EXTENT AND LIMITS OF THE UNION AND THE POWER TO REGULATE THE ECONOMY

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The major constitutional limitation on government power to regulate the economy of the country and the activities of the private sector of the economy is obviously found in part III of the Constitution which deals with the fundamental rights. The leading limitations are found in *article* 14 guaranteeing equal protection of laws and *article* 19 (1) (*f*) and (*g*) conferring on citizens, the fundamental right to 'acquire, hold and dispose of property' and right "to practise any profession, or to carry on any occupation, trade or business" respectively, subject to reasonable restrictions in the interests of the general public, and in the case of the right under *article* 19 (1) (*g*), to the right of the State to provide by law for the carrying on by it or by a corporation owned or controlled by it, "of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizen or otherwise." We may exclude *article* 31 providing for the right of compensation in case of acquisition or requisition of property, as this is a right common to all persons, not merely those operating private enterprise. However, the American doctrine that if regulation goes too far, it may amount to taking, requiring payment of compensation, was approved by the Supreme Court in *Subodh Gopal and Dwarkadas Shrinivas* cases.[1] Nevertheless, the importance of this doctrine in India has been considerably lessened after the Constitution (Fourth Amendment Act), removing justiciability of the adequacy of compensation and the doctrine is not likely to be invoked before Indian courts, in spite of the artificial respiration administered to *article* 31 (2) in recent cases like the *Vajravelu Mudaliar* and the *Metal Corporation* cases.[2] One may also refer in passing to the decision in *Kochunni* v. *State of Madras and Kerala*[3] providing for the applicability of *article* 19 (1) (*g*) to instances of depri-

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1. A.I.R. 1954 S.C. 92 and A.I.R. 1954 S. C. 119.

2. A.I.R. 1965 S.C. 1017 and A.I.R. 1967 S.C. 637. However the *Metal Corporation* case has been overruled and certain observations in *Vajravelu* case have been declared dicta and not binding in *State of Gujarat* v. *Shantilal*, A.I.R. 1969 S.C. 634, (*Editor*).

3. A.I.R. 1960 S.C. 1080.

vation of property under *article* 31 (1), though it has to be noted that the circumstances in which this decision may be applied are not likely to arise frequently.

"Due Process" in India

The really significant provisions are *article* 19 (1) (*f*) and (*g*) as they in fact constitute the "due process of law" safeguard, on the American pattern, for property and business rights in India. It is left to the Supreme Court ultimately to decide whether the restrictions imposed on the rights by the State are reasonable or not. In a classical passage, quoted often by the Supreme Court in subsequent decisions Patanjali Sastri C.J, asserted the wide sweep and finality of the powers of review reserved to the judges under this "due process clause" in these words of buoyant optimism:—

> The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part.[4]

However, the view generally held among scholars in the light of two decades of the Supreme Court's decision is that the Supreme Court has virtually abdicated its role in relation to *article* 19 (1) (*f*) and (*g*), and follows a policy of judicial deference to the legislative verdict in determining the reasonableness of the restrictions imposed by the legislature and that consequently "private economic interests do not enjoy much of a substantive protection under the Constitution."[5]

We will examine briefly in the following pages, whether this verdict is entirely justified and the extent to which judicial review under Article 19 is likely to operate restrictively on government powers to regulate private enterprise.

Undoubtedly from the beginning the Indian Supreme Court sustained the legislature's power to control production, supply and distribution of essential commodities, to issue licences for trade, to fix prices and quotas for sale, to provide for minimum wages and suitable conditions of work

4. *State of Madras* v. *V. G. Row*, A. I. R. 1952 S. C. 196 at p. 200.

5. Alice Jacob, "Public Control, of Private Enterprise: Judicial Process and Policy Perspectives" 1967, *JILI* p. 171 at p. 182. "See also Dr. M.P. Jain's observation in Administrative Process under the Essential Commodities Act, 1955 p. 152 and T. S. Rama Rao, "Subba Rao C. J. and Property Rights," 1967 *JILI*, p. 568 at pp. 591-2.

for employees etc.[6] The extreme opposition to all governmental control of private enterprise which the U.S. Supreme Court evinced in the early decades of this century under the influence of the *laissez-faire* economic philosophy in cases like *Lochner* v. *New York*, has no counterpart in Indian constitutional law. For one thing, India was accustomed to close governmental control of business activities during the British period, especially during the emergency created by the two world wars, and it was the fundamental rights, which were the new comers on the constitutional scene, and not governmantal restrictions on the liberties and rights of citizens. Besides, the need for governmental regulation in an underdeveloped country engaged in the uphill task of improving the standard of living of the impoverished masses, was accepted as an axiom by all politicians and was recognised by the courts also. Another important factor, which lesson the scope of judicial review, is the *Constitution (First Amendment) Act*, introduced as early as 1951 conferring powers on the legislature to restrict the right of citizens under *article* 19 (1) (*g*) by vesting monopolistic or quasi-monopolistic powers in the State in the fields of trade business and industry. As a consequence of this amendment it is constitutionally possible for the legislature to introduce communism in India, at one stroke, by vesting exclusive rights in trade and industry in the state, and thus eliminating the private sector altogether.

Judicial Deference to Mixed Economy

But India follows a policy of mixed economy, and while the legislature has passed elaborate laws authorising extreme degrees of interference with private enterprise, including (*e.g.*) the right of taking over the management of industrial undertakings, the private sector is in practice allowed to operate without undue restrictions, and the absolute and extreme powers reserved for the government in the statute book are seldom exercised.[7]

The implication of this gap between the law in theory and the law as it operates in practice may be studied a little later. Suffice it to note here that, against the background of intensive state control that had continued from British days onwards, and of legislative assertiveness of such power of control as typified for example by the *Constitution (First Amendment) Act*, an attitude of judicial deference towards legislative determinations was perhaps inevitable. Nevertheless, it would be a fallacy to conclude that the scope for judicial review under *article* 19 (1) (*f*) and (*g*) is insubstantial and limited. Such an impression has been gained from cases like

6. See e.g. *Hari Krishna Bagla* v. *State of U. P.*, 1945 S.C.J. 637 *Bijay Cotton Mills* v. *State of Ajmer* 1955 SCJ 51.

7. Mathew J. Kust, *Foreign Enterprise in India*, 160 The author makes a comprehensive and lucid survey of all the relevant statutory provisions in his book.

Union of India v. *Bhanamal Gulzarimal*,[8] sustaining the power of the State to fix the maximum price for the sale of iron, even when it results in a loss to a particular dealer, *Lord Krishna Sugar Mills* v. *Union of India*[9] forcing sugar mills to sell a portion of the sugar manufactured by them, at a loss, for purposes of export in the interest of gaining foreign exchange for the country, *Glass Chatons Importers and Users* v. *Union of India*[10] and *Daya* v. *Joint Chief Controller of imports and Exports*[11] validating the canalization of exports through the State Trading Corporation and thus denying the right to export to the petitioners, and *Narendra Kumar* v. *Union of India*[12] eliminating middle men in the field of copper trade by establishing a direct relationship between the importer and the actual industrial user of the metal. This is so for two reasons. Firstly, the court adduces persuasive and weighty reasons for reaching its conclusions in these cases. Thus, in the first two cases, while the respective petitioners alleged that they sustained losses due to the impugned laws, the traders in general had accepted the schemes without demur. Gajendragadkar, J. (as he then was) asserted in the *Gulzarimal* case,

> If it is shown that in a large majority of cases, if not all, the impugned notification would adversely affect the fundamental rights of the dealers guaranteed under Arts. 19 (1) (*f*) and (*g*) that may constitute a serious infirmity in the validity of the notification. In the present proceedings no case has been made out on this ground. . .[13]

The facts in the *Lord Krishna Sugar Mills* case show that the loss caused by the forcible export of a portion of the manufactured sugar at the international market rate which was less than the internal rate was off-set by the enhancement of the internal rate, and what is more that the decision was accepted by all the mill-owners, except the petitioners. The *Glass Chatons* and *Daya* cases dealt with restrictions on imports from third countries, and the court referred in the former case to the fact that a policy as regards imports has an impact not only

> on the internal or international trade of the country but also on monetary policy, the development of agriculture and industries and

8. A. I. R. 1960 S.C. 475.
9. A.I.R. 1959 S.C. 1124.
10. A.I.R. 1961 S.C. 1514.
11. A.I.R. 1962 S.C. 1796.
12. A I R. 1960 S.C. 430.
13. A.I.R. 1960 S. C. 475 at 482. The Court also seems to have felt wrongly that it was bound to sustain the validity of the impugned order, in view of the earlier precedent of *Harikrishana Bagla* v. *State of M. P.* (1948 S.C.J. 637). See in particular, the opinion of Subba Rao J. (as he then was) in A.I.R. 1960 S. C. 975 at 483. The Court seems to have ignored the fact the impugned control order was sustained by Mahajan C. J. in *Harikrishana Bagla's case* on the ground that it was a temporary law and hence could not be treated as an unreasonable restriction on the citizens' rights.

even on the political policies of the country involving questions of friendship, neutrality or hostility with other countries.[14]

As in *Daya* case the court sustaining the law, forbidding the right of export of manganese ore to the "new comers" in the field, referred to the fact that the earlier policy of unrestricted exports had led to complaints that "the quality of ore supplied (to the foreign buyers) was not according to sample," and thus governmental interference was necessitated. Besides, the government itself gave an assurance to the court that "the allotment of quotas to the new comers" was under consideration.[15]

The *Narendra Kumar's case*, a fixation of the sale price of copper and of elimination of dealers (middlemen), was necessitated by the fact that under the earlier policy, the importers exploited their monopoly position and the price of copper in India shot up unreasonably as a result.

Judicial Review

The second reason for coming to the conclusion that judicial review has not become too limited is that the Supreme Court examines in each case the reasonableness of the restrictions with great care, and has in other cases restricted the scope for legislative interference with the freedoms under *articles* 19 (1) (*f*) and (*g*) by skilful interpretation. Thus in *Akadasi Padhan* v. *State of Orissa*[16] the court had to uphold the validity of an Orissa law conferring monopoly rights on the State in the matter of trade in Kendu leaves, in view of the *Constitution* (*First Amendment*) Act. Nevertheless, the court restricted the scope of protection under the Amendment only to provisions of the law "which are basically and essentially necessary for creating the State monopoly" and not to the other provisions "which are subsidiary, incidental or helpful to the operation of the monopoly" and asserted the right to examine the reasonableness of these incidental provisions. And taking the view that the provisions dealing with the fixation of the price at which the Kendu leaves were to be purchased from the growers, were such incidental provisions, the court held that fixation of grossly unfair price would contravene the right of the growers under *article* 19 (1) (*f*). Similarly, it held that the agents that the State may appoint to work the monopoly should work on behalf of the State and not themselves and should not be independent contractors. The extended meaning of the word 'agent' in a commercial sense was therefore held wholly inapplicable in the context of *article* 19 (6) (*ii*) of the Constitution.

14. 1962 II S.C.J. 213 at 215.
15. 1963 I S.C.J. 632 at 638 and 640.
16. 1964 II S.C.J. 37.

The next result of the decision is that if the state decides to have a monopoly in trade, it must not engage independent contractors, and what is more important, it cannot fix arbitrary prices, to the detriment of those who sell goods to it. It is doubtful whether the framers of the *First Amendment* would have foreseen that the *carte blanche* provision they were enacting would be thus whittled down in scope by the Supreme Court.

And in *Mannalal Jain* v. *State of Assam*[17] an attempt by the Assam government to confer monopoly rights on cooperative societies in the matter of purchase of rice and paddy by issuing instructions to the licensing authorities to grant licences only to such societies and without enacting a regular law under Article 19 (6) (*ii*) conferring such a monopoly, was stuck down.

The Supreme Court has also been vigilant in enforcing the observance of procedural safegurds to the citizens exercising their rights under *article* 19 (1) (*f*) and (*g*) by circumscribing the discretion grant to licensing and other authorities, insisting on the observance of rules of natural justice by them. Unfortunately, such rules are enforced in the case of quasi-judicial authorities only. Subba Rao, C. J. however, departed from this rule of English Law in his dissent in *Kishan Chand* v. *Commissioner of Police*,[18] by insisting that the discretion conferred on an official must be tested from the standpoint of reasonableness of the person's right to do business, whether the discretion is judicial or executive".[19]

Thus it is evident that even when the scope for judicial review is curtailed by law, there are sufficient weapons in the judicial armoury in the form of rules of interpretation to enable a skilful court to widen the ambit of protection to the rights under *article* 19, and thus correspondingly to whittle down the powers of the state.

Conclusion

However, the significant fact about the Indian scene is that the wide powers for regulation of private enterprise which the state enjoys both under the Constitution and under the different statutes, do not seem to have been exercised in practice. The statutes themselves often provide for ample safeguards. Thus the *Tariff Commission* is consulted in the matter of fixation of price, and its recommendations are almost invariably accepted without question by the government. Such fair treatment of the private sector may not necessarily be due to the hold which the business

17. A.I.R. 1962 S.C. 386.
18. A.I.R. 1961, S.C. 705.
19. *Ibid.*, 715.

magnates have over government officials and ministers. It may well be due to legitimate desire to permit the private sector to play its role in the economic development of the country, so long at any rate as a mixed eonomy is allowed to operate in this country. On the other hand, conferment of privileges on selected industrialists or businessmen to the detriment of the principle of free competition is an evil to be guarded against in India. Such an evil is an ever present danger in a "licence-permit Raj" where the temptation to abuse the power of granting licences is ever present and should be curbed by legal modalities. The *Monopolies Commission* has also drawn attention to "the corrupting influence of big business on politicians and public officials." Such evils could be controlled only if the power of granting licences is vested in impartial bodies and a right of appeal or review is conferred on court from the decision of those bodies. A desirable innovation in this connection would be a bold departure from the rigid confines of English administrative law, and assumption of wider powers of review even over executive and non-quasi-judicial acts.[20]

20. *Kishan Singh* v. *State of Rajasthan*, A.I.R. 1956 S.C. 795.