

PROPERTY RELATIONS: THE CONSTITUTIONAL VISION

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The term "property" stands for a miscellany of equities that persons hold in the commonwealth."¹ It is impossible to give to it a fixed and definite meaning because of the continued dependence of the concept on the ever-changing technological and cultural levels of the society to which it has reference. The term would have one meaning in the primitive society with a simple agricultural economy and quite another in a highly developed technological society ever-finding new and new methods of controlling resources and using the end-products for the community purpose in a hundred ways.² There may, thus, be a whole plethora of adjustments called property. These adjustments pose many problems for modern democratic states which are called upon to undertake vast welfare programmes for an egalitarian society within the limitations of the democratic process and in countries like India the additional limitations of a set of specially guaranteed rights.

The society's schemes of property relations ultimately rests upon its system of rights and duties—both legal and moral, thus, making the individual as the primary basis of all social arrangements. A person's right consists of his claims to the conditions of well-being; his duties of what he is expected to contribute to the well-being. The structure and content of an individual's claims and obligations in social living inevitably raise the issue of justice, which, in functional terms, would mean the guarantee of equality or equal treatment.

The issue of justice can be considered around three main theories³ of the ethical basis of the rights to property which emerged in the nineteenth and twentieth centuries. In the first group are the natural right theories which regard property as a fundamental right independent of particular institutions. In the second group could be classed theories which rest upon the modes of origin and acquisition, e.g., those of corruption or labour, or such of them as depend on analysis of the factors

1. Hamilton & Till, "Property," in 12 *Encyc. Soc. Sci.* 528 (Seligman ed 1933).

2. "In fact, property is as heterogeneous as the societies within which it is found; in idea, it is as cosmopolitan as the systems of thought by which it is explained." *Id.* at 529.

3. Ginsberg, *On Justice and Society* 95 et seq. (1965).

which contribute to the value of the products of labour. The third group would consist of theories which would test property rights, like other rights, in terms of their contribution to the public good or the general social well-being.

It is not appropriate in this paper to give a detailed examination of these theories. Professor Morris Ginsberg⁴ suggests five main points which arise out of the above theories; they need to be considered before a picture of the fundamentals of an egalitarian industrial society can be presented.

First: Experience of communist societies has shown that the problem of power is not resolved by transferring the ownership of property in the means of production to the state. This adds political power to economic power, rendering the individual more helpless than in capitalist systems where power and responsibility are diffused.

Second: In western societies, property for power is of less importance than it used to be when political power was directly linked with property and freedom of association was limited or non-existent. Now-a-days the direct power of employers over workers is kept in check by trade unions. The wage-earners have learnt to use the political machine to remodel the economic system.

Third: The new industrial revolution has led to the emergence of economic structures which have broadly similar characteristics irrespective of the type of political system—a concentration of control, a unified direction, a vast increase in clerical labour and the number of administrators and technicians, aggregations of large masses of people in giant, impersonal concerns with everywhere much the same patterns of relationships and behaviour. The problem is how to avoid bureaucratization and administrative tyranny, how to reconcile control at the centre with local vigour and independence, how to maintain effective contact between centre and the local agencies, etc. Both the totalitarian and democratic systems have to face the problem. It may be more aggravating in the totalitarian systems because of the combination of the economic and political power.

Fourth: Western experience has shown that the function of managing, and directing, including the ensuring of saving for future development, can be performed by professional administrators who are not owners. Management has been largely dissociated from ownership in large organizations. This may not involve any big social changes because the administrators and the technicians may belong to the same social strata having the same outlook as the property owners. If the dangers of the managerial personnel, hardening into a caste, are to be avoided it

4. *Ibid.*

is necessary that the field of recruitment should be widened to include the working classes.

Fifth: The capitalist states have not, in fact, followed the line of development predicted by Karl Marx. They have adapted themselves to their new demands. This has been made possible in European societies because of (a) antagonisms between the classes gradually reducing themselves due to a rise in standard of living; (b) rise of nationalized sectors in capitalist societies (unforeseen by Marx) (for example, in Britain, as in France forty to fifty per cent of all fixed capital investments are done by public authorities); (c) introduction of large scale planning by capitalist governments. In Western societies, planning has not led to serfdom in spite of the fears of some scholars. The states' power has been kept in check by different associations of men which retain a measure of independence. In communist countries, demands are being made for decentralization and diffusion of responsibility.

Three fundamentals of an equitable industrial order follow from the above points:

- (1) The final directing power over the economic system must be in community's hands.
- (2) An individual has a right to the conditions of well-being and a correlative duty, *i.e.*, the duty of work, to play one's part in the task of providing the means of well-being.
- (3) The system is so organized that no individuals can, through the possession of property, have power over the lives of others.

These implications were a part of western experience at the time when the Constitution of India was being framed. While presenting the constitutional vision, concerning property relations, the influence or otherwise of these fundamentals will be noted.

For an ideological picture of the scheme of property relations in India it is necessary to turn to the Constitution of India which is not only a document reflecting existing social realities but, in many vital areas, projects the wisdom and the insight of the founding fathers. In a sense, almost all the provisions of the chapters on fundamental rights and directive principles could be said to contain direct or indirect ideas concerning property relations. For, even though some parts of these chapters directly refer to property or resource structure of Indian society the implications for the resource structure of equal opportunity clauses relating to training and education and the social consequences of a humane treatment to underprivileged classes are obvious. Apart from these chap-

ters, the following references to property also occur in the Constitution of 1950:

- (1) Part XI. relates to property, contract and suits where rules have been set up about tax and the distribution of revenues between the union and the state governments.
- (2) Part XIII would also involve reference to property value insofar as it relates to inter-state trade and commerce.
- (3) Article 337 relates to special educational grants to Anglo-Indian community.
- (4) Article 360 relates to financial emergency.

The Government of India Act, 1935, did not have the fundamental rights or the directive principles chapters. Provisions relating to finance, property, contract and suits with some provisions like the federal railway authority, appeal in revenue matters, restrictions on internal trade, provision relating to compulsory acquisition of land and some protection for rights of certain special sections was all that the 1935 Act contained in this area. The fundamental rights and the directive principles chapter of the Constitution of 1950 are, therefore, definitely visions of the founding fathers themselves and do not trace their origin to a growth through the Indian constitutional law and practice as represented by the Government of India Act, 1919, and the Government of India Act, 1935.

The property relations before the 1950 Constitution, therefore, were regulated by the ordinary law of the land. Articles 19 and 31 particularly give additional protection to property rights. The ordinary law protection of property relation in itself is a very wide one. In almost all modern societies, apart from property law proper, the entire legal system gets woven around property relations. Contract law is a device to secure them, law of tort leads to the creation of some important rights, some very well known areas of criminal law concern property. In many of its important aspects the administrative law has developed around the theory that the individual's rights of substance have to be protected from the executive's arbitrary behaviour.

Socio-psychological implications which lead to this special protection to property rights must be understood and examined in the light of earlier Indian experience. It is very well-known that up to the eighteenth century the Indian society did not hold the view of property rights which it holds today.⁵ All through the Hindu and the Muslim period, ancient

5. Referring to private property in land, Sir John Strachey said: "While our policy has been to encourage the growth of private property in land...former governments hardly recognized the existence of such property." *India* 1880, at 80.

property relations were hardly ever disturbed. Writing about the Muslim rule in India, Dr. Tara Chand says: "Its influence on Indian culture was deep and pervasive. But so far as the socio-economic structure was concerned there was little modification."⁶ Again, there was no problem of land. "If anyone wanted land he had just to clear it of jungle and occupy it for cultivation."⁷ Further, the land was hardly

marketable and that is why one hears so little of mortgages, sales and transfers of land in these times

Thus the Indian conception of real property was quite unique, totally incompatible with that obtaining in contemporary Europe . . . (which rested upon) absolutism, exclusive possession, and individualism.⁸

It was during the British regime, through various land organization schemes and a trade policy which was injurious to Indian interests, that a new type of outlook regarding property started emerging in India.⁹

Dr. Tara Chand observes:

The British fiscal policy and land system destroyed the ancient institutions and the rural organisation under which the Indian cultivator had lived for centuries. The shell which had protected the social organisation from all external influences was thus broken and the way was opened for the establishment of a society organised on the basis of private property, individual enterprise, accumulation of capital, and technological progress.¹⁰

The character of property relations in India was also considerably

6. 1 Tara Chand, *History of the Freedom Movement in India* 87 (1961).

7. *Id.* at 112.

8. *Id.* at 114.

9. *Id.* at 341.

The change in the status and functions of the zamindar or landholder also affected the socio-political organisation of the Indian village, destroying eventually its isolation and self-sufficiency. Two principal results of the change were (i) the creation of absolute property in land and its transfer into the hands of the new moneyed class which had no interest in land other than that of getting the maximum return on the investments, and (ii) the sub-infeudation of estates and holdings so that, as the competition for land increased, there emerged a chain of middlemen and intermediary rent-receiving interests between the original landlord and the cultivator.

10. *Id.* at 357-58.

affected through the operation of contract law in India.¹¹ The contract law with its division of agreements into enforceable and unenforceable ones, was responsible for creating a double promissory morality with respect to economic advantages. This was a major change in a country where for centuries the social and the philosophical traditions had been urging a single promissory morality which enjoined a person to adhere to and accept responsibility for what he had promised without taking shelter behind verbal niceties. The group that benefited by the new land system and by the contract law was also the group which (because of enough leisure and better economic position) found access to western education and quickly emerged as a new middle class. It was from this group that both the administrators for the British regime as well as Indian freedom fighters came. It was from this group itself that the members of the Constituent Assembly came. The experience of property relations on this class, therefore, largely determined the character and the ideology of the Constitution in this regard. It is in the light of this experience that one can expect to explain the paradox of rigid and special protection to property rights in the same breath in which the ideals of equalitarian society¹² with an emphasis on economic justice were being propounded. The provisions relating to economic justice and the general socialistic leanings of the Constitution could be said to be in deference to the wishes of late Prime Minister Jawaharlal Nehru. The emphasis on some typical Indian institutions¹³ like the *panchayat* and the village came by way of of deference to Gandhiji's views and in pursuit of a vague hope that somehow by a *dues ex machina* India of the future, while developing industrially and technologically, will retain some of its own special characteristics, thus escaping disparaging comments showered on wholesale imitators of another and a different culture. It is in the light of this paradox of tradition and modernity that the constitutional vision, if any, must be seen and the future implications of its unfolding examined. The recent strained dialogue between the judiciary and the legislature relat

11. Speaking about British economic policy which was represented by contractualism, Maurice and Taya Zinkin observe:

Laissez-faire, especially doctrinaire *laissez-faire* of the Morley type (he would not even let the Madras Government start a leather factory to help its local tanners) was not suited to a peasant economy with entrepreneurs in only a few areas, low savings, and few people with technical knowledge.

Maurice & Taya Zinkin, *Britain and India* 64-65 (1964).

12. See article 38 (welfare) article 39 (means of livelihood), article 41 (public assistance in cases of undeserved want), article 43 (living wage) and article 48 (free and compulsory education).

13. See article 40 (village panchayats), article 47 (prohibition) article 48 (cow slaughter), article 46 (Schedule castes and scheduled tribes), article 43 (cottage industries).

ing to property area is, in a great measure, the outcome of differing perceptions of this paradox. Mr. Granville Austin, a western scholar, does not find anything incompatible in this attempted fusion. He says:

The Assembly's adoption of a democratic centralised, parliamentary constitution meant the members believed that to achieve the objective of social revolution India must become a modern state. Yet panchayats and the ideal of reformed village life would be central to the programme for the modernization of Indian society. The development of this Indian institution and the creation of a modern state with an industrialized economy were not incompatible; the two were complementary and must be pursued simultaneously.¹⁴

It is difficult to support this generalization in the absence of any data drawn from the experience of sixteen years of attempt at implementing this part of the constitutional vision through various plans, community development projects, and educational and cultural drives at all levels of administration. As pointed out by Dr. C. D. Deshmukh:

Any cross-section in time would therefore, indicate that whilst a change is noticeable in certain aspects, other things seem to be very much as before The area of maladjustment, especially in relation to the disparity between the urban and rural sectors, is still very considerable and so are inequalities in the social field, especially in regard to what is popularly known as the caste structure.¹⁵

In fact, as pointed out by some economists, the Indian enigma results from reversing the historical process of economic growth. Dr. V.K.R.V. Rao says:

Everywhere, a free society seems to be an end-product of economic growth. But we in India have perhaps been too ambitious to go against the lessons of economic history and set about attempting an acceleration in our economic growth within the contract of a 'free society'¹⁶

The synthesis may be an ideal but the nearest we come to the first stages of a work-chart to achieve it is not in the Constitution but in the late Prime Minister Nehru's later efforts to create a mass psychology of work without undue emphasis on reward. He was trying to secure a more balanced relationship of man to property through land-cooperatives ceilings on lands, agrarian reforms and mixed economy.

The inevitable conclusion seems to be that the constitutional vision consists of bringing together of a few preferred fundamentals of an

14. Granville Austin, *The Indian Constitution: Cornerstone of a Nation* 49 (1966).

15. *Tradition & Modernity in India* 112-113 (Shah & Rao eds. 1965).

16. *Id.* at 92.

equitable industrial society with some peculiar Indian social problems. In emphasizing the role of the state or the community in regulating the economy and enjoining upon it to prevent concentration of wealth in a few hands, at least, two of the fundamentals of an equitable industrial society, referred to earlier in this paper, were fully taken care of by the Constitution. The third fundamental of providing conditions of well-being to the individual is rather vaguely conceived in the Constitution along with other ameliorative programmes. It is true that for a truly equitable industrial society this well-being condition goes along with the individual's recognition of an obligation to work and play his proper role in the community's production processes. Hardly any indications of such a social conscience are perceivable in contemporary India.

Perhaps the best way to view the value indications of the Constitution for property relations is to list out the problems that seem to emerge. The legal and the judicial process could then be seen as helping or hindering the search for their solutions and, thus, creating new values of their own. The following would be some of the problems that would relate to this area:

- (1) The problem of agrarian reform.
- (2) The problem of effective control of private enterprises so as to prevent extreme concentrations of wealth in fewer hands. After the Constitution, this tendency is on the increase.
- (3) The problem of giving weightage to particular castes and communities with regard to employment and, thus, upsetting existing expectations.
- (4) The problem of creating equality of opportunity for acquiring technical competence through education in certain areas and, thus, preventing class and caste monopolies in this very important area of an industrial society.
- (5) The problem of handling and controlling vast property concentrations in the hands of religious institutions.
- (6) The problem of the methods of finding finance for giving social security to disabled, weak and aged persons.
- (7) The problem of more effective exploitation of agricultural and other resources through cooperative device, thus, bringing about a modification of a highly emotionalized abstract attachment to things. (This perhaps would ideologically be in keeping with a rationalized view or the Hindu and the Muslim ideal of pro-

perty as a mere means to the end of a good life in the service of other men.)

For the judicial process each of the above problems will pose many subtle questions of balancing the individual interest against group and class interest and largely against the social interest as represented by the government in power. It is not necessary, indeed, it may even be harmful, to have a single set of judicial formulas to apply to all the problems at all times. The judicial wisdom would be in perceiving the values that the conflict situation of each problem involves and making functional and not logically consistent choices. (It is not the province of this paper to examine judicial trends relating to the problem areas listed. This will be done by other paper writers.) The judicial task, thus, involves a continuing search for justice which, as Llewellyn¹⁷ pointed out, has four attributes:

- (1) It is an aspect of the Good.
- (2) It has to do with conflict between people and regulate it.
- (3) It is affected by a certain degree of fairness, and even-handedness in this regulation.
- (4) It operates under the basic assumption of the sad fact of scarcity in society.

In each situation, concerning property relations, the courts' answer is likely to be more realistic and functional of the relative variants if each of the four attributes are fully examined. The task of the Indian judiciary in guiding the Indian society towards a synthesis of the paradox that the constitutional vision contains is not easy.

17. Llewellyn, *Jurisprudence* 203 (1962).