

PRIVATE ENTERPRISE AND GOVERNMENT REGULATION
(WITH SPECIAL REFERENCE TO ART. 19(1)(G) OF THE CONSTITUTION)

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The right of the individual to do business or choose his profession, are virtually co-extensive with the state regulation of economic activities in an organised society. Around the middle of nineteenth century, although the doctrine of *laissez faire* enjoyed supremacy, it has never completely governed the practice of any modern state. However, there have been significant changes in the kinds and degrees of control and in the philosophy underlying it. The growth of industry, the changes introduced in the system of land tenure and agricultural production, the industrial revolution and the strengthening of mercantile interests in general have altogether brought a new attitude in the forms of control.

In United States of America the individualistic theory was combined with a regime of high protective tariffs. The regulation of foreign trade by system of import duties was in fact a major form of control in many countries. In France the control of foreign trade provided one of the important issues in the field of economic policy during the nineteenth century. There, the liberals regarded the protectionists and socialists as equally dangerous because of their adherence to state intervention. In England the repeal of mercantilistic *Corn* law was regarded as ushering in the period of *laissez faire*. Yet even in England at no time there was complete adherence to principles of *laissez faire*. The first *Factory Acts* were enacted as a challenge to those principles and these laws can be said to provide the earliest examples of state control.

Economic Idealism

Under our Constitution a welfare state distinguishable from a police state is envisaged. It strives at securing "justice, social and economic" to all its citizens¹. Despite its pronounced ideals, the Constitution does not adhere to any particular ideological creed, but settles to effect a compromise between the individualistic philosophy and the socialistic

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1. See *Preamble* to the Constitution of India, 1950.

doctrine by putting checks on the vices of unbridled private enterprise and by imposing social control to attain minimum welfare measures.²

It may be noted that while the Constitution guarantees the right to acquire, hold and dispose of property to an individual as a fundamental right, it prohibits the state to acquire property without providing compensation or without laying down principles for purposes of compensation in a duly enacted law.^{2a} It also makes imperative that the *Directive Principles of State Policy*, though unenforceable by a court, are fundamental in the governance of the country. Accordingly, these directives are to be formulated in the enactment of laws so that the wealth and material resources are distributed justly and equitably in the society.³ As the study of the problem of government regulation of private enterprise has to be restricted only with reference to *article 19 (1) (g)* of the Constitution, the scope of our enquiry has to remain limited.

In the recent past the sustained economic ills of the nation, which have consequently caused imbalance in the matter of production and distribution of goods, have led the state to intervene actively. The intervention into the sphere of trade or business has been pursued either by nationalising the trade or by way of taking over the existing industries. Accordingly, the nationalisation of civil aviation, life insurance business and road transport business have been the result of this policy. Many other business activities are being or have already been brought within the fold of nationalisation. Such a trend decisively requires redetermination of the scope of freedom of trade and business as guaranteed in the Constitution *vis a-vis*, the power of state to regulate this freedom. In other words, the individual's right to engage in trade and business guaranteed in *article 19 (1) (g)* has to be mapped out with the help of restrictions likely to be imposed under *clause (6)* of *article 19* under the newer conditions of today.

Freedom of Trade—Limits

It may be stated at the outset that the freedom under *article 19 (1) (g)* is available only to citizens of India, and it cannot be claimed by non-citizens. Doubts were raised as to whether a corporation doing business can claim protection of *article 19 (1) (g)* of the Constitution. There was,

2. *Article 43* of the Constitution for instance, discards the old doctrine of *laissez faire* or freedom of bargain between an individual and employer and an individual worker and directs to secure by legislation and other state agencies, minimum wages and a decent standard of life, irrespective of the terms of his employment.

2a. *Article 31*, Constitution of India.

3. *Article 39(b) and (e)*, Constitution of India, 1950.

however, a conflict of opinion among the High Courts of India.⁴ By a 7:2 decision in *The State Trading Corporation* case⁵ the Supreme Court held that a company registered under the Indian Companies Act, 1956 was not a citizen for purposes of *article 19 (1)(g)* of the Constitution. In the instant case, the petitioner's counsel did not ask the court to "tear the corporate veil" which was sought to be done by the petitioners in *Tata Engineering* case.⁶ The petitioners contended that though the company or the corporation may not be an Indian citizen under *article 19*, this fact should not and cannot prejudice the claim of the petitioners who as Indian citizens were shareholders of the company and were entitled to get relief under *articles 19 (1)(g)* and 32 of the Constitution. According to the petitioners the corporation was no more than an instrument or agent appointed by them and as such it should be open to the petitioners, either acting themselves as companies or acting through their shareholders, to claim the relief under *article 19 (1)(g)*. The crux of the argument was that court should look at the substance of the matter and give the shareholders the right to challenge any contravention of their fundamental rights. The Supreme Court rightly relied upon the decision in *Salomon v. Salomon & Co.*⁷ and held that the entity of the corporation was entirely different from that of its shareholders. Mr. Chief Justice Gajendragadkar speaking for the court observed :

...If their plea was upheld, it would really mean that what the corporation or the Companies cannot achieve directly, can be achieved by them indirectly by relying upon the doctrine of lifting the veil.

His Lordship further held,

If the legislature intends that the benefit of Article 19 should be made available to the corporation, it would not be difficult for it to adopt a proper measure in that behalf by enlarging the definition of 'citizen' prescribed by the Citizenship Act passed by the Parliament by voting of the powers conferred on it by Articles 10 and 11.⁸

The court refused to extend protection to the company's shareholders.

4. *Jupiter Insurance Co. v. A. Rajagopalan* (A.I.R. Punj. 9) and *Amrit Bajar Patrika Ltd. v. Board of High School & Intermediate* Ed. A.I.R. 1955 All. 595 held that the corporation citizens for the purpose of every article of the Constitution in doing Art. 19 (1)(g). A contrary view was taken in *Kishangarh Mills v. State of Rajasthan* 1953 Raj. 363 and *T. D. Mumar & Bros. v. Iron & Steel Controller*, A.I.R. 1961 Cal. 258. The Supreme Court also did not give its final verdict in *Shewpunjanrai Inder Sain Ltd. v. Controller of Customs*, A.I.R. 1958 S.C. 845 but only assumed the company to a citizen for the purposes of the fundamental rights.

5. *State Trading Corporation of India Ltd. v. C. T. O.* A.I.R. 1963 S.C. 1811. (1963) 3 S.C.R. 792.

6. *Tata Engineering & Locomotive Co. Ltd. v. State of Bihar* A.I.R. 1965 S.C. 40.

7. 1897 A. C. 22 : 66 I.J Ch. 35.

8. A.I.R. 1965 S.C. 40, 48.

Thus what was held earlier in the *State Trading* case was subsequently endorsed in the *Tata Engineering* case. The implications of these pronouncements thus tend to show that (i) the scope of *article 19 (1) (g)* is restricted merely to those natural human beings who are Indian citizens and that (ii) the state can regulate private business corporations in a major way without caring for limits prescribed by *article 19 (1) (g)* of the Constitution except that the protection such corporations would enjoy will be limited to *article 31* of the Constitution. Resultantly, this affords greater leeway to the government to regulate private enterprise to promote national interests.

Nationalisation of Industries

Another very important problem in the field of government regulation is relating to the nationalisation of private industries. The regulation of private enterprise was not a major problem during the pre-independence days because of very limited industrialisation and also because of the alien government's reluctance to promote industrial and economic growth of the country. The post-independence policy of rapid industrialisation and the adoption of measures for planned economic development together with a social policy of ending anarchy in production and distribution of goods and wealth has led to ample problems. The implementation of this useful policy demanded that profits of industries be ploughed back to set up industries which may advance the public good. The necessity of nationalising some basic industries was also very much felt in the public interest with the adoption of the policy of a "socialistic pattern of society." In some cases the necessity was felt not only to nationalize private enterprises but also to create complete monopoly in government's favour. The pursuit of these policies and programmes brought many a change in the activities of the state, and these were such as could not have been contemplated as state functions at a time when *P. and O. Steam Navigation*⁹ was decided, but which would now legitimately fall within the scope of a welfare state.

In order to achieve the foregoing objectives *clause (6) (ii)* was inserted in *article 19 (1) (g) (6)* by Act, 1951 the *Constitution (First Amendment)* Act. The effect of *clause (6) (ii)* was to state clearly and specifically that the freedom guaranteed under *article 19 (1) (g)* would not be deemed to be violated if the state directly or through a corporation owned or controlled by it completely or partially took over any trade, business, industry and service in exclusion of citizens. The validity of such a law could not now be questioned on the ground that the restrictions imposed

9. *P. & O. Steam Navigation v. Secretary of State for India*, Bombay HCR App. 1.

by it were unreasonable or that the restrictions were not in the interest of general public.¹⁰ The scope of the amendment, was dilated upon by Mr. Justice Mukherjee thusly :

Article 19(6) of the Constitution, as it stands after the amendment of 1951, makes a three-fold provision by way of exception to or limitation upon clause (1) (g) of the Article. In the first place it empowers the State to impose reasonable restriction upon the freedom of trade, business, occupation or profession in the interest of the general public. In the second place it empowers the State to prescribe the professional and technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business. Thirdly, it enables the State to carry on any trade or business either by itself or through a corporation owned or controlled by the state to the exclusion of private citizens wholly or in part.¹¹

Regulation and Public Interest

The power of the state to regulate private enterprise and business in the public interest is a significant one. The public policy has been the measuring rod in this matter. Accordingly immoral acts or gambling are not deemed to be business or profession. In *Chamarbaugwala* case¹² it was held that a prize competition which was of gambling nature could come within the legislative prohibition without violating *article 19 (1) (g)*. The Supreme Court after examining the issue through several pronouncements of other courts,¹³ as well as by relying upon the scriptures¹⁴ observed :

We find it difficult to accept the contention that those activities which encourage a spirit of reckless propensity for making easy gain by lot or chance, which lead to the loss of the hard earned money of the undiscerning and improvident common man and thereby lower his standard of living and drive him into a chronic state of indebtedness and eventually disrupt the peace and happiness of his humble home could possibly have been intended by our Constitution makers to be raised to the status of trade, commerce or intercourse and to be made the subject-matter of a fundamental right guaranteed by Act 19 (1) (g).¹⁵

It may be noted that the Supreme Court while interpreting *article 19 (1) (g)* in the *Chamarbaugwallas* case¹⁶ kept the doctrine of social engineering in view which sustained the validity of Bombay Lotteries and Prize Competi-

10. *Akadesi v. State of Orissa* A.I.R. 1963 S.C. 1047.

11. *Sagir Ahmed v. State of U. P.* A.I.R. 1954 S.C. 728, 735.

12. *State of Bombay v. R.M D. Chamarbaugwala*, A.I.R. 1957 S C. 699.

13. *F. A. Lindsay, A. E. Woodward & Willcox v. The Commissioners* (1933) 18 Tax Cases, 43 and *Southern Inspector of Taxes v. A.B.K.* (1933) 18 Tax Cases I.

14. Hymn XXXIV of the Rigveda Verses 7, 10 & 13.

15. *Supra* n. 12 at 720.

16. *Supra* n. 12.

tion Control of Tax (An Ord.) Act, 1952 and rules made thereunder on the ground of public interest.

An interesting aspect of *article 19 (1) (g)* is witnessed in relation to prohibition. *Article 47* of the Constitution directs the state to adopt a policy of prohibition.¹⁷ In *Cooverjee* case¹⁸ the Supreme Court held that state has power to prohibit trades which are illegal or immoral or which are injurious to the health and welfare of the public. Chief Justice Mahajan approvingly cited the decision *Crowley v. Christiansen*¹⁹ for holding that there is no inherent right in a citizen to sell intoxicating liquors by retail : it is not a privilege of a citizen. His Lordship went to the extent of holding that as it is a business attached with danger to the community, it may entirely be prohibited, or be permitted under such conditions as will limit its evils. The Court ruled that the manner and extent of regulation rests with the discretion of the governing authority. The Supreme Court decision in the instant case is significant because it held that trade in liquors cannot be claimed as a fundamental right and state can regulate it in the public interest.

However in *Krishan Kumar's* case²⁰ the court explained the law laid down in the *Cooverjee*²¹ case differently. The learned Chief Justice held that :

“perusal of the entire judgment [in the *Cooverjee* case] shows that the Court conceded the fundamental right but held that the said regulation operated as a reasonable restriction on the said rights.”²²

Though the decisions in *Cooverjee's* case and *Krishan Kumar* case are in agreement on the issue that legislative restrictions to the extent of extinction or total prohibition of a trade or profession can validly be imposed, provided the restrictions are in the public interest, nonetheless the difference arises mainly because of the court's upholding in *Krishan Kumar's* case that a trade in liquor is a fundamental right envisaged under *article 19 (1) (g)*. Such a view is contrary to *Cooverji's* case. One may, however, agree with Mr. Justice Subbarao that the standards of morality cannot limit the scope of the right guaranteed under the Constitution, but this argument does not seem tenable to uphold the right of trading in liquor as an absolute fundamental right particularly in view of *article 47* of the directive principles of state policy which prescribes the prohibition of liquor as a state policy and enjoins upon the state to implement the same.

17. Article 47 provides, “The State shall endeavour to bring about prohibition of the consumption except for medical purposes of intoxicating drinks and of drugs which are injurious to health.”

18. *Cooverjee v. Excise Commissioner*, A.I.R. 1954 S.C. 220.

19. (1890) 34 Law Ed. 620.

20. *Krisan Kumar v. J. K. State* A.I.R. 1967 S. C. 1368.

21. *Supra* n. 18.

22. A.I.R. 1967 S. C. 1372.