LAW MANTRA THINK BEYOND OTHER
(ISSN 2321- 6417) (Online)
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SHRINKING AVAILABILITY OF FUNDAMENTAL RIGHTS IN THE ERA OF DISINVESTMENT*

ABSTRACT

Fundamental Rights placed in the III part of the Indian constitution ensure dignity and welfare for the people of this country. These rights are guaranteed and their enforcement can also be availed as a fundamental right. Since 1990's India changed its economic policies and with it came the era of Disinvestment. This paper touches upon the disinvestment policy of the government and its repercussions on basic fundamental rights of the individual. Under this policy, Government withdrew its shares and involvement from certain Public Sector Undertakings (PSUs), governmental institutions and bodies and hence shifted their ownership into the hands of private players. This led to the huge constitutional implications; most of the fundamental rights which were hitherto available against these bodies got curtailed as result of change in ownership of these institutions. Following the policy of disinvestment, these institutions no longer remain within the purview of the term "State" and hence, it became an uphill task to enforce the fundamental rights against them. This policy of Disinvestment and the standing definition of "State" under article 12 of the Indian Constitution actually curtail the availability of fundamental rights to the people of India. Therefore, through this paper we are critically analyzing the definition of "state", the present state of affairs and are proposing the possible remedies. The illustrious history of the apex court has been witness to the efforts made by this Hon'ble court to enlarge the availability of fundamental rights. With changing times, new moulds have been evolved. We propose that today such intervention is indeed required. Considering the developments in post liberalization era, the foremost challenge before the judiciary

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is to achieve a balance between the primacy of government to decide the economic policies and upholding the fundamental rights of an individual.

INTRODUCTION

What is more important, law or its enforcement? A rational analysis will tell us that both are equally important. Law is like a 'practical ideal' which we have. Enforcement mechanism is required to achieve the same.

Part 3 of Indian Constitution contains Fundamental Rights. Their violation, non-availability or any grievance regarding them can directly be addressed by the Supreme Court. The Apex court's indulgence in these issues is guaranteed under article 32 of the Constitution. A simple analysis will show that almost all Fundamental Rights are available against 'state' only. Be it right to equality, right to life or right to fair trial. For claiming this guaranteed remedy, one needs to prove that the violator is the 'state'.

The comprehensive analysis in the paper discusses Fundamental Rights and their relevance. Fundamental Rights have their roots in the "Theory of social contract". During the Freedom struggle these human rights were recognized and the freedom fighters resolved to provide them the protection of the highest level. When we are dealing with the Fundamental rights, 'we are dealing with the principle of liberty and justice so rooted in the tradition and conscious of our people as to be ranked as fundamental'- something without which a 'fair and enlightened system of justice would be impossible'.'[1]

In this context, the dilution of these rights due to economic policy looks disturbing and uncomfortable.

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INEVITABILITY OF FUNDAMENTAL RIGHTS

The significance of Fundamental Rights in the Indian scenario can be gauged from the fact these rights were so deeply embedded in the conscious of the framers of the Indian constitution that they could not even restrain themselves from a giving a glimpse of these rights in the Preamble of the Indian constitution. The Preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure all its citizen justice, so-

[1] Frankfuter: West Va. State Board of Education v. Barnette, 319 US 624,652.

cial, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and opportunity.

The need to have the Fundamental rights was so very well accepted on all hands that in the constituent assembly, the point was not even considered whether or not to incorporate such rights in the constitution. During the British rule in India, human rights were violated by the rulers on a massive scale. Therefore, the framers of the constitution, many of whom had suffered long incarceration during the British regime, had a very positive attitude towards these rights.

The developments associated with the Fundamental rights point towards the dire need of these rights in the Indian Scenario. The Nehru report which is considered to be a close precursor of the Fundamental Rights states that these rights should not be withdrawn under any circumstances. The real intention behind enacting these rights was to create a sense of security and safety in the minds of the people belonging to different religion, race, cast, creed and culture. It could not better secure the full enjoyments of religious and communal rights to all communities than by including them among the basic principles of the constitution.

Therefore, it is inconceivable that the founding fathers ever intended to empower Parliament or Judiciary to destroy or even minutely dilute the significance of the essential features of the constitution. In particular, it is inconceivable that having provided the most complete and comprehensive guarantees of the basic human freedom known to any constitution of the world, the constitution makers still intended that any executive order, government policy or judicial pronouncements may take away or abridge all or any of that basic freedom.

However, the most important problem which the courts are facing in present times is to achieve a balance between the rights of the individual and those of the state or society as a whole, between individual liberty and social control. According to Roscoe Pound, *"Law is social engineering which means a balance between the competing interests in society," in which applied science are used for resolving individual and social problems.* It must be remembered that the reach and availability of basic fundamental rights should not be shrunken under any circumstances so as to weaken the entire edifice of these natural rights. Here it is quite important to mention the remarks of J. PN Bhagwati "*that the fundamental rights are constitutional guarantees given to the people of India and are not merely paper hopes or fleeting promises and so*

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long as they find a place in the constitution, they should not be allowed to be emasculated in their application by narrow and constricted judicial interpretation"[2].

The framers of the Indian constitution visualised the widest possible reach of these rights, however, this vision of the founding fathers seems to be in a little ramshackle if the policy of disinvestment remains unchecked and continued to be followed without any modification and amendments.

Balance of payment crisis in early 1990's compelled the government of the day to shift the economic paradigm and as a result, Indian switched to Liberalization, Privatization and Globalization. Disinvestment is the progeny of this new policy. Under this policy government sells its shares in Public Sector Corporations. At times, this sale leads to the change of ownership. Once that is done, Deep and Pervasive control of Government over the institution dilutes and it no longer remains the State. The most glaring consequence of this is that the institute concerned no longer remains the state and hence guaranteed remedy U/A 32 can't be availed.

DISINVESTMENT AND ITS APPLICATION IN INDIA

As we are discussing the legal consequences of disinvestment, it is important to understand the concept of disinvestment.

Disinvestment is a process of selling government equities in public sector enterprises. It implies shedding of the ownership or management of a government owned enterprises. Government companies are converted into private companies in two ways, (i) by withdrawal of the government from ownership and management of public sector enterprises or (ii) by outright sale of public sector companies.

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Privatisation of the public-sector undertakings by selling off part of the equity of PSUs to the public is known as disinvestment. The purpose of the sale, according to the government, was mainly to improve financial discipline and facilitate modernisation.

The disinvestment process started as a response to cope with financial crisis that began to surface from 1980s. In the late 1980s, government expenditure began to exceed its revenue by such large margins that meeting the expenditure through borrowings became unsustainable.

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[2] Ajay Hasia v. Khalid Mujib, AIR 1981 SC 487 at 493: (1981) 1 SCC 722.

Prices of many essential goods rose sharply. Imports grew at a very high rate without matching growth of exports. As a result of this, India approached the World Bank and IMF for loans and in reciprocity agreed to condition put by them of liberalising the economy.

This led to the emergence of New Economic Policy (NEP) which consisted of wide ranging economic reforms including the disinvestment policy. The thrust of these policies was towards creating a more competitive environment in the economy and removing the barriers to enter into the market.

The process of disinvestment proceeded in two stages:-

i) Token disinvestment

ii) Strategic disinvestment.

Token disinvestment started in India with a high political caution. This phase of disinvestment though brought some extra funds to the government but faced fierce criticism as it could not enhance PSUs' efficiency.

Therefore, in order to make disinvestment policy a success by which efficiency of PSUs could be enhanced and the government could de-burden itself of the activities in which the private sector has developed better efficiency, the government initiated the process of strategic disinvestment. The essence of this type of disinvestment was first, the minimum shares to be divested will be 51 per cent, and second, the wholesale sale of shares will be done to a strategic partner having international class experience and expertise in the sector.

The total number of 13 public sectors enterprises including Modern Food Industries (MFIL), BALCO, VSNL, CMC ltd, HTL, IBPL, ITDC (13 hotels), Hotel Corporation of India ltd. (3 hotels), Pradeep Phosphate Ltd (PPL), HZL, IPCL, MUL and Lagan Jute Manufacturing Company Ltd. (LJMC), hence experienced the strategic disinvestment.

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CORE ISSUE

However**,** the government by the disinvestment process has not only shrunk its involvement and shares in the different public sector undertakings (PSUs) but also at the same time put these bodies and institutions outside the scope of article 12 of the Indian Constitution.

Article 12 defines and gives the extended significance to the term "state". According to the article, the term state includes: -

The Government and Parliament of India and the Government and the Legislature of each of the states and all local or other authorities within the territory of India or under the control of the Government of India.

The significant expressions used in article 12 are "local authorities" and "other authorities". However, the term "local authorities" have been clearly defined in Section 3(31) of the general clauses act 1898 as a Municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the government with, the control or management of a municipal or local fund. The term which is of utmost concern for us is "other authorities". This term has not been defined explicitly anywhere and the framers of the constitution have entrusted this duty upon the judiciary to interpret this expression depending upon the facts and circumstances of the cases. Justice Benjamin N. Cardozo once said, *that these undefined words are the great generalities of the constitution which have a content and a significance that vary from age to age.*

It is quite conspicuous that wider the meaning given to this term, the wider will be the coverage of the Fundamental Rights i.e. more and more bodies and institutions could be brought within the meaning of the term "state" and hence, their actions would be subject to Fundamental Rights of the individual.

Before adverting to the main submission of this paper, it is first important to look at article 12 in greater detail and the developments that have happened so far with respect to the meaning of "other authorities" through different judicial pronouncements.

In the case of *Rajasthan State Electricity Board v. MohanLal*[3] the apex court for the first time declared a statutory body to be a state under article 12. It was the first time that the court did away with the hurdle of sovereign function and the body performing such function only be declared to be state.

This doctrine was further extended in *Sukh dev v. bhagatram*[4] which declared statutory body like LIC, ONGC and Finance Corporation to be state. In this case, the remarks made by J.

[3] AIR 1967 SC 1857: (1967) 3 SCR 377.

[4] AIR 1975 SC 1331: (1975) 1 SCC 421.

Mathew are still relevant and have stood the test of time. *"The concept of state has undergone drastic changes in recent years. Today state cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority. It has to be viewed mainly as a service corporation"*[5].

The governing power wherever located must be subject to the fundamental Constitutional limitations. The need to subject the power centres to the control of Constitution require an expansion of the concept of State action. The historical trend in America of judicial decisions has been that of bringing more and more activity within the reach of the limitations of the Constitution. "The next step would be to draw private governments into the tent of state action. This is not a particularly startling proposition, for a number of recent cases have shown that the concept of private action must yield to a conception of state action where public functions are being performed" Arthur S. Miller: "The Constitutional Law of the 'Security State'.". 10 Stanford Law Rev. 620 at 664.[6]

Furthermore, in *Ajay Hasia case*[7], the judiciary initiated a new trend and expanded the meaning of the term 'authority'. The Supreme Court laid down the following tests to adjudge whether a body is an instrumentality of the government or not:

(1) "If the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government."

(2) "Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character."

(3) "It may also be a relevant factor that whether the corporation enjoys monopoly status which is the State conferred or State protected."

(4) "Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality."

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[5] Ibid, Para-80.

[6] Ibid, Para-93.

[7] Ajay Hasia v. Khalid Mujib, AIR 1981 SC 487 at 493: (1981) 1 SCC 722.

(5) "If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government."

(6) "Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government." If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of government, it would, as pointed out in the International Airport Authority's case, be an 'authority' and, therefore, 'State' within the meaning of the expression in Article 12.

Then again, the expression other authorities in article 12 was further expanded and broadened by the apex court in *Pradeep Kumar Biswas v. Indian Institution of Chemical Biology*[8]. In this case, the Supreme Court has overruled *Sabhajit Tewary* and has held that the council of scientific and Industrial Research (CSIR) is an authority under article 12 and was bound by article 14. The court laid down the following proposition for identification of authorities within article 12:

"Whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a state within the article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a state".

This trend of the judiciary shows that the term "other authorities" has constantly been widened in past four decades and numerous bodies, institutions, corporations and entities have been brought within the ambit of the term state defined in the article 12 of the Indian constitution.

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However, this trend got arrested in recent case of *Jatya Pal v. Union of India*[9] (also known as the VSNL case) in which the division bench ignored the specialities and peculiarities of the case and delivered a somewhat contentious judgement. The court in this case ignored the facts and circumstances of the case and applied the multiple tests as laid down by the majority view in Pradeep Kumar Biswas. J. Surinder Singh Nijjar stated that in order for TCL to be declared

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[8] (2002) 5 SCC 111: (2002) 4 JT 146.

[9] 2013 (6) SCC 452.

as a state or other authority within the meaning of article 12 of the constitution it would have to fall within the well-recognized parameters laid down in numbers of judgment of this court. The facts in this case due to Disinvestment policy are entirely different and can easily be distinguished from the cases of *Pradeep Kumar Biswas and Ajay Hasia*. Such situation demands an innovative approach from the judiciary to do the justice. Doing the same is not something new to apex court.

We, therefore through our paper are bringing into light the loopholes present in this very judgement and at the same time challenging the parameters or tests laid down in the number of cases. As the parameters are not sufficient enough, the straightjacket rigid formula and its application depend upon several other factors present in the case. It cannot be said that the decision laid down in *Jatya Pal* case is not infallible and not subject to judicial scrutiny.

To hold that the body would be considered to be state only when it is financially, functionally and administratively under the control of the government is not sufficient. It is correct to say that in order to declare the body or institution as state it is important that the government should play a major role in its functioning and the Fundamental Rights can be enforced against an authority when it is within Indian Territory or it is under the control of the government. Similarly, in the case of VSNL the body was once entirely dominated by the government and it is only after 2002, when government divested its 25% shares and made TATA the major shareholder in VSNL. The situation would have been very different had this body been in the hands of private players since its inception.

This problem is new and obviously demands for an innovative remedy. Adding a new test in the already given tests in the judgement of *Ajay Hasia* and *Pradeep Kumar Biswas* will solve the problem. **'Historical antecedents of the institute'** can be that test. Under this test, the court while deciding the status of the institute will look into the previous situations prevailing in the institute. If the institute was a state before the arrival of policy of disinvestment and people associated with them had the protection of A/32 available to them on this ground, then the institute should still be declared to be a State even after Disinvestment.

Otherwise, the **Theory of Social Contract** gets obliterated in these circumstances. People start losing incentives to follow the mandate of the STATE. These developments don't augur well for a democracy. Moreover, Disinvestment is not a passing phenomenon and it is here to stay. Not a long ago, Union cabinet gave its in-principle approval for disinvestment of Air India,

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whose debt has mounted to Rs 50,000 crore besides huge losses. People, in the executive as well as academics, have also been talking of taking this policy even to the Railways, which was considered earlier to be strict governmental affairs. Indian railways employs a whooping number of employees which is more than the population of many European countries combined. Therefore, deprivation of fundamental rights to such a large number of people would be detrimental to the very idea of guaranteed rights against the state. Without remedy to access our rights is as bad as not having them at all. Hence, the new test will not only cure the present ailment but will also act as preventive measure for future course of apprehended disinvestment policy.

In the case of BALCO, the disinvestment per se was challenged. The apex court following the previous pronouncements including the case of *RC cooper*[10] held that policy making falls in the exclusive domain of the executives and the legislature. Therefore, in that case no relief was granted.

We, in this paper, never challenged the prerogative of the legislature cum executive in the policy making. All we are proposing is that if this policy has the direct and inevitable effect as has been described in *Express newspaper ltd. case*[11] and followed in *Maneka Gandhi case*[12], the judicial intervention in saving the almost all the fundamental rights to concerned people become necessary.

CONCLUSION

"Life of law is not logic, its experience." In order to remain just, fair and reasonable law must mould itself with the changing needs and circumstances of the society. Law, at any point of time, must remain redeemer and trouble shooter.

'Disinvestment' as described in the previous part of the paper, is a Twenty First Century Phenomena. It is here to stay and considering the global experience, it might broaden itself to take new forms and dimensions with varying impacts and consequences.

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[10] Rustom Cavasjee Cooper vs Union of India, 1970 AIR 564, 1970 SCR (3) 530.

[11] Express Newspapers (Private) vs The Union of India (Uoi) And Ors, AIR 1958 SC 578, (1961) ILLJ 339 SC, (1964) ILLJ 9 SC, 1959 1 SCR 12.

[12] 1978 AIR 597, 1978 SCR (2) 621.

The legal impacts of this policy are multidimensional and our Paper focuses on the aspect of Enforceability of fundamental rights. Article 32 envisages remedy for enforcement of Fundamental Rights. Dr. Ambedkar called it **'soul of constitution'**. It is one of the fundamental right. It guarantees the intervention of the apex court in the case of violation and non-availability of fundamental rights. Fundamental Rights, in general, are available against the state which has been defined in Article 12 in an inclusive manner. So, to avail the remedy U/A 12 one needs to prove the other party to be 'state'. Judicial approach has consistently remained in favour of expanding the definition so that the availability of these rights remains relevant.

Under the policy of disinvestment, government sells its shares in Public Sector Undertakings (PSUs) to private players which many a times results in change of ownership. As per the existing definition of the State as has been pronounced in *Ajay Hasia and Pradeep Kumar Biswas* case, after this change of ownership these PSUs no longer remain 'State'. This transition hampers the remedy available U/A 32.

The consequences are huge. Protective umbrella of guaranteed remedies get removed. Employees associated with these institutes enjoyed these protections before the disinvestment and now a single move of government renders them vulnerable. Job security is deeply linked to the government jobs in India. In India, it's a middle class dream to have such a job because people although not being aware of these remedies still by experience know that in government jobs they can't be fired and hired at the whims of employer. In becoming non-state, people lose these remedies and idea of job security goes down the drain.

These changes might even have socio political effects. That might lead to Public unrest because the common people will feel that fundamental rights/extra ordinary constitutional remedy are not for them but to selected sections of society. They might feel disenchanted.

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Therefore, the only solution to tackle this menace is to further broaden the definition of "state" as has been done in last few decades. Doing so has multiple advantages. Once a body is characterised as an 'authority' under article 12, several significant incidents invariably follow, viz:

1. The body becomes subject to the discipline of the fundamental rights which means its actions and decisions can be challenged with reference to the Fundamental Rights.
2. The body also becomes subject to the discipline of Administrative Law.

3. The body becomes subject to the writ jurisdiction of the Supreme Court under Art. 32 and that of the High Courts under Art. 226.

The existing definition of State was formed at a time when Disinvestment was not a reality in Indian context. This phenomenon is sophisticated and yet so hard hitting that it requires a different treatment to take into account the involved nuances and subtleties. Not that all private institutions should be declared as state but that erstwhile state must not become "non" state. Hence, we are only requesting the protection of already accrued protection and privileges.

As and when need emerged, the Apex court has gone out of the way to broaden the availability of Fundamental Rights to the people. In the issue of Public Interest Litigation, the Apex court in *Bandhua Mukti Morcha vs Union of India & Others*[13] relaxed the *Locus Standi* so that even public interested litigants can litigate for the rights of voiceless poor.

In the light of these facts and circumstances we propose the hereinabove discussed remedy in the interest of the public of India.

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[13] 1984 AIR 802, 1984 SCR (2) 67