WESTERN QUESTIONS ABOUT THE RULE OF LAW IN INDIA

by

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1. At the colloquium on the reception of Western law in India, held in 1956 in Barcelona, the Indian experts stated as one of their principal conclusions that the establishment of the Rule of Law by the British authorities in India was the greatest contribution in the field of law and government which had been introduced by the colonizing power. It was impossible within the framework of last year's conference to examine this conclusion in detail and to analyse its contents. In particular, it did not emerge with certainty whether in the view of the Indian experts the establishment of the rule of law was to be seen in the establishment of a system of regular courts, staffed by independent and qualified judges who applied general rules of law without distinction of person, religion, race or sex in accordance with firm rules of procedure or whether the experts wished to refer to certain minimum standards which determined the content of the rules of substantive law imported from England and imposed in India.

2. As the preparatory work for the general colloquium on the Rule of Law in the West has shown, there is no generally accepted standard in occidental countries and in occidental legal theory as to the fundamental requirements for the establishment of the Rule of Law.

In common law countries, the Rule of Law is primarily to be found in a procedure which permits free access for all to the ordinary courts and safeguards the right of the individual against arbitrary action by the executive. The minimum protection of the crook in the courts became thus the basic charter of substantive civil rights for all.

In civil law countries, the idea of fundamental human rights, enshrined in the Constitution, which was first realized in the French revolution, forms counterpart of the common law doctrine. The two concepts are not identical, but they overlap wherever fundamental rights of the individual are asserted in judicial proceedings. Since fundamental rights guaranteed by the constitution are inoperative without some procedure of enforcement, the point of contact of the two doctrines is both necessary and frequent.

3. The question must now be put whether Indian lawyers, when stressing the importance of the introduction of the Rule of Law in India by the British authorities, were concerned with the procedural of the Rule of the Rule of Law or with its substantive content.

(i) In the first place, it is clear that they were not alluding to any restrictions upon the power of the legislature and with the judicial control of legislation. Leaving aside the question whether the legislation in India before independence was achieved in 1947 can be regarded as legislation by a parliamentary democracy in the accepted sense rather than as government by decree, the problem of judicial control of legislation never arose. Such control, which presupposes the existence of fundamental rights beyond the normal reach of the legislature, is alien to English law and did not find its way into India. When it did, in 1950, its American origin is evident.

(ii) In the second place, the introduction of English procedure brought in its wake those remedies which, in the form of prerogative writs, have enabled the courts to ensure that the administrative and quasi-judicial authorities carry out their duties within the framework of the law. This control of the executive by the ordinary courts is, beyond doubt, one of the great contributions of English law to problems of Government inasmuch as it ensures executive action within the law (whatever this may be). Modern experience has shown, however, that the procedure deve-

loped in past centuries where central government was limited in its functions in England and the bulk of administration was carried out by local boards which had little need to resort to great questions of policy, does not fill all the needs for the control of a centralized administration, and it may be questioned whether the procedure of prerogative writs, however startling and effective, constitutes the principal aspect of the introduction of the Rule of Law in India. On the other hand the introduction of government according to law as a principle of administration must be regarded as a constitutional novelty for India.

(iii) Probably the chief impact of the Rule of Law, as understood in the common law, occurred in the field of the administration of justice. Where formerly the King, at his Court, and village tribunals. elected by the villagers themselves from among themselves, dispensed justice according to custom, a hierarchy of courts staffed by Indian and European judges applied strict principles of law. It would seem that, from the early stages of British rule onwards, professional qualifications counted less than independence when the organization of the courts was established, and factual independence from direct political influence may have counted for more than abstract rules of irremovability and of disciplinary precedent.

As stated above, the common law provides a substitute for guaranteed human rights in its procedure which safeguards the individual against arbitrary action by the executive. Thus, by interposing a fixed procedure before independent courts with a defined jurisdiction applying rules of law, common law safeguards the individual by securing for him a uniform process and trial and by excluding any other form of interference with his personal liberty, freedom of opinion, of speech, and of association. Within the framework, it must be admitted, of laws which are enacted by the legislature without any control as to their substance.

Indian Criminal procedure provides the foremost example of this tendency. Strict provisions as regards searches, rules

for assuring that the accused is not detained beyond a certain period and not for more than 24 hours without an order of a magistrate (Code of Criminal Procedure, 1898, ss. 167, 61), the power of the High Court to control all arrests and detentions (ibid. s. 491), that the case is heard by the ordinary magistrate who has jurisdiction within the district and is not transferred at the request of the Government to another jurisdiction (ibid. s. 177 ff.) except in certain circumstances. But see now the Special Courts (Jurisdiction) Act, 1950. The position of the public prosecutor (ibid. s. 492 ff.) differs considerably from that in continental Europe, and it is unnecessary to examine it here. It may have to be considered to what extent the Code of Civil Procedure and the Evidence Act add fundamentally to the establishment of the Rule of Law. The Indian Penal Code, by providing a system of offences and of exceptions and defences must be regarded as an essential element in setting up the rule of law.

It is recognized that the Codes referred to here represent, with certain important modifications, English law as applied in an unwritten form in England. In so far as these codifications concerned right and duties of a material, as distinct from a procedural character the way was prepared for the formulation of general guarantees of the individual and of his property. But this was only taken in hand by the makers of the Indian Constitution, 1950 as amended subsequently.

4. Articles 19-35 of the Constitution provide a catalogue of fundamental rights safeguarding equality (arts. 14 - 18), freedom of thought, action, organization and movement, including the right to hold property (art. 19), freedom of the person, including protection against arrest and exploitation (art. 20 - 24), the unrestricted exercise of religion (art. 25 - 28), the protection of minorities, including access to cultural and educational institutions (art. 29 - 30) and the enjoyment of property (art. 31, 31A, 31B).

It must be asked, in the first place, whether a catalogue of fundamental rights bears any relation to the concept of the

rule of law, and if so whether the enumeration of basic rights adopted by the Indian Constitution must be regarded as having universal validity. Problems which are of special local interest in India, such as those arising from the position of minorities, of castes and of racial and religious tension, are reflected both in the emphasis upon certain fundamental rights and in their restrictions which appear in practically every article. The application of these restrictions by the courts need not be considered here, but must be left to the discussion in Chicago. This practice shows that such limitations are necessary, if fundamental rights are expressed in abstract propositions, and that the effectiveness of fundamental rights must depend, in the end, on the common-sense of the Courts, if the principles themselves are not to be destructive or negatory. Moreover, the restrictions on **fundamental rights in the Constitution** are reflected in legislation such as the Preventive Detention Act, 1950, enacted under art. 22 (4) of the Constitution. The question is thus whether there are fundamental rights with a variable content, having regard to the social, economic and political conditions of a country.

In the second place, it is interesting to note that the observance of these fundamental rights can be enforced by the individual with the help of a procedure which was developed in England for different purposes and that, following the American practice, the Supreme Court (and the High Courts) can thus control the compatibility of legislation with the constitutional guarantees. The guarantees are thus effective.

In the third place, the Constitution of India, art. 15 (2), in attempting to abolish disabilities arising from caste, addresses itself not to the organs of government, but to the individual, and had thus to be supplemented by Untouchability (Offences) Act, 1955.

From the point of view the present discussion, the constitutional provisions concerning the qualifications and the status of the judiciary (arts. 124 - 126, 217 - 218) are of outstanding importance, inasmuch as they guarantee the maintenance of an independent body of judges. The form of this gua-

rantee is conceived in terms which reflect English and American rather than Continental legal thought. There is no Ministry of Justice and there are no courts of discipline for judges.

It appears that, according to Indian thought, sufficient control of the executive is provided by the recognized methods of prerogative orders in order to ensure legality and constitutionality. Experience in other countries has shown that modern forms of government may bring whith them the need for specialized tribunals and procedures adapted to the needs of administration, if effectiveness, policy, discretion and legality are to be considered on equal terms. The indications are that this need has not, as yet, made itself felt in India, where the control of administrative agencies by the ordinary courts appears to suffice.

5. It seems that Indian legal thought has started from a concept of rule of law as understood in England. Administration of justice by the ordinary civil courts staffed by independent judges, according to established rules, control of the executive by the ordinary courts to ensure the exercise of administrative processes according to the general law and a minimum standard of protection of the individual against interference with personal liberty by the executive are its constituent parts. In this sense, the rule of law embodies the concept of formal justice which enforces compliance on the part of the administration with the rules of substantive law and, incidentally provides for the individual a free sphere of activities. It is essentially English in character.

The modern trend appears to concentrate upon the content of the law itself and affects the process of legislation as well as the existing law. The question is whether the formulation of fundamental rights and the concomitant control of legislation are essential for the Rule of Law and if so, whether the canons of fundamental rights can be said to be of universal validity.

While some of the rights which figure in the embody, once more, the idea of formal justice, others go beyond it and repre-

sent certain fixed concepts of what may be called material justice. The basic pattern is thus whether, and if so to what extent ,certain canons of material justice are synonymous with the (admittedly somewhat uncertain) concept of the Rule of Law. The general notion, which inspires most fundamental rights as expressed in the Indian Constitution of 1950, appears to be that of equality. Yet this notion is expressed in terms peculiar to Indian society. It includes equality of status in public law and in all branches of life which concern the community as a whole. It does not include equality in private law, especially in so far as equality of sexes is concerned. It may be interesting to examine to what extent the various fundamental rights acknowledged by the Constitution may impinge upon established principles of private law, particularly of family law and the law of succession.

6. If the proposition is accepted that the maintenence of the Rule of Law requires the formulation of fundamental rights, it follows necessarily that these fundamental rights must be of an overriding character, even in the face of legislation. The control of legislation by some outside body, such as the courts, becomes inevitable, if the fundamental rights are not to remain programmatical. However, it must be asked whether the existence of the Rule of Law is necessarily accompanied by the recognition of fundamental rights.

The formal view of the Rule of Law, as developed in English law, has resulted in certain guarantees of the liberty of the person and of his property. But these guarantees are themselves only formal and can be altered by legislation; moreover the point has been reached where they may not assist the individual in relation to discretionary executive action within the framework of legislation. The substantive view of the rule of social justice has equally resulted in the establishment of certain safeguards, but as, for exemple, art. 22 (3) (b) - (7) of the Indian Constitution shows, it does not necessarily guarantee what constitutes, according to the formal English concept the preservation of liberty, except by

way of criminal or civil proceedings based upon strict rules of substantive law, however variable in time and content.

7. It is now clear that the problem before the conference is not only that of reconciling the formal view of the rule of law, as developed in England (and its repercussions upon the substantive law concerning the liberty of the person) with the notion of basic material laws enshrined in a constitution. The problem is also that of determining what these basic notions are. The formal concept of the Rule of Law as adopted by the common law can dispense with this enquiry as long as the law provides formal certainty. Such certainty is provided in common law countries by the nature of the legal system itself, which proceeds from the particular to the general. Thus precise statutory limitations of the freedom of the person or of his right to hold property would be accepted in England. Similar limitations, however precise, would violate the basic law of India. A change of constitutional law would be involved, but this shows, in effect, that the problem becomes a formal one again, once popular opinion has changed and the proper constitutional changes have taken place. The common factor may well be found in the notion of certainty. This delimits the powers of the judiciary in applying the law, but defines at the same time the exercise of all governmental activities within the State. If this is correct, one conclusion emerges clearly. The control of the legislature by the courts to ensure compliance with the constitution is not an essential feature of the Rule of Law, but this control assists naturally in maintaining certainty in the formulation of legislation in the light of the fundamental rights guaranteed by the Constitution, since any legislation which it too broadly worded and uncertain may well be capable of affecting potentially well defined fundamental rights.

If this is correct, it would follow that the Rule of Law is not necessarily concerned with the protection of the individual, his freedom and his unrestricted sphere of activities. The protection of the individual and of the private sector of society could well be replaced by the protection of the State and of the public sector. The change is one of emphasis only. It seems, howe-

ver, that such an interpretation of the Rule of Law exploits the formal approach beyond its proper limits, at least in so far as the Western approach to the Rule of Law is concerned.

By accepting that the Rule of Law is not concerned with the substance of the law, but only with its form inasmuch as it ensures certainty in the operation of the executive towards the individual and defines his free sphere, certain assumptions have been made implicitly. These assumptions are that there exists a separation of powers including a law-making body and that all citizens are entitled to participate in the making changing and abrogating of laws, including the most fundamental constitutional law. In short, it assumes a rule of men, but a formalized process of ruling by way of majorities. Thus, while primarily concerned with the delimitation of frontiers between executive and judiciary, by insisting on certainty, the Rule of Law is also concerned with legislation and the processes leading up to legislation. It assumes the individual right to advocate changes, which implies freedom of speech, of political activity, including organization, and of the press, for the purpose of exercising and influencing legislation and, thus, negatively, freedom from arbitrary arrest, trial in absentia or conviction on grounds not previously etablished by law. Whether and to what extent it presupposes the recognition of private property is another question.

It is thus possible to crystallize those basic fundamental rights amongst the great number of such rights enumerated in various constitutions which underlie the Rule of Law and which are equally implicit in the formal English concept of the Rule of Law. Modern conditions have blurred the separation of powers even in the West (if it ever existed in a pure form) and delegation of legislative functions with discretionary powers to the executive in the place of a quasi-judicial application of law to a purely factual situation assumed not to involve any discretion has become more and more frequent. This development has let to the substitution of specially qualified courts in order to assess the limits of the exercise of discretion, but it has not destroyed the basic notion.

8. If then, the Western approach to the Rule of Law is one which postulates the separation of powers, a strict delimitation of spheres of action between the executive and the judiciary, and a restraint, on the part of the legislature, from curtailing the citizen from exercising his civic rights, which culminate in the right to control and to influence government within the framework of a recognized process of civic action, how does such an approach compare with that adopted by India? The answer seems to be that, with some exceptions, such as that embodied in art. 22 (3) (b) - (7) of the Constitution and the legislation thereunder, India has adopted the formal notion of the common law of England and has formulated its underlying assumptions in some of the provisions which now constitute the fundamental rights guaranteed by the Constitution and has provided the necessary remedies for putting the assumptions into practice. An ancillary and minor question is that of how Indian law has faced the modern expansion of administrative agencies with quasi-legislative or quasi-judicial powers, for in this field the Rule of Law is facing its test in the Western world.