Judicial Review and Forty-second Amendment: Should We Revert to the Old Position?

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I

It is a trite proposition that a constitution has to provide constraints on state action, and a sound government has to be based on checks and balances. In their quest for such checks and balances, the political scientists have found that the courts occupy an important place, and that merely legislative check by the elected representatives of the people is not enough. Firstly, on account of certain inherent limitations of composition and functioning of the legislature, it can be a grand assembly to decide national issues and policies but is not a fit body to deal with day-to-day problems of the people. Secondly, even if it be conceded that the elected representatives of the people are in a position to act as a check on the arbitrary exercise of the governmental powers, it may not be a good idea to trust these representatives alone and this raises the question: Why cannot the elected representatives *alone* be trusted? The author has raised this question as much fetish had been made of the legislative supremacy as against the judicial power during the last few years, more particularly during the black days of the emergency. An elective assembly could be as despotic or tyrannical as any dictatorship if its powers are left unfettered. There is a lot of truth in the old saying that power corrupts and absolute power corrupts absolutely. If there are no suitable checks on the representatives of the people, they may use the power for their own benefit or of the selected few and even try to perpetuate themselves. Jefferson had said in the 18th century: "An elective despotism was not the government we fought for."[1] This is again what an eminent political scientist Dahrendorf, Director, London School of Economics and Political Science said in the year 1976: "There is not only the elective despotism of omnipotent parliaments, but also the authoritarian despotism of unfettered governments..."[2] Weeramantry in his book *Law in Crisis* says: "The new sovereign [Parliament] like its predecessor [monarch] tends towards absolutism. The only means of counteracting such trends is to keep it under constant scrutiny."[3]

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1. The Federalist, No. 48.
2. "A Confusion of Powers: Politics and the Rule of Law," 40 *Mod. L.R.* 12 (1977).
3. Weeramantry, *Law in Crisis* (Capemoss, London, 1975).

We have even moved from the absolutism of the legislature to the absolutism of the executive. Theoretically it may be all right to say that in a parliamentary democracy the legislature controls the executive but the practice has been otherwise so much so that time has perhaps come to demolish this proposition even in theory. Thus about the British Parliament Wyatt says: "Parliament governs in no more than a formal sense. By some this is fully understood. By many it is half understood and by yet many more it is not understood at all."[4] He further says that the House of Commons has sunk from despotic sovereign with unlimited power to a mere constitutional figurehead. Sir Leslie Scarman speaks in the same vein when he says: "Today, however, it is Parliament's sovereign power, more often than not exercised at the will of the executive sustained by an impregnable majority. That has brought about the modern imbalance in the legal system."[5]

If we look in retrospect to the period of last thirty years in India one would find that the picture has been that of a complete dominance of the executive over Parliament. It has been a fact that the executive had taken the Parliament for granted. Even the most drastic of the laws affecting the life, liberty and property of the people were passed by Parliament without any murmur or demur by the legislators. The clear and the most recent example is that of the enactment of the all-important and drastic Forty-second Amendment which was hurriedly passed without any kind of debate or even application of mind by the legislators. Parliament without the slightest hitch endorsed the government sponsored draconian measures which had the effect of further strengthening executive and legislative powers and eroding judicial review.

Dahrendorf gives even a higher place to the judiciary in the scheme of the government than the institution of elected assemblies. He says:

> Democracy is precious, but the rule of law is indispensable... If a case were made for an Indian government having to take measures which no elected Parliament can reasonably be expected to approve, so that the powers of Parliament have to be suspended for some time, it would be hard to accept and likely to be a great error; but there may be times when it is difficult to reject such a case out of hand. However, at no time can it be acceptable to cross the boundary between expediency and morality, and suspend the rule of law in the sense of leaving elementary human rights in the partisan and often soiled hands of governments. Bismarck's Germany was

4. *Turn Again, Westminister* 1 (André Deutsh, London, 1973).
5. *English Law—The New Dimension* 74 (Stevens, London, 1974).

> not democratic, but it observed the rule of law; Hitler's Germany abandoned both and thus turned into tyranny. One must hope that Mrs. Gandhi's India will not follow the same downhill path.[6]

This was his speech in June 1976.

The judiciary is the bastion of individual right and of justice. When it is weakened, administrative despotism or tyranny knows no bounds.

Judicial review of governmental action is broadly classified into: (*a*) review of legislative action; and (*b*) review of administrative or executive action.[7] The Forty-second Amendment made substantial changes with respect to both these matters.

II

Since the day the American Supreme Court decided in 1803 *Marbury* v. *Madison*[8] which laid down the doctrine of judicial review of legislative action,[9] there have been recurring periods of vehement debate about the power of the court to declare laws unconstitutional. To some it sounds a paradox that the executive-nominated judges five, seven or eleven in number should have the power to veto the decision of the numerically much superior majority of the elected representatives of the people. Many, however, understand this paradox and staunchly support the doctrine. The arguments in favour of the principle are common and familiar and it is not necessary to examine them here, except to recapitulate them in brief for the benefit of the very few. The arguments given in favour of judicial review of legislative action are: A necessary concomitant of the written constitution is to have an arbiter to interpret this document and to decide the limits of the power of different organs of the government; the court is most suited

6. *Supra* note 2 at 12.

7. There is the third aspect also, namely, the power to review amendments to the Constitution (exercise of the constituent power). This aspect is not considered in this paper.

8. 5 U.S. (1 Cranch) 137(1803), 2 L. Ed. (1803).

9. It is not as if the doctrine was completely new and it was not there. It has been stated: "There was a Roman and medieval conception of a supreme law of nature, ordained by God and taking precedence over temporal laws in conflict with it; and this idea of certain fundamental principles controlling government finds noteworthy expression in Magna Carta. Not until the seventeenth century, however, do we find any persistent attempt to assess the right of judges to interpret this so-called fundamental, paramount law in the face of executive or legislative action... "Moschzisker, *Judicial Review of Legislation* 13-14 (Da Capo, New York, Reprinted 1971). There were colonial precedents and state (U.S.A.) precedents. See Moschzisker, *ibid*; Haines. the *American Doctrine of Judicial Supremacy* (Da Capo, New York, Reprinted, 1973). However, in *Marbury* v. *Madison*, *supra* note 8, the American Supreme Court for the first time laid down that the power of legislation by the Congress was subject to review by the judiciary, and the principle has come to be well accepted since then.

to discharge this role of arbiter because of its independence, being away from the heat of the controversy, and not possessing the power of sword or purse or distribute patronage, and judges being well-informed and educated persons at least in matters of law; the theory of checks and balances is a sound basis of the government; review by court acts as a check on hasty action when the hot heads have cooled down; while passing a statute by the legislature the question of constitutionality before it is mere peripheral and other considerations are more controlling, but, on the other hand, before the court constitutional issue is the central issue; democracies need not elect all the officers who exercise crucial authority and in every democracy non-elected officers may exercise power which may plunge the nation into darkness (*e.g.* admirals or generals or economists) and there are many important institutions which are not directly elected by the people but have power to take important decisions; the whip system and party alignments in a parliamentary system ensure that the elected representatives commanding majority in legislature vote in favour of any proposals put forth before them by the executive government, though they may have certain mental reservations of their own; and that court has its own limitations like the system of open court, adversary procedure, reasoned decisions, lack of power to adjudicate on a case *suo motu*, etc.[10]

Much bite from the power of the courts to review legislative action was taken away by the proposals further amending article 31C and introducing article 31D. Under the Forty-second Amendment fundamental rights covered by articles 14, 19 and 31 became subservient to all the directive principles [not merely 39(*b*) and (*c*)] in the cases where the law has been passed giving effect to all or any of the principles laid down therein. Further, a parliamentary law providing for (*a*) the prevention or prohibition of anti-national activities; or (*b*) the prevention of formation of, or the prohibition of, anti-national associations—was not to be void for violating articles 14. 19 or 31.

Fundamental rights have been a powerful source of challenge to the constitutionality of laws. Most of the cases of constitutional validity arose under the three articles (14, 19 and 31) and with the laws getting immunity from these articles, what is left for the court for testing the validity of laws may not be much or substantial. It is gratifying that the Forty-third Amendment Act, 1977, has deleted the all-harsh 31D provision. A strong plea has to be made for repealing article 31C. As it is articles 14, 19 and 31 provide a thin shield against attack on the constitutionality of laws and

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10. See Moschzisker, *ibid.*; "Haines, *ibid.*; Rostow, *The Sovereign Prerogative*: *The Supreme Court and the Quest for Law* (Yale University Prass, New Haven, 1962).

with the judicial policy of self-restraint[11] and tendency to give due deference to legislative determination, the protection is very marginal indeed. With the incorporation of article 31C whatever little is there to safeguard the rule of law against parliamentary majorities has been taken away as particularly the provisions contained in articles 14 and 19 are basic to any democratic society.

The Forty-second Amendment introduced dual judiciary to a certain extent by restricting the Supreme Court's jurisdiction in the matter of constitutionality of state law (including delegated legislation) and depriving the High Court in respect of the central law (including delegated legislation). This was an erosion of judicial power in a subtle manner on account of the difficulties for a person situated at a distant place to approach the Supreme Court to challenge the constitutional validity of a central Act or a rule. Fortunately, the Forty-third Amendment has done away with this dualism and restored *status quo ante.*

III

The Forty-second Amendment substituted a new article 226 for the old one, the thrust of the new provisions being to restrict judicial review over governmental action. Judicial review of administrative action under the article has been retained as it is in relation to the enforcement of fundamental rights. However, in relation to other rights, three changes have been made for issuing the writs: (*a*) there should be injury of a substantial nature; (*b*) there has been an illegality in the proceedings and it has resulted in substantial failure of justice; and (*c*) there is no other remedy available for redress of the injury.

It has been well said that the more the words there are in a statute, the more the words for interpretation, and the greater the problems of interpretation. The newly substituted article is an excellent illustration of this proposition. Article 226 is an embodiment of confusion, ambiguities and uncertainties. There are several objections to the new article.

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11. By way of a slight elaboration, it may be said that the rights guaranteed by article 19 are not stated in absolute terms but are subject to "reasonable restrictions." Article 31 does not afford any protection to the individual against "deprivation" and the exercise of the police powers by the State. Even with regard to acquisition, with the substitution of the word "amount" for the word "compensation" its potency to stall any economic programme has been considerably reduced. As for article 14, under the rubric "reasonable classification," introduced by the Supreme Court, any legislation can be upheld, except under an extreme situation. Even in the much maligned *Bank Nationalization* case, the Supreme Court had struck down the legislation not because the fourteen banks were picked up for nationalisation but because unlike other smaller banks, these were *completely* debarred from doing banking business.

Firstly, when the administrative powers are all pervading and the government possesses immense powers to affect the life, liberty and property of the people, and when the original article 226 provided merely a restrictive and limited judicial review of governmental action,[12] it is ironical that an attempt should be made to further narrow down the limited power of judicial review, immunizing governmental action from being controlled or prevented from going astray or wayward.

Secondly, on the one hand the article retains the prerogative writs, but on the other hand, it tries to curtail their traditional scope. This creates the problem of reconciliation of these two factors. A pertinent question is raised: how far should the courts go by such old doctrines as error of jurisdiction, error of law apparent on the face of the record, no-legal evidence rule? Should the courts cease to worry about such doctrines and principles and intervene when in their view there is a substantial failure of justice? Is the writ jurisdiction liberated from the technical fetters of the English Law?[13]

Thirdly, already the writ jurisdiction is characterised by technicalities and the jungle of wilderness. The two systems will now exist side by side—one relating to the fundamental rights and the other relating to any other purpose—increasing further the area of confusion. This would make our complex system even more complex.

Fourthly, the pharses "injury of a substantial nature" or "substantial failure of justice" are vague and will give much flexible area for the courts to operate, leading to its own uncertainties. What is the purport of the word "substantial"? Does substantial have reference to the quality of legality or quality of action? If the former, there will hardly be any difference between the present position and the proposed position. Under the writ jurisdiction the courts do not take action for all errors of law but only for those which are apparent on the face of the record, for errors of jurisdiction, for abuse of power (but not on merits) or when a finding of fact is perverse or completely lacks evidence in its support. In the case of procedural errors, the position is somewhat the same. One of the major procedural grounds for courts' intervention is the violation of principles of natural justice which is a very flexible concept, and these principles may not be said to be violated if no prejudice was caused to the person concerned. Further, the courts have often refrained from taking action by holding the procedural requirements to be merely directory and not mandatory.

If the word "substantial" has reference to the quality of action, then immediately an element of subjectivity enters into the matter and the

12. See S.N. Jain, "Judicial Review of Administrative Action: Pros and Cons of the Swaran Committee Recommendations," 16 *Indian Advocate* 55 (1976).

13. See *Ahmedabad Cotton Mfg. Co.* v. *Union of India*, A.I.R. 1977 Guj. 113, 122.

courts may have power to pick and choose cases where to intervene and where they should not. What is slight and what is substantial is not easy to determine, particularly where the only question before the court is whether the individual has been wronged or not, and there is no question of balancing the individual interest against the community interest. Perhaps every wrong done to the individual against law may have to be regarded to be "substantial", except where it is not possible for the courts to give any relief even though the individual has been wronged (that is, something like the situation of *injuria sine damno.*).

The Andhra Pradesh High Court has rightly pointed out that injuries of a substantial nature or failure of justice must be in relation to the aggrieved person.[14] The injury complained of may appear to be of some insignificant nature as such, but it may be of substantial nature in relation to the person.

"There is an alternative legal remedy available to the petitioner, My Lord", is the first cry that the respondent always raises against a writ petition. Since the jurisdiction conferred on the High Courts under article 226 is an extraordinary one, as a rule of policy, convenience and discretion rather than as a rule of law, the High Courts do not entertain writ petitions if there is an alternative legal remedy available to the petitioner. However, there are certain well recognised exceptions to this rule—cases of infringement of fundamental rights, and such cases as violation of principles of natural justice by an administrative authority, authority acting under an *ultra vires* law or rules, authority improperly constituted, action of the authority palpably wrong or going to the root of the jurisdiction, complete lack of jurisdiction, *etc.* The constitutional proposals seem to restate more or less the existing law on the subject, except that a few of the exceptions, but not all, to the rule of alternative legal remedy may now cease to exist under the new proposals. Only to that very limited extent there seems to be change in the present legal position. It may as well be that the principle of alternative legal remedy is extended to the enforcement of fundamental rights or completely abrogated. The judicial difficulties in the interpretation of "the alternative legal remedy clause" may not be ruled out,[15] particularly in the light of the fact that the other ouster clauses have developed a jurisprudence of their own.[16]

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14. *Government of India* v. *National Tobacco Co.*, A.I.R. 1977 A.P. 250. Also see *Harinath Prasad* v. *State of Bihar*, A.I.R. 1977 Pat. 305.

15. The Gujarat High Court in the *Ahmedabad Cotton Mfg. Co.* case, *supra* note 13, has taken the position that the alternative remedy by way of suit is not covered by the new provisions; but the Andhra Pradesh High Court in the *National Tobacco Co.* case, *supra* note 14, has taken a contrary position.

16. *Cf. The Ahmedabad Mfg. Co.* case, *ibid.*

There has been a general complaint that often writ petitions are filed mainly to gain time by obtaining stay order, and that the High Courts have been a little casual in granting such orders. There is some substance in this complaint. To meet this difficulty the amendment to article 226 provides that no interim stay will be granted unless a notice and opportunity of being heard have been given to the other party, provided that this may not be done in exceptional cases. Further, no interim stay at all could be granted in a few important areas. Many of the High Courts as well as the Supreme Court have rules on the lines of these proposals. Since the rules of these courts are already on the lines of these provisions, it may be better to leave the matters to the good sense of the courts.

However, no provision with regard to stay orders has been made in the case of the writ-issuing powers of the Supreme Court. On the rational plane it may be hard to justify this omission. Either such a restriction may be imposed on the Supreme Court or else it may not be there for issuing writs by the High Courts for the enforcement of fundamental rights.

The proposals dilute the writ jurisdiction of the High Courts in several other respects. Firstly, the Rules of Business framed under articles 77 and 166 are made confidential, prohibiting courts to require their production before them. As the position stands at present, the courts could look into the matter to find out whether a governmental order was made by a proper authority under the Rules of Business or not. To that extent the new proposals immunise the governmental action.

Secondly, a significant limitation has been placed on the courts in election matters by amending articles 103 and 192. It has been provided that the President of India shall decide after consulting the Election Commission the question of a corrupt practice by a person at an election to a House of Parliament or House of the Legislature of a State under any law made by Parliament, and *his decision shall be final.* The italicised words would exclude judicial review in election matters involving corrupt practices.

Thirdly, the powers of the High Courts under article 227 are proposed to be curtailed in two respects: (*a*) they will not have power of superintendence over the tribunals; (*b*) they will not have any jurisdiction to question any judgement of any inferior court which is not subject to appeal or revision. Articles 226 and 227 covered practically the same area in the matter of judicial review of administrative action, and perhaps the Constitution-makers did not realise the full implications of the two articles. It is good that article 227 is proposed to be restricted the way it is, provided article 226 jurisdiction of the High Court is not restricted in relation to the

administrative tribunals.[17]

Fourthly, the Amendment introduces a significant limitation on the writ jurisdiction of the High Courts and also of the Supreme Court by providing for the creation of administrative tribunals. Administrative tribunals may be created by Parliament by law for adjudication of disputes for service matters relating to public services and posts in connection with the affairs of the Union or any state or any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the government.

Further, the appropriate legislature has been given power to establish such tribunals for adjudication of disputes, in connection with the following matters: levy, assessment, collection and enforcement of any tax; foreign exchange, import and export across customs frontiers; industrial and labour disputes; land reforms by way of acquisition by the State of any estate as defined in article 31A, etc.; ceiling on urban property; election to either House of Parliament or Legislature of a state, but excluding the matters referred to in article 329 and article 329A; production, procurement, supply and distribution of foodstuffs and such other goods as the President may declare to be essential goods.

A few features may be noted with regard to these provisions. Firstly, even *offences* in relation to the above matters could be decided by these tribunals. Secondly, the propvisions do not cover the existing tribunals which are there in some of these areas. But this may not create much difficulty, for the legislature by the same statute may first abolish the existing tribunals and re-establish them under the new article of the Constitution. Thirdly, for service matters, whether Union or state services, Parliament alone has been given power to establish the tribunals, whereas other tribunals may be established either by the Centre or the states as the case may be. Fourthly, for the first time the power is being given to Parliament or the state legislature as the case may be for the exclusion of the jurisdiction of all courts (under article 226 or even of the Supreme Court under article 32) except the jurisdiction of the Supreme Court under article 136 with respect to all or any of the matters falling within the jurisdiction of the tribunals.

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17. In spite of the article excluding "tribunals" from the purview of article 227, the Bombay High Court in *S.D. Ghatge* v. *State*, A.I.R. 1977 Bom. 354, held that tribunals were to be regarded as courts as they were "performing judicial function of rendering definitive judgements having finality." For a comment on the case, see S.N. Jain, *Administrative Tribunals in India : Existing and Proposed* 27-28 (Tripathi, Bombay, 1977).

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Nothing more is said about these tribunals here, as this has been the subject matter of a somewhat detailed enquiry by the author at another place.[18]

18. S.N. Jain, *Administrative Tribunals in India: Existing and Proposed*, *ibid.*