

## REGULATORY POWERS OVER PRIVATE ENTERPRISE —SOME PERSPECTIVES

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Extensive inquiries have been made in the recent years on the subject of government regulation of private industry in India. Important among such studies are:

- (i) Industrial licensing
  - (a) *Swaminathan Committee* (two reports)
  - (b) Prof. R.K. Hazari's (*vide* his *interim* and final) Reports
  - (c) *Estimates Committee of Lok Sabha*.
- (ii) Commodity controls
  - (d) Iron & Steel by *Raj Committee* and *Khadilkar's Study Team*.
  - (e) Textiles by *Study Team* appointed by *Administrative Reforms Department*.
- (iii) D. G. T. D.
  - (f) *Mathur Study Team* appointed by *Administrative Reforms Department*.
- (iv) Economic controls in general
  - (g) *Study Team of Administrative Reforms Commission on Economic Administration*.

These studies mainly reveal that controls have failed to fulfill the purpose for which they were intended; and they have become a hinderance which need to be minimised. These studies have observed that other instruments of government policy can achieve the objectives better. The *Administrative Reforms Commission Study Team* epitomizes this trend of thinking towards relaxation of controls in the following words:

Within the frame work of broad aggregate laid down by the Plan we feel there is a considerable scope for the market mechanism to operate. Instead of seeking to achieve detailed targets through the control mechanism the Government should bring about a desired result by controlling the flow of inputs in the shape of finance, foreign exchange, credits etc. and by channelizing them to the desired field.<sup>2</sup>

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1. For General survey of regulations till 1962 see Paranjape; "Government Regulation of Private Industry in India," 8 *I.J.P.A.* 297 (1962).

2. *Administrative Reforms Commission Study Team on Economic Administration* (1962) § 1.6.

More or less similar views have been expressed by Professor Hazari in his final report.<sup>3</sup> In respect of industrial licensing Professor Hazari goes further to point out that the area of significance which industrial licensing occupied in the past is progressively shrinking. The views expressed by the various study teams of *Administrative Reforms Commission* that procedures of commodity controls, as at present, are too clumsy and deserve simplifying are valid.

### Distribution of Power—Some Incongruities

Like all other state activities the regulation and control of industries including the mines and minerals, and trade and commerce have also been demarcated between the centre and states.<sup>4</sup> However incongruities are apparent. Basu has pointed out that while *entry 33 of list III* gives power for central intervention with regard to trade and commerce in and production, supply and distribution of the products of industries controlled by the central government, the raw products used in industrial products can be treated as exclusively within the jurisdiction of the state government.<sup>5</sup>

Another lacuna is the inclusion of "gas and gas work" (*entry 25*) in the state list. Under the Industries (Development and Regulations) Act, 1951, "fuel gas" comes within the controlled industries, while the power to control is derived from the Union list (*entry 52*). The item in *entry 25 (list II)*, unlike *entry 24*, has not been subjected to *entry 52 (list I)*.

Apart from the incongruities, there seems to be some unreality about the functions assigned to the state governments. The "trade and commerce" in and "production control and distribution" practically of all commodities (may be within a particular state) is done through the Essential Commodities Act<sup>6</sup> which is a central legislation though administered through the state government agencies.<sup>7</sup> What are these state list entries therefore? *Entries 23 and 24* of state list relate to regulation of "Mines and Mineral development and industries" which are again subject to *entries 54 and 52* respectively of the Union list. With such sweeping legislations

3. § 17.2 *Hazari Committee on Industrial Licensing* (Final Report).

4. For detailed discussions see M.P. Jain, *supra* pp. 32-33.

5. Basu, D. D., *Commentary on the Constitution of India* (volume 5) 401, and 455, (1964).

6. An eminent industrialist in a memorandum submitted to the *Estimates Committee* had stated "at present prices of commodities like alcohol and molasses are controlled under the Industries (D.&R.) Act. There are many other legislative measures including Essential Commodities Act which empower the government to control prices, distribution and similar provisions under the Industries (D. & R.) Act appear to be redundant. IX the Report of Estimates Committee (Fourth Lok Sabha) 24.

7. *Entry 26 list II* subject to *entry 33 list III*.

as Mines and Minerals Regulations and Development Act, 1948 and Industries (Development and Regulation) Act, 1951 framed by the central government, is there any function in these fields left for state government?

It is also strange to note that there is no entry corresponding to "trade and commerce" within the state list and "the production, supply and control of such industry by the Union is deemed expedient in public interest (*vide entry 33 list III*) the sanction for such activities is thus provided for; but no sanction for "production, control and distribution" of commodities under The Essential Commodities Act, except in the case of "manufacture, supply and distribution of salt" (*entry 58 list I*) is to be found.

Perhaps it would not be foreseen at the time of framing the Constitution that extensive functions were required to be undertaken by the central government under a centralised planning. In the light of central laws such as the Industries (Development & Regulation) Act and the laws relating to mines and essential commodities, a second look into the matter has become inevitable.

#### **Control over Production, Distribution and Prices**

A comparison of *section 2* and *3* of Essential Commodities Act, 1956 and *section 18-G* of the Industries (Development & Regulation) Act, 1951 shows that there is some duplication and overlapping of powers insofar as control over supply, distribution and prices of certain articles relating to scheduled industry is concerned. It may be argued that whereas the control contemplated under the Industries (Development & Regulation) Act deals with articles or class of articles relating to scheduled industries (changeable from time to time), for certain other industrial articles the Essential Commodities Act is necessary. But what prevents these non-scheduled industrial commodities (or products) being included in the list of essential commodities for purposes of control over supply, distribution and prices. Does *section 2 (a) (xi)* of the the Essential Commodity Act not empower the Centre to declare by a notified order any other class of commodities in respect of which the parliament has power to make laws by virtue of *entry 33 of list III* to be an essential commodity?

The *Estimates Committee of Lok Sabha* has drawn attention to the anomaly resulting from the Cement Control Order 1961 issued under the Industries (Development & Regulations) Act, the Cement Quality Control Order 1962 issued under the Essential Commodities Act.<sup>8</sup> Regarding the

8. These have been referred to and explained in *9th Report of Estimates Committee (1967-68)* of the 4th *Lok Sabha* on Industrial Licensing § 2.19. However the *Cement Control Order 1961* issued under the Industries (D. & R.) Act has since been rescinded with effect from 1966.

cotton textiles, the *Study Team on Textile Commissioner's Organisation* (1966) observed :

The Cotton Textiles (Control) order was there long before the Industries (Development and Regulation) Act was enacted, and its provisions remained applicable even though in some respects the latter enactment made the control order out of date. The result is that to-day licensees have to comply with the requirements of both sets of statutory provisions.<sup>9</sup>

Ambiguity also exists in the case of Iron and Steel (Control) Order 1956 issued under the Essential Commodities Act 1956. The *Public Accounts Committee of Lok Sabha* have pointed out an instance where a party was given industrial licences for setting up two tin plate plants under the Orders, which actually should have been regulated under the Industries Development Regulations Act.<sup>9a</sup> Similarly, the instance of alcohol and molasses can be quoted. These articles are controlled both under the Industries (Development and Regulation) Act 1951 and the Essential Commodities Act. Professor Hanson has drawn attention to such "excess of statutory authority" and has observed that while this duplication may perhaps be convenient for the controllers, it must be a little confusing for the controlled.<sup>10</sup> The *Estimate Committee of Lok Sabha* has in its *IX Report* recommended that duplication is likely to cause avoidable inconvenience and harrasment and is likely to stand in the way of effective implementation of the relevant provisions of the Act. The government should examine these aspects urgently.<sup>10a</sup>

#### **Investigations into the Affairs and Control over Management of Industries**

There seems to be considerable overlapping between the powers exercised under the Industries Development and Regulation Act<sup>11</sup> and the powers exercised under the Companies Act.<sup>12</sup> In this connection the following observations on the working of administration of the Companies Act 1956 are significant.

Enquiries into complaints and investigations in several cases disclosed that in respect of many of them preliminary enquiries had been already made under the provisions of the Industries (Development and Regulation) Act, 1951, although these enquiries were generally incon-

9. *Report of The Study Team on Textile Commissioner's Organisation* (pt. I) § 5.16 at 43.

9a. §§ 4.152 to 4.154 *50th Report of the PAC* (1965-66) of 4th *Lok Sabha*.

10. Hanson, A. G., *Process of Planning*, 494.

10a. § 2.24 of the *IX Report of the Estimates Committee* (1967-68) 4th *Lok Sabha* on *Industrial Licensing*.

11. *Section 15, Industries (D & R) Act 1951*.

12. Ss. 235, 237 *Indian Companies Act 1956*.

clusive. On the other hand in some cases, formal investigations were needlessly delayed by duplicated preliminary enquiries both under the provisions of the Companies Act and those of the Industries (Development and Regulation) Act 1951. The primary object of an investigation under the Industries (Development and Regulation) Act is to assess the causes of any fall in production or employment, but in practice as production or employment, are, in the case of all established companies essential functions of the basic independent variable, viz., management, investigations under the provisions of the Industries (Development and Regulation) Act to be meaningful and suggestive of effective remedies must, in most cases be accompanied by investigations into the management of companies including their financial management and require a careful enquiry into company practices, board decisions and the accounts of companies such as can be undertaken only in terms of the provisions of the Companies Act. The area of overlapping between the administration of the Industries (Development and Regulation) Act and that of the Companies Act must, therefore, in many cases be necessarily considerable.<sup>13</sup>

The central government can by an order appoint an authorised controller for an undertaking engaged in the production and supply of an essential commodity in order to maintain or increase its production or supply.<sup>14</sup> The controller is to exercise such functions of control as may be specified in the order and in accordance with government instructions. Under *Section 18A* of the Industries (D. & R.) Act, 1951 also, the government can issue directions to an industry. In case the directions are not complied with or if the undertaking is being managed in a manner detrimental to the industry or public interest, its management can be taken over by government.

Of late co-ordination is attempted between the two departments and it is also known that in most cases investigations have been undertaken only under the Industries (Development and Regulation) Act. It is also true that in practice not several complaints have been received from trade and industry. The question however arises as to why two duplicate sets of provision for the same purpose be kept. Are not all organised industries run as companies? If the Industries (D. & R.) Act, 1951 contemplates co-operative form for the scheduled industries it can be assumed that the laws on cooperatives could take care of the situation contemplated in *section 15* of the Industries (Development & Regulation) Act 1951.

### **Prerequisites of Effective Formal Controls**

Despite the strong views expressed by the *Administrative Reforms*

13. *Second Annual Report*, Department of Company Law Administration (Ministry of Commerce and Industry) 44.

14. *Section 3(4)* The Essential Commodities Act 1956. It is not known in how many cases controllers were appointed under section 3 of The Essential Commodities Act. But under S. 18A of Industries (D. & R.) Act the central government had taken over the management of 10 textile units, 1 jute mill, 1 bicycle factory and 3 sugar mills during the period 1961-66.

*Commission*, and economists like Professor Hazari against controls and the gradual lifting of controls by government it is not likely that either the Essential Commodities Act or the Industries (Development and Regulation) Act will completely be put into the shelf. This would mean that formal controls on industries, in whatever limited form they exist, must function effectively and efficiently.<sup>15</sup>

There are two pre-requisites for effective and efficient controls: (i) simple procedures, and (ii) efficient organisation. The *Study Team on Economic Administration* has already suggested simplifications and changes in procedures. But constant watch will have to be kept and periodical studies will have to be conducted so that the procedures do not become a hurdle.

The organisation is another important prerequisite. Whereas in respect of some of the industries and commodities the regulatory agencies are under the central government,<sup>16</sup> in some other areas the function entrusted to central agency is only to lay down the policy and effect co-ordination. The actual implementation of control or regulation is left to the state agencies, e.g., in case of sugar and *vanaspati*. It is a common knowledge that there is no uniform pattern of administration for these matters at the state level and efficiency differs from state to state. It is difficult for the central government to direct the pattern of organisation to state government or even to lay down the rules of procedure, but from the point of view of entrepreneur or the consumers it is of utmost concern that he should get his permit, certificates, quotas as smoothly and quickly as possible. It has been the experience of trade and industry that in addition to delays at the CCI or DGTD levels several months have to be spent in dealing with state department in the matter of Import Control Act and the Industries Development and Regulation Act.<sup>17</sup> Without impinging on the states' prerogative to organise their own affairs it is possible to review the actual mechanism and organisation of work at the state level at least so far as these central Acts

15. The *A. R. C. Study Team on Economic Administration* has prescribed the following desiderata for controls; (i) the general policy of the procedural instructions should be published for the information of all those who are affected (ii) the public directly concerned with the particular control should be closely associated (iii) there should be greatest possibility in government regulation and minimum in *ad hoc* consideration (iv) the names of beneficiaries whenever practicable should be published. There should be forum for appeals and representations (v) time schedules be prescribed for various stages.

16. e.g. The Textile Commissioner, the Iron & Steel Controller.

17. References to such complaints have been made in the *Estimates Committee Report on Industrial Licensing (Lok Sabha) 25-26*.

are concerned.<sup>18</sup> While central mechanism of control has been subjected to detailed studies by various agencies no such study seems to have been conducted in respect of state department.

### **Check over Administrative Discretion**

The problem of execution of central controls through the state governments leads to the problem of check on administrative discretion. Let one not be alarmed by the statement that this problem is created because of the administration of central controls through the state governments. Whereas in respect of powers exercised by the central authorities there is the mechanism of orders being laid on the table of parliament and being subjected to scrutiny by the *Lok Sabha Subordinate Legislation Committee*.<sup>19</sup> In cases of powers delegated to state governments there is no such check.<sup>20</sup>

18. IXth Report of the *Estimates Committee* of Gujarat Legislative Assembly provides some instances of state industries department has to play in the various central controls. (1) Viewing with concern, large number of rejections of application for industrial licences, Committee has suggested that applications for industrial licences when received in the office of the *Director of Industries* should be very carefully scrutinized. (2) The *Committee* found that the system of distribution of coal, coal through the *Director of Industries* who was appointed as controller of coal was not satisfactory. The system of permits had led to establishment of syndicates. (3) The *Director of Industries* in each state is empowered to issue essential certificate for import of all raw materials including all metals and procedures followed in issuing them certificates was not satisfactory.

19. The *Lok Sabha Subordinate Legislation Committee* has examined the orders issued under section 18(g) of the *Industries Development and Regulation Act* which deals with controls over production, distribution and sales price etc. The report, however, shows that only in case of *Motor Cars Distribution and Sales Control Order 1950*, and the *Imported Tourist Car Control Order 1961*, they had something to comment. *Vide* §§ 19-26 of the *VII Report of the Committee* and §§ 22-23 of the *XIII Report of the Committee* appointed in Second *Lok Sabha*.

In the case of *Essential Commodities Act*, the *Lok Sabha Subordinate Legislation Committee* has examined orders issued under section 3 of the *Essential Commodities Act*. However, they had occasion to comment only in respect of nine SROs, the chief ones being the *Cotton Textile (Production by hand) Control Order 1956*, the *Cotton Control Order 1955* and the *Punjab Sugarcane (Prohibition of use for manufacture of Gur), 1959*. Out of these four only two contained some observations about administrative discretion used by state departments.

20. While examining SRO 1415 of 1857 made under the *Cotton Control order 1955*, the *Committee on Subordinate Legislation of Lok Sabha* had expressed the view that subsidiary orders made subsequently under the SROs should also be deemed to have been made directly under the provisions of the *Essential Commodities Act* and that such orders should be laid before Parliament. Government however, pleaded that it would involve considerable political and administrative difficulties as the orders ran into thousands. The *Committee* therefore accepted the government point of view and did not pursue the matter. It may also be mentioned in this connection that while under *Essential Commodities Act* all orders of 1955 by central government including those

It is a common knowledge that large number of orders have been issued by state governments in respect of powers delegated to them placing extensive powers in the hands of the state administrative agencies. However, on a random examination of at least fifteen reports of the *Committee on Subordinate Legislation*<sup>21</sup> it has been difficult to find any reference to statutory orders and rules issued by the state government under powers delegated to them. This is a problem which needs to be carefully enquired. It is possible to provide that all statutory orders issued by state governments in pursuance of delegated authority under the Industries (Development and Regulation) Act and the Essential Commodities Act may be required to be laid on the table of each state Assembly. By doing so it would be possible for *State Subordinate Legislation Committees* to check the exercise of administrative discretion by the state government.

delegating powers to state governments are atleast required to be placed before *Lok Sabha* in the case of Industries (D. & R.) Act, orders under provisions of *section 25* are not specifically required to be placed before Parliament. (See *Sixth Report of the Committee on Subordinate Legislation—Second Lok Sabha*, 21).

21. There was one lone exception and that was the *Third Report of the Committee on Subordinate Legislation* of Gujarat Legislative Assembly. The nearest scrutiny over delegated powers to state to which the committee has gone into is to recommend in this *Report* that "Government should take steps to reprint all central Acts with respect to matters enumerated in list III in force in the state and the rules made by state government thereunder" [p. 12 of the *Report*]