

## PRESIDENTIAL ADDRESS\*

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I am deeply grateful to the Indian Law Institute and Justice Wanchoo for having given me this opportunity to be present here and speak a few words on the subject of the Seminar.

Of the many seminars that this Institute has sponsored, I believe this, perhaps, is the most important. Property is the most ancient, the most vital institution, with which Man became concerned. Its original function was to secure physical existence. According to Jhering, its original function has been promoted to an all-embracing mission of civilization and ethical significance. 'Property' is a social concept and being a social concept is a creation of law. According to Bentham, Property and law are born together and die together. He felt that before laws were made there was no property; and that if the laws were taken away property would cease. He said:

There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is meta-physical; it is a mere conception of the mind.

To have a thing in our hands, to keep it, to make it, to sell it, to work it up into something else; to use it none of these physical circumstances, nor all united, convey the idea of property. A piece of stuff which is actually in the Indies may belong to me, while the dress I wear may not .....<sup>1</sup>

Uptill the end of the nineteenth century, the laws emphasise the private nature of property. There was very little social control beyond compulsory acquisition of property for public purposes and taxation. The change in thinking and the growth of the modern concept is well described by the celebrated historian Arnold Toynbee. According to him the institution of private property is apt to establish itself in societies in which the single family or household is the normal unit of economic activity and in such a society it is probably the most satisfactory system for governing the distribution of material wealth. But he feels that the natural unit of economic activity is now no longer the single family, the

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\* Delivered by the Union Law Minister to the Seminar on *Property Relations in Independent India: Constitutional and Legal Implications* organised under the auspices of the Indian Law Institute, New Delhi.

1. *Theory of Legislation* 112 (1904).

single village or the single national state, but the entire living generation of mankind. This explains some aspects of the new international law. Since the advent of industrialism, the Western economy has, in his opinion, transcended the family unit *de facto* and has, therefore, logically transcended the family institution of private property. In practice, however, the old institution has remained in force; and in these circumstances, industrialism has put its formidable drive into private property, enhancing the man of property's social power while diminishing his social responsibility, until a stage has come when an institution which may have been beneficent in the pre-Industrial Age has assumed many of the features of a social evil.

It therefore, appears to Professor Toynbee that under these circumstances, our society today, is confronted with the task of adjusting the old institution of private property to a harmonious relationship with the new force of Industrialism. The method of pacific adjustment in his view, is to counteract the maladministration of private property which Industrialism inevitably entails by arranging for a deliberate rational and equitable control and redistribution of private property through the agency of the State. By controlling key industries, the State could curb the excessive power over other people's lives which is conferred by private ownership of such industries and it could mitigate the ill effects of poverty by providing social services financed by high taxation of wealth. This method has the incidental social advantage that it tends to transform the State from a war-making machine, which has been its most conspicuous function in the past, into an agency for social welfare.

It was in this background of new thinking, that the concept of the Welfare State was embodied in our Constitution. The year 1950 marked a sharp break from the past. To our statesman, it appeared intolerable that a few should roll in wealth while the rest remain steeped in poverty. The situation was reminiscent of the description, given of society by Rousseau in his '*Social Contract*'. He felt that it was plainly contrary to the law of Nature that the privileged few should gorge themselves with superfluities, while the starving multitude were in want of the bare necessities of life. Political freedom was meaningless unless economic and social justice was secured to all. The Nation placed before it certain ideals and imposed on the State the obligation to pursue them, indicating the means and the instruments for achieving the goal. How to adjust property relations so as to bring them into accord with our aims, is our daily problem.

History of land reform legislation, series of judicial pronouncements

ments — *Chiranjitlal's*<sup>2</sup> case, cases of *Subodh Gopal*<sup>3</sup>, *Kochunni*<sup>4</sup>, *Bela Banerji*<sup>5</sup>, *Metal Corporation*<sup>6</sup> and *State Trading Corporation*<sup>7</sup> and several others, Constitutional amendments; all this is familiar learning. One cannot be sure whether the Supreme Court has said the last word on the subject or the Parliament itself has made the last amendment. That is because finality is not the quality of human nature. But one thing is clear. In Independent India, problems relating to property have presented and continue to present the greatest difficulty. Under social pressures, the notion of property is changing; development of science and technology have opened new vistas and forms of property not known before have come into existence. India is marching in step with advanced nations and is assimilating new ideas leading to progressive change. Before Independence the Indian lawyer was familiar with the definition of 'property' given by Williams in his *Principles of the Law of Real Property*.<sup>8</sup> According to that celebrated treatise, Property could mean, either (1) ownership or (2) the object or objects of ownership or (3) valuable things according to the context. And property, as meaning valuable things, includes incorporeal as well as corporeal things. It states that all these things, however, are mere rights unaccompanied with possession of anything corporeal. Some, are rights over land of which others are in possession as owners. A debt, according to it, is nothing more than the right to sue another for money due. All these different rights are, however, valuable; they may be turned into money and their worth can be assessed in money and so on. Property was treated as a concept of the widest amplitude. William's definition was applied to cases unknown to English common law. The right of a hindu father to sell his son's property to satisfy his own debt has been held to be a valuable right and therefore property which vested in the receiver on the bankruptcy of the father. Patents, copyright, trade marks, contracts, actionable claims, have been all recognised as property. According to modern notions, electricity is property which is saleable and sales are subject to tax. Water is property. Gas and Oxygen are property. Business is property. Managing agency is property. The area in which property is found to exist have expanded. Lands, minerals and other things of value under-

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2. *Chiranjit Lal v. Union of India* [1950] S.C.R. 869.

3. *State of W. Bengal v. Subodh Gopal* A.I.R. 1954 S.C. 92.

4. *Kochunni v. State of Madras* A.I.R. 1960 S.C. 1080.

5. *State of W. Bengal v. Bela Bannerjee* [1954] S.C.R. 558.

6. *Union of India v. The Metal Corporation of India*. Civil Appeal No. 1222-N of 1965.

7. *State Trading Corporation of India v. Commercial Tax officer* A.I.R. 1963 S.C. 1811.

8. Williams, *Principles of the law of real property*, 25th ed. (1933).

lying the ocean within territorial waters or continental shelf are property vesting in the Union. Continental shelf sometimes extends many miles beyond the territorial waters of six miles. It is in this expanded field that the lawyers, the legislator and the administrator have to deal with questions relating to property. New problems have arisen. Old problems present new facts. In the industrial field, there is increasing dissociation between ownership and control. Social control of property through law sometimes meets with obstacles. Social pressures, however, prove irresistible.

Social control on property has been exercised in various spheres of national life. Industrial Law imposes restrictions in numerous ways in the interest of healthy conditions of work. Labour laws make provision for minimum living wages to the worker and protection of contracts arising out of collective bargaining. There are laws relating to compulsory acquisition of property, taxation laws, laws regulating industries, laws relating to production and distribution of commodities, laws controlling capital and so on.

Of the various laws, which have created controls over the right to carry on business and the right to properties connected therewith, the Companies Act occupies a very special place. A company cannot have at the same time more than one of the four categories of managerial personnel. It cannot pay more than a certain percentage of profits to such personnel. In case of inadequacy of profits, Government sanction is necessary to pay remuneration to them within certain limits. Interlocking of directors, period of appointment of Managing Directors are all restricted. The policy of the Act is that, subject to exceptional cases, managing agency as a form of management should be abolished. The Act requires the consideration of the question of abolishing the Managing Agency system industry-wise and business-wise. In cases where fresh appointment or re-appointment has to be made, certain restrictions are imposed by the Act. The effect of the various provisions relating to managing agency is its elimination, subject to very exceptional cases, from the arena of business and industry. The Government has the power to remove managerial personnel in a certain class of cases. The law relating to the extinguishment or modification of rights of managing agents, secretaries and treasurers, managing directors, directors or managers or corporations or of voting rights of shareholders has received special protection under the Constitution against the exercise of rights conferred by Articles 14, 19 and 31.

Some of these laws have a multipurpose function. They are designed to subserve one purpose, but incidentally fulfil another also. To illustrate how difficult are some of the problems, I shall venture to take up

two clauses of an article in the Constitution. Under article 39, clauses (b) and (c), the State has to direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. 'Ownership' and 'control' in the modern industrial organisation have become dissociated and represent two ideas. Neither ownership nor control can be allowed to be concentrated. They have to be distributed. Likewise wealth and means of production represent two concepts. Concentration of both has to be checked. Distribution of ownership and control of the material resources simpliciter does not achieve the intended result. Distribution contemplated by that article must be such as best to subserve the common good. Nor is concentration in itself treated as a vice, although it is true that the word 'concentration' has in the context a bad odour. What is sought to be prevented is concentration to the common detriment; otherwise every big enterprise may be treated as concentration. There are some categories of enterprises which from their very nature must be of big size, for example, the manufacture of pig iron. What is common good and what is common detriment may at first, appear to be elusive terms. The Jurist, however, has to answer the question on a conspectus of the entirety of the circumstances. If the concept of 'the interests of the general public' is capable of judicial determination, there is no reason why it should not be possible to ascertain in any particular case whether distribution is for the common good or concentration is to the common detriment. The Supreme Court had to indicate in *V. G. Rao's* case certain tests, or to be more accurate certain factors, which have to be taken into consideration in order to determine whether in any particular case the law imposed restrictions in the general interests of the public. Likewise it should be possible to lay down some practical tests which can enable one to decide when distribution is for the common good or concentration is to be common detriment.

One problem facing us today is how far the existing laws which deal with property secure distribution as required by article 39(b) or prevent concentration as demanded by article 39(c). This appears to be practically an unbroken field. Many questions would arise. What are the methods by which article 39(b) and (c) can be implemented — legislative and non-legislative? Can these enquiries be extended to spheres other than business and industry? To what extent high taxation can be utilized to achieve the object? Beyond legislation aimed at removing restrictive and monopolistic practices, what other steps are required to be taken? A thorough examination and factual study of the numerous industries in the country and of the effect of the control exercised by some of the big

industrialists, vis-a-vis large groups of industries, on the operation of the economic system will certainly be useful. But if concentration to the common detriment is found, then what steps have to be taken; remembering all the while that in the present economic conditions in the country we cannot afford to do something which may retard the pace of the industrial growth. That also would be the consideration when we think of the small entrepreneur's right to carry on business or occupation of his own choice. The State has to secure to him opportunity and even financial assistance to some extent to enter the industrial field, otherwise there will be privileged classes. But it would not be denied that the larger interest of the industry and the paramount interest of the country must override the individual's rights and where the industry is new and requires high skill and foreign exchange and collaboration, which can be furnished only by big industrialists, the right of a small entrepreneur must yield. But there is still a very large area within which the small entrepreneur has a free choice. In recent years there has been considerable growth of professional management. This is one of the methods of effecting distribution of control for the common good.

Part III of the Constitution read in the background of Part IV postulates only 'mixed economy'. That brings in the question of how to determine which industry should appropriately be in the public sector. Circumstances of time and necessity and pragmatic approach can alone decide. Our 'mixed economy' has contributed to a rapid development of the law of Public Corporation in the country. Public Corporations are of different types. The Companies Act is an instrument which is utilised mainly for private enterprise. But its mechanism is also employed for creating public corporations. The President of India may own all the shares of the Company. In order to comply with the requirements of the Companies Act, his officers hold shares along with him. The device to transfer shares in blank is employed for the purpose of making them non-hereditary and to enable the shares to pass to another officer.

The Seminar will, I am sure, be of immense value not only to those who are interested in the general development of the law, to the lawyers and judges who are chiefly concerned with the interpretation of the Constitution and other laws but also to the Government and the legislatures who have mostly to deal with the practical aspects of the problems. An examination of the papers prepared for the Seminar reveal a wealth of learning, freshness of approach and a wide range of problems. Discussion in an atmosphere of detachment and if I may add, on the cool heights of the Queen of the Hills in the South is bound to be most beneficial.