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THE LARGE CORPORATION AS AN INSTITUTION AND SOME LEGAL RESULTS.

Introduction:

The Corporation as a Quasi-Political Institution.

In the present context of discussion, the conception of a large corporation as a quasi-political organism comes as a shock. Too much ink has been spilled on the subject of private enterprise--a description wholly apt when it began to be used in economic and legal thinking a century and a half ago. We have come to believe, not only that this is the fact, but that it is the only possible fact.

Yet, as common law lawyers, we know that any sort of corporation, and certainly the large corporation, were quasi-governmental organisms almost from the beginning of their history in Anglo-American law. They were devices by which the British king-state got certain functions attended to. They represented, quite frankly, the delegation of certain privileges and powers to a group of individuals constituted into a corporate body. The device, where successful, discharged functions, political as well as economic. Depending on the ensuing development, the historical result frequently was that the corporation at long last became in title as well as in fact an arm of the government -- for example, the British East India Company, and the colonial corporations which settled much of the Atlantic Coast. The thesis here presented is that in the American scene a situation is slowly growing up mid-way between frankly governmental corporations of the eighteenth century and the small private organisms using the corporate form in the mid-

nineteenth century. What the development will be from here on, of course, lies in the lap of destiny and no prophecy is here risked.

The argument for the institutional conception of the large corporation has been stated elsewhere and may merely be referred to and reviewed briefly here. Step by step, driven by forces of modern technology, the advantages of mass market and the ability of large organisms to generate their own capital, we have reached a kind of balance in economic organization. 45% of our manufacturing output is controlled by about 135 corporations--a figure both absolute and relative, without parallel in history -- more than a majority of all industry operations in a system of concentrates--that is, in each industry two, three, four or at most five corporations control well over half the assets and output, the balance being divided among a considerable number of relatively small producers. The concentrate system is at its most powerful in the basic industries: the great sources of energy (including, of course, oil), the handling of transport (including, of course, the production of motor cars), the production of prime raw materials such as steel, rubber, aluminum; and so on.

Our grandfathers were afraid of bigness. Our fathers came to tolerate it, though with occasional growls. Our generation relies on it, and in certain respects, insists on it. The system of relative bigness, and of concentration of production within an industry (which shall not be monopoly but shall be sufficient to obtain many of the advantages of monopoly) seems to be the mid-twentieth century American answer to the problem of industrial organization. The corporation, both as a legal entity and as an actual organization, has been the instrument.

Simultaneously the combined fact of acceptance, bigness and community reliance has brought another phenomenon. Between 1910 and 1945 practically every government in the world has voluntarily or involuntarily assumed a high degree of responsibility for the economic

functioning and conditions of its people. This has been indeed the cardinal fact of the twentieth century revolutionary period. The phenomenon has occasioned many attacks from those who dislike it. But it is clear that the governments thus acting were not driven entirely by the intrigues and scheming or the strange ideas of small bands of evil men. The state entered the picture sometimes because it wished to, but chiefly because it had to: whole populations insisted, whenever economic conditions were out of balance, that some force should step in to produce orderly conditions. The only available force was that of government--that is to say, the state. The mildest intervention among the great powers of the Western world has been that of the United States; the most extreme intervention, of course, has been that of the Communist government in the Soviet Union. Apparently the revolution towards some viable method of keeping a degree of order, and distributing a degress of functional prosperity, through political means, has been a world-wide revolution.

In the United States this has taken the form of a great series of national industrial plans. This came as a shock to the business community. "Planning" is a bad word. Unless, of course, it develops that the quarrel is not with "planning" but over a deeper question: by whom and under what criteria is the planning to be done? Every anti-trust case arises out of an attempt by private parties to do a piece of economic planning.

Factually, the most important areas in American industry are already covered by one or another form of national industrial plan, embodied in governmental arrangements of some kind. These plans are of all kinds, and in all stages of development. The historical theory in which these plans are rooted varies widely. The fact of their existence--the fact that great areas and those the most essential of American industry are now administered rather than left to the hazard of free market, seems, however, indisputable.

The transportation industry--railroads, buses, trucks--has long fallen under a variety of industrial plans worked out through the Interstate Commerce Commission. In even more developed form, this is the case in the newer industry of air transport. A quite different form of planning, accompanied by government financing, controls the American Merchant Marine. These might be dismissed as natural outgrowths of the ancient law of public utilities. But then we pass to the plan worked out for the oil industry--the combination of estimates of consumption by the Bureau of Mines, the machinery of the Interstate Oil Compact coordinating regulation so that oil shall leave the ground in approximate balance with consumption, the whole enforced by the Connolly "Hot Oil" Act. The arrangement would, of course, be unenforceable except for the existence of a concentrate of large corporations whose pipelines and refineries are operated in conformity with the plan, and so far as the writer can see, in full sympathy with it. Or, if you like, the present situation in the aluminum industry in which a monopoly--Aluminum Company of America--ceased to exist through the erection of two additional companies of comparable size due to administrative action in disposing of war plants at the close of World War II, and not inconsiderably assisted by government policy in purchasing aluminum for current military use and for stockpile. Or, again, the consistent and continuous planning in the air-craft construction industry--the enforcing element, of course, being the fact that government buys 90% of their product. Or again, the conscious erection of four or five large radio (and now television) broadcasting companies surrounded by smaller regional concentrates, as a result of the defined policy of the Federal Communications Commission. In this case planning was dictated by the fact that the spectrum of wave lengths is limited, and distribution of it has to be controlled somewhere. The newest and, as yet, least known plan of industrial development is developing

day-by-day as the Atomic Energy Commission parcels out to various large companies the commercial and peacetime development of atomic energy.

These are only a few illustrations. The number of industrial plans worked out under anti-trust decrees of one sort and another is large. Even steel--an industry which theoretically has no plan--reached a kind of balance after angry political debate in the years 1947 to 1949, the political thrust arising from the fact that the large steel companies had apparently underestimated the demand for steel, and the President of the United States in an inaugural address threatened direct governmental intervention in the industry unless solution was reached.

The interesting point in the present context is that in most of these situations (though not all) there was a concentrate of corporations dominant in the various industries; there was an impact on the community; out of the impact some sort of a plan was evolved. In one or two striking cases--aluminum and telecommunications--a concentrate did not exist but was consciously constructed.

I suggest, therefore, that we not only have the phenomenon of bigness and the phenomenon of concentration but also the phenomenon of both reaching some sort of adjustment with the modern state which relies upon the large corporation as a major source of supply, exercises a measure of control over it, and where necessary gives to it positive support through purchase, financing, allocation of some specific asset, or the like.

If the analysis is accurate, we are running full circle, though the language we are using hardly indicates the economic and juristic facts. We are using the corporations to accomplish certain functions. The state accepts this fact in greater or less degree and builds its policy upon it. Our corporations may no longer be exploring and settling colonies in America, India or the South Seas. They are exploring, settling and developing areas of enterprise in atomic fission,

aircraft construction, rural electrification and so forth. The corporations, in fact, if not in name, have once more become instruments of government policy and may fairly be accorded the dignity and the responsibility of institutions.

The Area of Implication.

Carefully considered, the foregoing subtends an enormous area of legal development for the next generation of lawyers. How wide and how deep this area is may be suggested by the list of topics which immediately suggests itself.

First, there are the relations with the community. In the case of corporations of national scope, or forming part of the national concentrate, the community is at least the entire nation. It may be much larger where the corporation has to include, as do for example the oil companies and the steel companies, great operations abroad as well as at home. These relations, as always in law, have to be dealt with both in adjective and in substantive mode, that is, lawyers have to think not only of the substantive criteria of action but also of the methods by which conformity to the criteria can properly be tested, and failure to conform to them be redressed. The political struggles of yesterday are the substantive legal criteria today. In 1890 the fact that transportation companies discriminated in their rates was a political issue. By 1910 the right of non-discriminatory rates and services had become a substantive rule for transportation companies in American law, enforceable in the federal courts. Seven years ago, as has been noted, the fact that steel production was not adequate to consumption became a major political issue. Politicians campaigned on the subject, and Mr. Fairless on behalf of the steel company himself took the stump in defense. There was no question as to the emerging substantive criterion: public opinion, making itself effective in politics, demanded that the steel industry produce an adequate supply of the product, and declined to entrust to the steel industry the job of allocating

the material if there was not enough to go around. In this case the criterion did not emerge as settled law only because the steel companies, by a tour de force which should command the respect of economic historians, increased the productive capacity of the industry in a period of about five years by about the amount which was then about the entire steel production of the Soviet Union--some thirty million tons. There the decision rests; but can there be any doubt that, should any shortage develop, the same demand would be made and that the state would step in were it not promptly met? The legality--the adjective side--of dealing with the substantive requirement has not been worked out; it remains a problem for the future.

So far as we can tell, the emerging substantive criteria in any concentrated industry are approximately these: There must be adequate supply. The price must be "acceptable"--such that the community does not consider that it is being exploited. The distribution of that supply must be non-discriminatory. The suppliers of the industry must have approximately equal chance at the business. More vaguely, there seems to be likewise a substantive requirement that no industry unreasonably hinder the advance of the technique or art, if indeed it is not obliged positively to foster that advance. Only to a limited degree may any unit in an industry keep to itself the more significant improvements in art or technique, despite the long and difficult history of patent law.

Other substantive criteria clearly will be emergent in time to come. Increasingly there is insistence that employment shall be reasonably stable, though this is still under debate and the method of working it out has not yet appeared.

Second, as to individuals. The large corporation, especially if member of a concentrate, and even more so if in an industry governed by a national plan, has apparently broad general

obligations towards the community aggregate. But insistence that the individual shall be protected within the complex is also palpable.

At the moment, the spectacular cases revolve around insistence that certain categories of individuals shall be denied employment: Communists, perhaps ex-Communists, possibly people who refuse to testify before Senate committees, individuals who have subscribed to Spanish War relief funds, and so forth. Corporations appear to be expected by some to make private legislation excluding certain categories of men as employables. In respect of any individual within the category, their personnel officers are supposed to enforce either by firing the individual involved, or blacklisting him so that he can not be employed there, or, for that matter, in any other similar concern. Possibly the current outcry for this sort of legislation may be justified; but no common law lawyer can watch it without wondering where it leads. If, for example, the theory that the Democratic Party was a conspiracy of treason were seriously adopted, private legislation by companies excluding from employment all save good Republicans would lead us squarely into a one party totalitarian state, deviation being punished by exclusion from economic life. Both Hitler and Mussolini did exactly this twenty years ago.

Somewhat the same problem arises with respect to customers though here no spectacular situation has arisen to call the theoretical problem into the foreground. It is, however, sufficiently plain that if the major oil companies set up a policy of refusing to sell gasoline to Negroes or to Orientals, they would be barred from the use of automobiles.

On the adjective side in either case the clear question is raised whether in the system as it presently exists a corporation may not deprive an individual of his life, liberty or property and whether its actions are not squarely regulated by the Fifth or Fourteenth Amendments to the American Constitution, as the case may be. For, if the corporation has become an institution,

relied upon and fostered by the state, and is to that limited extent instrumentality of the state, its action is in a material sense state action, federal or local. Where in the case of an employee or in the case of a customer, an action might be had against the corporation for violation of the individual's Constitutional rights, at this point the adjective law--the method of enforcing a right arising out of the Constitution--would crystallize.

Third, as to broad political development. If we are right in diagnosing the industrial arrangements made as planning, the question necessarily arises, planning for what? And by whom? And with what safeguards? That these plans have developed haphazardly will surprise no common law lawyer. It has been the precise genius of the common law that it met situation after situation and only paused to classify and sort out after a considerable body of experience. Yet it would seem we are approaching just that stage in the development of the corporation law. Any plan necessarily implies one or more major assumption. At their most elemental stage these might be merely that the community needs steel and will go on needing it for some time. At their most complex, these might be assumptions that the community not only needed steel but needed it distributed in various parts of the country and available with a minimum strain on prosperity, accompanied by a tolerable community life in each section affected. Or, perhaps, even more complex in the newer industries of telecommunication and television, the assumption must be not merely that the community demands the facility and that it shall be generally available but also that the facility shall satisfy an entire range of objections as diverse as the right of access to good music, the right of a politician to speak his piece, and the right of a local store to advertise its hardware or potatoes.

After pointing out the assumptions in any given case (always with the realization that new conditions will require their acceptance or revision), the problem then comes to be one of

assuring that the planning mechanism (or, if you choose, the handling of the situation so that the corporation conforms to or satisfies the community demands) shall be adequate to the situation, and shall not entail the risk of fine or imprisonment under the anti-trust laws. This means in practice setting up some sort of central mechanism where the demands can be recorded, the interests reconciled, and at least a modicum of ground rules laid down. There must also be some forum in which an industry, or a corporation, within an industry, or a customer, or a supplier, or perhaps the community itself, can appear and demand relief when the modalities used to effectuate any plan prove incomplete or oppressive.

Corporation Lawyers in a Revolutionary Age.

This brings us squarely to consideration of the role of corporation counsel as the capitalist revolution steadily proceeds.

Few of us whose practice extends over any considerable span of years would deny that the role has changed. Corporation questions which cross my desk in 1954 include a great range of problems unheard of in 1924 or in 1934. Where the writer has personal acquaintance with the heads of legal departments who are not in independent practice, the change seems even greater. Probably the Legal Department is bearing the brunt of change more than the independent counsel, for the precise reason that he is closer to the actual business and workings of the corporation than is the law firm retained from outside. The independent counsel does not usually have an office close to the President or to the other executive officers. As a rule the President does not drop in to his law office in odd minutes, asking a reaction to questions of policy which may or may not have legal implications. Neither does the general counsel attend staff meetings nor go to lunch with the executives in charge of personnel administration. He does not, in a word, get into the problem before its elements have hardened. The general counsel resolves

issues rather than frames them. But if we are right in our analysis, situations are emerging in which the business or executive decision today sets the stage for the legal problems of tomorrow. The head of a legal department rarely has the power to make decisions, but he has something more important: he has influence. Beyond anyone else in a corporation, he is supposed to have both the ability to think and the habit of thought.

In this respect, and reverting for a moment to twelfth and thirteenth century precedent, he has a position roughly parallel to the priest or clerk or resident chaplain who constituted "the conscience of the king" when the English law of equity was coming into existence. He is in a position to give advice even unsolicited. He does not have to be bound by the general counsel's usual rule that business decisions are for the client and legal decisions for the lawyer. He can suggest in certain sorts of questions--for example, when personnel policies or the plans for expansion cross his desk for comment. His comments can be formed by his realization that more is involved here than a mere mathematical calculation of possible profit or a cold reckoning of expediency. In some respects perhaps he can work out intra-corporate procedures which satisfy the requirements of due process of law.

He will also, probably, be thinking of the true relation between his corporation and the state. Here indeed he has opportunity to make a contribution, possibly in the great field of corporate law, which may be of first importance. Let us take a single illustration.

The General Electric is expected to screen some at least of its employees for "loyalty." Because it has intimate relations with the United States Government as contractor and supplier it has done this. But the General Electric has likewise insisted both in public and in private that this was a function which should belong only to government; that the corporation had neither the authority nor the equipment to perform it. If, perhaps, government should keep out of business,

there are areas in which business ought to keep out of government. Awareness of that fact will lead to the adoption of clear-cut corporate policies, and no one is in better position than the house counsel to make the issues clear. In still other areas, the intrusion of government into corporate operations may be not only undesirable but unconstitutional. Only recently a corporation was asked to discharge an employee for "security" reasons. This was a private employer, having relations with a private employee with which both were satisfied. After considering the matter, the employer took the position that it did not wish to make the discharge of its own volition, and that the government must show authority and reasonable cause if it intervened in this private relationship, and that its intervention must provide for due process. When the government agency involved declined to substantiate its charge before a reasonably impartial tribunal, the corporation took the position that it could not, without danger of liability, discharge the employee; and the government eventually accepted the position. What it was saying was that while the government has the right to discharge a government employee it has not the right to request a private concern to do so. Illustrations could be multiplied.

Or again. The corporation accumulates capital in one form or another. This may be in the form of undistributed profits which it piles up or it may be because the corporation is in the insurance business accepting savings and undertaking to invest them. The legal restrictions surrounding reinvestment of capital so far do not take into account the community needs. The corporation withholding profits must use the profits for its business; the insurance corporation must invest for the purpose of providing for its policy-holders. But the time will come when an insurance company must not only consider its policy-holders interests: it must also consider that the capital funds it accumulates must be used at least for the general development of the country;

it must therefore consider geographical distribution of capital investment and at least a reasonable consideration of economic areas in which new capital is needed.

An interesting mental exercise suggests perhaps one of the areas in which this kind of thinking is fertile. In any large corporation one first makes a mental picture of its relations with its employees, and then its relations with its customers, and then its relations with its suppliers. Project this to the degree of control which it thus exercises over lives of a great number of people. Then, with that in mind, read the Bill of Rights in the American Constitution. Then assume, for the sake of argument, that the corporation is in some sense an agency of the community and perhaps actually an agency of the government, and test the actual policies pursued by the corporation against the limitations of the Bill of Rights. In some instances, the result of this mental comparison suggests a review of policies; in others, the erection of procedures; in still others the insistence that functions performed by the corporation ought forcibly to be pushed toward the political government. Obviously in each situation the impact of the institutional status of the corporation differs. A small corporation is likely still to be a true private entity, operating within the relatively absolute powers granted to private owners over private property. A large corporation with great power despite its theoretical legal privacy is much more likely to be limited in its action. A small individual contractor can do as he wishes with his own. An organism wielding vast economic power, and appreciably affecting the lives of individuals, is already judged publicly by the standards applied to government; as we have observed, today's political complaint is tomorrow's legal requirement.

You will be saying, perhaps, that this review is leading you to the edge of a vast wilderness and that you shrink from the prospect of traversing it. To this there is only one answer but it is final. The twentieth century is leading straight ahead. None of us are led into

this wilderness. We are propelled into it by forces deeper and stronger than any of us. There is no possibility of holding back. We can decide to drop out and let others pick up the work of drawing the maps and building the new roads. We can not stop or even delay the march into the new ground. This group particularly is so placed that it can not decline to move. It must understand, and it must foresee, and it must advise, and in performing all of these functions, it must assist.

This indeed is the justification for a group of men whose business is that of giving legal advice within the frame-work of corporations. Even more, it is the justification for cooperation between such a group and the law schools like Columbia which is host today. Even more it suggests the requirement that none of us allow our minds and perceptions to grow stale in a tremendous and transcendently fascinating period of human development, of which we are perforce a formative part.