WHOSE LAND IS THIS

By

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Part – I

Introduction

Traditionally the land within the boundaries of a village including the waste land belonged to that village and to the villagers. When the land was brought under cultivation, the Raja claimed the Raja Bhogam. If the Raja wanted to gift the land to a person of his choice he used to purchase it and made a gift of it.

When the Mohammaden Government succeeded the Hindu Government it held that the waste lands in the conquered countries were always held to be the property of the State.

There were different types of Tenures in different parts of the Country. "Tenure means the holding of land on certain terms and conditions, in other words it refers to the manner in which law allows a person to hold land. The term estate has reference to the size in the sense of duration of landowners interest"[1]. In Latin Estate means status.

The Mohammaden Rulers brought about the system of Jamindari. In the eyes of the Ruler or the Government he is no more than a Collector of Revenue. He has no proprietory right in the land.

When the Northern Circars came into the domain of the East India Company they constituted the system of collection of Revenue through these Zamindars. The condition of East India Company in 1772 was such that the revenue became a financial necessity. The Zamindars were assessed to a 2/3rd of the collection of Revenue. Due to the policy of Cornwallis, the then Governor General of India, the permanent settlement was introduced in 1802. Permanent Settlement is meant, the Settlement in perpetuity of the Government demands with an intermediate class of persons known as Zamindars. This Regulation came into force on 13.7.1802. It declared the proprietory right in the lands to be vested in individual persons and for defining the rights of such persons. Section 14 made it obligatory on the Zamindar to enter into agreements with the ryots and grant them pattas. It was specifically stated that on acknowledging the proprietary rights of the Zamindars or other landholders, the rights of the ryots were not affected. The ryots though had no right to the land had a permanent right of occupancy, as long as they cultivated and gave the Zamindars the accustomed share of the produce. In 5 M.H.C.R. 120 it was held that the tenancy of a pattadar was not one from year to year but so long as he paid the rent. In 1802 several Regulations were passed. They were all consolidated in 1865. This Regulation gave a right to eject a ryot under certain circumstances.

The Government never claimed a right to the possession of the cultivated lands. Its assignee the Zamindar could never claim that right. It was therefore held that the presumption was that the ryot in a Zamindary was entitled to the right of occupancy and it was for the Zamindar to establish the circumstances giving him the right to eject. This principle was followed in several cases[2].

1. Williams Principles of the Law of Real property.

2. ILR 4 Mad. 174, *Srinivasa Chetty v. Manjunatha Chetty;* ILR 16 Mad. 271, *Mahalaxmamma v. Ramajogaya*; ILR 20 Mad. 299 *Venkatanarasimha v. Danda Mooda Kotayya*

Hence the right of occupancy was based on mere presumption and is liable to be rebutted. The Zamindars then devised a method of printing pattas with a clause that they were at liberty to eject them at their pleasure. It was realized that the claim of the ryots for occupancy should not depend upon mere presumption and should be given legislative basis. After the decision of the Privy Council in ILR 41 Madras 1012 *Suryanarayana v. Pottanna*. *Ramesan*, J., pointed out in ILR 44 Madras 588 – *Muthugoundan v. Perumal Iyer* that the presumption had considerably weakened. Madras Estates Land Act 1908 defined the substantive rights and liabilities of landholders and ryots. The ryots title to the land arose from occupation and the Government or its assignee, the Zamindar is entitled only to share the produce and not to the possession of the cultivated lands.

Waste Lands

What was the right of the Sovereign over the waste lands or unappropriated lands *Sunder Raja Iyengar* in his "Land Tenures in the Madras Presidency" states that there were two schools, one school affirms that it belonged to the State, while the other school maintains that it belonged to the subject individually or as a member of joint family or a village community. These waste lands were included within the boundaries of one village or the other. The learned author points out that in the early days no Hindu Sovereign asserted any proprietary right to waste. It was pointed out that when the King wanted to bestow waste land within the limits of the village he purchased it from the mirasidars. A similar practice was spoken to by the Inam Commissioner[3]. *Baden Powell* in his work "The land System in British India" notes that the Raja had his own private lands but as a Ruler of the whole country his right is represented not by a claim to general soil ownership but by the Ruler's right to the Revenue, Taxes, Cesses and the power of making grants of the waste. The system then prevailing was, the village Sabhas or the Assemblies of a particular village looked after the need of the villagers, allotted house sites as and when the occasion arose (Dr. *Hultzsch's* South India inscriptions)[4]. With the advent of Mohammedan Rule, the Ruler asserted that the waste lands in the conquered countries were always held to be the property of the State"[5]. Sir *Thomas Munro* insisted on the adoption of the Principle that the land belonged to the Sovereign.

For by English Law the king is the Supreme Owner, or Lord Paramount, of every parcel of land in the realm and all land is the Holden of Lord other, and either immediately or mediately of the King.

Lands were not bestowed as absolute gifts, but were granted on the condition of what is known as the factual system of Land holding…the grantees were regarded as holding the lands of the King as Lord, or the obligation of fidelity and service to him, in which, if they failed the lands would be forfeited and the King might resume them as his own, Land then is the object of Tenure. He who has land is said to hold it rather than own it. Mans land are often referred to as his estate[6]. In spite of the mass of Legislation passed in England the concept continues. "The paradox of the modern English Law…the Constitution of England has, whilst preserving monarchical forms became a democracy, but the land law of England remains the land law appropriate to an aristocratic state. This was what *Dicey* said in 1905[7]. In the then Province of Madras Land Encroachment Act was enacted Section 2 of the said Act states that all land belongs to the State; except that occupied legally. There

3. *Seshachalam Chetty v. Chinnasam*, ILR 40 Mad. 410

4. Quoted in ILR 40 Mad Page 456

5. ILR 28 Madras 257 *Secretary of State v. M. Krishnayya*.; ILR 3 Bombay 331 at 583, 584, 739 *Bhaskarappa v. The Collector of North Canara*

6. *Withaun* – Principles of the law of real property.

7. *A.V. Dicey* The Paradex of Land Law 21 LQR 221.

is a similar provision in the (T.A.) Land Revenue Act 1317 F (Section 24)

India now is an independent nation. Nation is synonymous with people. The term State imports the same concept "A State is a body politic, or society of men, United together for the purpose of promoting their natural safety and advantage by the joint efforts of their combined strength"[8]. The land in the possession of the State belongs to the people. The State holds the land as a Trustee. The beneficiaries are the people. Here the statement is not in terms of "The public Trust Doctrine" developed by Professor *Sax*[9], but the State as a trustee holding the waste lands for the benefit of the people. The beneficiaries, the citizens, have a right to demand distribution of the land. Does the Indian Constitution permit this. I think it does. It is a legally enforceable right will the Courts cross its boundaries if they enforce a provision of the Constitution to its conceptual boundaries. I think not. The richness and durability of our constitutional Tradition depends in great measure on the role of Supreme Court of India and the High Courts.

Citizenship

In "The changing Constitution", edited by *Jefferey Jowell* and *Dawn Oliver*, *Dawn Oliver* in "what is happening to Relationships between the individual and the State." States that the individual enjoys Civil, Political and Social rights which may be regarded as amounting to a Citizenship of entitlement." He states that the idea was drawn from the classical Graeco-Roman tradition that Citizenship involved participation in the political process and the acceptance of responsibilities to the community by its members, Second the notion of citizenship is associated with "Civic republicanism" that is duty of loyalty to the State, responsibility and respect for political and social procedural values, third must assume duties to put the general interest before those of individual, the fourth as an individual possessing entitlements to basic benefits from the State in addition to civil and political rights. *Dawn Oliver* quotes from *T.H. Marshall* from his lectures on Citizenship and social class, that these rights – (Social rights or entitlements) – to welfare benefit payments, to access to housing and free health care and education……these entitlement to Civil, Political and Social rights produce a Status of true Citizenship – a Citizenship of entitlements – they were not simply autonomous individuals. Participation necessitated a decent standard of living and freedom from destitution.

Physical survival is certainly as indispensable to the enjoyment of other freedoms as are speech and voting one must be able to express oneself to protest the violation other right, but to express oneself one needs at least a decent level of nourishment, shelter, clothing, medical care and education. To have these things one needs either employment or income support. Too easily Government purchases the silent acquiescence of the deprived in their own constitutional undoing …..... people bowed under the weight of poverty are unlikely to stand up for their constitutional rights ……[10]. Entitlement is the right against the State, the eligibility arises out of legal status, the legal status is Citizenship……. "The individual constitutional right to a decent level of affirmative governmental protection in meeting the basic human needs of physical survival and security, health, housing, work and schooling"[11].

"There is strong linkage between ownership of land and persons status in social system"[12].

8. *TM Cooley* A Treatise on Constitutional Limitations.

9. Article entitled "Public Trust Doctrine in Natural Resources Law. Effective Judicial Intervention" Vol 68 Michigan Law Review Part – I Page 473 referred to in 1997 (1) SCC 388

10-11. American Constitution Law, by *Lawrence*, *H.R. Tribe.*

12. 1982 (1) SCC 39 at 66 Para 4 *Waman Rao*

"Without some property or capacity for acquiring property there can be no individual liberty and without some liberty there can be no proper development of character" *Mathew* J. The learned Judges quotes from Pope Paul VI[13].

"To quote *St. Ambrose* …..the world is given to all, not only to the rich…… That is private property does not constitute for anyone an absolute and unconditional right. No one is justified in keeping for his exclusive use what he does not need, when others lack necessities. In a word, according to the traditional doctrine, as found in the fathers of the Church and the great theologians, the right to property must never be exercised to the detriment of the common good.

"God has intended the earth and all that it contains for the use of all men and all peoples. Hence, justice accompanied by Charity, must so regulate the distribution of created goods that they are actually available to all in an equitable measure". Moreover all have the right to possess a share of earthly goods sufficient for themselves and their families."

Pope Paul speaks of "Justice accompanied by charity". It is not charity today but it is a constitutional mandate "Welfare by meeting the basic demands of subsistence can help to bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance then is not a mere charity but a means to" promote the general welfare, and secure the Blessings of liberty to ourselves and our posterity"[14]. "Failure by the State to honour the entitlement might sound instead legal obligation, Justifying acts of protest and civil disobedience and perhaps self-help appropriation without demanding Judicial micromanagement of the political branches"[15]. "Confiscation and revolutionary violence might no doubt get rid of all technical problems which hamper the action of intelligent reformers. Robbery is an easy though unsatisfactory operation. But at no time for may centuries have (Englishmen) been prepared to effect even beneficial changes at the cost of obvious injustice to innocent person[16]" (read Indians for Englishmen)

After seven decades Justice *Krishna Iyer* had to say "we have divagated to drive home the pertinence and power of poverty to change our social order through law, and the necessity of the constitutional Courts to appreciate this fundamental logos voiding any law" and continued to say, "Lofty Constitutional consideration" should not be "reduced to hollow concepts, tea cup debates and impotent ideas which debase modern jurisprudence and are intellectually subversive" "The great problems are in the Street". The dogmas of the quiet past are no longer adequate to stormy present"[17].

"Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up, but injustice makes us want to pull things dawn"[18]. To quote Tribe again, "…a governmental omission can be as deadly as the most pointed governmental acts"[19].

What did the State do to assuage the feeling of injustice and the obligation to provide welfare measures and implement these measures meaningfully.

13. *M. Kesavana Bharati v. Sate of Kerala*, 1973 (4) SCC 225 at 884 and Page 885 Para 1734.
14. *Brennan*, J., in *Jack R Goldberg etc v. John Kelly*, 25 Led (2) 287 +397 US 254
15. Land Use Policy Yale Law Journal Vol. 116 – 3
16. *A.V. Dicey* The Paradox of Law Lewd (1905)
17. *State of Karnataka v. Ranganatha Reddy*, 1977 (4) SCC 471 at 500
18. Justice *Brennan* in "Legal Aid and Legal education" Quoted in *M.H. Hosket v. State of Maharashtra*, 1979 (1) SCR 192 at 204.
19. *Lawrence H Tribe* American Constitutional Law Page 919

Part – II

The Fundamental Rights and the Directive Principles

"What is a Constitution, and what are its objects ? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient State Government, it is not the cause, but the consequence, of personal and political freedom; it grants no rights to the people, but it is the creature of their power the instrument of their convenience. Designed for their protection in the enjoyment of their rights and powers which they possessed before the Constitution was made, it is but the framework of the political Government and necessarily based upon the pre-existing condition of law, rights, habits and mode of thought. There is nothing primitive in it; it is all derived from a known source. It presupposes an organized society, law, order, property, personal freedom, a love for political liberty, and enough of cultivated intelligence to know how to guard it against the encroachments of tyranny, A written Constitution is in every instance a limitation upon the powers of Government in the hands of agents; for there never was a written republican Constitution which delegated to functionaries all the latent powers which lie dormant in every nation and are boundless in extent and incapable of definition[20].

One cannot forget *Lock* and what he said in the Social contract. "The individuals by agreement entered into, to form a collective society to protect their own interests and objects. The collectivity emerged into a political society and Government".

The Preamble of the Constitution of India says "we the people of India resolved to constitute India into a socialist secular democratic Republic……..and gave to ourselves this Constitution."

Whoever is in Parliament or the Assemblies are the peoples' agents. It is the people who put them in the Parliament or the Assemblies of the States. Persons in power as Ministers, Chief Ministers or Prime Ministers are the peoples' agents.

The wealth of the Nation is the peoples' wealth. The persons in power, controlling or administering the Nation are acting on behalf of the people.

"The Constitution proceeds from the whole people; the people are the original source of all political authority exercised under it;……" "The Government (of the Union) is emphatically and truly a Government of the people. In the form and in substance it emanates from them. Its powers are granted by them and are to be exercised directly on them, and for their benefit….. It is the Government of all. Its powers are delegated by all, it represents all and acts for all[21]. *Bhagwati*, J., as he then was in unmistakable terms said in the Minerva Mills case that non-compliance with the Directive Principles… .would constitute breach of faith with the people who imposed the constitutional obligation on the State…..[22].

It is not necessary to go into the question whether the preamble is part of the Constitution or outside it and the Constitution was framed on the basis of the power conferred by the people directly on the persons who framed the Constitution. Whether by amendment of the PREAMBLE, you are imputing "to the dead and gone Legislators" a particular intention. Whether it was correct to amend the Preamble by adding words "Socialist" and "Secular" need not be considered in this article. One should accept

20. Cooley Constitutional Limitations – (quotes with approval the arguments of *Bates* in *Hamilton v. S.L. Low's* County Court) Page 37.

21. *Charles A Bread* An Economic Interpretations of the Constitution of the United States Pages 10 and 11.

22. 1980 (3) SCC 625 at 708 page 111

that the powers conferred on the State are to be exercised for the benefit of the people.

Directive Principles are not Paracitic Articles. They stand independently. The sounds of these vibrate the "great silences" of[23], Article 21. It depends on the note you choose.

In fact the Directive Principles constitute the "Conscience" of the Constitution. The purpose of the Directive Principles is to fix certain social and economic goals by bringing about a non violent social revolution. The Directive Principles form the fundamental feature and social conscience of the Constitution and the Constitution enjoins upon the State to implement these Directive Principles[24].

The dynamic provisions of Directive Principles fertilise the static provisions of the fundamental rights. The Directive Principles impose an obligation on the State to take a positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic Justice to all, so that individual liberty will become a cherished value and the dignity of the individual a living reality not only for a few privileged persons but for the entire people of the country[25] "…….in a Welfare State envisioned in the Directive Principles of State Policy, the basic perquisites are that every one is entitled to minimum material well being such as food, clothing and decent housing……."[26], "……it must be recognised that we are becoming a society based upon relationship and status, status deriving primarily from source of livelihood. …..The concept of right is most urgently needed with respect to benefits like unemployment compensation, public assistance and old age insurance. These benefits are based upon a recognition that misfortune and deprivation are often caused by forces far beyond the control of the individual…….the aim of these benefits is to preserve the self-sufficiency of the individual, to rehabilitate him where necessary and to allow him to be a valuable member of a family and community, in theory they represent part of the individual's share in the common wealth only by making such benefits into rights can the Welfare State achieve its goal of providing a secure minimum basis for individual well-being and dignity in a society where each man cannot be wholly the master of his own destiny"[27].

The methology of enforcement of these principles makes no difference. The economic empowerment is a must. It is a basic human right. The Constitution "directs the State to administer what may be termed distributive justice. The concept of distributive justice in the sphere of Law making connotes, *inter alia* the removal of economic inequalities and rectifying the injustice……. Law should be used as an instrument of distributive justice to achieve a fair divisor of wealth among the members of the society based upon the Principle. "From each according to his capacity, to each according to his needs…."[28].

In enforcing the law, "the Judges must look beyond the narrow field of past precedents, though this still leaves open the question, in which direction they must cast their gaze. The Judges are to base their decision on the opinions of men of the world, as distinguished from opinions based on legal learning. In other words, the Judges will have to look beyond the Jurisprudence and that in so doing, they must consult not their own personal standards or predilections but those of the dominant opinion at a given

23. Justice *Jackson's* Expression in 336 US 525

24. 1978 (2) SCC 1 *Pathumma v. State of Kerala*, 1962 (2) SCR 148, *Jyothi Prasad v. Administrator for U O I* and 1977 (2) SCC 310 *State of Kerala v. N.M. Thomas*

25. 1980 (3) SCC 625 at 705 (Per *Bhgawatis*) *Minerva Mills v. Union of India.*

26. 1995 Supp. (1) SCC 596 at 626 *Jilubhai Nanbhai Khavan v. State of Gujarat.*

27. The New Property *Charles A. Reich* 73 Yale Law Journal 733 at 785, 786

28. *Lingappa Pochenna Appelwar v. State of Maharashtra and others*, 1985 (1) SCC 479 at 493.

moment or what has been termed customary morality. The Judges must consider the social consequences of the rule propounded especially in the light of the factual evidence as to its probable results[29].

Part – III

The Legislative Action

Dicey refers to several enactments passed between 1830 and 1905 and says "From the immense amount of this legislative action, it is natural to suppose that something like a revolution in the whole system of land Tenure has been effected. Nor can one doubt that if *Elden* or his contemporaries could be brought again to life, then first impression would be that the triumph of liberalism of Benthamism, or as they would express it, Jacobinism, was complete, and that the old English Land Law as they knew it was a thing of the past.

"We all know that this impression would be erroneous. In truth, explain the matter as you will, the fundamentals of land law remains unchanged.

The magic of property turns sand into gold….

But the magic of property cannot work its miracles in the absence of individual ownership. The French peasant who devotes body and soul to the cultivation of small plot of ground is the worshipper of his land, because his land is his own."[29-A].

There are several enactments abolishing the age old Zamindari system and converting the land to a ryotwari system, prescribing a ceiling on holding of land and acquiring the excess land for assignment. How far the Government succeeded depends on the conscious effort and willingness to implement the laws enacted and bring about legislation to implement the Directive Principles.

The policy of the State should be directed to implement the Directive Principles. It may be by legislation, by schemes or in any other way. Part IV uses the expression, like policy, schemes, effective provision, economic organization. It, the methodology, depends on the wisdom of the executive Government.

Estates Abolition Act 26/48, Inams Abolition Act 37/56, Muttas Abolitions and Conversion into Ryotwari Act 2/69, Abolition of Jagirs Regulation 1359 F, Abolition of Inams Act 1955, AP occupants Homestead (conferment of ownership) Act 1976, and The Board standing order for assignment of land for cultivation and House sites Rules framed under A.P. (Telangana Area) Land Revenue Act for assignment of land for agriculture and for house sites and also under the Land Reforms (Ceiling on Agricultural Holdings) Act 1973.

When the excess land (above the ceiling limit) is determined the excess land vests in the Government free from all encumbrances. The land becomes the Government land. This land which vests in the Government is liable to be distributed as house sites to agricultural labourers *etc.*, and to the weaker sections of the society.

Robert Alexy stated that "All social constitutional rights are extremely costly. In satisfying social constitutional rights, the State can only distribute what it has taken from others, perhaps in the form of Income Tax"[30].

The statement that the State can distribute only by taking from others is not correct. Government is the major source of wealth. Government is in possession of lakhs and lakhs of acres of public land (waste land) most of the land is unutilized. The land can

29. *Percy H Winfield* Public Policy in English Common Law quoted by *Mathew,* J., in 1974 (2) SCC 472 *Muralidhar Agarwal v. State of U.P.*

29-A. *A.V. Dicey* The Paradox of Land Law

30. The theory of Constitutional rights Translated by Julian Rivers

be distributed. It can devise a policy and pass a legislation for distributing the land. The legislation naturally will have to prescribe the eligibility criteria.

In the Statement of Objects and Reasons of the Andhra Pradesh assigned lands (Prohibition of Transfers) Act 1977 it is stated that the Government have launched with effect from 1969 a special crash programme for assignment of Government waste lands to the landless poor persons. The rules regarding assignment of land and conditions incorporated in the "D" form patta prohibit alienation of such lands and provide for resumption *etc.* It also states that it is a protective legislation.

For assigning waste land to the poor persons, Board standing orders prescribe conditions of eligibility and the methodology for assignment.

Even now in villages land is set apart as gramanttam or village site. This land is at the disposal of the Government. The land which is not required for the common use of the villages is to be assigned. The Board Proceedings state that when the existing village site is not sufficient for the needs of the villagers or register holders, agricultural labourers and village servants about to become residents of the village. Collectors may extend the site by transfer of assessed lands to poramboke or by addition of other descriptions of available poramboke. The Tahsildars are authorized to do this except in the case of assessed waste which is not at the disposal of the Government and which must be acquired under the Land Acquisition Act.

The Tahsildar can assign house sites upto an extent of 10 cents for building purposes. Board standing orders 15 and 21 deal with assignment of land both for agricultural purposes and for house sites. When the Government assigns the land, it is not assigned for the privilege of use but as an exclusive possession of space. The land is his and he is the full owner of the land assigned to him. The assignee acquires the rights of ownership and the Government cannot resume the land without paying full compensation. This point was fully debated and was upheld by a seven Judge Bench of the High Court of Andhra Pradesh. This judgment is reported in 2004 (2) ALT 546, *LAO v. Mekala Pandu*. This is a landmark case. "it is clear, the Justices alter the puzzle itself and create law. Thus while Judicial legitimacy requires faithful adherence to precedent legal development turns on creative acts. As a result we call Judges who follow precedent legitimate but those who successfully break from it great[31]"

The Government should adopt the policy of assigning house sites to the eligible persons. When assigning house sites it should carry a condition that the assignee should reside in the assigned land. The assignment can be only in the suburbs. The suburbs should be developed. The cost of urban life is too much of a burden on the poor. To some extent the cities will be less crowded.

There is no legislation on the subject of assignment of lands for the poor persons as a welfare measure. It is time the State enacts a law prescribing the criteria for allotment of land for the purpose of agriculture and for house sites. This law must be capable of enforcing it in a Court of law. The Protection of Human Rights Act 1993 defines Human Rights – The rights relating to life, liberty, equality and dignity of individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India. *Michel*, J., Perry Points out the American experience and states "our collective commitment to human rights of the Socio-economic sort is doubtless thought by many, here and abroad, to the suspect – and perhaps with good reason. But surely the situation in America with respect to human rights of the political and civil sort is exemplary.

31. Agon to Agora – Creative misreading in the first amendment Tradition. David Cole 95 Yale Law Journal 857

Other Societies committed to improving their own human rights situations – as many are, now that the issue of human rights is ascendant throughout the world – must not overlook, or discount, this crucial feature of the American experience. The existence and contents of human rights is in significant measure as this book demonstrated, a function of Policy making Constitutional Policy not by an electorally accountable institution, but by one that is electorally unaccountable and otherwise politically independent – the federal judiciary, in particular the Supreme Court. There is an important lesson in that fact for other societies and learning it can help them deal more effectively with the challenge of elaborating and protecting human rights among their own members. Surely one must wonder what the American situation with respect to human rights would be like today were it not for non interpretative judicial review – a practice that for so long has been suspect legitimacy[32].

If the State does not legislate on this subject, the Courts are not powerless *W. Friedman* in his classic 'Legal Theory' deals with a situation of legislative inaction. The learned author states

"The dilemma of the Courts in deciding whether to reform the law, in the face of legislative inaction, has recently been succinctly formulated by a distinguished American Judge."

"It is now a commonplace that Courts, not only of common law jurisdiction but also those which have codified statutory law as their base, participate in the law-making process. The commonplace, for which the Holmeses and the Cardozos had to blaze a trial in the judicial realm, assumes the rightness of Courts in making interstitial law, filling gaps in the statutory and decisional rules, and at a snail like pace giving some forward movement to the developing law. Any law creation more drastic than this is often said and thought to be an invalid encroachment on the legislative branch……..

It is the failure or inability of the Legislature to act where there is nevertheless, a desperate need for creative law making. Whether it be deadlock or a refusal to face upto legislative or political hazards, there is often a deferral or refusal to act. Sometimes the reason is strongly based on the desire to permit the difficulties of the problem to be resolved judicially by an evolutionary case by case approach in the decisional process, at least for a time, until the question is ripe for legislative handing. Sometimes the reason is only the view that the common law solution is best because of nice technical distinctions and because the need for harmony with other rules of law is deemed paramount……..These are some of the reasons which make for a strong law making function in the Courts, far beyond the interstitial and the gap filling. These reasons, however, do not mean that it is all to the good and that Courts are best equipped to perform the function. On the contrary, there are grave limiting factors; the limitations of Judicial procedure, political dependence upon other branches of Government, and the isolated nature of the judicial office[33]"

"It is a difficult question for a Court to decide whether, in the face of continued legislative inaction, it should intervene to change a manifestly unjust and outdated legal principles, sometimes at the risk of stinging the Legislator into retaliatory action, or remain passive. Certainly the answer cannot be given in terms of subject-matter. The long overdue reform of the principles of liability of occupiers to visitors could easily have been carried out by the Courts, by interpretations far less sweeping than those the House of

32. *Michael J Perry* The Constitution, the Courts, And Human Rights Page 164.

33. *Charles D. Breitel* The Law Makers – The Twenty Second Annual Benjamin N. Cardozo Lecture 38-39 (1965) quoted by *Friedman* in his "Legal Theory" Pages 500-501

Lords used in case like *Bonsor v. Musicians' Union or Rookes v. Barnard.* In the end the law was changed by legislative reform. Such questions as the joint liability of tortfeasors, the immunity of public authorities (in the United States) from liability for negligence, or the rights of a married woman to occupancy of a matrimonial home could be and have been the subject of judicial as well as legislative reforms[34].

It is time the State moves in a positive direction and bring about a legislation for assigning land for the purpose of agriculture and for residence (House sites) conferring rights of full ownership.

PORTRAYAL OF INSURANCE POLICY AS PROPERTY

By

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Property is anything that can be owned. It is divided into reality and personality or chattels. Reality consists of all free hold interest in land. Personality is sub-divided into a) Chattels real, *i.e.*, Leasehold interest in land and b) Chattels Personal. These are further sub-divided between (i) Chooses in possession *i.e.*, tangible, movable objects such as a car, Wrist Watch or the family pet. It is possible to enjoy a right over such objects by physical possession (ii) Chooses in action, *i.e.*, rights such as debts, patents and copyrights which may only be enforced or protected by bringing legal action. The holder of a life policy can deal with it like any other property by way of sale, mortgage or create trust out of it or bequeath it. In *Grigsby v. Russel,* 223 U.S. 149 (1911) Justice *Holmes* observed that "life insurance has become in our day one of the best recognized forms of investment and so far as reasonable safety permits it is desirable to obtain for life policies, the ordinary characteristic of property and to deny the right to sell is to diminish the value of the contract in the owners hands".

Assignment of Life Policies :—An assignment is nothing but the legal transfer of one person's interest in an insurance policy to another person. Indian Law as to assignment of the life policies prior to the Insurance Act, 1938, was typified in Sections 130 to 135 of the Transfer of Property Act. The transfer of an actionable claim could be affected only by an instrument in writing signed by the assignor or by his duly authorized agent and ergo all rights and remedies of the assignor vests in the assignee. The Insurance Act 1938 which came into force on 1st July, 1939 by Section 38 laid down an exclusive method of effecting assignment of life policies. The assignment of life policies is now governed by Section 38 of the Insurance Act and not by the Transfer of Property Act which was amended to that effect in 1938. Section 38(1) of the Insurance Act dogmatizes that any kind of transfer or assignment of a life policy by mere delivery of possession as imparted in the English policies of Insurance Act 1867. A life policy can be transferred to anyone who is not a person legally precluded to be a transferee. It is therefore inapt that the assignee has no insurable interest in the life assured or privity of contract as held in *M. Farlane v. Royal London Friendly Society,* (1986) 2 TIR 755. Section 2(2) of the Insurance Act as amended by the Act 6 of 1946, defines a

34. *W. Friedman* "Legal Theory" Page 501