PRE-MARXIST SOCIALISM
AND
THE SUPREME COURT OF INDIA

by
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The motif of socialism looms large in an otherwise bourgeois constitutional text and context. Our Constitution is avowedly socialist since its adoption. In 1976, the amendment to the Preamble declaring it a socialist Constitution was thought to be a necessary addition to the rhetoric. And yet, broadly, judicial interpretation of the Constitution and the major economic legislations of India continue to betray strong capitalistic biases. For example, the Indian Companies Act has been affected by the currents of socialism only slightly and that too in the sense of social control over the means of production. It does not display the slightest sensitivity to the interests and rights of the labour. Of course, labour laws are seen to be specifically designed to protect the working classes. But the key idea in labour laws, too, is protection and welfare, not worker participation in management in any significant sense of that term. The emergency amendments brought in an additional directive principle on this aspect but no significant legislative steps have yet been taken to prevent it from becoming a magnificent piece of constitutional rhetoric.

In such a dismal context, one normally does not expect from the bourgeois operators of the constitutional system, including justices, any recognition of the rights of the working classes in the administration of the company law. A lone socialist Judge, Justice D.A. Desai (then of the Gujarat High Court) did, in many ways, attempt to instil the spirit of socialism alien to the cast and mould of the company law. But, on the whole, even the simple question whether the labour has a right to be heard in winding-up proceedings continued to be answered in the negative. And,

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2. See especially, Panchmahals Steel Ltd. v. Universal Steel Traders, (1976) 46 Com Cas 706 (Guj).

But the chinks in the armour soon appear. Consistent with the vacillation in *Maneka*, and notwithstanding the grandiloquence about “equal partnership” of labour and capital Justice Bhagwati says that it is open to the legislature to enact a rule expressly prohibiting workers any hearing at any stage in the winding-up proceedings. 18 Justice Chinnappa Reddy, surprisingly, agrees with this: “If the statute says only so and so will be heard, and no other, *of course*, no other will be heard.” 19 This “*of course*” rule of constitutional construction is one not anticipated anywhere in the world! If this “*of course*” rule of constitutional interpretation is to apply, it should be applied to fulfil, rather than frustrate, the “constitutional mandate” 20 requiring equal status, and participation of labour with capital. In other words, *of course*, the statute cannot exclude the rights of hearing accruing to workers. I do not know whether it is possible to have one’s capitalistic cake and eat it too. But it strikes me as singularly improbable that a similar feat could be accomplished with a socialist cake! In any case, the Court should now make up its mind on the vital issue whether the extension of the rules of natural justice are to depend on an institutional accommodation between itself and Parliament, or whether civilized justice and the Constitution require their observance, regardless of the will of the legislatures and courts.

The second chink in the armour is truly too wide, as to leave only the appearance of protection. After conferring wide *locus* even of preferring appeal against the order of the Company Judge, Justice Bhagwati takes pains to make it “clear that neither the petitioner nor the court would be under any obligation to give notices of winding-up application to the workers.” 21 Like the “*of course*” rule, this rule of constitutional construction may be called “swallow the camel and strain at a gnat” rule. Who says we are all Maxwellites? The requirement of giving effective notice is judicially recognised as an essential prerequisite for the operation of audi alteram partem rule, even if what satisfies the notice requirement may be a matter of not-so-trivial judicial debate. 22 Not all industrial labour in India is organized; and many “company unions” flourish under the guise of the trade union movement. Given these facts, to deny notice is to weaken whatever protection is extended by *Ramakrishnan*.

This caveat is all the more puzzling as Justice Bhagwati himself interprets Rule 34 of the Companies (Court) Rules, 1959 somewhat liberally. That rule provides that “every person who intends to appear at the hearing of winding-up petition, whether to support or to oppose it, shall serve on the petitioner or his advocate a notice of his intention…” 23 in the prescribed manner. Somewhat ambivalently, Justice Bhagwati rules both that this rule does not entitle any one else apart from creditors and contributors to do so and also that the “generic expression” “every person” may be interpreted to apply to workers as well. 24 The result is that should workers wish to intervene they have to give prescribed notice but no notice is due to them from the petitioner or the court!

The puzzle deepens when one looks closer at the reasoning provided by Justice Bhagwati to allow workers *locus* in the teeth of the provisions of the Act which totally ignore their existence. In rebutting the argument that Section 440 militates against any *locus* to workers, Justice Bhagwati maintains that this section deals with “the stage after the winding-up has commenced”; the court is here concerned with “a stage anterior to the making of a winding-up order.” 25 There is thus clear recognition of the need for worker’s *locus* at the anterior pre-winding-up moments of decision. If so, how can the immunity from obligation to serve notice, whether by petitioners or court, be justified in any rational terms?

One wonders whether this “hurry slowly” syndrome is a part of socialist disease! But even that is infinitely preferable to the approach manifest in Justice Venkataramiah’s dissenting opinion, supported by Justice A.N. Sen.

Justice Venkataramiah’s starting point (hold your breath!) is stunningly simple: “When a company has passed a special resolution resolving that a company may be wound up… the employees and the workers can have hardly any ground to object to the winding-up petition.” 26 One way, clearly, to solve a problem is to assert that there is no problem at all.

From this *sutra*, follows the rest. Section 445(3) clearly states that an order of winding-up operates as a discharge of employees, not attracting Section, 25-FFF of the Industrial Disputes Act. 27 To give *locus* to workers under the generic words of Rule 34 would be to open floodgates 28; just anyone can intervene. 29 It is not true that if workers can’t oppose winding-up proceedings, they have no other remedies. How about Section 15-A of the Industries (Development and Regulation) Act, asks Justice Venkataramiah? 30 The simplest thing in the world, His Lordship seems to suggest, is for workers in Coimbatore to persuade the bosses in Delhi to exercise their powers of investigation and takeover! Why fiddle with the Companies Act at all?

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20. *Id.*, at 260 (emphasis added).
21. *Id.*, at 269.
22. *Id.*, at 257.
25. *Id.*, at 256-57.
26. *Id.*, at 269 (emphasis added).
27. *Id.*, at 274.
28. *Id.*, at 273.
29. *Id.*, at 273.
And then comes the time honored judicial *brahmastaha*, an unfailing judicial weapon used for overkill; judges should not legislate, *even if the legislatures do not*. Parliament should enact recommendations of Sachhar Committee Report, or if that is just too indigenous why not shop around and borrow provisions of the English Employment Protection Act, 1975? or legislate as is Section 74 of the English Companies Act? The parties no doubt have the “privilege of making suggestions to the court in the public interest” and the Court, too, has a similar privilege to make suggestions to Parliament. Nothing more. “Concomitant rights” not contemplated by the statute are not within the judicial province. On Justice Venkataramiah’s model of judicial reticence, one wonders how he considers suggestive jurisprudence as legitimate!

Justice Venkataramiah asks us, expressly, to consider the injustice inherent in the majority opinion: the injustice to the *proprietor*. A factory owned by a proprietor may be subject to partition suits or dissolution proceedings, under the Hindu law of property. Would it be fair to owners in this situation to impose natural justice requirements to the employees? Is it fair to the owner of a company to allow workers to intrude at the winding-up stage? More so because, according to His Lordship, the workers “do not have any hand in the birth of the company, in its working during its existence and also in its death by dissolution”.

Article 43-A is troublesome but the trouble is made to disappear by the simple statement that the legislature has not taken any steps to attain worker’s participation: can “the Court step in and introduce drastic amendments in the company law?” Article 37 of the Constitution seems to have escaped Justice Venkataramiah’s argus eyes: clearly, it has been accepted, that the duty to apply Directive Principles in the making of laws applies to courts as a part of State and the Supreme Court is bound to advert to Directive Principles when it exercises its power to make law, while declaring it, under Article 141 of the Constitution. To say that Article 37 applies only to legislatures would indeed be to put the constitutional clock back.

Justice Venkataramiah is really protesting against what he considers to be excesses of judicial activism. This is what he thinks.

If the legislature exceeds its power, this Court steps in. If the executive exceeds its power, then also this Court steps in. If this Court exceeds its power, what can people do? Should they be driven to seek an amendment of the law on every such occasion? The only proper solution is the observance of restraint by this Court in its pronouncements so that they do not go beyond its legitimate sphere.

These are memorable words, worth reiterating in principle. Judicial lawlessness could be as much problematic for the people of India as executive or legislative lawlessness. But, I believe, this caution is totally misplaced in *Ramakrishnan*. To provide hearing to workers in winding-up proceedings is no “drastic amendment” to the Companies Act. To interpret the Companies Act in the light of the constitutional mandate is not a judicial excess; not to do so, in my opinion, would be. To apply *Maneka* is scarcely to take the Supreme Court beyond its “appointed sphere”. And in any case it is not judicial *restarini*, but judicial *abdicatio*, to interpret the company law as if it were above and beyond the Constitution of India. The oath that Justices affirm is to protect and uphold the Constitution of India and laws under it, not to protect laws against the Constitution.

And, pray, which people are adversely affected so as to have to take the trouble to agitate for the amendment of the law by *Ramakrishnan*? The owners of capital? How badly are they affected by the limited locus? What fundamental changes in the domination by capital over labour have been affected by *Ramakrishnan*?

Perhaps, it is imperative to remind the Supreme Court Justices that a chap called Karl Marx ever lived and that 1983 is his death centenary anniversary. Justice Venkataramiah says labour has no “hand” at all in economic enterprise. The majority says labour is equal partner with capital. The first view ignores Marx; the second distorts it. Perhaps, some day even our Justices would learn that even what they call capital is nothing but accumulated, frozen and congealed labour. And when that is realized company law and labour law will cease to be compartmentalized corpuses, uniting of which is regarded today as by some Justices tantamount to judicial treason.

30. *Ramakrishna*, at 276-77.
31. *Id.*, at 278.
32. *Id.*, at 280.
33. *Id.*, at 281.
35. *Ramakrishna*, at 281.

37. See text accompanying note 32 supra.
38. See text accompanying notes 19-25.
39. “No production is possible without an instrument of production, even if this instrument is only the hand. No production without stored-up, past labour.... Capital is, among other things, also an instrument of production, also objectified past labour....” K. Marx, *Grundrisse* 85-86 (1973; trns. M. Nicolleau).