The Courts : On trial again

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A lot of people have been upset by the Supreme Court's judgement in the Narmada case. And so also our High Court's judgement in the electricity tariff case, though the opposition parties quite strangely `welcomed' the judgement, and even discovered in its reasoning a non-existent vindication of their position. Those who are more closely involved with the Courts have found cause for being similarly upset in quite a few other cases which have not attracted public attention to the same extent as these.

This is not the occasion to go into the technicalities of the judgements and their rights and wrongs. But it is certainly the occasion to wonder whether we are seeing history repeat itself: the late sixties and early seventies of the twentieth century was a period when the Courts were the subject of public comment, principally the expression of dissatisfaction with their inability to measure up to the challenges of the times. The Courts were seen as the theatre of private property's last battle against the Welfarism espoused by the `leftist' elements of the Congress party. The Courts went back into their opaque shell after Indira Gandhi appeared to have ensured that private property lost and Welfarism won, and obtained for this victory the stamp of the Supreme Court's approval. The appearance was mostly a delusion, but in the late seventies and early eighties the Courts emerged again into the domain of public comment, this time as the heralds of change and not an obstacle.

The expectations that period gave rise to have now pitted the Courts against the `winds of change', namely the philosophy and the policies of globalisation. All indications are that the judiciary has by an overwhelming majority decided to sail with the winds. This is necessarily going to put the spot light of public scrutiny once again upon the Courts. If it is the wrinkles that show up, it is not the public that is to be faulted.

The judiciary has an easy answer to this: we are not a super-government, they say. They are not, and we do not want them to be. In other words, when one expresses dissatisfaction with a Court judgement on a matter of public interest, one is not blaming the Court for not usurping the policy-making power of the political government. And not merely out of considerations of a Constitutionalist character, but the very practical consideration that governmental vagaries are subject to electoral correction, at least in theory, whereas judicial vagaries are not, even in theory. And perhaps also the additional consideration that politicians, all said and done, are driven by the exigencies of political life in a democracy to know some thing about the concerns of the poor and the deprived, whereas the judiciary, individual exceptions notwithstanding, suffers from no such compulsions, nor therefore from any such concern.

But if one nevertheless complains, it is out of the dissatisfaction that the judiciary has failed to give full effect to the intent of the makes of the Constitution when they put the powers that they did in the hands of policy makers. Our Supreme Court has perhaps been too hasty in rejecting the idea that Courts can look at executive action from the vantage point of the `Spirit of the Constitution'. The word `Spirit' sounds vague and is easily condemned as a metaphysical category, but it is nothing but the intent of the makers of the Constitution: what was the goal for the furtherance of which the Constitution sanctions the powers of the State? It certainly would not be foreign to familiar legal principles to say that such intent can be a guiding light for the Courts in adjudging the propriety of executive or legislative action. Such a principle may not have been found necessary by the jurists of western countries whose Constitutions have not incorporated any goal for the nation, but our Courts should have by now evolved it into a sound frame of reference.

For our Constitution is an organic document that took shape within the nationalist movement and its varied aspirations. Almost all streams of opinion in the freedom struggle repeatedly said that freedom does not mean merely replacement of the rule of the whites by the rules of the blacks, but that it should necessarily include social and economic justice. The Constitution, notwithstanding its numerous limitations, incorporates this view, and indeed that is its `spirit', the purpose or intent for which the makers of the Constitution sanctioned the powers they did to the organs of the State.

Today it is precisely this purpose that is being jettisoned. That is the essence of the `winds of change'. That purpose is being replaced by the overriding purpose of rapid growth of merely two indices of development: the rate of capital formation and Gross Domestic Product. Should the Courts sail with these winds, or should they stand by the intent of the makers of the Constitution? This is the question that has directly arisen in these controversial judgements. It will arise again and again in the days to come, and the Courts will be the centre of controversy as in the late sixties and early seventies: with this difference that in that period it was a rising political star, Indira Gandhi, who put the Courts there in the name of the people, whereas now all the political stars, rising or risen, are on the other side, and it is the democratic aspiration for social justice that will be interrogating the leaders as well as the Courts.

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