NOTES AND COMMENTS

LAW, JUSTICE AND AFFIRMATIVE COURT ACTION

WITH THE ubiquity of administrative discretionary powers in the modern welfare state, the victory secured by the individual in his battle against the administration through court action is often pyrrhic. As has been said, the individual wins the battle but loses the war. He wins on the point of law but does not get ultimate justice (from his point of view) in the hands of administration. The reason for this is that, as a general rule, courts do not go into the merits of the exercise of discretion, but merely quash an illegal order and do not command the administration to act in a particular way (except in the rare situation where, according to the court, only one decision was possible). The basis for the courts to have this kind of approach is two fold—administrative expertise in the matter and the court's lack of it owing to various complex economic, social, administrative and technological factors involved. The courts are neither equipped to go into such complex factors nor a proper forum to do so as otherwise the purpose behind creating the administrative apparatus, sometimes vast, to deal with the problem will be lost. After the court judgment the individual is thrown back to the very people whose decision he had contested.

The Supreme Court made a sound departure from the above approach in *State of Kerala* v. *T.P. Roshana*,[1] and this should give the case a high place in our administrative jurisprudence. (The fact is that the court has been showing dynamism and progressive outlook in a number of recent cases which is enriching the administrative jurisprudence of the country). The judgment in the case was delivered by Krishna Iyer, J., famous for his efflorescence, rhetorics, pedanticism and judicial activism.[2] R.S. Pathak, J., joined with him.

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1. A.I.R. 1979 S.C. 765.

2. Though at times not without criticism even by his own brother judges. For example, in *Manohar* v. *Marotrao*, A.I.R. 1979 S.C. 1084, Tulzapurkar, J., obviously alluding to Krishna Iyer, J., says :

> Judges and lawyers always clamour for legislative simplicity and when, as is the case here, legislative simplicity is writ large on the concerned provision and the text of the provision is unambiguous and not susceptible to dual interpretation, it would not be permissible for a Court, by indulging in nuances, semantics and interpretative acrobatics, to reach the opposite conclusion than is warranted by its plain text and make it plausible or justify it by spacious references to the object, purpose or scheme of the legislation or in the name of judicial activism.

The lack of availability of sufficient number of medical seats and the pressure of admissions to medical colleges have generated a great deal of litigation, mainly involving challenges to governmental orders fixing criteria for admission against the touchstone of article 14 of the Constitution. The present case is typical of one of such cases. Without going into the details the facts in brief necessary for our purpose may be mentioned. The Government of Kerala laid down a university-wise formula for admissions to medical colleges affiliated to the Kerala University and the Calicut University, that is, each university was to give preference in the matter of admissions to its own students. The court following *Chanchala*[3] found this criterion to be valid under article 14. However, there was a rider in the government formula which had the effect of reducing seats in the Calicut colleges available for the Calicut University students by 30. This rider was held to be violative of article 14. The net result was that out of 180 total

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(*Id.* at 1090). Further, in the same case he says :

> . . . . I feel constrained, as a part of my duty, to give vent to my feelings of discomfiture and distress over one thing which is exer, cising my mind for a considerable time in this Court. In all humility I would like to point out that prefaces and exordial exercises, perorations and sermons as also theses and philosophies (political or social), whether couched in flowery language or language that needs simplification have ordinarily no proper place in judicial pronouncements. In any case, day in and day out indulgence in these in almost every judgment irrespective of whether the subject or the context or the occasion demands it or not, serves little purpose, and surely such indulgence becomes indefensible when matters are to be disposed o fin terms of settlement arrived at between the parties or for the sake of expounding the law while rejecting the approach to the Court at the threshold on preliminary grounds such as non-maintainability, laches and the like. I am conscious that judicial activism in many cases is the result of legislative inactivity and the role of a Judge as a lawmaker has been applauded but it has been criticised also—lauded when it is played within the common law tradition but criticised when it is carried to extremes." (*Id.* at 1095.)

We find the reaction of Krishna Iyer, J., to the above observations of Tulzapurkar, J., in *Organo Chemical Industries* v. *Union of India*, decided on 23 July 1979. While justifying his opinion in this case, even though he concurred with the other judge, he stated :

> Because exordiums are opprobriums and socio-economic apercus are anathema for some judicial psyches ; and I should have, for that reason, abandoned my habitual deviance from the orthodox norm that a judicial judgment shall be a dry statement of facts, drier presentation of law and logomachy and driest in least communicating to the law-abiding community, which is the court's constituency, the glow of life-giving principles rooted in social sciences and translated into juristic rules which legitimate our institution functionally. The last consideration, in my humble view, is the *elan vital* of the justicing process and jettisoning it is judicial self-alienation from the nation. Of course, minds differ as rivers differ and habits die hard !

3. *D.N. Chanchala* v. *State of Mysore*, A.I.R. 1971 S.C. 1762.

medical seats in the Calicut colleges, under the valid formula the Calicut University students were to be allotted 166 seats but under the invalid formula adopted by the government they got only 136 seats. By the time of the disposal of the writ petition by the High Court all the medical seats in the Calicut colleges had been filled up in accordance with the invalid formula and the teaching had begun. The High Court decided the law-point in favour of the petitioner, but refused the relief on the ground that it would mean dislodging of 30 Kerala University students from the Calicut colleges and the court had no power to direct the Calicut colleges to create additional 30 seats under the traditional function of the writ remedies. The petitioner thus had the law in her favour, but could not get relief from the High Court owing to the traditional role of the judiciary not to take affirmative action in a matter involving administrative discretion. Its traditional role is merely to quash the wrong administrative order.

The Supreme Court in this case decided to play an affirmative role and to enter the domain which was considered to be the preserve of the administration. In doing so the court did not cast any reflections on the High Court's order for what the High Court did was simply to follow "an obsolescent aspect of the judicial process" and "its remedial shortcomings in practice". The court pleaded for "the need to innovate the means, to widen the base and to organise the reliefs so that the court actualises social justice even as it inhibits injustice."[4]

The court ordered that medical seats in the Calicut colleges be increased by 30 so that all those who were unjustifiably left be admitted without disturbing those who had already been admitted. In granting this relief the court apart from going into the merits of the case accomplished another feat. Only the petitioner's case was before the court but the court travelled beyond her case. In justifying this the court said :

> We may also take note of the gregarious trend of one writ petition being followed by many when the grievance is common and the first case is in essence a test case and class action. What is granted to the petitioner has to be granted to others who follow her. In terms of numbers several candidates may have to be admitted into the medical colleges. More than that is the chaotic consequence of the pro-tempore project of the Government being struck down with no alternative methodology of selection. Governments have no magic remedies to tide over sudden crises. Their processes are notoriously slow and the temper of the student community is notoriously inflammable.[5]

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4. *Supra* note 1 at 767.
5. *Id.* at 775.

Another feature of the case is that the only parties before the court were the state government and the petitioner. Addition of the seats required action on the part of the two universities and the Medical Council of India. Consequently, as a matter of emergency, the court issued notices to these parties. The Medical Council assured the court that it had no objection to the addition of a small number of 30 seats on a temporary basis for that particular year. There is no evidence in the judgment to show that the two universities also gave such an assurance. In this regard the court said that "we see no ground for either University to plead inability to help the cause of justice", and made a fervent appeal that "we are ...sure that the Universities, the colleges concerned, the teaching community and the alumni themselves will appreciate the goal and co-operate in the success of the direction we make."[6]

Even at the cost of a little digression from the present case, one cannot fail to mention that the non-traditional order travelling beyond the immediate parties passed by the court in *Roshana*, though something new in our judicial process, is not confined to this case alone. In the subsequent cluster of cases—*Hussainara Khatoon* v. *Home Secretary, State of Bihar*[7] involving detention of prisoners awaiting trial, the court passed orders setting free not only the petitioners as they were kept in detention beyond the period of their maximum sentence had they been convicted, but also other under trial prisoners in the State of Bihar who had suffered such detention. The court also passed various other orders not only in relation to the petitioners but also others, such as, compliance with section 167 (2) of the Code of Criminal Procedure by the state, the state to provide lawyers at its own expense in the cases of persons accused of bailable offences who were unable to make bail application for want of a lawyer, and orders to ensure speedy justice to those who were in custody for more than six months. In all these cases the opinion of the court was delivered by Bhagwati, J., who said:

> The powers of this Court in protection f the constitutional rights are of the widest amplitude and we do not see why this court should not adopt a similar activist approach and issue to the State directions which may involve taking of positive action with a view to securing enforcement of fundamental right to speedy trial.[8]

In all these cases including *Roshana* the court has broken new ground.

A few caveats must be entered here against the otherwise remarkable judgment in *Roshana*. A small point could be disposed of without much ado. Though the two universities were made parties before the

6. *Id.* at 776.

7. A.I.R. 1979 S.C. 1360; A.I.R. 1979 S.C. 1369; A.I.R. 1969 S.C. 1377; Also *Nimeon Sangma* v. *Home Secretary, Government of Meghalaya*, decided on 30 April, 1977.

8. *Id.* at 1377.

court at its instance, yet the concerned board of studies, the faculty and the academic council were not. The direction of the court may be binding on the universities but not on these bodies which cannot be regarded as the servants of the university in view of their statutory character, and without their affirmative action the direction of the court could not be implemented. The court may be said to be aware of these difficulties when it spoke that "we are aware that these various directions and orders call for high pressure activisation."[9]

The most difficult aspect of the case is as to how far the case can be used as a precedent in other situations and how far the court would be willing to go in granting affirmative relief in the future cases. Firstly, out of the total of 180 seats available with the Calicut colleges, the increase in the number of seats given countenance by the court was said to be marginal. In the opinion of the court: "A marginal strain in the matter of teaching and perhaps extra burden in regard to the practicals may have to be endured."[10] Here perhaps the increase was negligible that may not have put strain on the medical education (it may have?), but suppose the government formula would have been so bad that the situation warranted an increase in the number of seats at a much higher figure, say, fifty per cent or so. What will be the relief in that situation? Certainly it may not be proper for the court to command this increase in number. In other words, a student, whether he gets affirmative relief from the court or not, would have to depend on the vagary of factors exterior to him, leading to a great deal of uncertainty in future litigation. In this connection it may also be stated that perhaps the two courts in the present case were expeditious in disposing of the matter before them, but the laws' delays are proverbial and it may be that the highest court arrives at its decision considerably after the academic session had begun, making any affirmative relief futile. This adds to the capriciousness of the situation.

Secondly, the case raises a more fundamental question. The court uses rhetorics at several places – for instance, "obsolescent aspect of the judicial process", "law promotes order, not anomie", "responsible justice", "flexibility of attitude on the part of the court", "the court system belonging to the people and must promote constructive justice". One has to seriously think whether these sentiments would have any practical significance in the future cases. Here the facts were simple which the court could marshal without needing expertise of a particular nature. Further, the seats to be added were negligible. There may be situations where facts involved are complex requiring marshalling of technological, economic and such other factors. If the courts were to examine factors of such difficult nature, perhaps we may have to think of departing from their present composition of the exclusive judicial element. Composed as they are, the courts at present are not adequately equipped to give affirmative

9. *Supra* note 1 at 777.
10. *Id.* at 776.

relief in such situations. Are we ready for such a change in the composition of the judiciary ? What is stated here may be substantiated by referring to challenges to the price control orders before the Supreme Court in a number of cases. The court has merely contented by examining the various economic and social factors involved in an extremely superficial manner and ever hardly quashed the price-control order.[11] In *Premier Automobiles*,[12] the court left the matter of price fixation to a commission appointed by the government to which proposition both the parties before the court agreed. In *Prag Ice and Oil Mills* v. *Union of India*,[13] the court specifically spoke of "extreme inadvisability of any interference by any court with measures of economic control and planning directed at maximising general welfare."[14]

Another aspect of the matter is that in the matter of individual-administrative relationship, statutes, as a general rule, exclude judicial review and the courts are not a proper forum to litigate such matters. Under the writ jurisdiction the courts may not do the same thing as an appellate court, that is, substitute their own judgment or go to the merits of the case, simply because the legislature has taken away their jurisdiction and placed confidence in the judgment of some administrative body. Too much excursion in this area by the courts may frustrate the basic purpose of creating expert administrative bodies.

All this is said not with a view to undermining the value of the present decision but to caution that too much may not be expected of the judiciary in the matter of affirmative action. The question is not whether in all cases the court will be able to give affirmative relief but whether in some situations, where it can, it should not do so. The author would support the latter even if it may add to the uncertainty of law. The greatest paradox of law is that in no branch of the human science so much effort has been spent to achieve certainty and in no branch of human knowledge perhaps certainty eludes as in law in spite of its vast media of statutes, law reports, digests, treatises, text books and what not. We should not be scared if the present decision of the court adds a little more to this uncertainty by its flexibility in giving ultimate relief to the individual.

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11. See *Dwarka Pd.* v. *State of U.P.*, A.I.R. 1954 S.C. 224; *Diwan Sugar Mills* v. *Union of India*, A.I.R. 1959 S.C. 626; *Union of India* v. *Bhanamal Gulzarimal*, A.I.R. 1960 S.C. 475; *Shree Minakshi Mills* v. *Union of India*, A.I.R. 1974 S C. 366; *S.I. Syndicate* v. *Union of India*, A.I.R. 1975 S.C. 460; *Prag Ice and Oil Mills* v. *Union of India*, A.I.R. 1978 S.C. 1296.

12. *Premier Automobiles* v. *Union of India*, A.I.R. 1972 S.C. 1690.

13. *Supra* note 11.

14. *Id.* at 1306, per Beg, C. J.

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