

INAUGURAL ADDRESS*

K. Subba Rao

I deem it an honour to be asked by the Indian Law Institute to inaugurate the Seminar on "Property Relations in Independent India: Constitutional and Legal Implications," in which Jurists, leading Advocates and members of the Government are taking part. In my capacity as the President of the Indian Law Institute, I must also express my thanks to the Government of Madras for inviting the Institute to hold the Seminar in the salubrious atmosphere of Ooty and for acting as a host for the participants therein. This reflects the abiding faith of the Government of Madras in the Rule of Law and its anxiety to have the opinions of the experts on the subject.

The expression 'property' is comprehensive. It takes in all categories of property, movable or immovable, corporeal or incorporeal. History records various theories expounded by economists from time to time such as the theory of Natural Right, theory of Utility and theory of Trusteeship. It is not for me to elaborate on these theories or to express my preference to one or other of them. Nor is it necessary to go deeper into the historical aspects of the doctrine of property, as our Constitution has, in clear terms, expressed its philosophy in regard thereto.

The twin objects of the ownership of property are security and stability. It is a trite saying that "property and law are born together and die together. Before laws were made there was no property; take away laws, and property ceases¹."

I shall take two illustrative definitions of 'property': one from the Anglo-American jurisprudence and the other from the Russian jurisprudence. The two definitions reflect apparently contradictory views. The 5th and 14th Amendments to the Constitution of the United States of America say that:

No person shall be deprived of his life, liberty or property, without the due process of law.

A wide definition of property is generally accepted in that country. According to it, the term in its broader sense, is the right of dominion, possession,

* Delivered by the Chief Justice of India 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. Betham "*Theory of Legislation*", 113 (1904).

and power of dispossession which may be acquired over a physical thing, and not the thing itself; and the right of property preserved by the Constitution is the right to acquire it in any lawful mode, or by following any lawful pursuit, which the citizen in the exercise of the liberty guaranteed, may choose to adopt and not just the right to possess and enjoy it. It will be seen from this, that the right of property consists of three elements: (1) ownership, (2) possession, and (3) right to enjoy and dispose of the same. Its essence lies in the free use, enjoyment, and disposal of one's acquisitions, without any control or diminution, save only by the laws of the land.

In contradistinction to the said definition, the Constitution of the U.S.S.R. defines the said concept thus:-

Article 4: The economic foundation of the U.S.S.R. is the socialist system of economy and the socialist ownership of the instruments and means of production, firmly established as a result of the liquidation of the capitalist system of economy, the abolition of private ownership of the instruments and means of production, and the elimination of the exploitation of man by man.

Article 5: Socialist property in the U.S.S.R. exists either in the form of state property (belonging to the whole people) or in the form of co-operative and collective-farm property (Property of collective farms, property of co-operative societies).

The other articles, no doubt, within the framework of the Soviet economy, recognise private and personal property, (personal property) within a very narrow limit. The socialistic concept of property is based upon the theory of labour. Karl Marx in his work *Capital* propounded the theory thus:

In political economy there is a current confusion between two very different kinds of private property, one of which is based upon the producer's own labour, whilst the other is based upon the exploitation of labour of others.

The discussion of the comparative merits of the said two doctrines need not detain us as our Constitution furnishes a guide for us.

Ownership also has ceased to be what it was. Its function has changed. Originally, it had coincided with personal work. Now it controls other persons. It has also given rise to complementary legal institutions, such as loan, tenancy, hire, contract of service etc. Its unity has broken up into power, profit, interest, rent etc. In short, the institution of private law has been transformed into that of public law. While, originally, absolute individual ownership to property was impressed only with moral obligations, now it is controlled and governed by legal obligations in public interest. The real problem facing modern India is

not much to preserve that unlimited right to property, but to regulate the user of it in public interest, while maintaining stability. If undue attachment to acquisition of property is bad, revolutionary zeal to dislocate the structure of property, without providing an effective substitute, is worse. Each country has its own peculiarities. Transplanting of slogans from one country to another does not solve it. It is a real challenge to the intellectuals of our country to meet it and suggest a solution of our own.

The functional approach to the problem is important. It brings out the discrepancies between legal ideology and social reality. Individual freedom may lead to exploitation; the doctrine of corporate personality may end in monopolistic institutions; socialism may lead to statism and the destruction of human personality. High ideals in action may lose their potency and remain only a slogan to support the totalitarian exploitation of the masses. Sociological investigation is a necessity, so that a constant dialogue may be maintained between ideology and action. It enables the State to withdraw an impracticable action, before it is too late.

The relevant articles dealing with property in our Constitution originally, were articles 19 and 31. Article 19(1) (g) in clear terms says that all citizens shall have the right to acquire, hold and dispose of property. Clause (5) thereof enables a State to make any law imposing reasonable restrictions on the exercise of the said right in the interest of the general public or for the protection of the interests of any Scheduled Tribe. Article 19 uses the expression 'property' in a general sense. It has three attributes mentioned therein, viz., that which could be acquired, held, or disposed of. It includes, subject to the said qualification, private property of all descriptions, both movable and immovable, corporeal or incorporeal, whether permanent or temporary, stable or precarious. There is a conflict of view on the question whether a contractual right could be regarded as property. Whether such a right is property or not may depend upon the question whether the benefits under the contract can be acquired, held or disposed of. A distinction may reasonably be made between an interest under a contract which is transferable and an interest which is only personal. The former is property and the latter is not. So too, a distinction can be sustained between an interest in an immovable property and an agreement of sale or purchase which does not create any interest in the said property. Perhaps a more comprehensive meaning may be accepted so as to include even personal rights. Though there are some decisions of the Supreme Court on this matter disclosing a line of thought, a clear pronouncement on the subject is awaited. The Supreme Court of India held on a construction of the provision of article 31(1) and (2) as it stood before the Constitution (4th Amendment Act, 1955).

that both the clauses dealt with the same subject-matter, namely, deprivation of property and that a person must be deemed to have been deprived of his property, if he is "substantially dispossessed" of it, or if his right to use and enjoy, his property has been "seriously impaired" or if the value of the property is "materially reduced" by the impugned law.

A combined reading of article 19 and article 31 leaves no room for doubt that the Constitution accepted the Anglo-American theory of property instead of the Russian theory. At the same time, article 39, which appears in Part IV — the Directive Principles of State Policy—, expressly lays down that the State shall, in particular, 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. The article places the concept of property in the right perspective. The combined effect of the three provisions leads to the following result: Article 19(1)(f) and (5) and article 31(1) and (2) form a single code relating to property. Every citizen of India has the fundamental right to acquire, to hold and to dispose of his property and he cannot be deprived of his property except by valid law or except by acquiring the same in the public interest after paying compensation. But at the same time, to prevent concentration of wealth and to subserve the common good the State is empowered to make laws restricting the said rights in the public interest. The High Judiciary is made the arbiter to maintain the just balance between private rights and public interests. This scheme was accepted by the Constituent Assembly after great deliberations and after it was satisfied that the equalitarian society visualised by it could be brought about smoothly by a process of gradual judicial adjustment without shaking the foundations of society. If the Constitution-makers had intended to revolutionise the economic structure of our country beyond recognition, they would have adopted different constitutional provisions to achieve that object. They rightly thought that within the framework of the constitutional provisions all the pressing agrarian and other reforms pertaining to ownership, transfer and inheritance of property could be brought about. The Constitution accepted democracy as a form of Government. It expected that different parties holding different ideologies, might capture power from time to time. The fundamental assumption of the Constitution is that every party that is elected to power shall be bound by the provisions of the Constitution and shall strive to bring about readjustments of the economic structure of the country in the manner prescribed therein.

Under the said provisions, Parliament made many laws to implement

the Directive Policies laid down in the Constitution. The Seminar may consider whether it would not have been possible for the state to bring about all the said reforms within the framework of the Constitution and whether any temporary maladjustment in the economic structure in the process could not have been rectified by the device of taxation. Uninformed criticism that courts are conservative and obstructing progress stems from an assumption that reforms are within the framework of the Constitution. Even a wrong decision may for a time act as a clog but sooner or later it will be removed as judicial mind does not hesitate to correct itself. Even when some of the laws were held to be unconstitutional, it could only result in some delay in implementing the said reforms. For after all in the life of a country a delay of few years would not be more important than the sanctity of the Constitution by which the country is governed. The object of the Constitution is to impose checks on hasty and unconstitutional action and the objectivity of the judicial mind will ordinarily be a guarantee against perverse decisions. Even if a particular generation of Judges are out of tune with the fast moving society, if the laws made conform to the society's accepted ideal, the new generation of Judges who are nurtured by the same society will gradually find the laws acceptable. The Constitution envisaged this process and that was the justification for imposing restrictions on the Executive and the Legislative powers.

Many amendments were made to articles 19 and 31 of the Constitution and articles 31A and B were added.

The effect of the constitutional provisions with the amendments relating to property as interpreted by the Supreme Court may be stated thus: "Every citizen of India has a fundamental right to acquire, hold or dispose of his property whether movable or immovable, corporeal or incorporeal. That right is subject to the law of social control. The State can acquire or requisition land for a public purpose after paying compensation the adequacy whereof is not justiciable. It can also deprive him of his property, if the law authorising it to do so amounts to be a reasonable restriction in public interest on his right to hold the property. But, in the case of 'estate' as defined in article 31-A which includes also the land of a *ryotwari pattadar* and any land held or let for agricultural purpose or any purpose ancillary thereto, the State by law can deprive any person of that estate; and the only limitation on the said law is that it shall be in regard to agrarian reform in the comprehensive sense of the term. The State also can make a law to enable it or a corporation owned or controlled by it to enter into business excluding the citizens therefrom, to take over the management of any property in public interest, to secure the management of any corporation, to provide for extinction or modification of the rights of officers of the corporation or to affect

the rights of people in respect of search for any mineral oil. It can also make a law imposing taxes on property, provided the said law does not infringe either article 19 or 14 of the Constitution. It is, therefore, clear that though originally under our Constitution every citizen had a fundamental right to acquire, hold or dispose of property, subject to the law of social control, later amendments weakened the right to a considerable extent though article 19(1)(f) still continues to protect the fundamental rights to property other than the properties covered by the said amendments.

There is some misapprehension regarding the scope of the recent judgments of the Supreme Court in regard to the ambit of article 31(2) of the Constitution. The Court has only said that the question, whether the principles are relevant to the question of fixing compensation of the property acquired, is justiciable. The decisions do not prevent the state from evolving relevant principles of compensation in regard to the property acquired, having regard to the social and economic condition of society. Indeed in one of the decisions the exclusion of potential value in fixing the compensation was approved.

It is true that the Company Law Administration requires control and regulation in public interests. But the State can, by reason of article 31-A, make laws untrammelled by fundamental rights in respect of the rights mentioned therein to achieve the said object. The Supreme Court has held that the rights conferred by article 19 are available only to natural persons who are citizens and that a corporation, not being a citizen, cannot claim any of the rights included in that article, even though its share-holders are citizens. This decision deprived the companies and corporations of their fundamental right. Till the decision was given, the Supreme Court assumed that a corporation was a citizen within the meaning of that article. India is moving fast in the industrial and co-operative fields. In future, it may reasonably be expected that the country will be covered by a network of companies and co-operatives functioning in both the fields. The result of the decision is that while a citizen has a fundamental right to carry on business, if he forms a corporation or floats a company, he along with others loses his right. An association of persons will have fundamental rights but if they form a corporation they lose them. This position will discourage persons from forming corporations and co-operatives, as such formations enables the State to infringe their rights. The decision of the Supreme Court has a far-reaching effect on the rights to property owned by corporations.

Industrial labour of our country has secured many rights in respect of wages etc. While it is necessary to secure to labour, living wages and to protect it from victimisation and unfair treatment in the interest of

the country's economy, it is essential to evolve some machinery to compel it to put forth its best in the interest of industrial production. Good wages must be co-related with good work. This can be done either by legislation or by self-imposed discipline of trade unions. High wages without corresponding production will be deleterious to the country's economy.

There are many other problems which are agitating the public mind such as the nationalisation of Banks, ceiling on urban property and other economic reforms of like nature.

Lastly it is said that taxation in our country is the highest in the world. The system of taxation and collection is criticised as complicated and unsuitable to our country, as a patchwork of undigested foreign ideas and as one of the main factors retarding the growth of our country. The large evasion of income-tax is attributed to the physical impossibility of meeting the demands. The criticism may or may not be justified. It is for the experts who are interested in that subject to consider the question objectively and offer constructive suggestions.

India attained her independence about 19 years ago. Within the comparatively short period there were kaleidoscopic changes in the Indian scene changing her face beyond recognition. The founding fathers of our Constitution with the background of centuries of foreign domination and exploitation made our Constitution to help us evolve a welfare state. During these years far-reaching and revolutionary agrarian reforms were introduced abolishing inter-mediaries, like zamindars, inamdars etc. In some States laws were made fixing a ceiling on holdings and providing for statutory transfers of lands to tenants, Acts were passed for consolidation, and Hindu law was codified removing disqualification of women to hold absolute interest in properties giving them rights of succession along with their brothers and sons. In the context of industrialization of the country, as strict legalistic approach did not meet the demands of labour or offer a solution to their problems, a new industrial law based on conciliation and collective bargaining is being developed in an attempt to regulate the relationship between employers and employees. To accelerate the progress of the country, heavy taxation became necessary and this brought in its wake complicated tax-laws, such as Income-tax Act, Sales-Tax Act, Expenditure Tax Act, Wealth Tax Act, Gift Tax Act, Estate Duty Act etc. During the foreign domination, our trade was practically with Great Britain; but after independence it became necessary to increase the tempo of our internal and external trade, which in its turn created problems for the lawyer to regulate and solve. Being an independent country, we have been and are bound to take an important part in international affairs, political as well as economic, and it is a fruitful

source for legal problems such as those relating to outer space, territorial waters, continental shelf etc. The avowed object of the socialistic pattern of society pursued by the present Government increases the State control in every walk of life and this necessitates the creation of administrative tribunals and a counter balancing machinery to control and check their arbitrary actions in the interest of individual liberty and freedom. There is also a spate of social legislation to improve the conditions of the underprivileged, economically backward and physically handicapped citizens of our country. India is a secular state. Though there are obvious difficulties, we must strive to evolve a common code of inheritance to property diversified from religious strings. That will not only rationalize the law of inheritance, but would be a great integratry force. This seminar should be able to throw up some constructive ideas viz-a-viz this impact on property relations.

I have expressed my passing thoughts. I do not claim to be an expert on any of the subjects, but I have no doubt that the eminent men gathered here will discuss the problems relating to property and evolve workable proposals for the guidance of the state. I would suggest that you may consider, in particular, the following questions:-

1. How do we define the concept of 'property' in our Constitution?
2. Is the amending process intended to abrogate or abridge the fundamental rights to property?
3. Could the agrarian reforms and other property reforms not be achieved under the Constitution as originally framed without the aid of the amendments?
4. What is the effect of the agrarian reforms introduced up-to-date on production in our country?
5. What are the principles relevant to the fixation of compensation by the State for acquiring or requisitioning property? Can principles of compensation, apart from those accepted by other countries, be evolved having regard to the peculiar circumstances obtaining in our country?
6. Have the laws made up-to-date retarded the growth of industries in the private sector?
7. Will the new personal laws relating to property suit the Indian Society? Are they well received by it and are any improvements or amendments required to make them acceptable?
8. Can labour laws be co-related to production?
9. Does the the tax structure adopted in India require improvement?

I have, cursorily gone through the papers presented by eminent scholars. They deal expertly with the different facets of the law of property. I have no doubt that they would afford a sufficient basis for the fruitful discussions that will take place in the seminar.

With these words I have great pleasure to inaugurate this Seminar.