

## ROLE OF THE STATE AND JUDICIARY IN ADVANCING EQUITY AND EQUALITY IN A MARKET ECONOMY

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The role of the State and Judiciary in the Indian Republic is laid out in the Constitution of India. The Constitution does not profess either a controlled economy or a market economy. Nevertheless it has some Directive Principles for the State to follow as fundamental in the governance; many of them seek to advance equity and equality amidst competition and development. Thus, Article 38 and 39 command the State to secure a social order for the promotion of welfare of the people and particularly of women, children, workers and disabled. The State is obliged to promote the educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections. The focus is on people and their well-being and not on markets or globalization. Equality is a guaranteed fundamental right for the attainment of which the State is empowered to make special laws extending affirmative action to women, children and other weaker sections. Respect for basic human rights, individual dignity and social justice are values which the Indian Constitution upholds and expects the State to honour and fulfil.

The judiciary under the Indian Constitution has a unique role in maintaining the basic individual rights and democratic structure of the polity keeping state power within the prescribed constitutional limits. For this it is endowed with the power of judicial review and ensures protection of judicial independence from executive control. Over the years the judiciary assumed decisive influence in setting the tone of constitutional governance including the use and control over natural resources and management of the economy by the State. It has generated a jurisprudence, which had emphasized distributive justice, workers' welfare, state monopoly on vital sectors of the economy and sustainable development. No doubt, growth was modest and corruption in government had increased. The introduction of liberalization of the economy (read marketization and privatization) in early 1990s was a turning point in the pattern of development and the nature of economic governance in the country. Commanding heights of the public sector disappeared and the license, quota, permit system was largely dismantled. State signed the multilateral GATT treaty and became a member of WTO committing itself to a globalized market and free trade under WTO auspices. A market economy promising greater opportunities for everyone and free enterprise was set in motion. Rules of the global economy are proposed to be evolved through negotiations in a manner that is fair to the developed and developing countries. Consequently, the Indian market is increasingly being opened to foreign entrepreneurs. The sovereignty of the State in economic matters is significantly reduced ostensibly to derive advantages through free trade and fair competition.

### I GLOBALIZATION AND ITS IMPACT

Globalization has set in motion a process of far reaching changes affecting everyone particularly those living at subsistence level. The current process of globalization is generating unbalanced outcomes, both within and between countries. Wealth is certainly being generated but its distribution is so uneven that the tendency is to make the rich richer and keep the poor at subsistence level only. The poor who are at the

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receiving end of the so-called globalization seem to have little or no voice in directing the process or distributing its outcomes. Otherwise how can one explain the phenomenon of government godowns overflowing with grains while people die of starvation; more and more specialty hospitals and nursing homes come up, but the poor are unable to access the minimum amount of healthcare; more and more schools are established but the number of children denied education is on the increase. There is shortage of housing for the poor when construction activity is booming. The stock market displays unprecedented growth while the poor are struggling to get work to keep their body and soul together. The banking system is flush with cash but farmers commit suicide because of inability to access minimum resources for their operations. If we compare the situation between countries, the picture is more alarming as projected by the UNDP report on Development. The existing model of trade and development is really robbing the poor of a meaningful role in the relief of their own penury. And this happens when we claim to be a democratic society in which State power is supposed to rest with the people.

Jeremy Seabrook in his book “The No Nonsense Guide to World Poverty” wrote, “.....poverty will not be eliminated for the very reason that the global developmental paradigm gives priority to the Market over Government, and even to the Market over Society. Governments everywhere have more or less voluntarily withdrawn from responsibility for distributive justice.. Of course, governments routinely express their desire to create a more equal society and make provision to alleviate the worst sufferings of the poor. But their capacity to do so is far behind the adroit efforts of markets to lavish prizes on those they favour. Indeed governments have been weakened by a globally integrated economy that permits finance to move so easily but does all it can to prevent the movement of the peoples of the world to where they might command higher wages. Even modest demands by government upon the heavy purses of the rich may be evaded by the instant disappearance of billions of dollars into havens, gilded exile and offshore hideaways”.

“The most damning critique of the existing development paradigm is not so much that it is unable to cure poverty, damning though that is; it is rather that out of the very abundance of its ability to produce, it manages to create new forms of poverty. Poverty remains an inescapable structural necessity of globalization – required to justify continued growth and expansion beyond sufficiency”.

If there is an element of truth in Seabrook’s analysis of the globalized market economy, we find a role for the State and the Judiciary, a role constitutionally prescribed and reasonably expected. Global imbalances in development are morally unacceptable and politically unsustainable. The need for reform of certain aspects of the global economic system and the case for strengthening governance at all levels are absolute necessities. The issue is highlighted in the collapse of the Doha Development Round of trade talks. An exasperated Indian Commerce Minister reportedly expressed his frustration when he said that he went to Geneva to negotiate trade and commerce and not to negotiate the survival and livelihood of people in poverty-stricken countries. Globalization has some amount of wealth to offer to every country and has the potential to eliminate poverty provided the process is managed by rules which are fair, just and reasonable to everybody. As the World Commission on the Social Dimension of Globalization in its report (2004) titled, “A Fair Globalization : Creating Opportunities for All” observed :

“Global markets have grown rapidly without the parallel development of economic and social institutions necessary for their smooth and equitable functioning. At the same time, there is concern about the unfairness of key

global rules on trade and finance and their asymmetric effects on rich and poor countries ..... Market opening measures and financial and economic considerations predominate over social ones ..... The multilateral system lacks policy coherence as a whole and is not sufficiently democratic, transparent and accountable ..... These rules and policies are the outcome of a system of global governance largely shaped by powerful countries and powerful players. There is a serious democratic deficit at the heart of the system. Most developing countries still have very limited influence in global negotiations on rules and in determining the policies of key financial and economic institutions.”<sup>1</sup>

## II NATIONAL GOVERNANCE IN MARKET ECONOMIES

The report of the World Commission on Globalization is relevant to the theme of this National Seminar on Equality and Equity in a Market Economy for another reason as well. The report articulates how corrections can possibly be made by national government and world bodies to make globalization work for the benefit of all, rich and poor countries as well as individuals. Reflecting on reform at the national and local levels, the Report states :

“The behaviour of nation states and global actors is the essential determinant of the quality of global governance. .... How they manage their internal affairs influences the extent to which people will benefit from globalization and be protected from its negative effects. In this important sense the response to globalization can be said to begin at home. This reflects the simple but crucial fact that people live locally within nations ..... It is clear that national governance needs to be improved based on the following principles in all countries, albeit more radically in some than in others :

- good political governance based on a democratic political system, respect for human rights, the rule of law and social equity.
- an effective State that ensures high and stable economic growth, provide public goods and social protection, raises the capabilities of people through universal access to education and other social services, and promotes gender equity.
- a vibrant civil society, empowered by freedom of association and expression, that reflects and voices the full diversity of views and interests. Organizations representing public interests, the poor and other disadvantaged groups are also essential for ensuring participatory and socially just governance.
- strong representative organizations of workers and employers are essential for fruitful social dialogue.

Policy must focus squarely on meeting peoples’ needs where they live and work. It is essential to nurture local communities through the devolution of power and resources and through strengthening local economic capabilities, cultural identity, and respecting the rights of indigenous and tribal peoples”.

I have quoted the World Commission Report extensively because it focuses on the role of the State in a market economy and analyzes how in many countries it failed to discharge that role with the result globalization did not benefit the poor and marginalized groups. It is a matter for debate on how far the Indian State acted or failed to act to neutralize the negative impact of market forces and protected the basic rights of people for which it has constitutional obligations.

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<sup>1</sup> A Fair Globalization: Creating Opportunities for All (2004) pp x-xi of Synopsis of the Report.

### III ROLE OF JUDICIARY IN SECURING JUSTICE IN A MARKET ECONOMY

If the State has failed in its constitutional obligations, globalization or no globalization, the judiciary is there to intervene and correct the system so that peoples' basic rights are not trampled upon by market forces. Does globalization affect the status of the judiciary under the Indian Constitution and its ability to protect peoples' fundamental rights, expansively interpreted by the Supreme Court in the past decades? What are the tools and techniques available to the court to discipline the market forces if the State is unable to negotiate and advance the constitutional goals? Given the absence of a strong organized civil society (as exists in some developed countries) to resist the misdoings of market forces, can the judiciary become pro-active monitoring policies in the context of the Directive Principles of State Policy? How far judicial writs and orders can lie against non-state actors in the liberalized economic regime? Given the fact that increasing levels of corruption is putting constitutional governance and rule of law into jeopardy, would the judiciary be able to inject the required probity in public life to make markets behave and governments serve public interests.

It is not necessary for me to highlight here the unique status of the Indian Supreme Court under the Constitution; nor is it required for the purpose of this Seminar to make an assessment of its past performance as the custodian of the constitutional scheme of governance and protector of peoples' rights. The Basic Structure doctrine is now part of Indian Constitutional law. Judicial independence and judicial review are acknowledged principles of Basic Structure immutable to the amending processes. Constitutional supremacy is integral to the democratic polity of the Republic. The guaranteed rights of equality, freedom, liberty, non-exploitation and access to justice are to be liberally interpreted taking on board the spirit of Directive Principles of the Constitution ensuring social justice and benefits of development to all sections of society. To be able to reach justice to disadvantaged sections and to provide equal justice to all, courts may waive the requirement of "standing" and allow public spirited individuals to agitate the claims on behalf of the poor. In short, we have today a rights jurisprudence which empowers the poor and enables the judiciary to intervene against actions or omissions of State and its agencies violating the rights of the poor. Of course, the elements of this jurisprudence were developed when the State was in commanding heights of the economy and private players were allowed their economic operations under license of the State only. The question that agitates the public mind therefore is whether the judiciary will continue to play its rightful activist role in defense of the people or withdraw to its conventional role in settlement of disputes under the changed circumstances. Would PIL become a low priority for the judiciary? Would the court avoid entertaining crucial economic issues on the ground that they are questions of policy for the executive to decide? Would the court hesitate to inquire into corruption charges and allow politicians to get away on grounds of technicalities and unfair legislative provisions? What will happen to the progressive environmental jurisprudence the court has developed to curb irresponsible use of natural resources? How far local communities be able to persuade the court if national and state governments collude with powerful corporate entities to compromise public interests under pressure from powerful market lobbies? Difficult questions indeed for which ready answers are not available as the issues are complex and the world scenario is changing fast and national governments are finding their authority steadily eroded through globalization processes.

Be that as it may. The Indian people will expect their judiciary to continue to play the balancing role to make governance serve human rights, democracy and social justice. The executive may falter when faced with pressure from within and outside. The legislature might think that its job is done when laws are enacted and resources allocated. The invisible hand of market forces will operate to make laws ineffective and government non-functional. The civil society which can act as a pressure group between market and governments is still

unable to perform for a variety of historical and structural factors. The inordinate delay in the setting up of the Competition Commission, the ineffective functioning of the Pollution Control Boards and the inability of the consumer protection system to protect the consumers are illustrative of markets eroding the efficacy of even existing regulatory arrangements. Increasingly even judicial functions are being conferred on bureaucratic regulatory systems statutorily created to facilitate market operations. It is the time that the country needs a stronger and activist judiciary than before to be vigilant and effective in managing constitutional governance in a transitional economy. In order to make it happen the judiciary also needs a lot of internal reform without further delay. And that is a subject for judges to deliberate upon and act with or without governmental support.