

STATE MONOPOLIES AND THE CITIZEN IN A DEMOCRACY

By

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I propose to examine the question how far the promotion and maintenance of State Monopolies in the production of goods or the operation of services is compatible with the rights of citizens in a democracy to operate similar enterprises.

I was attracted to this subject in 1956 when by an ordinance the Life Insurance Companies in India were taken over by the Government and subsequently they were nationalised and a completely state-owned monopolistic Life Insurance Corporation was brought into existence. I shall discuss later the merits and demerits of the state operation of monopolies but what struck me most at the time was whether it was proper for the state to take over businesses which were well run and which, to all intents and purposes, satisfied the needs of the customers whom they served. It seemed to me that where a business was being run according to the law of the land and where apparently it was carrying on a perfectly legitimate and socially useful activity a democratic state had morally no right to take over such a business.

The question then intrigued me how there was no protest at all from any quarter against what seemed to be a palpable invasion of the right of the citizens in a democracy to come together and operate any kind of

"People must come to accept private enterprise not as a necessary evil, but as an affirmative good."

—Eugene Black

President, World Bank

legitimate business or industrial activity. I then discovered that the power to extinguish the citizens' rights in this regard had been taken by an amendment to the Constitution in 1951. Probing further into this amendment, I discovered an astonishing failure on the part of democratic-minded public men to realise the danger implicit in this amendment and the need to correct the situation created by the amendment if we are not to let ourselves in for the complete regimentation of economic life in this country by the State.

To explain my point, I shall go in detail into the history of this constitutional provision. The wise makers of our Constitution provided in the Fundamental Rights clause of the Constitution a provision which declared:

Article 19(1)(g): All citizens shall have the right to practise any profession or to carry on any occupation, trade or business.

To this clause there was a proviso in Article 19(6) which stated: "Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business."

This was the original provision. It conferred a right to carry on any profession, trade, occupation or business subject to reasonable restrictions in the interests of the general public and subject to the power of the State to fix professional or technical qualifications. Shortly after the Constitution came into force, the U. P. Government decided to take over the operation of certain bus services and in pursuance of this decision did not renew the licences of certain private bus operators after the expiry of licences. The Allahabad High Court held that the denial of licences on the ground that the State intended to take over the services was *ultra vires* of the Motor Vehicles Act. In the course of the proceedings in this case, a distinction was sought to be made between the power to impose restrictions on the exercise of a right and the power of total exclusion from its exercise. To impose conditions in the public interest for operating any service or industry is one thing; to say that no citizen shall operate a particular service is entirely different.

That this judgment should have alarmed the Government, which had its own programme of nationalisation and extending the public sector, was understandable. To meet the situation created by the Allahabad judgment, an amendment was incorporated in the comprehensive Bill embodying the First Amendment to the Constitution which made a sweeping provision for the creation of State monopolies which potentially negated the right given under Article 19(1)(g). This amendment added to the original proviso to Article 19(6) an additional clause, viz., "Nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, the carrying

on by the State or by a corporation owned and controlled by the State, of any trade, business, industry or service, whether for the exclusion, complete or partial, of citizens or otherwise." Judged by any test, this is an astonishing provision. It seems to me that this clause is of such a sweeping character that there is no business, trade, industry or service which the State cannot take over at any time if it so chose. The mischief of this provision is so far-reaching that unless this provision is repealed or a fresh constitutional safeguard is added to it, it looks as if no form of private enterprise, however innocuous and however legitimate it may be, is safe from the unholy hands of the State. As you all know, the "State", under the Constitution, may refer to any public authority from a Panchayat to Parliament and as the Constitution stands there is nothing to prevent, say, the Communist Government of Kerala from passing a law enabling panchayats in that State to operate all businesses and industries in their areas and thereby completely destroy any form of private enterprise.

I do not want to be alarmistic. Having seen how the power under the provision has been actually utilised in the past eight years for the incursion of the State into various forms of business from life insurance to the export of iron and manganese ore on a monopolistic basis, I feel that it would be extremely dangerous to let the amended constitutional provision remain unchallenged and unqualified.

It is a great pity that at the time this provision was being incorporated in the Constitution, public attention was so much diverted to other amendments and provisions of the Constitution (First Amendment)

Bill—particularly the amendment relating to freedom of speech and expression—that little or no attention was paid to this far-reaching and, in my opinion, utterly anti-democratic provision of the amending Bill. Out of curiosity to see whether and how many members had cared to study the provision of the amending Bill and to draw the attention of Parliament to the mischief of this provision, I went through the Parliamentary debates on the Constitution (First Amendment) Bill and I was surprised to make two discoveries. The first was that except two gallant members who spoke on this particular provision and showed some realisation of its dangerous potentialities, few other members realised its implications. The second discovery was that an amendment to this provision moved by Mr. Shyam Nandan Sahaya with a view to providing some safeguard to citizens who may be adversely affected by an act of the State in excluding them from a business or trade was printed in the official records as having been adopted but which, to my surprise, I found had not been incorporated in the final Act. When I pursued this matter with the Speaker of the Lok Sabha I was told there was a misprint in the official proceedings and that where it was stated that Mr. Shyam Nandan Sahaya's amendment had been "adopted", it should read that it had been "negatived". It is extraordinary that on a vital matter like this there should have been such a major printer's error which had not been corrected in any subsequent issues of the official proceedings.

I mentioned earlier that only two members had referred to this clause during the debates on the Constitution Amendment Bill. One was Pandit Hridaya-nath Kunzru. Pandit Kunzru argued that, contrary to

the Law Minister's view that the Allahabad judgment necessitated the amendment to Article 19(6), there was no need for such an amendment at all on this particular ground. Pandit Kunzru went on to refer to the more serious implications of the amendment and stated:

"There is another point, too, that I should like the House to consider. For, though clause (6) of article 19 has not received the attention that it deserves in view of its importance, it relates to a very important matter. The amendment of the latter part of clause (6) provides for any restrictions that the State may place on trade, business, industry or service in order to carry it on itself or have it carried on by a corporation owned or controlled by it. These provisions do not really mean nationalisation so much as the creation of a State monopoly. Suppose Government start a cotton textile mill of their own in Delhi and they issue an order to the Delhi Cloth Mill to cease working. I suppose such an order would, if the necessary legislation were passed, be valid. And, as the Government would not, merely by issuing the order, be acquiring a property, their action, I suppose, would not fall under article 31 of the Constitution. I should like to know from the Prime Minister what is the exact intention of the Government in respect of this matter. How do they propose to use the amendment to the latter part of clause (6) of article 19? I am sure the House will agree that if it is used in such a way as to give no compensation to people whose property is rendered valueless, then, although they might not come under the opera-

tion of Article 31, they would nevertheless be committing a grave injustice. I do not want that this amendment should be used to circumvent article 31 in respect of trade and industry in the same way as the proposed article 31A and 31B would be used in respect of agricultural estates. I hope that my hon. friend the Prime Minister would be able to throw light on this matter and to assure us that Government want to do nothing contrary to the spirit of the Constitution and have no intention of setting at naught in an indirect way the provisions of article 31 in respect of trade and industry."

There is nothing in the subsequent proceedings to suggest that the Prime Minister recognised the importance of this issue or cared to answer the points raised by Pandit Kunzru.

I now come to Mr. Shyam Nandan Sahaya's intervention in this affair. He moved an amendment to the effect:

"Provided, however, that where such exclusion results in the displacement of citizens or otherwise from pursuing their normal avocation, the State shall either take over their property affected by such exclusion or shall compensate them to the extent of their loss due to such displacement."

As I mentioned earlier, according to the official proceedings (column 9878 of Parliamentary Debates dated 1st June 1951) Mr. Shyam Nandan Sahaya's amendment is stated to have been adopted. Considering the sweeping character of the official amendment, I should

have thought that the adoption of Mr. Sahaya's amendment was the barest **minimum** that Parliament could have thought of as a safeguard or protection for those **citizens** whose interests might be adversely affected by the creation of State monopolies. I am still unable to discover how this misprint occurred when the report scrupulously records how hundreds of other **amendments** to the official Bill were negatived. I shall leave it to **members** of Parliament and to interested persons to probe into this mystery and ascertain what really happened.

I may mention in this connection that several other amendments to this provision were moved by other members which were all negatived. One of those amendments was a very salutary provision suggested by Prof. K. T. Shah that where a State-sponsored enterprise functions side by side with a private enterprise in the same field, no discrimination should be made by the State in the conditions for carrying on the trade or business in favour of the State enterprise. Dr. S. P. Mookerjee had suggested that a law passed under the **amended Article 19(6)** by any State Legislature shall be reserved for the consideration of the President.

The position today as a result of the Constitutional amendment of 1951 is this: The State has an unrestricted right to create monopolies in "any trade, business, **trade** or service." Where such monopolies are created, **as** in the case of the nationalisation of life insurance companies, by the taking over of existing enterprises compensation will no doubt be given to the owners of the businesses taken over. Under the amended Article 31 such compensation need not be **necessarily** adequate

compensation for the full value of the assets taken over. But nationalisation is not **the** only means by which a new state monopoly can be brought into existence. As we have seen in the case of the State excluding private motor transport services from operating in certain areas and in the manner in which the State Trading Corporation has acquired a **monopoly** of the export or import trade in certain commodities, it is clear that by the mere process of refusing to renew licence or by specific legislation in this behalf, the State can extinguish private business in any field and bring a state monopoly into existence.

The question I am concerned with is not whether under the amended provision the State may do something absurd or not, but whether it should have a power which is liable to abuse. In discussing this matter we must proceed on some fundamental assumptions. The democratic system, I take it, is based on the **principle** that the State exists for the citizens and that there are some fundamental rights which the State cannot infringe except under clearly laid down conditions. It is implicit in this concept that the citizens of a democratic state shall have the right, individually or in concert, to pursue any trade, business or industry so long as they do not work against the public interest or violate the laws of the land. Implicit in this **right** is the principle that whenever the citizen is excluded, partially or otherwise, from a business, trade or vocation, it shall be for reasons demonstrably in the public interest and also on demonstrable grounds that the State can serve the public interest better than the citizens concerned. From this it follows that there ought to be, in every case of the creation of a State

enterprise or monopoly, a prior enquiry into the operation of private enterprise in the particular field and an opportunity given to citizens engaged in it whether or not they have served the public interest. There would be no case for the State stepping in unless it is proved that the private enterprise in question has failed to promote the public interest or that a public enterprise would promote public interests better than private enterprise.

In the case of the nationalisation of the life insurance companies, for instance, arguments in defence of nationalisation were advanced after the country had been presented with a *fait accompli*. Except for some articles in the "A.I.C.C. Economic Review,"—the author of which is no longer connected with the journal,—the country was given no indication that anything was seriously wrong with the Life Insurance Companies as a whole though as in every industry, public or private, there may be some black sheep. The nationalisation of life insurance came, in fact, after a year in which record business had been done by the insurance companies and it looked as if they were well set for further striking progress. No case was made out for setting up a monolithic corporation unknown in any other democratic country in the world. What justification could there be for nationalising companies which were well-managed and whose record was unimpeachable? Why should co-operative and mutual insurance societies which were well run and financially sound be nationalised? What canon of public interest or social justice demanded that no citizen or combination of citizens shall have anything to do with life insurance as a business? In other countries there are life insurance businesses run by private

managements to which no State operated insurance concern can hold a candle. We were told that once the 200 odd competing companies were eliminated, there would be a great economy in operation and that life insurance premia would be reduced and insurance would be made accessible to the masses. I do not know whether the expenses of the Life Insurance Corporation are less than what the combined companies were spending before nationalisation. I agree that in strict theory there is a case for a monopolistic operation of social insurance because in insurance the larger the number of people over whom the risks are spread the cheaper the costs of insurance. But in the life insurance business which the Government took over, it was not merely a minimum social insurance for everybody that was involved, but life insurance of all kinds from policies running into lakhs of rupees to so-called *Janata* policies. I cannot understand why a State, wedded to a socialistic pattern, should care to insure anybody for very large sums in a State enterprise.

From the experience of the working of the Life Insurance Corporation in the past three years we can see most of the evils of a State monopoly in operation. The organisation tends to be bureaucratic. The absence of competition makes for complacency and indifference to the consumer at every level. The danger of misuse of large public funds passing through a single agency are enormously increased. Above all freedom of choice for the consumer and the employee, which are very real advantages under conditions in which there are a number of competing enterprises in a particular industry, is completely destroyed under a monopoly. What this means can be seen, for instance, in

the opportunities for employment open to capable insurance organisers or actuaries under the L. I. C. as a sole employer. Anyone who is not satisfied with conditions of service in the Corporation has no option but to give up life insurance as a career altogether and turn to some other enterprise in which he cannot be equally interested or for which he cannot be equally qualified.

Another fundamental question which arises in connection with the starting of State monopolies is whether it is proper on the part of the State just because it feels that it can improve its financial resources, to take over any existing well-conducted private enterprise. Under the United States Constitution, State incursion into business is virtually impossible except under severely limited conditions. In India we may concede that the State has to play a more positive role and there is considerable room for public enterprise of various kinds to be started. Of course, where large investments are involved out of public funds, whatever the source from which they may be raised, there is constant need to see that the utmost economy is practised and to ensure that the public enterprises are run efficiently and economically. Subject to this essential safeguard, we may concede that there is room for extension of public enterprises.

But if we accept the democratic basis of our system and consider that the citizen has a fundamental right to pursue any legitimate business, trade, profession or industry, it must be laid down that no citizen shall be excluded from any business or industry he has built up except on grounds of overwhelming public interest. This implies that any citizen who may be

adversely affected by the extension of the public sector shall have a right to see a judicial remedy, not only to prevent the State from excluding him from the business which he has been carrying on, but also to seek compensation for any loss he might suffer as a result of such exclusion if the Court holds that the exclusion was justified in terms of the larger public interest but the citizen in question had suffered a loss thereby for no fault of his and, therefore, deserved to be compensated.

Senior Members of Parliament who were in the Constituent Assembly at the time when the First Amendment was being discussed have told me that when the amendment to Article 19(6) was included in the Bill they had imagined that it was only intended to cover cases of nationalisation like the taking over of bus transport and public utilities. They also told me that they never expected that this power would be utilized for extending State activity in fields like trading in ores. If State monopolies had been thought of in this limited sense, there would be some justification for the Constitutional amendment. Although all monopolies, whether public or private, lend themselves to abuse in one way or other and therefore have to be checked by some regulatory device, we know that in certain types of activity monopolistic operation is inherent in the nature of the service if economy and efficiency, are to be ensured. Operation of a tramway or the distribution of electricity in a particular area or the running of a telephone system, to give only a few examples, necessarily call for operation by a single agency. All over the world recognised methods have been evolved to see that such monopolistic operators are governed by regulations which ensure the public

interest in regard to efficiency of operation and the rates charged to users. If State monopolies are limited to this category of public utilities there would be no serious grievance, provided the safeguards which consumers will have in the case of private monopolies are maintained even when they are operated by the State. The mischief of the amended Article 19(6) would have been considerably reduced if the scope of State monopolies had been limited to essential public services like transport, electric lighting, etc., and had not been omnivorously extended to cover "any trade, business, industry or service".

But for this omnibus provision it would have been inconceivable that persons in authority would have lightheartedly thought of creating State trading monopolies to handle foodgrains and other products. Public opinion must be vigorously educated to realise that whenever a monopoly is created, whether in the public or private field, there is an inherent and grave danger to the public interest. Even when the public interest demands that prices should be controlled by regulating movement and sale of goods, it is always wiser to keep, as far as possible, competing agencies in operation instead of eliminating them. Here is an example of how unthinking intervention by the State with the mechanism of trade and distribution can create incalculable hardship and misery. I quote from the report of the Gauhati correspondent of The Statesman on State Trading in foodgrains which "is running a chequered career in the Nowgong District of Assam." He wrote: "I made a sample study of the State trading operation round about Hojai, the district's rice bowl, and had discussions with people connected with and affected by State trading early this week . . . State

trading had thrown out of gear the district's 30 rice mills, which for decades had been carrying on the procurement, storing, milling and distribution of food through the network of their organisation. Dealer's licences held by rice millers had been abruptly cancelled, and the millers' traditional machinery for procurement and distribution indirectly employing 4,000 personnel in the district, replaced overnight by those of the co-operatives.

"This has given rise to new problems for the rice milling industry, which had not been forewarned about this changeover. As a result, the district's milling industry, having a stake of Rs. 1.54 crores in block and working capital and about 2,200 employees on the permanent payroll, is faced with the question, to be or not to be. In the present scheme of things the mills are not allowed to procure paddy by themselves. Secondly, there is no guarantee by the Government to keep the mills going by supplying paddy according to the capacity of each mill. Thirdly, milling charge per maund of paddy has been fixed at 75 nP. against the actual cost of Rs. 1.35 nP. as quoted by millers in Assam, and Rs. 1.50 nP. milling charge fixed by the West Bengal Government in North Bengal.

"What is most lacking is popular enthusiasm and co-operation, an essential pre-requisite of the scheme. On the contrary, an impression has got currency that the primary co-operatives are not real producers' co-operatives, and that these have been hastily drawn up more or less on the basis of existing Mandal Congress Committees with Mandal Congress presidents and secretaries as chairman of the co-operatives, thus indirectly lending a political colour to the whole

scheme. Even Leftist political parties, who had once been the more steadfast supporters of State trading, are today among its bitterest critics."

This tragic story, which has been more or less repeated in other parts of the country where similar rude intervention with the existing machinery of distribution has produced more or less similar consequences, should be a warning to the general public as to what is in store whenever a multiplicity of buying or selling agencies is replaced by a monopolistic agency. The growth of bureaucracy or corruption and a widespread black-market have been the inevitable results each time State intervention in trade has taken the form of substituting monopoly procurement and monopoly distribution for the channels of competitive private trade. Whatever may be the justification for such monopolistic controls during a grave emergency like war or during a very severe food crisis, it would be an unmitigated disaster to envisage such monopolistic State trading as a normal appurtenance of peace time.

I should like to sum up my broad conclusions on the subject of State monopolies and the citizen as follows:

1. It is implicit in the basic conceptions of the democratic system that all citizens shall have the amplest freedom to engage in any form of economic activity that is not demonstrably against the public interest, without their being subject to threats actual or potential, of their exclusion from such activities by the intervention of the State.

2. There must be a more precise and narrowed definition of the area in which the State would be entitled to set up monopolies than is envisaged under the existing provisions of the Constitution. (It is significant that in Britain, where the Labour Party has long been an advocate of nationalisation, there has been in recent years a complete change in opinion in regard to the advantages of nationalisation and a radical change in attitude towards well-managed private enterprises. Not only is there no enthusiasm for re-nationalising the steel industry but there is a recognition that "under increasingly professional management, large firms are as a whole serving the nation well." The Labour Party now admits that no intervention by the State will take place "where any firm is doing a good job." Moreover, opinion in the Labour Party is veering to the view that where private Companies are "failing down" on their job, it is preferable to control them instead of nationalising them).

3. No State monopoly should be brought into existence without a prior enquiry into the operations of the private sector in that field and without a full opportunity being given to those engaged in that industry to vindicate themselves.

4. In no circumstance should an enterprise conducted by citizens on sound lines—except in the limited field of public utilities—be taken over by the State or be prevented from operation by the setting up of a State monopoly. (If such a safeguard had been in existence before 1956 some at least of the Life Insurance Companies which were nationalised could not have been taken over by the State).

5. When any particular existing enterprise suffers a loss as a result of the creation of a State monopoly there should be provision for compensation to the extent of such loss by the State.

6. In addition to purely Parliamentary bodies like the Public Accounts Committee or the Estimates Committee, which may periodically go into the working of State-run enterprises, there must be an impartial and quasi-Judicial body like the Tariff Commission in India, or the Monopolies Commission in England, to review the operations of State monopolistic enterprises to hear complaints from the public and from private concerns that may suffer in one way or other and to make recommendations for the better functioning of these enterprises to prevent abuses.

The views expressed in this booklet do not necessarily represent the views of the Forum of Free Enterprise.

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**Free Enterprise was born with man and
shall survive as long as man survives.**

—A. D. Shroff

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