The Rise and fall of the Constitutional socialism –
The journey to a cul-de-sac @ “Amrithotsav”

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What was the nature of the Indian freedom struggle? What were its leading ideas? How the project of the freedom culminated on 26th January 1950 into the declaration “*We the people of India* …”? What is the nature of the Indian Constitution? Is it a leviathan invited by ‘the naturally vainglorious and so seeking to dominate others and demanding respect in Hobbes’s world? Is it a ‘social contract’ as ‘between the individual and a collective “general will” aiming at a common good and reflected in the law of an ideal state’ in the theories of Rousseau? Or is it a liberal document of ‘a society of free citizens holding equal basic rights and cooperating within an egalitarian economic system’ in the nature of John Rawls? Is it a pragmatist curriculum to accommodate all the contending stakeholders and a deliberated compromise or agreement among the contending forces at a particular juncture of history amenable for any change at the instance of the mood of the subsequent generations?

Indian freedom movement was predominantly the movement of the middle and upper-middle classes, fairly acquainted with the liberal political theories and traditions of the then Europe and the US. But various groups, sometimes aware of and sometimes unaware of the future State and how it related to their dreams have accentuated the struggle each having its own claims. The Congress and Gandhi functioned as lever to this behemoth. A Bipan Chandra[1] notes: “It is a legacy that belongs to all the Indian people, regardless of which party they belong to now, for the ‘party’ which led this struggle from 1885 to 1947 was not then a party but a movement - all political trends from the Right to the Left were incorporated in it.”

But one thing was also largely true. The mood of the nation was largely convinced of a broader view of some kind of an egalitarian State, a kind of ‘**socialism**’[?], though many might not have been convinced of a particular variety of it like, say, Marxist etc., or any other inflexible notion of the term. Bipan Chandra[2] further elaborates this: “The freedom struggle was also a struggle for economic development.” The Constituent Assembly constituted for the purpose of framing a Constitution for free

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[1] Bipan Chandra © 1989, *India’s Struggle for Independence*, Penguin Books, p. 14
[2] Bipan Chandra, *op. cit*, p.15

India was also in tune with the tide of the times. Granville Austin[3] observed: "The Assembly's belief in parliamentary government was also strengthened in large measure by the intellectual or emotional commitment of many members to socialism. Although they ranged from Marxists through Gandhian socialists to conservative capitalists, each with his own definition of 'socialism', nearly everyone in the Assembly was Fabian and Laski-ite enough to believe that 'socialism is everyday politics for social regeneration and that democratic constitutions are … inseparably associated with the drive towards economic equality." All these ideas bordering 'socialism' and many more liberal views of the economy and the duties of the State found their expression in the **D**irective **P**rinciples of **S**tate **P**olicy [DPSP].

The nexus between capitalism and colonialism was well understood by the leadership in the erstwhile colonies struggling for freedom than the Communist theoreticians of the West. But the common experience of the intellectuals of the erstwhile colonies was different. As rightly observed by Chandra[4] - "Of all the national movements in colonial countries, the Indian national movement was the most deeply and firmly rooted in an understanding of the nature and character of colonial economic domination and exploitation."

It is not that the idea of defining India as a 'socialist' country has come first in the 42 Amendment in 1976. K. M. Munshi Munshi, Ambedkar and K. T. Shah, on the contrary wanted the Directive Principles to be justiciable. In fact an amendment moved by K. T. Shah sought to describe India as "a secular, Federalist Socialist Union of States". Dr. B. R. Ambedkar opposed the amendment, but on the ground that it was not proper to tie down the people to live in a particular form of social organization. Since the time of French revolution there has been a growing awareness of the link between political freedom and social or economic justice.

The Congress's long-standing affinity with the Irish nationalist movement made the Constitutional "Socialism" expressed in the Irish Directive Principle of State Policy, central to the governance of the future India. The ideal of 'secular socialism' in the European political thought impressed the Constitutional makers. The most weighty support came from B.N. Rau and Ayyar, and secondly from Ambedkar and K.T. Shah. K.M. Munshi had even attempted to include 'Rights of Workers'

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[3] Granville Austin, *The Indian Constitution - Cornerstone of a Nation*, Oxford University Press, 1966, p. 41
[4] Bipan Chandra, op.cit., p.91

and 'Social Rights' in his draft list of Rights, which also included provisions protecting women and children and guaranteeing the right to work, a decent wage, and a decent standard of living.'

An interesting discussion on the Fundamental Right to Property (Art 31) also bears witness to the mood of the Assembly. The right to property has always been considered fundamental and sacrosanct in the constitutional parlance of legal theory of the West. The ultimate shape the property right assumed in the Constitution as on 26th January 1950 allowed the right with certain riders for public use. But by the Constitutional 44th Amendment, 1978, the then Janata government fulfilled its historical role of the socialist perspective by changing the status of the Right from that of the fundamental to that of the constitutional / legal. A new Article 300(A) was inserted.

On 26th day of November 1949, "the people of India" solemnly resolved to constitute India 'into a **Sovereign Democratic Republic**, and with effect from 26th January 1950 brought their resolution to effect. On 3rd January 1977, the people's representatives added some additional attributes unto the State – **Socialist Secular** between the Sovereign and Democratic Republic. Thus India is defined as on today a '**Sovereign Socialist Secular Democratic Republic**.' The challenge to 'democracy' received its first visible shape in the proclamation of 'Emergency' on the midnight of the 25th June 1975. The 'socialist' attribute had fallen in the grace of the governing forces, more apparently, with the India's New Economic Policy of 1991, in less than 16 years of its incorporation. The third attribute – 'Secularism' is under stress and strain since long. It has now come under a serious threat since the 2014 General Elections to the Parliament when the BJP came to power with a clear peoples' mandate.

'We the people' also resolved in the Preamble that the aim was 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 unity and integrity of the Nation." With or without the additional attributes of the 42nd Amendment which incorporated the words – 'Socialist' and 'Secular' the State was socialistic in its nature at its birth.

But the rationality of the restrictions imposed on the State in the Directive Principles were initially thought to be for tilting the balance more in favour of the weak and defenseless, which however found in the experience of the Indian democracy over seven decades to be the contrary. Prof.

Mohammed Ghouse[5], in his "The Two Facets of Judicial Activism" wrote: "Judicial activism in India is therefore far more complex than American. One stream of Indian activism radiates capitalism, champions the cause of status quo and services the rights of vested interests while the other radiates socialism, espouses the cause of social change and advances the interests of the poor."

It cannot be denied, however, that the fundamental rights, though burdened with 'reasonable' (?) restrictions, have played a significant role in the shaping of the Indian State along with the DPSP. The very definition of the State for the purpose of Fundamental Rights brought under its fold a huge spectrum of activities when it said: "the State" includes the Government and Parliament of India and the Government and Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Thus, no part of the State is exempted from its duty of protecting the fundamental rights of citizen, even within the 'reasonable' restrictions. The Right to Equality under Article 14 with all its imposing exceptions in Article 15 and 16 made a great contribution in defining the nature of the Indian State. Article 17 which abolished the age-old stinking social evil of 'untouchability' made great strides towards a state of equality. The Untouchability (Offences) Act, 1955 along with the Article 35 (a) (ii) greatly succeeded in ushering an egalitarian State. The Right to Freedom in Article 19 strengthened the hands of the citizens in critiquing the State, assembling, forming associations, etc. The Rights against exploitation as contained in Articles 23 and 24 redefined 'forced labour' leading further to the Immoral Traffic (Prevention) Act, 1956, Bonded Labour System (Abolition) Act, 1976 and the Child Labour (Prohibition and Regulation) Act. These provisions with several other welfare measure make a compulsive reading of the Indian State as a 'Socialist State' or a benign State.

Added to these, the Resolution of the Lok Sabha in the cool Delhi winds of December 1954 declared: "That the basic criterion of determining the lines of advance must not be private profit but social gain … Major decisions regarding production, distribution, consumption and investment, and in fact all significant socio-economic relationship, must be made by agencies informed by social purpose" represented the journey and direction of the new-born independent indian State.

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[5] Prof. Mohammed Ghouse, "The Two Facets of Judicial Activism", in "Judicial Activism and Social Change",in K. L. Bhatia (Ed.) Deep & Deep Publications, New Delhi, 1990

But the legal and juridical study of the conflict between the fundamental rights and the DPSP contains the proper material for understanding the limits of the '**Constitutional Socialism**' and its destiny over decades to the present celebration of the Amrithotsav. The aspirations of the people of India, the State, the Executive, the Capitalist class and judiciary appear to have run with cross-purposes in India in the last 75 years. Justice H.C Kania, the first Chief Justice of India, in his inaugural address of the Supreme Court, expressed the hope and held out a promise that laws would be interpreted with enlightened liberality and not in legal formalism. The legal philosophy as it evolved through 1990s and as it stands today, resulting out of the combined reading of the Preamble, Fundamental Rights, Directive Principles of State Policy and the working class, forms a rich field of experimentation in labour and industrial jurisprudence.

The Indian courts appear to be no exception to the vicissitudes of time and economic policies of the governments. In J.K. Cotton Spinning & Weaving Mills Co. Ltd. Vs. Badri Mali and others[6] Justice Gajendra Gadkar held: "In our opinion, the argument that the consideration of social justice an irrelevant and untenable in dealing with industrial disputes has to be rejected without any hesitation. The development of industrial law during the last decade and several decisions of this Court in dealing with industrial matters have emphasized the relevance, validity and significance of the doctrine of social justice. …. Indeed the concept of social justice has become such an integral part of industrial law that it would be idle for any party to suggest that industrial adjudication can or should ignore the claims of social justice in dealing with industrial disputes. … It is founded on the basic ideal of socio-economic equality and its aim is to assist the removal of socioeconomic disparities and inequality; … It therefore, endeavors to resolve the competing claims of employers and employees by finding a solution which is just and fair to both parties with the object of establishing harmony between capital and labour and good relationship."

With the amendment to the Preamble in 1976 an era of socialist jurisprudence made a definite entry into the Courts. In Managing Director, Uttar Pradesh Warehousing Corporation & Another vs. Vinay Narayan Vajpayee[7] Justice Chinnapa Reddy, in a concurring judgment has spoken eloquently on the changed legal atmosphere: "It is self-evident and trite to say that the function of the State has long since ceased to be confined to the preservation of the public peace, the exaction of the taxes and the

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[6] AIR 1964 SC 737
[7] AIR 1980 SC 840

defence of its frontiers. It is now the function of the State to secure social, economic and political justice; to preserve liberty of thought expression, belief, faith and worship; and to ensure equality of status and of opportunity"

In another classic example of these changes in the theory of justice can be seen in Glaxo Laboratories V. The Presiding Officer[8] where Justice Desai observed: "In the days of laissez-faire when industrial relation was governed by the harsh weighted law of hire and fire, … The developing notions of socio-economic justice necessitated statutory protection to the unequal partner in the industry namely, those who invest blood and flesh against those who bring capital. Moving from the days when whims of the employer was supreme *lex*, the Act took a modest step to compel by statute the employer to prescribe minimum service conditions of service subject to which employment is given. …."

This great churning process for socio-economic justice and realization of constitutional goals of socialism further got embedded in the flourishing public interest litigation (**PIL**), initiated by the concerned citizens, on behalf of the poor and disadvantaged during 1980s and 1990s. "Judicial activism" as it was defined in praise and a "committed judiciary" in a pejorative sense, has become a powerful game-changer in the industrial relations. We find a rapid expansion of the activist role of the judiciary through uncoordinated use of law by scattered legal activists. Especially in the areas of bonded labour, women workers, child labour and inter-state migrant labour and in extending the benefits of the payment of minimum wages and extension of the laws of 'social security' to these disadvantaged groups, the public interest litigation made huge huge strides.

This extraordinary jurisprudence could be seen full-blown in the hands of such articulate judges like Justice V.R. Krishna Iyer, P.N. Bhagwati, D.A. Desai, O. Chinnapa Reddy et al. The dynamic provisions of the Directive Principles fertilized the static provisions of the Fundamental Rights, because it was thought that it were the Directive Principles which nourished the roots of our democracy. The case of People's Union for Democratic Rights vs. Union of India[9] (or alternatively knows as **Asiad case**) set the law of the land in motion in favour of the democratic rights of the marginalized workers. A letter addressed to Justice P.N. Bhagwati lit the light in the lives of hundreds of migrant, child and woman workers and opened a great debate for two decades.

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[8] 1984 AIR SC 505
[9] AIR 1982 SC 1473

In the words of Justice Bhagwati: "Public Interest Litigation which is strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masks, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between litigating parties. … But it is intended to promote and indicate public interest which demands that violations of constitutional or legal rights of large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and un-redressed".

The juggernaut of the *pro bono public litigation* demolished many hither to conventional concepts of litigation, *locus standi* and jurisdiction in the law and put the non-justiciable DPSP over and above the fundamental rights (which were hitherto mostly exploited by the rightly and powerful). In Sanjit Roy vs. State of Rajasthan[10]; Bandhua Mukti Morcha vs. Union of India[11]; MC Mehta vs. State of Tamilnadu[12] etc., the higher echelons of the Indian judiciary reverberated with the calls of 'social justice' for about two decades.

But, by the early 2000s the whole scenario has changed. The dreaded *laisseze faire* economy, which was considered obsolete and hackneyed, returned back to the central stage in the corridors of higher courts. The Indian polity, as a whole, went into a typical ignorance of its own promises. Suddenly the euphoria over 'socialism', 'socio-economic justice' and the appeals to the DPSP disappeared. The State has returned back to the *laissez faire* economy, and along with it all the organs of the State started enacting a new opera of LPG. One of the contentious issues was brought before the courts and heatedly debated in the year 2000 and onwards has been the policy change in the governments leading to corporatization and privatization of certain sovereign. With the New Economic Policy of 1991 a new stage is set in rendering the term 'socialist' in the Preamble and the Principles governing the State Policies in DPSP nugatory and redundant.

Whether, now, the term 'socialist' in the Preamble is just an '*obiter dicta*', most often wholly unnecessary and even suffocating? Was it a temporary and momentous emotional outburst of the enlightened individuals in the backdrop of the colonial legacy? Are the words and expressions such as

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[10] AIR 1983 SC 328
[11] AIR 1984 SC 802
[12] AIR 1997 SC 699

'the welfare society' etc., are empty slogans in the imposing "liberalization, privatization and globalization" (LPG)?

When on May 13, 1994, the Indian government introduced National Telecom Policy, several writ petitions came up as PILs in to SC and in some high courts. The SC heard all these petitions in Science Forum and others vs. Union of India and another[13]. The Court observed the trends in telecom sector in the world in general and was convinced of the view that by and large it was realized that this section needed acceleration because of the adoption of liberalized economic policy. Dismissing the petitions the court observed: "The Courts cannot express their opinion as to whether at a particular juncture or under a particular situation prevailing in the country any such national policy should have been adopted or not. … That has to be sorted out in the Parliament. … Privatization is a fundamental concept underlying the questions about the power to make economic decisions. What should be the role of the State in the economic development of the nation? How the resources of the country shall be used? How the goals fixed shall be attained? … All these questions have to be answered by a vigilant Parliament…."

The *bonhomie* of the labour and the courts had ended and quite conspicuously. In the PIL of BALCO Employees Union (Regd) vs. Union of India[14] the SC felt: " … process of disinvestment is a policy decision involving complex economic factors" … The State which invested of its own volition can equally well disinvest." "The policies of the Government ought not to remain static. With the change in economic climate, the wisdom and the manner for the government to run commercial ventures may require reconsideration. … "

This is the saga of the Constitutional socialism. It is now beyond any reasonable imagination to expect a return to the avowed "socialism". The working class is now exposed to the challenges of liberalization, privatization, and globalization and more and more aggressively day-by-day. Is it a point of no return or a *cul-de-sac?* Is it a question of "What to be done?" Is it an enigma that the Indian socialists should ponder over at this juncture of the Amrithotsav?

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[13] AIR 1996 SC 1356

[14] 2001(8) Supreme 660