THE REGULATORY PROCESSES

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The middle of the nineteenth century is indeed an excellent date in India to take stock of the substance of the concept of property and the safeguards for its protection as well as against its abuses.

I

The doctrines about the function of property in general and especially that in land went through many stages. At one extreme there was Henry George who said that private property in land was usurpation[1] while at the other extreme, there was Locke for whom preservation of property (and Locke thought of property in land also) was the end of government.[2] Harold Laski's well known chapter on property, probably considered revolutionary at the time it was written[3] reads like a milk sermon today. He recognised that the right to private property is necessary though he was not quite certain where the rule against perpetuity should draw the line fixing the period beyond which vesting cannot be prolonged.[4] Absentee landlord and the absentee factory owner instead of being antisocial persons have become parts of the contemporary production technique as a result of the development of the corporate device. Land companies and industrial corporations have share-holder owners having possibly no control over the subject matter they own with others. The resultant legal concomitents have been the subject matter of profound studies, foreign[5] and Indian[6]. The 'new property' created by the modern welfare state, has perhaps to have a fully worked out doctrine of its own.

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1. Henry George *Progress and Poverty* 1879, 263. (52nd anniversary ed. 1937).
2. Locke *'Of Civil Government* 187, (Everyman's Library Edition, 1924).
3. Laski *A Grammar of Politics* 173-217, (4th ed. 1938).
4. *Id.* at 187.
5. Berle and Means, *The Modern Corporation and Private Property;* (2nd ed. 1944) K. Ronnor, *The Institutions of Private Law and Their Social Functions* (1949). The introduction of Kahn-Freund to the English translation is useful.
   See the bibliography and notes in Stone, *Social Dimensions of Law and Justice*, 249, 426-32 (1966).
6. D. L. Mazumdar, The Modern Company and the Rule of Law, University Special Lecture. (University of Mysore, 1965).

II

Property is a legal concept. The term has really no significance except in the context of a legal, system and as the legal system changes its complexion, the concept of property also changes its content. Nomadic tributes, settled indigenous communities, feudal system, mercantialism, industraialism, the modern mixed economy and the socialised orders of today have their own peculiar content for the term property. Probably there is some correspondance between the order in which the factors of production viz., land, capital, labour and entrepreneurship or organisation developed and their relative growth in importance in time. Even though it is now fashionable to decry the landlord and the capitalist as it is to show sympathy with the labourer (which is only an aspect of contempt) and though the reign of the enterpreneur who has none of these elements at stake is reaching its apex in a few years, (if it has not already been reached), it is necessary to remember that at each epoch of production when each of these elements were in the ascendancy, each played a role which was not capable of substituted performance. For example, at the break-up of the Roman Empire, feudalism with its property relations tied around land with the device of sub-infeduation[7] was at least an effective way in which man could find some security in that dark and dismal period. The continuity of legal relations centred on land on the basis of inheritance from generation to generation was itself functional. Taking into consideration the stage of economic development at which we observe each system we notice that there was no better alternative. There is nothing non-functional in the management of an estate or a factory continuing in a family than in I.C.S. or I.A.S. posts or judgeships continuing in certain families.[8]

Take for example the concept of property centred round the celebrated mithakshara joint family which sustained for milleniums a large sections of the Hindu society. At a time when there was no public fund taking care of the unemployed, the overaged, the disabled, etc. the property rights involved in this institution provided satisfactory arrangement. Now, under the ideal of the welfare state the public exchequer is to look after the above categories of non-earning persons and in societies where the fully developed concept of the welfare state is functioning this ideal is to a great extent realised. But in such a state the contribution which

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7. In fact we do not fully realise the rapidity with which non-functional institutions of society fade away.

8. To this extent the analysis in most of the modern books of the evolution of the concept of property is defective. Confer for a brief description at the level of a secondary source, Paton; *Text book of Jurisprudence,* 481 et, seq. especially 488. (3rd ed. 1964).

the earning members have to make works out in such a fashion that public aid is not supplementary of his private insurance against unemployment, old age, sickness etc. of himself or of his depends but supplants it. The great demands that taxation makes on the earning members of a community are understandable and justifiable only on the assumption that they need not keep anything for a rainy day, because the state discharge its responsibility of looking after them and their dependents. But in developing countries the taxation pattern is that of fully developed welfare states while the protection pattern is rather that of the *laissez fars* state. This imbalance has created a new type of insecurity. Further the legal attributes of the 'new property' that is a peculiar consequence of the welfare state has not been completely worked out even in advanced countries. It has not even been thought of in developing countries like India.

The welfare state tends to become the greatest employer. Public employment has become the biggest property pool shared by the largest segment of the population. Besides the direct jobs, government contracts and government assignment of lands are the only form of property known to many. Holders of private property use the government machinery to enhance their economic bargaining advantage against other private interests.[9]

Land has lost its value, capital is loosing its security, labour has become or will become in the optimum stage of technological development so standardised as to approximate to a kind of currency rather than individualised like the skill of the artisan of the earlier periods. The modern property which is greatly value dis entraprenuership, organisation and the products of intellectual inventiveness and leadership. A labour leader who is the president of an employees Union in a unit of production with which that leader has no other relationship would be the ideal representative of the *Ugadharma.* As he is not a labourer in that factory he has no stake in a strike in that factory which he might precipitate. His capital or land is not involved in it: he has no capital except this wits and no land. He maintains his leadership by his entrepreneurship. Irresponsibility involved in this kind of property relationship requires to be observed carefully and anxiously.

Because of the failure of jurisprudence to develop doctrines along with the change in the function of the State this 'new property' has already created imbalance in the domain of public law. The public law doctrines which had relevance when the king was the state have not been logically

9. See the closely analysed consequences of this dispensation in Charles A. Reich, "The New Property", 73 *Yale Law Journal* 733-787 (1964). To me *Somavati* v. *Punjab,* A.I.R. (1963) S.C. 151, appears relevant here.

transformed to be meaningful when the state became nothing but an incorporated entity intended to serve the sovereign people.

This thought, it is felt, is so important as to deserve an elucidation. The law till recently was almost completely fashioned on the concept that the king had both imperium and dominium. The land was his and therefore he could give it to anybody he liked. Abandoned land and all unoccupied land or any property left without other lawful climants escheated[10] to the king as of right. He could hire and fire anybody he liked. The doctrine of pleasure in the arena of civil service was logical. The public records were his, the courts were his courts: he need not disclose the records; he could not be sued for wrongs and the laws could not bind him.

Unfortunately the doctrines of private law where the rights of private property had its maximum dominance tended to get extended to the domain of public law also. Ironically, in this operation the result of a Constitution in countries like India was to degrade an ordinary occupation which should be the right of any free man to have to the position of a privilege that could be granted or refused in the discretion of an officer. Two typical and notorious non-Indian illustrations are found in the Privy Council decision of *Nakkunda Ali* v. *Jayaratna*[11] and in the King's Bench Division decision of *R.* v. *Metropolitan Police Commissioner*.[12] The Privy Council said in the first case that the licence under which a Ceylon textile owner carried on his occupation being a privilege it could be revoked without a hearing. In the second case the Lord Chief Justice of England said taking the analogy of a bare licence and a licence coupled with an interest of real property law that a licence of a taxi-cab driver by which the driver earned his livelihood could be simply cancelled because a bare licence did not, according to the learned Chief Justice, involve any legal right. Of course both English law and Indian law are fast progressing from this stage in this particular area. But the entire concept of legal rights in the realm of the 'new property' requires immediate reorganisation. For example, the artificial juristic entities called the Union Government and

10. This word denoted a feudal arrangement. The new word that has been brought in is *bona vacantia*. Its English equivalent has still to be coined.

11. (1951) A.C. 66. The Privy Council said that the Textile Controller was not a tribunal and could revoke a licence ex parte because: "in truth when he cancels a licence he is not determining a question; he is taking executive action to withdraw a privilege..."

According to the Privy Council the position is almost like a case under which Rama after permitting Krishna to sit and read in Rama's library for two hours for a year cancels that permission at the end of the fourth month!

12. Ex parte Parker (1953) 1 W.L.R. 1150. See Gordon, "The Cab Driver's Licence Case," 70 L.Q.R. 203.

the State Governments created by a written constitution like the Indian Constitution cannot hold any niche for a right-privilge dichotomy. A government job is a matter of right to an Indan citizen who can show that the officer having the authority under the law did not exercise his power properly in overlooking the applicant's claim. A government contract, if not awarded in accordance with the rules in force governing the matter, could be had by a disappointed tenderer for the contract if he could demonstrate that the rules showed that he had the preferential claim. He could have the matter investigated and decided on the merits. The government cannot argue that none has a locus standi to question the matter because government can, like any other private person, contract with whoever it likes and it is not a matter involving the legal right of any citizen. This is wrong. A government is not like a private person at all and it has no inherent rights at all. If an occupational licence like that of a taxi driver or coal dealer or a ration shop keeper which is the source of livelihood of each of them is not recognised as proeprty or as a legal right nothing can better demonstrate the defect of the jurisprudence which refuses that status. A passport cannot be denied unreasonably. A pension cannot be arbitrarily discontinued. Regarding passports the decision of the U.S.A. supreme Court in *Kent* v. *Dulles*[12a] which denied to the government a power to withhold the grant of a passport at their will and pleasure did surprise many old fashioned thinkers of the common law world.

If the 'new jurisprudence' is not quickly brought into line with the general concepts of the 'new property' we will be creating a 'new feudalism' under which we will all be holding our property conditionally subject to the constant fear of Confiscation on an order of a public authority.

III

We can only touch another area where new regulatory processes forget the perennial utility of well established principles in the law of property. The Transfer of Property Act 1882 of India gives us the fundamental operations found necessary to make property itself functional. Sale, mortgage, lease, exchange and gift are the five-fold transactions which human experience have found necessary in the area of property. Reforms which suffocate any one of these avenues for circulation of interests in property cannot be effective. All rules against perpetuity are intended for the eventtual circulation of property because without property will not serve its function, cater to human needs and human aspirations. Without a right to sell or lease, a property interest can become a curse instead of a blessing. For example, the Second Five Year Plan points out the defects of

12a. 375 U.S. 116 (1958).

certain laws that are in force today which deprive persons of the right to transfer land[13] held from government and the right to leaseland.[14]

IV

Attention now requires to be focussed on all the rules governing property of all types in the light of the principles indicated above. For example, the rule against perpetuity as it is finally crystalised in the common law world limits the maximum period of vesting of interest in property to the lives in being and the minority of any person who will be in existence at the dropping of the last life and in whom the interest is to vest. Translating it into social facts the law simply promises father who has collected a fortune to protect it from the possible mismanagement of his children so as to hand it over to his grandchildren.

The balance struck between the competing interests of society in the mobility of property and that of accumulation of property spurred by the hope of benefiting one's family find its expression in the present rule against perpetuity. It is necessary to investigate whether the new forms of property, the existing conditions that surround old forms and the general social conditions require now the same long period or some other period of time.

Taking another example Section 40 of the Transfer of Property Act provides for a well known property interest viz., the right to prevent the establishment of an objectionable neighbourhood. *Tulk* v. *Moxhay*[15] could have, sociologically speaking, been decided in the way in which it was decided only in the middle of the nineteenth century and possibly in London. By that time urbanisation and industrialisation were creating a congestion making hygenic neighbourhood valuable and capable of being recognised by the courts. But as the tempo of the causes that required the recognition of such a right increased, compulsory provision of a general nature had to be made and zoning and town planning legislation supplanted the system of private agreements. One would wonder whether the provision for "*Tulk* v. *Moxhay* convenants" in Sec. 40 of the Transfer of Property Act of India was the result of a felt need. The number of Indian cases are extremely few and the nine recnt cases that wre found in the last two quinquennial Digests (1951—60) show the very limited social need. Not

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13. Report of the Second Five Year Plan, 183 (para 13).

14. Prohibition of leases created difficulties—for it "introduces a degree of rigidity in rural economy and is difficult to enforce administratively." The planners then prescribe equally objectional cannons. They state that wherever possible leases should be had through panchayats and "in any event when leases ar mad edirctly they should be for minimum periods of 5 to 10 years" *Ib. Sup.* 184 (part 14).

15. (1848) 2 Ph. 774.

a single case is on a *Tulk* v. *Moxhay* type situation. One has to find out whether town planning legislation in India has rendered this provision reduntant or whether the social need of this type of convenant is satisfied by some other methods or whether Indian social habits never needed this property right.

This actually brings one to the question whether we have not in India introduced some western rules of property which have no functional justification for us.

This thought has particular relevance to the more modern types of property that are socially acceptable, respectable and relatively more protected viz. intellectual property. Patents, copy rights, trade marks, etc. are examples. One additional point here for serious thought in India is the international competitive advantages to India of the existing rules. Copy right is a typical example and this has already been dealt with in another paper. It is only necessary here to point to this matter as one which requires attention by the lawyers. When U.S.S.R. and most of the other developing countries of Asia are not signatories to either the Berne Convention or the Universal Copyright Convention, is it not desirable for India also to think whether we should continue on those conventions. conventions.

V

All the above reflections bring out the immediate needs of a body of sociologists and jurists to draw the outlines of a jurisprudence of property for India which would probably be applicable to other developing countries also. An ill advised rule of law can stultify otherwise well thought out agrarian and industrial plans.[16] It was really heroic of the planning commission that it has been functioning without a group of jurists on it. The need of the hour is finally the investigation on all the lines indicated above for the formulation of a 'new jurisprudence' which covers the legal principles of the 'new property' which the welfare state brought into existence.

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16. See *Supra* notes 13 and 14