LIBERALISATION, PUBLIC INTEREST AND INDIAN CONSTITUTION

I Preface

WE LIVE in an era of transition today. Transition is the essence of development. The world is changing fast and witnessing the re-definition of economics and relationships between people and nations of the world. It is necessary to ensure that this change is not a step towards self-destruction. Protecting our people cannot be limited to protecting our land but should also include protection of all our resources: labour, technological, natural, social and cultural. And above all, it is necessary to ensure that the change being initiated is in conformity with norms of the Indian Constitution: the fundamental law of the land.

The Indian Constitution is a living document. The full import and meaning of its words can be appreciated only when considered in relation to the vissicitudes of fact which from time to time emerge. But the basic value choices remain. It can perhaps be best described as a document which, while upholding and protecting individual interest in the form of fundamental rights guaranteed against the state, envisages a positive role for it in ensuring realisation of these basic rights by every individual. In other words, the fact that an individual has a right would mean the state has a duty not to interfere with it. Further, the state of this proposition can perhaps be best explained in terms of Rawl's first principle of justice that each person is to have an equal right to the most extensive, total system of equal basic liberties compatible with a similar system of liberties for all.[1] This principle can be further elucidated as follows:

> The purpose of legitimate politics, or government, is to secure and protect, for each human being, as much health and freedom as is compatible with equal health and freedom for all other human beings.[2]

It cannot, therefore, be disputed that the government has a positive role to play. The Indian Constitution recognised this when it discarded the notion of a mere 'police' role for the state, and instead endowed it with a positive, 'welfare State' role.

It is in this context that we seek to examine the subject of this paper—liberalisation and emergence of transnational corporations as major world actors. The basic premises on which this paper is based are:

(*i*) The Government of India has built the country's industrial capacity over a period of time by measures geared towards supporting domestic concerns.

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1. John Rawls, *A Theory of Justice* 302 (1971).
2. Christian Bay, "Universal Human Rights Priorities", in Jach Donnelly (ed.), *International Human Rights Priorities: Contemporary Issues* 6 (1989).

(*ii*) It is a matter of policy for the Indian legislature to decide whether to dismantle the system of strict controls over growth of industries and encourage the incoming of foreign competition. It may be necessary to be able to stand upto foreign competition, but it would be self-defeating if the government is unable to control the machinations of foreign enterprises and allows the country to dance to their tunes. In other words, the state cannot allow a parcel of its power coupled with duty, to be transferred to corporations which act to the detriment of the people.

(*iii*) There is therefore an imperative need to re-examine and determine what the state ought to take upon itself to direct by public wisdom, and what it can leave to individual exertion, and how that individual exercise of power can be made an accountable and responsible exercise.

II Constitutional exposition of public interest

The core of the directive principles of state policy is that ownership and control of the material resources of the community shall be so distributed so as to best subserve the common good[3] and that the operation of the economic system should not result in concentration of wealth in the hands of a few. With the Indian constitutional mandate, Indian economic activity has to satisfy the demands of distributive justice and public interest.

The concept of public interest has been examined by the Supreme Court in *Kasturilal* v. *State of Jammu* and *Kashmir*.[4] It was held that what, according to the founding fathers, constitutes the plainest requirement of public interest is set out in the directive principles and that they embody, *par excellence*, the constitutional concept of public interest. The court further held that every activity of the government has a public element in it and must be guided by public interest.

Justice Krishna Iyer elucidated the philosophy behind article 39 in *State of Karnataka* v. *Rangannath Reddy*.[5] Two quintessential conclusions emerge from article 39(*b*) and (*c*) when they prescribe a futuristic mandate to the state with a message of transformation of the economic and social order. These are:

First, such change calls for a collaborative effort from all legal institutions of the system, *viz.*, legislature, judiciary and administrative machinery.

Second and consequentially, loyalty to the high purpose of the Constitution, *viz.*, social and economic justice in the context of material want and utter inequalities on a massive scale, compels the court to ascribe expansive meaning to the pregnant words used with hopeful foresight, not to circumscribe their connotation into contradiction of the objectives inspiring the provision.[6]

In that case, Justice Krishna Iyer interpreted the term 'material resources' in article 39 as "embracing all the national wealth, not merely natural resources, but all the *private and public sources* of meeting material needs, not merely public

3. Art. 39(*b*).
4. (1980)4 S.C.C.1.
5. A.I.R. 1978 S.C.215.
6. *Id.* at 250.

possessions. Everything of value or use in the material world is material resource and the individual being a member of the community, his resources are a part of those of the community. To exclude ownership of private resources from the coils of Article 39(b) is to cipherise its very purpose of redistribution the socialist way."[7]

In other words, the Supreme Court has also recognised the private entity and its resources to be a parcel of the community's resources, and answerable to the community's needs.

In *Kesavananda Bharati* v. *State of Kerala*,[8] the Supreme Court clearly held that the directive principles are part of the basic structure of the Constitution and the state by its act *cannot affect* that basic structure.

The Constitution, therefore, does envisage a positive role for the state. The judiciary, however, has laid down that the manner in which this role has to be performed is left to the legislature: a matter of policy into which it will not interfere. The policy of liberalisation, and dismantling of the regulatory framework that has been built over the years, is a matter of 'policy' which the legislature is entitled to make. Indian public enterprises, while they have a number of achievements to their credit, have been accused time and again of corruption and inefficiency. Privatisation may perhaps be necessary to induce an element of competitiveness and efficiency. It is necessary to ensure, however, that the casualty in the process is not 'public interest'. The mandate therefore arising is that we have to build safeguards to avoid being trampled by the power of private corporations which are stepping into many of the areas hitherto controlled by the state.

III Liberalisation and public interest

One of the ways of ensuring the element of public interest in any state action, was by availability of certain rights in the individual against the state. The Constitution[9] confers on the individual certain basic rights enforceable against the state.

If the ultimate objective is sustainable, (*i*) utilisation of natural and human resources, (*ii*) achievement of higher levels of production and *per capita* income, (*iii*) generation of employment, (*iv*) reduction of inequalities and ensuring of social and economic justice, we have to develop safeguards against the private actors who are stepping in, in a big way, to take over many of the state-owned enterprises. Such a need is enhanced especially in the light of corporations emerging globally as major 'actors' by sidelining the 'state'.

The purpose of the Constitution[10] as explained by the Supreme Court, is that the state, in the exercise of its powers should be subjected to limitations of fundamental rights of individuals.[11] The reasoning was that it was *only* against the

7. *Ibid.*
8. A.I.R. 1973 S.C. 1461.
9. Pt. III.
10. *Ibid.*
11. A.I.R. 1952 S.C. 59.

state and its *immense power* that an individual needs constitutional protection.[12]

But what are the safeguards available against the 'immense' power of the corporations? The real question which needs to be addressed is whether the 'private sector' is really 'private'. We are all aware of the fact that the private sector is only indulging in private management of public capital. Most of them are recipients of large public funds from public financial institutions and banks. They are dealing with money of the public at large. Is there any need, or for that matter, justification, in calling them private?

With the process of economic liberalisation and an increasing role being contemplated for private sector and in the absence of any regulatory framework it is time that we re-evaluate the concept of public-private divide contemplated by article 12 of the Indian Constitution. If the state action for reasons of presence of public element in it is subject to certain restrictions contained in the Constitution,[13] (in order to fulfill the mandate of article 14 of the Constitution, which guarantees equality before law and equal protection of law) should not the 'private' sector, which is only using the corporate veil to shield its public identity, be subjected to the same restrictions which the state is subject to, by piercing the corporate veil?

What in essence is being proposed is that the ambit of the Constitution,[14] and particularly of article 12 should be expanded in the light of emergence of corporations as entities with immense power. The emergence of this new jurisprudence would be an essential and much needed safeguard against their activities. It will not be possible to transpose the positive duty mandated upon the state on the corporation.[15] But what can and should be done is to make private corporations answerable to constitutional guarantees of fundamental rights. The test being suggested is that any private entity which holds itself open to the 'public', has a 'public element' in it and its activities should be made answerable to the guarantees of fundamental rights. Such a proposition would be in conformity with the fundamental basis of the Indian Constitution: the guarantee of basic rights to all individuals.

The Supreme Court in *Shrilekha Vidyarthi* v. *State of Uttar Pradesh*,[16] did recognise that the presence of 'public element' is sufficient to attract article 14. In that case, however, the court maintained the public-private divide in state and privately controlled activities by stating that private parties are only concerned with their personal interest, whereas, state action has public interest. The reasoning was that the state activity affects day-do-day life of members of society and with its role in our economic activity, the impact of this action is also on public interest.

The question arising is, can such a divide be maintained in the light of private corporations touching almost every aspect of our lives—in terms of production, technology, finance, employment and so on? An act of a private corporation

12. *Ibid.*
13. Pt. III.
14. *Ibid.*
15. Pt. IV, Directive Principles.
16. A.I.R. 1991 S.C. 537.

uninformed by reason and influenced by personal predilections alone would result in adverse consequences for the public at large and even affect the national interest.

IV Conclusion

Economic liberalisation is throwing up new challenges to the Indian constitutional scheme and concept of public interest enshrined thereunder.

The need of the hour is to innovate and protect public interest. This debate is of outmost importance because the concept of fundamental rights cannot be reduced to naught with gradual reduction of the state's activity in different spheres of economic life.

Making private corporations answerable to constitutional guarantees is just a step towards making any private entity affecting public life accountable. Legislative innovations and safeguards beyond that are also necessary if we have to ensure that another Union Carbide does not slip away by payment of an insignificant amount deposited infringing on the fundamental constitutional guarantee of right to life. This is necessary because a private entity is brought to act in its own interest alone. It is upto the state to ensure that public interest is not injured thereby. Keynes has observed:

> We cannot settle on abstract grounds, but handle on merits in detail, what Burke termed as one of the finest problems in legislation, namely, to determine what the State ought to take upon itself to direct by public wisdom, and what it ought to leave, with as little interference as possible, to individual exertion.[17]

Of more significance is his observation:

> It is not true that individuals possess a prescriptive natural liberty in their economic activities. The world is not so governed from above that private and social interests always coincide. It is not so managed here below, that in practice they coincide. It is not a correct deduction from the principles of economics that enlightened self-interest always operates in the public interest. Nor is it true that self-interest is generally enlightened; more often individuals acting separately to promote their own ends are too ignorant or too weak to attain even these. Experience does not show that individuals, when they make up a social unit, are always less clear-sighted than when they act separately.[18]

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17. John Maynard Keynes, *Essays in Persuasion* 112 (1963).
18. *Ibid.*

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