence, the legislation can be held void.

In applying the doctrine of colourable legislation in Kameshwar's case, the majority in the Supreme Court, with great respect, had made a colourable judicial amendatory negative legislation.

Whenever a court assumes power to declare a law partially or totally invalid on grounds which are prohibited by a provision of the constitution by invoking another provision of

1. Joora Sugar Mills (Private Ltd. vs. State of Madhya Pradesh A.I.R. 1966 S.C. 416. Prof. G.C.V.Subba Rao differs from this view and says that these two doctrines are distinct in the sense that the doctrine of colourable legislation applies only to cases where the underlying motive is to reach objects beyond the ambit of the power. But it is submitted as B.K.Mukherjea, J., rightly said "it may be made clear at the outset that the doctrine of colourable legislation does not involve any question of 'Bonafides' or 'malafides' on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motives does not arise at all. Whether a statute is constitutional or not is always a question of power. Vide Coolly's Constitutional Limitations, Vol. I p. 379'. A.I.R. 1953 S.C. 379, that the motive of the legislature cannot be considered nor questioned and the only question is whether the legislation in pith and substance falls within what is purports to do. Prof. G.C.V.Subba Rao himself cited number of American cases to show that the motive is beyond judicial enquiry. Profession G.C.V.Subba Rao, Indian Constitutional Law, Vol. I 1970 p. 172-173.
the Constitution for the same purpose, it may be termed, as, with due respect to the court, colourable judicial amendatory negative legislation. This doctrine of colourable judicial amendatory negative legislation applies also to cases where the court makes matters justiciable which are made non-justiciable by constitutional amendment by giving old meanings to the same words and by dictionary oriented interpretation. Kameshwar's case in which the doctrine of colourable legislation is propounded in its new form and applied for the first time is an example of the doctrine of colourable judicial amendatory negative legislation. There were two provisions in the Constitution using the word 'compensation', namely Article 31 (2) and Entry 42 of List III of Schedule 7. Actually, it is only in Article 31 (2) that the two conditions of compulsory acquisition namely, public purpose and compensation are mentioned expressly. In the case of Entry 42 of List III it was only a legislative head and the word 'compensation' mentioned cannot be said to be a condition. Even if it is considered to be a condition the power of the State is exercised under Entry 36 List II and it is not subject to Entry 42 List III. Even, assuming that it is a condition in Entry 42, and Entry 36 of List II is subject to it, how can it be relied upon to strike down a law which has immunity against a condition of compensation under another provision. When it is said that there is no legislative competence in this matter it means that the condition of compensation supposed to be mentioned in entry 42 is not complied with. But under clause (4) of Article 31 laws covered by that clause are given immunity against clause (2) of Article 31. It means immunity against the two conditions mentioned in that. In effect,

2. This entry has been omitted by the Constitution, (Seventh Amendment) Act, 1956.
the jurisdiction of the Courts is ousted. A law is not justiciable in cases covered by clause (4) for want of public purpose and compensation. The Constitution permits such laws giving immunity against those conditions. It is immaterial whether those conditions are in one provision or in more than in one provision in the Constitution. What is cured in clause (4) is those defects. The Counsel for the respondents could not answer the question posed repeatedly that what would be the effect or meaning of clause (4) of Article 31 if exactly protection given by it to certain laws was taken away, under Entry 42 of List III. Clause (4) of Article 31 becomes ineffective and meaningless. The court, instead of taking the view that if conditions are given in two provisions the violation of one proviso amounts automatically the violation of another proviso and pari passu the condonation of contravention of one proviso must necessarily mean the exemption from the operation of another proviso, ignored clause (4) and gave effect to Entry 42 List III. The conditions are non-justiciable under clause (4). In such a situation the court whose jurisdiction is barred to test such a law on the basis of those two conditions, assumed jurisdiction which it has not got and amended the law passed negatively by striking down two provisions of 4 (b) and 23 (f) of the Bihar Land Reform Act. With due respect it is submitted that this is nothing but colourable judicial amendatory negative legislation. Under the guise of examining the law on the basis of Entry 42 List III it has in fact tested the law under Article 31 (2) which it is prohibited to do. It has no judicial competence. Ostensibly it is purporting to test under Entry 42 List III but really it is testing the law under Article 31 (2). What it could not do directly it has done indirectly. Hence, Kameshwar Singh's case is an instance of the application

1. Ibid, p. 264.
of the doctrine of colourable judicial amendatory negative legislation in India.

Other cases of doctrine of colourable judicial amendatory negative legislation are Vajravelu's Bank Nationalisation and Privey Purses cases. Every case in which the judiciary assumes jurisdiction disregarding the immunity to certain legislation or nullifies amendment to the constitution by resorting to some other similar provisions or gives meaning to a word which is outdated or barred by subsequent amendment to the Constitution is a case of colourable negative amendatory legislation.

The doctrine can be extended to cases of power of Parliament to amend the Constitutional provisions and the Supreme Court's intervention in this matter. This doctrine may be termed as the Doctrine of colourable Judicial Constitutional Amendatory negative legislation. Whenever the courts abridge the scope and ambit of power of Parliament to amend the provisions of the Constitution by posing a conflict between the provisions which permit amendments to the Constitution without restriction and other provision in the Constitution and resolve the conflict against the Parliament or read implied limitation where there are none, or invoke the invisible spirit of the Constitution and extra constitutional creation of the theory of basic structure it is a case of the doctrine of colourable judicial constitutional amendatory negative legislation, because such an interpretation cuts down the amending powers of Parliament which it has clearly under Article 368.
C. EVALUATION OF SUPREME COURT'S JUDICIAL REVIEW OF LEGISLATIVE ECONOMIC REFORMS:

1. MAGNITUDE AND DIRECTION: REVIEW OF JUDICIAL REVIEW:

As has already been mentioned no provision in the Constitution of India received greater attention and consideration, created confusion, conflict and controversy both in the Constituent Assembly and subsequent constitutional history of India than the one relating to right to property. It is the Right to Property which caused the confrontation between the Parliament and the highest court in the country. No article in the Constitution has been subjected to so many serious series of Amendments of far reaching importance as that of Article 31. Barring Article 14 which is used and misused as a broad spectrum antibiotic by the vested interests against the virus of the socially beneficial economic reformatory legislation, it is only Article 31 perhaps, which has been invoked before the Supreme Court in maximum number of cases amongst the substantive fundamental rights of the Constitution of India. The best legal brains in the Country were pressed into the service in the litigation relating to right to property. With accretion of amendments in course of time Article 31 has become one of the lengthiest articles in the Constitution passing one's comprehension.

The Judicial Review of Property legislation has been discussed in detail already in dealing with almost all the reported judgments delivered by Supreme Court, in different chapters, broadly divided on the basis of the major economic problems faced by the country. The role of the Supreme Court is further reviewed briefly with reference to the specific problems in the concluding portion of each chapter. In addition, the critical examination of the doctrines and concepts applied, and juristic techniques followed and
nature of the participation of individual judges, general philosophy of property of the court are dealt in different sections of this chapter. In this section a compendious review of judicial review is projected.

As has already been mentioned the Supreme Court has delivered about 266 reported judgments expressed in about 3,427 closely printed pages. It has reviewed 158 Acts including 52 Central Acts and 106 State Acts, 10 Executive Actions, 9 Rules, 4 Regulations, 5 Orders, 2 Ordinances. In 119 cases the Court was moved by the petitioners under Article 32. In 155 cases the appellate jurisdiction of the court was invoked. Total number of judgments delivered by all the Chief Justices were 59. Article 31 of the Constitution in 189 cases, Article 19 (1) (f) in 159 cases and Article 14 in 54 cases were invoked severally or jointly. 228 unanimous judgments, 38 majority judgments were delivered.

Out of the 266 judgments the impugned laws were held valid in 214 cases invalid in 38 cases and partially invalid in 14 cases. Thus 214 judgments went in favour of the State, 50 went in favour of individual. In 212 cases the lower courts judgments were upheld. In 43 cases lower court judgments were reversed and in 4 cases partially reversed.

The Supreme Court held partially invalid only one enactment in 12 judgments delivered with respect to abolition of zamindaris. Out of the 19 judgments delivered in

1. The figures are based on the judgments reported in All India Reported. There may be some unreported judgments. All figures given here are fairly accurate as overlapping judgments, repeated consideration of some Acts, common disposals of the petitions and appeals may not permit absolutely accurate collection of statistical data. The actual petitions and appeals filed before the courts may be many times more.
2. See Appendix X
3. See Appendix IV
4. See Appendix IV
which the laws pertaining to abolition of Estates other than those covered by Article 31 (4) and (6) (relating to abolition of zamindaris) 17 were held valid, 1 invalid, and 1 partially invalid. This shows very clearly ostensibly that statistically speaking the performance of the Supreme Court in the abolition of all intermediaries including zamindaris is most impressive. This mathematical deceptive simplistic derivation from the figures cannot hide the truth by a close look to the constitutional provisions.

The Constituent Assembly as a Constituent Assembly and as well as acting as Parliament provided immunities to such legislation under Article 31 (4) and (6) and 31A against the onslaught of the missiles of Articles 14, 19 and 31 (2) fired by the feudalistic vested interests. There was little choice for the Supreme Court in this matter. With respect to the remaining aspects of agrarian reforms also most of the laws were held valid. 20 Judgments were delivered dealing with tenancy laws. Two laws were held partially invalid and one totally invalid. With respect to regulation and management 2 judgments went against the State out of 6 judgments. Out of 18 judgments delivered dealing with ceiling laws 1 was held totally invalid and 2 were held partially invalid. Among the 4 judgments dealing with laws for consolidation and prevention of fragmentation of holdings one went in favour of the individual. The only case dealing with debt relief enactment was decided in favour of the State.

The Central position occupied by right to property and the strong opposition evoked by agrarian revolution are manifested by the fact that all the four cases involving challenge to the power of the Parliament to amend fundamental rights related not only right to property but to agrarian property legislation. It is very interesting to note that in all the four cases the impugned legislations were held valid. But in Golaknath and Kesavananda the Supreme Court posited limitations on the power of Parliament to amend some
of the constitutional provisions including fundamental rights. The most well known judgments even to the common man delivered by the Supreme Court out of thousands of cases decided by it pertain to the Constitutional Law dealing with the fundamental right to property and involve a challenge to agrarian reformatory laws. Kameshwar, Kochunni, Kunhi Koman, Kunjukutti, Bhagat Ram are some of the most controversial judgments. The first, Seventh, Seventeenth, and Twenty-ninth amendments of the Constitution were passed by the Parliament to nullify some of the judicial pronouncements dealing with agrarian reforms. Out of total judgments of 84 dealing with the first and second phase of agrarian revolutions 72 went in favour of the State, six were held partially invalid and six totally invalid. Inspite of it, it is difficult to say that the judicial process of the Supreme Court facilitated the agrarian revolution in the country.

With respect to the urban problem of housing accommodation the Supreme Court delivered 15 judgments out of which 13 went in favour of the State. One law was held invalid and another partially invalid. Three judgments were delivered with respect to the problems of slum clearance, one case was decided in favour of the individual. Four judgments were delivered dealing with the problem of Town Planning. All went in favour of the State. With respect to the Tenancy Protection Laws also in urban areas all the five cases were decided in favour of the State. The single case decided with respect to the problem of the settlement of refugees namely Mrs. Bella Banerjee created constitutional history was decided in favour of the individual. The four cases were decided dealing with the problem of widening up of the roads went in favour of the State. Only two cases came up for consideration dealing with rent control legislation and both were decided in favour of the State. Out of total 34 cases dealing with the problems of urbanisation only 3 laws were held invalid and two partially invalid.
Kushualdas, Bhanji Munji, Jeejee Bho'y, Vajravelu, Bella Benarjee, Shantilal, Amita Pan are some of the notable judgments. Vajravelu, Mrs. Bella Benarjee are the most controversial cases. The fourth amendment to the Constitution of India is the result of the Supreme Court's judgment in Mrs. Bella Banerjee in which the Anglo-American conception of compensation was blindly imported to our country ignoring the socio-economic realities and constitutional socialistic imperatives imbedded in the preamble and directive principle of State Policy of the Constitution. Some of the judgments of the Supreme Court are positive and helpful in solving the problems e.g., Bhanji Munji, Ali Gulshan, Shantilal, Bella Benarjee.

As in the case of urbanisation, the Supreme Court handed down 34 judgments pertaining to the control of economy and Regulation by the State. The first property legislation that was impugned before the Supreme Court was a central enactment, namely, The Sholapur Spinning and Weaving Company (Emergency Provisions) Act, 1950. Two cases namely Charanjitlal and Dwarakdas Shrinivas, were decided with respect to the same enactment dealing with the problem of temporary management of private industries by the State. Understandably the first judgment was in favour of the State and the second in favour of the individual one validating and another invalidating the same Act. The Supreme Court's justification of this self-contradiction was not convincing.

One judgment dealing with winding up of the companies went in favour of the State. Out of five cases dealing with Labour Regulations, only one judgment went against the State. Out of six cases pertaining to licensing, in one case a law was held invalid. In the matter of the problem of controls, three laws were held valid and two partially invalid. In the matter of marketing out of 5 judgments one went against the state. With respect to Fairs and Exhibitions out of the two decisions, one was in favour and
another was against the State. The only case decided dealing with the problem of Soil Preservations went against the State. And the only case decided dealing with the management of property went in favour of the State. With respect to the regulation of leases six judgments were delivered, out of which one went against the State. In all, out of the 34 cases dealing with the control and regulation of the economy, 25 were decided in favour of the State. Four laws were held partially invalid, five totally invalid. Many cases dealing with control of economy are fairly important though not outstanding. The judgment of the Supreme Court in Dwarakadas Shrinivas was one of the provocations for passing the fourth amendment to the Constitution of India.

Total number of cases decided by Supreme Court on the problem of Nationalisation are fifteen. Only in nine cases the laws were held valid. Out of the four judgments dealing with Nationalisation of Electrical undertakings, two were decided in favour of the State and two against. With respect to nationalisation of Road Transport out of the five decisions, one was held against the State. Three judgments were delivered pertaining to the nationalisation of mines; two laws were held valid and only one was upheld. With respect to the nationalisation of Tendu leaves both the judgments upheld the validity of the laws impugned. The only case decided dealing with the nationalisation of the banks went against the State. There are many notable decisions of the court relating to nationalisation. The judgment of the Supreme Court in Saghir Ahmed's case along with other cases mentioned above led to the passing of the Constitution fourth amendment act permitting creation of State monopoly in Trade and Commerce. Bhikaji Narain and Deepchand cases dealt with the doctrine of eclipse. Namasivaya, Federal Corporation and Bank Nationalisation cases together stirred great controversy in the matter of compensation nullifying the Fourth amendment Act by a gradual process culminating in
Bank's case. The Bank's case is one of the most controversial cases in the Constitutional law of India creating repercussions in the economic, political and legal fields. This case lead to the passing of 25th Amendment to the Constitution of India nullifying the ratio - decidendi with respect to compensation. The judgments show the Supreme Court was sensitive on the issue of nationalisation laws.

The judgments which do not strictly and directly relate to the broad problems discussed above are dealt separately under different sub-headings as miscellaneous cases in Chapter IX. Some of them may also fall under regulation or some other chapters. Overlapping is inevitable as strict compartmentalisation of the judgments is not possible. More than 1/3rd of the cases decided by the court pertain to this category. Out of the 99 cases dealt with in Chapter IX dealing with miscellaneous problems 79 went in favour of the State, 18 laws were held invalid and two partially invalid. Out of 31 cases of taxation only 3 were held invalid. All the five cases dealing with seizures and penalties went in favour of State. Out of the two judgments of public health one law was held invalid. The problem of Evacuee Property brought 8 cases to Supreme Court. Only one decision went against the State. Out of 14 judgments dealing with endowments, two went against the State. Four out of the seven cases dealing with education were decided in favour of the individual. One judgment out of six in matter of services went against the State. Two out of the four pre-emption laws were held invalid. Same is the case with respect to the abolition of grants to the members of erstwhile princely families. Acquisition of land for industrial purposes were held valid in all the three decided cases.

In the last 28 years of judicial review of property legislation the Supreme Court approximately delivered 10 judgments per year on an average. It has invalidated 2 laws
per year on an average. The total votes casted by all the 61 judges who participated in all the 266 cases are about 1303. The total votes casted in favour of the socio-economic laws or in favour of the State as some describe—this is wrong in this context, the correct description should be in favour of society—are about 1008. The total votes casted in favour of the individual or property right or against state or society or social justice are 295. The number of votes casted for total invalidity are 223 and for partial invalidity 72.

Zamindari abolition legislation received least resistance for reasons mentioned already i.e. Constitutional immunity. 52 votes were in favour of legislation and only 3 for partial invalidity. Out of 19 judges who participated only 3 judges namely Mahajan, Mukherjea and Chandrasekhara Iyer voted against only one time each, all at the same time, in Kameshwar's case. The second phase of agrarian revolution involving abolition of residue of intermediaries, tenancy reforms, rent control, consolidation of holdings and the most important of all imposition of ceiling, has not got the same smooth sailing as zamindari abolition. However, it is not also discouraging as out of 72 judgments delivered by the Court in as many as 61 it upheld the laws, casted 291 votes in favour of the laws impugned and 63 against (Consisting of 14 votes for total invalidity and 49 for partial invalidity). Excepting 6 judges all the judges who participated in property cases participated in the judicial review of the second stage of agrarian laws. Out of the total judges of 65 so far adorned the bench of the Supreme Court 55 have participated in the review of second phase of agrarian reformatory legislations. It shows clearly that agrarian reforms occupy a prominent place in the Constitutional history of right to property in the last 28 years. This is understandable as the legislatures decided, though half heartedly, in tackling the problem of the land first as it

1. See Appendix - VII; 2. See Appendix - IX.
is the mainstay of our economy. As in the case of zamindari abolition, here also the low percentage of invalidity if not as low as in that, may be due to the constitutional immunities given to the legislations under Articles 31A, 31B and 9th Schedule which gave less scope for judicial review.

As the parliament and legislatures have not taken up - even after 30 years of independence - the problem of restructuring and altering the urban property relations only ancillary problems like housing accommodation, town planning, slum clearance, widening of roads and so on - all mainly in the nature of municipality problems - came up for consideration before the Supreme Court. As is already mentioned 29 out of 34 cases were decided in favour of the State. 127 votes were cast in favour of the impugned statutes and 34 against including 24 for total invalidity, and 10 for partial invalidity. As many as 47 judges participated. The maximum participation was Wanchoo, J., and most of the judges participated in less than 5 cases each.

In the matter of regulation and control of economy the same number of 34 judgments were handed over by the Court as in urbanisation. Almost the same number of 46 judges participated. 25 out of 34 cases were decided in favour of the State. 102 votes were cast in favour of the impugned laws and 47 against including 29 for total invalidity and 18 for partial invalidity. The maximum participation was By Sinha, J., in 11 cases. Wanchoo, J., and S.R. Das are close by with 9 each.

The member of cases on nationalisation are less - only 15 - when compared to agrarian reforms, urbanisation and Regulation. But the percentage of invalidity is highest i.e. 40% This shows clearly the court inspite of limited choice due to 4th amendment curtailing justiciability of compensation but having more choice than in agrarian laws
as they have greater immunities, virtually judicially amend-
ing the 4th Amendment inhibited the nationalisation laws. 
Though the cases are only 15 as many as 39 judges participated.
The reasons may be: greater importance of the cases and 
formation of bigger benches, full benches, and greater 
strength of Supreme Court in later years due to increase 
in the number of judges. 30 votes were casted in favour of 
the impugned statutes and 34 against, all for total invali-
dity. The maximum participation is by only one Judge S.R. 
Das, J., in 5 cases.

In the first five years of the Constitution 33 judg-
ments were delivered by the Supreme Court on right to property1.
In the second five years - from 1956 to 1960 - corresponding 
to the period of the Second Five Year Plan 37 judgments were 
delivered. The largest number of 85 cases were decided 
during the third five year plan - from 1961 to 1965. Per-
haps this may be the result of the impact of in passing and 
implementing economic legislation. In the next period of 
5 years 2 cases were decided. From 1971 to 1975 45 judgments 
were delivered. The lowest per year is the last three years-
1976 to 1978 - only 14 cases were decided. The lowest per-
centage of invalidity is also during the same period - only 
one case is decided against the State i.e. only 7% of invali-
dity of impugned laws. This may be due to the battle of 
property right in the courts coming to an end.

1. See Appendix VII.
2. INCIDENCE AND PATTERN OF PARTICIPATION OF INDIVIDUAL JUDGES - A QUANTITATIVE INVESTIGATION:

Almost all the Judges who sat on the bench of the Supreme Court since the establishment of the Supreme Court participated in cases involving right to property. Out of 65 judges who adorned the Bench of the Supreme Court of India so far as many as 61 participated. The maximum participation among the judges was by Justice K.N. Wanchoo in 80 cases, a little less than 1/3rd of the total number of cases. Justice J.C. Shah stands second with 73; Justice P.D. Gajendragadkar third with 69; Justice B.P. Sinha fourth with 63; Justice Hidayatullah fifth with 57. The incidence of participation of some of the other judges is as follows: Justices Rajagopala Ayyar 52, M. Sikri 48, K. Subba Rao 48, S.R. Das 48. This is only to mention few who had greater participation. The lowest participation was by Justices Govinda Menon, P. Sathyanarayana Râju and Ghulam Hassan with one each, Fazal Ali and A.K. Mukherjea with two each. Fifteen out of the sixty one judges participated, functioned also as Chief Justices for some time. The maximum number of twenty seven judgments were written by Gajendragadkar, 12 as Chief Justice and 15 as Judge; next comes K.N. Wanchoo, with seventeen out of which 3 as Chief Justice and 14 as Judge; third place goes to Hidayatullah with 14 out of which 4 as Chief Justice and 10 as Judge; the fourth position is shared by Sikri and Subba Rao with 13 each, Subba Rao 3 as Chief Justice and 10 as Judge, Sikri 6 as Chief Justice and 7 as Judge. Out of eleven judgments delivered by Sinha 8 were as Chief Justice and 3 as Judge. Rajagopala Ayyangar also delivered 11 judgments.

Some of the Judges wrote few judgments even though they participated in many judgments. e.g., Jaffar Imam

1. See Appendices: VIII and IX.
delivered only 2 judgments though he has participated in 26 cases; Rama Swamy 2 against 25; R.S. Bachawat 1 against 22; Raghubardayal 3 against 20; K.C. Das Gupta 4 against 39; Sarkar 2 against 35. Whereas, Justice Chandra Chud delivered four judgments against a participation of 9.

Among earlier judges Fazal Ali, Govinda Menion, Satyanarayana Raju, S. Roy and A.K. Mukherjea did not deliver any judgments. Of course their participation also was very negligible only in one or two cases.

It is common both for law men and lay men to speak about the Supreme Court either in appreciation or in criticism or otherwise as if it is of one mind in continuity and unity. The Supreme Court as an institution in its operation is referred to as an independent metaphysical entity with unity and identity in continuity. It is submitted that this is an inaccuracy which is usually committed even by learned people though inescapable. In fact the Supreme Court is a body with successive individuals in groups who function following the rules of the Constitution, influenced by the institutional practice, the precedents and traditions handed down by the predecessor generation of judges. Hence, to speak about it in fact as though it is a single concern for the last 28 years, and attribute a particular approach and attitude is unrealistic. Of course, for the sake of convenience of reference, it is inevitable to refer to it as one body. The ocean of judicial process of the Supreme Court receives its content from many rivers and streams with their sources in independent fountain heads of individual judges which are decipherable and identifiable. Of course, ultimately the major complexion that goes into the Constitution of the judicial ocean, may be taken into consideration in the determination of its ideological content. Nevertheless, an analysis of the roles of individual and groups of judges is illuminating and rewarding and hence worth attempting. A quantitative as well as a qualitative study can be made in this.
Though jurimetrics may not help in finding the whole truth and may be sometimes misleading, it is useful to make an objective study and throws light whatever may be its enlightenment. As is already mentioned 61 judges participated up to the end of 1978. So when we say Supreme Court is like this and like that or its outlook is conservative or progressive unknowingly we will be referring to a group of judges of Supreme Court. Hence, individual or group performance has significance. Quantitatively speaking though percentage conclusions are misleading. e.g., Govinda-menon, J., participated in only one case and held it valid hence the percentage of cases held valid by him is hundred and invalid 0%. If samples of substantial participation are taken into consideration to study the individual performance of judges in holding the laws valid or invalid, Justice P.B. Gajendragadkar appears to concede the supremacy of the legislature by imposing faith in its wisdom and integrity in passing socially beneficial laws interfering with right to property. He participated in 69 cases and held invalid only 4 cases i.e., only 5.8%. It can be said without fear of contradiction that he preferred socio-economic justice to the sanctity of individual right to property. His subsequent published lectures testified to this conclusion. Justice A.N. Ray delivered 34 judgments, out of which he validated 30 and invalidated 12% of the cases in which he participated. Justice V.R. Krishna Iyyar, J., participated in 10 cases and invalidated only one. B.P. Sinha took part in 63 cases and invalidated 19% of the cases. K.N. Wanchoo, J., participated in 80 cases and invalidated 29% but the last two judges are known to have shown more judicial restraint in interfering with State action. On the other hand Justice M. Hidayatullah, J., who participated in 57 cases

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1. Here and after invalidity includes both total and partial invalidity.
and invalidated 19% only does not belong to the above category of judges. Mudholkar, J., participated in 26 cases and invalidated only 16%.

On the other hand Justice M.C. Mahajan, J., participated in 21 cases and invalidated 50%. B.K. Mukherjea also belongs to same class with a participation in 24 cases (invalidated 34%). K. Subba Rao, and S. Sikri, JJ., participated in the same number of cases i.e., 48 each and invalidated the same percentage of cases i.e. 33%. The above two Chief Justices have earned the reputation as the champions of the fundamental rights of the individual including right to property. They had no confidence in the Parliament and legislatures to entrust them with vast powers. Justice J.C. Shah who is supposed to belong to the above class of judges participated in 73 cases and invalidated only 14% which statistically speaking proves to the contrary. G.K. Mitter participated in 36 cases and invalidated 33%. B.J. Das participated in 13, and invalidated only two cases. M.H. Beg participated in 19, and invalidated only 3. Y.V. Chandrasekhar, C.J., so far participated in 9 and invalidated only 2 cases. A.K. Sarkar to whom the western philosophy of property was a betenoire and who never imported western doctrines, participated in 35 cases and invalidated only 3 i.e. less than 10%.

The participation and results can be studied with reference to major problems of zamindari abolition, agrarian reforms, urbanisation, regulation and nationalisation.

With respect to zamindari abolition legislation out of 19 judges who participated, the maximum participation was by S.R. Das in 9 cases without invalidation of any law impugned. Only one law, Bihar land reforms Act was invalidated and the three judges who voted against the law are Mahajan, Mukherjea and Chandrasekhar Iyer.
In the case of the second phase of agrarian revolution maximum number of 55 judges out of 61 who participated in property cases had opportunity to exercise their power of judicial review. Justice Chandrasekhar Iyer stands first in participation in 20 cases out of which he voted against the impugned laws in 4 cases. Next position goes to chief Justice Subba Rao with 19 cases out of which he voted against in 4. Hidayatullah and Sikri participated in 18 cases each and the former voted against in 3 and the latter in 1/3rd of the cases. Whereas Gajendragadkar participated in 16 cases and voted against in only 2 cases. Sinha, Shah, Shelat and Mitter participated in 15 cases each and voted against in 2, 2, 4 and 4 respectively. S.R. Das and A.N. Ray participated in 12 cases each and the former voted against in only 1 and the latter in 2. N.H. Bhagwati participated in 11 and Rajagopala Ayyanger in 10 and the former voted against in only one and the latter in 2. Khanna participated in 5 cases and voted in favour of the laws only twice. The same is the case with Grover with 6 cases voted in favour in all. Bachawat also participated in 6 cases. But he voted against in 50% of the cases. On the other hand Jagannadh Das, Imam, Dayal, Jagannmohan Reddy and Krishna Iyer JJ., participated in 4 cases each and voted in favour of the legislation impugned in all the cases. Sarkar participated in 9 and voted against in 2.

Statistically concluding Sikri and Shelat appear be less favourably disposed to agrarian legislation and Gajendragadkar and P.N. Bhagwati and S.R. Das appear to be well disposed to such legislation.

47 judges participated in urbanisation cases. Only Wanchoo participated in more than ten cases, namely in 11 and voted against nearly in half of the cases i.e. 5. Hidayatullah participated in 9 cases and voted against in
1/3rd of the cases. Imam, S.K.Das and Shah and Sikri participated in 7 cases each. While the first 3 judges voted against in 1 case each, the fourth judge voted against in 2. Mitter and Subba Rao participated in 6 each and the former voted in favour of all laws impugned, and the latter voted against in 66% of the cases. Rajagopala Ayyangar participated in 5 cases and voted against in 40% of the cases. Mitter and Beg, participated in 5 each and voted in favour in all the cases. Grover, Imam, Ramaswamy and Ray participated in 4 cases each and voted in favour in all. S.R.Das participated in 5 cases and voted against in only one. Mahajan participated in 4 cases and voted against in 2. Wanchoo, Hidayatullah and Subba Rao appear to have disfavoured the intereference of the state in urban property relations. Regulation and control of the economy like urbanisation attracted less than half of the Supreme Court agrarian litigation. The number of cases decided by the Supreme Court of both the problems put together are not equal to agrarian judgments.

Roughly the same number of judges as in urbanisation, i.e. 46 participated with respect to regulation cases. The maximum participation is by Sinha with 11 who voted only in one case. Whereas S.R. Das, surprisingly voted against in 5 cases as against a participation in 9 cases, contradicting the common opinion about his ideological preferences for less judicial interference in economic legislation. On the other hand Wanchoo voted against in 2 cases against a participation in 9 cases. Gajendragadkar and Das Gupta participated in 8 and 7 cases and voted in favour of all. Bose and Venkatarama Iyer participated in 6 cases each and voted against in 66% and 33% of cases respectively. Subba Rao participated in only 4 cases and voted against in 3 cases, 75% of invalidation. The figures are demonstrative of the preferences of judges in regulatory legislation.
The Supreme Court decided only 15 cases with respect to nationalisation with a participation of 39 judges and invalidation of more than 1/3rd of the laws. The maximum participation is by S.R. Das in 5 cases with an invalidation of 40% i.e. voted against in 2 cases. Subba Rao, Sinha and Das Gupta participated in 4 cases each. Subba Rao and Sinha voted against in one case each and Das Gupta in two cases. Bhagwati N.H., Gajendragadkar, Sikri, Shelat and Bhargava participated in 3 cases each. The first two judges voted against in one case each and the next three judges voted in 2 cases each. Mahajan participated in 2 cases and voted against in both. As the incidence of participation is not much in the case of every judge it is hazardous to draw any conclusions. However, the figures show the inclinations and trends whatever might be their dependability in drawing generalisations.

The above statistical analysis of individual participation and invalidation of property legislation by the judges of the Supreme Court, tallies sometimes only with the known notions of classification of judges on the basis of the sanctity which they attached to the right to property or the primacy which they gave to socio-economic justice. However, it is helpful in knowing the exact picture of their quantitative performance.

3. VARIEGATED STRANDS AND VARIED TRENDS IN THE IDEOLOGY OF THE SUPREME COURT: A QUANTITATIVE APPRECIATION:

Though sometimes quantitative approach by statistical analysis may be helpful in comprehending the judicial policy of different judges, it may sometimes conceal the truth or give a distorted picture. Hence, a qualitative study by referring not to the final results of all the judgments but their decisions and reasoning in crucial cases and their conceptions of concepts and expression of their general
outlook with respect to the state and the individual would throw better light. An examination of the self-expressions of the postures of the judges will give an insight into the inarticulated premises of the ratio decidendi of their decisions.

By and large the judicial philosophy of the judges of the right to property can be compared to the corresponding conflicting views expressed in the constituent Assembly. As in the case of constituent Assembly right to property figured prominently in the constitutional judicial process of the Supreme Court creating conflicts, controversies and confrontation. As in the case of constituent Assembly the heart of the problem with respect to right to property was the justiciability of compensation in the judicial process of Supreme Court. The outlook of the judges can be gleaned through expressions of their awareness of the magnitude of the economic problems of the country and goals adumbrated in the preamble and Directive Principles of the State Policy of the Constitution and their view on the justiciability of compensation. Here, only a representative class of judges has been taken to show their conflicting philosophies.

The judicial Philosophy expressed by Patanjali Sastri Chief Justice though not in a property case, is relevant with respect to the role of the Supreme Court in reviewing the legislation on the touch stone of the fundamental rights. Referring to the extensive power of judicial review of the Supreme Court of U.S. without specific grant in the Constitution, and the specific power given to the courts under the Constitution of India, he observed, "if, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights",
as to which this court has been assigned the role of a sentinel on the *qui vive*. While the court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the courts in the new set up are out to seek clashes with the legislatures in the country. It is submitted that no one would dispute the power of the judicial review of the court, but the learned chief justice appears to have forgotten the constitutional mandate laid with equal emphasis on the state to realise the goals adumbrated in the preamble namely economic justice and the collective rights of the people for a decent dignified living enshrined in the directive principles of State Policy. Viewed from this context judicial restraint in this matter is more consistent with the living constitutional philosophy. Many of the judges frequently took up the line of thinking of Patanjali Sastri Chief Justice, exercising the role of the court as a sentinel on the *qui vive* with a crusaders' spirit contrary to his views.

Justice Mahajan, in Kameswar's case showed appreciation of the socio-economic justice. He observed referring to Article 39 of the Constitution: ...now it is obvious that concentration of big blocks of land in the hands of a few individuals is contrary to the principle on which the Constitution of India is based. There is no reason why one cannot justifiably and logically extend this judicial policy to the concentration of wealth other than in the form of lands. He observed "the legislature is the best judge of

3. Ibid.
what is good for the community, by whose suffrage it comes into existence and it is not possible for this court to say that there was no public purpose behind the acquisition contemplated by the impugned statute. He said that the nationalisation of land was for a public purpose. He observed "...the phrase 'public purpose' has to be construed according to spirit of the times in which particular legislation is enacted and so construed the acquisition of the estates has to be held to have been made for a public purpose".

There is no reason why this dynamic progressive interpretation should not be extended to the conception of the concept of the compensation in accordance with the spirit of the times. If this would have been done, perhaps, the constitutional history would have been different.

Referring to the changing concept of public purpose, Das, J., shared the view of Mahajan, J., and observed "...it follows that whatever further the general interests of the community as opposed to the particular interest of the individual must be regarded as a public purpose. With the onward march of civilization our nations as to the scope of general interest of the community are fast changing and widening with the result that our old and narrower notions as to the sanctity of the private interest of the individual can no longer stem the forward flowing tide of time and must necessarily give way to the broader notions of the general interests of the community. .... This modern trend in the social and political philosophy is well reflected and given expression to in our constitution".

Dealing to the relationship between individual and the state, he again observed "our constitution as I understand it, has:

1. Ibid.
2. Ibid.
not ignored the individual but has endeavoured to harmonize the individual interest with the paramount interest of the community. Referring to Article 19 (1) (f) and clause 5 and Article 31 simultaneously guaranteeing individual right to property and giving power to the state to regulate and acquire the property he clearly conceded the primacy of the power of the State. He observed "it is thus quite clear that a fresh outlook which places the general interest of the community above the interest of the individual pervades our Constitution. Indeed, what sounded like idealistic slogans only in the recent past are now enshrined in the glorious preamble to our Constitution proclaiming the solemn resolve of the people of this country to secure to all citizens justice, social, economic and political and equality of status and opportunity. What were regarded only yesterday, so to say, as fantastic formulate have now been accepted as directive principles of state policy prominently set out in part IV of the Constitution. He cited Articles 38 and 39 and observed that the State must constantly strive to promote the welfare of the people by eliminating and preventing concentration of wealth and creating a just social order. He observed "in the never ending race the law must keep pace with the realities of the social and political evolution of the country as reflected in the Constitution. Discussing the constitutional socio-economic policy he observed "it cannot be overlooked that the directive principles set forth in part IV of the Constitution are not merely the policy of any particular party but are intended to be principles fixed by the Constitution for directing the State Policy

1. Ibid.
2. Ibid.
3. Ibid.
whatever party may come into power". Referring to the Bihar Act for the abolition of Zamindaris he significantly pointed out and appreciated the purpose of the enactment and observed that further "it must always be borne in mind that the object of the impugned Act is not to authorise the stray acquisition of a particular property for a limited and narrow public purpose but that its purpose is to bring the bulk of the land producing wealth under State ownership or control by the abolition of system of land-tenure which has been found to be archaic and non conducive to the general interests of the community". Showing keen awareness and consciousness of the changing times he observed "we must not read a measure implementing our mid 20th century Constitution through a spectacles tainted with early nineteenth century notion as to the sanctity or inviolability of individual rights".

Justice Jaganmohan Reddy pleaded for a balance between individual rights and social justice. He observed "This court has in no uncertain terms laid down the test for ascertaining reasonableness of the restrictions on the right guaranteed under Article 19 to be determined by a reference to the nature of the right said to have been infringed, the purpose of the restrictions sought to be imposed, the urgency of the evil and the necessity to rectify or remedy it—all of which has to be balanced with the social welfare or social purpose sought be achieved. The right of the individual has therefore to be submitted to the larger interest of the general public".

Krishna Iyer, J., in the few judgments he delivered

1. Ibid.
2. Ibid.
3. Ibid.
relating to right to property tellingly articulated in his inimitable style a very keen sense of the urgency to do distinctive justice and awareness to the basic needs of all the members of the society. He has definitely given supremacy to social justice over the individual's right to property. Referring to the need to emphasise social control and social justice he observes "....the law has to be tested not merely by the cold print of Article 19 (1) (f) but also by the public concern of Article 19 (5) and the compassionate animus of Article 39. Parts III and IV of the Constitution together constitute a complex of promises the nation has to keep and the legislation challenged before us is in partial fulfilment of this trust with the people. Rejecting the contention that concept of social justice is extraneous to the insightful understanding of a section in an Act he observes "....judicial conscience is not a mere matter of citations of precedents but of activist appraisal of social tears to wipe out which the State is obligated under the constitution". He suggests that the executive government should defend the socially beneficial laws when challenged before the courts by a Brandies brief by supply the "socio-economic conspectus" and statistics underlying the enactment by conducting social research. He thinks that the judiciary should see an impugned legislation through a "socially constructive, not legally captious, microscope to discover glaring unconstitutional infirmity, if any and not chase every chance possibility or speculative thought which may vitiate the law". Referring to the inevitable incidental stray misfortunes that may visit few individuals in the process of

2. Ibid, p. 1148.
social large scale reformatory legislation he observes "social legislation without tears affecting vested interests, is impossible". Some times even unmerited hardships on unintended individuals may occur. But as laws cannot be perfect they have to be accepted. With respect to the test of a validity of a law he suggests "Law is a social science and constitutionality turns not on abstract principles or rigid legal canons but concrete realities and given conditions: for the rule of law stems from the rule of life". Regarding the guidelines for interpretation he suggests "And if reasonable interpretation can avoid invalidation, it is surely preferable. Here humanist considerations, public policy and statutory purpose may provide guidelines of construction within reasonable limits". He says that the interpretative process should not be 'literal, pedantic, legalistic or technically correct'; can the subconscious influence he says "In the process of interpretation where alternatives are possible, the man in the law influences the law in the man may be ....". Pleading for a dynamic interpretative process he observes "the calculus of statutory construction relating to complex problems of the community cannot be hide bound by orthodox text book canons". Focussing attention to the objects of our constitution he observes "our Constitution is a tryst with destiny, preabled with luscent solemnity in the words of 'justice—Social, economic and political'. He thinks that the Supreme Court should not disown social justice in the interpretation of the meaning of the articles of the organic law.

1. Ibid, p. 1151.
2. Ibid, p. 1151.
3. Ibid, p. 1151.
5. Ibid, p. 1158.
Justice V.R. Krishna Iyer is cited profusely to direct the attention to one end of the spectrum of judicial philosophy of property right.

Justice P.N. Bhagawati also prefers a dynamic interpretative process. He observes "It is an elementary rule of construction that a statutory provision must always be interpreted in a manner which would suppress the mischief and advance the remedy and carry out the object and purpose of the legislation. Moreover we must not forget, as pointed out by Mr. Justice Holmes, that it is the constitution that we are expounding. Our Constitution has a social purpose and an economic mission it seeks to accomplish".

Sarkar, J., made a most daring progressive projection of constitutional philosophy when he held valid the provisions dealing with the progressively diminishing compensation were not discriminatory and unconstitutional as the same reason namely ability in progressive taxation applies in this case also. He boldly said that state resources are benefited in both the cases by augmentation in progressive incometax and prevention of large scale depletion in the other case of graduate scale of compensation. In another case Sarkar, J., observed "....a statute has to be read so as to make it valid and if possible, an interpretation leading to a contrary position should be avoided".

On the other hand Iyengar, J., preferred an individual oriented philosophy. He observes "It would, I consider, be a proper rule of construction to interpret the terms of such a provision with strictness which would serve

1. Ibid, p. 925.
to preserve the area of 'guaranteed freedom from encroach-ment except as specially provided. In other words, if the construction of Article 31A were ambiguous, the ambiguity should be resolved in favour of the citizen so as to pre-
serve to him the guarantee of the fundamental rights guaran-
teed by Articles 14, 19 and 31 except where the same has been denied to him by the clear words of the Constitution.1

Shelat, J., took a correct attitude to the constructive process of the provisions of the Constitution mainly based upon the purpose. He observed "a mere literary or mechan­
ic construction would not be appropriate when important questions such as the impact of an exercise of a legisla­tive power on constitutional provisions and safeguards thereunder are concerned. In cases of such a kind, two rules of construction have to be kept in mind: (1) that court generally lean towards the constitutionality of a legislative measure impugned before them upon the presum­tion that a legislature would not deliberately flout a constitutional safeguard or right, and, that while construing such an enactment the court must examine the object and the purpose of the impugned Act, the mischief it seeks to prevent and ascertain from such factors its true scope and meaning."2 He rightly focussed the attention on the purpose of a legislation and underlined the importance of the object of an enactment in formulating the test for the determination of the validity of a legislation.

The discontinuity and inconsistency and contradictions in the constructive process depending upon the measuring rods and varying testing meters of individual judges who

1. Purushothaman vs. State of Kerala,

2. Vrajlal, M & Company vs. State of Madhya Pradesh,
changed them periodically is demonstrated by the Supreme Court's turning of hundred and eighty degrees from the above mentioned judicial policy of Shelat, J., in less than a year in the Banks Case. This has already been dealt critically in chapter VIII. To refer briefly to its significance and import in the words of a jurist "...it has spelled out a new mode of approach to constitutional guarantees reorienting the techniques of interpretation which have prevailed with the Supreme Court in the first two decades after the inauguration of the new constitution. This decision bids fair to be the starting point of a bold re-interpretation of the constitution upsetting many old faiths, creating new concepts and opening up new horizons in the spacious domains of Indian Constitutional Law.

In the words of the same jurist the effect of the new doctrine is: "The theory that the object and form of the State action determine the extent of protection which the aggrieved party may claim is not consistent with the constitutional scheme". "The true view is that 'the extent of protection against impairment of a fundamental right is determined and not by the object of the legislature not by the form of the action; but by its direct operation upon the individual's rights".

This has upset the settled theory of law if not practice laid down in the first case decided by the Supreme Court under the new constitution in which it was held that in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the state action above need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored....".

3. Ibid.
4. Ibid.
The Banks case thus, can be said to have conceptualised the culmination of two decades of judicial practice which deviated gradually from the theory enunciated in Gopalan's case. Of course, there are sporadic earlier pronouncements to the same effect. To illustrate, in one case Kapur, J., held that the statute should be examined in the light of its repercussions on the fundamental right of the citizen and should be held invalid if it was unreasonable. On the other hand some times some judges took an uninhibited approach to go beyond the enactment in question to assess the validity. Hidayatullah, J., observed "the court in judging the reasonableness of law will necessarily see not only the surrounding circumstances but all contemporaneous legislations passed as a part of a single scheme. The reasonableness of a restriction and not of the law has to be found out, and if restriction is under on law but countervailing advantages are created by another law passed by the same legislative plan, the court should not refuse to take that other law into account".

But Subba Rao, J., preferred a narrow view and refused to take cognizance of the collateral law which countervails the hardship on the individual in determining the validity. Sarkar, J., who earlier followed the doctrine of the purpose of legislation in another case qualified it and observed "...an object, however laudable, cannot by itself and without more make a restriction put on citizens right to carry on a trade for attaining that object, reasonable. A restriction on a person's right to carry on his trade does not become, reasonable, simply because

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3. Ibid.
it had been imposed on him to achieve an object of great necessity and undoubted merit. The reasonableness has to be judged in all the circumstances of the case and the object to be attained is only one of such circumstances.¹

Kapur, J., on the other hand gave importance to the surrounding factors in determining the validity of a law which infringes fundamental rights. He observed "Therefore, when the constitutionality of an enactment is challenged on the ground of violation of any of the Articles in Part III of the constitution, the ascertainmet of its nature and character becomes necessary i.e. its subject matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease, which the legislature resolved to cure and the true reason for the remedy."² He further observed that it should be assumed that the representatives of the people pass laws appreciating the needs of the people to solve their problems and hence the presumption should be in favour of the constitutionality of an enactment. He criticised the "method of judging the reasonableness of restrictions to compare every section of the Act, with the corresponding English Act and then to hold it unreasonable merely because the corresponding section of the two Acts are different. The evil may be the same, but the circumstances and conditions in the two countries, in regard to standards may be different and there are bound to be differences in the degrees of restrictions on the effective portion of the two acts."³

¹. Ibid.
B.K. Mukherjea, J., preferred a liberty oriented approach. He observed "...if there is any presumption at all it is in favour of the liberty of the subject, and any law which encroaches upon such liberty must be construed strictly and should not be called beyond what the actual words used mean in their plain grammatical sense".

Chandrasekhar Aiyar, J., gave a dynamic interpretation to the concept of public purpose extending it to acquisitions of property for the use by private charitable institutions. He observed "Acquisition of sites for the building of hospitals or educational institutions by private benefactors will be a public purpose, though it will not strictly be a state or union purpose". He visualised a third category of public purpose other than for the union or state purpose.

Shelat, J., delivering a minority judgment on behalf of himself and Vaidialingam, J., preferred the concept of effect on fundamental rights. He observed "It is a well settled principle that in determining the constitutionality of a provision impugned on the ground of its being invasion on a fundamental right, the court must weight not its form which may appear and look innocuous but its real effect and impact on such fundamental rights". But in another judgment delivered later cited above Shelat, J., expressed a different view and held that the purpose of legislation determined its validity.

S.R. Das, J., excepting for rare departures, maintained a progressive and dynamic attitude towards the knotty problem of right to property and social justice. He pleaded

for least interference on the part of the courts with socio-economic legislation for the welfare of the people which inevitably incidentally interfere with personal property. He observed "we must reconcile ourselves to the plain truth that emphasis has now unmistakably shifted from individual to the community". He said that the constitution trusted the legislature.

Subba Rao, J., consistently took an attitude of sanctity of private property, sacrosanctity of the fundamental rights, supremacy of the constitution and limitation on the power of legislature and unlimited power of judicial review with ultimate say on any socio-economic-political issues as they cannot be completely separated from constitutional issues. His views and judgment are critically examined in different chapters which substantiate the above conclusion. To illustrate; in Kochunnis case he rejected the view of Das, J., expressed in Subodh Copal's case that no limitations could be postulated on legislature's police power under Article 31 (1) to deprive a person of his property excepting the good sense of the legislature. Subba Rao, J., observed "police power cannot be divorced from social control and public good". He said that the police power in India should be exercised subject to the limitations evolved in the judicial process of the Supreme Court of America. But according to Prof. Willobuhy there is no limit to the police power excepting what the courts deemed to be the public welfare. Hence, in India it is mandatory on the part of the State mainly the legislation—to implement Directive Principles of State Policy which have to be

translated into legal norms by legislation. It is the legislature which has to do the main job. Further, the legislature is the representative of the people. Hence, it is undemocratic to give supremacy to the conception of welfare of the people of the judiciary over that of the conception of the legislature. He says that the constitution makers by including part III did not give the powers of the British Parliament to the Indian Parliament as limitations are imposed on that power. He observes "The state is expected to bring about a welfare state within the framework of the constitution, for it is authorised to impose reasonable restrictions in the interest of general public on the fundamental rights recognised in Article 19".

Subba Rao, J, sought to enlarge the power of judicial review by linking Article 31 (1) with Article 19 in Kochunni's case, by adding the word reasonable to the word law in order to be a valid law by virtually adding the adjective 'just' (which was rejected by Constitution makers) to the word compensation even after the 4th amendment in Vajravelu's case, and by denying to Parliament the power to amend fundamental rights in Golknath case. He postulated conflict between the rights of the individual under Article 19 and the two conditions for acquisition by the State namely compensation and public purpose on the one hand and the power of the State to acquire on the other. He observes "this raises a conflict between individual rights and social justice, between a citizen and the State. The judiciary is made the arbiter of conflicting claims. It has to decide as best as it can whether the fundamental right or social justice, having regard to the peculiar circumstances of time and place, shall prevail. If the states assertion on the said two conditions is final the fundamental right chapter

1. Ibid, p. 1095.
will become nugatory. It is submitted that the conflict is not between the State and the individual, but between the vested interests and the social interests. Secondly, the legislature, the representative of the people has to bring rapid socio-economic transformation. He felt that the State should place all material to enable the courts to uphold the law. V.R. Krishna Iyer, J., also expressed this feeling more strongly. Subba Rao accusing the Government observed, "All reasonable laws of social control will be permitted by the Courts. The real grievance of the person in power is against this judicial check; indeed the complaint is against constitutional democracy itself."

He complained "The Supreme Court was not given a real chance or time to evolve appropriate doctrines to reconcile the individual's right to property with social control." He preferred market value as measure of compensation. If the State had no money, he suggested for taking away a good slice of compensation "by taxation in the shape of capital gains etc." He accused those who complained lack of funds to pay full compensation for intending to destroy the constitutional structure. It is difficult to understand the logic of objection to pay less than market value as compensation and acceptance of taking the same by way of taxation simultaneously. His fetishism to the outmoded concept of market value applicable to all cases is testified when he observed "In India the broad principles of compensation

2. Ibid, p. 64.
5. Ibid, p. 64.
6. Ibid, p. 73.
were well settled by the Privy Council in Chemudu and Vijayanagaram cases. Indeed Sections 23, 24 of the Land Acquisition Act embodied the law on the subject. Market value was considered to be the value to the owner in its actual condition at the date of the notification under Section 4 of the Land Acquisition Act...1.

Little comment is necessary on this as it is crystal clear that how the 19th century *Laissez faire* philosophy of the police state sought to be continued against the sweeping socialist constitution of the twentieth century.

A reference to the multi-judicial relevant conceptual expressions in the words of different judges in Kesavananda is worth quoting without much comment to project different views. Sikri, C.J. observed in Kesavananda "I must interpret Article 368 in the setting of our constitution, in the background of our history and in the light of our aspirations and hopes, and other relevant circumstances"2. Is this really followed? How different the constitutional history would have been if property provisions would have been interpreted in the light of the aspirations and hopes of the substantial majority of the propertyless electorate—the real sovereign in democracy—for whose sake also rule of law and freedoms are supposed to be preserved.

He against observed "...the Indian Constitution must be interpreted according to its own terms and in the background of our history and conditions"3.

Shelat and Grover, JJ. observed "The Constitution makers had, among others, one dominant objective in view and that was to ameliorate and improve the lot of the common man and to bring about a socio-economic transformation based on

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1. Ibid, p. 72.
principles of social justice. Can it be said that this is kept always in the judicial process relating to right to property? Immediately they observed that freedoms should not be touched. Is it possible?

Hegde and Mukherjea, JJ., observed "A society like ours steeped in poverty and ignorance cannot realise the benefit of human rights without satisfying the minimum economic needs of every citizen of this country. Any Government which fails to fulfil the pledge taken under the Constitution cannot be said to have been faithful to the Constitution and to its commitments." This concern for the underdog is immediately watered down, "Our Constitution does not subscribe to the theory that the end justifies the means adopted." Is payment of market value as compensation in all cases the means prescribed by the Constitution to realise the goal of economic justice enshrined in the preamble and prevention of concentration of wealth enjoined in the Directive Principles of State policy?

Ray, J., rejected the doctrine of consequences and observed "the doctrine of consequence has no application in construing a grant of power conferred by Constitution. In considering a grant of power the largest meaning should be given to the words of the power in order to effectuate it fully." Hence, the fear of legislatures' abuse of power, which may not be baseless, cannot be allowed to interfere with its powers to bring radical transformations in society. Thus, the legislature should be allowed to be free in bringing economic structural charges to interfere with the right to property subject to the payment of full compensation only

1. Ibid, p. 1606-7.
2. Ibid, p. 1641.
3. Ibid.
in cases of property below the ceiling limit. In the rest of the cases there should not be any judicial interference. He observed "If rights are built upon property those who have no property will have no rights." Thus, democracy and poverty cannot really coexist. Rejecting market value concept of compensation be observed "If compensation means an amount determined on principles of social justice there will be general harmony between part III and Part IV. Secondly, if compensation means market price then the concept of property right in part III is an absolute right to own and possess property or to receive full price, while the concept of property right in part IV is conditioned by social interest and social justice." He defended the elimination of the concept of market value by the 25th amendment. He further observed "just as the amount can be fixed on principles of social justice the principles for determining the amount can be specified on the same consideration of social justice. Amount is fixed or the principles are specified by the norm of social justice in accordance with Directive Principles." It is clear that Ray preferred a collectivist or socialist theory of property by following an egalitarian interpretation of property provisions giving primacy for peremptory economic justice to sanctity of individual right to property.

Justice P. Jaganmohan Reddy gave a clear expression to his constitutional philosophy. He observed "The basic approach of this court has been, and must always be, that the legislature, has the exclusive power to determine the policy and translate it into law, the Constitutionality of which is to be presumed, unless there are strong and cogent

2. Ibid, p. 1715.
reasons for holding that it conflicts with the constitutional mandate. Undoubtedly, Jaganmohan Reddy took a sound judicial approach. He rightly appreciated the paramount role of the legislature in bringing structural changes in socio-economic institutions through the instrument of law. Referring to the neutrality of the court, he observed "The court is not concerned with any political philosophy, nor has its own philosophy, nor are judges entitled to write into their judgments the prejudices or prevalent moral attitudes, of the times, except to judge the legislation in the light of the felt needs of the society for which it was enacted and in accordance with the constitution". One wishes it to be true not only in theory but also in practice. It is difficult to imagine a judge, especially in the higher court without a philosophy as the ultimate underlying principles and policy behind law have to be decided by the highest court. And as Friedman says "laws are connected at one end with philosophy at another end with political science. Existence of pure legal rules is a myth. He pleaded for a dynamic approach towards laws by emphasizing the need to make changes in law either by legislative action or by re-review or re-examination or restatement by the judiciary to make it in conformity with socio-economic changes and the jurisprudential outlook of succeeding generations. He observes, "The words of the law may be like coats of Biblical Joseph, of diverse colours and in the context in which they are used they will have to be interpreted and whenever possible they are made to subserve the felt needs of the society. This purpose can hardly be achieved without an amount of resilience and pay in the interpretative process". The logical application

1. Ibid, p. 1734.
2. Ibid, p. 1734.
of this approach should result in a dynamic interpretation of the word 'compensation' in the context of legitimate demands for distributive justice under which blind insistence on a universal application of concept of market value would be unsound, illogical undesirable and impossible. He said that the constitution should be understood in the context of place, time and that justice was a relative concept changing from society to society. He warned against the difficulty in citing and applying foreign cases as the whole set up and content would be different.

Palekar, J. rightly appreciated the inevitable conflict between private property and social justice when he observed "The core philosophy of the constitution lies in social, economic and political justice - one of the principal objectives of our constitution as stated in the preambles and Article 38, and any move on the part of the society or its Government made in the direction of such justice would inevitably impinge upon the "sanctity" attached to private property and the fundamental right to hold it". He went a step further doingly and observed "Deprivation of property in one form or other and even expropriation would, in the eyes of many, stand justified in a democratic organisation as long as those who are deprived do not earn it by their own effort or otherwise fail to make adequate return to the society in which they live. The attribute of 'sacredness' of property vanishes in an egalitarian society. And once this is accepted and deprivation and expropriation are recognised as inevitable in the interest of a better social organisation in which the reality of liberty and freedom can be more besidely achieved, the claim made on behalf of property that it is an immutable and inalienable natural right loses its force".

He frankly and categorically observed "A blind adherence

1. Ibid, p. 1803.
2. Ibid, p. 1803.
to the concept of freedom to own disproportionate wealth will not take us to the important goals of the preamble. Referring to the absence of 'property' in the preamble he observed "Right to property was, perhaps, deliberately not enthroned in the preamble because that would have conflicted with the Objectives of securing to all its citizens justice, social, economic and political, and equality of opportunity to achieve which Directive Principles were laid down in Articles 38 to 51." It appears that among all the judges Palekar, J., has very clear and correct outlook on the problem of property and poverty in the context of the constitutional imperatives and socio-economic realities and the inevitable means to be followed in realising the good abridging in the process some freedoms of some individuals.

Khanna, J., emphasising socio-economic justice observes, "The modern states have consequently to take steps with a view to ameliorate the conditions of the poor and to narrow the chasm which divides them from the affluent sections of the population." "The privilege of some must give way before the rights of all." As occasions arise quite often when individual rights clash with the larger interests of the society, the state acquires the power to subordinate the individual rights to the larger interest of society as a step towards social justice.

Referring to preamble says "...there is nothing in it which gives primacy to claims of individual right to

1. Ibid, p. 1815.
2. Ibid, p. 1815.
property over the claims of social, economic and political justice. There is, as a matter of fact, no clause or indication in the preamble which stands in the way of abridgment of right to property, for securing social, economic and "social justice".

Referring to the resolutions of national party during freedom struggle and debates in the constituent Assembly he observes "...the stress in the impugned amendments to the constitution upon changing the economic structure by narrowing the gap between the rich and the poor is a recent phenomenon".

He further observed "The material further indicates that the approach adopted was that there should be no reluctance to abridge or regulate the fundamental right to property if it was felt necessary to do so for changing the economic structure and to attain the objectives contained in the Directive Principles".

Referring to right to property and basic structure he observed "Basic structure or framework indicates the broad outlines of the Constitution, while the right to property is a matter of detail".

It is these lines that tilted the balance in Kesavananda as a casting vote against right to property to permit amendment to it.

He said that the constitution makers subordinated right to property to social good.

Mathew, J., also stand the philosophy of Palekar and Ray. He observed "Fundamental rights like natural

1. Ibid, p. 1878.
2. Ibid, p. 1880.
5. Ibid, p. 1881.
rights are liable to be limited for the common good of the society. Referring to the controversial relationship between Part III and Part IV of the Constitution he said "From a juridical point of view, it makes sense to say that Directive principles do form part of the Constitutional Law of India and they are in no way subordinated to fundamental rights." He says that the judiciary is bound to apply Directive Principle. He suggests without mincing words "It is relevant in the context to remember that in building up a just social order it is sometimes imperative that the Fundamental Rights should be subordinated to Directive Principles." He pointedly remarked "Economic goals have an uncontestable claim for priority over ideological ones on the ground that excellence comes only after existence." Referring to the goal of the country he observes "So the main task of freedom in India for the large part of the people is at the economic level." Dealing with nature of natural rights or fundamental rights he observes "The Fundamental Rights themselves have no fixed content; most of them are mere empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgment, and even abrogation of these rights in circumstances not visualized by the constitution-makers might become necessary; Their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in part iv."
Mathew supports functional theory of property and criticises functionless ownership. He observes "Foundation of our society today is found not in functions", but in rights; that rights are not deducible from the discharge of functions, so that the acquisition of wealth and the enjoyment of property are contingent upon the performance of services but that the individual enters the world equipped with rights to the free disposal of this property and the pursuit of his economic self interest, and that these rights are anterior to, and independent of any service which he may render".

M.H. Beg, J., took a goal oriented outlook. He observed "The whole constitution is based on the assumption that it is a means of progress of all the people of India towards certain goals. The course of progress may involve, as choices of lesser of two evils, occasional abrogations or sacrifices of some fundamental rights, to achieve economic emancipation of the masses without which are unable to enjoy any fundamental rights in any real sense. The movement towards the toals may be so slow as to resemble the movement of a bullock cart. But, in this age of the automobile and the aeroplane, the movement could be much faster".

M.H. Beg, J., prefers a socialistic theory of property. He observes "A socialistic State must have the power and make the attempt to build a new social and economic order free from exploitation, misery and poverty, in the manner those in charge of framing policies and making appropriate laws think best for serving the public good".

Dwivedi referred to the commitments made in the freedom movement and by constitution makers for bringing struc-

1. Emphasis not supplied.
atural changes in the economy, to do economic justice, to prevent concentration of wealth not by payment of market value as compensation but by equitable compensation, to give ascendancy to Directive Principles. He vividly deserves the hazards of unlimited ownership of property.

Speaking about the inherent limitations on judiciary he observes "I conceive that it is not for us to make ultimate value choices for the people. The constitution has not set up a Government of judges in this country. It has confided the duty of determining paramount norms to parliament alone. Courts are permitted to make limited value choices within the parameters of the Constitutional value choices." He frankly says "Reason is a fickle guide in the quest for structural socio-political values".

With a sense of self-abnegation he points out the perils of too much dependence on judiciary as a bastion of peoples freedoms against Parliament. He observes "Judicial review of Constitutional amendments will blunt the people's vigilance, articulateness and effectiveness. True democracy and republicanism postulate the settlement of social, economic and political issues by public discussion and by the vote of the peoples elected representatives, and not by judicial opinion. The Constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people."

Directly and frankly criticising the courts, compensation policy he observed, "In direct opposition to the manifest intention of the Constitution-makers, this court held that the word "Compensation" in Article 31 (2) means

"full cash equivalent". (The State of West Bengal vs. Mrs. Bela Banerjee) (1954) S.C.R. 558 - (A.I.R. 1954 S.C. 170). Further criticising the court for nullifying the 4th amendment he observed, "These two decisions neutralised the object of the 4th Amendment".

Referring to Shantilal's case he says "Shantilal Mangaldas transfused blood in the 4th Amendment made anaemic by Vajravelu and Metal Corporation". He says that soon after Banka case overruled Shantilal and restored the old position. It shows very clearly he did not subscribe to the Blackstoneian theory of property.

Chandrachud, J., (as he then was) gave a big list of dictionaries cited which proves the dictionary oriented interpretation followed by many lawyers and judges. He rejected the argumentum horrendum by which it was contended that calamities would befall on the nation if untramelled power would be conceded to the Parliament. He said that there was no escape from trusting the representatives of the people. He observed "It is true that our confidence in the men of our choice cannot completely silence our fears for the safety of our rights. But, in a democratic polity, people have the right to decide what they want and they can only express their will through their elected representatives in the hope and belief that the trust will not be abused. Trustees are not unknown to have committed breaches of trust but no one for that reason has abolished the institution of trusts".

Excepting in few other judgments it is in Kesavananda that judges gave free bentilation to their judicial approaches,

1. Ibid., 2012.
4. Ibid, 2027.
5. Ibid, 2043.
methods and philosophies.

Contrasting this one finds surprisingly that Wancho, J. who participated in the largest number of cases spoke less in general, perhaps, believing in judicial restraint to confine to the issues at hand pragmatically. However, on some occasions, he gave expression to his interpretative process. He observed "It further requires on the part of the citizens of this country, some sense of sacrifice of their individual right in the interests of the common good for it has not been unknown that one cantankerous citizen standing on the letter of the law and defending his right to property irrespective of the need for the public good can hold up beneficial schemes for long periods of time through resort to law courts". It shows clearly that how vested interests naturally challenge every piece of legislative economic reforms, Some of the judges after retirement gave expressions to their constitutional philosophy and justified their decisions. Chief Justice Subba Rao has contributed thus more to the juristic literature. Chief Justice P.B. Gajendragadkar also took it as a missionary zeal to propagate his philosophy of Indian Constitution different from that of Subba Rao. He also delivered number of lectures most of which are published.

1. Inaugural address, Law and Urbanisation in India, published by the Indian Law Institute, New Delhi, p. 5.
2. Subba Rao, K: M.C. Setalvad Memorial lectures, published as Some Constitutional Problems, 1970; The philosophy of the Indian Constitution, 1969; Man and the Society, 1971; Riffion vs. Srinivasa Sastri Lectures; Lala Bhadur Sastri Lectures; Lala Lajpathi Rai Memorial Lectures published as Conflicts in Indian Polity, 1970; Dr. Rajendra Prasad Memorial Lectures;
Some other judges also contributed to the legal literature. It is interesting to note that as in the case of statistical analysis one cannot arrive to definite conclusions on the basis of the qualitative analysis of judicial expressions of views on constitution, judicial review, right to property and fundamental rights. Perhaps, that is the limitation to reach perfection in the socio-legal research as in the case of other social sciences research. However, closer observation may reveal the actual preferences, reservations, prejudices and fears. Further, it is also possible to identify on the basis of the decisions and views on critical areas like concept of compensation. Here also, there is a difficulty. All the judges who have participated in property cases have not got opportunity to express on that issue as it might have not been cropped up pointedly in the cases in which they participated.

It is interesting to note that as in the case of Constituent Assembly, in the Supreme Court also those who are more vociferous and believed in socialist theory of property are in minority and the silent majority of judges spoke vaguely about social justice, or expressed vehemently


2. See for example: Rajeev Dhavan: The Supreme Court of India, 1977 p. 173. Table VI.
in favour of amelioration of the conditions of the poor and immediately qualified it by freedoms or did not express generally any views on these controversial issues apart from deciding them believing in the possibility of slot machine deductions from the constitutional mechanics.

However, Gajendragadkar observed frankly "It is well-known that on the major issues of Constitutional importance which the Supreme Court and the High Courts have had to consider during the two decades of the working of the Indian Constitution, different views have been expressed by different eminent judges; indeed on many legal problems involving interpretation of the Constitution two views are reasonably possible".¹

Hence, it is submitted that the judges and the court should boldly reject the great legal fiction of non-judicial legislation and accept responsibility for the choices they make without taking advantage of concealing their preferences of socio-economic-legal philosophies under the undecipherable disputable intentions of the Constitution makers or the cold, lifeless printed mute words of the Constitution. This would facilitate to project a clear picture of judicial process and helpful in the constitutional debates in general and on right to property in particular.

The above survey of the judicial constitutional conceptual conspects of the right to private property vis-a-vis socio-economic justice reveals the conflicting assumptions and axioms not only between different judges but sometimes in the views of the same judge expressed at different times. Few judges maintained consistency in their outlook. But even they did not lag behind in giving expression to the opposite view. Those who championed individual rights in general including right to property spoke with

concern about social justice and presumption of constitutionality of a legislation. And, those who appreciated the need for urgent total socio-economic reforms spoke about the sanctity of property. As pointed out by a foreign jurist it may be an Indian trait. He observed, "It is relevant to note here that the fluid, syncretic, non-disjunctive approach to ideas and phenomena is notoriously characteristic of Indian thought, gradually merging and broad identities being far more congenial even to their category minded attitudes than staccato separation of things which share a characteristic".

However, this judicial synoecosis in relation to sanctity of individual right to property and peremptory societal demands for socio-economic justice evaporates, as in all cases of superficial theoretical integration of conflicting interests, in the fact of specific cases in concrete situations in the present time frame. On the theoretical plane this blind refusal to recognise the existence of conflicting interests in real life may help to evade from making hard and painful choices. But when it comes to brass-tacks the real preferences cannot be hidden. By and large, one can discern the dominant trend among the judges. It is a preference for the preservation of sanctity of private property following the metaphysical theory of property. K. Subba Rao ably supported by K.S. Hegde, Shah, Sikri and so on preferred individual oriented approach following Blackstonian theory of property.

P.B. Gajendragadkar, earlier S.R. Das, later Ray, Mathew, Beg, Palekar, and Dwivedi, Khanna and V.F. Krishna Iyer and so on preferred goal oriented approach following functional and socialist theories of property.

Considerable number of judges did not give expression to their views and rather took pragmatic approach of limiting their concern to the cases at hand.

On the whole, one may say, that the Supreme Court did not evolve a consistently progressive dynamic goal oriented constructive process in the interpretation of the provisions relating to right to property.

4. POVERTY OF PHILOSOPHY OF PROPERTY AND POVERTY.

As has already mentioned, some of the judges showed awareness of the radical change in the concept of State in the twentieth century and also appreciated the significance of the goal of economic justice set in the preamble and the Magna Carta for a decent dignified living promised for all the poor people in the Directive Principles of State Policy and the magnitude of the economic problems that the State has to solve. The percentage of invalidity of legislation by the Supreme Court is undoubtedly not high in contrast to the reputation it earned as conservative and antagonistic to state interference with the sanctimonious right to property of the individual.

But on the whole the trend setters of the Supreme Court among the judges have not appreciated the necessity for fast radical reforms in the economic structure and the distribution of wealth. Judges like Patanjali Sastri, Subba Rao, Sinha, Shah, Shelat, Hidayatullah, Mukherjea, Sikri, Grover, Hegde and others dominated the Supreme Court.

and tried to set trends for others to follow. It is difficult to judge conclusively from the percentage of invalidation whether the Supreme Court has stood in the way of progressive economic reformatory legislation as alleged by some. It is because, one decision setting the tone by laying down a principle to be followed subsequently by the Supreme Court may deter the legislature to go forward. One invalidation of legislation in a crucial case determining the principle divergent from the legislative policy may qualitatively speak more about the nature of judicial process than dozens of cases of validation of legislation which do not transgress the principle laid down by the judiciary.

The more important questions on the whole are: what is the judicial philosophy of the Supreme Court with respect to property? What are the juristic techniques followed by the Court in the construction of the property provisions of the Constitution? What are the doctrines and concepts applied by the Court? Has the court evolved any indigenous concepts or given new conceptions to old concepts suitable to the socio-economic conditions of the country?

The Court, it is submitted, concentrated more on the philosophy of the natural rights, fundamentality of the fundamental rights, sanctity of the right to property and its

1. "Theories, often highly speculative in character, as to the origin and development of the concept of private ownership in the infancy of civilization are irrelevant to the existence of the right in the law of today. More relevant, however, at all times, is the moral justification of the right". E.Y. Exshae: 'The right of private ownership' in Fundamental Rights (Ed.) by J.W. Bridge, D.Lasok, D.2 Perrot, R.O. Plender, 1973 at p. 73 in Eire.
own role as the sentinel on the quivive rather than on the imperatives of the needs of the teeming millions of the masses for a minimum decent standard of living even though the judiciary being part of the state is bound to take responsibility in the implementation of the Directive Principles of the State Policy.

The aim of attaining political independence was not considered by the leaders and founding fathers of the constitution to confer mere formal, empty political rights on all the people. The socio-economic goals were made clear repeatedly by Mahatma Gandhi, Nehru, Rajendra Prasad, Santhanam and other leaders and public spirited jurists like Dr. Ambedkar, Sir B.N. Rao and Ayyar. The Indian Constitution is mainly goal oriented and not merely liberty oriented. This is manifest in the preamble and directive principles of State Policy. Even though the word socialism was not added in the preamble originally rejecting the suggestion of some members, it cannot be forgotten that by 1954,

1. "Then some judges are swayed by their own regard of social conditions and needs, by their convictions born of their long association with legal principles and sometimes by their inborn prejudices. Into their determination then follow all the inarticulate major premises which it is so difficult to isolate or demonstrate". M. Hidayatullah: Judicial Methods, 1970 p. 24. Comparing judicial review of Supreme Court of India with that of courts in America, Australia and Canada Prof. T.S. Rana Rao says "compared to the enormity of the perversion of the original constitutional purpose by these tribunals, the attempt of the Indian Supreme Court to enlarge the scope of Article 31 would seem to be but a minor deviation from property cannons of constitutional construction". "Judicial Review in India", The year Book of Legal Studies, p. 141.

the congress party declared its preference for a socialist pattern of society. Not only the Congress Party but there are a number of parties like the communist party of India the socialist party, the forward block party, the revolutionary communist party and peasants and workers party known as parties of the left wedded to socialism. Of course, some politicians have a penchant for socialism and for some others it is a betenoire. It is so also with judges. In 1954 itself the Parliament passed a resolution proclaiming the establishment of socialist pattern of society as its goal. The origins are much earlier as by 1950 itself commencing with the Karachi resolution the Nation had discarded the laissez faire philosophy and decided to develop the economy by planning and to establish economic justice. As Granville Austin described by the Indian Constitution is a social document. The Constitution including fundamental rights is not an end in itself which has to be understood and interpreted dynamically¹. It is only a means for the establishment, maintenance and continuation of an egalitarian society where there will be no exploitation and each individual will be assured of nourishment in the childhood, free education, employment, decent standard of living and care in sickness and old age. In this process major part has to be played by the legislature and the courts have only contributory secondary role as they are meant nor suited to bring in radical

¹. "While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning". Justice Black and Frankfurter: Conflict in the Court, p. 57. Quoted from P.B. Gajendragadkar: Indian Parliament and Fundamental Rights, 1972 p. 197.
institutional changes in society.

After independence as is already mentioned in the introductory chapter the country faced gigantic political economic and social problems. The most and biggest of all the problems is the problem of widespread abysmal poverty. The nation decided to solve these problems by democratic means through legal process using law as an instrument of social change. Change in all the spheres mainly in the economic structure is inevitable and necessary. Even the pace of change is decided by the leaders at least in their utterances. It is not marginal, slow, and not totally painless. As is already quoted they used the word revolutions not a bloody revolutions but a peaceful constitutional revolution. It means radical transformation of the society through fundamental structural changes in the economic and social institutions. The institution of property is not an exception to undergo a radical change. It is significant that in the preamble only equality, justice and liberty are mentioned and property is omitted unlike the preamble of the American Constitution where property was mentioned. In addition, 'economic justice' is mentioned in the preamble before 'liberty'. In part IV Article 39 (b) and (c) eloquently speak for doing distributive justice. In order to bring these revolutionary changes in the socio-economic structure of the country by erradicating poverty, eliminating glaring inequalities and doing economic justice, the legislature has necessarily to be given the finance and the supremacy among the three great departments of Government. One can say that the judiciary has to play a secondary role.

2. "So long as the sources of economic power remain in private hands, there will be no liberty except for the few who control those sources". Bertrand Russell: The Future of Science, p. 29.
contributory complementary role in this great experiment.

Hence, the Indian Constitution written in the English language necessarily expressing concepts in English words and framed by those who were educated in the Anglo American System of education with its own economic philosophy would undoubtedly create difficulties in the interpretation of Western concepts in their jurisprudence. But it should not be forgotten that the Indian Constitution is meant to work in the context of the Indian geographical political social, economic demographic, and cultural content. Hence, the interpretation of the Constitutional provisions exactly following the conceptions of the concepts given in the

1. But sometimes it does not. Julius Stone says that the legislature has to make efforts to perform the task of adjustment of concrete interests which the judges have stumped. He observed "For whatever be the correct interpretation of the judicial behaviour, the later sections will make clear that judicial responses to the legislature's adjustments have too often re-created the very problems of which the legislature tried to dispose". He gave the example of Rooks vs. Barnard.


From the Indian experience one may cite many instances. To illustrate: The Parliament and legislatures for reasons of paucity of funds and to meet ends of macro-economic justice and to prevent concentration of wealth wanted discretion in the payment of compensation and amended constitution. But see cases like Kamleshwar and Bank nationalisation.
Anglo American judicial process cannot help in solving the problems of the country. Blind comparisons and total imitations may lead to catastrophic consequence. For several reasons it is advisable not to follow the foreign examples. The philosophy, institutions, problems, conditions, cultural background, history and stage in the time-scale of the economic development in the Western countries are entirely different to illustrate the differences. America is a land of plenty, with a vast expanse of unoccupied and uncultivated lands available to the people with virgin soil at the time when they launched the programme of economic development and property. The density of population is very much less. Even today the population of America is one-third of the Indian population whereas the area is three times to that of India. Secondly, the Americans started

1. E.M. Fernando says that the American Supreme Court which was a bulwark of property rights shortly before 1900 upto the administration of President Roosevelt and later it was less receptive to such protestations on the part of American Corporate interests. He cited cases: West Coast Hotel vs. Parrish, 300 U.S. 379 (1937) overruling Adkins vs. Children's hospital, 261, U.S. 525 (1923); see also U.S.V.F.W. Darby Lumber Co., 312, U.S.236 (1941). He further observes referring to Philippine Constitution, "Even prior to such change in judicial temper, however, such judicial timidity in the face of allegations that property rights were not accorded unimpaired respect would not be justified in view of the philosophy as well as the explicit provisions in our Constitution. No doubt need be entertained, therefore, that our fundamental law, without ignoring property rights, paid greater attention to the peremptory demands of the welfare of the great majority of our people to assure that liberty becomes a living and actual force in their lives". E.M. Fernando: The Bill of Rights, 1970 pp. 9-10. This applies with greater force to our Constitution in the context of our conditions.
their industrial revolution two hundred years earlier than India. India has to compress it into few decades to provide a minimum descent standard of living to all its people. Hence, there it was an evolution and here it should be revolution. Thirdly, when America started its economic development there was no consciousness and unity and expectation of good living on the part of the workers. Whereas India in the second half of the twentieth century economic growth has to be achieved simultaneously with economic justice. The American constitution does not contain a chapter on directive principles of State policy but the Indian Constitution contains a separate charter of economic rights and mandates to the states to establish a socialist state.

To take the example of England, it started industrial revolution three hundred years ago. The story of the economic development of the England began and ended with the indiscriminate large scale exploitation of colonies for centuries spread over the entire globe. The ship of economic development and prosperity of England sailed on the rivers of sweat and tears of the working class, tainted with the splashes of red water's coloured with the blood of the exploited. But independent India with its progressive constitution cannot afford to enjoy the advantages of England. Labour legislation started simultaneously with rapid post independent industrialisation in India.

Seervai¹ exposes the fallacy in the conclusion of the syllogism framed in the majority judgment of the bank's case² that all states following rule of law provide for just compensation and that rule of law prevails in India and India in which rule of law prevails provides for just compensation and Article 31 (2) must be interpreted accordingly.

He observes that interpreting the concept of compensation with reference to the history of other countries is "irrelevant... first for the following reasons:"

"...the U.S., Australian and the Japanese Constitutions (which provided for just compensation) and Section 299 of Government of India Act 1935 (which provided for compensation) were not amended by a constitutional amendment so as to make the adequacy of compensation justiciable.

Secondly, it is well known that a constitution has to deal with, and provide solutions for the problems of the times. Such solution will reflect the political, economic and social philosophies of the day, or a compromise between conflicting philosophies1.

"The 5th Amendment to the U.S. Constitution and Section 57, (XXXI) of the Australian Constitution reflect respectively the political, economic and social philosophies or compromises of 1791 and 1900. The Japanese constitution of 1946 was in substance imposed upon a defeated Japan by the United States and, among other things, the Constitution was designed to serve the political, economic and global interests of the United States. The Government of India Act, 1935 was enacted by British Parliament which wished to protect the large investments and extensive commercial and industrial interests of British in India2.

The Constitutions mentioned above do not have, directive principles of state policy with their emphasis on social justice and common good.

Seervai making the above points of difference between the Indian Constitutions and other Constitutions, criticises the Supreme Court's judgment in Bank's case and comments that the majority judgment in the case "propounded a theory of the

2. Ibid.
nature of the right to property which has been discarded in the country of its origin and is contrary to the Directives of State Policy embodied in Article 39. To prove his point he quotes the judgment in which Blackstone's theory of property is cited. That theory says what all the state can do is to compel the owner of a state to transfer his property on an exchange basis treating society also as individual. Seervai says that the development of English law did not stop with Blackstone and quotes Lord Denning to substantiate it. He further quotes Lord Denning to show that if judges could not change the law the Parliament was free to do so. Lord Denning observed "...the significance of the social revolution of today is that, whereas in the past the balance was much too heavily in favour of rights of the property and freedom of contract, Parliament has repeatedly interfered so as to give the public good its proper place".

H.M. Seervai further comments on the preference of the court for the outmoded philosophy of property. "It seems surprising to the present writer, as it may seem surprising to the reader, that Shah, J., speaking for 10 judges of Supreme Court should consider Blackstone's views on property relevant in 1970; and even more surprising that Shah, J., should make no reference to the Directive Principles of State Policy embodied in Article 39, when, in Shantilal Mangal Das case he himself has pointed out that the earlier Supreme Court's decisions had placed serious obstacles, in implementing the directives contained in Article 39."

1. Ibid.
2. Lord, J. Denning has said that '...the extent to which judges carried rights of property seems to us today to be incredible". Freedom under the Law, p. 68 Hamlin Lectures 1949. Quoted by H.M.Seervai at p. 674. Next generation may think the same in India.
Another critic of the Supreme Court, Dr. Rajeev Dhavan, said that judicial review of the Supreme Court in property cases was based upon the cosmopolitan jurisprudence. The court followed cosmopolitan jurisprudence, was inspired by foreign concepts and did not base its decision on the text of the Constitution. It interpreted the word compensation on the basis of the provisions of Land Acquisition Act passed in the 19th century by Britishers in which the concept of full compensation of Anglo-American case law was incorporated. Criticising the Supreme Court for not following in this matter the Afro-Asian experience he observed, "The result that the Supreme Court achieved accords with the position in England, the United States, Australia, Malaysia, but the question whether it deals with the problems of underdevelopment is left, on the surface open. Unable to tackle the moral and economic problems, the court compels the legislature into saying explicitly what the court seems to wish to avoid admitting openly. Inadequate compensation is becoming a normal feature of African public law. In direct contrast to the Bank Nationalisation case we find a Zambian statute which specifically lays down that no compensation shall be paid for the goodwill of a company. Inspired by Anglo-American notions of fairness the court has tried to keep abreast of western ideas, but failed to apply a theory of "distributive justice" in India's context. He accused the court for deliberately expanding power of judicial review. Few judges correctly appreciated the dynamics of conception of compensation and gravity of economic problems and significance of social justice."

Mathew, J., asks "If full compensation has to be paid, concentration of wealth in the form of immovable or movable property will be transformed into concentration of wealth in

the form of money and how is the objective underlying Article 39 (b) and (c) achieved by the transformation? And will there be enough money in the coffers of the State to pay full compensation? 1.

He further questions, "When property is acquired for implementing the directive principles under Article 39 (b) or 39 (c), is there an ethical obligation upon the State to pay the full market value? In all civilised legal systems there is a good deal of just expropriation or confiscation without any direct compensation. 2

However, unfortunately as the saying goes, one swallow does not make a summer.

It appears that the court following the Western liberal Laissez Faire philosophy of property, increased its power of judicial review, assuming the role of sentinel on the qui vive 3 for the protection of the fundamental rights forgetting the paramount importance of economic justice. It is obvious that the court ignored the Indian context, the Indian concepts, the Indian problems and the indigenous widespread poverty. Even though in the beginning and ending few judges showed awareness of the need to do socio-economic justice, in course of time, almost all the judges could not lift themselves from the Anglo-American juristic thought and juridical norms. The court followed not the socialist theory of property nor the functional theory of property but the outdated, Blackstonian theory of property.

3. Contrast this with experience in Ireland. Only in one case a legislation was held invalid by the High Court in 35 years interpreting Article 43 of the Constitution of Eire which guarantees right to property. J.W. Bridge, D. Lasok, D.Z. Perrot, R.O. Plender: op.cit.
It failed to appreciate the correlation between concentration of property and widespread diffusion of poverty the former being one of the major causes of the latter. The court did not appreciate the dynamics of the relative importance of fundamental rights and Directive Principles of State policy in time-frame continuum. The Court has not attempted to evolve indigenous concepts by the fusion of our Indian tenets of Dharma with the Western scientific socialist juridical norms. The techniques used by the courts in

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1. K.S. Hegde, observes, "...the significance of the Directive Principles had not been clearly appreciated by the various organs of the State not excluding the judiciary". Directive Principles of State policy in the Constitution of India, 1972 p. 71.

2. But if we can put through a successful industrial and agrarian revolution in our country through the socialist democratic way by bringing about a synthesis of the best features of both systems, we would have found perhaps a new system to socialism by consent and co-operation for the world to follow. To my mind, this ancient land of ours with all its multicultural and multi-national diversities represents the world in miniature. If we can succeed in harmonising its diversities through our great experiment in political and economic democracy, we may provide something like a model for a world socialist co-operative. Interview by R.K. Karanjia: The Philosophy of Mr. Nehru: 1961-62, p. 43.

Prof. T.S. Rama Rao observes, "India, which has advocated co-existence between socialistic and capitalistic countries in the international field might well succeed in evolving a mixed economy combining socialism with private enterprise".

"Judicial Review in India". The Year Book of Legal Studies, p. 145.

One may say this synthesis between democracy and socialism in evolving a conceptual political philosophical theoretical consistent framework nor organisation of cadre with connection for implementation of bravely formulated programmes with courage to face vested interests remains still an idea.
the process of construction of constitution are irrelevant; the doctrines applied are imported and outdated; and the philosophy antiquarian; the theories of property are not based on justice and the comparisons made are odious. To put it in a nut shell the Supreme Court, it is submitted respectfully, has given room to comment that it exhibited poverty of philosophy of property and poverty in its judicial process relating to property. In the critical evaluation of the exercise of the power of judicial review by the Supreme Court with respect to right to property the following points emerge:

1. About 20% of the judgments resulted in the partial or total invalidation of economic reformatory enactments, orders etc. It means that one in every five cases was decided against the socially beneficial legislation. Viewed from the point of the enormity of the economic reforms in the context of existing unjust maldistributed society with glaring inequalities and exploitation and economic stagnation, this cannot be considered as low percentage of invalidation.

2. One case of invalidation or one judgment laying down a principle contrary to the legislative policy or one trend-setting decision may outweigh in its adverse effect on potential reformatory legislation than dozens of judgments which uphold the laws e.g. Kameshwar Singh, Eella Banerjee, Kochunni, Kunhikonan, Arora, Golaknath, Banks and Kesavananda cases.

3. The principles, policies, and concepts preferred and applied through the ratio decidendi or articulated through the obiterdicta determine more the nature of the role of the court than merely percentages of validation or invalidation even though the statistical data also helps much in arriving at conclusions.

4. The court followed a wrong test of validity of legislation. It is the object that determines the validity and
not the effect of it on fundamental rights.\(^1\)

5. The majority of the judges failed to appreciate the need and method to eliminate economic inequalities by implementing the directives for the prevention of concentration of wealth.\(^2\)

6. The court assumed wrongly that if compensation is not justiciable and if legislature is given freedom in this matter it would confiscate the private property. Having such power in the case of zamindari abolition it did not do so. Having almost such power in general after 4th amendment till Banks Case it did not do so. Having total power to do so under laws that received protection under 31E by being placed in the IXth Schedule it is not done. Similar power was available by Article 31A after 17th amendment with respect to agrarian laws but it was not used. Having such power general with respect to all properties after 25th amendment the parliament or legislatures have not confiscated properties.\(^3\)

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1. But, Palekar, J., correctly observed "It follows that if in implementing such a law the rights of an individual under Article 14, 19 and 31 are infringed in the course of securing the success of the scheme of the law such an infringement will have to be regarded as a necessary consequence and, therefore, secondary". Kesavananda vs. State of Kerala, A.I.R.1973 S.C. 1461 at p. 1815.

2. Few Judges like Palekar, J., very clearly perceived it. He observed, "the philosophy which informs the Constitution looks on concentration of wealth and means of production as a social evil because such concentration, resulting in the concentration of political and economic power in the hands of a few private individuals, not only leads to unequal freedom, on the one hand, but results, on the other, in undermining the same in the case of many". Ibid at p.1825.

3. Speaking in general about power of legislature and abridgment of fundamental rights Khanna, J., observed "It is not, in my opinion, a correct approach to assume that if parliament is entitled to amend part III of the Constitution so as to take away or abridge fundamental rights, it would automatically or necessarily result in the abrogation of all fundamental rights". (Kesavananda vs. State of Kerala A.I.R.1973 S.C.1461 at p.1857). He said that it did not do so before the Golaknath decision when it had such power, nor it had done after 24th amendment when it had regained such power. Ibid, p. 1858.
7. It is evident that on the whole the court preferred Blactonian Theory of Property, Grotian doctrine of eminent domain, American doctrine of police power, English concept of compensation, privy councils' concept of public purpose and Canadian-Australian doctrine of colourable legislation.

8. It is also clear that the Court has neither adopted the Indian concept of Dharma in general which emphasises on social and community aspect of possession and enjoyment of wealth, Gandhian trusteeship nor evolved any indigenous doctrines, concepts and principles, relevant in facilitating economic revolution and realising the constitutional goals of economic justice.

9. With respect to the question raised in the introduction: who is responsible for the demise of right to property as a fundamental right? (Which is discussed in the succeeding section of this chapter), one may say that both the courts with their fixed notion of compensation and suspicion of legislature and the legislature with lack of political will to implement socialistic programmes against

1. See Property not a fundamental Right, A debate, Peoples publishing house, 1970, p. (iii) consensus, Section 2. Shah, J., who by none means can be considered to have subscribed to socialist theory of property referred to Bella's case and observed "and apart from the practical difficulties in giving effect to the directive principles of state policy incorporated in Article 39". State of Gujarat vs. Santilal, A.I.R.1969 S.C. 634 at p. 648.
the opposition of vested interests finding alibis\(^1\) in throwing the blame on the courts have to share equally the responsibility.

D. THE DEMISE OF RIGHT TO PROPERTY AS A FUNDAMENTAL RIGHT:

In the opening paragraph of the first chapter of this study the Parliament's decision to write the epilogue to the history of right to property as a fundamental right under the Indian Constitution has been referred. Inspite of expressions of extreme views on the right to private property

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\(^1\) See generally N.A. Palkhiwala: *Our Constitution defaced and defiled*, 1974.

Surendra Prasad says "...it is not the judiciary which obstructed in the way economic and social progress but the inefficient leadership and bankrupt planning". Vol.3(3) 1974, J.B.C.l p. 340.

See also V.G.Ramachandran: "Who is to be blamed? is it the judges". Vol.5(4): 1976, J.B.C.I. at p. 295.

Criticising the Government he observes, "It appears to be the fashion and ruse of the establishment to throw all the blame on the poor judiciary for their own laches and incompetence" at p. 297.

On the other hand V.R.Krishna Iyer observes "Even the battle for property in the context of acquisition on payment of compensation was avoidable had the perspective of socio-economic justice been imported into the concept of what was just equivalent".

He further says "The course of political and constitutional history and the pace of economic planning would have been different had judicial activism and the rules of statutory interpretation struck a louder social note. Indeed, had part IV energised and sublimated part III in the court one set of difficulties in shaping a social order for promotion of the welfare of the people could perhaps been obviated".

by some of the members of the Constituent Assembly holding socialistic views none has suggested seriously it to be removed from the fundamental rights chapter and keep it as a mere constitutional right. This idea originated in the bitter struggle between the Parliament to have almost the last word on the 'compensation' and the courts' desire to have a desire to have a greater say in this matter. For the first time a sitting judge of the Supreme Court in a judgment gave expression to this, perhaps, due to vexation in this unending battle and due to the eagerness to protect other freedoms of the individual from the amendatory operations of the Parliament. In spite of the above expression in Golaknath case by Justice Hidayatullah, who repeated it after his

1. Hidayatullah, J., observed "Our Constitution accepted the theory that right of property is a fundamental right. In my opinion it was an error to place it in that category". Golaknath vs. State of Punjab, A.I.R. 1967 S.C. 1643 at p. 1716.
retirement, and despite of the Golaknath decision to take away the power of Parliament to amend fundamental rights by judicial amendment of Article 368 neither Nathpal's private bill nor Parliament's twenty fifth amendment tried to remove the fundamental right to property. It shows very clearly


Item 4 of the consensus of the debate says:

"That the right to property contained in Article 19 (l) (f) and (g) and Article 31 be taken out of Part III of the Constitution and that it be left to Parliament to make appropriate laws in this matter" p. (iv).

K.V. Raghunatha Reddy who was a minister for some at the centre, observed "Unless the right to property is taken away from chapter III of the Constitution and, with it, its present fundamental character, unless it is made a subject of ordinary legislation having regard to the socio-economic objectives adumbrated in the Directive Principles of State Policy, it will be almost impossible to achieve any meaningful social change or to achieve the social objectives laid down as injunctions in chapter IV. This is the purpose for which the fundamental right to property has to be ultimately taken away from chapter III of the Constitution; otherwise we will be facing enormous conflicting situations and insurmountable difficulties".


On the other hand, Mohan Kumaramangalam, who was also an ex-communist and ex-cabinet minister at the centre for some time observed "It is not a question of general attack on property owners, not a general desire to abolish properties in all its forms. Having agreed with one who want to retain Article 31, we say that parliament is entitled, the people of our country are entitled, to acquire property for a public purpose. And compensation should not be justiciable.

that the Congress party the then ruling party — which engaged itself in the name of Parliament in a confrontation with court wanted right to property as fundamental right — may be with very limited judicial review of socially beneficent legislation. Even the notorious 42nd amendment to the constitution which declared India as a Socialist State has not touched the fundamental right to property. It all started seriously with the emergency which virtually turned the executive the ruler and the Parliament into a most powerful hand maid of it without any limitation. The theoretical sacred freedoms practically enjoyed by insignificant minority were threatened. The sustained criticism of the Parliament against the courts for allegedly blocking the socio-economic legislation which is not wholly untrue had its impact. This has provided an alibi for the Parliament for not ushering in an egalitarian society. The Janata Party — the Offspring of emergency rule is a confederation of erstwhile Jana Sangh, Congress (O), Socialist Party and B.L. of Charan Singh—Promissed to "delete property from the list of fundamental rights and instead, affirm the right to work " in item (18) of 'Political charter' in its Election Manifesto of 1977! The reasons provided are very curious and the logic is very peculiar. On the one hand it says the previous Government's (Congress) plea that "the fundamental rights and judicial processes had to be curtailed in order to protect and further progressive and to prevent vested interests from thwarting them by resort

2. Ibid.
to the courts" is totally fallacious. It quotes in support of this the report of an official task force set up by the Planning Commission reported in 1974 which said "that land reform measures had not been implemented because of a clear lack of political will". Logically, the next step is that the fundamental rights need not and should not be curtailed. But, it says that "in order to remove this spacious alibi once and for all, the Janata Party will move to delete property from fundamental rights chapter of the Constitution, leaving it as an ordinary statutory right like any other which may be enforced as an ordinary law".

Literally, speaking in this illogical step it should have logically deleted the whole of the chapter on fundamental rights as the alibi is alleged to be related to the whole of the chapter. Instead of disproving the alibi and dispelling the wrong notions it proposed to delete the right to property. It is quite obvious that it proposed to do exactly what it does not believe. So those who criticised the courts for their interpretation of property provisions and fundamental rights in favour of vested interests did not take steps to delete it from part III. But some of those who believed in the sanctity of property and supported the courts, proposed to delete the rights. Really, this is ironical.

1. Ibid. Friedman says "On this basis, a number of sociological investigations have shown how the legal ideology of individual freedom and inviolability of private property has been put into the service of systematic exploitation by the few of the many". W. Friedman: Legal Theory; 1967 p. 74. Referring to the Bill of Rights in the U.S. Constitution Sir Ivor Jennings observes "More often it is used by vested interests to protect their anti social behaviour", Some Characteristics of the Indian Constitution 1952, p.49. Morris Cohen observes, "Thus the bill of rights, originally intended to protect men against political appression, have become the legal basis of economic exploitation". Morris Cohen-Law and Social Order, p. 149.

2. Ibid.

3. Ibid. In addition as a corollary it proposed to delete the ninth schedule for sheltering non-economic political laws like M.I.S.A.
In pursuance of its declared policy in the Election manifesto to rescind 42nd Amendment the Janata Parliament in its comprehensive compendious controversial Constitution (Forty Fifth Amendment) Bill, 1978, passed mainly as an antidote to undo the 42nd Amendment, provided for the deletion of right to property from the chapter on Fundamental Rights. It seeks to delete sub clause (f) of clause (1) of Article 19 dealing with the fundamental right to property to acquire hold and dispose of property. It also seeks to delete totally Article 31 with its 6 clauses. Excepting clause (1) of Article 31 the rest of the article is sought to be deleted from the entire Constitution. Clause (1) of Article 31 which says "No person shall be deprived of his property save by authority of law" is incorporated verbatim in a new Article 300A incorporated in a new chapter entitled "chapter IV- Right to Property" at the end of part XII of the Constitution of India. The safeguard contained in Article 31 relating to acquisition of property of an educational institution established and administered by a minority is sought to be incorporated in article 30 by

   Clause 5 of the Constitution (Forty Fifth Amendment) Bill, 1978 omits the sub-heading "Right to Property" occurring after Article 30 of the Constitution.
the amendment to that article proposed in clause 41.

The statement and objects of the Bill says that it proposes to secure some of the basic features of the Constitution including fundamental rights from impairment and to provide for changes only by referendum2. Hence, it says "In view of the special position sought to be given to fundamental rights, the right to property, which has been the occasion for more than one amendment to the constitution, would cease to be fundamental right and become only a legal right"3.

This reasoning is not convincing for the following reasons:-

1. If one really believes in the sanctity of right to property and considers it equally important as the right to equality and liberty it should be preserved by retaining it in the Fundamental Rights Chapter. It is quite evident that the Janata ruling party does not believe in collectivists and socialist theory of property which advocates ownership of instruments of production by the State with

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1. Notes on clauses, the Constitution (Forty Fifth Amendment) Bill, 1978 p. 18.
2. Ibid, para 2, p. 16.
3. Ibid, para 3, p. 16.
centrally organised planning. So the amendment is con­
trary to its belief.
2. , The majority judgment of the Supreme Court in Kesava­
nanda's case including the judgment of Khanna, J., made it
clear that right to property is not a basic feature of the
constitution. Hence, the fear that the Parliament in order
to further amend the right to property interfere with the
other fundamental rights has not basis.
3. When 'Kesavananda' itself overruled 'Golaknath' on
the point of amendability of Fundamental Rights and con­
ceded the power of the Parliament to amend fundamental rights
excepting the whole chapter or those provisions which con­
stitute basic structure of the Constitution there is no
reason denying the power to Parliament totally to amend
any provision of part III and on that plea to expel right
to property from the Fundamental Rights.
4. The previous governments or the previous ruling party
never declared that it would not pay compensation in all
cases. They never made it their policy to confiscate pro­
property. In fact it cannot be shown that fair compensation
was not paid in all cases. What could be shown was 'equiva­
lent of market value' was not paid in some cases involving
huge assets or in liquidating intermediaries. In most of
the cases of acquisition the legislatures provided for pay­
ment of compensation 'equivalent to market value', and in
considerable cases more than that when land is acquired
under land acquisition Act which provides 15% additional
solatium. Further by the 17th amendment to the Constitution
the previous government guaranteed payment of compensation

1. See Manifesto, p. 7. "The Party, therefore, believes
in a polity that ensures decentralisation of economic
and political power. This is essential for the maxi­
malisation of Individual initiative and popular participa­
tion in development and administration".
"equivalent market value as compensation in all cases of acquisition of land below the ceiling limit held under personal cultivation".

5. Further, there was no reason to believe that the previous regimes were genuinely totally committed to collectivist or socialist philosophy of property to confiscate most of the private property. Even then, they were governments of the past.

6. The argument that other freedoms can be saved to the people if right to property is taken away from the chapter on fundamental rights is not born out of experience as the freedoms were taken away during the recent emergency not to establish a socialist society by confiscatory legislation.

7. The freedoms can be safeguarded not by mere safeguards in the Constitution. Favourable conditions in the society in which most of the people enjoy these freedoms really is the greatest guarantee. Secondly, strong public opinion and independent press and intellectual leadership maintain a free atmosphere.

The absence of right to property as a fundamental right will adversely affect other rights guaranteed in the Constitution. F.S. Nariman mentions some of the consequences and collateral effects on other liberties of the removal of fundamental right to property. He points out that enough national debate has not taken place in spite of the absence of emergency. He observes, "I have been rather

3. Perhaps it is paradoxical that greater debate by way of seminars, meetings, publication of articles and letters in newspapers had taken place on 42nd amendment during emergency.
surprised to see the cavalier manner in which the right to property is proposed to be deleted in the Constitution 45th Amendment Bill, 1978, and the little attention it has attracted. The implications however are far reaching"1.

Referring to the need to preserve the right to property he observes, "I believe that the right to property deserves protection not because it is a rich man's right but because it encompasses the whole spectrum of rights and interests which in law are comprehended in the expression 'property',...."2.

He says that the Bill not only removes one of the "seven freedoms" from Article 19 but "will affect the basic structure of the remaining six; to secure which the 45th Amendment has been avowedly introduced. The guarantee of a free press loses much of its lustre if the printing press and the place when it operates is not constitutionally protected. The right to carry on a trade, business or profession loses much of its basic content if the property with which it is carried on can be taken away without any justifying public interest"3.

The institution of property in its unlimited form is precisely under attack because if property is required for the enjoyment of other freedoms it is denied to the vast multitude of the faceless propertyless masses. The answer to this is not total elimination but a provision for a minimum or basic property for all the people. Freedom of trade, commerce, occupation, profession, association, assembly, movement, settlement all will be affected adversely as these freedoms cannot be enjoyed in practice without some property.

1. Ibid.
2. Ibid.
3. Ibid.
F.S. Nariman pointed to other dangers of disintegration of the nation by the stipulation of the qualification of residence in the State for the acquisition of property by some states in the absence of Article 19 (1) (f). He points out to another alarming consequence of a state passing a law "taking away or abridging the right to hold or dispose of property without any justifying public interest or could impose restrictions on that right even if such restrictions be unreasonable; it would also result in the consequence that in the constitution (as proposed to be amended) property both movable and immovable could be compulsorily acquired or requisitioned or otherwise taken away without any justifying public purpose".

He also points out that though the rights of minorities and of cultivators below the ceiling limit are not affected in the matter of compensation but it is so in the more important matter of public purpose.

He suggests that if it is inevitable to delete the property right from the chapter on fundamental rights at least it should be strengthened as a legal right by importing almost all the guarantees imbeded in Articles 31, 31A, 31B and 19 (1) (f) even though it would result in repetition as Articles 31A and 31B are not disturbed by the 45th Amendment. Then though right to property ceases to be a funda-

1. Ibid, p. 13.
3. Ibid, p. 14. Even though the proviso to Article 31 (2) giving protection in the matter of compensation is transposed in sub-clause (1A) in Article 30, it does not help from the point of view of condition of 'public purpose' in the absence of Article 31 (2) which stipulates the condition of public purpose. So also the benefit conferred by the second proviso to Article 31A (1) acquisition of land in personal cultivation below the ceiling limit is limited to the matter of compensation and hence, such land can be acquired for wholly private purposes.
4. Ibid, p. 16.
mental right it will be a constitutionally recognised legal right on par with the rights under Trade and Commerce.

Further, it may be noted that in view of *Kesavananda* identifying right to property as outside the bag of the un-amendable basic features of the Constitution, and even otherwise in view of the 42nd amendment which restored to Parliament the power to amend Constitution including basic features without limitation, there is no distinction between fundamental rights and other rights guaranteed outside part III anywhere in the Constitution. Of course, this was the position till *Golaknath* came and also during the interregnum between passing of 24th amendment and delivering of the judgment in *Kesavananda*. Hence, the fundamental rights enjoyed superior protection to other constitutional rights only for two short intervals in the post independent constitutional history of India.

The only difference between a fundamental right and a non-fundamental constitutional right is that in case of violation of the former right one can move directly the Supreme Court under Article 32 for a remedy, whereas in the case of a mere constitutional right one cannot get remedy under Article 32. This does not make much difference in view of the availability of an equally efficacious right under Article 226 before the High Courts. Strictly legally speaking this is the only difference excepting in the case of a fundamental right which is also recognised as a basic feature.

Nevertheless, psychologically and sentimentally it makes considerable difference. Further, it may be possible either by judicial interpretation or by amendment to the Constitution to protect a minimum content of all fundamental rights against amendatory abridgment or taking away by the Parliament. In such a situation retention of right
to property in the fundamental rights chapter will have greater significance. However, in a hurry, without much deliberation and debate it is decided to drop the right.

The Chief Justice of India Y.V. Chandra Chud criticised this hasty step and questioned the prudence of the move to delete the right to property from the Fundamental rights listed in the Constitution. He observed, "the greatest danger of such a step was that property could in unusual times be taken away for private purposes and not just for public purposes as presently permitted under law". He felt that as the right to property was one of the most important rights guaranteed by the Constitution, its deletion "might involve complications, we could not appreciate now as the issue was being discussed at a "purely political level" instead of the dispassionate level of scholars".

It is obvious that the issues involved are not correctly appreciated, the consequences not properly seen and attempts to arrive at satisfactory solution are not made.

The failure on the part of the Supreme Court to show judicial restraint in the matter of judicial review of economic reformatory legislation and to make a distinction between unearned wealth, functionless ownership, concentration of wealth and property for power on the one hand and earned property and property for use on the other hand and appreciation of the goals set by the founding fathers of the constitution which requires radical changes lead to

1. Indian Express (Bangalore Edn.) 25th November, 1978.
2. Ibid.
3. "If rich men's immovable property is acquired and in lieu of it he is paid an exorbitant sum which may be its, market value, the disparity, and disharmony in the community will continue". Joseph Minattur: "Right to Property: Constitutional Provisions and Christian Social Principles" (1976) 18 J.I.L.I. 609.
unnecessary heated controversy resulting in the demise of the right to property as a fundamental right to property at the hands of those who have more faith in the courts and belief in the sanctity of property and less trust in the legislative impartiality and integrity, which is avoidable. The Parliament also by its ambivalent and half hearted political will to do economic justice instead of making its position very clear contributed to this culmination.

A future Constitutional jurist may write an epitaph on the tomb of the right to property as a fundamental right in the following words:

'The Supreme Court of India in its over zealousness to protect the right to property contributed unwittingly and the Parliament in its anxiety to safeguard liberty effectuated unwillingly to the demise of right to property as a fundamental right'.

E. AN IDEALISTIC - PRAGMATIC ALTERNATIVE:

Right to property consisting of a bundle of rights in material and immaterial things is essential for human survival and for the development of individual personality and happiness. Primacy and exclusiveness are the sine qua non for preserving the uniqueness, individuality, dignity, peace, intellectual artistic and scientific creativity and spiritual upliftment. All the criticism levelled against the protection given by the State to the right to private property by the socialists of various hues including Marxists is misunderstood. The opposition is not against the institution of property in toto. Only rarely the pleas for total abolition of right to property are heard. All the troubles arose because the distinction between property for power

from property for use is not maintained. The functional theory of property pleads that the right to the enjoyment of material things should be based on the performance of socially useful functions by the individuals. The socialist and the collectivist theories opposed to property for power and exploitation and hence pleaded for the social ownership of instruments of production to prevent exploitation of man by man and to secure equitable distribution of wealth in the society based on the personal contribution of labour manual or mental useful to the society. The right to retain and enjoy the fruits of one's work is accepted. Total community ownership of property is still an utopia.

Perhaps, there is not a single civilised society now in the world which does not recognise the right to property. Most of the constitutions of the world recognise the right to property. Many constitutions recognise it as a fundamental right and even otherwise give so much importance as in the case of England. Even those constitutions founded on the fundamental tenets of Marxist philosophy like those of Soviet Union and China recognise the right to property. The new Soviet Constitution recognised Soviet citizen's right to property. The personal property of citizens of the

1. Even the Stalin Constitution recognised right to property, though limited, under Article 10. The present Soviet Constitution, 1977 (adopted at the Seventh (Special) session of the Supreme Soviet of the U.S.S.R., Ninth Convocation on October, 7, 1977) recognises right to private property under Article 13 which says "Earned income forms the basis of the personal property of right to property constituting earned income, articles of every day use for personal consumption and convenience, a house, plots of land for limited cultivation and land for construction of a house. Right to inherit also is protected. See for a comparative study: M.P. Singh: Right to property in U.S.S.R. and India: A Comparison: Vol.4 (1-4) 1975, J.B.C.I. p. 139.

U.S.S.R. may include articles of every day use, personal consumption and convenience, the implements and other objects of a small-holding, a house, and earned savings. The personal property of citizens and the right to inherit it are protected by the State. Citizens may be granted the use of plots of land, in the manner prescribed by law, for a subsidiary small holding (including the keeping of live-stock and poultry), for fruit and vegetable growing or for building an individual dwelling. Citizens are required to make rational use of the land allotted to them. The State, and collective farms provide assistance to citizens in working their small-holdings. Property owned or used by citizens shall not serve as a means of deriving unearned income or be employed to the detriment of the interests of society.

As really no one in the country can be said to be opposed to the right to property as a fundamental right with respect to genuinely earned property up to a limit, it is submitted that it should be retained. A basic or modicum of right to property is a necessary concomitant for the enjoyment of other fundamental rights. In view of this the following suggestions are made for the recognition of alternative idealistic pragmatic system of institution property which permits limited individual right to property consistent with social justice:

1. "It is abundantly clear that the right to property is a basic human right and all civilized nations have recognised this right. To say now that property right is not a fundamental right would bring down the position of civilized man to that of defenceless animal".
C.L. Agrawal: Right to Property as a basic right, Vo. 2(8) 1973 J.B.C.I. 369.
1. Property for power, functionless ownership, concentration of wealth and exploitation are to be abolished.

2. A basic minimum micro right to private property in all forms as a fundamental right below a ceiling limit which may be different in rural and urban sectors has to be recognised and protected even against the legislative interference.

3. Solatium equivalent to the market value of the property lost by the individual whose total wealth is below the ceiling

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1. To quote Mathew again "The roof of the difficulty is that in most of the discussions the notion of private property is used to vaguely. It is necessary to distinguish at least three forms of private property: (i) property in durable and nondurable consumer's goods; (ii) property in the means of production worked by their owners; (iii) property in the means of production not worked or directly managed by their owners, especially the accumulations of masses of property of this kind in the hands of a relatively narrow class. While the first two forms of property can be justified as necessary conditions of a free and purposeful life, the third cannot. For this type of property gives power not only over things, but through things over persons. It is open to the change made that any form of property which gives man power over man is not an instrument of freedom but of servitude". Ibid, p. 1956. cites Holland, "Property: Its duties and Rights", pp. 183-192.

"For all these reasons a distinction between personal property - property which is the necessary condition to one's happiness and freedom - and the property in the means of production is not only relevant but necessary". M.P. Singh: "Right to Property in U.S.S.R. and India: A Comparison". Vol. 4 (1-4) 1975 J.B.C.I. p. 164.

2. Mathew observed "The framers of our Constitution made the right to acquire, hold and dispose of property a fundamental right thinking that every citizen in this country would have an opportunity to come by a modicum of that right". Kesavananda vs. State of Kerala, A.I.R. 1973 S.C. 1461 at p. 1956.
has to be paid in all cases of deprivation either by acquisition or otherwise. It is only in cases of regulation simpliciter, taxation and penalty, it need not be paid.

4. But individual Macro right to property i.e., unlimited right to accumulation of wealth should be abolished by confiscation of excess of wealth over a ceiling prescribed. The legislature should have power to deprive a person of his property in excess of the ceiling limit either by way of acquisition or otherwise without payment of any solatium. However, the legislature may provide solatium, if it thinks necessary. But such a legislation cannot be questioned in a court of law on any ground for violation of any fundamental right including the equality provision. The legislature has to be trusted and the litigation and obstruction in the process of distributive justice should be totally eliminated.

5. Concentration of private property and democracy are contradiction in terms. Unlimited right to accumulate wealth and rule of law cannot coexist. Macpherson rightly observes "The contradiction, it will be remembered, was between the assertion of majority rule and the insistence on the sanctity of individual property. If the men of no property were to have full political rights, how could the sanctity of existing property institutions be expected to be maintained against the rule of the majority? This was no fanciful problem. When it had been raised during the civil war all the men of property had seen the impossibility of"\(^1\). Combining real majority rule and property rights. If really democratic rights and freedoms one

enjoyed and rule of law prevails a substantial majority
demand and enforce an immediate restructuring of property
relation by doing distributive justice which is in conso-
nance with preamble and Directive Principles of State policy.

6. Hence, Ceiling limit of property may be fixed on the
basis of a multiple of the per capita income indexed in the
relevant year e.g. 500 times to the per capita income. In
the alternative ceiling limit may be fixed on the basis of:
a multiple of the minimum salary in the Central Governmen:
Service e.g. so many time the minimum annual salary of a
permanent employee. Per capita income and minimum wage
differ to rural and urban sectors and hence, they may differ.

Ceiling limit can be higher in the case of politica,
social, religious cultural and literary organisation to
guarantee freedom of association and expression through
press.

7. Excepting in cases of purely private purposes no law
of acquisition or deprivation of property shall be questioned.

8. A national rational ceiling limits to private urban
property should be announced immediately and laws should be
passed to take effective measures to acquire all such pro-
perties by extending the policy of imposition of ceiling
on landed property in the agrarian sector to the urban pro-
perties as otherwise it may amount to not only discrimi-
nation but violation of the principle of economic justice
in the preamble and infringement of the principles in Article
39 (b) and (c) regarding prevention of concentration of
wealth and utilisation of national natural resources for
the common benefit.

9. A national ceiling limit on incomes in public and
private sectors should be imposed based on a multiple of the
minimum wage or per capita income.
If this conception of private property based upon 'the social macro-power and individual micro right to property' is accepted a legal framework in drafting a new article of fundamental right can be framed without any difficulty. In sum, the 'social macro-power' has to be accepted and the 'individual micro-right' has to be protected to synthesise the antonyms of individual right to property with the social justice to realise the goals enshrined in the preamble of the constitution in establishing a society free from exploitation really protecting the freedoms of all the people to realise the positive potentialities of their personalities.

1. "The problem of the future is to devise gradual modification of the system by which it advantages - the encouraging of industry, originality, energy, enterprise, individuality which it affords, the measure of liberty which it secures for a few, the training in character and the development of individuality the sense of responsibility and of family solidarity which it encourages shall be secured without the outrageous inequalities, material hardships and uncertainties, and the injury to character which are produced alike by excessive wealth and excessive poverty". Rev. Hasting Rashdall: "Philosophical theories of Property". Rational Basis of Legal Institutions: by various authors. Reprinted 1969 at pp. 399-400.