

PRIVATIZATION AND PUBLIC WELFARE: CONSTITUTIONAL IMPERATIVES

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1. Introduction

A nuanced understanding of the working of the Indian Constitution in the post liberalization era reveals the challenges, the country has been facing in implementing some of the constitutional guarantees. Yet the issue has not yet fully caught the national attention. The National Commission to Review the Working of the Constitution (NCRWC) appointed under the Chairmanship of M. N. Venkatachalaiah, Former Chief Justice of India, during the earlier NDA regime had, no doubt, gone into some of these nuances and made suitable recommendations but did not enquire into all aspects. Ensuring public welfare, as ordained under the Constitution, in the age of privatization is one such issue that did not get adequate attention. This is an important issue that needs to be considered. The relevant question to begin with is this: Does 'privatization' and 'public welfare' go together? Or to put it more appropriately, can the governments, which are relentlessly pursuing policies of liberalization, privatization and globalization (LPG) through the methods, *inter alia*, of disinvestment, deregulation and denationalization (which Upendra Baxi calls 'three Ds'), continue to perform their public welfare functions?

Some say, 'privatization' and 'public welfare' is an oxymoron and they do not go together. Is it so? If it is so, then what are the constitutional imperatives? Should the government desist from pursuing this policy of LPG, which is the central idea of the New Economic Policy (NEP) adopted in India in 1991, in view of constitutionally ordained welfare functions? Or is it permissible for the government to pursue such policies without minding the welfare functions? The paper seeks to briefly address these questions.

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2. Constitutional conception of Welfare State

It is indisputable that the architects of the Indian Constitution did not intend to establish India as a *laissez fair* state. They, in fact, wanted India to be a welfare state. If the preamble and directive principles of state policy envisaged under the Indian Constitution are to be considered as its integral parts forming parts of its basic structure, there cannot be an alternative view. Unlike the Constitution of United States of America, which, according to Oliver Wendell Homes Jr. J., does not embody a particular economic theory, Indian Constitution does clearly embody, at least in broad terms, an economic theory.

At the outset, it is stated in the preamble itself that securing justice, not just 'political' but also 'social' and 'economical' is one of the principal objectives of the Constitution. In addition, if one looks at various directive principles of state policies, it is abundantly clear that the Constitution does contain an explicit commitment to 'socialism'¹ and imposed an obligation on the state to promote 'welfare of the people'.

The Constitutional conception of welfare state is not limited only to provide certain basic facilities, amenities or services like health, education, housing, sustenance etc. The concept of welfare state envisaged under the Indian Constitution is a holistic one. It is evident from Article 38(1), one of the cardinal directive principles of state policy, which mandates that:

[T]he State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

Thus, constitutionally speaking, promoting welfare of the people would require securing them socio, economic and political justice.

Whereas this is a very broad and a grand principle envisaged under the Constitution, various other welfare functions the State is expected to discharge are specified in clause (2) of Article 38, Articles 39, 39A, 41, 42, 43, 45, 46 and 47 of the Constitution of India. All these are directive principles of state policies.

¹ V. Krishna Ananth, *The Indian Constitution and Social Revolution: Right to Property Since Independence* (2015).

These provisions require the state, in particular, to take measures to minimize in inequalities in income and endeavor to eliminate inequalities in status, facilities and opportunities amongst individuals as well as groups of people residing in different areas or engaged in different vocations.² The State is also ordained to direct its policies towards securing adequate means of livelihood; distribution of material resources of the community so as best to subserve the common good; prevention of concentration of wealth and means of production to the common detriment; equal pay for equal work. It is also under an obligation to prevent abuse of health and strength of workers and tender age of children. It shall strive to provide opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity and protect them and to youth against exploitation and moral and material abandonment.³ Public welfare functions envisaged under the Constitution also include securing right to work, to education and to public assistance in cases of underserved want;⁴ to make provision for just and human conditions of work and for maternity relief;⁵ secure living wage and conditions of work that ensure decent standard of life;⁶ to make provisions for early childhood care and education to children below the age of six years;⁷ to raise the level of nutrition and the standard of living and to improve public health;⁸ to promote with special care educational and economic interests of the weaker sections of the people.⁹ In addition, the Constitution (Forty-second Amendment) Act, 1976 has also imposed an obligation on the state to promote equal justice and to provide free legal aid.¹⁰

These principles, though judicially unenforceable, are nevertheless fundamental in the governance of the country. They lay down roadmap for the progress of the country. They serve twin purposes:

² Art. 38(2).

³ Art. 39(a) to (f).

⁴ Art. 41.

⁵ Art. 42.

⁶ Art. 43.

⁷ Art. 45.

⁸ Art. 47.

⁹ Art. 46.

¹⁰ Art. 39A.

- (i) They provide an assurance to the people as to what they can expect from the government, and
- (ii) They command the state and its agencies and instrumentalities¹¹ to follow them while making laws or formulating policies for the governance.

These principles require the State, its agencies and instrumentalities to adopt such laws and policies that aim at securing and promoting the welfare of the people as envisaged. It is their constitutional duty to implement them. They may not be answerable in a court of law for the failure to implement them but before the electorate, as per the wishful thinking of the chief architect of the Constitution of India, they are answerable.¹²

3. Promotion of public welfare in a free market economy

It is axiomatic that unless the state has an effective control over the market/economy, it cannot promote public welfare as ordained under the Constitution. State control and regulation of economic activities is a *sine-qua-non* for implementation of welfare programmes mandated under the Constitution. That is the reason why framers of the Indian Constitution not only contemplated mixed economy, where both public and private sectors can co-exist, but also allowed the State to create monopolies in favour of public sector undertakings and also to effectively control and regulate all economic activities.

But in the post 1991 era, which marked the beginning of New Economic Policy (NEP), the State is gradually losing effective control over the economy. The NEP was adopted by the government in order, *inter alia*, to comply with the ‘conditionalities’ of the global regulatory institutions *viz.*, World Bank and the International Monetary Fund. Ever since the adoption of NEP, the successive governments in India are relentlessly in pursuit of Liberalisation, privatization and

¹¹ It may be pertinent to note that even in Part IV, unless the context otherwise requires, the term ‘state’ has the same meaning as in Part III. Thus, the directive principles of state policy are required to be followed not only by the “Government and Parliament of India and the Government and Legislatures of each of the States” but also by “all local or other authorities within the territory of India or under the control of the Government of India.” Since all *agencies or instrumentalities* of the State fall within the ambit of ‘other authorities’ in Art. 12 of the Constitution, they are also required to follow those directives addressed to the ‘state’. See *Central Inland Water Transport Corporation v. BrojoNath Ganguly* (1986) 3 SCC 156; *Delhi Transport Corporation v. D.T.C. Mazdoor Congress*, 1991 Supp (1) SCC 600.

¹² B. R. Ambedkar, VII *CAD* 41.

Globalisation (LPG). Disinvestment, Denationalization and Deregulation have also become the characteristic features of NEP. LPG has become a new *mantra* that every government is chanting ever since then.

Privatization takes place in many forms, from disinvestment, through public private partnership and private financial initiatives to outsourcing and contracting of services and activities in governmental organizations or institutions etc.,

All these forms of privatization are in vogue in India. Recently, as per the reports in *[T]he Hindu*,¹³ the Prime Minister's Office had given a green signal to the NITI Aayog's two set of proposals:

- (i) For shutting down seventeen sick or loss-making government companies, and
- (ii) For strategic sales aimed at reducing government ownership to below fifty-one percent (1%) in about 22 public sector companies.

The first list includes Indian Oil-CREDA Biofuels Ltd., CREDA HPCL Biofuel Ltd, both Jatropa oil-focussed subsidiaries of state-owned petroleum giants, National Jute Manufactures Corporation Limited and its subsidiary, Birds Jute and Export. Bharat Wagonand Engineering etc., The second list includes the Miniratna helicopter services operator Pawan Hans Limited, Scooters India Limited, Cement Corporation of India Limited and three plants of the Maharatna Steel Authority of India (SAIL) located at Salem, Durgapur and Bhadravati. etc., The NITI Aayog is in pursuit of identifying more and more public sector undertakings for disinvestment.

Indian economy is increasingly liberalized to suit privatization and to promote foreign investments. A policy of liberalization involves, in the opinion of Permananda Singh:¹⁴

[d]ismantling of the regime of discretionary control over private investors in industry and trade and also liberalizing the regime of foreign trade and investment. Such policies are also accompanied by

¹³ *The Hindu*, September 21, 2016.

¹⁴ Parmananda Singh, *Supra* Note 14 at 105.

a regime of incentives to the foreign and domestic investors and mark a transition to the ‘retreat of the State’¹⁵ from a socially responsible government.

Particularly after the adoption of NEP in 1991, India is marching towards creating free market economic conditions. Free market requires that the state should recede from the market and restrict its economic functions. It requires that the state should free the market from its regulations.

When the States are increasingly adopting the measures of deregulation, disinvestment and denationalisation, they are not only losing their regulatory powers but, more importantly, their *redistributionist capacity* as well. David Schzeiderman highlighted this aspect very succinctly, while discussing about global investment rules, in the following words:¹⁶

The emergence of a transnational regime for the protection and promotion of foreign investment challenges directly the proposition that global capital has not tangible, institutional fabric. This rules regime cumulatively attempts to fashion a global tapestry of economic policy, property rights, and constitutionalism that institutionalises the political project of neo-liberalism. *This project advances the idea that the state should recede from the market, restrict its economic functions, and limit its redistributionist capacity.* The paradox is that at a time when institutions of democracy are being reproduced globally, democracy is not to be trusted in economic matters.

Similar views were expressed by Upendra Baxi too, who stated that “deregulation signifies not an end of the nation-state but an end to the *redistributionist state*.”¹⁷ If the redistributionist capacity of the state is limited, welfare functions contemplated under the Constitution cannot be carried on by the State. As J.S.H. Gildenhuys has

¹⁵ The concept of ‘retreat of the State’ “signifies a process in which the state contracts out its social welfare commitments by transferring ownership, control and/or managerial responsibility of the government enterprises to private corporations through the measures of deregulation, disinvestment and denationalisation.”

¹⁶ David Schzeiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise 2* (Cambridge University Press, 2008). Emphasis supplied.

¹⁷ Upendra Baxi, *The Future of Human Rights* 140 (2002).

stated “the general socialization of particular services...is unacceptable within a free market system.”¹⁸

It may, however, be noted that the NEP that is intended to promote LPG is not *per se* unconstitutional.¹⁹ But, seemingly there exists a conflict between the directive principles, in particular the socialist agenda contained therein, and the NEP.²⁰ Concerns expressed by V. R. Krishna Iyer J., may be noted here:²¹

We have a new democracy run from afar by strong capitalist proprietors influencing the political process and humouring the glitterati and winning parties Right, Left and Centre through a monoculture of *globalization, liberalization, marketisation and privatization plus anti-socialism*.... Herein lies the contradiction between the Constitution and the elections held under the Constitution.

It may also be pertinent to refer to the observations made by Surya Deva on this aspect:²²

Given that the policies promoting liberalization *per se*, including privatisation and disinvestment, have been declared to be constitutional and are here to stay, it needs to be considered how they impact on the constitutional obligation of the Indian state to promote human rights – whether embodied as directive principles, or in the form of ‘converted fundamental rights’. For example, can the Indian government still establish a just social order by minimizing/eliminating inequalities, ensure that there is no concentration of wealth or means of production, secure maternity benefits in private sector, or protect environment and wild life? The same could be said regarding the plethora of

¹⁸ J.S.H. Gildenhuys, *The Philosophy of Public Administration: A Holistic Approach* 363 (2004).

¹⁹ Mahendra P. Singh, “Constitutionality of Market Economy” XVIII DLR 272 (1996). Also see Parmananda Singh, *Supra* Note 116 at 105. See, *Delhi Science Forum v. Union of India* (1996) 2 SCC 405; *BALCO Employees’ Union (Regd.) v. Union of India* (2002) 2 SCC 333.

²⁰ Upendra Baxi, *Supra* Note 5; Parmananda Singh, *Supra* Note 14; S. S. Singh and Suresh Mishra, “State and Market: A Constitutional Analysis” XVIII DLR 46 (1996).

²¹ V. R. Krishna Iyer, *Rhetoric Versus Reality: Essays on Human Rights, Justice, Democratic Values* 51 (2004). Emphasis added.

²² Surya Deva, “Globalization and its Impact on the Realization of Human Rights: Indian Perspective on a Global Canvas” in C. Rajkumar, K. Chockalingam (eds.), *Human Rights, Justice, and Constitutional Empowerment* 236 at 257 (2003).

rights created by the judiciary by importing directive principles into fundamental rights. For example, it is not clear how the government plan to ensure that various traits of globalization do not unreasonably affect, for example, the right to livelihood or the right to shelter.

Similarly, though the policy of privatisation, in particular, is not *per se* unconstitutional, it may not confirm to the goal values of the cardinal directive principles envisaged under articles 38 (1) and (2), and 30 (a), (b) and (c) of the Constitution.²³ Upendra Baxi expressed this view, while commenting in the context of privatisation of Uttar Pradesh State Cement Corporation. It is important to note one of his observations made in the context:²⁴

Without any amendment of the Preamble, it is not fully open to the proponents of 'privatisation' to practice unbridled forms of it. Similarly, it is not open to advocate or practice 'privatisation' without changing the text of Articles 38, 39 or 43-A. Pending such changes... 'privatization'... is fraught with grave constitutional improprieties and even invalidity.

It may not be completely justifiable to argue that such policies are fraught with constitutional invalidity as they are apparently inconsistent with the directive principles only. Having regard to their judicially non-enforceable character, directive principles have not been made the sole basis for invalidating any law or policy. But such policies are certainly fraught with constitutional improprieties for the very reason that they are inconsistent with directive principles.

4. In lieu of conclusion: a way forward

The socialist agenda and the welfare programmes envisaged in the Constitution are fast losing their significance as they are getting diluted and side-lined in the process of relentless pursuit of the successive governments to carry forward NEP and to achieve LPG to the fullest possible extent at the earliest possible time. There is a need to pause at least for a while and re-think is it justifiable to side-line the socialist agenda and the public welfare mandate of the Indian Constitution?

²³ Upendra Baxi, *Supra* Note 5 at 32.

²⁴ *Ibid* at 33.

If the pursuit of LPG continues endlessly, without sufficient attention paid to the mandates of the Constitution in the form of directive principles, even the very preambular objectives would be defeated.

If the current processes of LPG are irreversible, as some say, the only effective way out is to provide horizontal effect to constitutional guarantees envisaged as fundamental rights and directive principles of state policy. That requires, in the very first place, revisiting of the definition of ‘state’ under Article 12 of the Constitution. As it is well known, the said definition had been expanded to certain extent by the Supreme Court in the pre – globalization era.²⁵ Such judicial expansion came about primarily with a view to prevent the government from by passing its constitutional obligations by creating companies, corporation, etc., to perform its duties.²⁶ But, in the post – globalization era, the judiciary is unwilling to further expand the scope of the definition. This approach is evident from the observation made by N. Santosh Hegde J. in *Zee Telefilms Ltd.*:²⁷

[b]ecause of the need of the day this Court in *Rajasthan SEB* and *Sukhdev Singh* noticing the socio-economic policy of the country thought it fit to expand the definition of the term “other authorities” to include bodies other than statutory bodies.... It is to be noted that in the meantime the socio-economic policy of the Government of India has changed... and the State is today distancing itself from commercial activities and concentrating on governance rather than on business. Therefore, the situation prevailing at the time of *Sukhdev Singh* is not in existence at least for the time being, hence, there seems to be no need to further expand the scope of “other authorities” in Article 12 by judicial interpretation at least for the time being.

It is pertinent to note that in the age of globalization, the government is no longer trying to bypass its constitutional obligations by creating companies, corporation, etc., to perform its duties. It failed in that endeavour in the pre – globalization era itself. It does not, however, mean that the government is

²⁵ See, *Rajasthan State Electricity Board v. MohalLal* (1967) 3 SCR 377; *Sukhdev Singh v. BhagatramSardar Singh Raghuvanshi* (1975) 1 SCC 421; *R. D. Shetty v. International Airport Authority of India* (1979) 3 SCC 489; *Ajay Hasia v. Khalid MujibSehravadradi* (1981) 1 SCC 722.

²⁶ *Zee Telefilms Ltd. v. Union of India* (2005) 4 SCC 649.

²⁷ *Ibid* para 35.

not trying to bypass it at all in the post – globalization era. It is, in fact, more successfully outmanoeuvring the constitutional obligations by pursuing the policy of disinvestment and privatization. If, for example, the government's stakes in a public sector undertaking is reduced to less than fifty – one per cent, most probably such public sector undertaking cease to be 'state' within the meaning of article 12. Perhaps, there is a greater need now, more than ever before, to further expand the definition to include every organization or institution in relation to such of its functions which are of a public nature. This was, in fact, the recommendation of the NCRWC as well.

In *Zee Telefilm Ltd.*, itself N. Santosh Hegde J., while refusing to expand the definition, had observed that "...in a democracy there is a dividing line between a State enterprise and a non – State enterprise, which is distinct and the judiciary should not be an instrument to erase the said line *unless, of course, the circumstances of the day require it do so.*"²⁸ But, after having contemplated the necessity of erasing the dividing line, when the circumstances require, he had not, it seems, fully appreciated the prevailing circumstances in the age of globalization, where the scope for enforcement of fundamental rights and directive principles of state policy are increasing getting reduced. Thus, there is a necessity to further expand the scope of the definition and it is appropriate to do so in exercise of the constituent power by the Parliament. This, of course, is a very first but significant step. Lot more needs to be done to enliven the socialist agenda and the public welfare mandate of the Indian Constitution in the age of globalization.

²⁸ *Ibid* Emphasis supplied.