

ROLE OF ADMINISTRATIVE LAW IN THE AGE OF
PRIVATIZATION

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ABSTRACT

In several countries, privatization is the sole focus of government policy. Privatizations may be motivated primarily by political and economic considerations, but they raise a slew of legal issues. Apart from the constitutionality and legality of the privatisation decision, there are public law and administrative law issues that frequently arise with privatization decisions. The main goal of this paper is to look at whether administrative law principles can be applied during privatisation. The paper begins by examining the phenomenon, the relationship between privatization and administrative law, their rationale, and limitations. It also depicts various intersections between privatization and administrative law, with a focus on India. The paper is finished with a suitable conclusion and recommendations.

INTRODUCTION

Administrative law, which is essentially a subset of public law, focuses on administrative or legislative actions. Public law is defined as the area of constitutional, administrative, criminal, and international law appertaining to the structure of government, the association between the government and the public, and the rights and duties of government officials. Although 'privatisation' is a substance of public policy, initiating it poses a number of challenges and has a number of legal implications. Privatization necessitates not only doctrinal changes, but also a re-evaluation of the field of public law, with a focus on "public law of privatisation." Governments are attempting to meet these demands in the modern world, where human society is undergoing rapid transition in terms of demands and expectations, by changing, reforming, and even reinventing policies. Economic development is the most important task that any government faces, as it is a multi-faceted task that

encompasses a wide range of political, economic, social, technical, and cultural activities. To achieve rapid economic growth, privatisation has become a global phenomenon. This paper aims to capture public law questions from the Indian experience, with a special emphasis on administrative law questions in privatisation.

PRIVATIZATION

The first display of privatization is the transfer of government assets to private hands, such as land, stakes in government companies, and so on. Privatization can also occur as a result of government passivity, such as contracting with private companies to provide services or public goods. When economic development is introduced in a nascent economy, another type of privatisation is a system of industry development. In some cases, privatisation may imply the government's complete withdrawal from certain fields of activity. or simply transferring the delivery of social services to private entities while leaving management and responsibility to the government.

Privatization is the process of a publicly traded company being taken over by a small group of people. The term "privatisation" is used as a remedy for many economic problems, particularly those involving public enterprises. Privatization is often said to be the "constitutional other" of nationalization. It poses a question of both public policy and public law.

PRIVATISATION VIS-A-VIS ADMINISTRATIVE LAW

In the changing environment, the greatest threat is that private sector enterprises performing government-like functions may jeopardize citizens' fundamental rights. It is frequently claimed that the economic growth and prosperity brought about by privatisation are not evenly distributed. The rich get richer, while the poor get poorer. The government is also concerned that private investors will transfer the country's vital resources to third parties, particularly hostile nations. One of the most pressing issues in India's privatisation process is the inability of private investors to fully privatize large public sector enterprises. In India, public sector enterprises are overstaffed, and private investors face a difficult task in getting rid of this labor.

In the Balco case¹, employees of the Balco Company challenged the government's administrative policy — administrative power in the matter of disinvesting its stake in a government company and the procedure to be followed in deciding the question of disinvestment. The Supreme Court of India held in its decision that the decision to disinvest and its implementation are purely administrative decisions relating to the state's economic policy. Labor could not claim a right to be consulted, or a right to receive prior notice, or a right to be consulted at every stage of the process, based on natural justice or any other basis. Even a government employee protected by Articles 14 and 16 of the Indian Constitution or Article 311 of the Indian Constitution had no absolute right to remain in service.

The Supreme Court's silent approval of the disinvestment process indicates that disinvestment and privatisation are in the national interest and for the advancement of the economy as a whole. The decision also demonstrates the limit of public interest litigation in relation to disinvestment.

The notion that privatisation decisions are "solely a matter of policy" needs to be reconsidered. Both institution-based and rights-based analyses show that certain activities, such as criminal justice administration and defense cannot be privatized because they are essential to the state. The main legal issue at this stage of privatisation policy development is developing norms that will apply to private bodies that are involved in performing government-like functions. In India, however, there is a lack of a comprehensive privatisation policy.

Privatization initiatives may be questioned on the basis of safeguards against infringements of fundamental rights by private actors who have been entrusted with responsibilities previously held by public officials. The decision-making process in privatisation must be fair, ensuring that potential bidders or contractors have equal opportunities. Simultaneously, legal measures must be implemented to ensure that the state receives the best price from the highest bidder in order to maximize the economic benefit of privatisation.

¹ 90 (2001) DLT 789.

The Supreme Court of India considered whether a private entity performing important public functions can be a State in the Mehta case². These private actors, it was argued, did not fall under the jurisdiction of the state. This reasoning was reaffirmed in the case of Zee Telefilms Ltd. v Union of India³, in which it was determined that the BCCI did not meet the definition of a state. The public function test was established in Rahul Mehra v. Union of India⁴. It was decided that whether or not actors fall under the definition of state is determined by the functions that the company or organisation performs. As a result, private actors may be subject to regulation if they infringe on citizens' fundamental rights.

REGULATION OF PRIVATIZATION

The process of privatisation and privatized activities must be regulated to make it constitutionally valid. The Indian Supreme Court held in Delhi Science Forum v Union of India⁵ that the central government and the telecom regulatory authority must act as active trustees for the public good in order to ensure that the private sector contributes more to the development of India's telecom network and the introduction of plurality in the telecom sector.

One of the primary goals of privatisation, is to ensure that the government does not crowd out the market and that privatisation increases competition in the provision of goods and services. No special protection should be given to specific suppliers of goods and services. Any regulatory agency's goal would be to ensure that market competition is allowed to thrive without distortion or intervention, whether from an external source, such as the government, or from within the market, such as more powerful firms.

The government's privatization policy must be straightforward in order to allow for a clear-cut uniform business position. To overcome overlapping interests, complex conflicts, and controversy, the privatisation policy must be strong. For example, the Confederation of Indian Industry (CII) Task Force Committee's recommendations to the Indian government to close three nationalized banks, namely the Indian Bank, UCO Bank, and the United Bank of

² AIR 1987 SC 1086.

³ (2005) 4 SCC 649

⁴ 114 (2004) DLT 323.

⁵ 1996 SCC (2) 405.

India, drew widespread criticism in the country due to the negative impact on depositors, clients, borrowers, employees, and other stakeholders. The general public, bank borrowers, and depositors were all affected by this report, which caused panic and uncertainty. More intriguingly, the taskforce included two corporate sector industrialists who owed these nationalized banks Rs. 500 crores and Rs. 350 crores, respectively. They were chastised for recommending the liquidation of all three nationalized banks out of fear of being exposed.

“Article 12 in a Privatized India”⁶ on October 3, 2020.

This article analyses the role of Article 12 of the Constitution, which defines a state, in the context of Privatization in India. It interprets various case laws and writings to identify the stance of the Indian Judiciary and various learned theorists regarding the need to change the definition of a ‘state’ due to the changing economy. Further, it identifies the loopholes in these judgments and gives recommendations to rectify the same. The writer attempts to expose the present government’s attempt to bypass its Constitutional obligations in the garb of Privatization.

“Historical Development of Administrative Law in India”⁷ by Shambhavi Goswami on April 13, 2021.

The author examines the evolution of administrative law in India right from the reign of the Mauryas to the policies implemented within the country in 2021. The Maurya and the Gupta Dynasty followed a centralized administrative system. The rule of ‘Dharma’ was observed and no one could claim immunity from it. With the advent of the British, the recent law came into force in India. India adopted a state approach after independence, gradually increasing state activities. As the government's and administrative authorities' power and activity grew, so did the need for "Rule of Law" and "Judicial Review of State Actions." Procedures like

⁶ Sumanta Narayan Podder, “Article 12 in a Privatized India,” 2020. <http://www.legalservicesindia.com/law/article/1649/10/Article-12-in-a-Privatized-India>

⁷ Shambhavi Goswami, “Historical Development of Administrative Law in India,” 2021. <https://timesofindia.indiatimes.com/readersblog/shambhavi/historical-development-of-administrative-law-in-india-31054/>

laying and delegated legislation were borrowed from contemporary regimes and adapted to suit Indian needs for better law administration and execution at the grassroots level.

“Applicability of Administrative Principles to the issues of Privatization in India,”⁸ by Diva Rai on July 17, 2020.

The author states the meaning, aims and features of privatization. The article analyses the evolution of the policy of privatization in India and the pivotal concepts related to privatization- Delegation, Divestment, Displacement and Disinvestment. It states the major issues related to privatization in India- violation of Fundamental Rights, unequal economic growth the rich and the poor, vital resources being transferred to foreign investors, impossibility of complete transformation of large PSUs and the management of labor. The author concludes that since privatization is inevitable, the government and the judiciary should make regulations to ensure that private actors do not hinder the fundamental rights of the citizens.

An effort is made in this research paper to examine the “Role of Administrative Law in the age of Privatization.” It strives to ascertain whether the Indian administrative laws have been efficient in coping with the changing economic scenario in India. If not, what are its deficiencies and what can be done to overcome them.

This research is better appreciated by the citizens, economic and social organizations, the government, bureaucrats, academicians and law students and at last, towards whom the entire the task is dedicated, the public at large.

CONCLUSION AND RECOMMENDATIONS

The socialist agenda and welfare programmes envisioned in the Constitution are rapidly losing their significance as they are fully diluted and sidelined in the relentless pursuit of the NEP and LPG possible at the earliest possible time by successive governments. It is

⁸ Diva Rai, “Applicability of Administrative Principles to the issues of Privatization in India,” 2020. <https://blog.iplayers.in/applicability-of-administrative-principles-to-the-issues-of-privatization-in-india/>

necessary to pause for a moment and reconsider whether it is justifiable to ignore the socialist agenda and the Indian Constitution's public welfare mandate. Even the very preambular objectives would be defeated if the pursuit of LGP continues indefinitely without sufficient attention paid to the Constitution's mandates in the form of directive principles.

Better-run public enterprises must be protected. For this, public enterprise reform at both the political and bureaucratic levels is required to equip public sector enterprises to compete in international markets. At all levels, there is a growing awareness of the need to address the issue of equity, without which privatisation reforms are likely to face opposition and resistance. Enterprises must be prepared to compete both domestically and internationally. Exposing public enterprises to domestic and external competitions, freeing public enterprise managers from non-commercial goals and government interference in day-to-day decision making, and developing institutional mechanisms and performance evaluation systems to hold managers accountable for results are all examples of such reforms. However, such reforms must be well-designed and implemented in a politically and technically sound manner.

Managerial autonomy and accountability must also be improved as part of reform programmes. While creating an investment-friendly environment, the state must also ensure inclusive growth by addressing imbalances and people who are left out of the growth process. Fairness and good faith must be guaranteed in the activities of private bodies performing state functions that are subjected to judicial review. The supervisory jurisdiction of the courts assists in ensuring that private bodies performing public functions do not abuse their power or act arbitrarily, capriciously, unreasonably, or unfairly. Litigation, or the threat of litigation, can serve as a useful regulatory tool.

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