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by

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Which Road to Social Revolution?

Liberalization and Constitutional Reform in India

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This article explores the constitutional ideology of the social revolution in the context of liberal economic reforms in India. While India's new economic policies emphasize the benefits of competition and free markets her constitutional preferences remain embedded in legal provisions and traditions that favour social engineering in the name of economic, political and social equality. As liberalization as well as the global marketplace have become firmly established in the rhetoric and practice of elite politics, the political momentum towards economic change falls short of the numerical majorities to amend the Constitution. Consequently, India's Supreme Court judges are taking centre-stage in the field of economic liberalization, having the power to either stall or accelerate the reform process by means of judicial review. Unrestrained by the political obstacles of democratic politics the court has sketched a dialectical reform of the constitutional political economy exercising judicial restraint as the means and modes of production are freed from state control and exposing judicial activism as the judges advocate the interweaving of the distribution and consumption of wealth with the goals of the social revolution. Based on an analysis of judicial policies as well as

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constitutional reform debates the article maintains that the constitutional ideology of the social revolution acts as an important, if not constructive, constraint and guideline as India's policies are shifting from "empirical gradualist" socialism (Morris-Jones 1959: 415) to empirical gradualist liberalization and globalization.

The inauguration of the Indian Constitution on January 26, 1950 had marked the birth of an equal sovereign in the international system and has embodied the ideal of inculcating economic, political and social equality in the subcontinent: "The Indian Constitution is first and foremost a social document. The majority of its provisions are directly aimed at furthering the goals of the social revolution" (Austin 1966: 50).² Almost sixty years after the inauguration of the Constitution the meanings of independence, self-reliance and sovereignty have changed in the context of transnational flows of commodities and capital, people and discourses. Likewise, the pace of socio-economic change that was meant to bring inequalities to an end is perceived as chronically lagging behind the constitutional vision. India, therefore, seeks new roads to social revolution.

Technical blue prints to engineer the social revolution from above have been manifold. India's Constituent Assembly had colossal developmental and even greater redistributive ambitions at the end of the 1940s.

Nehru's state was a purposive state. It was unashamedly socialist even though while moving the Objectives Resolution before the Constituent Assembly, he was aware that the word 'socialist' was missing. But, socialism was not just a stated objective, it was the very essence of the task that India had embarked herself upon. Nehru's socialism manifested itself in the very structure of the Constitution. Socialism was not a dream of the masses; but the responsibility of the state (Dhavan 1992: 47).

Thus, there was broad agreement that unless the problems of poverty and inequalities within the society were addressed and solved "all our article constitutions will become useless and purposeless."³ As well as this, the Constituent Assembly's socialist visions of a new political economy also reflected the experience of imperialism, which the key policy makers had come to view much more in terms of the imperatives of capitalist production than as an ideology of civilizational or racial domination. "It would therefore be foolish to conceive of Indian independence merely as a political condition [...]. Political independence would not remove India's vulnerability to economic imperialism" (Khilnani 1998: 71-2). In short, and on the most basic level, the Constituent Assembly chiselled "democratic socialism" (Dhavan 1992: 48) into the fundamental structures of the

² All references are to the Constitution of India, 1950, as amended; the latest amendment, The Constitution (Ninety-Fourth Amendment) Act, 2006, came into force on the 12th of June 2006. Cases cited refer to decisions by the Supreme Court of India.

³ Jawaharlal Nehru, *Constituent Assembly Debates*, Volume II, 317, January 22, 1947 (3rd repr., Lok Sabha Secretariat 1999).

“constitutional political economy” (Elster 1995) in order to give effect to the social revolution mandate and to respond to the apprehension of vulnerability of India’s economic interests in an open international economy.

CONSTITUTIONAL RULES AND ECONOMIC POLICY

The constitutional political economy at Independence was attuned to the emerging model of economic development – and whenever there was a need for further fine-tuning, or to override judicial pronouncements, an easy amendment procedure kept a sovereign Parliament in firm command as policy makers blended mixed economy and centralized planning. The state-directed regulatory schemes sheltered as well as controlled the private sector and India’s government-owned public sector unequivocally dominated key industries. Notwithstanding intervallic shifts in emphasis, the vital structures of these policy fundamentals were not subjected to significant changes until the early 1990s. Four decades of planning, however, have not delivered the promised social revolution. “Poverty in the country-side and the city continues to destroy the lives of hundreds of millions. And, as the example of the East Asian economies has dazzled the world, the dusty failures of the Indian state to devise anything like an effective policy of trade – fundamental to the *raison d’état* of any modern state – appear increasingly inexcusable. Gandhians and socialists, environmentalists and free-market liberals all agree that something has gone wrong” (Khilnani 1998: 62-3). It is difficult, though, to evaluate what has gone wrong and what or who is to blame. Economists inevitably differ in their judgments, each of them drawing on convoluted, often counterfactual, technical details, differing in their emphasis on domestic or international contexts. India’s project of development is further complicated by the country’s robust democratic politics in which ideological designs as well as practical economic policies often do not withstand the pressures and claims of voters. Prime Minister Rajiv Gandhi, for instance, found himself with a strong parliamentary majority, yet, unable to sustain his efforts to “modernize” the Indian economy during the second half of the 1980s (Jenkins 1999). Nevertheless, he had put liberalization on the political agenda before increasing domestic deficits as well as a severe foreign-exchange crisis brought India’s economy to the brink of bankruptcy and collapse soon after the end of the Cold War. In response to this crisis the country embarked upon a reform process that gave fresh and strong emphasis to liberalization, deregulation and globalization. Today there is little doubt about India’s status as a potent emerging market and by the mid-1990s the Economist news article already had much-admired the reforms as “nothing less than a repudiation of India’s distinctive approach to development – a repudiation, that is, of Nehru’s vision of socialist self-reliance” (Corbridge and Harriss 2000: 157). At the same time, the Preamble of the Indian Constitution still venerates the Indian polity as a sovereign socialist secular democratic republic:

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a *SOVEREIGN SOCIALIST SECULAR* DEMOCRATIC REPUBLIC and to secure to all its citizens:
 JUSTICE, social, economic and political;
 LIBERTY of thought, expression, belief, faith and worship;
 EQUALITY of status and of opportunity;
 and to promote among them all
 FRATERNITY assuring the dignity of the individual and the *integrity* of the Nation;
 IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.⁴

Similarly, the Ninth Schedule, added by the *Constitution (1st Amendment) Act, 1951*, which provides a safe haven from judicial review for the land reform legislation by India's States, irrespective of their inconsistency with fundamental rights, remains in effect and so do the constitutional amendments which have transformed the fundamental right to "acquire, hold and dispose property"⁵ into a much weaker, only statutory right to property.⁶ In 1983, five years after the *44th Amendment Act, 1978*, Justice Chinnappa Reddy summed up the relationship between the social revolution and the right to property, holding that "[t]he fundamental right to property has been abolished because of its incompatibility with the goals of justice, social, economic and political and equality of status and of opportunity and with the establishment of a socialist democratic republic, as contemplated by the Constitution."⁷ The judges have not changed their mind so far⁸ and it is often forgotten that India is embracing the principles of a market economy without any formal constitutional guarantees of the right to property and without constitutional protection from its arbitrary expropriation. While the transformation of property regimes has been seen as a key constitutional challenge in postsocialist Eastern Europe (Stark and Bruszt 1998) as well as China (Oi and Walder 1999; Ho 2005), India's economic reforms have embraced market economics in the context of insecure and ill-defined property rights, thus, simply ignoring the most fundamental benchmark of liberal constitutionalism (Fitzpatrick 2006). Needless to

⁴ Preamble; words in italics were inserted by the *Constitution (42nd Amendment) Act, 1976*.

⁵ Article 19(1)(f) in the "original," unamended constitutional text.

⁶ Article 300-A: "No person shall be deprived of his property save by authority of law", inserted by the *Constitution (44th Amendment) Act, 1978*; Article 300-A not only lacks the status of a fundamental right but also rules out constitutional judicial review with respect to questions of just and equitable compensation.

⁷ *State of Maharashtra v. Chandrabhan Tale* AIR 1983 SC 803 (par. 2).

⁸ See, for instance, *Dharam Dutt v. Union of India* (2004) 1 SCC 712: "the right to property had ceased to be a fundamental right and the newly engrafted Article 300A of the Constitution requires only authority of law for depriving any person or his property (par. 68).

say, the absence of formal constitutional guarantees of the right to property has neither stopped the flow of foreign direct investment nor the growth of the economy – in fact, the ease of the process of acquisition of land by the state often lays the ground for the speedy development of industrial areas and infrastructure. For instance, Bangalore’s world famous IT corridor and software technology parks could not have been built without the *Karnataka Industrial Areas Development Act, 1966* which allows for the acquisition of agricultural lands without paying much compensation or concern for the needs and rights of the affected rural communities.⁹ It is not only a tragic irony that the abolition of property rights during the heyday of the socialist state and in the name of social justice has left many marginalised unprotected – subjected first to the needs of a self-serving and self-justifying socialist state and, today, also to the demands of private economic power. What is more, the question of property rights is a stark reminder of the complexity of the social revolution and the ideological nature of constitutional adjudication (Kennedy 1997). Some authors tend to equate constitutional law with repression or view the Supreme Court as a forum that tends to reinforce the prevailing hegemony (e.g. Bhushan 2004). Others see India’s constitutional system as inherently beneficent and continue to hold the Indian Supreme Court in high esteem: “on a comparative basis, it may be true to say that no apex court in any democratic country has shown as much dynamism, humanism, creativity, and empathy with the cause of the poor and the downtrodden as the Supreme Court of India has done” (Jain 2000: 99). The purpose of this study is not necessarily to choose between these competing visions, each of which seems to overlook important successes and failures of the judges’ efforts to implement the social revolution;¹⁰ much rather the specific aim of this article is to understand the “ontological robustness” of the social revolution, as the idea of the Indian Constitution continues to signify “a set of ideological sites that provide justification/mystification for constitutional theory and practice” (Baxi 2000b: 1186).

While liberalization as well as the global marketplace are firmly established in the rhetoric of “elite politics” (Varshney 1999: 222) the constitutional text and its normative repercussions continue to reflect India’s “old-fashioned” development consensus. Not only is the constitutional ideology still formally engrained in the

⁹ Since 1966, the *Karnataka Industrial Areas Development Act* has enabled the state to acquire nearly 57,000 acres of land all over Karnataka. A report on the impact of this Act and a summary of some ongoing cases in various courts of Bangalore has been published by the Alternative Law Forum in Bangalore; see *Of Master Plans and Illegals in an Era of Transition*, available at: <www.altlawforum.org>. In general, without constitutional guarantees of the right to property, the courts seem unable to protect individual plaintiffs from unjustified expropriation or low compensation payments; see, for instance, *Chameli Singh v. State of U.P.* (1996) 2 SCC 549; *New Riviera Coop. Housing Society v. Special Land Acquisition Officer* (1996) 1 SCC 731; *Butu Prasad Kumbhar v. Steel Authority of India* (1995) Supp (2) SCC 225; *Jilubhai Nanbhai Khachar v. State of Gujarat* 1995 (1) SCC 596.

¹⁰ See Baxi’s (2000a) seminal article, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]justice*.

days of state-directed economic development, but also the sweeping constitutional amendments, which allowed for Indira Gandhi's assault on the private sector as well as the de-constitutionalization of the fundamental right to property under the Janata government, are left intact – despite significant liberal economic reforms for almost two decades.

CONSTITUTIONAL IDEOLOGIES, ELITE POLITICS AND MISSING SUPERMAJORITIES

In a nutshell, the widening gap between constitutional semantics and the new economic policies sponsors pungent debates about a constitutional crisis and the need for constitutional reforms (Baxi et al. 1999). Interestingly though, there seem to be no efforts to synchronize constitutional reforms to the new economic policies – on the contrary, face to face with markets and competition the constitutional reform debate aims at an extension of social, economic rights stressing the imperative nature of the social revolution. Constitutional ideologies, constitutional reform discourse, judicial decision making, and the amendment process are important in two ways.

To begin with, Alexis de Tocqueville's observation that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question" (Tocqueville 1863: 375) holds true for India too, particularly at the end of the 1970s, as India's Supreme Court judges began to reinvent themselves in the course of the emergence of public interest litigation as judicial activists of the "most active" sort. Today, authors like Rajeev Dhavan (1980: 1-26) or S.P. Sathe (2002: 249) simply as well as unequivocally refer to India's Supreme Court as the "most powerful court in the world." "The Court's specific political role lies in its functioning as a parallel legislature and quite often as a parallel constituent body" (Baxi 1980: xii). Such extraordinary powers of course derive from a history of contestation. During the first clash of Parliament and the Supreme Court (on the interpretation of the constitutional provisions on the right to property) the dominant Congress Party could easily amend the Constitution, first, to undo the effects of judicial review, and then, trying to undo judicial review itself. With Nehru at its head, the Congress party was not content with gaining office and majorities, but aimed for nothing less than boundless legislative freedom to rebuild Indian society from above. Though not a chaste 'Diceyan' democracy, India's electoral winners were thus quick to claim a popular mandate and knew no higher form of law than the will of Parliament as expressed in legislative texts or, if necessary, the wording of a constitutional amendment. In a nutshell, at the beginning of the 1950s, Nehru and India's political elites had no doubt that "if the Constitution itself comes in our way, then surely it is time to change that Constitution" (Nehru 1951 [1989]: 325).

Enter Chief Justice Sikri and the famous judicial opinions in *Kesavananda Bharati vs. State of Kerala*,¹¹ known throughout the world as an epoch making affirmation of the power of judges, and asserting the ultimate supremacy of the Indian Supreme Court over the ballot box. This drumming vindication of judicial power, though partly a strategic retreat from the unsophisticated doctrines set out by the *Golak Nath* case,¹² quickly became the icon of India's new constitutionalism, as unelected judges have effectively substituted the notion of the separation of powers with an unambiguous declaration of formal judicial supremacy (Mehta 2007). With the downfall of the Congress system and the rise of regional parties and coalition governments India's judges find themselves in a much more powerful position and have been making extensive use of it.¹³ The article illustrates that the political forces favouring basic changes in India's economic policies have not been able to translate the momentum for economic reforms into a constitutional discourse, leave alone into the political consensus necessary for constitutional amendments. Consequently, as the supermajorities required for amending the Constitution's political economy seem to be out of reach for coalition governments and their fragile political alliances, one cannot remain blind to the policy-making and policy-making potentials of the judges. Indian courts have not been shy to extend their power as public interest litigation revolutionized access to justice and led to an extraordinary extension of the social, political and economic rights as India's Supreme Court judges pursue empowerment in the context of distributive justice – particularly economic and social rights. A powerful, activist judiciary, armed with a constitutional text that is thoroughly committed to the social revolution, may at times hang over economic reformers like a sword of Damocles. For instance, in 2003 the Supreme Court passed a devastating judgement for Disinvestment Minister Arun Shourie, as a public interest litigation challenged the decision of the Government to sell the majority of shares in Hindustan Petroleum Corporation Limited (HPCL) and Bharat Petroleum Corporation Limited (BPCL):

There is no challenge before this Court as to the policy of disinvestment. The only question raised before us whether the method adopted by the Government in exercising its executive powers to disinvest HPCL and BPCL

¹¹ (1973) 4 SCC 225. All references are to the Constitution of India, 1950, as amended; the latest amendment, the Constitution (Ninety-Third Amendment) Act, 2005, came into force on January 20, 2006. Cases cited refer to decisions by the Supreme Court of India.

¹² *Golak Nath vs. State of Punjab* AIR 1967 SC 1643.

¹³ In this context, it is important to keep in mind that constitutional amendments and regular legislation to override constitutional decisions are not the only weapons of the legislative and the executive; for a general model see, Lee Epstein and Jack Knight (1998: 138 ff). The former Prime Minister Indira Gandhi, for instance, was able to exert direct pressure – if not threats – on individual judges; see, Granville Austin (Austin 1999: 317-8). Moreover, Parliament and the government not only can hold judicial salaries constant but also are in control of prospective appointments of justices to government posts after their retirement from the Indian Supreme Court (at the age of 65).

without repealing or amending the law is permissible or not. We find that on the language of the Act such a course is not permissible at all. 21. In the result, we allow these petitions restraining the Central Government from proceeding with disinvestment resulting in HPCL and BPCL (SIC) to be Government companies without appropriately amending the statutes concerned suitably.¹⁴

While the court does not question its earlier decisions, in which it had implicitly endorsed the new economic policy of disinvestment,¹⁵ the Supreme Court has also not ruled out the possibility of assessing the constitutionality of specific economic policies in the context of socialism being a basic feature of the Constitution. It is true that the disenchantment with India's mixed economy and economic planning has seized the Supreme Court too and that the judges have often thrown their weight behind economic reforms – yet, judicial policy preferences may still come to haunt the liberalization process. In this respect, the main arguments advanced here concern the distinction drawn by Ashutosh Varshney (1999) between elite- and mass politics in the process of economic liberalization: “Elite concerns – investment tax breaks, stock market regulations, custom duties on imported cars – do not necessarily filter down to mass politics” (Varshney 1999: 223). They also do not impinge too much on the social revolution as not too many people are affected by them in a direct or obvious manner. On the other hand, if India's economic reforms shift further towards the terrain of mass politics – privatization of the public sector, restructuring of labour laws, agricultural reforms and the reduction of fiscal deficits to low levels (Varshney 1999: 225) – the judges will be bound to encounter much harder choices and greater problems reconciling between liberalization and the social revolution. Thus, the first central contestation of this article is that the Supreme Court, a key actor within the institutional matrix of economic reforms, will function as a powerful – yet often ignored – policy maker whenever liberal reforms conflict with the goals of the social revolution. In the words of Justice Banerjee:

There cannot possibly be any doubt that the socialistic concept of the society as laid down in Part III and IV of the Constitution ought to be implemented in the true spirit of the Constitution. Decisions are there of this Court galore wherein this Court on more occasions than one stated that democratic socialism aims to end poverty, ignorance, disease and inequality of opportunity.¹⁶

¹⁴ *Centre for Public Interest Litigation vs. Union of India*, AIR 2003 SC 3277.

¹⁵ *BALCO v. Union of India*, AIR 2002 SC 350.

¹⁶ *G.B. Pant University of Agriculture & Technology v. State of Uttar Pradesh* AIR 2000 SC 2695 (par. 3); the case relates to a labour dispute, decided in favour of the regularisation of contract workers as full employees.

As a matter of fact this Court has been candid enough on more occasions than one and rather, frequently to note that socialism ought not to be treated as a mere concept or an ideal, but the same ought to be practised in every sphere of life and be treated by the law courts as a constitutional mandate since the law courts exists for the society and required to act as a guardian-angel of the society. As a matter of fact the socialistic concept of society is very well laid in Part III and Part IV of the Constitution and the Constitution being supreme, it is a bounden duty of the law courts to give shape and offer reality to such a concept. [...] The primary impact of socialism as a matter of fact is to offer and provide security of life so that the citizens of the country may have two square meals a day, and maintenance of a minimum standard of life, it is expected, would lead to the abridgment of the gap between the have-s and have not-s. The feudal exploitation and draconian concept of law ought not to outweigh the basis structure of the Constitution, or its socialistic status. Ours is a socialist State as the Preamble depicts and the aim of socialism, therefore, ought to be to distribute the common richness and the wealth of the country in such a way so as to sub-serve the need and the requirement of the common man. [...] Raw societal realities, not fine-spun legal niceties, not competitive market economics but complex protective principles, shape the law when the weaker, working class sector needs succour for livelihood through labour.¹⁷

The practical significance of these judgements should not be overestimated as the organized sector of India's labour market, i.e. the government administration at the central, state and local level as well as public and registered private firms, employ only about 8.5 per cent of the country's labour force of about 350 million people (Zagha 1999: 161). Yet, the decisions' ideological contents, as spelled out by Justice Banerjee, are an indispensable cornerstone of India's political economy, since the broad consensus on a socialist framework has been central and instrumental to the emergence of the state's capacity to act as a third actor: "The state as a third actor began its autonomous career in independent India as a creature of Nehruvian socialism" (Rudolph and Rudolph 1987: 62). The perseverance of the constitutional ideology of the social revolution, thus, is the second important concern of the arguments presented here, as the constitutional text continues to sanction a command polity model, imagining the state as "sovereign – differentiated, autonomous, and authoritative" (Rudolph and Rudolph 1987: 14).

Expectations that liberal economic reforms might challenge the constitutional "socialist consensus" (Rudolph and Rudolph 1987: 25-6; Jenkins 1999: 46) have so far remained unfulfilled and the social revolution laid out by the Constitution continues as market-oriented economic policies are introduced and consolidated. Consequently, the second central contestation of this article emphasizes the role of India's constitutional ideology in channelling the structural changes of

¹⁷ Secretary, H.S.E.B. v. Suresh AIR 1999 SC 1160 (par. 1-3 and par. 7); this case too concerns regularisation of contract workers as full employees.

liberalization and globalisation. India escapes the discourse of statelessness (Evans 1997) as the norms and values, the ideologies and principles enshrined in the Indian Constitution argue the case for a higher level of stateness in order to control and transform political effects of new economic policies as well as transnational production-consumption networks. For better or worse, the Indian Supreme Court judges to go along with the “untrammelled hegemony of Anglo-American ideological premises” (Evans 1997); in the context of India’s constitutional discourse the inexorable logic of economic globalization is not at all the decline of public institutions, but an increased role for the state.

Today, the untrammelled hegemony of Anglo-American ideological premises is one of the most salient forces shaping the specific character of the current global economy, including the extent to which globalization is viewed as entailing the eclipse of the state. In this environment, pursuing Nettl’s agenda requires a different starting point. “Statelessness” can longer be treated as simply a feature of Anglo-American political culture. It must be dealt with as a dominant global ideology and potential institutional reality. Therefore, the question of whether the eclipse of the state is likely and, if so, what the consequences of such an institutional shift would be, takes precedence. The trick is to deal with the question of eclipse seriously without taking a positive answer for granted. I will argue that while eclipse is a possibility, it is not a likely one. What the “discourse of eclipse” has done is to make responses to a genuine crisis of state capacity unrelentingly negative and defensive. [...] Preoccupation with eclipse cripples consideration of positive possibilities for working to increase states’ capacity so that they can more effectively meet the new demands with which they are confronted. The goal should be to work back toward something closer to Nettl’s original agenda of comparing different kinds of “stateness” and their consequences, this time with more explicit attention to the effects of globalization (Evans 1997: 64).

India’s unbeaten resistance to the unimaginative visions of statelessness underlines the institutional centrality of the state and the importance of diverging ideologies. Constitution, constitutional court, constitutional discourse as well as constitutional reform debates are crucial determinants of how India tries to find her autochthonous version of a liberal economy embedded within the social revolution. “[T]he Indian Constitution is a National Charter pregnant with social revolution, not a legal parchment barren of militant value to usher in a democratic, secular, socialist society which belongs equally to the masses including the harijan-girijan millions hungering for a humane deal after feudal-colonial history’s long night.”¹⁸ As India’s liberalization has fundamentally altered her economic and development

¹⁸ Justice Krishna Iyer, *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India* AIR 1981 SC 298 (par. 11).

strategies, elements of state autonomy might have “leaked away, upwards, sideways, and downwards” (Strange 1995), yet, they never just evaporated. Seeing with the eyes of India’s Supreme Court judges an eclipse of the state is not in sight as the constitutional commitments to the social revolution have not been given up and the new political economy of production is sustained only the promise of state-administered social and economic justice only.

AMENDMENT POLITICS, CONSTITUTIONAL CHANGE AND THE SOCIAL REVOLUTION

Independent India has witnessed a struggle for judicial supremacy and deep transformations of parliamentary governance. Naturally, since the inauguration of the Constitution, those who possessed or managed political authority objected to the transfer of their ‘political property rights’ to India’s apex courts. However, the first judicial rumblings against zamindari abolition and other land reform legislation in the 1950s unmistakably set the tone that would allow India’s judges to reinvent themselves in the style of judicial activism in the 1980s. Although the delegation of power to judiciaries, has often been accompanied by deep political hostility towards judges, it has also come to be viewed as a necessary evil; and even a polity that was inspired by the Westminster model of parliamentary sovereignty has succumbed to American-style judicial review, where ‘separation’ of powers means ‘checks and balances’ among co-equal branches of government. Such separation-of-powers games between India’s government legislators and judges are ritually rehearsed under the following headlines: parliamentary sovereignty; ultra vires doctrines; judicial review; concept of a basic structure of the constitution; separation of powers; *Golak Nath*, *Keshavananda v. State of Kerala*, *Minerva Mills*; 24th, 42nd, 43rd and 44th Constitution Amendment Acts; the story then continues with the emergence of public interest litigation, India’s rights revolution and an unparalleled transformation of judicial behaviour in terms of social activism. Today, there “is no area where the judgments of Supreme Court have not played a significant contribution in the governance – good governance – whether it be – environment, human rights, gender justice, education, minorities, police reforms, elections and limits on constituent powers of Parliament to amend the Constitution.”¹⁹ As well as this, the Indian Supreme Court has come to provide the single most important avenue for political activists, organized groups of every stripe and even opposition parties to challenge the government of the day. Above all, it is not only astonishing to note the exceptionally bold and copious rulings of the court after the emergency, but, what is more, since the end of the 1980s the

¹⁹ Speech of the Chief Justice of India, Y. K. Sabharwal, “Role of Judiciary in Good Governance” (2006: 11), at: <http://www.supremecourtindia.nic.in/new_links/Good%20Governance.pdf>.

judges have repeatedly claimed the power of “the last word” and successfully imposed their will on the executive and legislative.²⁰

The social revolution played an important part all the way through. Granville Austin’s concept of the “social revolution” has had an enormous impact on Indian constitutional law and his book (Austin 1966), which introduced this popular conception, has been “canonised by the bar and the bench [...], probably the most cited work in the Indian judicial decisions,” (Baxi 2001: 921), although, Austin himself (Austin 1966: 26) clearly credits the social revolution theme as the brainchild of two southern members of the Constituent Assembly, i.e. the newsarticle editor K. Santhanam and Sarvepalli Radhakrishnan (President of India 1962-1967). What is more, the social revolution has become a centre-piece of the key decisions on the substantive limits of constitutional amendments in Indian constitutional history. The quarrels between Parliament and the Supreme Court were mostly triggered by land reform legislation (in the name of the social revolution) and judicial review of it.

“It has been not today’s policy, but the old policy of the National Congress laid down years ago that the zamindari institution in India, that is the big estate system must be abolished. So far as we are concerned, we, who are connected with the Congress, shall give effect to that pledge naturally completely, one hundred per cent. And no legal subtlety and no change is going to come in our way. That is quite clear. [...] Within limits no judge and no Supreme Court can make itself a third chamber. No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of Parliament. But we must respect the judiciary, the Supreme Court and the other High Courts in the land. As wise people, their duty it is to see that in a moment of passion, in a moment of excitement, even the representatives of the people do not go wrong; they might. In the detached atmosphere of the courts, they should see to it that nothing is done that may be against the Constitution, that may be against the good of the country, that may be against the community in the larger sense of the term. Therefore, if such a thing occurs, they should draw attention to that fact, but it is obvious that no court, no system of judiciary can function in the nature of a third House, as a kind of Third House of

²⁰ See, for instance, *People’s Union for Civil Liberties v Union of India* AIR 2003 SC 2363 as a striking demonstration of judicial power, de facto overriding a legislative amendment, although, it is obvious that the judges have perfect and complete information about the preferences of the legislator. In other words, the Supreme Court of India is able to choose not to defer to the other branches of government.

correction. So, it is important that with this limitation the judiciary should function.”²¹

Golak Nath, reversing precedents, was the first case that directly challenged Parliament, defending the property rights of an individual and arguing in favour of implied limitations on amending power. As the judges denied Parliament the right to abridge the fundamental rights as laid down by Part III of the Constitution, Parliament, with a strong Congress majority, simply set itself on collision course with the judges since the social revolution could not be achieved without essential modification of the right to property. Three judges delivered the minority opinion and followed the opinion of the legislators as the “social revolution in our country may require more rapid changes.”²² As the formal procedures for amending the Indian Constitution²³ are simple, and at most require that an amendment bill is passed “in each House by a majority of the total membership of that House, and by a majority of not less than two-thirds of the members of that House present and voting,” the massive mandate of the 1971 elections made it easy for the dominant Congress party to amend the Constitution in response to unpleasant judicial pronouncements and to keep ‘conservative’ judges away from the social revolution.²⁴ Congress’s electoral success became the democratic mandate to pass and implement further constitutional amendments in accordance with a socialist electoral campaign. Eventually, the 24th and the 25th Amendment were passed, thus, allowing for large scale nationalizations in industry and commerce – and “saving” the social revolution from a conservative and capricious Supreme Court. In terms of theory, India’s colonial tradition of parliamentary sovereignty (Westminster style) clashed with a written constitution and judicial review (American style). In terms of practice, India’s judges did not prove sensitive enough to understand the rules of the game and it is worthwhile remembering that the court’s frontal assault on parliament’s sovereignty was at first unsuccessful and politically costly.

Failing to adapt to the strong position of the legislator, the *Kesavananda Bharati* case did not shift judicial policies towards the social revolution as much as the legislators had hoped. Reassessing the role and relevance of the Directive Principles of State Policy, as laid out in Part IV of the Constitution, which “set forth the humanitarian socialist precepts that were the aims of the Indian social

²¹ Jawaharlal Nehru, Constituent Assembly Debates, Volume IX, pp. 1195-96 [10th December 1949].

²² *Golak Nath v. State of Punjab* AIR 1967 SC 1643 (par. 292).

²³ Article 368.

²⁴ Specific parts of the constitution can even be amended by simple majority. In addition to the special majority requirements outlined here, amendments that affect certain aspects of centre-state relations in India’s federal make-up, also require the ratification by at least half of the States’ legislatures. Again, the requirement of ratification by half of the States did not present a problem before the 1980s for most Congress governments could easily gather the necessary support in the States. After *Golak Nath*, the Supreme Court had continued to challenge Parliament by interfering with bank nationalization and the abolition of privy purses.

revolution,”²⁵ the majority of the judges still declared that *Golak Nath* had been wrongly decided and upheld the 24th and 25th Amendment. Yet, the judges arrived at this decision in a very confusing and contradictory way, extending the power of judicial review via the invention of the *basic structure doctrine*, which proclaims certain basic features of the Constitution to be beyond Parliament’s power of amendment. Again, Indira Gandhi amended the Constitution to override this decision – this time however, she was not empowered by elections but empowered herself by declaring an internal emergency (1975-1977), which gave her the power to push the 42nd Amendment through a Parliament controlled via emergency rule.

At the end of the 1970s the following compromise emerged: After Indira Gandhi lost the 1977 elections, the Janata government would try to override the 42nd Amendment, yet, needed the support of the Congress to pass constitutional amendment bills so that the 44th Amendment falls short of a complete repudiation of the 42nd Amendment. In the bargaining process surrounding the 44th Amendment, the left-leaning Janata government ensured an end to the disputes over the constitutional status of the right to property by removing it from the fundamental rights section of the Indian Constitution once and for all.²⁶ At the same time, the basic structure doctrine has been accepted by the legislators, so that the judges have safeguarded their right to control the constitutional amendment process. The Supreme Court, now more to separation-of-power games, has accepted the end result without reservations; judicial activism would return to the Indian polity in the 1980s, yet, with a shift in emphasis from property- to civil rights. In *Minerva Mills*, the nationalisation of a textile undertaking called Minerva Mills, under the provisions of the *Sick Textile Undertakings (Nationalisation) Act, 1974* was challenged and the court was asked to declare the unconstitutionality of Sections 4 and 55 of the *Constitution (42nd Amendment) Act, 1976*. Once again, the social revolution theme was invoked by the judges:

The history of India’s struggle for independence and the debates of the constituent Assembly show how deeply our people value their personal liberties and how those liberties are regarded as an indispensable and integral part of our Constitution. It is significant that though Part III and IV part of our Constitution as two distinct fasciculus of Articles, the leaders of our independence movement drew no distinction between the two kinds of State’s obligations – negative and positive.²⁷ [...] The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Granville Austin’s observation brings out the true position that Parts III and IV are like two wheels of a chariot, one no less important than the other. You snap one and the other will lose its efficacy. They are like a twin formula for

²⁵ *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461 (par. 489).

²⁶ See above, p. 4.

²⁷ *Minerva Mills v. Union of India* AIR 1980 SC 1789 (par. 53).

achieving the social revolution, which is the deal which the visionary founders of the Constitution set before themselves. In other words, the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution.²⁸ [...] This is not mere semantics. The edifice of our Constitution is built upon the concepts crystallised in the preamble. We resolved to constitute ourselves into Socialist State which carried with it the obligation to secure to our people justice – social, economic and political We, therefore, put Part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved. [...] Parts III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution.²⁹

The majority of the Supreme Court seized the opportunity to reaffirm the basic structure doctrine and confirmed the unconstitutionality of the specific parts of the 42nd Amendment. The informal constitutional consensus which has emerged since the 1980s is based on (1) the acceptance of the basic structure doctrine by all political institutions (2) the Supreme Court is exercising maximum restraint when an amendment is challenged as unconstitutional (3) judicial activism in the name of the social revolution has shifted away from interference with economic policies to the field of civil, social and economic rights. The balance between fundamental rights and the directive principles of State policy, i.e. the social revolution, is thus moving towards a state of “stable equilibrium” as hung parliaments and weak coalitions provide the judges with a window of opportunity to change the balance of power in their favour (Sathe 2002: 96 ff; Rudolph and Rudolph 2001). Once more, the social revolution provided a welcome and sturdy ideological backbone, this time in the context of judicial activism. For instance, the social revolution mandate is an essential element of one of the most important public interest litigation decisions, *S.P. Gupta v. Union of India*, with Justice Bhagwati’s long and famous exposition on the question of *locus standi* and liberalization of standing, setting the tone of judicial activism in India.

It is necessary for every Judge to remember constantly and continually that our Constitutional is not a non-aligned national charter. It is a document of social revolution which casts an obligation on every instrumentality including the judiciary, which is a separate but equal branch of the State, to transform the status quo ante into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. The judiciary has therefore a socio-

²⁸ Ibid., (par. 56).

²⁹ Ibid., (par. 57).

economic destination and a creative function. It has to use the words of Granville Austin, to become an arm of the socio-economic revolution and perform an active role calculated to bring social justice within the reach of the common man. It cannot remain content to act merely as an umpire but it must be functionally involved in the goal of socio-economic justice. The British concept of justicing, which to quote Justice Krishna Iyer (Mainstream, November 22, 1980), “is still hugged by the heirs of our colonial legal culture and shared by many on the Bench” is that “the business of a Judge is to hold his tongue until the last possible moment and to try to be as wise as he is paid to look.”³⁰

These ideological fundamentals of the Constitutional ideology have remained untouched as liberalization has changed India’s political economy. Public Interest Litigation revolutionized access to justice in India and the democratization of the judicial process has led to an extraordinary extension of the social, political and economic rights. In other words, as economic planning and the socialist modes of production are abandoned and reformed in line with competitive market policies, India’s Supreme Court judges pursue the social revolution in the context of distributive justice. Consequently, it is important to keep in mind that India’s rights revolution remains first and foremost embedded within the context of radical redistributive goals and that judicial declarations of individual rights (Epp 1998) are of secondary importance. “Indeed civil liberties concerns have been palpably weak in Indian courts” (Mehta 2005:165). The nexus between social revolution, justice and legal rights is thus fundamental to the Indian rights revolution as the representations of socio-economic entitlements remains at the centre of political imagination. And while it is clear that the pace of law and social change is still chronically lagging behind constitutional visions, Indians have skilfully utilized socio-economic rights discourses to contribute to meaningful social change. To assess the potential of this “rights revolution” (Epp 1998; Ignatieff 2000), it is necessary to trace an evolving constitutional jurisprudence that has asserted greater powers of judicial review and to chart its influence on contemporary legal and political practices. It is clear that the intellectual origins of the Indian rights revolution have had a contentious history, leading back to the formal articulation of various demands for rights during the independence movement since 1895 as well as the language of rights of the Karachi Resolution of 1931 (Reddy and Dhavan 1994). The concern of this article, however, is less with the history than with the discernable patterns of juristic thought: Through the modern process of constitutionalization, the social revolution has integrated itself into the fabric of positive law, engendering radical shifts in our understanding of the character of Indian law as the sphere of socio-economic rights transforms into fundamental norms that infiltrate and shape the architectonic principles of the new economic order (Alexy 2002; Habermas 1996: 247-248).

³⁰ *S.P. Gupta v. Union of India* AIR 1982 SC 149 (par. 27).

REFORMING THE CONSTITUTION: TOWARDS LIBERALIZATION?

The political economy of “socialism” has triggered important constitutional amendments to achieve the desired goals of the social revolution: The 1st Amendment created the 9th schedule, the 7th Amendment introduced new land laws, expropriations following the 17th Amendment were struck down by the *Golak Nath* decision, correspondingly the 24th, 25th and 27th amendment diluted *Golak Nath* while the 42nd amendment overrode *Kesavananda*. Liberalization policies, so far, have neither translated into mass politics nor into a constitutional reform debate. On the contrary, the constitutional reforms envisaged by policy-makers give preference to the social revolution ideology and a high level of stateness.

The National Commission to Review the Working of the Constitution (NCRWC) submitted its Final Report in spring 2002. The fierce opposition to the Commission and the political posturing at the time of its appointment undermined the entire exercise of reviewing India’s constitutional experience after 50 years. Nevertheless, the Final Report, as it has been submitted to the Government of India, spells out central policy preferences in the field of constitutional reform. As well as this, the suggestions of the NCRWC are surprisingly similar to the general debates in India’s law and policy journals. As a result the final report mirrors many of the dominant ideological currents of the constitutional reform debates. The absence of any suggestions to constitutionalize certain aspects of economic reforms or to re-introduce a fundamental right to property supports the contestations advanced in this article. Even the former Prime Minister Atal Behari Vajpayee, key initiator and staunch defender of the Review Commission, did not talk about the need for inserting liberal economic policies in the constitutional text but much rather warned of “an open-door policy” and affirmed the relevance of protecting small and cottage industries to increase employment as well as greater state investments in the agricultural sector (Raina 1998: 35). Vajpayee also gave the Commission a specific task: “The country is also faced with a pressing challenge to quickly remove regional and social imbalances by reorienting the development process to benefit the poorest and the weakest” (Vajpayee 2000: 98). Can it be that India is trying to induce a liberal market economy within the paradigms of a socialist constitution?

It is interesting to note that even though the country has been carrying out policies, which are aimed at providing more liberal markets and have included reforms in license policies as well as in investment and privatisation, the NCRWC seems to justify these scenarios by the same instruments, which were said to be the headlights of socialist ideology in India. The constitution with its goal of the social revolution uses the same terminology today as it did then to justify socialism. The report of the committee to review the working of this constitution not only provides further justification for the existence of these terms and ideologies but also seeks to

ensure that they are strengthened and more rigorously integrated with state policy. Therefore, the question to be asked is:

The political economy of the Constitution is thus largely a product of the theory and thought of the age of market failure which was based on 'the proposition that the market is unable to satisfy certain types of demand.' Now India has entered the age of state failure and as a result wants to return to the market. So a question arises whether a political economy geared to market failure can now service the market. A more specific issue is whether this political economy, envisaging poverty eradication within the framework of socialism is functional to poverty eradication within the framework of market economy (Ghouse 1999: 240).

If we address ourselves to this question within the parameters of the NCRWC then the question would be is the panacea for today a form of market economy within the framework of the social revolution? Even though the market economy is lauded as the most desirable, the necessity for removal of inequality of income, wealth and means of production and the redistribution of resources of the community are still considered indisputably essential for securing social and economic justice and welfare of the people (Ghouse 1999).

The answers to the questions above seem to be that despite the use of jargon and rhetoric the reviewers of the Constitution have firmly established that it is still a document for social change, which has to be brought about in concordance with economic reform. To do this they take recourse not only to history but also current trends in growth, seeking to use the instrumentality of the state in a more "state of the art" manner. The measures suggested by the reviewers seek to establish liberal economic policies as merely another tool for creating state capacity, which will help eradicate some of the problems that had not been effectively addressed by the system of licensing and government-owned public sectors.

There is also no doubt that welfare rights should be enhanced: "A new article, say article 21-C, may be added to make it obligatory on the State to bring suitable legislation for ensuring the right to rural wage employment for a minimum of eighty days in a year.³¹ The role of the judiciary in the integration of directive principles of state policy and the fundamental rights has been commended by the NCRWC, which calls this process "constitutionalising" social and economic rights. Yet, in the eyes of the Commission this process has not been adequate to fulfil the goals of the founding fathers. The Commission reinforces the need to strive for both common good and against common detriment. Firm in its belief that this is to be brought about by taking recourse to the directive principles of state policy as the NCRWC spells out its understanding of the lessons learnt in fifty years: "Macro economic stability is an essential pre requisite for achieving growth needed for development. In largely agrarian societies like India, economic growth should

³¹ Report of the National Commission to Review the Working of the Constitution, vol. I, 91, par. 3.13.2. (Lok Sabha Secretariat 1999).

ensure employment generation. Growth does not trickle down; development should address human needs directly.”³²

These points have been repeatedly stressed in the report showing the absolutely inescapable nature of social economic and rights oriented concerns of the Commission and the view that only a high level of stateness can achieve such ends. In this context the right to food, livelihood and work being justiciable is a higher priority than mere economic growth as measured by the rise in national income. In search of the right parameters of development and having eschewed models from developed nations the commission tries to carve out India’s place through an inventive argument which states that these justiciable rights cannot be spoken of without providing and ensuring employment – which goal thus becomes the ground for both social and economic policies.

Furthermore, the State is enjoined to ensure market stability and lack of fluctuation in the agricultural sector, which seems idealistic given that competition in a market economy is in itself a high accomplishment without the added requirement to rise above as a regulatory authority. An idealistic scenario of a network creation scenario between demand, production, market, availability and economic prices is also envisaged.³³ It also suggests for taking measures to protect Indian peasantry and “other traditionally producing classes from the adverse effects of the regimes of WTO, IPR, etc. while at the same time helping them to secure the benefits of those regimes.”³⁴ In addition, high stateness is needed as “the government has the further duty to provide information for the marketing of agricultural goods especially due to freer import regulations under the WTO.”³⁵

The unorganised sector and its development tie in with the reports tilt towards social development. It again makes it a duty of the state to provide laws for the regulation of employment of the unorganised sector, which constitutes the majority work force of the country (see above, p. 8).

The report stresses that high growth rate as a result of service sector growth result is delivering higher employment and thus not to be equated with development, and thus, it should not be confused with the one area, which will actually bring development which is the creation of jobs in the agrarian sector. This is explicitly stated when the report says that industrialization and heavy industries offer limited solutions to India’s developmental problems.³⁶

Ensuring that the social message does not get sidetracked the commissions report underlines the fact that “only a massive transfer of resources to the educational programmes for the scheduled castes and scheduled tribes will enable

³² Report of the National Commission to Review the Working of the Constitution, vol. II, 85 (Lok Sabha Secretariat 1999).

³³ Report of the National Commission to Review the Working of the Constitution, vol. I, 336 (Lok Sabha Secretariat 1999).

³⁴ Report of the National Commission to Review the Working of the Constitution, vol. II, 84 (Lok Sabha Secretariat 1999).

³⁵ Report of the National Commission to Review the Working of the Constitution, vol. I, 356 (Lok Sabha Secretariat 1999).

³⁶ Report of the National Commission to Review the Working of the Constitution, vol. II, 337-8 (Lok Sabha Secretariat 1999).

us to achieve the kind of quantitative expansion need to bring these communities on par with others in terms of skills and knowledge base to engage with the modern world.”³⁷ In this respect, the Commission took into account: “the changing parameters of State action in the context of the tectonic shift toward globalisation and liberalisation. It is necessary for the Government to step in firmly and clearly, if the gap is to be bridged between private prejudices, camouflaged in the name “efficiency” on the one hand and the just aspirations of the SC, ST, BC including OBC minorities, and women.”³⁸

Clearly then, the argument that the NCRWC ties economic development firmly with social development is garnered not only by the fact that their second working article is titled towards socio economic development but also by the fact that the very question on economic progress is not a question of economic growth, but stated as being: “what has been the pace of social and economic growth in India? Has it been fair, fast and equitable?”³⁹ “What merits a new dimension to the process of social economic change within India is the global competition of market shares. It will become increasingly difficult for Governments in developing countries to protect job, wages and working conditions.”⁴⁰ Here, the NCRWC reflects on the fact that developed countries have extremely high disparities in income consumption amongst their various segments. The Commission stated that the share of income consumption amongst the poorest 20% in India is 9.2% while that of the richest is 39.5%. In USA poorest 20% had 1.5% and the richest had 45.2%. The index was used as evidence that widespread social disparities are linked to one dimensional economic growth. Though not rejecting outright the model of the developed nations the Commission tries to tread the middle path by putting this factor forward as a negative impact India has to avoid. It suggests that a true test of development would be social progress as opposed to merely a rise in the national income, a test the Commission considers of no value.

The argument of socio-economic development is also prioritised using the case study of Karnataka, an Indian state and South Korea.⁴¹ Both Karnataka and South Korea have a similar size of population, yet, per capita income in South Korea is 20 times that of Karnataka. The reasons cited by the NCRWC for Korea’s progress are universal literacy and good health. e.g. life expectancy in at birth amongst women in Korea is 11 years higher than in Karnataka and the infant mortality rate 10 times lower. Female literacy rate is 95% whereas in Karnataka it is 44%. Thus the importance and perspective of social development as instrumental for economic change is abundantly highlighted by the Final Report.

The role of high stateness in this picture is important to point out, as in all these scenarios state control, or regulation or sensitisation are key concepts stressing the

³⁷ Ibid., at 299.

³⁸ Ibid., at 305.

³⁹ Report of the National Commission to Review the Working of the Constitution, vol II., 65 (Lok Sabha Secretariat 1999).

⁴⁰ Ibid., at 147.

⁴¹ Ibid., at 129.

need for further legislation and state action to deal with and solve the socio economic crisis.

Not only does the Commission actively suggest increasing the ambit of the State but it also recommends public good duties to be enjoined on private organisations thus enforcing a more strident socialism in the voice of the Constitution. Under the heading Social obligations of the private sector the report states that since “investment in the private sector is largely from and by public bodies (Government bodies and Banks which handled Public Funds) the private sector too has social responsibilities to perform.”⁴² The NCRWC’s recommendation that under Article 51 A of the Constitution it should be the duty of industrial organisations to provide education to the children of their employees is one case in point. Even more interesting is the Commission’s recommendation with respect to disinvestments:

The Commission recommends that it should be mandatorily stipulated in the Memoranda of Understanding of privatisation or dis-investment of public sector undertakings that *the policy of reservation in favour of SCs, STs and BCs shall be continued even after privatisation or dis-investment in the same form as it exists in the Government and this should be incorporated in the respective statutes of reservation.* As a measure of social integration there should be a half percent reservation for children of parents one of whom is SC/ST and the other parent in non- SC/ST and this reservation should be termed as reservation for the Casteless.⁴³

Clearly, concepts which have till now been confined to the realm to government and public institutions are seeping into the private market vocabulary.

Last but not least, the Commission’s desire to create awareness of the fundamental duties seems to point towards a vocalisation of principles, which emphasise a two way relationship between the state and its citizens, further reinforcing the notion of an almost invisible broadening of the peripheries of the state. From the explicit legitimisation of an increase in the duties of the state, an articulation of the duties and responsibilities of private institutions, individual duties and thus civil societies duties are also articulated and given weight in the new model: “The Commission recommends that the duty to vote at elections, actively participate in the democratic process of governance and to pay taxes should be included under the ambit of Article 51 A.”⁴⁴ Eclipse of the Indian state?

THE SUPREME COURT AND ECONOMIC REFORMS: FROM MARX TO RAWLS?

⁴² Ibid., at 82.

⁴³ Report of the National Commission to Review the Working of the Constitution, vol. I, 296 (Lok Sabha Secretariat 1999).

⁴⁴ Ibid., 117.

As a result of the 42nd Amendment, which introduced the word socialism in the Preamble of the Constitution, the Supreme Court upheld the constitutionality of laws of nationalization of private property, introduced a fundamental right to 'equal pay for equal work,' struck down the *Central Civil Services (Pension) Rules, 1972* as they failed to achieve the establishment of a welfare society, regularised casual workers with parity in pay with regular workers and seeks to reduce inequalities in income.⁴⁵ As well as this, the Supreme Court has exercised judicial restraint as Parliament has passed dozens of fresh amendment acts and more than tripled the number of acts placed under the Ninth Schedule.

This policy of judicial restraint (after the 44th Amendment) in the field of economic policies has been applied as industries were nationalized and private companies were excluded from areas occupied by the State sector. As new economic policies were introduced in the 1990s the court stuck to its new found preference for judicial restraint in economic affairs. However, the court enforces guidelines to implement liberalization policies: E.g. the policy of disinvestment is approved of by the court, yet, disinvestment agreements can be struck down as they had not been sanctioned by Parliament.⁴⁶ A more direct effect of liberalization can be found in the judges approval of greater competition in the transport sector.⁴⁷

Decolonisation of our jurisprudence, heavily soaked in Anglo-American legal literature, is a desideratum if the wretched millions of the Indian earth are to enjoy distributive justice and share in the work, wealth and happiness of Bharat. Regrettable but true, the socialist structure of our constitutional order – a basic feature, as ruled by the Supreme Court in the past – is being subverted by a coup engineered by Fund-Bank pressure and M.N.C. infiltration into Indian economic space, making swadeshi (Gandhi), self-reliance (Nehru) and democratic economic sovereignty (Constitution) mere abracadabra. The judicature, with power to strike down contra-constitutional manouvres, has specifically held in *Nakara Case* plus that socialist factors are basic features and inviolable, We thus face a juris-crisis and the Court must act. Which way? It is anybody's guess. Will it be the Waterloo of the Preamble, Parts III, IV and IVA, as interpreted by the Apex Court? (Iyer 1997: 172)

One the other hand, it may be difficult to uphold judicial restraint as liberalization shifts towards mass politics and the court has to decide in matters relating to labour laws or subsidies. An interesting case to assess the direction of judicial preferences is *Dalmia Cement v. Union of India*⁴⁸ which upheld the *Jute Packaging Material*

⁴⁵ See, *Excel Wear v. Union of India* AIR 1979 SC 25; *Randhir Singh v. Union of India* AIR 1982 SC 879; *Nakara D.S. v. Union of India* AIR 1983 SC 130; *Dharwad Employees v. State of Karnataka* AIR 1990 SC 883; *Samatha v. State of A.P.* 1997 SC 3297.

⁴⁶ *Centre for Public Interest Litigation v. Union of India* AIR 2003 SC 3277.

⁴⁷ *Jagdip Singh v. Jagir Chand* AIR 2001 SC 3027.

⁴⁸ (1996) 10 SCC 104.

(Compulsory Use in Packing Commodities) Act, 1987, although, the judges themselves had to admit that the requirement by law to use jute bags for packaging cement had extremely negative effects on the industries concerned. However, the judges put the welfare of agriculture first:

Article 38 of the Constitution enjoins the State to strive to promote the welfare of the people by securing and protecting, as effectively as it may, the social order in which justice - social, economic and political - shall, inform all the institutions of the national life striving to minimise inequalities in income and endeavour to eliminate inequalities in status, facilities, opportunities amongst individuals and groups of people residing in different areas or engaged in different avocations. As stated earlier, agriculture is the mainstay of rural economy and empowerment of the agriculturists. Agriculture, therefore, is an industry. To the tiller of the soil, livelihood depends on the production and return of the agricultural produce and sustained agro-economic growth. The climatic conditions throughout Bharat are not uniform. They vary from tropical to moderate conditions. Tillers of the soil being in unorganised sector, their voice is scarcely heard and was not even remotely voiced in these cases. Their fundamental right to cultivation is as a part of right to livelihood. It is a bastion of economic and social justice envisaged in the Preamble and Article 38 of the Constitution. As stated earlier, the rights, liberties and privileges assured to every citizen are linked with corresponding concepts of duty, public order and morality. Therefore, the jural postulates form the foundation for the functioning of a just society. The fundamental rights ensured in Part III are, therefore, made subject to restrictions i.e., public purpose in Part IV Directives, public interest or public order in the interest of the general public. In enlivening the fundamental rights and the public purpose in the Directives, Parliament is the best Judge to decide what is good for the community, by whose suffrage it comes into existence and the majority political party assumes governance of the country. The Directive Principles are the fundamentals in their manifestos. Any digression is unconstitutional. The Constitution enjoins upon the Executive, Legislature and the Judiciary to balance the competing and conflicting claims involved in a dispute so as to harmonise the competing claims to establish an egalitarian social order. It is a settled law that the Fundamental Rights and the Directive Principles are the two wheels of the chariot; none of the two is less important than the other. Snap one, the other will lose its efficacy. Together, they constitute the conscience of the Constitution to bring about social revolution under rule of law.⁴⁹

From this perspective, let us consider the constitutionality of the provisions of the Act. The Statement of Objects and Reasons and the Preamble of the

⁴⁹ Ibid., par. 21.

Act, would, in unmistakable terms, indicate that it intends to provide livelihood to nearly 4 million rural agricultural families and 2.5 lakh industrial workers. The ancient agro-based jute industry occupied a significant position in our national economy, in particular in the economy of the North-Eastern region of the country. It is an agro-based and labour-intensive industry. It is also an export-oriented one and its raw material is based entirely on indigenous jute produced by the above agricultural families. Parliament avowedly intended to protect the interests of the persons involved in jute production; jute industry, therefore, requires protection.⁵⁰

The Supreme Court seems to follow a twofold strategy: The social revolution is defended as the judges identify new groups as beneficiaries of state actions and create new patterns of distribution as well as rights that can be claimed against the state. For instance, the Supreme Court pushes for legislation that enshrines the right to work: “[T]he right to free choice of employment, the right to just and favourable conditions of work, the right to protection against unemployment etc., and the right to security of work [...] true that all these rights cannot be extended simultaneously. But they do indicate the socialist goal. The degree of achievement in this direction depends upon the economic resources.”⁵¹ Similar developments can be observed with respect to the right to food, which the judges deduce in the context of the right to life, Article 21.

The judges seem to be content to apply a wider definition of socialism, that is at ease with the market economy as long as the state is capable to control the material resources produced and as long as wealth is distributed as to best serve the social revolution. The article’s analysis of the impact of globalization and liberalization on India’s constitutional fabric focusing on the amendment process and the final report of the National Commission to Review the Working of the Constitution illustrates the ordering and re-ordering of constitutional priorities as India transforms her economy. To sum up, and to return to Evans’ arguments, the evidence that we can extract from the Report of the Commission to Review the Working of the constitution clearly points towards a vision of a high level of stateness, even after liberalization. The constitutional framework of today does not really provide for an ideological shift from fifty years ago. The State is viewed as responsible for the same functions – yet, it is accepted that the Indian state needs a new set of economic tools to fulfil its tasks. What is at stake is the question of state autonomy, the maintenance of “command politics.” India then is a good example for the relevance of autochthonous ideological channelling of economic reforms as an explanatory factor (Mitra 1990). The Supreme Court judges recognize that liberalization increases both – the potential returns from effectual state action and the costs of state ineffectiveness. India’s Constitution and the constitutional discourse do not see globalization as a movement towards statelessness. Given the

⁵⁰ Ibid., par. 23.

⁵¹ *Delhi Transport Corporation v. D.T.C. Mazdoor Congress* AIR 1991 SC 101 (par. 241).

degree to which political effects of economic change are mediated by superimposed interpretative frames, the constitution and its ideology becomes consequential, not just for the insights it offers but also because of its potential impact on economic policy.

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