

SOCIALISM AND THE NEW ECONOMIC ORDER: CONSTITUTIONAL PERSPECTIVES

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I. INTRODUCTION

India ordains itself to be a 'Sovereign Socialist Secular Democratic Republic'. The socialist agenda was a primary consideration in the minds of the Constitution makers as is evident from the Directive Principle of State Policy in Part IV of the Constitution which talks about socio-economic rights.

Socialism is a sacrosanct principle which is essential for the purpose of establishing an egalitarian society. This understanding assumes a lot of importance especially in the Indian socio-economic scenario which is ridden with gross inequalities. Although the word 'socialist' did not find mention in the original Preamble, the socialist agenda was looming large and the same was affirmed by the Constitution (Forty-Second Amendment) Act, 1976, by which the word 'socialist' was added to the Preamble thereby formally recognizing the constitutional goal.

The Indian Constitution makers opted for a path involving slow, regulated and planned growth as opposed to a *laissez-faire* economy.¹ This is evident from thoughts echoed by the Indian National Congress at its Avadi session before the Constitution was brought into force, where it had recognized and committed itself to the adoption of socialism as its goal.² Such an approach inevitably meant considerable State intervention in the functioning of the economy as a whole. The State had been asserting its socialist stand through various efforts at nationalization as is evidenced by a plethora of events in the 1970s and 1980s. However, with the advent of globalization, the State has sought to adopt a hands-off approach. In other words, the New Economic Policy being pursued aims at increased privatisation, more private sector industries, denationalization and decontrol of business and industry. The question that then arises is whether the economic policy of liberalization is violative of 'socialism', which has been held to be a basic feature of the Constitution. If it is so, even a constitutional amendment would not be adequate to sustain this economic policy because, as has been ruled in a number of cases, the basic features of the Constitution cannot be altered, damaged, destroyed or, in any way affected by any amendment.

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1 Constituent Assembly of India Debates, Vol. VII, 2 December 1948.

2 *ibid.*

This paper seeks to review the interplay between the constitutional goal of socialism and the presently pursued economic policy of privatization. It seeks to understand how the changing needs of the State and Society mould our understanding of the Constitution.

II. SOCIALISM: CONCEPT AND TREATMENT

The Preamble of the Constitution aims at making India a Sovereign, Socialist, Secular, Democratic Republic. The term 'socialist' indicates the incorporation of the philosophy of socialism in the Constitution.³ In debates preceding the drafting of the constitution, KT Shah had proposed the inclusion of this word in the Preamble, but Pandit Jawaharlal Nehru had strongly opposed it because according to him, they had already provided for the substance of an economic democracy in the Constitution in the chapters on Fundamental Rights and Directive Principles of State Policy and that there was no need for the inclusion of additional terminology that was likely to be interpreted differently by different people.⁴

The Constitution does not define the term 'socialism'. However, it has been subject to scholastic and judicial interpretation. According to a former judge of the Supreme Court, Justice O. Chinnappa Reddy, Indian Socialism is about what the Constitution of India wants for the people of India, that is, the establishment of a welfare state. The Constitution makers, he says, were aware that mere adherence to an abstract democratic ideal was not enough and that it was necessary to secure to the people economic and social freedom in addition to political freedom. In addition, though the word 'Socialist' was introduced into the Preamble only by a later amendment of the Constitution, the fact that socialism has always been the goal is evident from the Directive Principles of State Policy and some of the Fundamental Rights.⁵

The Supreme Court has also made similar observations, stating that the philosophy of socialism existed in the Constitution even before the 42nd Amendment.⁶ On one such

3 When the Constitution was framed, Dr. B. R. Ambedkar, declared that "there was 'complete absence' of one thing in Indian society - equality and that on the Economic Plane, we have a Society in which there are some who have immense wealth as against many who live in abject poverty." In India, "social" and "economic" justice cannot but mean justice to the weaker and the poorer sections of the society. Art. 38(2) now has specifically provided that the mandate is to "minimize the inequalities of income" and "eliminate inequalities in status". All these cannot leave any room for any doubt that the Directive Principles, which are declared in Article 37 to be "fundamental in the governance of the country", are socialist. Bhattacharjee, A. M., "The Constitutional dilemma - Liberal or socialist economy?" *The Hindu Business Line*, January 25, 2002.

4 Constituent Assembly of India Debates, Vol. VII, 15 November 1948.

5 Interview with former Justice O. Chinnappa Reddy on 09-08-06; on record with the authors of this paper.

6 *Akadasi Padhan v. State of Orissa*, AIR 1963 SC 1047.

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occasion, it opined that “the mandate for a social order and securing the welfare of the people and the directions prescribed in Article 39⁷ are nothing but the essential qualities of socialism in our Constitution.”⁸ In this sense, socialism is more of an economic doctrine that the Constitution prescribes for the State. The amendment, it held, was only to emphasize the need for ownership, control and distribution of national productive wealth for the benefit and use of the community and the rejection of a system of misuse of its resources for selfish ends.⁹ Further, it has been held that the word ‘socialism’ is inextricably related to state ownership and social welfare of the people and that nationalisation is a means of securing the goals enshrined in the Constitution and the social, economic and political rights of the people.¹⁰

What then is the position of ‘socialism’ in the present legal system? Does one look at it as a mere directive that is non-justiciable in nature or something that is essential in the making of the economic policy of the State? While socialism did exist in the Constitution before 1976, it gained in significance after its inclusion in the Preamble. The objectives specified in the Preamble constitute a part of the basic structure of our Constitution.¹¹ As a result, such principles and objectives cannot be amended under Article 368 of the Indian Constitution.¹² This further affirms the notion that the principle of socialism enshrined in our constitution is extremely significant and cannot be abrogated.

However, the point to be noted is that the social and economic goals enshrined in Part

7 Article 39 of the Constitution lays down, that the State shall, in particular, direct its policy towards securing - (a) that the citizens, men and women equally, have the right to an adequate means of livelihood, (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good, (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment, (d) that there is equal pay for equal work for both men and women, (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength, (f) the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

8 *Srinivasa v. State of Karnataka*, AIR 1987 SC 1518. In *Dharwad Employees Union v. State*, (1990) 2 SCC 396, the Court held that the right to equal pay for equal work enshrined in article 39 gives essence to the Constitutional goal of a socialist economy. It also stated that Article 39 in a sense prescribes directions for the achievement of a socialist ideal.

9 *Sanjeeva Coke Manufacturing Co. v. Bharat Coking Coal Ltd*, AIR 1983 SC 239.

10 *Akadasi Padhan v. State of Orissa*, AIR 1963 SC 1047.

11 *Keshavananda Bharti v. State of Kerala*, AIR 1973 SC 1461, *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299, *Minerva Mills v. Union of India*, AIR 1980 SC 1789. That socialism is a part of the basic structure of the Constitution has been acknowledged by the Supreme Court in the case of *Sanjeeva Coke Manufacturing v. Bharat Coking Coal Ltd*, AIR 1983 SC 239, where the Court opined that ‘socialism’ is no doubt a part of the basic structure of our constitution and acts as a fundamental directive in the policy of the State. It also affirmed that the principle of nationalization in Article 39 (b) echoes the notion of socialism in the Constitution.

12 Article 368, Constitution of India. See also, Sethi, Anuranjan “Basic Structure Doctrine: Some Reflections”, October 25, 2005. Available at SSRN: <http://ssrn.com/abstract=835165>. Last visited: 18/06/2007.

IV are non-justiciable in nature. This means that, unlike the Fundamental Rights, these directives cannot be enforced in a court of law. Although there are many cases that have harmonized the Directive Principles of State Policy with the Fundamental Rights; by their very nature, the Directive Principles are only meant to act as mere directives that the State may consider in the formulation of a policy.¹³ On the other hand, according to Article 13 (2), a law that violates any of the Rights mentioned in Part III of the Constitution is liable to be struck down. So, in theory, unless socialism can be inferred from Part III, State action that is against the goal of socialism is valid if no rights in Part III are violated since the Directive Principles are non-justiciable.

The issue of socialism vis-à-vis the State's policy of privatization was considered by the Supreme Court in the case of *Excel Wear v. Union of India*¹⁴. The Court, by adopting a *via media* approach, interpreted Article 39 in such a manner as to strike a balance between the competing claims of nationalisation and state ownership of industries on the one hand and privatization on the other. The court stated,

*"The concept of socialism or a socialist state has undergone changes from time to time, from country to country and from thinkers to thinkers. But some basic concepts still hold the field. The amendment made by the Legislature in Article 19(6) shows that, a law relating to the creation of State monopoly should be presumed to be in the interests of the general public."*¹⁵

The Court took note of the reality that the private sector occupied an overwhelmingly large sector of India's economic structure. It observed nationalization to be necessary ingredient in the economic development of the country as it has the objective of a public control over resources and greater accountability without a profit motive so that the economic inequality is reduced to the minimum and the goal of socialism is furthered.

Further, the underlying idea behind the issue of socialism was again considered in *D.S. Nakara and Ors. v. Union of India*¹⁶. In this case, the court was of the opinion that the basic framework of socialism is to provide a decent standard of life and security to the working people. The Court also underlined the role of the state in achieving the goal of socialism. It noted that the State shall direct its efforts towards equitable distribution of income and maximisation of production, which are the basic objects of

¹³ *Waman Rao v. Union of India*, AIR 1981 SC 271.

¹⁴ AIR 1979 SC 36.

¹⁵ *ibid*, Paras 24 and 25.

¹⁶ AIR 1983 SC 130.

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socialism, to solve the problems of unemployment, low income and mass poverty and to bring about a significant improvement in the national standard of living. The same line of thought is also reflected in the Supreme Court's decision in *State of Karnataka v. Shri Ranganatha Reddy*¹⁷. In this case, the court considering the issue of nationalization of contract carriages, opined that the aim of socialism is the distribution of the material resources of the community in such a way as to subserve the common good.¹⁸

A common thread running through the above judgments is that the courts seek to underline the importance of deliberate and purposive action on the part of the State. However, the point to be noted is that in all the above cases, the violation of the goal of socialism in the Constitution was read as a violation of the Fundamental Rights enshrined in Part III of the Constitution. During the 1970s and 1980s when the State pursued a policy of nationalization, socialist ideals enshrined in Part IV were used to validate such State action.¹⁹ However, the absence of socialism in Part III of the Constitution and the reluctance of the courts to interfere in economic policy matters has facilitated the government to pursue the goals of disinvestment and privatization by abrogating the socialist values underlying the Constitution.²⁰ This dichotomy is further pronounced by the recent Supreme Court judgment in *M. Nagaraj v. Union of India*²¹, where the Court noted that constitutional principles can qualify as essential features only if it can be established that the said principle is a part of the constitutional law binding the legislature. In this context, it noted that federalism, secularism, reasonableness, socialism etc. were beyond the words of a particular provision. The Court further stated that these are systematic and structural principles underlying and connecting various provisions of the Constitution.²²

In the light of the above observation, it can be argued that socialism is merely enshrined in the Directive Principles and is not binding on the legislature; and thus is not justiciable in a court of law. Thus, it is pertinent to look at the concept of socialism which arguably is one of the most essential principles of the Constitution, but in practice remains merely a directive that the State is not obliged to follow in an era of liberalization.

Keeping the above as backdrop, the issue which actually forms the focus of this paper

17 AIR 1978 SC 215.

18 The principle embodied in Article 39(b) of the Constitution endeavours to bring about fair distribution of material resources. It gives full play to the concept of distributive justice and fulfils the basic purpose of re-structuring the economic order. Article 39(b), therefore, has a social mission.

19 *Excel Wear v. Union of India*, AIR 1979 SC 36, *D.S. Nakara v. Union of India*, AIR 1983 SC 130.

20 *All India ITDC Worker's Union v. ITDC Ltd.*, AIR 2007 SC 301, *BALCO Employees Union v. Union of India*, 2002 (2) SCC 333.

21 AIR 2007 SC 71.

22 *ibid*, Para 20.

is the seeming conflict between the concept of socialism *vis-à-vis* the economic policy of liberalization. This is an interesting question and before one deliberates on it, it is necessary for us to get a basic idea of the issues of liberalization, separation of powers and the extent of the power of judicial review because it is the latter that actually has the force to render the policy void as being violative of a constitutional prescription which is also a preambular goal.

III. CONCEPT OF LIBERALIZATION

The word “Liberalization” derives from liberty. It believes in the attainment of welfare goals with minimum external constraints²³. Society is there to serve the individual and not the other way round as communism or socialism try to make out. In a sense, it refers to a relaxation in government restrictions in areas of social or economic policy.²⁴ Such policy seeks to secure the interests of private players and does not incorporate the interests of the poorer sections of society.²⁵ In an era where the general notion is that State industries are inefficient, loss-making and riddled with bureaucratic hassles, disinvestment and liberalization seem to be a ready answer. Liberalization was a solution to the removal of red-tapism and corruption that most industries are accused of in India.

Since 1991, India has sought to push forward economic growth through the practice of liberalization as an ideal. While this has been the attitude of the government, it is interesting to see how the courts have dealt with this concept. Justice AR Lakshmanan in *State of Punjab v. Modern Breweries*²⁶ stated that globalization has brought radical change in the economic and social landscape of this Country and that the policy of liberalization has a significant impact on it. The Judge also noted that it had a significant impact on aspects of Constitutionalism and the Constitution though he did not elucidate on the same.²⁷ In the decade since liberalization, the judiciary seems to have adapted itself to the values which are espoused by the dominant sections of society.²⁸ More recently, the Court in *Ashoka Smokeless v. Union of India*²⁹, held that policies formed to

23 Greenstone, JD, “Against Simplicity: The Cultural Dimensions of the Constitution”, (1988) 55 *U. Chi. L. Rev.* 428.

24 *ibid.*

25 While this was the Classical view of liberalism as propounded by Adam Smith, later writers emphasize that one of the essentials of a liberalist economy is the goal of community good. This has to be read in light of Constitutional principles. See West, RL, “Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision”, (1985) 46 *U. Pitt. L. Rev.* 673.

26 (2004) 11 SCC 26.

27 *ibid.*

28 In *Secretary HSEB v. Suresh*, AIR 1999 SC 1160, the Court held that in as much as liberalism is a part of Indian economic policy, social justice must not be compromised. Aspects of the Liberalist policy may also be seen in the cases of *BALCO Employees Union v. Union of India*, AIR 2002 SC 350 and *All India ITDC Worker’s Union v. ITDC Ltd.*, AIR 2007 SC 301.

29 *Ashoka Smokeless v. Union of India*, (2007) 2 SCC 640.

meet the liberalization demands of the country in respect of selling coal would be valid. In 1996, the then Chief Justice of the Supreme Court in a lecture stated that "liberalization was consistent with socialism because equitable distribution first required wealth creation".³⁰ While the above statement seems surprising, the fact remains that in a series of cases³¹, the Courts have stated that liberal goals are not violative of Part III and matters of economic policy are not subject to judicial review.

To explore this issue in detail, it is now pertinent to look at judicial attitudes towards the review of economic policy.

IV. JUDICIAL REVIEW VIS-À-VIS POLICY MATTERS

It is common knowledge that courts are hesitant to rule on policy issues. In fact, courts refuse to intervene in such matters lest they are accused of transgressing the boundaries within which they have to function.³² There have been a lot of cases which have looked into this issue.³³ On a perusal of these cases, it can be aptly summarized that the courts would interfere with an administrative policy decision only if it is arbitrary, discriminatory, and mala fide or actuated by bias.³⁴ There is a plethora of case law and literature which go on to reinforce the ratio of the Court in this case.

It may be observed that judicial review of policy matters is concerned not with the ultimate decision or the merits of the case but the manner in which the decision has been made. It is not for the court to substitute one policy for another and substitute its own judgment for that of the administrative body, or it will be guilty of usurping power. The decision making process falls within the domain of judicial scrutiny. However, the Supreme Court has quashed policy decisions on the grounds of

30 Karat, Prakash, "The Supreme Court in Liberalised Times", available at <http://www.countercurrents.org/hr-karat090803.htm>, last visited: 1st April 2007.

31 *Fertilizer Corporation, Kamnagar v. Union of India*, (1981) 1 SCC 568, *BALCO Employees Union v. Union of India*, AIR 2002 SC 350, *All India ITDC Worker's Union v. ITDC Ltd.*, AIR 2007 SC 301. *Centre for Public Interest Litigation v. Union of India*, AIR 2003 SC 3277.

32 "Judicial review is a great weapon in the hand of the judges; but the judges must observe the Constitutional limits set by the Parliamentary system upon the exercise of this beneficial power"- Lord Scarman in *Nottinghamshire County Council v. Secretary of State for the Environment*, (1986) 1 All ER 199.

33 *Narmada Bachao Andolan v. Union of India*, (2000) 10 SSC 664 where it was held thus: "It is now well-settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision." Similar observations were also made in *BALCO Employees Union v. Union of India*, AIR 2002 SC 350 and *All India ITDC Worker's Union v. ITDC Ltd.*, AIR 2007 SC 301.

34 *M.P. Oil Extraction v. State of M.P.*, (1997) 7 SCC 592. In this case, it was held that the administrative bodies are entitled to pragmatic adjustments which may be called for by the particular circumstances. Therefore, for example, the courts have no authority to strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been fair, logical, or wiser. Hence, the court can interfere only when the policy decision is arbitrary, discriminatory or mala fide.

unreasonableness³⁵ and arbitrariness in various cases demonstrating that it all depends on the facts and circumstances of each case.

It is worthwhile then to question the wisdom of non-interference when the consequences of a policy decision are potentially disastrous. Policy decisions may occasionally operate as a smoke-screen claiming immunity from violation of rights. It is a matter for the executive to decide the quantum and the shape of the policies and normally policy matters are not interfered with through writs.

The above attitude of the courts where it has refused to interfere in an economic policy is clearly illustrated in the case of *BALCO Employees Union v. Union of India*³⁶, wherein the Court held that the disinvestment policy of the Government cannot be challenged. Stating that the executive is the best judge in matters of economic policy, the court maintained that it would look into matters of economic policy only in case of a dereliction of constitutional or statutory obligations on part of the Government.³⁷ It further stated that Courts are not intended to conduct the administration of the country and that it should be highly reluctant in entertaining policy matters by way of a public interest litigation. In essence, the Court gave way to a policy of liberalization irrespective of whether it is against a constitutional mandate of socialism. In fact, the issue of socialism was not even considered by the Court in the case.³⁸ In this manner, judicial sanction has been given to a policy of liberalisation in recent times.

The issue that arises in the light of the above is whether the constitutional goal of socialism has been discarded and replaced with the economic policy of liberalisation. It is commonplace that policies that affect majority of the people in the country should be in tune with the democratic and socialist ideals that govern the very functioning and administration of the country. In the light of the above, the question that arises is whether the court can declare such a policy unconstitutional on the ground that the State is abdicating its basic duty of trying to further the constitutional goals.

35 The Wednesbury Principle of unreasonableness; *Associated Provincial Picture House Ltd., v. Wednesbury Corporation*, (1948) 1 KB 223.

36 AIR 2002 SC 350.

37 The Court cited *Narmada Bachao Andolan v. Union of India*, (2000) 10 SSC 664, where it was held that the Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution.

38 The Court in *BALCO Employees Union v. Union of India*, AIR 2002 SC 350, also held that: "In matters relating to economic issues, the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority. There is no case made out by the petitioner that the decision to disinvest in BALCO is in any way capricious, arbitrary, illegal or uninformed. Even though the workers may have interest in the manner in which the Company is conducting its business, inasmuch as its policy decision may have an impact on the workers rights, nevertheless it is an incidence of service for an employee to accept a decision of the employer which has been honestly taken and which is not contrary to law."

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There is another dichotomy in this matter. As mentioned earlier, the Court in *M. Nagaraj v. Union of India*³⁹ stated that for something to be a part of the basic structure it has to be shown to be binding on the legislature to follow. The Courts have specifically stated in *S.R. Bommai v. Union of India*⁴⁰ that Socialism is a part of this basic structure but on the other hand, a series of judicial dicta have ruled that socialism is not binding on the legislature. A lot of confusion then has arisen as to the place of socialism in the Constitution.

It is also noticed that this dichotomy may be used as a double edged sword. The goal of socialism embodied in the Constitution and Article 39(b) is used as justification by the Government to further a policy of nationalization and, on the other hand, it also becomes a convenient tool to pursue a policy of liberalization on the ground that the very same constitutional principle is not binding on the legislature. The latter approach is furthered by the courts refusing to interfere in a policy matter.

It is argued, in this background, that a balance needs to be struck to deal with the dichotomy; otherwise, the goal of socialism would acquire the nature of becoming a political tool to further specific policies of the Government. The solution does not lie in the judiciary invalidating an economic policy as being unconstitutional because it violates one of the fundamental Constitutional principles. It is not necessary to take an extreme view of the situation; it is essential to strike a balance. Considering the fact that efforts at nationalization in India have not been able to achieve the goals with which they had actually been introduced, it is after a series of continuous failures that the Indian government has found privatization to be the tool for achieving the required economic growth. Such a policy, it is submitted, is not antithetical to the concept of socialism. Socialism need not mean only state ownership and control of industries meant to raise the standard of living of the people. If the state feels that privatization, as a measure to boost economic growth and end red-tapism and corruption, will work better in a particular situation as opposed to nationalization, then in the larger interests of society, the move may be sound and rational. This then does not mean that the constitutional goal is demolished. The State, ultimately, has to work in accordance with the changing needs of society.

One of the possible mechanisms that could be adopted would be privatization with greater state control. Here, state control is not intended to mean ownership, but more in terms of governing the functioning of the privatized industry. For example, the state can formulate mandatory guidelines for the continuance of the pension schemes, security

39 AIR 2007 SC 71.

40 (1994) 3 SCC 1

of tenure of workers, avenues for growth and the like as part of the process of privatisation. The objective behind pursuing such a role is to see that the workers' rights are not jeopardized in any way; in other words, the workers should be entitled, as far as possible, to the same rights and entitlements that were available to them earlier under the State employer.

Furthermore, the State should be pro-active in its involvement with the industry post-privatization. This requires the State to take all necessary measures to ensure compliance on part of the acquirer and also carry out periodical checks on the activities of the privatised company. The State should also mandate that the acquirer submit detailed reports of the working and functioning of the industry at regular intervals. The purpose of this exercise is not only to make the State and the acquirer accountable for their acts but also instill a sense of confidence in the minds of the workers and the public at large. In this way, the state will have a hold on the functioning of the privatised company and may be able to achieve what it could not have directly by taking over the industries by way of nationalisation.

Thus, in the light of the above, it is argued that, in following a policy of privatisation, the underlying principles of socialism should not be compromised in a manner which detrimentally affects the interests of the stakeholders, in this case, being the employees. A fine balance has to be struck between the constitutional goal of socialism, the policy of nationalisation and privatisation. The state should, at each instance, sift and weigh out the pros and cons of each policy and then come to the most plausible solution. The Constitution is a living document that has to be interpreted according to the needs of the time. This is because, if the State cannot deliver the goods, then other constitutional goals will themselves be derogated. What is being foregrounded is the fact that adopting a policy of privatisation does not mean that the State is making a mockery of socialism. Socialism, in the Indian context, has various defining characteristics and the same can be modified to meet the needs of society.

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