Constitutional Amendments, Judicial Review and Constitutionalism in India

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I

While both the U.S. and the Indian Constitutions provide for a Bill of Rights and judicial review of the same, their history in the two countries indicates an avowed acceptance of the rights as well as the institution of judicial review in the U.S., but a varying attitude ranging from ambivalence to hostility to them is prevalent in India. The present writer has gone into this question and the reasons for the varying attitudes in the two countries in earlier articles.[1] While even in the U.S., acute controversies have occasionally arisen over the role of judicial review in the country's polity, there is general acceptance of the necessity of such review and as Blackshield points out, "Supreme Court Justices tend to be projected as ultimate arbiters of every aspect of the "American Way of Life" and this has deep historical linkage with the origins of the whole polity in a people's rebellious choice of its own destiny, based on a natural law ideology." And Archibald Cox, the celebrated Watergate Special Prosecutor, who was dismissed by President Nixon for refusing to obey his illegal instructions, has also noted two important sources of "the American People's attachment to constitutionalism—an attachment now so strong that it forced a popularly elected President [Mr. Nixon] to reverse his field and comply with the order of even an inferior court"[3] [to produce the tapes of his conversation]. These are according to him, (1) the necessity for an umpire to resolve the conflicts engendered by an extraordinary complex system of government; (2) a deep and continuing American belief in natural law."[4]

II

The Indian Polity is an equally complex matrix of divergent and conflict-

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1. See T.S. Rama Rao, "Chief Justice Subba Rao and Property Rights", 9 *JILI*, 568, 572 (1967), and "Law and Social Change—A Historical Perspective: Independence and After," XVII *Indian Book of International Affairs* 460-484.

2. See Blackshield's essay, published as appendix to an article by Miller and Scheflin on "Power of the Supreme Court in the Age of the Positive State: A Preliminary Excursus—Part One", *Duke Law Journal*, 273 at pp. 309-10 (1967).

3. Archibald Cox, *The Role of the Supreme Court in American Government* 9 (Oxford, 1976).

4. *Id.* at 16.

ing elements, but there is great reluctance in accepting the role of the judiciary as an umpire. For one thing, we do not have a natural law tradition. The Hindu tradition has essentially been an authoritative one secularly, relying on the authority of the *Kshatrya* to impose the rules of *dharma* on the society by force, with no checks on him save the religious one based on the *karma* theory and with no countervailing natural rights inhering in the citizen *qua* an individual or institutions of third party adjudications against the State and the King at the operative legal level. And Indian society is a deeply divided one with a caste and community orientation, operating on the basis of a political inter-group consensus, with no great faith in the judicial role as an arbiter. Even the fundamental rights seem to have been adopted in the Constituent Assembly, primarily because it was necessary to provide for the educational and religious rights of the *minorities* in order to gain the adherence of the minority groups. And it is these minority rights like articles 25 to 30 which were left untouched, even under the 42nd Amendment, while all other fundamental rights whether relating to liberty or property have been steadily eroded and amended out of existence by a series of constitutional amendments.[5]

And the leaders of the Congress Party in the Constituent Assembly including avowed rightists like Patel and Rajaji never envisaged a crucial arbitral role for the judiciary on the American pattern relying on their political strength and leadership to ward off attacks on property rights, rather than on judicial protection. And even the requirement of reasonableness of the restrictions on the rights under article 19 was introduced as a result of a revolt of the back benchers in the Constituent Assembly without the leaders being fully aware of the significance of this requirement to the property rights guaranteed under article 19 (1) (*f*) and (g).[6]

However, the Indian judiciary with a natural judicial bias towards protection of guaranteed rights, took the fundamental rights seriously, expanding their scope by a liberal interpretation. This resulted in successive constitutional amendments curtailing these rights, and a running battle between the judiciary and the political wings of the government, from 1951 to the period of the emergency. In fact, the judiciary became a convenient political scape goat for the politician in power and constitutional amend-

5. The rights of minorities under articles 29 and 30 are not enjoyed by the Hindu majority and the freedom of Hindu religious denominations has been severely regulated by the State unlike those of the minority groups while it may be an exaggeration to say that the Hindu owes his freedom of religion as a fundamental right to the Muslim, it is undeniable that the religious and cultural rights of the minorities are qualitatively more effective than those of the majority.

6. See for a greater elaboration of this question, *Indian book of International Affairs*, *supra* note 1 at pp. 463-468.

ments to supersede the effects of alleged reactionary judgements especially in the field of property rights proved an unfailing talisman, for drawing votes in elections, and a convenient alibi for their inaction at the political level in ushering in the socialist utopia promised by them. The conflict between the legislature and the judiciary would probably have petered out in a sober political regime as under Nehru or Shastri but in the subsequent turbulent period when political success became the sole and ruthlessly pursued aim, with no concern for constitutional nicties, it was inevitable that the Supreme Court became the whipping boy of the politician in power. And the opposition became tongue-tied when it came to constitutional amendments to protect the new religion of socialism from the attacks by the wily judiciary and the fact that "religion in danger" is an unfailing call for rallying popular support in all theocratic states was not missed by the strident exponents of this new religion. The *Bank Nationalization* case,[7] the *Princes* case,[8] *Golak Nath*[9] and *Kesavananda Bharati* cases[10] were all utilised successfully as so much convenient grist to the political mill and helped the government in power to win votes from a gullible electorate, who could not critically assess the beneficial long-range implications of these judgements.[11] The intellectuals and lawyers felt helpless at the new ruthless political style which subordinated all political conventions and rules of the game, as well as concern for the rule of law, to the interests of political success. An early pointer was the executive act of de-recognition of princes to get over the effects of the failure to secure a constitutional amendment in the *Rajya Sabha* to put an end to the privy purse. The unanimous political support to this circumvention of the democratic norm of bringing in a fresh amendment at the next session of the legislature; was but a portent of the immaturity of our politicians both in the ruling and opposition parties, which resulted finally in the misuse of the emergency provisions to set up personal dictatorship and secure dynastic succession of the same. The tragedy for the rule of law in India arose due to the failure of the politicians and the legislature in upholding democratic norms and in failing to realise the value of fundamental rights and judicial review as a check against authoritarianism. They should have realised, for example, that *Golak Nath* was but a desperate judicial attempt to safeguard personal liberties

7. *R.C. Cooper* v. *Union of India*, A.I.R. 1970 S.C. 564.

8. *Madhava Rao Jivaji Rao Scindia* v. *Union of India*, (1971) 3 S.C.R. 9.

9. *I.C. Golak Nath* v. *Union of India*, A.I.R. 1967 S.C. 1643.

10. *Kesavananda Bharati* v. *State of Kerala*, A.I.R. 1973 S.C. 1461.

11. P. Jaganmohan Reddy, former Judge, Supreme Court in *Social Justice and the Constitution* 69 (Andhra University, 1976) rightly points out that "instead of the Judiciary obstructing the Government, it has in a way helped the Ruling Party to consolidate its power at polls. The decision in the *Princes' case* "built up the ultimate image which brought about a thundering victory at the polls."

and freedoms of the citizen at the expense of property rights (in the agrarian sector at least) as the doctrine of prospective overruling as applied by the Court safeguarded even future agrarian reform laws under the Seventeenth Amendment and thus gave free rein to all agrarian reform laws. It was most unfortunate that even dedicated Parliamentarians like late Nath Pai were incapable of visualising the necessity of retaining this decision, notwithstanding its unconventional mode of preserving democratic freedoms and should have been persuaded to bring in constitutional amendments to change the law.[12]

The far-reaching constitutional amendments and legal enactments during the emergency period, sweeping away personal liberty and authorising preventive detention without disclosure of grounds (without even the magistrates issuing the detention orders ascertaining the existence of these grounds and with their signing orders on blank forms, as is revealed in the Shah Commission disclosures) and immunising elections of the Prime Minister from any type of challenge, etc. would not have been passed had our legislators, especially in the opposition benches, stood steadfast by the liberties and freedom of the citizen, from the beginning. David Selbourne rightly sums up the way the Constitution and constitutional norms were subverted by the Executive during the emergency under the guise of legal changes:

> The judiciary is attacked in the name of the 'sovereignty of Parliament' while the sovereignty of parliament is attacked in the name of democracy and the people; while democracy and the people are being attacked in the name of 'national discipline' and the struggle against conspiracy and subversion.[13]

It is easy to criticise the Supreme Court for its decision in *Shukla*[14] and the *Indira Gandhi Election*[15] cases, in the hind light of post-emergency academic boldness. But any bolder decisions might only have resulted in the closure of the courts, especially in the light of the fact that there was a move to close the High Courts on the eve of the proclamation of emergency. This is not to deny the soundness of the criticism of majority decision in *Shukla* holding that detention orders cannot be challenged on the ground even of *mala fides*, as standing to such a challenge

12. Due to such prevailing political climate, the present writer advised the need for the Supreme Court adopting a more restrained attitude in the sphere of judicial review in his article for the earlier Seminar of the Indian Law Institute on *Constitutional Developments Since Independence* held on April 20 to 22, 1973, in his paper on "Quo-Vadis Indian Constitutionalism", *mimeographed*.

13. See David Selbourne, *An Eye to India* 149 (Pelican, 1977).

14. A.I.R. 1976 S.C. 1207.

15. *Indira Gndhi* v. *Raj Narain*, A.I.R. 1975 S.C. 2299.

was barred at the threshold, by the suspension of article 21. It woule seem more reasonable to say that *bona fides* is a threshold requirement for any state or governmental act, and with two such threshhold bars for the petitioner and the respondent in existence, the scales should have been tilted in favour of the petitioner, as the bar against *mala fides* is a basic requirement of the rule of law and the common law. And if the court was prepared to sustain the validity of orders of detention, "which may happen to be in less than absolute conformity with the MISA[16] evidently, it is because of the cold fact that the judicial wing is "less than full alive" during the emergency and in the then existing bleak milieu of despotism, "the diamond bright, diamond hard hope" expressed by a judge that the executive will not "whip, strip, starve and even shoot" detenus inspite of the failure of protection by the judiciary, was like the illusion of a mirage in a desert, the product of the despair of a helpless judiciary in the face of a sustained onslaught on it at the political level. If constitutionalism is to survive in the new post-emergencey environment, it is essential for parliamentarians and the community at large to see the need of preserving the norms of democracy and the rule of law at all times. It is illusory to expect the judiciary to be the *sole* guardian of the rule of law.

16. *Supra* note 14 at 1349.