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QUO VADIS INDIAN CONSTITUTIONALISM?

By

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While we have a chapter on Fundamental Rights, which includes a due process clause (in Art. 19) in the Constitution, as in the U.S., there has been a striking contrast in the Constitutional development of the two countries, in that the wide and liberal interpretation of these rights, especially the property rights, by the judiciary has been constantly and vehemenbly opposed by the Government and the Legislature in India. Unlike in the U.S. such opposition was evident even in the Constituent Assembly of India, dominated by Sardar Patel and other rightists, who were opposed to "any sort of violent expropriation which was characterised, by Patel as "choree (theft) or daka (dacoity)"[1] but who at the same time opposed wide judicial review. Thus, it was typical that Rajaji, at that time a Cabinet Minister at the Centre, should have stated that the result of the judicial review of the justness of compensation (guaranteed in Art.31(2) of the Constitution) would be that "Government functioning will be paralysed".[2] The leaders acted on the interpretation of Art. 31 by Sir Alladi Krishnaswamy Iyer to the effect that judicial review of the question of compensation would arise

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1. See Granville Austin - The Indian Constitution - Corner Stone of a Nation, p.93.

2. Ibid. p.88.

only if the compensation was illustory and thus there was a fraud on the Constitution. It is significant to note in this connection that judicial review in the 'Seven Freedoms' clause (the present Art. 19) was provided for not by the Drafting Committee, but as a result of a revolt by the rank and file of members headed by Mr. Thakur Das Bhargava, who moved successfully for the inclusion of the rucial adjective "reasonable", before the word "restrictions" pn the seven freedoms thus brining in the due process clause in the case of these freedoms".[3] Thus fundamental rights as juristic and justiciable rights, whose contours and limits are constantly set down by the judiciary on the U.S. pattern, were far from being contemplated by the framers of the Constitution. The Indian politicians, enjoying a charismatic following in the country due to their part in the freedom-struggle were attuned to the Indian tradition of authoritarian leadership and did not certainly envisage any substantial sharing of power with the judiciary which would have been necessary if effective fundamental rights were to be created on the American model. The judiciary in India, of course, took a different attitude to the issue, and systematically attempted to maximise the amhit of the rights as well as their own role as the interpreters and abriters of these rights, and in that process, came into inevitable conflict with the political leaders.[4]

The reasons for the different constitutional philosphies adopted by the politicians of India on the one hand and of the U.S. on the other bear some analysis. The U.S. view is in fact a heritage of the natural law philosophy, tracing its origin to the Greak period, and is exemplified by the statement of the British jurist and judge, Coke,

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3. Ibid. pp.73-74.

4. See for a more detailed analysis of the subject, T.S.Rama Rao, "Law and Social Change - A Historical Perspective Independence and After", presented to the ICSSR Seminar on Law and Social Change held in Bangalore, on June 5 to 11, 1971 and published in Vol. XVII Indian Year Pook of International Affairs; p.460.

in the early seventeenth century "It appeareth in our books, that in many cases the common law will control Acts of Parliament and adjudge them to be utterly void; for where an Act of Parliament is against common right and reason or repugnant or impossible to be performed, the common law will control it and adjudge it to be void".[5]

Of course, Coke's views as to the limitations on Parliament's powers, were not accepted by the English Courts, but even in England there is consensus on the ambit of the citizen's rights, though sans judicial protection as against legislative encroachment. And Cokes views have been accepted and acted upon in the U.S. An American Jurists has recently pointed out: "The) function of judicial review the paramount prerogative of the Supreme Court to determine the validity of legislative or executive action on the basis of the Court's interpretation of the letter and spirit of the written Constitution -- is now taken for granted by virtually all schools of American political thought, whether conservative or liberal ..... However unpopular the Supreme Court's political decisions may be at a given time, there is a vast emotional residuum of American Public Opinion which opposes even the appearance of Presidential (and to a lesser degree, Congressional) invasion of a judicial sphere which, according to the insistent stereotype, is non-political".[6]

It is evident that the views of the intellectual elites, in the West who have accepted the natural law philosophy of basic, inalienable rights of citizens have been accepted by the people at large in Western liberal democracies, especially as the economic lot of the common man has improved as a result of industrialisation. In the developing countries, on the other hand, the revolution of rising expectations, poses a constant threat to political stability and the juridical norms based on concepts of the rule of law and judicial review, which presuppose such stability for their continued viability. This has resulted in the increasing radicalisation in the attitudes of the Governments and Legislatures in these countries.

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5. See Andrew C. Mclaughlin, Foundations of American Constitutionalism (Paper back) at pp 120-21.

6. William F.Swindler "The Supreme Court, the President and the Congress" I.C.L.Q 1970 p.671 at pp.673 and 674.

the right of polygamy sanctioned by their religion, with the recent Flag Saluting cases, of the U.S. Supreme Court where the right of Jehova's witnesses not to salute the national flag, in accordance with their religious injunctions, was upheld. Similarly the decisions of our courts in upholding the validity of the Hindu Marriage Act forbidding biganny among Hindus cannot but be supported as a right one, inspite of their logical inconsistency with the proposition enunciated by the Supreme Court that the contents of the freedom of religion have to be tested in the light of the tenets of the religion concerned (according to Hindu religion, a childless man has a religious right to remarry). As in these cases, in the sphere of constitutional litigation also, it may well be necessary for courts to perform the role of legitimising widely held political aspirations inspite of their obvious untenability, under the prevailing constitutional law as interpreted in earlier decisions. At the same time, the Executive and Legislature would do well to relise that an independent and intrepid judiciary is a necessary bulwark against the onset of totalitarianism, and that short-cuts to political success at the expense of fundamental rights and constitutionalism pave the way to the very supersession of democracy.

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