

“Administrative Reforms Post 1991(Privatization and Change in Definition of State)”

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ABSTRACT

Privatization is a multi-dimensional process that requires various political, economic, social, technological, and cultural practices. There are various alternatives to privatization, including the orthodox policy that does not conflict with procedural rule, which may lead to the government withdrawing from certain operations, reducing the government's position to virtual nothingness. The state must be a capitalist agent, and no express consent is required for privatization. The permissive approach to privatization relies on the concept of ultra-vires, aiming for statutory authorization. The legislature also encourages outsourcing acceptance regulations. The strategy proposed by the privatization authority may create questions in the process of regularization of privatization. As privatization encourages private entrepreneurs to access key government operations, the conventional solution is outdated. Policymakers are striving to adapt to the rapid transformation of human culture and the global challenge of accelerated economic growth. The essay aims to explore the facets of public law in the privatization of Indian and Malaysian activities, focusing on administrative law issues.

INTRODUCTION

Policymakers are seeking to fulfill these demands by updating, improving, and even reinventing strategies in today's world, where human culture is experiencing a rapid transformation in terms of its demands and desires. Global transformation, a multi-dimensional undertaking requiring a wide variety of political, economic, social, technological and cultural practices, is the main task facing every country. There are several alternatives to privatization.¹ Orthodox policy maintains that a decision to privatize would not conflict with procedural rule. Privatization can, under certain cases, take the form of a full withdrawal of the government from operations in certain areas. The position of government is gradually reduced to virtual nothingness in such a situation and the private sector is becoming increasingly powerful. The state must have been a capitalist agent. No express consent for privatization is ever required in many nations, when there is an implicit authority for the state to initiate privatization projects that have already been accepted by the courts. The 'permissive approach' to privatization relies on the concept of ultra-vires, implying that privatization decisions should be aimed at statutory

¹ Simrit Kaur, 'PRIVATIZATION AND PUBLIC ENTERPRISE REFORM: A SUGGESTIVE ACTION PLAN' < https://crawford.anu.edu.au/acde/asarc/pdf/papers/2004/WP2004_08.pdf > accessed 7 February 2021.

authorisation². The outsourcing of acceptance regulations is also encouraged by the legislature. The strategy that should be expressed or suggested by the privatization authority would create questions in the process of regularization of privatization. It would be incorrect to conclude that, with the exception of arrangements with private corporations, the state would perform its duties. As privatization transforms its essence by encouraging private entrepreneurs to access key government operation³s, the conventional solution is out of date. Global transformation, a multi-dimensional undertaking involving a wide variety of political, economic, social, technological and cultural practices, is the main task facing every country. Privatization has become a worldwide movement to achieve accelerated economic growth.

PRIVATISATION AND ITS ESSENCE IN GLOBE

The privatization of such units in western countries was a tactic of governments. Political, social and economic interests are the main factors for privatization rather than legitimate ones. Privatization is based on the premise that the human conditions for a better life must be equalised. The strain put on India by the IMF and the World Bank to reduce the financial and administrative burden by privatizing some PSUs has made the Indian government realize the need to restructure the private sector. Privatization was implemented by the British Government until 1991, when it was assumed that the privatization era was nearly complete. The French programme lasted for a brief time, with the loss of the parliamentary majority. In several countries, including India and Malaysia, the reasons and justifications for privatisation include the following:

1. The environment in which public corporations⁴ exist will be improved by privatization. The economic and social benefits of privatization are apparent in both developing and developed countries. In India, the rationale for privatization was in line with contemporary economic thinking.
2. Removal of the accumulation of economic force.
3. In India, in *Delhi Science Forum & Others v Union of India & Others*, the Supreme Court of India ruled that "the new Telecom Policy is not only a commercial venture of the Central Government" The purpose of the policy is also to improve the service so that the service will meet the needs of the common man.
4. Improve the productivity of state-controlled enterprises.
5. Investment enhancement: privatisation provides new investment,⁵ contributing to labour market reforms.
6. International direct investment: reducing the deficit of the public sector and attracting a large inflow of foreign direct investment⁶. Liberty: Indian history reveals that the

² ink.springer.com/article/10.1007/s41111-017-0053- last accessed 20th january2021.

³ Ibid.

⁴ Simrit Kaur, 'PRIVATIZATION AND PUBLIC ENTERPRISE REFORM: A SUGGESTIVE ACTION PLAN' (2004) < https://crawford.anu.edu.au/acde/asarc/pdf/papers/2004/WP2004_08.pdf> accessed 7 February 2021.

⁵ Ibid.

⁶ Ibid.

operation of banks and insurance companies, etc., became more liberalized and pervasive as a result of privatization, with the abolition of certain constraints on their working. For eg, 1934 banks must be authorized to open new branches pursuant to section 23 of the Reserve Bank of India Act, but it has become a mere formality since privatization. Banking and insurance are the two largest financial sectors that were privatized in India in the early 1990s.

Limitations on Privatisation

Privatization issues of public law are largely issues of administrative law. As the private sector in India does not have the ability to take over and run large public corporations, wholesale privatisation is undesirable. Baxi: When a trade or sector is nationalised by law, it naturally follows that it can only be privatised for that purpose by a particular statute. The Indian Constitution prohibits the replication of the company's mercantilist state formative activities by entirely elected oligarchies in India. The Constitution is a salutary discipline of government authority.

Responsible acts of denationalisation would be those that do not give away at the expense of employees and society on a silver plate state resource for private benefit. The takeover of PSUs by the private sector will find it difficult to get rid of needless labour. Retrenchment will be the government's difficult decision. The doctrine of ultra vires argues that the privatisation plan would be invalid if there were no statutory authorisation for privatisation. In view of the equality clause under article 14 forbidding arbitrary and irrational state action, this is the Indian constitutional situation. As an exception to Article 14, the mere repeal of nationalisation laws may be called into doubt. The Supreme Court of India restrained the Central Government from continuing with disinvestment in the Centre for Public Interest Litigation v Union of India. The benefits of economic growth are not spread fairly when it comes to privatisation. People can follow illegal and corrupt paths to gain maximum benefits in a completely free economy and a market-oriented economy.

However, in the privatisation process, deaths are always in the public interest, he claims. As he writes, the Indian constitutional mandate must meet the criteria of distributive justice and public interest. "The mandate of the Constitution is to build a welfare society in which justice, social, economic and political, shall confirm all institutions of national life. "The Constitution's mandate is to build a welfare society in which all institutions of national life are confirmed by justice, social, economic and political.

PRIVATISATION AND ITS IMPACT ON JUDICIAL INTERPRETATION

Here, the answer to second research question will be answered in particular. While privatization is partly the subject of public law doctrines, a systematic analysis of privatization is not provided for by public law. In the history of India, privatization poses some fundamental questions in the field of administrative law, such as the degree of privatization, the limits of privatization? (ii) what are the weaknesses that can be privatized in the form of actions/powers?

(iii) What should be the systemic privatization process, including the government's privatization policy? (iv) What are the implications of the privatization process? (v) what regulatory regime should extend to privatized activities?

In **Balco Employee Union v Union of India**⁷, Balco Business employees challenged the government's administrative control over the disinvestment of its share in a government company (the Balco case). The Supreme Court of India held that the decision on disinvestment and its execution were solely administrative decisions relating to the economic policy of the State. The court held that the standards of natural justice were not applicable except in situations where the rights of workers have been violated by a change of employer. The decision broadens the scope of regulatory authorities in determining a policy option. Quiet approval by the supreme court of the disinvestment process indicates that disinvestment⁸ and disinvestment is in the national interest. The silent acceptance by the apex court of the disinvestment mechanism suggests that it is in the national interest to disinvest and privatise. Some operations, such as the administration of criminal justice and security, can not⁹ be privatised because they are an integral part of the state. Again, the selection of privatisation operations is a matter of policy and not of statute. The case of Balco further points out the scope of the judicial investigation of regulatory actions. Unless the plan adopted by the government suffers from illegality or mistrust, the courts may not interfere. The government has the authority to decide on the implementation of a policy of disinvestment, as the executive has already been within the policy-making sphere. The lack of a systematic privatization plan opens up the potential to realize the possible gains of privatization. A privatization policy will also help the reform process. The decision-making process must be rational in the spirit of privatization, thus providing equitable opportunity for potential bidders. In order to prevent racism and collusion, mandatory procurement rules and mandatory competition between vendors must be in place. Around the same time, legal action must be taken to ensure that the top bidder gets the best prize from the state. There is a lack of a systemic privatization policy in India. Privatization plans may be opposed on the grounds of protections against infringements of civil rights by private companies previously under the responsibility of government officials.

Considering that the state finds the process of the manufacture of chemicals and fertilizers to be an enterprise of vital public significance, the public importation¹⁰ of which requires the final progress of the activism. As the court observed that the American doctrine of state interference can be applied in India, the Mehta case remains valid and therefore all activities of an agency considered to be 'state' do not need to be public functions.

⁷ Balco Employee's Union V. Union of India. (2017, Jan 11). Retrieved from <https://phdessay.com/balco-employees-union-v-union-of-india/>.

⁸ Ibid.

⁹ Ibid

¹⁰ IIUM LAW JOURNAL VOL. 23 NO. 2, 2015.

Zee Telefilms Ltd. v Union of India¹¹ concluded that the Control Board for Cricket in India (BCCI) is not a State under Article 12 and that its roles are not public functions. Any entity which regulates the fundamental rights referred to in point (g) of Article 19(1) is not, in its nature, a State within the scope of Article 12. To what extent do the rules of public law extend to private bodies? The nature of the role played by the company can be a source of concern in making a decision¹². The 'Public Functions Test' requires the courts to accept state instruments as 'any local or other body' to be considered a state. The measure of public functions determines that, if the functions performed by private entities can be defined by state functions, they will become state agents in contrast with the public functions performed by them.

PRIVATISATION'S IMPACT ON POLICIES AND ADMINISTRATION

In order to ensure a consistent and uniform market role, the privatization strategy of the government needs to be open. The strategy must be strong in order to address conflicting desires, dynamic conflicts and disagreements.¹³ Any regulatory body shall have the task of ensuring that competition is upheld. No special rights should be given to particular suppliers of products and services. The intent of all of them. The regulatory agency must ensure that competition is able to prevail on the market without any distortion or obstruction. In the most powerful firms, an external source, such as the nation, or from the inside. India lacks a comprehensive privatization policy. The lack of strategy would benefit political expediency interests in the short run, albeit at the expense of undermining good economic governance in the long term. In terms of infrastructure, economies of scale and productivity¹⁴ in the utilization of capital, many small privatized enterprises do not compete successfully with large firms. In the age of a free economy, the private sector is given sufficient opportunity to gain great economic strength. In general, the concentration of economic forces leads to corruption and the exploitation of weaker parts. The Indian Government's Voluntary Retirement System has been sharply criticized. Many drives of privatisation made lakhs unemployed from regular wagers. Farmers also committed suicide due to subsidy decreases in some states. Due to rising pressure from corporate interests to step strongly into the large-scale agricultural sector, many small and marginal farmers have decided to leave agriculture. Privatisation poses dynamic problems both socially and economically¹⁵. Other than its possible effects on human rights, privatisation decisions also have social and distributive¹⁶ consequences. In terms of actual privatisation, there is a broad gap between rhetoric and fact. Failure to privatise may be attributed to political or structural failure.

Privatization does not inherently boost efficiency benefits or expand the funding available to invest in capital. Progress relies on the state's administrative and political capacity to plan and

¹¹ 2005 (1) SCALE 666.

¹² Ibid.

¹³ Lukose, L. P. (2015). The Applicability of Administrative Law Principles to Issues of Privatisation in India. *IIUM Law Journal*, 23(2). <https://doi.org/10.31436/iiumlj.v23i2.171>.

¹⁴ Ibid.

¹⁵ Id

¹⁶ Id

administer an acceptable collection of subsidies. Any privatization efforts in many developed countries have failed due to poor political and economic institutions, patronage issues, related corruption, and arbitrary state interference. The key issues are bad decisions, poor enforcement and lax control, with little credible adherence to contracts or policies.

As privatization creates private monopolies, the abuse of monopoly power must be prevented through proper legislation. Government is missing out on prospective privatization dividends and private companies are getting more profitable and more regulated. Significant public programs, such as health insurance, education, etc., have included the public interest in compromising the profit incentive towards privatization.

CONCLUSION

Privatization has come to an end in the age of globalization, liberalization and privatization (GLP). However, better-run public corporations deserve to be protected. To this end, both the political and the institutional restructuring of public enterprises should be undertaken in order to equip public sector enterprises with international competition. The need to resolve the question of equity, without which privatization initiatives are likely to create criticism and resistance, is gradually being introduced at all levels. Businesses should be structured in order to meet domestic and multinational competitions. These changes in many countries include opening up public enterprises to domestic and external competition, withdrawing public enterprise management from non-commercial purposes and political intervention from day-to-day decision-making, and establishing institutional structures and performance management processes to keep managers accountable for outcomes. However, all changes must be well-designed and strategically and theoretically sound in order to be implemented. Reform efforts would also enhance managerial autonomy and openness. The State must ensure economic development by addressing imbalances and keeping individuals out of the growth chain while at the same time creating an investment-friendly enabling environment. It is important to ensure justice and good¹⁷ conscience in the actions of private bodies undertaking state functions which are subject to the judicial review process. The supervisory powers of the courts aim to ensure that private bodies conducting public duties do not infringe their jurisdiction or behave in an inappropriate, capricious, unjustified or unreasonable manner. Litigation and the threat of litigation would have a significant regulatory role to play.

¹⁷ Id