STATE MONOPOLY AND THE CITIZEN

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A DEVELOPING country like India confronted as it is with its innumerable pressing and agonising problems of meeting the daily needs of its ever-increasing starving millions has, perhaps, no other alternative but to accept democratic socialism as the only method of attaining social justice for its citizens. The word "socialism" has diverse meanings to diverse minds; it has, however, generally come to mean that production and distribution of material goods of life must be controlled by the State. It is on this ideological premise that the foundations of our constitutional system are anchored though the words "socialism" or "socialistic planning" do not occur anywhere in the Constitution. The Constitution of India does not expressly or by implication lay down the socialist idea. The Preamble of the Constitution and the Directive Principles as well as the norms underlying the restrictions imposed on Fundamental Rights are such as to raise an irresistible inference that one of the most crucial threads in the entire fabric of the Constitution is the achievement of a true welfare State through some kind of socialistic planning. Such socialistic objectives axiomatically lead to State control of trade, business, industry and service.

The Constitution (First Amendment) Act of 1951 set at rest any doubts on this controversy whether socialistic planning was incorporated into the Constitution. Article 19 (6)[1] as amended enables the State to

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1. Article 19(6) before its amendment stated :

   Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any Law prescribing or empowering any authority to prescribe, the professional or technical qaulifications necessary for practising any profession or carrying on any occupation, trade or business.

   Subsequent to its amendment Article 19(6) read as follows :

   Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law

carry on any trade, business, industry or service either by itself or through a corporation owned or controlled by the State to the exclusion of private citizens wholly or in part. In other words, the amended Constitution enabled the State to usher into India, an era of greater State control of trade and business. It also conceived the growth of a "mixed" economy, permitting thereby private enterprise to function simultaneously with State-owned or State-controlled corporations and undertakings in the sphere of trade and business. The amended article 19 (6) not only empowers the ship of State to launch upon an unchartered sea of commerce and to execute a vast industrial programme through State-controlled corporations and undertakings but also allows it to venture itself into an ambitious plan of State trading. Inevitably, this resulted in Parliament and State Legislatures creating legislations for two decades "nationalising" several spheres of business activity such as air and road transport, life insurance, banking etc. to name only a few. In the wake of this followed the growth of a kind of "new despotism" of both the ministerial and official high-ups which had necessarily to be curbed by the superior courts in India. Every law creating a State monopoly, even if there are built-in safeguards within it, cannot but lead to some abuse. Lord Acton's classic dictum "Power corrupts; absolute power corrupts absolutely" is as much true of a rapidly rising welfare State in India as it was in the 16th century France in spite of all the sophisticated constitutional devices devised by the makers of the Constitution.

One of the earliest cases where the Supreme Court had to consider the creation of a State monopoly was that of *Saghir Ahmad* v. *State of Uttar Pradesh*[2], whether a monopoly created in road transport by the State would operate as a reasonable restriction on citizen's right within the meaning of article 19(1)(g). Interpreting the unamended article, the Court held that the impugned legislation was unreasonable. However, *Saghir Ahmad's* case is no more good law after the amendment of article 19(6). It has, however, some relevance because of certain observations made by Mukherji, J. namely,

> "The result of the amendment is that the State would not have to justify such action as reasonable at all in a Court of Law, and no objection could be taken to it on the ground that it is an infringement of the right guaranteed under Article 19 (1) (g) . . ."[2a]

imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or (ii) the carrying on by the State or by corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

2. [1955] 1 S.C.R. 707

2a. *Ibid.* at 727.

Seervai has pointed out that Mukherji, J. was right in observing that it is not open any more for the courts to question the unreasonableness of any law made by the State creating a State monopoly in trade or business.[3] He, however, has been unduly critical of resort to sociological interpretation followed by the Supreme Court in interpreting the amended article 19 (6) in a case that arose later namely *Akadasi Padhan* v. *State of Orissa.*[4] Speaking for the Court, Gajendragadkar, J. (as he then was) held that the amendment of article 19 (6) must be viewed from the broader standpoint of social philosophy underlying the Constitution.[5] Seervai's criticism is somewhat justified going strictly by the rules of grammatical interpretation in interpreting article 19 (6) as amended. The amended article does not empower the courts to question legislation creating State monopoly on the touchstone of reasonableness.

However, a Court is not fettered by mere rules of grammatical interpretation. It can resort even to principles of sociological jurisprudence to interpret constitutional provisions so long as it reaches a correct conclusion. The problem in India is that our judges and lawyers are too steeped in Austinian Jurisprudence and follow closely the analytical school when they should turn more frequently to sociological school for interpreting so live a document as the Constitution which, as the Supreme Court itself has remarked, should be interpreted not in a pedantic fashion. In any event, the Court has also reached the same conclusion as Seervai because it observed—"validity of the laws covered by the amendment is no longer left to be tried in courts." Under these circumstances, Mukherji, J's observations to that extent do not seem to have been departed from by the Court in *Akadasi Padhan's* case[6] even though it mistakenly resorted to a

3. Seervai, *Constitutional Law of India*, 399-404 (1967).
4. [1963] Supp. 2 S.C.R. 691.
5. He observed: "The task of construing important Constitutional provisions like Article 19(6) cannot always be accomplished by treating the said problem as a mere exercise in grammar. In interpreting such a provision, it is essential to bear in mind the political or the economical philosophy underlying the provision in question, and that would necessarily involve the adoption of a liberal and not a literal and mechanical appronch to the problem. With the rise of the philosophy of Socialism, the doctrine of State ownership has been often discussed by political and economic thinkers....The amendment made by the Legislature in Article 19(6) shows that according to the Legislature, a law relating to the creation of State monopoly should be presumed to be in the interests of the general public. Article 19(6)(ii) clearly shows that there is no limit placed on the power of the State in respect of the creation of State monopoly....In other words, the theory underlying the amendment in so far as it relates to the concept of State monopoly, does not appear to be based on the pragmatic approach, but on the doctrinaire approach which socialism accepts....In our opinion, the amendment clearly indicates the State monopoly in respect of any trade or business must be presumed to be reasonable and in the interests of the general public, so far as Article 19(1)(g) is concerned." *Ibid.* at 704-5
6. *Supra* note 4.

philosophical theory as an aid to construction of article 19 (6) as amended.

Whatever the controversy may be as to the true interpretation of article 19 (6), the law as it has emerged is that the reasonableness of the laws creating State monopoly is put beyond the pale of judicial examination, with, however, one solitary exception; if the attack is directed against such of the provisions of the law creating a State monopoly which do not "basically and essentially" deal with it, then the courts are free to question them from the standpoint of their reasonableness under the first part of article 19 (6). This is what the Supreme Court laid down in *Akadasi Padhan's* case. It held :

> "In other words, the effect of the amendment made in Article 19(6) is to protect the law relating to the creation of monopoly and that means that it is only the provisions of the law which are integrally and essentially connected with the creation of the monopoly that are protected. The rest of the provisions which may be incidental do not fall under the latter part of Article 19(6) and would inevitably have to satisfy the test of the first part of Article 19(6)."[7]

A necessary corollary of this decision is that though a citizen cannot question the reasonableness of essential and integral provisions of laws creating State monopolies, he can still challenge them on the grounds of infringement of his other fundamental rights including those enshrined in article 19 itself, namely, those in article 19(1)(a) to (f) read with article 19(2) to (5).

Inasmuch as the latter part of article 19(6) permits the State itself and its undertakings to carry on business in competition with other citizens by their partial exclusion, it is not difficult to visualise cases where such challenge can be made against State action. Besides, since nothing in article 19(6)(ii) prevents the State from appointing agents from amongst the citizens to advance the interests of its exclusive monopoly trading activities, cases may arise also wherein such monopoly control by State is abused by it or its officers.

Though article 19(6)(ii) as amended does not enable the courts to question legislation creating State monopolies, exclusive or partial, as to its reasonableness, the citizen can impugne such action before courts as being arbitrary and discriminatory and that it is violative of equality before law under article 14. A law which is discriminatory cannot but be unreasonable though it may be true that what is unreasonable may not necessarily be arbitrary or capricious. Admittedly, the line is too thin for the courts to perceive or draw in a given case with the result that they

7. *Ibid.* at 707.

can question both the legislative wisdom as well as administrative action. In fact, Gajendragadkar, J. in *Akadasi Padhan's* case was fully alive to this distinction but stated that the main attack in that case was directed on the ground of article 19(1)(f) and (g) and no plea or contention was ever raised under article 14.[8]

It is at this juncture that the Supreme Court's more recent pronouncement in *Rasbihari Panda* v. *State of Orissa*,[9] has considerable relevance. Here the attack was made against the law creating state monopoly, not merely on the ground of infringement of article 19 but also of article 14. For the first time the Court had to consider whether the State under the guise of a law creating a monopoly in kendu leaves could abuse its power. The High Court of Orissa interpreting section 10 of the Orissa Kendu Leaves (Control of Trade) Act 1961, was of the view that the State having assumed monopoly of trading in kendu leaves was alone entitled to purchase kendu leaves from primary producers and was by section 10 authorised to dispose of the leaves "in such manner as the Government may direct." It observed that that Section placed no restriction in the manner in which Government could sell kendu leaves. The Supreme Court while setting aside the judgement of the High Court held that if the scheme adopted by the Government for the disposal of kendu leaves "creates a class of middlemen who would purchase from the Government kendu leaves at concessional rates and would earn large profits disproportionate to the nature of service rendered or duty performed by them it cannot claim protection of article 19(6)(ii). Speaking for the Court, Shah, J. (as he then was) laid down indeed a very salutary, wholesome and fine principle :

> "Validity of the law by which the State assumed the monopoly to trade in a given commodity has to be judged by the test whether the entire benefit arising therefrom is to enure to the State, and the monopoly is not used as a cloak for conferring private benefit upon a limited class of persons."[10]

He stated further that the scheme adopted by Government, first of offering to enter into contracts with certain named licencees, and later inviting tenders from licencees who had in the previous year carried out their contracts satisfactorily was liable to be adjudged void on the ground that it *unreasonably* excluded tenderers in kendu leaves from carrying on their business. He went on to apply the test laid down in *Akadasi Padhan's* case and said:

"The scheme of selling Kendu leaves to selected purchasers or of

8. *Ibid.* at 718.
9. A.I.R. 1969 S.C. 1081.
10. *Ibid.* at 1088.

accepting tenders only from a specified class of purchasers was not "integrally and essentially" connected with the creation of the monopoly and was not on the view taken by this Court in *Akadasi Padhan's* case protected by Article 19(6)(ii). It has to satisfy the requirement of reasonableness under the first part of Article 19(6)."

Though Shah, J. justified his decision on the ground of unreasonableness of the governmental scheme by placing reliance on the first part of article 19(6) what appears to have weighed with him and the Court was the obnoxious and discriminatory policy underlying the entire scheme which enured to the private benefit of a limited class of persons. The submission here is that the Court could as well have struck down the scheme on the exclusive ground that it violated article 14. Indeed, this case only points out the fallacy in trying to draw a distinction between unreasonableness of a law and its arbitrariness or capriciousness. It may be that the First Amendment itself was misconceived inasmuch as it was not comprehensive enough to extend protection to the State's legislative actions from challenge under article 14. Apart from administrative actions, a citizen can also challenge any scheme evolved uder a statute which may result in discrimination in its scope and operation. To the extent that it widenes the fundamental rights of citizens *Rasbihari Panda's* case is a welcome one but it does create for the State serious repercussions inasmuch as it has saddled it with an additional obligation not only to devise legislation which does not in operation result in discriminatory practice but also to see that its officers act in conformity with the fundamental rights guaranteed to the citizen. After the decision in *Golaknath* case[11] the citizen cannot but congratulate himself as the door has undoubtedly become immensely wide for him to attack any subsequent legislation creating a State monopoly, partial or exclusive, from the standpoint of its unreasonableness.

One wonders if the limited protection afforded to the State by the rule followed in *Akadasi Padhan's* case and *Rasbihari Panda's* case is not entirely watered down by the latest observations of Shah, J. who delivered the majority judgment for the Supreme Court in what has come to be popularly known as the *Bank Nationalisation* case, namely, *R.C. Cooper* v. *Union of India.*[12] Though the Presidential Ordinance followed by the Banking Companies (Acquisition and Transfer of Undertakings) Act 1969, may not strictly be construed as laws creating State monopoly, they, in fact, provided for a substantial exclusion of citizens from carrying on banking business. The unreasonableness of these laws under article 19(6) could not be questioned. Yet, Shah, J. after reviewing the aforesaid decisions came to the following conclusion : "The restriction imposed

11. [1967] 2 S.C.R. 762.
12. A.I.R. 1970 S.C. 564.

upon the right of the named banks to carry on "non-banking" business is, in our judgment, plainly unreasonable." In the earlier part of his judgment he did refer to *Rasbihari Panda* v. *State of Orissa*,[13] *Messrs Vrajlal Manilal & Co.* v. *State of Madhya Pradesh*,[14] *Municipal Committee, Amritsar and another* v. *State of Punjab*.[15] He again reiterated the rule:

> "The 'basic and essential' provisions of law which are 'integrally and essentially' connected with the carrying on of a trade by the State will not be exposed to challenge that they impair the guarantee under Article 19(1)(g), whether the citizens are excluded completely or partially from carrying on that trade, or the trade is competitive."[16]

Applying this test he reaches the conclusion that the impugned Act in that it prohibited the petitioner banks from carrying on banking business, being a necessary incident of the right assumed by the Union was not liable to be challenged because of article 19(6)(*ii*). If this were so, one is unable to understand why the learned Judge held that the restriction imposed by the very law upon the named banks to carry on non-banking business was unreasonable unless it was held to be not a basic and essential provision for the creation of State monopoly. Ray, J. in his dissent shows great sense of clarity when he summed up his judgment upon the attack based on article 19(1)(g). He stated:

> "Article 19(6) in the two limbs and in the two sub-articles of the second limb deals with separate matters and in any event State monopoly in respect of trade or business is not open to be reviewed in Courts on the ground of reasonableness. This Court in the case of *Municipal Committee of Amritsar* v. *State of Punjab*, held that so far as monopoly business by the State was concerned under Article 19(6) it was not open to challenge."[17]

It seems that the majority of the Court was guided in the *Bank Nationalisation* Case by the totality of circumstances and the cumulative effect of the attack made on the entire piece of legislation upon a multiplicity of grounds arising not merely under article 19(1)(g) but also under articles 14 and 31.

In this sense decided cases, therefore, do not afford any precision to the Court's logic which undoubtedly and inevitably has been pragmatic and much less socialistic; guided more by considerations of meeting justice to the litigants in their individual cases than by any desire to evolve a judicial policy or philosophy. However, one is tempted to generalise—though

13. A.I.R. 1969 S.C. 1081.
14. A.I.R. 1970 S.C. 129.
15. A.I.R. 1969 S.C. 1100.
16. *Supra* note 12 at 600.
17. *Supra* note 12 at 632.

such generalisations must be eschewed due to the glorious uncertainty that goes with judicial practice—that in each instance the Court has scrutinized the nature of the restriction imposed by the law creating State monopoly and has interfered only where it felt that the restriction was so absolute and arbitrary as to render it impossible for the citizen to carry on a particular trade or business. In other words, in spite of the amendment in article 19(6), the Court has not rigidly disallowed a citizen from challenging the provisions of a law creating monopoly in favour of a State if the citizen could attack the law on the ground that it impairs one or more of his other fundamental rights. But there need be no apprehension that the Court has completely emasculated the whole object and purpose of the Constitution (First Amendment) Act.

Possibly the judgment in the *Bank Nationalisation* case stands on its own footing and may not be followed by the Supreme Court in cases arising subsequently in which the laws creating State monopolies are challenged. The rule in *Akadasi Pudhan's* case may still hold sway.

At any rate one good result of the First Amendment appears to be that Courts in India have become slow in questioning the unreasonableness of State laws creating monopoly in their favour. To that extent State monopolies are less vulnerable from judicial interference but that is not to say that there should not be frequent judicial review of abuses practised by State monopolies.

Abuse of monopoly rights by the State and its officers both in the exercise of legislative as well as administrative power can take myriad forms. *Rasbihari Panda's* case was one such case of abuse. In an ever-extending horizon of State trading corporations and bodies, the task of controlling the abuse of power needs hardly to be emphasized.

In a more recent case from Andhra Pradesh, which is now pending disposal before the Supreme Court, the allegation in the writ petition[18] is that the State of Andhra Pradesh by so enacting the provisions of its Excise Act 1968, and the Rules laying down the lease of right to sell liquor in retail and special conditions of contract has created a monopoly in the hands of the State itself for the manufacture and distribution of *arrack* and which it was abusing not only by fixing an arbitrary price for liquor supplied by Government and sold through private lesees but also by compelling the latter to lift the minimum guaranteed quantity of liquor from the Government sources as per the terms of a one-sided contract. One of the averments is that when country liquor made through illicit distillation is available at a nominal price, the price at which a retailer has to purchase from Government is more than 200 per cent over and above the actual cost

18. *Venkataratnam v. State of Andhra Pradesh and Others*, Civil Writ Petition No. 649/1971.

price, making it impossible for him to sell government liquor for which there could be no demand at all on account of mass illicit distillation. Since the case is *sub-judice* no comments can be made except to point out that the abuse of monopoly rights in the field of State trading is as much on the increase as it is in the private sector.

It is, therefore, necessary from the point of citizens' rights that there should be some machinery devised through which arbitrary exercise of authority by State monopolies is curbed, checked and controlled. The Parliamentary and Legislative control is one such method open and indeed is being exercised,[19] but it cannot be the sole one. The pressure of legislative work cannot permit either the Parliament or State Legislatures to exercise their effective control or supervision. The institution of Ombudsman has been adopted in India by the passing of the Act for the appointment of a Lokpal who certainly can play a more effective role. Nonetheless it cannot be denied that there should be a serious inquiry by the Parliament and State Legislatures into this field of abuse of authority by State monopolies.

The Monopolies and Restrictive Trade Practices Act 1969, which has for its object the control of concentration of economic power in private hands, in section 3 empowers the Central Government to make the provisions of the Act applicable to any State-owned or controlled undertakings.[20] Unless the Central Government notifies in the official Gazette that the Act is applicable to any one or more of the State owned or controlled corporations or companies, the Monopolies and Restrictive Trade Practices Commission appointed under section 5 cannot hold an enquiry into their affairs under section 12 of the Act. This is indeed a very serious limitation on the powers of the Commission for no citizen aggrieved by the abuse of monopoly by a State trading organisation can prefer a complaint to the Commission which is powerless even to hold an enquiry, leave alone granting any relief. The Central Government under

19. The Public Accounts Committees at the Central and State level can play a vital role in providing the necessary correctives.
20. Section 3. *Act not to apply in certain cases—*

    Unless the Central Government, by notification in the Official Gazette, otherwise directs, this Act shall not apply to—

    (*a*) any undertaking owned or controlled by a Government company,
    (*b*) any undertaking owned or controlled by the Government,
    (*c*) any undertaking owned or controlled by a Corporation (not being a Company) established by or under any Central Provincial or State Act,
    (*d*) any trade union or other association of workmen or employees formed for their own reasonable protection as such workmen or employees,
    (*e*) any undertaking engaged in an industry, the management of which has been taken over by any person or body of persons in pursuance of any authorisation made by the Central Government under any law for the time being in force.

section 3 can obviously even withdraw the application of the Act at any time by notification thus making even a pending enquiry infructuous, though there are no express words in section 3 or anywhere else in the Act spelling out such a wide power as to include the power of withdrawal of its applicability. It may be reasoned that this apprehension is merely hypothetical. This process of reasoning, however, cannot be an answer to the possibility of an abuse of powers under the section by the Central Government itself. However, it is not within the compass of this paper to go into a detailed examination of the Act and its various provisions. Suffice it to observe that the Act is not an adequate piece of legislative enactment under which the Monopolies and Restrictive Trade Practices Commission set up can ever exercise its effective control over the State owned or controlled monopolies unless section 3 is suitably amended to confer a wider *ipso facto* jurisdiction on it.

A preliminary study here reveals that the problem of State monopolies is inextricably mixed up with the larger problem of a more honest, impartial and fair administration without which no social or administrative justice is ever attainable. In a country where the politician is glibly paying lip service to the socialistic ideas, where almost all rungs of administration have been polluted by corrupt and nepotic practices, where inadequate financial and economic resources are unable to meet the gnawing needs of hungry millions, where vested interests are thriving on malpractices in all spheres of human endeavour and activity, where educational and ethical standards are fast deteriorating and where canker has set in at some of the most exalted offices under the Constitution, Superior Courts are still playing a laudable role in providing judicial correctives to those wielding vast political power and yet, inevitably, incurring their displeasure. The politician is today maligning the Courts to delude the illiterate electorate. In a climate such as this, it is inconcievable that any progress in the foreseeable future can be made in the direction of the economic and social objectives glorified in the Preamble to the Constitution.

It is lamentable that we lawyers often try to find remedies in the domain of law and the Constitution. The problem of State monopolies is not a mere jural problem requiring a juristic solution; it is a multi-dimensional one. The answer to the abuse of State monopolies is to be found not in the realm of law or jurisprudence, but in the field of socio-economic planning. In the ultimate analysis, the problem which is facing India is at the level of raising character in all walks of life. The abuse of State monopoly is, therefore, a matter having a nexus with the sense of justice which citizens have to inculcate in themselves. A social welfare state much less a socialistic state can never emerge unless the whole nation rises to meet the great challenge facing it.