

Increase in Denationalization: A Harbinger of Economic Growth or a Call for the Need of Regulation

Mr. Vineet Gupta* and Mr. Yajush Tripathi**

Abstract

Denationalization is a phenomenon wherein, a transfer of an asset takes place from that of a public ownership, mostly held by the government of a country to the hands of a private entity. There was a shift in denationalization globally mainly of the entities owned by the Government, pertinently because once the entity becomes denationalized or privatised, then there are umpteen advantages that follow, viz-a-viz free choice to consumers, high-quality products, economic growth and disarmament of unbridled economic power and eventually which results into the economic development of the nation.

The authors through this paper have made an attempt to throw light upon unexplored aspects of denationalization, which are important to be dealt with. Lack of participation of employees of the organisation that is denationalized in the process of determination of whether that particular organisation shall be denationalized or not and the absence of a regulatory body or regulations in order to govern the process of denationalization are the aspects which this paper has dealt with extensively. The existing literature on denationalization does not discuss about these aspects and thereby, an extensive study regarding it was highly required, majorly in order to ensure the rights of employees and to keep a check on the uncontrolled power of the government to denationalize government entities.

According to the authors, the most appropriate way to assure that the above aspects/issues are dealt with is by mandating the government to consult employees of the organisation before denationalizing the organisation, as through that both the issues i.e., right of

* Legal associate at EY GDS, Noida, India.

** 4th year, Gujarat National Law University.

participation of employees in the process of denationalization and lack of regulatory framework for the process of denationalization would be solved. This is deemed to be the most appropriate method as the other alternative of establishing a regulatory framework would defeat the purpose of denationalization, as it would to a significant extent snatch away the discretion of the government to denationalize even for genuine and bonafide purposes.

Keywords: *Denationalization, Privatisation, Regulatory Framework, Rights of employees, Government*

Understanding Denationalization: An Introduction

Denationalization can be referred to as a process whereby the transfer of an asset is taken place from that of public ownership (specific ownership in the hands of a national government) to the hands of the Private entity or private ownership¹. This term is considered synonymous with privatization, but the term ‘privatization’ also includes the ownership held by a local or a provisional government. It can be said that “denationalization” might not be considered the most important description. As a fact, denationalization can occur when a government sells an occupied stake in a state-owned enterprise. This type of transaction is often seen in the sectors of energy, banking, telecommunication, transportation, etc. Denationalization can depend on the privatized firm and the industry in which that firm is currently operating. It is observed that politicians and the Government heavily influence the management of the end enterprises. This might lead to lax and corrupt management working for the enterprises. There are also many extra unnecessary hiring and retention of staff due to political aims and patronage. The firms might also be unwilling to dissolve any firm indulging in vast losses and would even be willing to run the company in debt since many people, jobs, and political motives are involved. A lot of people are also considered critics of denationalization. It is argued that denationalization often overlooks the well-being of society as a whole, and it leads to harmful effects to the environment and society, which private enterprises also overlook. The growth of government enterprise is also focused on inclusive growth within the society. For example, there is a quota system of hiring in Indian enterprises that increases diversity; many of these industries are constructed in remote locations of the country, expanding that region’s economy. Critics of privatization often give a strong argument that the essential sectors such as electricity, water, and schools should not be given in the hands of private players and be subjected to money-making and profit. In many states across the country, the liquor stores and essential commodities are sold by the government, and the profits are used for development purposes.

¹Investopedia.n.d. *Denationalization*. [online] Available at: <<https://www.investopedia.com/terms/d/denationalization.asp#:~:text=Denationalization%2C%20which%20is%20a%20form,owned%20firm%20to%20private%20investors.>> [Accessed 13 December 2021].

Why was there a shift to Denationalization?

Earlier with the advent of socialism and communism, many countries in the world had a state control mechanism for everything. But as time moved and after the fall of Communist countries, it was clear that too much state control is not convenient for a viable economy. Attributable to World War II also, people realized that too much state control could be uncondusive to a healthy economy. This led to many countries adopting a model whereby private companies play a significant role in the country's commerce and only be involved in critical industries. The 1991 reforms were a turning point for the Indian economy when the government decided to privatise government industries.

Choice of consumer and high-quality products

With the increase in privatization, there was an increase in the number of privately operated companies in India. This led to a wide variety of products available for the consumers to choose from. This process was very beneficial for the consumer. Also, the competition led to an increase in the quality of the products available to the consumer at a significantly lower cost.

Economic Growth

Denationalization of significant sectors in the economy led to an increasing number of private companies being less competitive with each other in that economy. This led to you being competitive in providing services and products to the consumer. These firms also recruited many new employees, which led to the rise in the people's standard of living.

The disarmament of economic power

With the increasing privatization and the Indian economy, the Monopoly that the government possessed before the advent of the private companies had gradually declined, leading to a power shift. Earlier, a lot of power was concentrated in the hands of a single entity, the government-controlled by some selected Elite class. This has interned help to propagate the aspirations of the marginalised and weaker sections of the economy.

Enhanced level of investments

With increasing privatization, there was also an increase and the equity market investment from the institutional as well as foreign investor private companies. Many foreign banks also started opening their branches in India, and they were not to provide loans to private companies, and their business flourished and the ever-expanding Indian market.

Regulatory Mechanism for Carrying Out Denationalization

This research study analyses thirty vibrant democracies globally regarding the effect that globalization and denationalization have had on them. Herein, it was stated that denationalization per se does not affect the core principles of democracy, i.e., freedom, equality and control. This, in a way, has a ripple effect and thereby it is noted that the lack of a regulatory framework for denationalization does not essentially thwart the principles of democracy. The reasons for the same have been developed based on a democracy barometer and thereby can be relied upon.²

Denationalization and parallelization are a process wherein the governments hold less than 50% ownership of shares or assets of an organization by giving it to a private-owned enterprise or set-up some of the claims. This process in developing countries such as India has a different trajectory than developed countries such as European countries. The regulatory framework for this procedure is not statutorily driven by many factors, i.e., regulated by many factors in developing countries such as India. In India, it is not rampant since it is not politically acceptable, attributable to the reason that the world bank has put India in a list of countries that have established state-owned enterprises to reaffirm nationalistic goals and thereby denationalization would thwart the world bank's stance and therefore was not supported and, in a way, regulated. Because of strong trade unions in India, denationalization would not be feasible and thereby is not pragmatic. At the state level in India, denationalization is fostered because certain governments there may have a goal of social welfare spending, which can be best facilitated by denationalization or privatization. It also stated that South-Asian countries have nodal or regulatory agencies for

² Lee Heyne, Globalization and democracy: Does Denationalization Affect the quality of democracy?, 229-252 (Springer & Cham 2018).

denationalization, but the same is not in India. Thus, parallelization shall be a precursor of denationalization. So that there could be effective denationalization, as sudden denationalization could create a kind of chaos in the organizational structure and functioning.³

As part of its plan of action, the current government has privatized and still are privatizing a lot of state-owned enterprises. According to the Ministry of Finance, except for the four strategic sectors, the Government would privatize all the public sector enterprises or close them. These strategic sectors include atomic energy, space and defence, transport and telecommunications, power, petroleum, coal and minerals, banking and insurance, and financial services. The existing government did this to better the functioning of the organizations. But this is criticized by the opposition and certain section of society on the grounds that it is for the progress of certain private individuals. Thus, there is no regulatory mechanism to prevent the government from denationalising as such in India, countering the opposition effectively and ensuring that it does not become arbitrary.⁴

This study deals with the privatisation or denationalization of Democracy in India. It essentially aims to research upon the issue of whether privatization or denationalization acts as a disadvantage for lower-class employees and serves only to elites or not. The history and background of privatization have been discussed, along with the present scenario of privatization reforms. It was concluded by describing whether privatization thwarts the ideals of democracy or not. The results of this study represent that privatization, to an extent, is healthy and is received well by people from various sections of the country. Still, when it is done in an unabated manner, there are opposition forces from multiple sections of people, such as local people, opposition, employees of the organization, etc. Though on the outset, there is no regulatory mechanism to control unabated privatisation. Still, in reality, actors such as local people the opposition do hold the capacity to control excessive privatization, this can be signified by observing the Plachimada case, wherein a small movement started by

³ A.J Goulding, retreating from the commanding heights: Privatization in an Indian Context, 50 *Journal of International Affairs* 581 581-612 (1997) <https://www.jstor.org/stable/24357634>.

⁴ Aditya Sharma, DW, <https://p.dw.com/p/43j3w>, (Last visited Feb. 20, 2022).

local tribal women led to national and international attention to their cause and succeeded in driving back one of the most influential multinational companies in the world.⁵

The privatisation process aligns with the provisions of the Indian Constitution or not is an issue that has not been discussed extensively, and that is the subject of this research study. Through its verdict, the people's commission on public sector and Services (PCPPS) has held that privatization or denationalization is an affront to the Indian Constitution. This was held so on the basis that the state has an onus to ensure that the distribution of ownership of assets or shares is in accordance with the common good, i.e., the congregation of economic power shall be prevented. This onus finds its basis in the provisions of directive principles of state policy, preamble and fundamental rights of the Constitution of India. This state duty gets hampered through privatisation as privatization is not a mere change of ownership of assets. Instead, denationalization/privatization transfers assets to those who already control and command a disproportionately large share of the nation's wealth.⁶

This report analyses one of the essential purposes of privatization which is deemed to ensure an effective corporate governance framework for State-owned enterprises. This report is based on the responses from respondents of 20 OECD countries. It describes objectives, laws, regulations, policies and other rules, employment conditions post-privatization, Administration frameworks and procedures of 20 countries mentioned above in a tabulated comparative analysis.⁷

This research study entails the role of regulatory agencies in the Brazilian Privatization process. It states that when denationalization involves enterprises in non-competitive markets- huge state-owned enterprises in subject areas such as power, water supply, telecommunications, etc., there should be a regulatory system for such denationalization.

⁵ Alka Sakat, Privitisation, democracy and state in India, Lauderdale, 3 3-19 (2007) https://www.fau.edu/spa/pdf/Privatization%20and%20Democracy%20in%20India_3-1-07.pdf.

⁶SurajitMazumdar, The Leaflet, Denationalization%205th%20article%20(2nd%20research%20question).html, (Last visted Dec. 16, 2021)

⁷ Secretary general of OECD (Name), Privitisation and the broadening of ownership of state-owned Enterprises, OECD 7 7-84 (2018) <https://www.theleaflet.in/privatisation-as-an-affront-to-the-indian-constitution-how-a-recent-peoples-report-shatters-several-myths-about-indias-neoliberal-state/>.

This regulatory system is needed since excessive state intervention exists in denationalized markets. This is also required for successful privatization, as that would separate potentially competitive activities, establish the tariff regime, clarify service goals, develop cost minimization targets, and create or strengthen an agency to supervise the process. The characteristics of the regulatory framework in Brazil are- 1) independence of the regulatory agency; (2) transparency and competition in the privatization process; (3) dynamic sale mechanisms; (4) adoption of adequate procedures to reach the desired targets; (5) continuously concerning within the investments to be accomplished; and (6) management of the collusion between regulator and firm.⁸

This paper explores a negative view on privatization, especially on the transfer of ownership from a public entity to a private entity, and suggests a tentative formula to effectuate the privatization efficiently, wherein problems are not created for the actors related to privatization. Herein, the purpose of privatization was also stated, 'Increased competitiveness'. The USA and UK's regulatory agencies regarding privatization have been discussed and compared. Significantly, in the area of telecommunications, regulatory agencies regulate privatization, and how they do it is discussed herein. Thus, regulation has been discussed mainly in two countries, i.e., the UK and the USA.⁹

This paper entails the establishment of a regulatory framework in the context of privatization in Australia. Through explaining the functioning of denationalization or deregulation of Australia, attempts to establish learning for developing countries such as India. The regulatory framework of Australia is as follows, incentive-based regulation of revenues or prices of natural monopolies; third-party access to infrastructure services to create opportunities for upstream and downstream competition; corporatization or privatization of government utilities so that resource utilization and service provision mimic outcomes in a competitive market; winding-up of territorial franchises; and jurisdictional review of legislation that restricts competition, subjecting it to a net public benefit test. According to

⁸ Isaac Benjoneto, The role of regulatory agencies in the Brazilian privatization process, IBI 1 1-26 (1996) <https://www2.gwu.edu/~ibi/minerva/Fall1996/isaac.benjo.neto.pdf>.

⁹ Tom Sharpe, Privatization, Regulation and Competition, 5 Fiscal Studies 47 48-60 (1984) <https://www.jstor.org/stable/24434584>.

these, the learnings for the developing countries are as follows-First, corporate restructuring is an essential feature of any structural adjustment undertaken by any government in the world. Secondly, it requires a firm but fair environment. It is crucial to reduce red tape, minimize processing time, and maintain transparency. Speed is of the essence; therefore, the Government must play a key role in facilitating the process. Thirdly, financial sector restructuring vehicles, such as asset management companies, must be effectively used as tools for corporate restructuring since they are likely to become significant creditors for many corporations and have considerable power, such as the threat of foreclosure.¹⁰

The paper herein states that privatization hampers democracy and is an affront to democratic principles. It says that massive privatization would dissuade polity as it would not allow the government or the polity to act on behalf of the people and give power to only a handful of people and thereby erode public responsibility. It explains privatization through an instrumental account and a non-instrumental account to explain the reasoning of the result that privatization erodes the principles of democracy.¹¹

Giving rights to employee participation rights in the decision of denationalization has been considered an effective way of regulation of denationalization. In this regard, there have been the following studies-

Employee participation in India is not a nascent concept. It has been in existence since the 1950s. There have been various government schemes to facilitate employee participation in organizations. Some projects have been successful, and some have failed in the past. In recent times, the government has successfully implemented the schemes, i.e., employee participation in organizations seems palpable. The significant reason for the same is HRM practices, which the organizations have inculcated. Most organizations have opted for this because of Globalization, and the subsequent need for change to meet the competition-driven organizational structure, i.e., organizations now need communication programs. To

¹⁰ Allan Asher, Establishment of a Regulatory Framework in which Developing Economies Can Consider Privatisation, 27 INT'L Bus. LAW. 505 505-507 (1999) 27Int'lBusLaw505.pdf.

¹¹ Alon Harel, Why Privatization Matters: The Democratic Case against Privatization, 60 NOMOS: AM. Soc'y POL. LEGAL PHIL. 52 52-78 (2019) <https://www.jstor.org/stable/26786102>.

effectively do that, employee participation is imperative. But this method also does not seem to effectively allow employees to participate in substantive decisions of the organization. In India, employee participation does exist, but in many forms, i.e., in both structured or traditional ways and unstructured or novel ways. The diversity can be gauged by observing the methods of employee participation in western India (Maharashtra) and eastern India (West Bengal). Both are Industrial-driven regions, with various industries and employee participation schemes. Observing these, it can be stated that there is employee participation in some or the other in these areas. Still, there is a challenge that can be faced in coming times that if the challenge for competition loses momentum owing to companies' success, then employee genuine participation would become redundant. Also, owing to privatization, employee participation could become redundant.¹²

The result of privatization on employees is substantial. The effect seems to be positive in general, along with some negative ones. This study analyses the impact of privatization on front-line employees of a water-supply service. The study results were that the level of training was improved after the privatization of the employees, their working conditions were improved, and in turn, they became empowered. But the privatization led to low motivation among employees, compared to when the water-supply service was not privatized. The employees now feel insecure about their job security. The reason for these feelings of the front-line employees is the apathetic attitude of the management on front-line employees' actions, i.e., Including success and failures. This study also states that there are no rewards for the employees for their performance. Thus, these were the significant changes in front-line employees' behaviour, functioning and the environment before and after privatization.¹³

This research study aims to find out the appropriate way to improve an organization between the methods of participation and welfare. It enlists the advantages of low-level participation

¹² Dr. Ratna Sen, Employee participation in India, 40 ILO (IERD) 8, 8-76 (2012), https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_187873.pdf.

¹³ FW Struwig & L van scheers, The Effect of Privatisation on Front Line employees in a service organisation, 7 SAJEMS NS 1 1-21 (2004), <https://sajems.org/index.php/sajems/article/download/1425/548>.

and high-level participation of employees. Through this study, it was observed that privatization decreases employee participation in organizations compared to government-controlled organisations. It was stated that employees' low-level participation negatively affects the organizations. The workers in this type of functioning feel that they are not listened to, thus making them less efficient as they cannot put genuine effort into the organisation. In contrast, a high level of employee participation at the outset seems reasonable. Still, it has its share of problems because the employees get dictated by their profit rather than the organization, in general, owing to their power. Also, this would most probably result in reduced competitiveness, as the management would not be able to authorize the employees freely. Thus, this study suggests that participation in a reasonable manner along with welfare measures (Such as equal opportunities and family-friendly policies) shall be the norm. This can be best done in the form of trade union presence and recognition, i.e., this approach combines participation with welfare. This research study also entails the issue of the dichotomy of Employee Participation and Company Performance. The result of this study signifies that employee participation through trade unions is a viable option to do both, i.e., to secure the rights of the employee to have a say in the organization and also to ensure that there is an authoritative position in the scheme of things so that the organizational structure remains intact. It also states that training is required for employees so that their participation helps themselves as well as the organization. Thus, this is the most efficient way of maintaining employee participation and organisation improvement dichotomy.¹⁴

This research study entails recent trends in employee financial participation in the European Union in the form of a report. It includes a comparative overview of the economic participation of employees in 10 countries of the European Union. It outlines a systematic overview of existing forms of employee financial participation, the reasons for its application, the preconditions for its existence and the impacts on the employment relationship. Particular emphasis has been laid upon special types of employees who share

¹⁴ Juliette Summers & Jeff Hyman, Employee Participation and Company Performance: A review of the literature, Joseph Rowntree Foundation 1 1-5 (2005) <https://www.jrf.org.uk/sites/default/files/jrf/migrated/files/1859352995.pdf>.

ownership and the relationship with the other three pillars of employee participation: direct participation, representative participation, and collective bargaining. This report stated that employees' financial and direct involvement is mainly found in the commercial sector.¹⁵

The debate around the financial participation of employees in European areas in profits or enterprises, either directly through profit sharing or indirectly through share-ownership, is a subject of this study. The results of the study state that all the actors, including member states, social partners, and enterprises, shall step up efforts of theirs to have employee participation at large in Europe since it is not at that level where it should be, and it can be spruced up only by valiant efforts of the actors above-mentioned.¹⁶

This research study essentially lays down the impact of denationalization on Employment from the perspective of NHS foundation trusts. This study integrates the few analyses conducted on the effects of Foundation Trusts and provides the first evaluation of its impact on hospitals' employment. FT status is characterized by features typical of privatization, denationalization, decentralization and participative decision making. It provides empirical evidence of these features' impact on employment outcomes, explicitly focusing on secondary healthcare providers. Alongwith these results, it presents a particular limitation of this study. Thereby becoming a research study, that deals with employee change after denationalization.¹⁷

Therefore, the literature on this issue does not directly and substantially address employees' right to participate in the denationalization process. Instead, majorly the literature is available on the effect of denationalization on employees, i.e., how does it help or hamper their prospects. It also deals with the subject of the changes experienced by the organisation's

¹⁵ Erik Poutsma, Recent Trends in Employee financial participation in the European Union, European Commission 11 11-124 (2001) <https://edz.bib.uni-mannheim.de/www-edz/pdf/ef/01/ef0112en.pdf>.

¹⁶ *Com/2002/0364final* /, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002DC0364:EN:HTML> (Last visited Feb. 19, 2022).

¹⁷ Federico Bruni, The impact of denationalization on employment: Evidence from NHS Foundation Trusts, LSE 2 2-50 (2014) https://www.academia.edu/35153751/The_impact_of_denationalization_on_employment_evidence_from_NHS_Foundation_Trusts.

employees after denationalization by comparing to the structure and functioning in the organisation before denationalization. But the only aspect which directly is not answered is whether there shall be a right of participation to employees in the process of denationalization and, if in affirmative, then in what manner these rights shall be exercised in India.

The literature discusses the regulatory framework to keep in check denationalization, but this mostly is regarding other countries apart from India. In the context of India, the literature only in one way or another discusses as to how privatization needs to be regulated since excessive use of it is a danger to democratic principles, but as to what is the regulatory framework and if there is a lack of it, the how it shall be developed, and issues such as these are not dealt in the literature.

Denationalization, how does it take place?

The process of denationalization can be carried out through changes in ownership, changes in the organisational structure or a difference in the way the organisation's operation takes place. Thus, we can say that changes can take place. Changes can occur by privatising ownership; there is the privatization of management of the whole and the prices privatized in substantive terms. The following can be methods that the government can adopt in the process of denationalization:

1. The government can create a corporation that is aimed to sell government stocks at a future time for a profit. An example of this method is the privatisation model adopted by British Petroleum.
2. Denationalization can also take place when a government sells its own company as a whole to a private entity. An example of this method can be the selling of Air India to Tata Airlines.
3. By Outsourcing work. A lot of work initially carried out by the government entity itself has now been outsourced to a private entity. An example of this can be seen in the case of construction projects of construction, catering, garbage collection, and station management, which have now been given to private entities.

4. Government can call for private funding for governmental construction.
5. Government can private companies do whatever they are till both execution of the construction work and investment required agreement. The private entity carries out the operation in this infrastructure for some time and subsequently transfers the ownership of this project back to the governmental hands.
6. The government can privatize by handing over licenses in the sectors which were earlier core sectors of the government: example- telecommunication and airlines.
7. By giving the projects in lease to the private entity for an extended period.
8. public-private-partnership.
9. By listing the stocks on the entity in the stock market
10. By selling the majority stake in the business entity or ultimately selling off the stake in the entity.

The Lack of Regulation

With the shift in privatization, there was a void created in the public law doctrines. When the government wholly owns an entity, the search entity is subject to the general law doctrines applicable to them because these companies are government-owned and require special protection from the constitution of India. Hence, the applicability of administrative law was deeply affected when the economic aspect of privatization became mainstream for the Indian economy. After the privatization and denationalization became mainstream, there was a lot of anxiety amongst the labourers, employees, and activists who were afraid that if there were an increase in privatization, their jobs would not be as secure as in the case of public institutions. An increased level of privatization also pauses not conducive to an inclusive society, environmental growth, and the development of the country's demographically and residentially backward areas. Private companies are more into profit-making and not much about the development aspect of the employees or the socio-economic environment around them. This led to many cases being filed in front of quotes seeking comprehensive guidelines for action that had earlier applied to these entities. It was seen that the public law did not provide a comprehensive analysis of denationalization. Many questions in the process of privatization races in the realm of public law needed to be addressed. Specific fundamental questions are raised by the process of denationalization, such as the limit of power on the

government to privatize an entity? Impact of denationalization and the applicability of public law to the administration of the new private entity?

In the case of *Balco Employees Union v. Union of India* (Balco Case)¹⁸, the Balco company Act employees challenged the process by which the government had disinvested the stakes in the company and the government's power to do so same. The employees also challenged the procedure to be followed by the government while giving decisions on the question of disinvestment. The case was brought before the Supreme Court of India. The supreme court held that the decision to disinvest and the policy related to its implementation could be categorized as a decision about the country's economic policy, and laborers cannot claim any right to be consulted. This right could not be claimed based on the principle of natural justice or by any other legal regulations. Employees are also not entitled to prior notice before the government takes up the decision of disinvestment.

Even in regard to a government servant who has protection under Articles 14, 16, and 311 of the Constitution of India would have no absolute right in regards to keeping up service when the government had decided to change the control of the Balco company from the government to the hands of a private entity. This is the sole discretion of the government and cannot be challenged by the company's employees.

The decision in the Balco case was paramount in increasing the administrative discretion which the government enjoys when it chooses to privatize or denationalize a government entity as this choice which the government enjoys is related to the selection and implementation of a policy that has a somewhat strong impact on the economic position of the country. Silent acceptance by the Honorable Supreme Court of India in regard to the disinvestment policies of the government is an indication that investment and denationalization are issues of national interest. As for the progress of the country's economy, the court would not interfere in such matters. The case also highlights the limitation regarding judicial review of administrative action. The court would not consider interfering in the decision of a government until such policy is based on a *mala fide* or illegal

¹⁸BALCO Employees' Union (Regd.) v. Union of India 2002 2 SCC 333

basis. The decision is an example whereby the court puts a light on the strength or the scope of administrative power in regards to making a policy decision. In this case, the government's privatisation procedure is considered a political question. It would be better not to shift a political question into the constitutional sphere.

The Need for Regulation

In order to legitimize the process of privatization and denationalization, there needs to be a policy in place. When there is a lack of comprehensive and privatization diffuses the scope and purpose for realizing the potential ends resulting from the process of privatization. However, we have seen that in India, that a total lack regarding creating a good privatisation policy. For example, in the recent National monitoring plan, there are a lot of issues about the dispute resolution mechanism¹⁹. The privatisation process may be a question on the grounds of a safeguard against the treatment of fundamental rights of the private player who takes part in the allotment process whereby excretion of the government is still there. The privatisation process should be fair and ensure equal opportunities to the potential bidders of the contractor as per their rights under Article 14 of the Indian Constitution. There should be a process of mandatory bidding, and bidding should be fair to rule out corruption and biases.

Another critical point to consider is whether the privatized activities should be subject to the State Action doctrine, determined under Article 12 of the constitution of India and whether such doctrine should only be subjected to the traditional functions related to the state. In the case of *MC Mehta v. Union of India*²⁰, there was a question before the Supreme Court of India to consider the issue of whether we can subject a private entity involved in discharging an essential public function to Article 12 of the Indian Constitution. The problem-specific in the MC Mehta case was to consider whether the victims who were subjected to the gas leakage coming from a private chemical and fertilizer plant can be sued for getting any monetary compensation under Article 32 of the Indian constitution. Although one of the sitting judge Justice Bhagwati had shown his interest and intention to include the private

¹⁹Verma, S., 2021. *National Monetisation Pipeline: unlocking value in brownfield projects via the private sector*. [online] The Indian Express. Available at: <<https://indianexpress.com/article/explained/explained-what-is-the-governments-plan-with-the-national-monetisation-pipeline-7468258/>> [Accessed 12 December 2021].

²⁰ MC Mehta v. Union of India, 1987 AIR 1086.

authorities under the definition of state under Article 12 of the Indian Constitution, he did not delve deep into this question and left the question undecided due to less time and despite knowing the fact that the activity of producing chemicals and fertilizers which this private company carried out was of more considerable public interest and safety and should be considered as been carried out by the state. It is observed that the Mehta case remains a crucial case whereby the Supreme court of India had considered the state action doctrine, which is part of American jurisprudence, for the first time in an Indian issue.

In the case of *Zee Telefilms Ltd v. Union of India*²¹, it was said by the supreme court of India that a cricket Board like that of the Board of Control for Cricket in India (BCCI) could not be considered as a state under Article 12 of the Indian constitution and the function which the board is involved in cannot be viewed as a public function. The court said that every entity regulating the fundamental rights under Article 19(1)(g) could not be considered a state under Article 12 of the Indian constitution. In the case of *Rahul Mehra v. Union of India*²², it was held by the supreme court of India; when the government of India took a back foot a let a body like a board of cricket control in India (BCCI) be the sole representative of Indian cricket underlying BCCI to choose the team for India for appearances and international events like World Cup. It gives up on BCCI with the public functions at least insofar as in selecting the team to represent India and the Indian representation in the international cricket arena. The question here is to what extent are the public law rules applicable to a private body? We can see that the nature of the function of the company performance can be one of the determining factors to reach for public functions Test. Play Down by the public function test whether the tasks performed by the private bodies can be considered identified with the state functions then they would become state actors in regard to the general procedure performed by them.

Thereby the question of public regulation for private entities has been discussed in the cases mentioned above. Still, the question remains the same as to whether there is a need for regulation and if it is such that a straight-jacket legal formula cannot be made to have a

²¹ *Zee Telefilms Ltd v. Union of India*, AIR 2005 SC2677.

²² *Rahul Mehra v. Union of India* (2005) 4 CompLJ 268 Del.

regulatory board or it cannot be created because it would defeat the purpose of denationalization. The regulation can most definitely be made to keep denationalization in check and contemporaneously ensure that denationalization takes the place of the institutions that require it. To suffice these purposes and other such purposes, the best way is to increase the participation rights of employees in the denationalization process. This can be done by mandating the government to take employees' opinions of the institution they plan to denationalize. These rights shall be inalienable so that a form of regulation for denationalization remains intact rights of the employees are maintained, i.e., they are not rendered unemployed.

How Can the Process of Denationalization be Regulated?

Regarding constitutionality, there should exist a regulation for the process of privatization and privatized activity. In the case of *Delhi Science Forum Versus Union of India*²³, the Indian Supreme Court held in regard to telecom regulatory authorities. The Government of India cannot be acting as a sleeping trustee and have to take maintain public good and ensure that the private sector contributes to the development of the telecom network of India and supports equality in the telecom sector. There are certain specific decisions regarding privatization that need to be accountable and transparent. The Rs.1300 crore high-speed data network project to be set up the witch, would become a data umbrella for Indian data needs. A lot of questions were raised about how the government allocated these resources. The project was cleared with the foreign company even Before any other certain to wear history, asset shareholding pattern and identity. One of the essential factors that need to be considered while the government takes privatization is ensuring that there is no overcrowding in the market. Any regulatory authority should aim to ensure that all the competition is protected and there is no favouritism regarding any specific protection.

Denationalization and the Road Ahead

In the era of globalization liberalization and privatization, the role of government has shifted from an enterprise in itself to a regulatory authority for private individuals. Recently in 2021-2022, the government has accumulated around 1.75 lakh crore from selling equity in public

²³ *Delhi Science Forum v. Union Of India*, 1996 AIR 1356.

sector undertakings and financial institutions. India's Supreme Court challenged the finance ministry's decision to denationalize certain public sector banks. The government has merged public sector banks. Significant public sector undertaking like HPCL has also been recently privatized. Many coal mines are being sold to private companies that the government previously held. The government recently has a national monetization plan, which gives access to governmental Infrastructure in a long-term lease to the private player in return for money upfront.

These reforms should not be made hastily without any proper policy in place. There is a growing realization that privatization without adequate consideration of the concern of equity and fairness generated opposition from various sectors of the Indian society. There is a lot of trouble regarding the labor laws of the entity that is being nationalized. These entities are not subjected to the same level of labor law compliance as that of a government entity. The level of job security of the employees of the new private entity is not the same as the level of job security they used to have in the Public Enterprise. So, many labor unions are protesting atoms of privatization by the government of public sector undertakings. Earlier the government contracts were given based on mandatory bidding, and the contractor has the option to enforce his fundamental right against the government organization, but in the private organization. However, the private organization might be doing a public function, but the same level of dispute resolution mechanism is not available to these private contracts. Private entities are mostly looking towards profit motives and are not concerned about the well-being of employees or society and the economy of the country. Concerning the condition of India, it is not viable for private entities to manage such big Enterprises of Core and essential Industries related to public sector undertakings. The question of the legitimacy of privatization also needs to be looked into. The doctrine of Ultra vires says that if there is no legislative backing for authorization of privatisation, then the privatisation policy should be held invalid. While enacting a law legislature looks at the pros and cons of the law and also goes through a long deliberation in the parliament, and they also look into the extent of government supervision in the process of privatization Presumption against the government delegating its power to the private body that it requires Express legislation for doing the

same. According to Upendra Bakshi²⁴, when a trade or industry is Nationalized by legislation, it can be privatized only by specific legislation. He says that a government entity must also disclose the ground that by denationalizing, they are doing community service and the public good. This would align with Article 14 of the Indian Constitution for arbitrary and irrational state actions. In the case of the Centre for Public Interest Litigation versus Union of India, The Honorable Supreme Court²⁵ of India attempted to restrain the central government from moving with an astonishment which would result in HPCL and BPCL, the two major public sector undertakings becoming private companies without appropriately amending the concerned legislation or statute under which it was formed.

But denationalization has certain benefits as well. A government can take a step back and focus more on the governance and regulatory part rather than taking part in business trade and commerce. The role of the government is not that of a businessman but that of a governing body for society.

Therefore, excessive denationalization shall not be done, and the need of the hour is the regulation of denationalization. Establishing a regulatory board for the same seems to be the most viable option. Still, it cannot be considered fair, as the government would establish the regulatory commission. Only it has the right to denationalize, so there can be a conflict of interest. Thus, it would be a viable option only when this regulatory board entails independent members. So instead of that, the quick way through which regulation can be made which can contemporaneously also solve the issue of the rights of employees is to mandate the government to take the consensus of employees of the institution, which is to be adequately denationalized. This would serve the dual purpose of workers' rights and act as a regulatory mechanism. The opinion of employees could be taken through a proper channel, i.e., a proposal could be given to them as to why there needs to be denationalization of their institution and why it is carrying out the same, and in accordance with their mandate, denationalization process could be carried out, i.e. A proper dialogue shall be between

²⁴Baxi, "Privatisation is a Coat," 32.

²⁵ Centre for Public Interest Litigation versus Union of India The Honorable Supreme Court Writ Petition (civil) 171 of 2003.

government and employees of the company so that the purpose of denationalization is realized. Also, the rights of the employees are maintained, and the best way to do it is to include employees in the process of denationalization. India seems to have taken this route, if TATA observes the current denationalization of Air India, therein the government took the opinion of employees of Air India, now in future, it is just that it needs to happen in a proper effective manner and through an appropriate channel and to every institution and not just big and reputed institutions.