The Third A. *D. Shroff Memorial Lecture*

PROPERTY RIGHTS UNDER THE CONSTITUTION

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"People must come to accept private enterprise not as a necessary evil, but as an affirmative good."

—Eugene Black

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By

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The late A. D. Shroff was a leading industrial magnate and economist of high calibre. He was honestly misunderstood by some and designedly misinterpreted by others. He was certainly not a doctrinaire Marxist, nor was he a capitalist of the nineteenth century variety. He thought that the former was out of date and the latter had no place in contemporary life. He believed in the establishment of Welfare State and "in an economic system rooted in the fulfilment of the individual controlled and bounded always by the values of the principles of the society in which he lived." Indeed his views synchronised with the economic philosophy underlining the Constitution. The said compatibility is the justification for the selection of the topic, "Property Rights under the Constitution."

At the outset, an oft-quoted doctrine requires to be clarified. It is stated in two propositions: (1) Nothing can be subject of property which is not recognised by law to be such; (2) When law withdraws such recognition, a thing ceases to have the attributes of property. These propositions mean that right to property lasts so long as law gives to a particular item, the status of property, and if law withdraws that status it ceases to be property. This legal position introduces economic instability, as the valuable rights of a person to property would be at the mercy of

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the transitory majorities of legislatures. At the same time, the socio-economic conditions of the country may require the regulation of the said right in public interest. This problem was solved by the Constitution by conferring a right to property on a citizen subject to the laws of social control. In this context, property under the Constitution means all things and rights recognised by law—statutory, customary and common law, as property before the Constitution has come into force. The right to property in all such things and rights have been guaranteed in the manner prescribed by the Constitution. As regards the future, the law can certainly create new property rights, and once they are created, they automatically acquire the Constitutional protection. If this be not the construction, fundamental right to property will be a mirage for, in that event, the Legislature by changing the definition of property can destroy the right to property.

What was the meaning of the term 'Property' in Indian Law before the Constitution? It was a generic term of extensive application. It was indicative or descriptive of every possible interest which a person can have. It was extended to all recognised types of interests which have the characteristic of property rights. Property was classified as moveable and immoveable, corporeal and incorporeal, real and personal. It may mean a thing or a right which a person has in relation to that thing. The expression "Property" in the Indian Constitution was given this wide meaning.

Ownership ceased to be what it was. Originally it coincided with personal work. Now it controls other persons. Its unity has broken up into power, profit, interest, rent etc. It has also given rise to complementary legal institutions such as loan, tenancy, hire, contract of service etc. While originally absolute individual ownership of property was impressed only with moral obligations, now it is controlled and governed by legal obligations in public interest. In short, the institution of private law has been transformed to that of public law. The real problem facing modern India is not so much as to preserve the unlimited right to property, but while maintaining the substratum of individual right and its stability, to regulate the use of it in

public interest. If undue attachment to acquisition of property is bad, revolutionary zeal to dislocate the structure of property is worse.

Two illustrative definitions of property, one from the Anglo-American Jurisprudence and the other from the Russian Jurisprudence, may help to appreciate the scope of the right to property and the meaning of the expression "property" under the Indian Constitution. The Fifth and Fourteenth Amendment of the Constitution of United States of America read: "No person shall be deprived of life, property without the due process of law." The following wide definition of property is generally accepted in that country. "Property" in its broader sense is not the physical thing which may be subject to ownership, but is the right of dominion, possession, and power of dispossession which may be acquired over it; and the right of property preserved by the Constitution is the right not only to possess and enjoy it, but also 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.

It will be seen from the said definition that the right to property consists of three elements, (1) to acquire, (2) to own and possess, and (3) to dispose of the same. This apparently unrestricted right to property is subject to the laws of social control reflected in the State's right of "taxation", its "police power", and its power of "eminent domain". The absolute doctrine of the freedom of property propounded by Locke, the makers of French and American Revolutions, Bentham, Spencer, Kant, Hegel and others do no longer hold the field. That absolute doctrine had its origin when the labour and property were united and the increasing disassociation of the two makes it no longer valid.

The Constitution of U.S.S.R. defines the said concept thus: "Article 4. The economic foundation of the U.S.S.R. is the socialistic system of economy and the socialistic ownership of the instruments and means of production, firmiy established as a result of the liquidation of the capitalistic 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. The socialistic property in the U.S.S.R. exists either in the form of "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, within narrow limits. 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 the labour of others. The Russian Constitution, therefore, rejects private ownership of the instruments of production but admits only to a limited extent of private ownership based upon the producers own labour."

W. Friedman in his book on "Legal Theory" brings out with clarity the difference between the two doctrines. He says at page 374: "The recognition of freedom of property is a basic right would still be generally considered as a principle of democracy as distinct from socialism which recognises it only in so far as it does not convey power over the means of production and subject to the needs of the community. But modern democracy by the same process which has led to the increasing modification of individual rights by social duties towards neighbours and community has everywhere had to temper freedom of property with social responsibilities attached to property."

Some authors describe the ideology of democracy which accepts individual right to property subject to the laws of social control as democratic socialism. Democratic socialism believes in human dignity and individual initiative. It does not accept nationalisation of property except under extraordinary circumstances, and instead, pleads for social control of economic power. It wants the State to

hold the ring and "to function as control mechanism by rectifying the imbalances that might arise in the economy --such as concentration of economic power, distortion of the price line, uneven development of different regions and sectors, neglect of the interests of the weak social groups including the consumers in the hands of the organised capital or the labour or the like." To avoid confusion in terminology, I would prefer to describe this doctrine as individual right to property subject to social control rather than by the high sounding doctrine of socialism with or without any qualification. Ths doctrine of democratic socialism has been lucidly explained by A. B. Shah on "Planning for Democracy."

There is also some confusion between socialism and socialisation. "Socialism is an ideology, a system of ideas concerning desirable social changes. Socialisation is a process of transforming private into public property, ordinarily followed by Governmental operation and management of such enterprises." Indeed socialisation is recognised in the new Constitution of France, Italy and Germany. Socialisation is associated with the statement of basic rights and a limitation upon the right af private property.

The party in power at the centre describes its ideal as "socialistic pattern of society." The meaning of this concept has not been clearly explained. It means different things to different persons. It looks as if it has been kept designedly vague. The extremistsin the party find in it the dogma of statism; the moderates identify it with democratic socialism. If it means only social control of economic power, there is nothing in it to cavil at. It will then be identical with the Constitutional ideology. In that event, the difference between this party and parties other than the communist party, is more on emphasis rather than on inherent incompatibility.

There is some misapprehension on the scope of the right to properly conferred under our Constitution. An assumption by constant repetition has become a conviction in some minds that the right to property has been so entrenched in our Constitution that it is not possible without amendment to enforce the directive principles. A scrutiny

of the relevant provisions of the Indian Constitution as they stood on 26-1-1950 will dispel this assumption. They are Articles 14, 19(1)(f), 19(5), 31, 32, 39(b) and (c), 226 and 265. The gist of the said provisions may be briefly stated thus: Every citizen has the individual right to acquire, to hold and dispose of property. A duty is implicit in this right, namely, that it should be so reasonably exercised as not to interfere with similar rights of other citizens. The exercise of it, therefore, should be reasonable and in accordance with public interest. The directive principles of State Policy lay down the fundamental principles of State Policy, lay down the fundamental principles for the governance of the country, and under the relevant principles, the State is directed to secure 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. Indeed, the State in exercising the power to enforce this principle, does in fact enforce the duty implicit in the exercise of the fundamental right. The conflict between the citizen's right and the State's power to implement the said principles is reconciled by putting limitations both on the right and the power. The said fundamental right is not absolute. It is subject to the law of reasonable restrictions in the interest of the general public. The State's power is also subject to the condition that the law made by it in so far it infringes the said fundamental right should stand the double test of resonableness and public interest. The State also has the power to acquire land of a citizen fsr a public purpose after paying compensation. It has the further power to impose taxation on a person in respect of his property. All the laws made in exercise of the said powers are governed by the doctrine of equality subject to the principle of classification. But the question of the validity of the said laws of social control, taxation and acquisition is a justiciable issue. Shortly stated, under the said provisions, the right to property is subject to justiciable laws of social control.

The Articles place the concept of the right to property in a right perspective. They definitely rejected the Russian

theory, but accepted the doctrine of individual right to property subject to the laws of social control. The right to property was conditioned by the social responsibility. The higher judiciary was made the arbiter to maintain the just balance between private rights and public interests. The social order visualised by the Constitution was expected to be brought about smoothly by a process of gradual judicial adjustment. The fundamental assumption of the Constitution was that every party that was elected to power should be bound by the provisions of the Constitution and should strive to bring about the new social and economic structure of the country in the manner prescribed therein. Under the Constitution, both the means and the end were equally important in the evolution of a new society.

After the Constitution of India came into force, the following agrarian reforms were introduced:

(1) Intermediaries were abolished;

(2) Ceiling was fixed on land holdings;

(3) The cultivating tenant within the ceiling, secured permanent rights;

(4) In some States, the share of the landlord was regulated by law;

(5) In one State, the tiller of the soil secured cultivating rights against the absentee landlord; and

(6) In some States, the rural economy was readjusted in such a way that the scattered bits of land of each tenant were consolidated in one place by a process of statutory exchange.

These reforms certainly implement the directive principles of State policy. All these agrarian reforms could have been introduced within the framework of the original Constitution, perhaps with a little more expense which could have been re-adjusted through the laws of taxation. But on a specious plea that they could not be done within the said framework, the Constitution had been amended on so many occasions that its philosophy had been completely subverted.

During the last 18 years, the State made a consistent attempt by the process of amendment to the Constitution to remove the judicial check on the exercise of its power in a large area and to clothe itself with arbitrary power in 'that regard. The history of the amendments of Article 31(1) and (2) and the adding of Articles 31(A) and (B) and the 9th Schedule disclose the pattern. Article 31 in its first two clauses deals with the deprivation of property and acquisition of property. The Supreme Court held in series of decisions that Article 31 clauses (1) and (2) provided for the doctrine of eminent domain, and under clause (2) a person must be deemed to be deprived of his property if he was 'substantially dispossessed' or his right to use and enjoy the property was 'seriously impaired' by the impugned law. According to this interpretation, the two clauses of Article 31 dealt only with acquisition of property in the sense explained by the Court, and that under Article 31(1) the State could not make a law depriving a person of his property without complying with the provisions of Article 31(2). The Parliament instead of accepting the decision, by its Fourth Amendment, amended clause (2) and inserted clause 2A to Article 31. The effect of the amendment is that clause (2) deals with acquisition or requisition as defined in clause 2A and clause (1) covers deprivation of a person's property by the State otherwise than by acquisition or requisition. This amendment enables the State to deprive a person of his property in an appropriate case by law. This places in the hands of State an arbitrary power to confiscate citizens' property. This is a deviation from the high content of the rule of law envisaged in the Constitution. The amendment to clause (2) of Article 31 was an attempt to usurp the judicial power. Under amended clause (2), the property of a citizen could be acquired or requisitioned by law which provides for compensation for the property so acquired or requisitioned, and either fixes the amount of compensation or specifies the principles on which and the manner in which the compensation is to be determined. It was further provided that no such law could be called in question in any court on the ground that the compensation provided by that law is not adequate. This amendment made the State the final

arbiter on the question of compensation. This amendment conferred an arbitrary power on the State to fix at its descretion the amount of compensation for the property acquired or requisitioned. The non-justiciability of compensation enables the State to fix any compensation it chooses and the result is, by abuse of power, confiscation may be effected in the form of acquisition.

What is more, that Article 31A introduced by the Constitution First Amendment Act. 1951 and later further amended by the Constitution Fourth Amendment Act of 1951 and 17th Amendment of 1964 constitute a subtle mode of destroying property rights. By the First Amendment, the Parliament defined "Estate" and went on by further amendments to extend its meaning so as to comprehend practically the entire agricultural land in the rural area including waste lands, forest lands. lands for pasture or sites of buildings etc. Under the said amendment. no law providing for acquisition by the State of an estate so defined or any rights therein or the extinguishment or modification of such rights could be questioned on the ground that it was inconsistent with or took away or abridged any of the rights conferred by Articles 14, 19 or 31.

Article 31B and Schedule 9 introduced by the subsequent amendments was another attempt to usurp judicial power. It was an innovation introduced in our Constitution unheard of in any other part of democratic world. The Legislature made void laws offending fundamental rights and they were included in Schedule 9 and later on the iist was extended from time to time. Article 31B declared that none of the Acts or Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void on the ground that they are inconsistent with or take away or abridge any of the rights conferred by Part III notwithstanding any judgements, decree or order of any Court or Tribunal to the contrary. By further amendment, the list was extended. This amendment discloses a cynical attitude to the rule of law and the philosophy underlying our Constitution Autocratic power was sustained by democratic processes. The amendments in the

realm of property substituted the Constitutional philosophy by totalitarian ideology.

The Supreme Court by various judgements considered the said amendments and restricted their scope within reasonable confines. The Supreme Court in Kochini's case did not accept the plea of the State that Article 31(1) after amendments gave an unrestricted power to the State to deprive a person of his property. It held that Article 31(1) and (2) are different fundamental rights and that the expression "Law" in Article 31(1) shall be valid law and that it cannot be valid law unless it amounts to a reasonable restriction in public interest within the meaning of Article 19(5). While this decision conceded to the State the power to deprive a person of his property by law in an appropriate case, it was made subject to the condition that the said law should operate as reasonable restriction in public interest and be justiciable. The Court construed the amended provision reasonably in such a way as to salvage to some extent the philosophy of the Constitution. But the Supreme Court in SEETHABHATHI DEVI's case held that Article 31(2) i.e., the provision relating to the acquisition or requisition of land was not subject to Article 19(5). It would have been logical if the expression 'law" in Article 31(2) was given the same meaning as in Article 31(1). In that event, the law of acquisition or requisition should not only comply with the requirements of Article 31(2) and 2(a), but should also satisfy those of Article 19(5). That is to say, such a law should be for a public purpose, provide for compensation and also satisfy the double test of "reasonable restriction" and "public interest" provided by Article 19(5). The reasonableness of such a law should be tested from substantive and procedural standpoints. There may be a public purpose, but the compensation fixed may be so illusory that it is unreasonable. The procedure prescribed for acquisition may be so arbitrary and therefore unreasonable. There may be many other defects transgressing the standard of reasonableness, both substantial and procedural. But from a practical standpoint, the present dichotomy between the two decisions—Kochini and Seethabathi Devi—will not bring about any appreciable hardship to the people, for a law of acquisition or requisition which strictly

complies with the ingredients of clause (2) may ordinarily also be "reasonable restriction" in "public interest". Substantive deviations from the principles of natural justice may be hit by Article 14. Provision for an illusory compensation may be struck down on the ground that it does not comply with the requirement of Article 31(2) itself. Anyhow, I hope and trust that the Supreme Court will reconsider the said judgment and bring Article 31(2) in conformity to that of Article 31(1).

The Supreme Court in VAJRAVELU and METAL CORPORATION cases considered Article 31(2) in the context of compensation and held that if the compensation fixed was illusory or the principles prescribed were irrelevant to the value of the property at or about the time of acquisition, it could be said that the Legislature had committed a fraud on power and therefore the law was bad.

The Supreme Court in three other decisions confined the bar of Article 31A only to agrarian reforms. In Kochini's case the Court held that requirement of Article 31A bars an attack on the ground of infringement of fundamental right only in the case of agrarian reforms, pertaining to an estate. In RANJIT's case it was held that the expression "agrarian reform" was wide enough to take in consolidation of holdings as it was nothing more than a proper planning of rural areas. In VAJRAVELU's decision, the Supreme Court explained that there is no conflict between the said two decisions and pointed out that the latter decision includes in the expression agrarian reforms, slum clearance and other beneficial utilisation of vacant and waste lands. In PONDICHERY case the Supreme Court did not accept the contention of the State that the expression "Estate" takes in all waste lands, forest lands, lands for pastures or sites of buildings etc. in a village whether they were connected with agriculture or not but ruled that the said enumerated lands would come under the said definition only if they were used for the purpose of agriculture or for purposes ancillary thereto.

The result of the brief survey of the provisions of the Constitution and the case law thereon may now be stated in the form of the following propositions:

(1) Every citizen has a fundamental right to acquire. hold and dispose of property;

(2) The State can make a law imposing reasonable restrictions on the said right in public interest. The said restrictions, under certain circumstances, may amount even to deprivation of the said right;

(3) Whether a restriction imposed by law on a fundamental right is reasonable and in public interest or not, is a justiciable issue;

(4) The State can by law, deprive a person of his property if the said law of deprivation amounts to a reasonable restriction in publia interest within the meaning of Article 19(5);

(5) The State can acquire or requisition the property of a person for a public purpose after paying compensation;

(6) The adequacy of the compensation is not justiciable;

(7) If the compensation fixed by law is illusory or is contrary to the principles relevant to the fixation of compensation, it would be a fraud on power and therefore the validity of such a law becomes justiciable; and

(8) Laws of agrarian reform depriving or restricting the rights in an "estate"—the said expression has been defined to include practically every agricultural land in a village—cannot be questioned on the ground that they have infringed fundamental rights.

The said summary discloses the vast and unlimited control the State, through its legislative power, could exercise over the property rights of the people. One of the limitation put on the said power by the Supreme Court is that compensation payable for the property acquired shall not be illusory and the principle of compensation should be reasonable and relevant to the acquisition of property. If that condition was not satisfied, it would be a fraud on power. Arbitrary power through its protagonists asked how could the appalling poverty of the people could

be removed without confiscation of other's property and how could the State afford to give reasonable compensation for all the property required for distribution among landless, for slum clearance and for carrying out the national projects? This criticism has ideological overtones and it is not based on the express terms of the Constitution. The simple answer to this criticism is two-fold. (1) India is a democratic State and not a totalitarian State. and (2) Neither the original Constitution nor the amendments dispensed with the payment of compensation. The non-justiciability of the adequacy of compensation puts on the State a greater responsibility to pay reasonable compensation, for, by conferring such a power on the State, the Constitution assumed its impartiality and objectivity. It could not have been the intention of the Constitution that under the cloak of non-justiciability, the State could defraud its citizens. Instead of this ideological debate and dialetics, jurists, research scholars and economists may investigate the problem for evolving reasonable principles of compensation, relevant to the social and economic conditions of our country. Fixation of compensation is not an exact science. In other countries, research is being made on these lines. In India, the broad principles of compensation were well-settled by the Privy Council in CHEMUDU and VIJAYANAGARAM cases. Indeed sections 23 and 24 of the Land Acquisition Act embodied the law on the subject. Market value was considered to be the value to the owner in its actual condition at the date of the notification under section 4 of the Land Acquisition Act with its then existing advantages and disadvantages and defects, and with all its future possibilities. Different modes of valuation to arrive at the market value were also accepted by the court depending upon the nature of the property and the availability of evidence. Comparable sales, capitalisation of rent, expert valuation axe some of the modes. Further, potentialities, special adaptibility and the loss caused by injurious affection to the other properties of the owner of the land acquired have to be valued. In England, the principle of "reinstatement" applies to those persons who are deprived of their lands or buildings by compulsory acquisition for special purposes such as churches. hospitals, schools

and businesses of special nature. In such cases the owner has to be reinstated in some other suitable area. Under the Acquisition of Land (Assessment of Compensation) Act of 1919, solatium for compulsory acquisition and value for potentialities were excluded. There is also the Norwegian socially justifiable compensation doctrine. All this I have stated only to show that the valuation of property is not an exact science. The last word is not said on the subject. There is every scope for evolving new principles based on reason, equity and the economic and social conditions of a particular society. There is a real need for research in this field.

There is another problem which is not finally solved but requires further elucidation. Can the fundamental right to property be waived? The Supreme Court in Basheswarnath's case held by majority, that a fundamental right flowing from Article 14 could not be waived by a citizen or other person who is benefited by reason of the said provision. As regards the right to property, two Judges held it cannot be waived, two did not express any view, but one Judge held that it could be waived. The main reason given for holding it could be waived is, that the right to property is solely for the benefit of the individual and therefore it could be waived. In my view, none of the fundamental rights could be waived. There is no scope for making a distinction on the analogy drawn from American decisions that some rights were conferred for individual benefit and some were conceived in public interest. The entire Part III has been introduced in public interest. The Constitution attempted to preserve to the people their fundamental rights against infringement by the institutions created by it. The said rights and their limitations were crystallised and embodied in the Constitution. It does not permit importation of any further limitation on the said rights other than those contained in Part III by any extraneous doctrine. It is suggested that Articles 19(f) and 31 which deal with property are specially connected with the interest of the individual and the interest of the public do not come into the picture, and therefore they can be waived. There is an underlying fallacy in this suggestion. The right to acquire property, the right not to be deprived

of property except by law, and the right to one's property not to be compulsorily acquired except for a public purpose and on payment of compensation, are given in the interest of the public. They are Constitutional safeguards against expropriation or interference with the property of a citizen in exercise of arbitrary power. The said rights are conceived in the interest of the security and the stability of the State. The relevant provisions are based on the assumption that stability in property rights is for the good of the society. Though there may be scope for adopting different scales in the matter of the laws of social control depending upon the nature of the right sought to be controlled, there is none in the matter of the application of the doctrine of waiver. It was said with some plausibility that if the doctrine of waiver would not apply to the fundamental right to property, it would lead to the anamolous result that no person could give up the right to his property to the State. This is based upon a misapprehension of the scope of the doctrine of waiver. Waiver means an unilateral agreement not to enforce one's rights. While a person cannot waive his right to property, he can certainly enter into bilateral agreements with the State in respect of his property in accordance with law. A person, therefore cannot waive any of his fundamental rights including the right to property.

The topic on property will not be complete without reference to the right to do business. The relevant articles are few in number. Under Article 19(1)(g), all citizens have the right to practise any profession or to carry on any occupation, trade or business. Under Art. 19(6), nothing in sub-clause (g) of clause (1) prevents the State from making any law imposing in the interests of the general public reasonable restrictions on the exercise of the said right or from making any law relating to the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or the carrying by the State or by a Corporation owned or controlled by the State, of any trade, business, industries or service, whether to the exclusion, complete or partial of citizens or otherwise. The latter two exceptions were added to clause (6) by the Constitution First Amendment

Act, 1951. Articles 301 to 307 deal with the freedom of trade, commerce and intercourse within the territory of India subject to certain limitations. Article 305 saves existing laws and laws providing for State monopolies from the provisions of Articles 301 and 303. The present Article 305 was substituted for the previous Article 305 by the Constitution Fourth Amendment Act, 1953. Article 298 extends the executive Dower of the Union and each of the States among others, to the carrying of any trade or business. This Article was substituted for the earlier Article 298 by the Constitution Seventh Amendment Act, 1956. Article 31(a) enables the State by law to take over the management of property for a limited period either in public interest or in order to secure the proper management of property or to amalgamate two or more Corporations either in public interest or in order to secure the proper management of the property or to extinguish or to modify any of the rights of the Managing Agents, Secretaries and Treasurers, Managing Directors, Directors or Managers of a Corporation, or of any voting rights of shareholders or to extinguish or modify any rights accruing by virtue of any agreement, lease or license for the purpose of searching for or winning any mineral or mineral oil or to terminate or cancel any such agreement, lease or licence. These clauses were introduced in Article 31(A) by the Constitution Fourth Amendment Act, 1955.

Under the relevant provisions, every citizen of India has the fundamental right to do business or trade in any part of India. There is also the constitutional declaration that the trade, commerce and intercourse throughout the territory of India shall be free. This freedom refers to the right of free movement of trade without any obstruction by way of barriers, inter-State or intra-State or other impediments operating as such barriers. But both these rights are subject to limitations. The former right is subject to the laws of social control in the shape of reasonable restrictions in public interest. The subsequent amendments diluted the right by making it subject to laws enabling the State or its agencies to have monopoly in particular businesses or industries and to interfere with the internal management of the Corporations or to extinguish or modify

the rights of their officers. The latter right is also subject to the laws made by Parliament, imposing reasonable restrictions on the said freedom in public interest and the laws of the State imposing similar restrictions with certain safeguards.

The relevant provisions before their amendments were in accordance with the philosophy of the Constitution. An individual or a partnership or a Company had a right to carry on any business or start any industry in any part of the country. They could conduct their business operations throughout India without any obstruction. The State could also do business in competition with others. It could make laws correcting the imbalances in the economy. It could make laws regulating the business and industry in order to prevent defalcations, misfeasance, monopolies, tyranny of the majorities, fraud, unhealthy practices in stock exchange and other evils. It could make laws for the issuance of permits and licenses in respect of some industries and businesses where public interest demanded. It could even nationalise some business or industries if it was essential for the public good. It could make a law regulating the relations between the employer and the employees. All this it could do. But if the validity of such a law was questioned, the State should be in a position to justify it in a court of law, on the ground that it was reasonable restriction in public interest. In other words, the individual right to do business was subject to justiciable laws of social control. The economy of the country had to be regulated not in exercise of arbitrary power but in accordance with the rule of law.

The State, presumably, found the judicial check irksome. In a few amendments it had removed the checks in two very important matters. One amendment conferred a power on the State to nationalise any business or industry it liked. Another amendment enabled it likewise to make a law to take over temporarily the management of any property to interfere in the ordinary management of Corporations, to extinguish or modify the rights of officers or of the voting rights of the shareholders or to cancel

the particular class of the agreements. These laws are not subject to fundamental rights or judicial review on the ground that they offend the said rights. With the result, totalitarian slant was given to the State's interference in the field of industry and business.

In our country and in other developed countries, economic progress has become bogged in ideological controversies. The division of industry and business into public or private sector is not opposed to the Constitutional ideology. It only means in economic terminology, that some industries are socialised and others are under private management. This is not a new phenomena or one confined to India. In pre-independent India, the State owned large industries which were beyond the financial means or the administrative capacity of private individuals or particularly needed to serve a national purpose; railways, hydro-electric schemes, national highways were some of the enterprises. Even in America which is supposed to function under a capitalistic economy, there is an appreciable public sector enterprise, But in socialistic States, the public sector excludes the private sector, that is to say. all the instruments of production and distribution are nationalised. In Democratic States a just balance is maintained between Public and Private Sector having regard to the needs of society. Under the Indian Constitution, in its original condition. nationalisation was not an arbitrary process but was a justiciable one. If ideological overtones are avoided and the allocation between the two sectors is made on economic considerations, the Constitutional objective will equally be served.

The concept of a Corporation was the product of a brilliant mind. A Corporation is a juristic person. It has rights and liabilities; it can hold and dispose of properties; it can attract investments from small holders with a limited liability and can do business in a big way. Modern thinkers give it a synthetic personality or mind. Its decision evolves out of sub-decisions at various levels. Whether in Public or Private Sector it is a potent instrument of nation's constructive activity. It may be bedevilled by mismanagement, corruption, defalcation, defeasance, monopolies, manipulations, internecine disputes and labour problems. It may be impoverished or it may lose its effectiveness by excessive Corporate Taxation, crippling regulatory provisions, over-centralisation and corruption. The Public Sector Corporations are further affected by political influence and patronage and Civil Service procedures and distant bureaucratic control. If reasonable regulation in public interest is necessary to keep it on an even keel, bureaucratic un-imaginative restrictions destroy it. The main purpose of a regulatory measure is to create conditions for better management and not to put crippling and irksome restrictions in the way of its working. So long as the regulatory power was subjected to judcial control a just balance was maintained between the right to do business and social control.

But unfortunately the Supreme Court in two decisions ruled that the expression 'Citizen' in Article 19 means only a natural person and that a Corporation which is only a juristic person is not a person within the said meaning, and therefore, it cannot claim the rights in the said Article. These decisions have far-reaching effect. India is moving fast in the industrial and co-operative fields. The country will be covered by net-work of Companies and Co-operatives functioning both in the Public and Private Sectors. The effect 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 along with others, the said Corporation or Company has no right. An Association of persons may have the fundamental right, but if they form a Corporation, they lose this right. In 1950 the Supreme Court held that a Company was a Citizen though it held that a foreign Company was not a Citizen. There was a conflict among the High Courts. Indeed, in the first decision, two of the Judges of the Supreme Court recorded a powerful dissent. The majority mainly relied upon the provisions of the Citizenship Act which dealt with only persons and on the doctrine that the Corporation was a distinct and separate personality. The Citizenship Act, 1955 being an Act of Parliament, could not control the scope of the expression 'Citizen' in Article 19 of the Constitution. The concept of juristic personality conceived for

the purpose of convenience of the public, cannot be put against them for destroying their freedom. When a Corporate veil was torn for the purposes of comparatively lesser public interest such as to discover fraud, for dealing with foreigners, and for income-tax purposes, I do not know why it cannot be lifted for safeguarding the fundamental rights of the people. If public policy to protect the interests of the State sanctions the tearing of the veil, public policy to safeguard the freedom of the public must equally justify it. This anomaly must be rectified by Parliament. Whether Parliament does it or not, I hope and trust that as the time passes by, the Supreme Court will reconsider the judgement and resuscitate the said fundamental right to do business by a Corporation.

Planning has become an integral part of economic development. Planning for development is consistent both with democratic Constitutions and totalitarian regimes. There is democratic planning and totalitarian planning. As an author puts it, the difference between the modern national communities is not in having a plan but in the degree to which the existence of the plan is evolved, in the formality with which the goals are spelled out, and in the broad techniques used to achieve the goals of the planning. The essence of the planning is first to establish selected objectives or goals and next devise a method or design for reaching them. Indeed without an objective and a method to reach the objective, no country, whether democratic or totalitarian, can achieve economic results. A haphazard growth will be disastrous to a developing country, but the danger signal is given when a democratic country adopts the totalitarian method of planning for, in the process, the rule of law will be destroyed. Law, therefore, must be on its guard to see that planning and the implementation of the plan is in accordance with the law of the land. As a learned author puts it, democratic planning would place purely economic aims in proper perspective by relating them to the growth of a free, complex and rich human personality that it seeks to foster and only when absolutely necessary should Government assume the role of a producer. Totalitarian planning in a democracy will end in a failure; if it succeeds, democracy will come to

an end. Is there any constitutional support for this institution? The only entry relating to social and economic planning is entry 20 in the concurrent list i.e., list 3. No doubt there are other entries in list 1 which enables the Union to regulate and develop certain subjects of national importance (see entries 52, 56, 58 and 68 etc.). In view of the specific entry 20 in list 3, the residuary entry 97 in list 1 cannot be invoked. If so, what is the scope of entry 20? It cannot be so construed as to override the substantive entry in lists 1, 2 and 3. It means all that it says. It permits planning and not implementation. That has to be done under other entries. It enables a law to be made by Parliament for an integrated economic and social planning for the whole country. Such planning necessarily will be advisory in nature. It can be implemented only by the co-operation of the Union and the States. No doubt the entry "planning" must be liberal and widely construed, and so construed, it will enable the Union to make a law constituting a Planning Commission and entrusting it with specific duties. But the Planning Commission that has been functioning in India till recently had neither constitutional nor statutory status. It had functioned in violation of the provisions of the Constitution. That had become possible because the same party was in power in the Centre and in all the States. It is hoped hereafter planning will be done in accordance with the provisions of the Constitution.

Pausing here, let me recapitulate the Constitutional position vis-a-vis the property rights. The Constitution conferred individual right to property and to do business on citizens subject to justiciable laws of social control. The said Constitutional ideology was sought to be substituted by amendments by totalitarian philosophy in that the said amendments enabled the State in the exercise of its arbitrary power to confiscate property directly or indirectly or nationalise any business carried on by a citizen. What was more, they sought to release the arbitrary power from judicial checks in that regard. No doubt the Supreme Court, by construction, imposed certain limitation on that power, but they may not prove effective against determined exercise of arbitrary power. What the Constitutional Assembly apprehended and provided against has actually happened.

The makers of the Constitution, some of them were of the highest calibre and character the Nation could produce, visualised the situation that arbitrary power even benevolent might destroy property rights among others honestly believing it was for the good of the country though in fact it was not. They also knew that in modern democracies the executive controlled the majority of the Parliament, and it could push through any law it liked. They knew further that in India for a long time to come there would not be enlightened public opinion. They therefore provided for judicial check on both executive and legislative action. But it has proved unavailable against the strong majority of a single party continuously in power for two decades.

The Supreme Court in a recent judgement cried a halt to the continuous erosion of fundamental rights. There, the petitioner questioned the validity of the First, Fourth and Seventeenth Amendments of the Indian Constitution on the ground that they abridge the scope of the fundamental rights guaranteed by Part 3 of the Constitution. The Supreme Court held that the Parliament has no power to amend the Constitution so as to take away or abridge the fundamental right of the people. But the Court held on the application of the doctrine of prospective overruling that all the amendments made by the Parliament up to the date of the judgement were and would continue to be valid. The legal basis of the judgement may briefly be stated thus: Under Article 368, the Parliament has the power to amend the Constitution. Under Article 13(2) the State is prohibited from making any law which takes away or abridges the fundamental rights and such a law if made is void. The question is whether amendment is law. If it is law and if it takes away or abridges fundamental right, it will be invalid. It is conceded that amendment is law, in its comprehensive sense, but it is said that expression "law" in Article 13(2) is the law made in exercise of legislative power, but the amendment is made in exercise of "constituent power" conferred on the Parliament under Article 368. Five of the six Judges who expressed the majority view held that amendment to the Constitution is made in exercise of the residuary legislative power under Article 245

and that Article 368 only prescribes a special procedure and a special majority for exercising the said power and one of them held that the power to amend was implicit in Article 368 itself. It is not really material whether the power to amend is here or there. But the main question is whether the amendment is made in exercise of constituent power. If it is not in exercise of constituent Power it must necessarily be an exercise of a legislative power. There is no other way of making laws. What is constituent power? It is a power to elect representative, charged with the making or changing Constitution. This power rests with the people. They can elect a Constituent Assembly and confer the power on them. The Constituent Assembly after making the Constitution becomes functus *officio.* The said Assembly cannot confer that constituent power on any institution created under the Constitution. It may confer a wide power of amendment on the Parliament, but that power of amendment is exercised under the Constitution and therefore is not a constituent power. To put in other words, amending power is a power under the Constitution, whereas the constituent power is a power outside the Constitution. The former is given to the Parliament and the latter rests with the people. An eminent author rightly observed:

> "But no matter how elaborate the provision for amendment may be, they must never, from a political viewpoint, be assumed to have superseded the Constituent power."

Therefore as an amendment is made in exercise of the power conferred on the Parliament under the Constitution, it is clearly law and in so far as it infringes Article 13, it is void. If the Parliament seeks to take away or abridge fundamental rights, it should seek the help of the people to create a new Constituent Assembly. The Parliament in exercise of its residuary power can make a law providing for a machinery for electing a Constituent Assembly. This process enables the people to appreciate the scope of the freedom and if they choose to give up their freedom or to place them at the mercy of the transitory majority of the Parliament they could elect such representatives who could achieve that purpose. The suggestion that the Par-

liament can convert itself into a Constituent Assembly would be illegal, for, by that process, it does not get the requisite mandate from the people in whom the constituent power rests.

The criticism that the judgement of the Supreme Court tied the hands of the Parliament and prevented it in future to usher in the agrarian and other economic reforms so essential for the progress and prosperity of the country is without substance. The Supreme Court held on the application of the doctrine of prospective overruling that all the amendments made by the Parliament up to the date of the judgement were and would continue to be valid with the result all the agrarian reforms already made were sustained and the Parliament continues to have the power to introduce further agrarian reforms under the protection of the amendments already made. The State no doubt could not confiscate property for a purpose not related to agrarian reforms, but the said amendments enable the Government to acquire land by paying compensation, the adequacy whereof is not justiciable. The State can also introduce further land reforms other than agrarian reforms by law imposing reasonable restrictions in public interests on the right to property. In extraordinary circumstances, when the situation demands, it can deprive a person of his property in public interests. It has also the power to impose taxes and take back money from persons with large income for social purposes. The only difference between an exercise of power in respect of agrarian reforms and in respect of other reforms is that the former cannot be questioned in a court of law, while the latter is justiciable. It will therefore, be seen that the Parliament has still vast power, if it chooses and its exercise is essential for public good, to bring about radical changes in the realm of property law. What the judgement really saved were the other rights like right to equality, right to freedom, including right to freedom of the Press, right to personal liberty, right against exploitation, right to freedom of religion, cultural and educational rights and right to Constitutional remedies.

There appears to be some controversy in regard to the impact of the judgement on Schedule 9 of the Constitution. A view was expressed that under the judgement, the Parliament could add new Acts to the Schedule and make them immune from attack on the ground that they infringe fundamental rights. As the Court held that only the amendments already made would continue to be valid and that the Parliament has no power to amend the Constitution as to take away or abridge fundamental rights, it follows that no further amendment of the Schedule would be possible by including therein Acts which affect fundamental right, for, the inclusion of such new Acts in the said Schedule would be the amendment of the Schedule of the Constitution, and therefore of the Constitution and as the inclusion of such Acts would have the effect of abridging the fundamental rights of the people affected by such Acts, the said inclusion would be void. What the amendment cannot do directly, it cannot obviously do indirectly.

A word about the Constitutional Amendment on the anvil. By this Amendment, the Parliament seeks to amend Article 368 so as to confer a power on the Parliament to amend the Constitution so as to take away or abridge by a special majority the fundamental rights of the people. The Select Committee, I understand, suggested that such an amendment requires the concurrence of half the States and also that Article 13 should be so amended as to make it clear that amendment is not law within the meaning of that expression in Article 13. The appreciate the effect of this amendment if carried, one should bear in mind that in modern Democracy the Executive has become all powerful for it controls the majority in the Parliament and it could push through any bill it chooses to introduce therein. A power confined on Parliament is in fact a power given to executive. That apart, unlike advanced democratic countries, in India the majority of the people are illiterate and therefore there is no real public opinion, to control the party in power. In the premises if the amendment is carried out, it means that in future any powerful Prime Minister with a requisite majority at his command can take away all the fundamental rights. History records many

instances where a powerful leader used Parliaments to destroy the Constitution itself. That apart, the proposed amendment would also be void. It would be in defiance of the Supreme Court judgement. While the Supreme Court held that Parliament cannot amend the Constitution so as to take away or abridge the fundamental rights, the amendment confers the power on the Parliament to do so. The Supreme Court says that the Parliament cannot. Parliament says it can. That will be the beginning to the end of rule of law in our country. Another subtlety suggested is that the Supreme Court has only said that the Parliament cannot by amendment take away or abridge fundamental rights, but it has not said that it cannot amend Article 368 conferring such power on the Parliament, and therefore nothing precludes the Parliament from doing so. But what the Parliament cannot do by one step, it cannot do by two steps. It cannot do indirectly what it cannot do directly. While the Supreme Court preserves the fundamental right from Parliament's interference, the amendment proposes to place it at the mercy of the transitory and changing majority in the Parliament. That apart, I have already indicated earlier that the amending power is not a constituent power and therefore the Parliament in exercise of its amending power cannot enlarge the scope of the ameding power into a constituent power.

To conclude, our Constitution had originally placed the property rights in the correct perspective. While the individual right was safeguarded, the State was given ample power to regulate the exercise of it in public interest through the rule of law. The amendments not only enormously increased the State's Power but also gave a totalitarian slant to the exercise of the said power. But the existence of an arbitrary power need not necessarily compel its exercise, though its temptation cannot be resisted by weak minds. The tragedy in India is the uninformed repetition of foreign slogans.

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 as slogans to support the totalitarian exploitation of the masses. Sociological investigation is a necessity so that constant dialogue may be maintained between ideology and action. The Constitutional pragmatism is the only way to reach welfarism.

I hope and trust that those who happen to be in power now or those who come into power hereafter will help to evolve a just society where a right balance will be maintained between the right to property and social justice.

A. D. Shroff
(1899-1965)
Champion; of Free Enterprise

A. D. Shroff was a champion of free enterprise and a great leader of business and industry, and an economist whose predictions have proved right over the years.

He was associated with promotion of planning in the country even before Independence. When Netaji Subhas Chandra Bose was the President of the Indian National Congress, in 1938 he appointed a National Planning Committee with Pandit Jawaharlal Nehru as the Chairman. Mr. Shroff was one of the members of the Committee.

After graduating from Sydenham College in Bombay and the London School of Economics, Mr. Shroff started as an apprentice at the Chase Bank in London. On return to India, he joined a well-known firm of sharebrokers and was also teaching advanced banking at the Sydenham College of Commerce & Economics. For over forty years, he was associated with a number of industrial and commercial enterprises, many of which owe their origin and development to him. He was a Director of leading concerns like Tatas, and his range of interests covered insurance, radio, investment, shipping, banking, and a number of other industries.

He was one of the eight authors of the well-known Bombay Plan presented to the country by private enterprise in 1944, He was also an unofficial delegate at the Bretton Woods Conference in 1944 which set up the World Bank and the International Monetary Fund.

He served on a number of committees including the well-known Shroff Committee on Finance for the Private Sector set up by the Reserve Bank of India.

In 1956, he started the Forum of Free Enterprise which has stimulated public thinking in the country on free enterprise and its close relationship with the democratic way of life. It is a tribute to Mr. Shroff's vision, courage and leadership that in spite of many adversities, the Forum of Free Enterprise has established itself as a national institution within a short time.

Tree Enterprise was born with man and shall survive as long as man survives."

—A. D. Shroff
(1899-1965)
Founder-President.
Forum of *Free Enterprise.*

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