

Legal Implications of Liberalisation and Globalisation of Insurance Sector

Mrs. Priyam Sharma

Himachal Pradesh University Institute of Legal Studies

Abstract

The liberalization and globalization of the insurance sector have had significant legal implications. The liberalization and globalization of the insurance sector have been driven by the increasing interconnectedness of economies and the desire to promote competition and efficiency in the market. This process involves opening up domestic insurance markets to foreign companies and removing barriers to entry for new players. As a result, there has been a surge in cross-border investments, mergers, and acquisitions, leading to the expansion of multinational insurance companies. From a legal perspective, the liberalization and globalization of the insurance sector have necessitated changes in regulatory frameworks and the harmonization of laws across jurisdictions. Governments have had to revise their domestic insurance laws to accommodate the entry of foreign insurers and ensure a level playing field for all participants. This includes revisiting licensing requirements, solvency regulations, consumer protection laws, and dispute resolution mechanisms. The liberalization and globalization of the insurance sector have had far-reaching legal implications. These include the need for regulatory reform, international cooperation, and harmonization of laws.

Keywords: Constitution, solvency, globalization, self-government and Nationalisation

INTRODUCTION

India's founding fathers established in the Constitution both the nation's ideals and the institutions and process for achieving them. The ideals were national unity and integrity and a democratic and equitable society. The new society was to be achieved through a social-economic revolution pursued with a democratic spirit using constitutional, democratic institutions.

The Constitution exhorted the government and imposed upon it, the responsibility to pursue the social revolution. Self-governing and democratic government was now confronted with the great issues arising from the Constitution's goals, which were to persist till today. The leading amongst them seemed the choice to be adopted to pursue the "Road to Social Revolution". The solution was found in taking into the hands of government itself, the spheres of activity paramount for national interest - "Nationalization" was the key word. A study of history points that the thought of nationalising certain strategic sectors was a desire with a long past, which the congress cherished in one way or the other. Independent India saw this desire become a living reality with the nationalisation of various sectoral units soon after the independence.

The Insurance Sector also witnessed this wave of nationalisation with the coming into force of The Life Insurance (Emergency Provisions) Act, 1956¹ which provided for the taking over, in the public interest, of the Life Insurance Business pending nationalisation thereof. This was followed by The Life Insurance Corporation Act, 1956² which provided for the total nationalisation of Life Insurance Business in India. Nationalisation of General Insurance Business was to follow with the coming into effect of The General Insurance (Emergency Provisions) Act, 1971³ which was followed by The General Insurance Business (Nationalisation) Act, 1972⁴. Thus the "exclusive privilege", which resulted in a total monopoly, of carrying on both forms of insurance business was now in the hands of "state".

The world of today has transformed into a "Global village" transcending national boundaries and jurisdictions and this resulted in the propagation of the idea of "world economy" - internationalisation of trade and investment - Globalisation - a process of economic integration through expansion of trade and financial investment. To put it in a simplistic manner, Globalisation is about investment, production and trade primarily and their mobility across the globe.

India, even as an ancient civilisation, has recurrently attracted foreign people. Some came as friends, some as traders and some as invaders. History took such a course for India that by the time it became a politically sovereign entity on August 15, 1947, it was left with no option other than adopting protectionist economic policies.⁵

After four decades of mixed economy and planned development, the Government of India, in 1991 embarked on the new economic policy, by providing market oriented free economy as the model. It has replaced the system of controls with Liberalisation and Globalisation. The new economic policy was devised to accelerate economic development, which is the consequence of the international developments resultant of coming into effect of the World Trade Organisation and TRIPS etc.⁶

The Insurance Sector was not left untouched by these universal and consequential national development. The coming into force of The Insurance Regulatory and Development Authority Act, 1999⁷ saw the ending of "states" exclusive monopoly over insurance business and the opening up of the same for individuals, both Indian and foreign. This project is an endeavour in the direction of highlighting some of the consequential "legal effects" of the opening up of the Insurance Sector in wake of the policies of Globalisation and Liberalisation.

“GLOBALISTION” - A CONCEPT AND ITS EFFECTS

¹ Act No. 9 of 1956.

² Act No. 31 of 1956.

³ Act No. 17 of 1971.

⁴ Act No. 57 of 1972.

⁵ Justice S.B. Sinha, "Constitutional Implications of Liberalisation", SOUVENIR, International Conference on Law and Economic Change, 9 (Nov. 24-25, 2001).

⁶ S.K. Verma, "Globalisation, Marketisation and Constitutional Mandate", Ibid, P. 14.

⁷ Act No, 41 of 1999.

The term "Globalisation" is a post-soviet phenomenon. It changed the very intellectual comprehension of world politics and economy, apart from global power equations. It is a western model of market economy.⁸

"Globalisation" is primarily a removal of national barriers to trade and investment. It is associated with contemporary phenomenon of privatisation, de-regulation, the expanded provisions of incentives of entrepreneurial behaviour, structural adjustment programmes and related pressures on developing countries to open up their markets for international financial institutions and developed countries. Globalisation, in economic terms, is the opening up of the markets which will operate under market forces, where state will have a very little role to play.⁹

In so far as private foreign investment is concerned, there is a emerging a principle in International Law that the state in which such investment is made should not by its exchange control laws and regulations hamper or prevent the payment of profits or income to the foreign investors.¹⁰ With regard to the entry of capital, although the general trend of international law is towards the promotion of investment, investment-receiving states are not debarred from prescribing requirements for the screening, approval and registration of any capital inflow.¹¹ It is to be observed that Article 2, Paragraph 2(a) of The Charter of Economic Rights And Duties of States, 1974, provides:

“Each state has the right:

a. to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No state shall be compelled to grant preferential treatment to foreign investment”.

A number of proposals have been made for the protection and encouragement of private foreign investment, inducing The Convention For The Settlement Of Investment Disputes Between State and Nationals Of Other State 1965, setting up international conciliation and arbitration Machinery on a consensual basis so that private foreign investors might have a direct access thereto to settle legal disputes with investment receiving states. On the aspect of investment promotion, there should not be overlooked the expansion of the activities in this area since 1977 after the establishment of the International Finance Corporation, established for the purposes, among others, of stimulating productive investments. A major step in the direction of the protection of foreign investment was the adoption in 1985 of The Convention Establishing The Multilateral Investment Guarantee Agency, representing the culmination of efforts spanning of over thirty years to implement the concept of a multilateral investment guarantee scheme in respect of non-commercial risks, which scheme would be both

⁸ Asghar Ali, “Globalisation, Democracy and Threat to Diversity”, MAINSTREAM, 10 (Nov. 1, 1997).

⁹ Sigrun Skogly, “Structural Adjustment and Development : Human Rights - An Agenda for Change”, 15 HRSQ 751 (1993).

¹⁰ J.G. Starke, Introduction to International Law, 377 (1994).

¹¹ J.G. Starke, The Protection and Encouragement of Private Foreign Investment, 74 (1966); G. Schwarzenberger, Foreign Investment and International Law, 52 (1969); As pointed out by the International Court of Justice in the Barcelona Traction case, ICJ Rep., 1970, P.S., one overriding general principle is that an investment receiving state, while bound to extend some protection in law to the investments concerned, does not thereby become an insurer of that part of the investing state’s wealth corresponding to such investments, certain risks must remain; See, Para 87 of the Judgement.

productive and promotional of foreign investment.¹² A trend, reflecting the above-mentioned developments Concerning private foreign investment is towards the encouragement and protection of investments. Similarly, the coming of WTO marks a culmination point in this direction of increasing the momentum of trade liberalisation. Under the influence from the international financial institutions and the new dispensation of the WTO, many countries around the world have embraced the policy of liberalisation, there by diminishing the economic role of the state in framing its policies or setting its development goals. State Sovereignty is no more absolute, when it comes to economies policies. These developments have resulted in the international marketisation of domestic economies wherein the movement of capital, goods and services are made dependent on the exterior factor as national barriers to investments and trade have been removed.¹³

Globalisation has been presented in terms of the virtues of entrepreneurship , economic rationality and an efficient legal regime imbued with security, predictability and transparency.¹⁴ The Copenhagen Declaration adopted at The World Summit For Social Development, 1995, very succinctly states:

"Globalisation, which is a consequence of increased human mobility, enhanced communication greatly increased trade and capital flows, and technological developments, open new opportunities for sustained economic growth and development of the world economy, particularly in developing countries.... At the same time, the rapid processes of change and adjustment have been accompanied by intensified poverty, unemployment and social disintegration. Threats to human well-being.... have also been globalised. Further more, the global transformations of the world economy are profoundly changing the parameters of social development in all countries. The challenges is how to manage these processes and threats so as to enhance their benefits and mitigate their negative effects upon people".¹⁵

After embarking on the new economic policy, its perceptible impact on the social structure and governance of the country would become visible in due course of time in India. More recently visible are the impacts on our legal system which are highlighted in the course of the paper.

CONSTITUTIONAL VALIDITY OF GLOBALISATION OF INSURANCE SECTOR

"A Constitution is framed for ages to come and to approach immortality as nearly as human institutions can, It course cannot always be tranquil".¹⁶

This statement of Justice Holmes takes account of the philosophy of Supremacy of Constitution - a mechanism under which laws are to be made.¹⁷ And thus Constitution governs the nation and the validity and legality of every legislative device- either law or Policy- must be tested on its touchstone,

¹² F.I. Shinhata, "Towards a Greater Depoliticization of Investment Disputes", (1986) 1 FILJ, PP.3-4, Carl Bell, "Promoting Private Investment: The Role of the International Finance Corporation", (1981) 18 Finance and Development, PP.16-19.

¹³ Yash Ghai, "Human Rights and Governance: The Asia Debate", 15 AYBZ (1995).

¹⁴ Supra note 7, P. 15.

¹⁵ The Copenhagen Declaration, 5 (1995).

¹⁶ Virginia v. Cohens, (1863) 117 US 90 at P.92.

¹⁷ See also, the observations of Higgins, J. in Att. General v. Brewery Employees Union, (1908) 6 CLR 469 at PP. 611-12.

The Constitution framers idealized courts as guardians of the Constitution- they would be the expression of the new law created by the Indians for Indians. So observed the Privy Council on **R. v. Burah**:¹⁸

"...in Federal Constitutions, the question not infrequently arises whether the law passed by a legislature is valid having regard to the distribution of legislative powers and constitutional limitations. When such a question arises the courts of the country must decide it".¹⁹

Judges, performing a delicate²⁰ job of interpreting the Constitution as a living organism having within itself the force and power of self government,²¹ have in a number of cases gone into the constitutionality of liberalisation and privatisation. Law Reports bear ample testimony of the fact that courts have time and again scrutinised the viability of the processes of privatisation and liberalisation not only as a policy but also as an improper implement mechanism.

At this juncture it is convenient to discuss two leading decisions of the Supreme Court in this arena. In *Mithlesh Garg v. UOI*,²² the grant of state carriage permits in the motor transport business, pursuant to the liberalisation policy was challenged on the ground that it violated Article 19(1)(g) and Article 14 of the Constitution. In that case sections 47(3) and 57 of the Motor Vehicle Act, 1988 provided for certain restrictions on the procedure for grant of permits to private individual operators. With the enactment of the Motor Vehicles Act, 1988 which replaced the old Act, the system of granting license was liberalised resulting in large scale privatisation. The Supreme Court speaking through Kuldip Singh, J. held that Article 19(1)(g) of the Constitution is a guaranteed right of every citizen whether rich or poor to take up and carry on, if he so wishes, the motor transport business, and, it is only the state which can impose restrictions within the ambit of Article 19(6) of the Constitution, sections 47(3) and 57 of the old Act being some of the restrictions which have been taken away by the new Act which provides for a liberal policy as regards the grant of permits to those who intended to enter the motor transport business. In this context, it was further held that when the state has chosen not to impose any restriction under Article 19(6) in respect of motor transport business and has left the citizens to enjoy their right under Article 19(1)(g), there can be no cause for complaint by the existing operators.²³

In *Delhi Science Forum v. UOI*,²⁴ the grant of licenses by the state to non-government companies and foreign collaborated companies for establishing, maintaining and working of telecommunication system of the country pursuant to Government Policy of privatisation of telecommunication was challenged on the ground of being violative of Article 14 of the Constitution. Speaking for the court, N.P. Singh, J. observed that the courts cannot express their opinion as to whether at a particular or under a particular situation prevailing in the country any national policy should have been adopted or not, for they cannot be tested in a court of law and have to be sorted out in the Parliament which has to approve the same and the courts cannot review and examine as to whether the said policy should have been adopted. But a

¹⁸ (1878) 3 App. Cas. 889.

¹⁹ At P. 904.

²⁰ T.K. Tope, Constitutional Law of India, 415 (1982).

²¹ Chief Justice Harilal J. Kania in an address after taking oath on 28th January, 1950, 1950(1) SCR Journal, P. 9.

²² (1992) 1 SCC 168; Ranganath Misra, C.J., M.H. Kania, Kuldip Singh, JJ.

²³ At PP. 177-178.

²⁴ (1996) 2 SCC 405; A.M. Ahmadi, C.J., N.P. Singh, K.Venkataswami, JJ.

rider was imposed. To quote the Learned Judge: "Of course, whether there is any legal or constitutional bar in adopting such policy can certainly be examined by the court".²⁵ In that case it was contended that the Central Government which has the exclusive privilege under section 4 of the Indian Telegraph Act, 1885 of establishing, maintaining and working telegraphs which shall include telephones, has no authority to part with the said privilege to non-government companies for the consideration to be paid by such companies on basis of tenders submitted by them and the same amounts to an outright sale of the said privilege. Section 4(1) provides that within India, the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs. The first proviso to that section provided that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India. The court held that section 4(1) on plain reading vests the right of exclusive privilege in this case with the Central Government, but the proviso thereof enables the Central Government to grant license, on such conditions and in consideration of such payment as it thinks fit to any person under the said section. It was further held that the framers of the Act conceived and contemplated that a situation may arise when the Central Government may have to grant a license to any person to establish, maintain or work such services in India, within any part and it was with this object that it was provided that license may be granted to any person by the Central Government. If proviso to section 4(1) itself provides for grant of license on conditions to be prescribed and considerations to be paid, to any person, then whenever such license is granted, such grantee can establish, maintain or work the telephone system in that part of India. It was observed that in view of the clear and unambiguous proviso to section 4(1), the power and authority of the Central Government to grant licenses to private bodies including companies cannot be questioned, if done subject to conditions and payments of considerations.

Many students of Law get an impression from these judgments of the Apex Court that in declining any action on the front of privatisation and liberalisation in those few instances, the court have given outright approval to the concept of Liberalisation in itself. It is submitted that the scrutiny of these decisions embedded in the true spirit of law does not lend support to such a view. It is worth noting that in Mithilesh Garg's case, the Supreme Court only upheld the liberal policy of granting permits in case of road transport under the Motor Vehicle Act, 1988 and in Delhi Science Forum's case the Supreme Court upheld the grant of licenses by the State to non-government companies and foreign collaborated companies for establishing and maintaining telecommunication system in the country as the power of so doing was read into a statutory provision dealing with the subject and in neither of the two cases the policies of Privatization and Liberalisation were upheld standing alone. Testing the liberalisation of insurance sector on the touchstone of these two judicial pronouncements, it is submitted that such a policy may not find support within the four corners of judicial legality. The Insurance Regulatory and Development Authority Act, 1999 which liberalised the insurance business in India provides for the establishment of Insurance Regulatory and Development Authority to regulate insurance industry in India and in section 14 which deals with Powers, Duties and functions of Authority provides for the power and function of the said Authority to issue a certificate of registration to an applicant in terms of section 3 of The Insurance Act, 1938.²⁶ Contrasting this with the situation in Mithilesh Garg's case the

²⁵ At P. 413.

²⁶ By virtue of the Second Schedule read with section 31 of the 1999 Act, the Insurance Act shall apply in case of both life and general insurance.

provision herein is only regarding granting a certificate of registration and the said provisions only talk about the procedure of granting registration certificate and no where provide for the granting of registration as such. The only task of the Authority is to issue registration certificate to insurance companies who approach the same for registration as by virtue of section 3 of the Insurance Act, 1938, no person is allowed to carry on insurance business in India without registration, and no discretion is conferred on the Authority in the matter of granting registration, as was there in case of Motor Vehicles Act, 1988 in Mithilesh Garg's decision.

Further by virtue of section 30 of The Life Insurance Corporation Act, 1956 and section 24 of The General Insurance Business (Nationalisation) Act, 1972, the exclusive privilege of carrying on life insurance and general insurance businesses respectively has been given to the Life Insurance Corporation in case of life insurance and to four acquiring companies²⁷ in case of general insurance under the said legislations. Further under section 6 of The LIC Act, it is provided that the LIC shall have the power to transfer the whole or any part of the life insurance business carried on outside India to any other person or persons, if in the interest of the corporation it is expedient to do so.²⁸ Applying the ratio in Delhi Science Forum's case, if at all the power to liberalise insurance business exists, it has to be with the corporation in case of Life Insurance under the LIC Act in terms of section 6 of that Act and the Central Government has no power to do so by an Act of legislature. In case of General Insurance, the General Insurance Business Act has no provision corresponding section 6 of LIC Act. But that Act confers on the four acquiring companies the exclusive power to carry general insurance business in India and it logically flows that they should have similar powers regarding liberalisation of general insurance business as the LIC as regards life insurance business. This conclusion again flows from the decision in Delhi Science Forum's case wherein the statutory provision concerned showered exclusive privilege on the Central Government to carry on telecommunication business in the country, and court upheld the power of the same authority on which the exclusive privilege was conferred to liberalize the arena in the field concerned, which was the Central Government in that case and which are the four acquiring companies in the context of general insurance business in the country.

Thus, it is submitted that the Liberalisation and the resultant Globalisation of the insurance sector in our country goes against the well settled legal and judicial norms as embodied in the pronouncements of the Apex Court and they as a result do not satisfy the test of economic- constitutionality in the context of our Constitution. The broad impact of this process on specific constitutional guarantees are discussed in the next few pages.

"SOCIALISM"-THE SPIRIT OF OUR CONSTITUTION

The constituent Assembly's task was to draft a constitution that would serve the ultimate goal of social revolution, of national renaissance . The constitution which was drafted was to foster the achievement of many goals, transcendent among them was that of social revolution. Thus observes eminent Constitutional Historian Granville Austin.

²⁷ National Insurance co. Ltd., New India Insurance co. Ltd., Oriented Insurance co. Ltd., United India Insurance co. Ltd.

²⁸ Section 6 (2) (d) of the LIC Act, 1956.

"The Indian Constitution is first and foremost a social document. The Majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievements".²⁹

The preamble to the Constitution of India, which in the words of the Supreme Court contains the ideals and aspirations³⁰ and the objects which the Constitution makers intended to be realised by its enacting provisions,³¹ describes India as a "Socialist" Republic. Though the word "Socialism" did not originally appear in the preamble to our Constitution, as Indira Gandhi has observed :

"Our path is Socialism. If we do not use the word, it does not mean we have forgotten it".³²

The word "Socialist" was inserted by The Constitution (42nd Amendment) Act, 1976, thus in the words of the Supreme Court in *D.T.C. v. D.T.C. Mazdoor Sabha*³³:

"Making explicit what was already latent in the Constitutional scheme".³⁴

The majority of the full bench of the Supreme Court in *Kesavananda Bharti v. State of Kerala*³⁵ has held that the Preamble of our Constitution should be interpreted as a part of the Constitution and logically flows the observations in *G.B. Pant University of Agriculture and Technology v. State of U.P.*³⁶:

"Socialistic concept of society as laid down in Part-III and Part IV of the Constitution ought to be implemented in the true spirit of the constitution."³⁷

In *State of U.P. v. Dr. Dina Nath Shukla*,³⁸ the objectives specified in the Preamble of our Constitution, which includes "Socialism" were held to be the "basic structure" and thus beyond the reach of amending power of the Parliament.³⁹ But what does "Socialism" mean and imply. Realising the word "Socialist" in the Preamble required to be defined, the 45th Amendment Bill, which later became the 44th Amendment, proposed an amendment of Article 366 of the Constitution by inserting the definition of the said expression.⁴⁰ However, this amendment was not accepted by the Council of States and consequently the word "Socialist" remained undefined. The Concise Oxford Dictionary defines "Socialism" as:

²⁹ Granville Austin, *The Indian Constitution- Cornerstone of a Nation*, 50 (1999).

³⁰ See, *Atam Prakash v. State of Haryana*, AIR 1986 SC 859 at P. 864.

³¹ *I.C. Golaknath v. State of Punjab*, AIR 1967 SC 1643 at P. 1655; *Indira Sawhney v. UOI*, (1992) Supp. (3) SCC 217.

³² Speaking to the AICC meeting, 3-4 April 1971 "Congress Marches Ahead", IV, AICC, 70(1971).

³³ (1991) Supp. (1) SCC 600.

³⁴ At para 207.

³⁵ AIR 1973 SC 1461; Per Sikri, C.J. (Paras 94-98); Shelat and Grover, JJ. (Paras 518); Palekar, J. (Para 301); Khanna, J. (Para 1417); Mathew, J. (Para 1618); Dwivedi, J. (Paras 1882-83); Chandrachud, J. (Para 988).

³⁶ AIR 2000 SC 2695.

³⁷ At Para 3.

³⁸ (1997) 9 SCC 622, at Para 6; See also the observations of Sikri, C.J., Shelat, Grover, Hegde, Mukherjee, Reddy and Khanna, JJ. in *Kesavananda's case*, supra note 48, paras 1535, 1603, 1628, 1810.

³⁹ It is submitted that since the Preamble is a part of the Constitution, it can be amended by the Parliament in exercise of its constituent power, but since the objectives enshrined therein are part of the basic features of the Constitution, they are unamendable and only logical conclusion thus flows is that the Parliament by way of an amendment add more objectives to the Preamble, but cannot take away the already existing ones.

⁴⁰ The Constitution (Forty-Fifth) Amendment Bill, 1978: "Clause 44-A-Amendment of Article 366- Article 366 of the Constitution shall be renumbered as clause (2) of that Article, and before clause (2) as so re-numbered, the following clause

"Political and economic theory of social organisation which advocates that community as a whole should own and control the means of production, distribution, and exchange and policy or practice based on this theory".⁴¹

Thus, Socialism as a theory of socio-political organisation advocates "Social Control" over means of production, including services, which are fundamental to the community at large. Thus, the word "Socialist" as it appears in the Preamble of our Constitution, read with Article 14 has been interpreted so as to strike down a statute which failed to achieve the socialist goal or which adopts a classification which is not in tune with the establishment of a welfare society⁴² and read with Articles 14, 15, 16, 17, 21, 21, 23, 38, 39, 46 and all other cognate provisions of the Constitution as providing equality of opportunity and facilities.⁴³ It is submitted that the policy of Globalisation and Liberalisation of Insurance Sector in our country goes against the principle of "Socialism" as embodied in our Constitution both as a constitutional objective and as the basis of our polity. First, The Insurance Regulatory and Development Authority Act, 1999 which liberalised the insurance business in our country, goes against the concept of welfare society. Globalisation, which would be an inevitable result of the policy of liberalisation, to put simply is about investment, production and trade primarily and their mobility across the globe. It is about the free and untrammelled mobility of these without regulatory controls by the state and restrictions for whatever reason including imperatives of a nation's development and priorities or concerns of human welfare.⁴⁴ As of principle, MNCs are private organisations in the world production with the primary objective of profit maximization and they cannot be expected to function on considerations which are less or non-profitable. Since they are in private business none should live under any illusion that their operations would ever be directed for the welfare of humanity at large or that they are the instruments of development.⁴⁵ The policy of Globalization of insurance sector has attendant risks of monopoly and lopsided development. Since private investments are promoted by profit motive, the economic benefits may not reach the intended masses. The legislations which nationalized insurance business in our country, did so in public interest and to ensure that the operation of economic system does not result in the concentration of wealth to the common detriment, as is evident from their preambles. This clearly signifies that in the pre-nationalisation era, the insurance companies in our country were carrying on their activity which resulted in jamming of precious national wealth in the hands of a few private profit seekers and the interest of the community at large was not taken note of. This was the inevitable consequence considering the true nature of an economy totally functioning under the influence of market forces. But, did these private entrepreneurs all of a sudden have changed their basic characteristics so as to shun the idealism of profit making. The answer is an obvious no. Then why such a policy which is against the welfare of the majority. The obvious defence which is given in favour of the policy of liberalization of insurance sector is that it will

shall be inserted, namely: (1) In the preamble to this Constitution- (2) the expression "Republic" as qualified by the expression 'SOCIALIST' means a republic in which there is freedom from all forms of exploitation, social, political and economic".

⁴¹ The Concise Oxford Dictionary, 1087 (1975).

⁴² See, D.S. Nakara v. UOI, AIR 1983 SC 130 (Paras 33-34); Minerva Mills v. UOI, AIR 1980 SC 1789 (Para 62).

⁴³ Samatha v. State of A.P., (1997) 8 SCC 191 (Para 79).

⁴⁴ N.M. Sundaram, Global Finance Capital on Rampage, 2 (2002).

⁴⁵ Devendra Thakur, Globalisation and International Business, 37 (1995).

lead to a greater variety in policies and wider and deeper coverage due to increased number of players in the insurance sector. But the basic standard of living and per-capital will remain the same and will not grow suddenly due to the liberalization of the insurance sector. Till the opening up of the sector the GIC and the LIC served the rural and the social sector. But with the coming in of private global players with profit motive, this sector is going to be very low on the priority list of the private insurance companies, as they do not have as high a profit potential as the urban sector and also require the investment of an exorbitant amount for distribution networks, market know-how and staff. Thus, it is submitted that the new 1999 Act which liberalizes the insurance business in order "to promote and ensure orderly growth of the insurance industry" adopt a classification and a scheme which is ultimately bound to go against the concept of welfare society and equal facilities to all the people which form the life line of the constitutional ideal of a "Socialist" Republic, and thus is unconstitutional on the face of it, as per the judicial rulings of the Apex Court as the guardian of our constitutional polity, discussed above.

GLOBALISATION OF INSURANCE SECTOR AND FUNDAMENTAL GUARANTEES OF THE INDIAN CONSTITUTION

"In enacting fundamental rights in Part III of our Constitution, the founding fathers showed that they had the will, and were ready to adopt the means, to confer legally enforceable fundamental rights"⁴⁶. In *A.K. Gopalan v. State of Madras*⁴⁷, **Patanjali Sastri, J.** said that the people of India in delegating to the legislature, the executive and the judiciary their respective powers reserved to themselves certain fundamental rights, so called because they had been retained by the people and made paramount to the delegated powers⁴⁸. But against whom were the fundamental rights to be enforced? Broadly speaking, against "the state", not as ordinarily understood but as widely defined by Article 12 of our constitution to include "the Government and the Parliament of India and the Government and the legislature of each of the state and all local or other authorities within the territory of India or under the control of the Government of India". By defining "the state " very widely, the founding fathers ensured that fundamental rights operated over the widest field. The expression "other authorities" appearing in Article 12 again has a wide connotation in wake of liberal judicial interpretation being afforded to the same. It has been held that every type of public authority, exercising statutory powers, whether such powers are Governmental, quasi-Government or non-Government⁴⁹, and whether such authority is under the control of the Government or not⁵⁰, and even though it may be engaged in carrying on some activity in the nature of trade or commerce like a public corporation⁵¹, and an Authority setup under a statute for the purpose of administering a law enacted by the legislature, including those vested with the duty to make decisions in order to implement them⁵², do get included within "other Authorities" in Article 12 and consequently are "State" within the meaning of that provision. But a non-statutory body, exercising

⁴⁶ H.M. Seervai, *Constitutional Law of India*, vol. 1, 349 (1991).

⁴⁷ (1950) SCR 88.

⁴⁸ At P. 198.

⁴⁹ *Rajasthan S.E.B. v. Mohanlal*, AIR 1967 SC 1857 at P. 1861-63; *Railway Board v. Observer Publication*, AIR 1972 SC 1792 at P. 1800; *Bidi Supply Co. v. UOI*, AIR 1956 SC 267 at P. 277.

⁵⁰ *Ramamurthy v. Chief Commr., Pandicherry*, AIR 1963 SC 1464.

⁵¹ *D.T.C. v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101 (Para 199).

⁵² *Sabhajit Tewari v. UOI*, AIR 1975 SC 1329; *Mysore S.R.T.C. v. Devraj*, AIR 1976 SC 1027 (Para 14); *Premji Bhai v. D.D.A.*, AIR 1980 SC 738 (Paras 8-9); *Ujjam v. UP*, (1963) 1 SCR 778 at P. 969; *Masthan Sahib v. Chief Commr., Pandicherry*, AIR 1963 SC 533.

no statutory powers⁵³, is not state, like, a company⁵⁴, and private bodies, having no statutory powers⁵⁵, not being supported by a state Act⁵⁶.

In determining whether a corporation or a Government company⁵⁷ is 'State', the volume of financial assistance received from the state⁵⁸, quantum of state control and the statutory duties imposed upon the same play a decisive role⁵⁹. It is submitted that applying the various tests laid down in a series of judicial pronouncements, mentioned above, as regards the cases in which a particular public corporation or a Government Company can be called a "State" within the meaning of Article 12 of the Constitution, both the Life Insurance corporation constituted under section 3 of The Life Insurance corporation Act, 1956 and The General Insurance Corporation constituted under Section 9 of the General Insurance Business. (Nationalisation) Act, 1972 as a Government company, are "State" within the meaning of Article 12. In *Sukhdev v. Bhagat Ram*⁶⁰, the Supreme Court considered its earlier decisions on the meaning of the word "authorities" in Article 12. One of the questions which arose in this case was whether the life Insurance corporation was "State" under Article 12. A.N. Ray, C.J. delivered the majority judgment for himself, Chandarchud and Gupta, JJ. It was contended on behalf of the state that regulations made under a statute affecting matters of internal management do not have a statutory binding character⁶¹, and that LIC is not "other authority" within the meaning of Article 12. Ray, C.J. rejected these contentions. He held that Rules and Regulations made in exercise of statutory authority were subordinate delegated legislation, which if validly made, had the full force and effect of Law. It was further held that these regulations are only binding on the authorities but on the public as well⁶². As so whether LIC was "other authority", Ray, C.J. adopted the test laid down by the Majority in *Rajasthan State Electricity Board v. Mohan Lal*⁶³.

"A statutory authority would be within the meaning of 'other authorities' if it has been invested with statutory power to issue binding directions to the parties, the disobedience of which would entail penal consequences or it has the sovereign power to make rules and regulations having the force of law."⁶⁴

Concluding, it was held that the rules and regulations formed by the LIC have the force of law and that it is a 'authority' within the meaning of Article 12⁶⁵. Mathew, J. in a concurring Judgment, adopted a new line of approach. He held that:

⁵³ *Devdas v. K.E. College*, AIR 1964 Raj. 6 at P. 11.

⁵⁴ *S.K. Mukherjee v. Chemicals Allied Products*, AIR 1962 Cal. 10 at P. 12.

⁵⁵ *Naresh Shridhar v. State of Maharashtra*, AIR 1967 SC 1 at P. 11; *Parbhani T.C.S. v. R.T.*, AIR 1960 SC 801; *Tekraj Vasandi v. UOI*, AIR 1988 SC 469.

⁵⁶ *Kochunni v. State of Madras*, AIR 1959 SC 725 at P. 730.

⁵⁷ *Central Inland Water Corpn., v. Brojo Nath Ganguly*, AIR 1986 SC 1571 (Paras 23, 24, 69); *Bhandari v. ITDC*, (1986) 4 SCC 337 (Para 3).

⁵⁸ *Manmohan v. Commr., UT Chandigarh*, AIR 1985 SC 364 (Para 8); *Workmen Food Corpn. v. FCI*, AIR 1985 SC 670 (Paras 16-17); *Ganpati National Middle School v. Durai Kannan*, (1996) 6 SCC 464 (Para 2).

⁵⁹ *Ajay Hasia v. Khalid Muhib*, AIR 1981 SC 487 at P. 496; *LIC v. Escorts*, AIR 1986 SC 1370 (Para 100); *Gujrat SFC v. Lotus hotels*, AIR 1983 SC 848 (Para 8); *Kalra v. P&E Corpn.*, AIR 1984 SC 1361 (Para 15).

⁶⁰ AIR 1975 SC 1331.

⁶¹ At P. 1336.

⁶² At P. 1338.

⁶³ AIR 1967 SC 1857.

⁶⁴ At P. 1880.

"...Whether despite the fact that there are no provisions for issuing binding directions to third parties the disobedience of which would entrain penal consequences, the corporations setup under statutes to carry on business of public importance or which is fundamental to the life of the people can be considered as 'state within the meaning of Article 12.'"⁶⁶

Mathew. J. observed that a state is an abstract entity and it can only act through the instrumentality or agency of natural or juridical persons and therefore, there is nothing strange in the notion of the state acting through a corporation and making it an agency or instrumentality of the state.⁶⁷ It was further held that our constitution has been framed on the basis that limitations should exist on the exercise of power by the state, and therefore the constitution should be so interpreted that the governing power, wherever located, must be subjected to fundamental constitutional limitations. Learned Judge further opined that a public corporation being the creation of the state, is subject to the same constitutional limitations as the state itself.⁶⁸ But when can a corporation be looked upon as an agency of the state for subjecting it to Constitutional limitation? To this, Mathew, J. observed that a finding of state financial support plus an unusual degree of control over management and policies might lead to characterising the acts of the corporation as state action. Also the combination of state assistance with assigning important public functions to the corporation might lead to the conclusion that the corporation should be classified as a state agency.⁶⁹ It was further observed that a state may help a corporation otherwise than by finance assistance, like, by granting it the power of eminent domain, or by creation a monopoly in its favour or by granting it tax exemptions.⁷⁰ Applying these tests, Mathew, J. held that the LIC is an agency or instrumentality of the state and thus the state within the meaning of Article 12. It was held that as to the LIC, the Central Government had contributed the original capital of the corporation; part of the profits went to the Central Government; the Central Government exercised control over the policy of the corporation and the corporation carried on business of great public importance in which it held a monopoly.⁷¹ The line propounded by Mathew, J. has been adopted unanimously by the 5 judges in *Ajay Hasia's case*.⁷² It is submitted that applying the test in *Sukhdev's case* and various other cases discussed previously, GIC also falls within the scope of "other authorities" in Article 12 and thus is a "state". A number a constitutional implications flow from such a conclusion:

1. In *Central Inland Water Transport Corpn. v. Tarun Sengupta*⁷³, the Supreme Court has held that as the definition of "the state" in Article 12 is for the purposes of both Part III and Part IV of the Constitution, state actions, including actions of the instrumentalities and agencies of the state, must not only be in conformity with the Fundamental Rights guaranteed by Part-III, but must also be in accordance with the Directive Principles of state policy prescribed by Part IV of the Constitution. The

⁶⁵ Supra note 68, at P. 1348.

⁶⁶ At P. 1349.

⁶⁷ At P. 1350.

⁶⁸ At P. 1351.

⁶⁹ At P. 1354.

⁷⁰ At P. 1354-1356.

⁷¹ At P. 1356.

⁷² AIR 1979 SC 1628.

⁷³ (1986) II LLJ 171 at P. 216.

same applies to LIC and GIC but there is no such Constitutional prescription in case of private players entering the field of insurance business in wake of liberalisation and resultant globalisation of this sector.

2. Mathew, J. in Sukhdev's case⁷⁴ has observed that under Article 13(2) it is state action of a particular kind that is prohibited and individual invasion of individual rights is not generally speaking⁷⁵ covered by the said provision. Since the rights mentioned in Part III are guarantees against "the state" only, a writ under Article 32 and 226 of the Constitution will lie only in cases where "the state" violates a particular fundamental right and in case of such rights being invaded by private individuals or companies, the person aggrieved must seek his remedies under the general law.⁷⁶

3. The provisions of Article 14 of the Constitution imposes an obligation to act reasonably on all the organs of the State. It has been held in *LIC v. Consumer Education and Research Centre*⁷⁷ that in the sphere of contractual relations, the state, its instrumentalities, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined in a manner that is fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purposes of public good and in general public interest and it must not taken any irrelevant or irrational factors into consideration or appear Arbitrary in its decision.⁷⁸ It was further held that since insurance is a contract and LIC is "state", the same applies to it also. It was further held by the Allahabad High Court in *Shree Devi v. LIC*⁷⁹ that since LIC has been held to be an authority such as to be regarded the "state" within the meaning of Article 12, Article 14 of the Constitution applies to it, as to the state itself and thus, the corporation owes a duty to the public not to discriminate between man and man and to act fairly and reasonably in all its dealings with them. No Such requirement of reasonableness is necessary in cases of private action.⁸⁰

4. In effect, The Insurance Regulatory and Development Authority Act, 1999, which liberalised the insurance business in our country, creates two totally different classes in the same field, viz. Insurance Sector, as is evident from the discussion above. In *Chiranjit Lal Chawdhury v. UOI*⁸¹, it has been held that the principle underlying Article 14 is that there should be no discrimination between one person and another if as regards the subject matter of the legislation their position is the same. In other words, the scheme of the Act must not be arbitrary but must be based on some valid principles which itself must not be irrational or discriminatory.⁸² Thus, it is submitted that the new law on the face of it goes against the spirit of Article 14 of the Constitution.

⁷⁴ Supra note 68, at P. 1351.

⁷⁵ Exceptions being Articles 17, 23 and 24 which are by their very nature capable of being violated by private individuals also.

⁷⁶ *Samdasani v. Central Bank*, AIR 1952 SC 58; *Vidya v. Shivnarain*, 1956 (2) SCR 108.

⁷⁷ (1995) 5 SCC 482.

⁷⁸ At para 27.

⁷⁹ 1979 All LJ 602.

⁸⁰ At P. 607.

⁸¹ 1950 CR 869.

⁸² See, *R.D. Shetty v. IAAI*, AIR 1979 SC 1628 (Para 11); *Kasturilal v. State of J&K*, AIR 1980 SC 1992 (Para 14).

5. It has been held in *Saghir Ahmed v. State of UP*⁸³ that what is enjoined by Article 14 of Constitution is that "the state" shall not, by its acts, discriminate as between two individuals who are similarly circumstanced. It was further held that the same has no application to any possible discrimination in favour of state itself when the state enters into some transaction or business which is open to private individuals. This may result in an advantageous situation for both LIC and GIC over private individual in certain cases.

6. The Supreme Court in *Basudeo Tiwary v. Sidokanhu University*⁸⁴ has held that once it is acknowledged that non-arbitrariness is an ingredient of Article 14 of the Constitution pervading the entire realm of state action governed by Article 14, it has come to be established, as a further corollary, that the rules of Natural Justice are also the requirement of Article 14, for, natural justice is antithesis of arbitrariness.⁸⁵ No such requirement of natural justice exist in cases of individual actions.

7. Article 15(1) of the Constitution provides that "the state" shall not discriminate against any citizen on ground only of religion, race, caste, sex, place of birth or any of them. The exception to this general provision is carved out in clause 4 of that Article which provides that nothing in Article 15 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribe. Nine-judge bench of the Supreme Court in *Indira Sawheny v. UOI*⁸⁶ has held that the object of clause 4 of Article 15 is to make it constitutional for "the state" to reserve seats for backward classes of citizens and scheduled castes and scheduled tribes in public institutions⁸⁷, to bring Article 15 in line with Article 16 (4) of the Constitution. Article 16(4) provides that nothing in Article 16 shall prevent "the state" from making any provisions for the reservation of appointments or posts in favour of any backward classes of citizens which, in the opinion of "the state", is not adequately represented in the service under "the state" and Article 16 (4A) which was inserted by The Constitution (77th Amendment) Act, 1995, further provides that nothing in Article 16 shall prevent "the state" from making any provision for reservation in matters of promotion to any class or classes of posts in the services⁸⁸ under "the state" in favour of the scheduled castes and the scheduled tribes which, in the opinion of "the state", are not adequately represented in the services under "the state".⁸⁹ It has been held that the appearance of the word "provision" in Article 16(4), as distinguished from the word "Law" in clause (3) of that Article, means that the reservation under clause (4) may be made not only by statute but also by an executive orders. It was further held that the expression "any provision" is wide enough to include not only reservation but other supplemental and ancillary provisions, such as exemptions, concessions, which are necessary for the upliftment of backward classes.⁹⁰ In *PGI v. K.L. Narasimhan*⁹¹ Supreme Court has held that all

⁸³ AIR 1954 SC 728.

⁸⁴ (1998) 8 SCC 194.

⁸⁵ At Para 9; See also, *D.T.C. v. D.T.C. Mazdoor Union*, AIR 1991 SC 101 (Paras 262, 264 and 267).

⁸⁶ AIR 1993 SC 477; See also *Ajay v. State of Bihar*, (1994) 4 SCC 401.

⁸⁷ *Sudarsan v. State of AP.*, AIR 1958 AP 569.

⁸⁸ The expression "services under the state" has been judicially interpreted to cover all posts under the state, permanent or temporary and any public employment under the 'state'; see, *Chimanlal v. UOI*, AIR 1964 SC 1854 at P. 1860; *State of Maharashtra v. Chandrabhan*, AIR 1983 SC 803 (Paras 2 and 19).

⁸⁹ It was held in *Narsimhan v. State of AP*, AIR 1970 SC 422 that "state" in Article 16 (4) and (4A) means the state in the extended sense as defined in Article 12 of the Constitution.

⁹⁰ *Indira Sawheny v. UOI*, AIR 1993 SC 477 (Paras 55-56).

administrative and "other authorities" are under an obligation to scrupulously implement the policy of reservation.⁹² The condition as regards Scheduled Castes and Scheduled Tribes is the same by virtue of various judicial decisions⁹³ which recognised this position before Article 16(4) was enacted. Thus LIC and GIC being "the state" within the meaning of Article 12 of the Constitution, they are equally governed by the mandate of the Constitution as regards reservations. But there is no such obligation on the private sector which is outside the purview of this constitutional requirement.⁹⁴

8. A very important component of economic constitutionality is the constitutional settlement of the basic economic and social rights of the citizens. These basic rights should be based on guarantee of social security, the improvement of equality of opportunity and the principles of social justice.⁹⁵ Among these rights, the right to work, the right to social security, to leisure, the right to strike, and further more the right to establish organisations for representing interests are of particular importance. It is very likely that with the privatisation of the insurance sector, the marginalized sections of society may not be able to enjoy their basic human rights because of the on slaught of this global phenomenon. Further more, it would become difficult to ensure "social justice", which as a fundamental right⁹⁶ forms the conscience of our Constitution, in its varied colors as mentioned above.

9. Article 19 of the Indian Constitution deals with "Right to Freedom". Clause (1), sub-clause (g) therein provides that All citizens shall have the right to practice any profession, or to carry on any occupation, trade or business. It is worth noting that this right is only available to a citizen and any person who is not a citizen of India cannot claim the right conferred by Article 19(1)(g) of the Constitution.⁹⁷ There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential for the welfare of the community. For the very protection of the liberties the society must arm itself with certain powers.

⁹¹ (1997) 6 SCC 283.

⁹² At Para 16; Thus in Indira Sawheny's case it was observed that Article 16(4) enjoins the state to take positive action to alleviate inequality or, in other words, it confers power coupled with duty; Supra note 98, Paras 366 and 370.

⁹³ See, Chitalekha v. State of Mysore, AIR 1976 SC 490; S.S. Sharma v. UOI, AIR 1981 SC 588.

⁹⁴ See, Rajesh Ramchandran et.al., "Disinvestment will End reservation"; The Times of India, January 5, 2001; Carlos A. Austin, "Needs for a constitutional Requirement of Equal Opportunity in Employment in Private Corporations: An Indian Perspective", XIX DLR 38 (1997); Thus, it is submitted that with the liberalisation and resultant globalisation of the insurance sector, only LIC and GIC would be legally compelled to afford reservations in jobs as per the Constitutional mandate without any such obligation on the majority of other players in the same filed.

⁹⁵ Thus, in Sadhuram Bansal v. Behari Sarkar, AIR 1984 SC 1471, the expression "social justice" was held to include within its guarantee the principles mentioned in Articles 15(4), 16(4), 19(1), 38, 39, 41, 46, 14, 15, 16, 17, 18, 275, 330, 35; at Paras 29, 70 and 73; see also Indira Sawheny v. UOI, AIR 1993 SC 477, at Para 4.

⁹⁶ In CESC Ltd. v. Subhash Chandra, AIR 1992 SC 573 it was observed : "The right to social justice is a fundamental right. The aim of fundamental rights is to create an egalitarian society to free all citizens from coercion or restriction by society and to make liberty available to all. Right to human dignity, development of personality mean nothing more than the status without means. Our Constitution in the Preamble and Part -IV reinforces them compendiously as socio-economic justice, which thus is a fundamental right"; At PP. 584-85; see also CERC v. UOI, (1995) 5 SCC 42; Air India Statutory Corp. v. United Labour Union, (1997) 9 SCC 377; Dalmia Cement v. UOI, (1996) 10 SCC 104.

⁹⁷ See, Hans Muller v. Supdt., Presiding Jail Calcutta, AIR 1955 SC 367.

Thus observed the Supreme Court in *Chairman, Railway Board v. Chandrima Das*.⁹⁸

“No Fundamental right under part III of the Constitution is absolute and it is to be within permissible reasonable restrictions. Hence, every individual right has to give way to the of public at large. The primacy of the interest of the nation...must be read into every Article dealing with fundamental rights.”⁹⁹

What our constitution, therefore, attempts to do in declaring the restrictions upon the rights of the people is to strike a balance between individual liberty and social control . Clause 6 of Article 19 provides for such restrictions on the rights conferred by clause 1(g) of that Article. It provides that nothing in sub clause (g) of Article 19(1) shall affect the operation of any law so far as it imposes, or prevent the state from making any law imposing, in the interest of the general public, reasonable restrictions on the exercise of the right conferred by the said clause, and, in particular, nothing in the said sub-clause shall effect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to:

1. The professional of technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or [Article 19(6)(i)]; and
2. The carrying of by the state, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise [Article 19(6)(ii)].¹⁰⁰

In *Ebrahim Sulaiman Sati v. M.C. Mohammed*¹⁰¹, it has been held be the Supreme Court that where a right is created by a statute it can be taken away by the legislature, but when a right is 'fundamental' it cannot be taken away by the legislature and can be subjected to such restrictions only as are permitted by the constitution itself.¹⁰² It is submitted that the globalisation of insurance business in India would lead to a situation where two players having radically different situation in the eyes of law would operate in the same field . As Article 19(1) (g) is available only to citizens, the right to carry on trade etc, of India citizens is protected by the said provision, subject only to restrictions laid down in clause 6 of Article 19, which has to be reasonable and in the interest of the general public in terms of that clause.¹⁰³ But since non-citizens do not enjoy any fundamental right to trade etc., no condition of reasonableness need be satisfied if "the state" wants to restrict right to trade etc. of that class of persons. It has been held in *P.P. Enterprises v. U.O.I.*¹⁰⁴, that the expression "reasonable restrictions" seeks to strike a balance between

⁹⁸ (2000) 2 SCC 465.

⁹⁹ At Para 35; see also, *State of Punjab v. Ram Lubhaya Bagga*, (1998) 4 SCC 117; *Collector of Customs, Madras v. Sampathu Chetty*, AIR 1962 SC 316 at P. 333. *K.K. Kochuni v. State of Madras*, 1960 SC 1080 at P. 1099; *A.K. Gopalan v. State of Madras*, 1950 SCR 88 at PP. 253-54; *Divisional Forest Officer v. Bishwanath Tea Co.*, AIR 1981 SC 1368 at P. 1388.

¹⁰⁰ The Supreme Court in *Akadasi v. State of Orissa*, (1963) Supp. (2) SCR 691 has held that clause 6(ii) of Article 19 is an illustration of reasonable restrictions imposed in the interest of general public under clause 6.

¹⁰¹ AIR 1980 SC 354.

¹⁰² At P. 357; see also, *Pannalal Binjraj v. UOI*, 1957 SCR 233 at P. 261.

¹⁰³ Supra note 108, at P. 706.

¹⁰⁴ AIR 1982 SC 1016.

the freedom guaranteed by Article 19(1)(g) and the social control permitted by clause (6) of Article 19. It was held to connote that the limitation imposed on a person in the enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public¹⁰⁵. It flows that in case of non-citizens no such requirement need be satisfied as a necessary collary of "reasonableness" under Article 19 (6).

Article 301 of the Constitution provides that trade, commerce and intercourse throughout the territory of India shall be free. The Supreme Court in *Automobile Transport Ltd. v. State of Rajasthan*¹⁰⁶ has held that Article 19(1)(g) confers a fundamental right, Article 301 confers a justiciable right but it is not fundamental and it extends to all individuals unlike Article 19(1)(g) which extends only to citizens.¹⁰⁷ The result which flows from this distinction is that a citizen can either approach the Supreme Court or High Court under Article 32 to 226 or can seek a remedy under the general law for the violation of his right to trade etc. as he enjoys this right at two places in the Constitution, both under Article 19(1)(g) and Article 301. But a non-citizen can only take recourse of the general law as he enjoys this right only under Article 301 of the Constitution.

Thus, it flows from the above discussion that only "state" can impose restrictions under clause (6) of Article 19 on the freedom guaranteed by clause (1) of that Article. And till the state decides not impose any restrictions the citizens continue to enjoy the freedom. But once "the state" decides to impose a restriction under Article 19(6), it has to be tested on the touchstone of "Reasonableness" which forms a fundamental part of that provision. No such requirement is there in case "state" decides to impose restrictions upon a business carried and non-citizen. The same applies in case of citizens and non-citizens who would be carrying on insurance business after its liberalisation.

In *Raghubar Dayal v. UOI*¹⁰⁸, the Supreme Court has held that the right to carry on business or to hold property and to enter into contract which are fundamental to right to trade etc. guaranteed under Article 19(1)(g), are also fundamental.¹⁰⁹ Thus these rights which flow from the fundamental right under Article 19(1)(g) are only available to citizens carrying on insurance business, in this context, and not to non-citizens in the same field.

Thus, from the discussion in this part, it becomes amply clear that the Liberalisation and resultant Privatization and Globalisation of the insurance sector in our country is going to have wide ranging constitutional implication in the context of our Supreme Law.

GLOBALISATION AND THE LIC AND GIB (NATIONALISATION) ACTS

The Life Insurance Corporation Act, 1956 which came into force on 1st July, 1956¹¹⁰ was:

¹⁰⁵ At para 8; see also, *Bennett Coleman v. UOI*, AIR 1973 SC 106; *Laxami Khandhari v. State of UP*, AIR 1981 SC 873; *Pathumma v. State of Kerala*, AIR 1978 SC 771; *Hanif Quareshi v. State of Bihar*, AIR 1958 SC 731.

¹⁰⁶ AIR 1962 SC 1406.

¹⁰⁷ At P. 1418; see also *Atilabari Tea Co. v. State of Assam*, (1961) 1 SCR 809

¹⁰⁸ AIR 1962 SC 263.

¹⁰⁹ At P. 274; see also, *State of Bihar v. Kameshwar*, AIR 1952 SC 252.

¹¹⁰ Vide Notification No. S.R.O. 1456, dated the 25th June, 1956; see *Gazette of India, Extraordinary, 1956, Part II, sec. 3, P. 1531.*

"An Act to provide for the nationalisation of life insurance business in India by transferring all such business to a corporation established for the purpose and to provide for the regulation and control of the business of the corporation...."¹¹¹

This Act was enacted to ensure absolute security to the policy-holder in the matter of his life insurance protection, to spread insurance much more widely and in particular to the rural areas, and as a further step in the direction of more effective mobilisation of public savings.¹¹² The constitutional validity of the LIC Act was upheld by the Mysore High Court in *V.T. Srinivasa Raghavachar v. State of Mysore*¹¹³ in the following words:

"The Life Insurance Corporation Act, 1956, is above the reproach of unconstitutionality".¹¹⁴

Section 3 of the Act provides for the establishment of the Life Insurance Corporation which shall be a body corporate having perpetual succession and a common seal with power, subject to the provisions of the Act, to acquire, hold and dispose of property, and may by its name sue and be sued. By virtue of section 5 the original capital of the corporation shall be five crore rupees provided by the Central Government. Under section 6 subject to the rules made by the Central Government in this behalf, it shall be the general duty of the Corporation to carry on life insurance business, whether in or outside India, and the corporation shall so exercise its powers under the Act as to secure that life insurance business is developed to the best advantage of the community.¹¹⁵ Section 17 provides for Constitution of Tribunals for the purpose of the Act by the Central Government and the tribunal shall have the powers of a civil court while trying a suit under The Code of Civil Procedure, 1908¹¹⁶ in respect of the following matters:

- a) summoning and enforcing the attendance of any person and examining him on oath;¹¹⁷
- b) requiring the discovery and production of documents;¹¹⁸
- c) receiving evidence on affidavits;¹¹⁹
- d) issuing commissions for the examination of witnesses or documents.¹²⁰

The section further provides that every tribunal shall have power to regulate its own procedure and decide all matters within its competence, and may review any of its decisions in the event of there being a mistake on the face of the record or correct any arithmetical or clerical error therein.¹²¹ By virtue of section 30 the corporation shall have the exclusive privilege of carrying on life insurance business in India.

¹¹¹ See, the preamble of the Act.

¹¹² Vide Statement of Objects and Reasons, published in the Gazette of India, Extraordinary, Part II, Sec. 2, No. 2, dated the 17th February, 1956.

¹¹³ AIR 1968 Mysore 71.

¹¹⁴ At P. 72.

¹¹⁵ Sub-section 2 of section 6 from clauses (a) to (i) lists various powers available to the corporation which are subject only to other provisions of this Act.

¹¹⁶ Act No. 5 of 1908.

¹¹⁷ Orders V, XVI and X of the C.P.C.

¹¹⁸ Order XI of the C.P.C.

¹¹⁹ Order XIX of the C.P.C.

¹²⁰ Section 75 and Order XXXVI of the CPC.

¹²¹ Section 41 of the LIC Act, 1956 provides that : "No civil court shall have jurisdiction to entertain or adjudicate upon any matter which a tribunal is empowered to decide or determine under this Act".

The Insurance Regulatory and Development Authority Act, 1999 which liberalised the Insurance Business in India provides for in section 31 that the LIC Act, 1956 shall be amended in the manner specified in the Second Schedule of the 1999 Act. Entry 2 of the Second Schedule provides that after section 30 of the LIC Act a new section 30 A shall be inserted which reads:

"Notwithstanding anything contained in this Act, the exclusive privilege of carrying on life insurance business in India by the corporation shall cease on and from the commencement of the Insurance Regulatory and Development Authority Act, 1999 and the corporation shall, thereafter carry on life insurance business in India in accordance with the provisions of the Insurance Act, 1938".

Section 28 of the 1999 act provides that the provisions of that Act shall be in addition to, and not in derogation of any other law for the time being in force. A conjoint reading of the 1956 and 1999 Acts gives useful insights into the legal implications as regards the LIC Act, 1956 which result from the liberalisation and resultant globalisation of the insurance sector in or country by the 1999 Act.

As section 31 of the 1999 Act only "amends" the LIC Act, 1956 in the manner listed out above, the logical conclusion which flows therefrom is that the LIC Act subject to the said amendment continues to be in force. Though the amendment provides that the Insurance Act, 1938 shall apply in the same manner to LIC and private players in the field of life insurance, but the LIC Act will continue to apply in cases envisaged by it in the arena of life insurance business being carried on by the LIC. Thus, in certain cases this situation may lead to the creation of an advantageous situation for the LIC. For example, section 17 read with section 41 of the LIC Act provides that no civil court shall have jurisdiction to entertain or adjudicate upon any matter which a tribunal is empowered to decide or determine under that Act, which now also would be tried by the said tribunal but as regards disputes etc. in case of private players, the ordinary course of law has to be adopted. Thus, private players may be devoid of the advantage of a speedy trial in a said case as may be provided by the tribunal in case involving the LIC.

Since the new Act of 1999 by virtue of section 31 read with Second Schedule of the Act abolishes the exclusive monopoly of the LIC to carry on life insurance business in India, the preamble¹²² and section 30 of the LIC Act becomes redundant. It is submitted that it would be better to delete these provisions rather than keeping such redundant and misleading provisions on the statute book. It would be advisable to change the Preamble of the LIC Act as follows:

"An Act to provide for the control of the business of the corporation established under this Act and for matters connected therewith or incidental thereto".

Under the LIC Act, the Central Government has been given wide ranging powers to control the activities of the LIC and to exercise authority over the same. Under section 4 of that Act the central government has been given the power to decide on the Constitution of the LIC . The original capital of the corporation had been provided by the central government in terms with section 5. Under Section 18 the central government has been given the power to determine the places at which the central and zonal

¹²² Except for the words "An Act... to provide for the regulation and control of the business of the corporation....".

offices of LIC are to situate. Section 21 provides that in the discharge of its functions under the LIC Act, the Corporation shall be guided by such directions in matters of policy involving public interest as the Central Government may give to it in writing and if any question arises whether a direction relates to a matter of policy involving public interest, the decision of the central government thereon shall be final. Under section 25(3) all the copies of the Audits of the corporation have to be submitted to the central government . Under section 26 the corporation shall, once at least in every two years, cause an investigation to be made by actuaries into the financial condition of the life insurance business of the corporation including a valuation of the liabilities of the corporation in respect thereto and submit the report of the actuaries to the central government. Under section 27 the corporation shall after the end of each financial year, prepare and submit to the central government a report giving an account of its activities during the previous financial year, and the report shall also give an account of the activities which are likely to be undertaken by the corporation in the next financial year. under section 28, if as a result of any investigation under section 26, any surplus emerges, ninety-five percent of the same or such higher percentage thereof as the central government may approve shall be allocated to or reserved for the life insurance policy-holders of the corporation and after meeting the liabilities of the corporation which may arise under section 9, the remainder shall be paid to the central government or, if the central government so directs, be utilised for such purposes and in such manner as the Central Government may determine. By virtue of section 28-A, if for any financial year profits accrue from any business, other than life insurance business, carried on by the corporation, then after making provision for reserves and other matters for which provision is necessary or expedient, the balance of such profits shall be paid to the central government. By virtue of section 29 the central government shall cause the reports under sections 25, 26 and 27 to be laid before both houses of parliament, after each such report is received the central government. Under section 48 the central government has been given power to make rules by issuing a notification in the official gazette to carry out the purposes of the Act . The situation will remain the same even after the coming into force of the 1999 Act and the central government would continue to exercise such great powers and control over the business of life insurance being carried on by the LIC in addition to control exercised by the Insurance Regulatory and Development Authority constituted under the 1999 Act, in terms of that Act and the amendments made by that Act in the Insurance act, 1938 which now applies to LIC also. Thus LIC is subject to dual control in matters of life insurance or other business carried on by it as opposed to single control over private players exercised by IRDA only.

Section 49 of the LIC Act, 1956 provides that the LIC may, with the previous approval or the Central Government, by notification in the Gazette of India, make regulations not inconsistent with that Act and the rules made there under, to provide for all matters for which provisions are expedient for the purposes of giving effect to the provisions of that Act. The regulations made or issued by the LIC, as held in Sukhdev's case discussed previously, are law as it is a "State" within the meaning of Article 12 of the Constitution and thus are binding on the Public. Thus, any regulation made by the LIC in exercise of the power conferred by section 49 of the LIC Act, 1956, must not go against Part III and Part IV of the Constitutions or else a writ under Article 132 or 226 of the Constitution will lie against such a regulation. This situation does not arise in case of private players as they do not have any such power to issue regulations.

Parliament may incorporate a corporation in one of the following ways:

- a) by a private or local Act;
- b) by a special or a public Act;
- c) under a general public Act, by registration in compliance with statutory requirements.

Incorporation of public utilities, such as canals, railways, transport, gas, water, electricity etc. enterprises is done by the first method; the incorporation of enterprises of national importance is done by the second method and such a corporation is known as a public corporation; and the third method is used to form business corporation in the private sector of business and this is done by the Registrar of companies by virtue of the power conferred on him through issuing a certificate of registration under the companies Act and such corporations are known as the registered companies. The LIC has been incorporated by the second method aforesaid.¹²³ The Characteristics of a Public Corporation have been described by Denning, L.J. in *Tomlin v. Hannaford*¹²⁴ thus:

"A public Corporation is a statutory corporation..... It has defined powers which it cannot exceed, and it is directed by a group of men whose duty it is to see that those powers are properly used. It may own property, carry on business, borrow and lend money, just as any other corporation may do, so long as it keeps within the bounds which parliament has set. But the significant difference in this corporation is that there are no shareholders to subscribe the capital or to have any voice in its affairs. The money which the corporation needs is not raised by the issue of shares, but by borrowing; and its borrowing is not secured by debentures but is guaranteed by the treasury. If it cannot repay, the loss falls on the consolidated fund, that is to say, on the tax payer. There are no shareholders to elect the directors or to fix their remuneration..... If it makes losses and be unable to pay its debts, its property is liable to execution, but it is not liable to be wound up at the suit of any creditor. The tax-payer would, no doubt, be expected to come to its rescue before the creditor stepped in. Indeed, the tax payer is the universal guarantor of the corporation".¹²⁵

All these Characteristics as regards LIC are well evident from the discussion of the provisions of the LIC Act, 1956 previously. But one very important provision deserves separate discussion. Section 37 of the LIC Act, 1956 provides that the sums assured by all policies issued by the LIC, the amounts assured by all policies issued by any insurer, the liabilities under which have vested in the LIC under that Act, and all bonuses declared in respect thereof, shall be guaranteed as to payment in cash by the Central Government. Thus, as Denning, L.J. has observed the consolidated fund of India or in other words the tax-payer himself becomes the guarantor of the policies issued by the corporation and in case the corporation fails to pay the said amount, the liability falls on the consolidated fund. But in case of private players operating in the insurance business, no such situation exists and if it is unable to pay the policy amount the creditor can file a suit for winding-up of that particular insurance company.

Section 43, sub-section (1) of the LIC Act, 1956 provides that sections 2, 2-B, 18, 26, 33, 38, 39, 41, 45, 46, 47-A, 50, 51, 52, 110-A, 110-B, 110-C, 119, 121, 122 and 123 of the Insurance Act, 1938 shall, so

¹²³ B.N. Banerjee, Law of Insurance, vol.2, 11 (1994).

¹²⁴ (1950) 1 KB 18.

¹²⁵ At P. 22; See also, Palmer, Company Law, 782 (1982).

far as may be, apply to the corporation as they apply to other insurer. Sub-section (2) provides that sections 2-D, 10, 11, 13, 14, 15, 20, 21, 22, 23, 25, 27-A, 28-A, 35, 36, 37, 40, 40-A, 40-B, 43, 44, 102 to 106, 107 to 110, 111, 113, 114 and 116-A of the Insurance Act, 1938 shall apply to the corporation by a notification to be made by the Central Government in the official gazette, as soon as may be after the commencement of that Act, subject to such conditions and modifications as may be specified in the notification. Bu virtue of sub section (3), the Central Government may by a notification in the official gazette, direct the all or any of the provisions of the Insurance Act other than those specified in sub-sections (1) or (2) shall apply to the corporation subject to such conditions and modifications as may be specified in the notification. Thus only selective provisions of the Insurance Act, 1938 were applicable to the LIC Act, 1956 before its amendment by section 31 read with the Second Schedule of the IRDA Act, 1999, which makes the entire Insurance Act, 1938 applicable in cases of life insurance business being carried on by the LIC. Thus, LIC now is governed by its own LIC Act and also by the Insurance Act, 1938 whereas private players are governed only by the Insurance Act. This becomes significant in the light of the changes brought to the Insurance Act, 1938 by the 1999 Act¹²⁶ wherein instead of the Central Government and controller as previously, the IRDA has been given wide ranging powers to regulate insurance business in our country read alongside the IRDA Act, 1999. Thus, LIC is subject to dual control whereas private players are subject to only single control seen plainly, as pointed out previously.

The Insurance Regulatory and Development Authority Act, 1999 is:

"An Act to provide for the establishment of an Authority to protect the interest of holders of insurance policies, to regulate, promote and ensure orderly growth of the insurance industry and for matters connected therewith or incidental thereto and further to amend the Insurance Act, 1938, the life Insurance Corporation Act, 1956 and the General Insurance Business (Nationalisation) Act, 1972".

Section 3 of the Act provides for the establishment and incorporation of an Authority for the purposes of that Act to be called "the Insurance Regulatory and Development Authority". Section 14 which lists the "Duties, powers and functions of the Authority" provides for in sub-section(1) that subject to the provisions of that Act and any other Law for the time being in force, the IRDA shall have the duty to regulate, promote and ensure orderly growth of the insurance business and re-insurance business. Sub-section (2) of section 14 lists out the functions and powers of IRDA. Under Section 15 the Central Government may make to the Authority grants for being utilised for the purposes of that Act. Section 26 provides that the IRDA, may by notification, make regulations consistent with that Act and the rules made thereunder by the Central Government in exercise of powers conferred on it by section 24 of that Act, to carry out the purposes of the Act and such regulation has to be laid before each house of Parliament as provided for under section 27. It is submitted that applying the test regarding "other authorities" to be included in the definition of "state" in Article 12 of the Constitution as discussed in Chapter-V previously to the provisions of the IRDA Act, 1999, the Insurance Regulatory and Development Authority constituted under that Act, is "state" within the meaning of Article 12 and thus the regulations issued by it has the power of "Law" under Article 13 of the Constitution. Thus in a given situation both LIC and IRDA, being state within the meaning of Article 12, have power to issue

¹²⁶ See, section 30 of The IRDA Act, 1999 read with The First Schedule thereof.

regulations having the power of law and it may so happen that the regulations issued by the two corporation may conflict in a particular case and both being "state", it is not clear as to the regulation issued by which of the two "authorities" should prevail, as, the 1999 Act by its preamble and section 31 read with the Second Schedule only "amends" the LIC Act.

The General Insurance Business (Nationalisation) Act, 1972 is:

"An Act to provide for the acquisition and transfer of shares of Indian insurance companies and undertakings of other existing insurers in order to serve better the needs of the economy by securing the development of general insurance business in the interest of the community and to ensure that the operation of the economic system does not result in the concentration of wealth to the common detriment, for the regulation and control of such business and for matters connected therewith or incidental thereto".

Section 2 declares that the Act is for giving effect to the policies of the state towards securing the principles specified in clause (c) of Article 39 of the Constitution. Explanation appended to this section provides that in this section "state" shall have the same meaning as in Article 12 of the Constitution. Section 9(1) provides for the formation of a government company by the Central Government in accordance with the provisions of The Companies Act, 1956 to be known as The General Insurance Corporation of India for the purpose of superintending, controlling and carrying on the business of general insurance. Sub-section (2) thereof provides that the authorised capital of the corporation shall be Rupees 250 Crore. Sub-section 3 provides that notwithstanding anything contained in The Companies Act, 1956 it shall not be necessary to add the word "Limited" as the last word of the name of the corporation. Under section 16, if the Central Government is of the opinion that for the more efficient carrying on of general insurance business it is necessary so to do, it may by notification frame one or more schemes providing for all or any of the matters listed in that section and by virtue of section 17, every scheme framed by the Central Government under section 16 shall be laid before each House of Parliament. Under section 17-A the Central Government has been given power to regulate the terms and conditions of service of officers and other employees of the GIC or any of the four acquiring companies. Section 18 lists out the functions of the corporation which includes the carrying on of any part of the general insurance business, aiding, assisting and advising the acquiring companies etc. Section 19 provides that subject to the rules made by the Central Government and to its memorandum and articles of association, it shall be the duty of every acquiring company to carry on general insurance business and each acquiring company shall so function under that Act as to secure that general insurance business is developed to the best advantage of the community. It further provides that in the discharge of any of its functions, each acquiring company shall act so far as may be on business principles and where any directions have been issued by the corporation, shall be guided by such directions. The section also gives the GIC and the four acquiring companies the power to enter into re-insurance contracts and treaties subject to the rules made by the Central Government in that behalf. Section 22 provides that the corporation (GIC) may at any time transfer any officer or employee from an acquiring company or the corporation to any other acquiring company or the corporation. Under Section 23 the corporation and every acquiring company shall, in the discharge of its functions, be guided by such directions in regard to matters of policy involving public interest as the Central Government may give. Under Section 24 the GIC and the four acquiring companies have been given the exclusive privilege of carrying on general

insurance business in India. By virtue of section 35, subject to such exceptions, restrictions and limitations as the Central Government may, by notification, specify in this behalf, The Insurance Act shall apply to or in relation to the corporation and every acquiring company as if the corporation or the acquiring company were an insurer carrying on general insurance business within the meaning of that Act. under section 39 the Central Government has been given the power to make rules by a notification, to carry out the provisions of that Act.

Section 32 of The Insurance Regulatory and Development Authority, Act 1999 provides that The General Insurance Business (Nationalisation) Act, 1972 shall be amended in the manner specified in the Third Schedule of the 1999 Act. The Third Schedule to that Act provides that after section 24 of the 1972 Act, a new Section 24 A shall be inserted which reads:

"Notwithstanding anything contained in this Act, the exclusive privilege of the corporation and the acquiring companies of carrying on general insurance business in India shall cease on and from the commencement of the Insurance Regulatory and development Authority Act, 1999 and the corporation and the acquiring companies shall, there after, carry on general insurance business in India in accordance with the provisions of the Insurance Act, 1938".

Thus, the 1999 Act only "amends" the 1972 Act as is clear from the preamble and section 32 read with the Third Schedule of that Act, and so provides section 28 of the 1999 Act that the provisions of that Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. A conjoint reading of the 1972 and 1999 Acts gives useful insights in to the legal implications, as regards the 1972 Act, as a result of the Liberalisation and resultant globalisation of the insurance sector in our country by the 1999 Act.

As already pointed out that applying the various tests regarding "other Authorities" in Article 12 of the Constitution as discussed in Chapter-V previously GIC falls within that category of "other Authorities" and consequently is "state" within the meaning of Article 12 of our Constitution. In addition, the Madras High Court in a series of case law¹²⁷ has held that having regard to special circumstances and statutory provisions like sections 24 and 32 of the 1972 Act¹²⁸, the four acquiring companies are "other authorities" within Article 12 of the Constitution. Thus, as regards the GIC and the four acquiring companies the same legal effects are bound to arise as in case of LIC as discussed in points (4) and (7) previously.

¹²⁷ See, K.G. Mathew v. Director, National Insurance co. Ltd., (1976) 1 Lab LJ 27; A.A. Nathan v. UI General Insurance Co. (1978) 1 Lab LJ 259; G.M.,UI General Insurance Co. v. A.A. Nathan, 1981 Lab IC 1076; See also Bholenath v. NIC Ltd., (1994) 79 Com. Cases 90 (Cal); Nanappa v. DG, Kottayam, AIR 1989 Ker 223; Officer Welfare Assn. v. Govt of T.N., (1990) 3 Com Cases 227 (Mad).

¹²⁸ Section 24 gives the GIC and the four acquiring companies the exclusive privilege of carrying on general insurance business in India and section 32 provides that every officer of the Central Government and every officer or other employee of the corporation and of any acquiring company shall be indemnified by the Central Government or the corporation or the acquiring company against all losses and expenses incurred by him in relation to the discharge of his duties under the 1972 Act. The Hon'ble court read section 32 in the light of chapter IX of IPC, 1860 (sections 161 to 171) which deals with offences by the public servants.

Section 24 of the 1972 Act which affords exclusive privilege and monopoly to GIC and the four acquiring companies to carry on general insurance business in India becomes redundant in wake of changes made by the 1999 Act under section 32 read with Third Schedule of that Act and accordingly it should be removed from the statute book.

A discussion of various statutory provisions of the 1972 Act as discussed previously¹²⁹ reveals that the Central Government has been given wide ranging powers to control the activities of GIC. Thus the same result is bound to follow as regards the GIC as in case of LIC discussed in point (3) previously. In addition, the four acquiring companies will now be amenable to triple, control by the Central Government, GIC and IRDA as compared to only single control by IRDA over private player in plain legal terms.

As the 1999 Act has given full application to the Insurance Act, 1938 the discretion given to the Central Government in cases of general insurance business being carried on by the GIC and the four acquiring companies under the 1972 Act, under section 35 of 1972 Act ceases to exist and consequently that provision becomes redundant and thus should be removed from the statute book.

The Punjab and Haryana High Court in *M.L. Nohria v. GIC*¹³⁰ has held that the earlier corporate nature of four zonal insurance companies remain wholly unimpaired even after the coming into force of the 1972 Act.

Thus as regards these four acquiring or zonal companies, they continue to be governed by The Companies Act, 1956 and after coming into force of the 1972 Act they are also governed by that Act. No such situation exist as regards private insurance companies who are only governed by the Companies Act.

The General Insurance Corporation as established under Section 9 of the 1972 Act is a "Government Company". Section 617 of The Companies Act, 1956 defines a "Government Company" as meaning:

"... any company in which not less than fifty one percent of the paid-up share capital is held by the Central Government, or by any state Government or Governments, or partly by the Central Government, and party by one or more state Governments, and includes a company which is a subsidiary of a Government company as thus defined".¹³¹

Section 619 (2) of the Companies Act¹³² provides that the auditors of a Government company shall be appointed or re-appointed by the Comptroller and Auditor- General of India. Sub-Section (3) there of provides that the comptrollers and Auditor-General of India shall have power:

¹²⁹ See, Sections 9, 16, 17, 17A, 19, 22, 23 and 39 of the General Insurance Business (Nationalisation) Act, 1972.

¹³⁰ AIR 1979 Punj & Har. 183 at P. 190.

¹³¹ Section 3 (h) of the General Insurance Business (Nationalisation) Act 1972 provides that "Government Company" means a Government company as defined in section 617 of the Companies Act.

¹³² By virtue of sub-section (1) of section 619 the provisions listed in sub-section (2), (3), (4) and (5) shall apply, notwithstanding any thing contained in section 224 to 233 of the Companies Act which deals with "Audit".

a) to direct the manner in which the company's accounts shall be audited by the auditor appointed in pursuance of sub-section(2) and to give such auditor instructions in regard to any matter relating to the performance of has functions as such.

b) to conduct a supplementary or test audit of the company's account by such person or persons as he may authorise in this behalf; and for the purposes of such audit, to require information or additional information to be furnished to any person or persons so authorised, on such matters; by such person or persons, and in such form, as the comptroller and Auditor-General may, by general or special order, direct.

Sub-Section (4) provides that the auditor shall submit a copy of his audit report to the Comptroller and Auditor-General of India who shall have the right to comment upon, or supplement, the audit report in such manner as he may think fit. Section 619-A provides that the central or the State Government/s, as the case may be, shall cause an annual report on the working and affairs of that government company of which it is a member to be prepared and laid before each house of Parliament. By virtue of Section 620, the Central Government may, by notification in the official gazette, direct that any of the provisions of The Companies Act, 1956, others than sections 618, 619, and 619-A, specified in the notification :

- a) shall not apply to any government company.
- b) shall apply to any government company, only with such exceptions, modifications and adoptions as may be specified in the notification.

A study of these provisions suggest that as regards the matters specified in these sections, the Government Companies are governed by special provisions and as regards any other matter, The Companies Act, 1956 (now The Companies Act, 2013) will apply to the government companies in the same manner as any other private insurance company. There is no such dual treatment in case of private insurance companies as against GIC.

Also under section 620 of The Companies Act, 1956 (now The Companies Act, 2013), the Central Government has the power to decide the manner in which The Companies Act will apply to a Government Company. But in case of private companies, the Companies Act shall apply in total and any change in that Act has to be brought through an amendment by a law of Parliament.

The above mentioned were the legal implication of liberalisation and resultant globalisation of the insurance sector on the laws governing the field of insurance directly.

CONCLUSION

The Insurance Regulatory and Development Authority Act, 1999 came into force on 19th April, 2000.¹³³

Thus began a new journey in the field of insurance law, which our legal system now have to pursue as a consequence of the global phenomenon called "Globalisation". Our insurance sector market

¹³³ Gazette of India, Extraordinary, Part II section 3(ii), No. 277, dated April 11, 2000.

is now open for all- citizens, non-citizens- National Corporations, MNC's or private individuals who venture to enter this field satisfying the requirements of the Law - the exclusive monopoly of "the state" has been put to an end by the state itself.

A lot has been commented on the pro and cons of the process of Globalisation in general and its impact on the insurance sector in particular. But that all apart, the massive changes brought in the insurance sector in wake of the policy of globalisation has necessitated a fundamental shift in the thrust of our legal system itself - consequences - a wide ranging legal wrangle. The Constitution, the Supreme Law, is being defied. Constitutional and legal perspectives of the process are not taken account of. Nobody talks of socialism or social justice or at best of the Preamble which supposedly embody the "aspirations" and "vision" of the people and the Constitution makers. Part-IV - The Directive Principles have become a dead letter- directives which state now don't even consider while framing policies regarding governance of the country as it is mandated to do by Article 37 of the Constitution. What is the constitutional regulation of the economic role of the state ? - Nobody knows, not even the government. The legal and constitutional system is in a state of flux.

Law must change with the changing society. But such change should be for the better. There need be made a distinction between policy instruments and policy objectives. Globalisation, Marketisation and Privatization the three main pillars of the reform process, as they say, should be recognised as the instruments to achieve national interests and not as goals in themselves. We should recognise that the excessive fervour for policy instruments rather than for policy goals could force us to miss the woods for the trees. The current debate in our policy system has been over obsessed by the instruments of policy like Globalisation and Privatization, while the objectives of our Constitution, legal system and the polity itself are marginalised.

The practical interpretation of a particular philosophy for specific proper policy interventions, is a separate exercise in itself. But what is important is that the interpretations and their policy- corollaries must work in a rythm with the legal and constitutional set-up on whose touchstone they will ultimately be tested. True globalisation and liberalisation are the mantras of the day but a cohesion need be established between this mantra and the legal verses.