CHAPTER X

Reflections

1. Is any basic change necessary in the system of Judicial Review ?

Voices are sometimes heard condemning the present system of judicial review by writ as an obstacle to the establishment of the welfare state. The conflict between the socialistic objectives of the directive Principles and the liberal principles of the fundamental rights, the latter only being enforceable by the Courts, has inevitably resulted in judicial decisions like *Motilal* v. *State of U.P.*[1], by which Government has been thwarted in its attempts to nationalise industry without special legislative authority, because the rights of the individual had been violated. In order to ensure the validity of the legislation to break up the large agricultural estates, ad hoc amendments of the fundamental rights were necessary,[2] and, to get rid of an interpretation of Art. 31 pregnant with incalculable inconvenience to the socialist planners,[3] a constitutional amendment has emasculated that article.[4] There is in certain quarters a feeling that economic progress cannot continue, unless plans made to achieve it can be implemented without risk of defeat or delay by writ petitions filed by individuals more concerned with their own rights than with the welfare of the people as a whole.

But another view is that the Constitution has already undergone sufficient amendment as to deprive it of its paramount and fundamental character. It was neither hastily drafted nor imposed upon the people. While second thoughts on matters of detail, if generally approved, should be materialised in constitutional amendments, substantial changes are to be avoided, for, in the long run they will not make for peace, order and good government. Planners should endeavour to keep within the Constitution, not create precedents for another generation, with a different approach to India's problems, to alter the Constitution to serve their own ends.

The fundamental rights and the writ procedure provide the most striking difference between the Constitution Act of 1935 and the present Constitution. In the 14th Report of the Law Commission it is said :—

1. A.I.R. 1951 All. 257.
2. Constitution (1st and 4th Amendment) Acts.
3. *In State of W. Bengal* v. *Subodh Gopal* [1954] S.C.R. 587; *Dwarkadas* v. *Sholapur Spinning and Weaving Co.,* [1954] S.C.R. 674.
4. Constitution (4th Amendment) Act.

> "The conferment of such a wide jurisdiction.........was perhaps inevitable. The Constitution makers, having included a bill of rights in the Constitution, had necessarily to provide remedies for their enforcement. They also envisaged a Welfare State with its necessary mass of.......legislation which would involve constant interference with the normal life of the citizen. Such intense legislative activity........made it essential to formulate procedures which would enable the citizen to approach the courts....... Articles 32 and 226 would therefore seem to be an indispensable part of the structure erected by our Constitution....The beneficial effects of this new jurisdiction cannot be over estimated......Our endeavour......must be to preserve this wide and effective jurisdiction and help to make the remedy function with expedition so that it may truly serve its purpose."[5]

In the preceding pages of this report it has been only possible to refer to a fraction of the reported cases on writ petitions, but, it is submitted, they furnish clear evidence of wrongs which could not have been righted if the writ procedure was not available. Some procedure to deal with such matters is essential. The only alternative to the writ procedure would seem to be a *conseil d'etat* administering a *droit adminisiratij*, but it may be doubted whether this would conveniently fit into the existing machinery of government. To make such a radical change now would mean the sacrifice of the ten years' expertise which has been built up. One may also doubt whether tribunals of an unknown character would secure the confidence of the average Indian. The popularity of the writ procedure with the people generally is evident from the steady increase in the number of institutions, notwithstanding the application of the deterrent of increased court-fees, while confidence in the courts generally is suggested by the general increase in the amount of litigation, notwithstanding the inevitable delays which inadequate cadres of judicial officers produce.

2. Is it necessary to retain the named writs with their traditional rules ?

As has been indicated earlier, the draft Constitution for Nigeria, which is to come into force in 1960 proposes to empower the superior courts to " make all such orders as may be necessary and appropriate to secure to the applicant the enjoyment of these (fundamental) rights ". No writ is named, and the power cannot be exercised, as in India " for any other purpose ". In India, the power of the Hight Courts to issue

5. Law Commission, 14th Report, pp. 657-58.

writs " for any other purpose" is at least as important as their power to use them to protect the fundamental rights. Even if it would have been desirable in 1950 to substitute for Arts. 32 and 226 in the Indian Constitution language similar to that set out above, it is submitted that no such change is desirable now. The power of the superior courts in India is not limited to the named writs, nor can a writ petition be defeated by failure to choose the appropriate writ; in fact a writ petition usually includes a prayer for " any appropriate writ ". The popularity and success of the writ procedure, it is submitted, is in part due to selection of the writ appropriate to the circumstances set out in the petition, and the observance of the basic rules, worked out in the *English and Indian Courts, governing its application. There has been no* slavish adherence to technical rules, and the procedure has been modified to suit Indian conditions, for example by the introduction of negative mandamus and by the adaptation of the writs to the protection of fundamental rights. The object of the rules attaching to the named writs is to ensure expeditious disposal and to restrict judicial review within the compass of the judicial power. It is axiomatic that a multi-purpose instrument serves no purpose so well as an instrument designed for that particular purpose. A tribunal bound by no other rule than to do justice, if its activities are to be predictable must evolve rules and precedents, and the next few years will probably see the Nigerian courts referring to Indian decisions and following the rules laid down in the Indian courts.

3. Territorial Jurisdiction of High Courts

Article 226 at present gives the High Courts no jurisdiction over respondents not within the territorial limits of their jurisdiction, one result of which is that, notwithstanding that the cause of action arises within the territorial limits of a High Court's jurisdiction, if the tribunal or authority is situated in Delhi, it is only the Punjab High Court which has jurisdiction. This imposes considerable hardship on a person resident in a State remote from Delhi.

> "This tends to defeat the very purpose of the jurisdiction conferred by Art. 226 which is to enable a person to seek a remedy under this article in respect of acts done in violation of his rights within the State by an application to the High Court of his own State ".[6]

The general rule in civil procedure is that a petitioner may institute proceedings in the court within which the cause of action arose or

6. *Law Commission, 14th Report, p. 669.*

the respondent resides or carries on gainful employment. It does not seem probable that the Founding Fathers contemplated the present situation whereby central authorities can defeat a well-founded writ petition by a plea to the jurisdiction and it is submitted that Art. 226 (1) should be amended so as to read :

> "Notwithstanding anything in Article 32, every High Court shall have power to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them to any person or authority, including, in appropriate cases, any Government within those territories and when the cause of action arises within those territories to any such person or authority as aforesaid within the territory of India for the enforcement of any of the rights conferred by Part III and for any other purpose".

The above amendment of Art. 226 appears necessary in so far as the majority judgment in *Khajoor Singh* v. *The Union of India and Another*[6a] approves of the principles stated in *Saka Venkat Rao's* case. Chief Justice B.P. Sinha would strictly construe Art. 226 and would advise a constitutional amendment to remove the hardships occasioned by such a strict construction. The Law Commission had suggested that proper step be taken to remove the hardships due to *Saka Venkat Rao* case[6b]. The dissenting judgment of Subba Rao, J., would however indicate that the words 'within the territories' could be construed as applying to Union Government whose orders are operative in any part of India. When it so operates, it should be deemed to be 'within' the territories of the relevant High Court. The opinion further was service that of notice on the relevant authority is one of procedure and that failure to obey court's orders will entail contempt action. Though the dissenting view can be accepted as a broader construction of Article 226 and Article 32(2A), yet since the majority view is against it, the only course open is constitutional amendment as indicated.

4. Error of law

There is no authority or sound reason to justify the Bombay High Court's description of "error of law apparent on the face of the record" as an error so manifest that it calls for no longer any elaborate argument.[7] It has been accepted by the Supreme Court as a test applicable in some cases of certiorari and prohibition [8] but the Supreme

6a. A.I.R. 1961 S.C. 532.

6b. 14th Report page 670.

7. In *Mushran* v. *Patil*, I.L.R. [1952] Bom. 995.

8. In *Hari Vishnu* v. *Ahmed*, [1955] 1 S.C.R. 1101.

Court seems to have preferred to leave the further definition of this phrase to be worked out in future decisions. It is submitted that this puts counsel advising on the advisability of presenting a writ petition in an unenviable position. If the writ procedure is to be retained as an expeditious procedure, it should be restricted to cases in which the petitioner can readily establish a prima facie case and in the present uncertainty about the meaning of this phrase, counsel may well be tempted to advise that any error of law may be sufficient. This type of error of law should be distinguished from error of law going to the jurisdiction, and it should be on the record, but it should be restricted to such errors of law as are calculated to result in manifest injustice, or to affect the decision of the tribunal, whether this is obvious, or whether elaborate argument is necessary to establish it.

5. Speaking orders

As Lord Goddard's exhortation to administrative tribunals to render assistance to the court when exercising its powers to issue certiorari by making speaking orders was followed in England by the enactment of the Tribunals and Enquiries Act, 1958, which has imposed that duty on a number of English statutory authorities, it is submitted that there are good reasons why legislation on similar lines should be enacted in India. The tribunals on which this duty is to be imposed would have to be selected, having regard to the nature of their functions and the probability of their actions giving rise to writ petitions. The order should be required to set out the points for determination, the findings and the reasons, with a brief summary of the evidence, and it should form part of the record. This is no more than a Sub-Deputy Collector does when making a village or revenue enquiry and should impose no insuperable burden on an administrative tribunal. As things stand at present, the conscientious tribunal, which will probably do this in any case, runs a greater risk of correction than the more arbitrary tribunal, which will carefully avoid putting anything on record.

6. Substantial evidence

In recommending the adoption of the American substantial evidence rule, it is not intended to recommend any wide extension of the scope of the hearing before a court hearing a writ petition, nor is it regarded as desirable that there should be any unreasonable abridgement of the rule that questions of fact are matters for the administrative tribunal. If a tribunal comes to a finding of fact which no

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8a. See *Sathyanarayan* v. *Mallikarajun*, A.I.R. 1960 S.C. 137-141;

reasonable man could have reached, it is abusing its jurisdiction, and there seems no reason why a tribunal which acts in this way should be less liable to correction than a tribunal which has acted on its own intuition as to the relevant state of facts.

A difficulty which arises in this connection relates to the appreciation of facts by technical tribunals, but it is a difficulty which has been faced in patent cases, and in hearings of writ petitions on such questions as the educatability of feeble-mined persons. The judge does not substitute his own opinion on matters on which an expert alone can give an opinion on which a reasonable man would act. Moreover, it is for the applicant to show that a finding of fact has been reached on evidence which would convince no reasonable man.

7. Questions of fact

If administrative tribunals are generally required to make speaking orders, the task of the court, when dealing with questions of fact will in many cases be simplified, but there are occasions, for instance, when jurisdiction depends on the objective existence of facts and when right to office is in question, when a speaking order can give little or no assistance. It is submitted that the rule propounded by the Assam High Court[9] that questions of fact cannot be gone into in quo warranto petitions should not be followed when hearing any writ petitions whatsoever. But it is essential that the expeditious nature of writ proceedings should not be imperilled by permitting the examination of witnesses, whether by the court or the issue of a commission, unless there are very special circumstances to justifiy it. Normally questions of fact should be determined by scrutiny of the affidavits; if this leaves the question of fact in doubt, permission could be given to cross-examine the deponents of the affidavits but normally a writ petition should be dismissed if it is necessary to take further evidence on a question of fact, essential to the determination of the matter.

In the recent *Kochunni Moopil Nair* case,[9a] the Supreme Court has however held that "where the record is insufficient and there are disputed questions of fact, evidence *dehors* the record may be allowed by affidavits or by issuing commission or by settling the application for trial on evidence on the particular issue". This rule which was enunciated in respect of writ petitions under Art. 32 (relating to fundamental rights) may also be adopted in proceedings under Art. 226 in the High Courts, at least where fundamental rights are involved. Cases

9. In *Mohid Chandra* v. *Secretary*, A.I.R. 1953 Assam 12.
9a. A.I.R. 1959 S.C. 725.

can be conceived where mere affidavits may not be sufficient to bring out the facts in cases. Actual examination of the deponent of the affidavit may be necessary.

The recommendation of the Law Commission[9b] is also to this effect, viz., 'Rules should be framed by the High Courts on the lines indicated in our report on the Specific Relief Act[9c] to enable them to record evidence and to determine if necessary disputed questions of fact in proper cases in proceedings under Art. 226. For instance, Rule 7 of the Orissa High Court states :

> "All questions arising for determination under the Chapter shall ordinarily be decided on affidavits but the Court may direct that such questions as it may consider necessary be decided on such other evidence as it may deem fit. Where the Court orders that certain matters in controversy between the parties shall be decided on such evidence, the procedure prescribed in the Code of Civil Procedure, 1908, for trial of suits shall so far as applicable be followed ".

The Law Commission's recommendation[10] that questions of fact should be appealable to administrative appellate tribunals has been discussed in Ch. IV where it was submitted that in view of the failure of the Industrial Disputes Appellate Tribunal and of the delay in disposal of administrative matters which their activities would involve, it should not be implemented[10a].

A matter which seems to require immediate attention from the legislature is a declaration of the extent to which the Evidence Act is binding on administrative tribunals. Though that statute is declared to apply to all persons legally authorised to take evidence the courts do not grant *certiorari* where the rules in the Evidence Act are infringed

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9b. Vide Vol. II, p. 670.

9c. Similar rules are framed under Art. 226 in Orissa, Mysore, Madhya Pradesh, Allahabad, Rajasthan, Bombay and Assam.

10. At p. 694 of the 14th Report.

10a. It is possible to have another view of the failure of a tribunal like the Industrial Disputes Appellate Tribunal. It was considered due not only to delay but also due to the inefficiency of the personnel manning it. The Law Commission's observations in p. 694, para. 42(4) of the 14th Report, Vol. II, are relevant in this connection :

> " In the judicial and quasi-judicial decisions, an appeal on facts should lie to an independent tribunal presided over by a person qualified to be a judge of the High Court. He may be assisted by a person or persons with administrative or technical knowledge. The tribunal must function with openness, fairness and impartiality as laid down by the Frank's Committee."

and if they were to do so, the consequences would be that proceedings before administrative tribunals would be unnecessarily prolonged.[10b]

8. Procedure

The present procedure provides for hearing on admission, for ample notice to persons affected, for full hearing and for appeal.[10c] The only point for discussion is whether writ petitions in a High Court should come before a single judge or a bench. This matter has been discussed in the previous chapter and while a preference has been expressed for the Allahabad practice of placing selected types of petition before a bench, it seems probable that it is best to leave this question for the different High Courts to find their own answers. As the High Courts give priority to writ petitions, it is clear that the means of ensuring more expeditious disposal of writ petitions must be sought elsewhere than in changes in procedure and particularly by adding to the strength of the Bench. In this connection, the following extract from the Law Commission's 14th Report is of interest :

" Governments could not have been unaware, at any rate, from 1950 onwards, that the files of the High Court were being loaded with a large amount of additional work.... it should have been the duty of both the High Courts and the Governments to have examined the scale and requirements of the High Courts as to their strength and to have taken steps well in advance ... that unfortunately does not appear to have been done... It does appear that in some cases, Chief Justices of High Courts, did make an endeavour to obtain additional judge strength for their courts. Their efforts seem however to have been defeated by a baffling procedure which seem to be in vogue in considering the need for additional judges... Not only has the necessary addition to judge strength been withheld but in several cases a course of action has been pursued which has resulted in depleting these courts even of their normal strength ".[11]

10b. Supreme Court has held in *Union of India* v. *T.R. Varma*, A.I.R.1957 S.C. 882 : "The Evidence Act has no application to enquiries conducted by tribunals...The law requires that such tribunals should observe Rules of Natural Justice ". See *Maqbool Hussain* v. *State of Bombay*, A.I.R. 1953 S.C. 325-330 (Rules of Evidence do not bind customs authorities). Also *Thoma. Dana* v. *State of Punjab*, A.I.R. 1959 S.C. 375.

10c. The Frank's Committee Report (1957-England) has suggested in its summary of Main Recommendations (Ch. 31, pp. 91-92) that every care should be taken to ensure that the citizen is aware of and fully understands his right to apply to a tribunal (Recommendation 9) ; that he should know in good time before the hearing of the case which he will have to meet. He should accordingly receive a document setting out the main points of the opposing case (Recommendation 10). It also recommends

9. Stay orders

Undoubtedly the most controversial question which this report raises is whether it is necessary or advisable to impose any legislative restrictions on the discretion of the High Courts to grant stay orders. If the rate of disposal of writ petitions could be stepped up so that the target figure of six months proposed by the Law Commission could be reached (and this, as has already been submitted, can only be achieved by the appointment of extra judges), the problem would be less acute. Governments, in implementing their plans for extensive economic development, are in perpetual need of money, and are embarrassed by stay orders in taxation cases. It is also probably true that tax evasion in India is more prevalent than it should be in a welfare state. But to demand payment of an impost, which is not justified by the law or the Constitution, coupled with the threat to set in motion the provisions of the law for the recovery of arrears of revenue is a denial of the individual's rights, from which he is entitled to the protection of the courts. If the ultimate decision is in favour of the applicant for the writ, Government has no just ground of complaint against the stay order, but there are unfortunately no available figures of the percentage of cases in which the applicant, who has been granted a stay order, succeeds. It is submitted that, where this rule is not in force, at present, no stay order should be granted, where the revenue is involved, without fourteen days' notice to the revenue authority concerned. If Governments do not choose to oppose a stay order, there seems no obvious reason why it should not be granted. If a stay order is granted, it could be made conditional on security being given within a limited period to the satisfaction of the revenue authority concerned. Only if this fails should resort be had to legislation to restrain the grant of stay orders in revenue cases.

It is not only in taxation cases that stay orders prove an embarrassment to Governments. In the previous chapter an instance was cited of a scheme for consolidation of holdings being delayed by a

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(No. 22) that decisions of tribunals should be reasoned and as full as possible.

The Law Commission of India has recommended legislation "providing a simple procedure embodying the principles of natural justice for the functioning of tribunals". "Such procedure", the report says "will be applicable to the functioning of all tribunals in the absence of special provision or provisions in the statutes constituting them" (Vide 14th Report (1958) Vol. II, p. 695).

11. Law Commission Report, pp. 65-66.

spate of writ petitions, but the action taken by Government to implement the scheme was not in accordance with law and, in such circumstances it is difficult to maintain that the High Court could have done anything other than grant the stay orders. The suggested remedy for the resulting crisis, that Art. 226 should be amended so that Government could veto a stay order by a certificate that it would be against the public interest or concerned the revenue or a Government department would be repugnant to current notions of rule of law and would derogate from the position which a High Court was designed by the Constitution to fill.

The right of an applicant for a writ with a good prima facie case to a stay order should be recognised and maintained. Government should not be given what amounts to discretionary power to deprive him of this right. There is no obvious reason why each case should not be decided on its merits; if Government has grounds to urge against the grant of a stay order, they should be put before the court, but the public interest as certified by the Government or the concern of a department should not be required to prevail.

The following may be formulated for consideration in the matter of stay of proceedings:

(a) Grant of stays in the writ petition should not be as a matter of course. It can be ordered after giving notice to the respondent and hearing him except where the Court deems that there are special circumstances warranting an exparte stay.[13]

(b) In urgent cases, if ex-parte stay is ordered, it should be operative only for a short time within which time the respondent should be served with notice and duly heard.

(c) In revenue and tax matters, courts should be more circumspect in granting stay. Expediting the hearing and giving priority to tax cases in the hearing list is one method where stay is or is not granted. Facility for instalment payment or furnishing of security to the government are other points which the Courts have to keep before them when petitioners seek stay.[14]

13. The Punjab High Court has framed a rule to this effect.

14. In tax matters, the assessee even if he ultimately fails, saves interest on the amount if an early hearing is had.

11. Delay in the final disposal of writ petitions

In the Supreme Court and most of the High Courts there is a preliminary hearing of the writ petition before notice is served. This practice reduces the number of writs that reach the stage of final hearing. The recommendation of the Law Commission that a time limit of six months for disposal of a writ petition [15] may not be feasible as a rule. That may hamper parties, more particularly Governments, in getting the relevant records from the various authorities or in filing its return or replies in time. The judges can be relied upon to do what is proper and best in each case.

One suggestion is to increase the number of judges (*ad hoc* or permanent) in High Courts which have large arrears.[16]

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15. This is recommended by the Law Commission, Vide p. 670, Vol, II, 14th Report.
16. *Ibid.*