CORPORATE GROWTH

S. Rangarajan

It is not possible, in the course of this brief paper, to do anything more than state, what is known already, that corporate growth has great impact on the economy of any nation.

It is also not possible to find any roots of the Joint-Stock Company, notwithstanding the persistent attempts which have been made to find them. According to Levy[1] even the Romans had no theory of corporate personality despite the assertion that the doctrine of *Ficta Persona* was already accepted in pure Roman Law. The *Societas Publiconorum* was not a corporation, though in classical Roman Law, however, it is quite clear that a thing owned by a corporate body was the property of the association as such, quite distinct from the property of the member.[2]

Philosophers and scholars have endeavoured to evolve a natural law theory of corporations even as there has been a natural law theory of the State.[3] An extreme view, propounded by the French philosopher Turgot was that "moral bodies", in contrast to individuals, who had rights which were sacred even for the whole community had no rights at all against the State.[4]

Karl Marx, who was not familiar, in his time, with the idea of joint stock companies, wrongly thought, that if money, which alone accounted for power, could be controlled and distributed equitably, the tyranny and resultant unhappiness due to exercise of power, could be eliminated. It is also an irony that yet another aspect of Marxist theory, concerning the withering of the State and its coercive machinery due to the socialisation of the means of production has been falsified by the concentration still of State power in Soviet Russia itself in spite of the current efforts toward humanisation.

The futility, therefore, of the pursuit of means conceived to minimise or even maximise State power merely by dealing with the associations (including corporations) is becoming increasingly apparent. Any approach

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1. Levy, *Private Corporations* and their control (1950).

2. *Id.* at 3-7.

3. Gierke, *Natural Law and the Theory of Society* Translated with an introduction by Ernest Barker, (1958).

4. *Id.* at 166.

to the problem of corporate power would to be evaluated on its merits irrespective of how authoritative, or loud or persistent the voices are: the only thing to consider would be whether something more persuasive than what had been said before is now said.

Before we attempt to understand the property element in corporate power, it may be helpful to refer to the great change that the concept of property has itself been and is still undergoing. Prof. F. H. Lawson says that:

> speaking generally and somewhat crudely, artificiality and conceptualism, though on the whole out of place in the part of property law which deals with physical objects, are essential to that part which deals with money. In any case, what is more artificial than money itself? Property law now needs the attention of jurists..... Whether they choose or not to adopt ownership as their starting point is not very important, so long as they are prepared to subject it to a more profound analysis and to admit that it has no prescriptive claim to be considered indivisible..... No attempt has been made in this book to deal with the effects on property of what has been called 'The Managerial Revolution'. This is not to suggest that they are unimportant. Much property of all kinds is now owned by corporations such as limited companies, the control of which is often in the hands of smal groups of individuals who between them own perhaps less than a quarter of the shares. If we see as the essential part of ownership the power to dispose of property, than such small groups really own enormous masses of property, to which they have no direct legal title.[6]

Even more than thirty years ago Prof. Adolph A. Berle wrote:

> The translation of perhaps two-thirds of the industrial wealth of the country from individual ownership to ownership by the large, publicity financed corporations vitally changes the lives of property owners, the lives of workers, and the methods of property tenure. The divorce of ownership from control consequent on that process necessarily involves a new form of economic organisation of society.[6]

He raised the question:

> Must we not, therefore, recognize that we are no longer dealing with property in the old sense? Does the traditional logic of property.... apply?..... An answer to this question cannot be found in the law itself. It must be sought in the economic and social background of law.[7]

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5. F. H. Lawson *Introduction to the Law of Property* 185-6, (1958).

6. Preface to Berle an dMeans: *The Modern Corporation and Private Property*, (1932).

7. Berle and Means op. cit. supra note 6 quoted by Prof. Berle himself in 'Property, Production and Revolution",(1965) *Columbia Law Review*

Writes Prof. Berle in 1965:[8]

> As technology and its organisations for production and use evolve so will property. The "private" and still more individualised aspects will become increasingly attenuated.[9]..... A shift in attitude toward corporate property arises in part from the changed origin of finance capital. The property of corporations is dedicated to production, not to personal consumption; but, even more significant, that property is no longer the result of individual effort or choice. The change has come silently: its implications even yet are not understood.[10]..... In 1929 perhaps one million Americans owned common stock. At the close of 1963, a conservative estimate would place that figure between seventeen and twenty million stockholders. These holdings represent 525 billion dollars of current market value comprising slightly less than one third of individually owned wealth in the United States.[11] Yet this is the only top-level of passive property holding. A very large number of shares are not held by individuals but by intermediate fiduciary institutions, which in turn distribute the benefits of share-holdings to participating individuals..... The significance of the intermediate institutions is two fold. First, they vastly increase the number of citizens, who to some degree rely on the stock-holding form of wealth. Second, they remove the individual still further from connection with or impact on the management and administration of the productive corporations themselves.[12]. We are well underway toward recognition that property used in production will be made to conform to the conception out through American constitutional democratic processes[13]

Commenting on Prof. Berle's division of property into active and passive Paul P. Harbrecht says:

> The thesis advanced here will be (1) the concept of property whether or not divided into active or passive, is no longer adequate to describe the dynamics of our economic order; (2) the objective proposed by Berle and Means, that the community shall be served by the modern corporation, has been largely realised, and (3) that this end has been brought about by a system that has displaced property as the concept that regulates relationships betwee nmen and things.[14]

Referring to the buying and selling of shares of a corporation, usually in an impersonal manner, he says that the separation of capital income from capital use is probably the key to modern economic development.

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8. (1965) *Columbia Law Review* 1-20.
9. *Id.* at 7.
10. *Id.* at p. 8.
11. *Id.* at p. 13.
12. *Id.* at p. 14.
13. *Id.* at tp. 19.
14. Paul P. Harbrecht, S.J. 'The Modern Corporation Revised", (1964) *Columbia Law Review,* 1410- 1411.

Referring to the evolutionary movement—the rise of financial institutions which has created a development for which there is no significant earlier parallel—he points out that this has been accomplished by (1) placing control of wealth in collective societies (corporations) (2) making claims on their income negotiable in the financial markets, and (3) establishing the financial institutions to collect and use those claims as a basis for new claims that they offer to the public.[15] He concludes

> Our economy is thus characterised by an inter-connection and inter-penetration of its institutions to such a degree that it is now an organic unity and no longer a collection of distinct component parts. We are only beginning to experience the changes for man that such an economy implies[16] it would be a mistake to regard the new economic evolutionary forms too narrowly, for they are in fact production of the whole society and as such mark out the course not merely of the evolution of the economy or of business, but of society itself.[17]

The insights that are now possible into the working of the modern corporation show that a new dimension has been added to economic life calling for social, rather than legal restraints: 'Countervailing power' has been emphasised by Prof. Galbraith and the moral check of the 'corporate conscience' by Prof. Berle. Pertaining to this aspect Friedmann points out[18] that the statutory obligation, introduced by the Wagner Act, of industry to bargain collectively with a labour organisation certified by an official National Labour Relations Board to represent the majority of workers concerned is in a sense a statutory recognition of the legitimacy of the 'countervailing power'; but the translation of the 'corporate conscience' into legal terms would seem to be a contradiction. The idea of 'corporate conscience' must remain a moral concept, elusive in definition and certainly incapable of legal consolidation.

The situation is vastly more complicated by labour problems. As Friedmann observes[19] the corporate organisations of business and labour have long ceased to be a private phenemena. That they have a direct and decisive impact on the social, economic, and political life of the nation is no longer a matter of argument. The challenge to the contemporary lawyer is to translate the social transformation of these organisations from private associations to public organisms in legal terms. In attempting to

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15. *Id.* at 1421.
16. *Id.* at 1422.
17. *Id.* at 1425-26.
18. W. Friedmann: *Law in a Changing Society*, p. 318, (1959).
19. *Id.* at 309-310. It is not possible within the ambit of this paper to make anything more than a reference to 'labour'.

do so we have to recognise that both business and labour currently exercise vast powers.

Serious doubts are entertained as to whether the mere transfer of ownership from private to public hands will solve the problem of control in modern industrial society. The Russian experiment, as we already noticed, does not seem to guarantee the results desired. Friedmann refers to the Yugoslav experiment of a decentralised co-operative socialism, hostile to State bureaucracy of the Stalinist pattern.[20] Even in a mixed economic system the position of the chairman of a public corporation does not differ materially from his counterpart in a private corporation. In an underdeveloped country like ours, where we have the need for a mixed economy, the public sector undertakings will still have to be worked in terms of cost and economic viability. These considerations are bound to progressively affect the formation and growth of such undertakings.

The directive principles of the constitution have laid by article 38 upon the State the duty of promoting the welfare of the people by securing and protecting as effectively as may be a social order in which justice, social, economic and political, shall inform all the institutions of national life. The State shall, in particular, direct its policy along certain principles adumberated in article 39. The State has also, by article 41 within the limits of its economic capacity and development to make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. It shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions 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 under article 43 to promote cottage industries on an individual or co-operative basis. Article 46 lays down the duty upon the State to promote the economic interests of the weaker sections of the people. The State is committed to the promotion of what may shortly be called "socio-economic" justice.

It is in this setting that one has also to draw lessons from the more advanced countries of the world the where debate of *laissez-faire* v. regulation is still going on. In the Indian sub-continent, having regard to the objectives of the Indian Constitution regulation in economic matters, to such extent at least as to promote socio-economic justice cannot be ruled out. But when one maps out the area of regulation one cannot, none-the-less, help drawing lessons from other experiments.

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20. *Id.* at 75.

The case of monopolies is an instance in point. There was no law against monopolies here. The Monopolies Inquiry Commission presided over by Mr. Justice Das Gupta has warned against excessive concentration of economic power and suggested that there should be curbs except where they serve the common good. A permanent Commission, consisting of three members with a Supreme Court Judge as Chairman has been suggested for watching monopolistic trends. Appeals would lie from this Commission to the Supreme Court. The Commission would have power to institute enquiries either on Government's complaint or from the Director of Investigations. It could issue a mandate calling upon the person concerned to desist from and discontinue the practice complained of. The commission should also examine the structure of a monopoly industry and suggest suitable ways for effecting improvements and avoiding obsolescence.

In the United States where the situation is complicated by the unincorporated Foundation and its apparent philanthropic role there are differing approaches to the problem of monopolistic trends. There are those like David E. Lilienthal[21] who ask for a positive, not a negative approach toward achieving economic prosperity. Of the Sherman Act he says:

The Sherman Act *forbids* "restraint of trade"—a double negative. The new law, by contrast, should expressly *foster* the *"development* of trade"—a double affirmative.[22]

And again:

> The whole problem of promoting the public welfare through Bigness will change once we shift from the negative to the positive—from no to yes.
>
> Such a change is a deep and profound thing. It is simple, but it is not easy. It puts a heavy demand upon the imagination and discipline and judgment of individuals and of a people.
>
> The change from punishment to education, from domination by force to persuasion and co-operation, from totalitarian dictation to democratic self-government are all examples of this course of human evolution.[23]

He concludes:

> There was an old dream: the independent man in his own little shop or business. It was a good dream.
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> There is a new dream: world of great machines, with man is control,

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21. David E. Lilienthal *BIG BUSINESS.* A New Era (1952), 22 Id. at 185.

23. *Id.* at 188, 24.

> devising and making use of these inanimate creatures to build a new kind of independence, a new awareness of beauty, a new brotherliness.
>
> The brain of man conceived these fabulous machines, and the intellect of man can master them to further the highest purposes of human freedom and culture.
>
> Bigness can become an expression of the heroic size of man himself as he comes to a new found greatness.[24]

The great pace of scientific, technological and even managerial advancement has awakened us to the existence of and the need to pursue newer roads to economic prosperity. One is no longer freightened by mere bigness. As David Lilienthal himself says there has to be 'Big Bigness for a Big Country from which one cannot shy away on account of the so-called 'dangers of inefficiency, sterility and bureaucracy'.

Even in terms of the Das Gupta report there have to be curbs except where the common good is served. What is the common good and how it has to be served are matters for constant search, enlightenment and the needed courage to act as one sees the light.

Friedmann complained,[25] more than half a dozen years ago, that "the emergence of the large industrial corporation—depersonalised and institutionalised—as a major social phenomenon and its impact on the legal economic and social structures have, not surprisingly, occupied the attention of American thinkers more than those of England. I have referred to some of the later writings of Prof. Bearle and Prof. Harbrecht. So far as our country is concerned the Companies Acts largely followed the British pattern. The history of company legislation has been set out by the Bhabha Committee.[26] Levy[27] gives a full account of the legislation in England wherefrom it is seen that even changes in the legal requirements such as prospectus, audit etc., had its own impact on the growth of companies. The Bhabha Committee concerned itself with the need for eliminating abuses and harmful practices on the one hand and for providing sufficient flexibility in the law on the other.[28] There was a dissenting note by Shri Mohanlal L. Shah who found himself unable to agree with his colleagues with reference to certain suggestions which he thought were not

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24. *Id.* at p. 204.
25. Op. cit. note 18 at p. 303.
26. Company Law Committee (1952) Chapter III pp. 16—19.
27. Op. cit. note 26 at p. 210.
27. Op. cit. note I.
28. Op. cit. note 26 at p. 210.

in the long term economic interests of the country.[29] But all the suggestions were framed only in the light of the general pattern of company law, inherited as part of the British tradition. The Viswanatha Sastri Committee[30] said of the Act of 1956, which followed the Bhabha Committee:

> The Act of 1956 has..... provided for some measure of Government control over company management in the interests of the shareholders and the investing public. Since the passing of the Act, public interest in company law and its proper enforcement has increased and the volume and variety of representations that we have received show that small investtors as well as manage:ial interests are becoming more and more company—law minded. This is all to the advantage of healthy joint-stock enterprise.[31]

But the Viswanatha Sastri Committee refrained from suggesting major or radical changes in the view that the

> balance of convenience was found to lie in retaining the scheme and arrangement of the present (1956) Act, which it might be mentioned, mainly follows the order in which the different topics were dealt with in the Indian Companies Act of 1913. We, therefore, focussed our attention on the difficulties attendant on the working of the Act in actual practice, and the inte:pretation of its provisions. We have t ied to plug loop-holes, supply ommissions, clarify ambiguities, correct mistakes, remove inconsistencies, omit unnecessary or otiose provisions and add others conducive to the smooth and effective working of the Act".[32]

It must be noticed that not all the recommended actions made by the Bhabha Committee were even accepted by Government. The Government did not, for instance, accept the recommendation of the Bhabha Committee concerning the setting up of a Central statutory body on the lines of the Securities and Exchange Commission of the U.S.A. in preference to departmental administration. Without leaving the administration of companies to the States it was made a department of the Central Government. Even this separate department was later abolished in 1963 and it was made a wing of the Finance Ministry; it is now a wing of the Law Ministry. Most of the powers and functions vested in Government under the Companies Act have now been delegated to the new Board with Regional offices at Bombay, Madras, Calcutta and Kanpur. An annual report has to be laid before Parliament concerning the activities of the Board. Under the same Act the Companies Tribunal enquires into cases against

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29. *Id.* at p. 215.

30. Report on the Companies Act mendment Committee of which the late Viswanatha Sastri was the Chairman (1957).

31. *Id.* at p. 7.

32. *Id.* at p. 5.

managerial personal involving fraud, misfeasance and such other malpractices; there is an Advisory Commission consisting of members representing various interests like trade, industry, accountancy, shareholders and labour, to help the Government.

It is therefore clear that a comprehensive effort is still to be made to take an overall view of the country's economy and to conceive the corporate structure in that light. It does not need to be stated that phoblems concerning taxation, labour and other allied ones have all to be studied in the light of the total perspective to be gained. There are perhaps some lessons to be gathered from the thorough going annual reports of the Reserve Bank of India concerning company finances. All these require a pragmatic as opposed to, a doctrinaire approach.

The recent decision of the Supreme Court[33] and the one that followed[34] now fall for discussion. In the earlier case it was found, as a matter of interpreting the Constitution, that the Corporation was not a citizen within the meaning of Art 19 and so could not claim to exercise fundamental rights. Among the arguments which weighed with Sinha C. J. who spoke for himself and S. K. Das, P. B. Gajendragadkar, A. N. Sarkar, K N. Wanchoo and N. Rajagopala Ayyangar JJ, was the argument that clauses (b). (d) and (c) of article 19 (relating to the right of assembly, movement and settling in part of the country) could not apply to a corporation. Hidayatullah, J. who wrote a concurrent (on this part of the case) but separate judgment went into the question elaborately and found that on a construction of the relevant provisions it was not possible to held that the corporation was a citizen for this purpose. Even the doctrine of piercing the veil of the corporation was not of any assistance even if all the share holders were citizens of India for a corporation cannot have married status where all the share-holders are married; Das Gupta J. had no difficulty in holding tha the corporation was a citizen since he did want the Constitution to be interpreted (Shah J. also saying so) in a mechanical manner. Das Gupta J. thought of the more important clause (f) relating to the freedom to acquire, hold and dispose of property, the concern of the consititution makers to improve the economic condition of the country and their trust in the ability of the courts to go under the surface and look at the composition of a corporation in deciding whether the corporation is entitled to enforce fundamental rights. Das Gupta J., while contending the proposition that a corporation was a distinct legal entity from its members (as being too well established to require discussion) did

33. *The State Trading Corporation of India Ltd.*, v. *The Commercial Tax Officer and others*: A.I.R. (1963) S. C. 1811.

34. *The Tata Engineering and Locomotive Co. Ltd., and others* v. *The State of Bihar and others etc.*, A.I.R. (1965) S. C. 40.

not want the charm of this legal learning to hold us captives as to blind us to the rule of interpretation viz., of giving effect to the intention of those who made the law unless the words make that impossible. His Lordship was unable to find anything in the words of the Constitution that stood in the way of giving effect to that intention.

Hidayatullah J., had evidently a lingering doubt about the impact of this holding on the Corporations, for he ended (wi h the hope?):

> Lastly, I have no cause for anxiety about corpo ations in general and companies in which the States own all or the majority of the shares in particular. They are amply protected under our Constitution. There can be no discrimination, no taxation without authority of law, no curbs involving freedom of trade, commerce of intercou se and no compulsory acquisition of property. There is sufficient guarantee there and if more is needed then any member (if citizen) is free to invoke article 19(i)(f) and (g) and there is no doubt that the corporation in most cases will share the benefit. We need not be apprehensive that corporations are at the mercy of State Government.[35]

In the later case[36] Gajendragadkar C. J. speaking for the court refused to invoke the doctrine of piercing the corporate veil, in the face of the earlier decision, so as to allow the share-holders (petitioners) as citizens to achieve indirectly what they could not achieve directly as a corporation in the matter of claiming fundamental rights.

There does not seem to be hope, at least in the near future, of a fuller court going back on its holdings in this regard. Having regard to the undoubted importance of the corporate structure in our nation's economy and the desirability of giving to corporations the right to enforce fundamental rights one has to look to the legislature, more than the court, for this purpose, even though it is possible now to convict a corporation vicariously for hte offence committed by its servant. This is on the ground that the average citizen is now very much exposed to the activities of persons acting, in the name of the corporate bodies to his detriment.[37] If a corporation can thus suffer the disability of being so convicted it may be quite proper to enable the corporation to assert fundamental rights. Nor would it seem to help by going into the validity of the dichotomy of persons into natural and artificial[38] in order to understand the legal persona-

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35. A.I.R. (1963) S.C. 1886.

36. A.I.R. (1965) S.C. 40.

37. *State of Maharashtra* v. *Messrs Syndicate Transport Co. (P) Ltd., and others* 1964 (2) Criminal aw Journal 276.

38. This dichotomy does not have scientific precision: may so called national persons do not have legal personality—minor, lunatic, insolvent person suffering civil death (a Hindu Sanyasin renouncing the wo-ld).

lity of corporations. To me it seems that the remedy may lie in Parliament enacting a law under the power vested under articles 10 and 11 of the Constitution, even without amending the constitution. In the later case[39] Gajendragadkar C.J. relied upon the absence of any law by Parliament making corporations citizens for infering that it was not the intention of Parliament to treat corporations as citizens.

If this course is not found feasible for any reason the only their alternative would be to amend the constitution. The Southern India Chamber of Commerce suggested[40] to the Law Ministry the following amendment of 19 (1) by inserting a clause 1A, (deeming article 19(1) to have always included it) to the following effect:-

Every corporation, Company, other Association of persons treated as resident in India under the law relating to the income tax for the time being shall have the same rights as citizens under clause (1).

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39. A.I.R. (1965) S. C. 40, 48.

40. This suggestion appears to have been made on the advice of Shri V. K. Thiruvenkatachari, Advocate, Madras.