

****** An evaluation of working of federalism and fundamental Rights Under Constitution of India.**

Constitution of India has guaranteed to the people federalism and fundamental rights. Fundamental Rights and Federalism have been attacked from various ways. Critics, even, points out that constitution does not embody fundamental rights in reality but only an appoloy to them. Last 46 years of working and experience of fundamental rights has shown various short comings and defects. It is also alleged that the constitution is not federal. It is now simply Quasi - federal or unitary with federal characteristics or unitary federal. But in reality it federal on record but autocratically unitary in practice Let us collect - all these short comings and defects as Under :-

(1) It is true that many fundamental rights particulary freedom of press, right to education, right to rest and leisure, public service and right to work etc. have been ignored while drafting the chapter on fundamental rights inspite of heavy assertion for their inclusion in the chapter of fundamental rights, these were not included as fundamental rights. Although the importance of these rights to an Individual was not denied, but it was agreed that it would not be feasible to include them as fundamental rights looking into the prevailing poverty of Nation and limited resources. Now the question is that when it was not possible to ilrclude these rights as fundamental rights, then why the right to work, education, rest and leisure had been included as Directive Principles of state policy as being mandate to the nation and legislatures to be implemented in near future for the benefit of society at large. Now in the changed circumstances these rights should be made enforceable through court of law, then only the court can compel the legislature and government to fulfill the pledges of the constitutional mandate. Freedom of press has been accepted as a fundamental right under the constitution Guarantee of freedom of speech through the various verdicts of apex court of land. But nothing is expressly clear unless the law of press is codified properly under fundamental rights.

2) Recently there have been numerous violations of human rights by the Govt., Police and certain other official agencies, besides . influential landlords, captains of industry, Several assessment made by impartial organisations and individuals in the country, such as those concerned, with civil liberties, have confirmed that human rights in India are not as 1 well assured as they have supposed to be four decades ago. True, the right to life and personal liberty of the individual have been assiduously protected by the courts, especially legislatures and the executive.

The deviations and the gross excesses indulged in by the Police and certain unauthorised agencies have become too frequent to be ignored as mere aberrations caused in the Discharge of duty. Many of these violations are made in the name of national security and the public interest Several sweeping and draconian laws continue to be on the

Statute-book, despite consistent opposition by certain political parties, leaders of independent groups organisations of lawyers and right thinking individuals. Among these draconian laws which make nonsense of basic rights and liberties are the National Security Act (used even against journalists who try to expose act of corruption and the Government's malpractices), the Jammu and Kashmir public security Act and the terrorists and disruptive Activities (prevention) Act. 'Anti-terrorism and other similar acts have also been enforced in certain disturbed states such as Punjab, Assam and Kashmir . Moreover, despite the high sounding commitments to democracy federalism equality of citizens, justice and fair play for every one, the due processes of law have often been suspended and arbitrary measures adopted. Even third degree methods continue to be used by the police against suspects.

Some over zealous people believe in the doctrine that those who are responsible for national security or for the maintenance of public order must be sole judges of what security and public order require. Some senior court judges, however, reject this doctrine because of the misuse of authority by some of the persons forming the security network. One enlightened Judge rightly commented:

"This doctrine is too perilous a proposition. Our constitution does not give a carte blanche" to any organ of the state to be the sole arbiter of such matter "The courts have to face the difficult task of maintaining a balance between national defence against organised terrorism and protection of Individual liberties and rights." It is alleged that chapter of fundamental rights should be renamed as limitations on fundamental rights or fundamental rights and limitations thereon..

Substantially much of our Fundamental rights are taken away by the extra ordinary provisions such as preventive detention laws, suspension of the right to the Constitutional remedies, unequal laws for equals without reasonable and probable cause, easy provisions and procedure for the Abrogation of any provision and amendment to the constitution itself. Shree M.C. Chhagla wrote, "It has been said that our constitution gives fundamental rights with one hand and with the other takes them away by circumscribing the rights by in-numberable exceptions and provisions." It is also a fact that these rights are hedged in by so many exceptions, explanations and qualifications that it is very difficult to understand the scope of fundamental rights left with the people. It will be noticed that these limitations are objective standard laid down by the constitution itself. The legislature is given the rights to impose reasonable restrictions in public interest or otherwise according to other constitutional grounds, whether a restriction is reasonable or not is firstly left to the determination of legislature second, to the executive and lastly, if occasion arise upon the petition or information to court, by the court of laws. As we know this three tier system can never sail in one and single boat. These three different organs cannot have consensus of opinion, differences of opinions and possible

misuse is possible. Experience has taught us that present constitution has left us to the party in power in legislature or to the caprice of the executive to limit, control or impair any fundamental right. Hence to put checks and balances on this situation certain standard barometer or objective principles may be fixed for implementation to avoid confusion and clarity of concept. We do not find any justification for the provisions relating to preventive detention and suspension of constitutional remedies. It cannot be denied that the operation of many fundamental rights was seriously effected to the proclamations of emergency in 1962, 1965, 1971 and 1975. These kinds of laws are always described black laws. Flagrant violation of human rights and liberty of persons can be put in peril by these black laws. The aggrieved person becomes the featherless bird who cannot fly to the sky. Misuse of these laws had been experienced in the past years frequently by executive authorities. It was only the court of law which intervened to fulfill the constitution thrust of human rights .

(3) Emergency provisions are great obstructions in the smooth functioning of federalism and operation of fundamental rights. These kinds of provisions are only expressly found in the constitution of India and Germany only. No body denies that the emergency provisions of the constitution can be abused by the Government and have been actually misused on certain occasions by the Govt. During the emergency period of 1975-77 thousands of peoples were put behind the bars and were subjected to severe hardships 3. Experience shows that apex court of land has been very vigilant to safeguard the fundamental rights of persons. In *M.S. Tara Sikka Vs. State of Punjab* (AIR 1964 SC 381) court upheld the validity of order under article 359 but gave reliefs to the petitioner on account of malafide and illegal action of the executive. In *Mohammad Yakub v/s State of J and K* (AIR 1968 S.C. Page 765), the court held that maximum consideration should be given to the judgment of the executive as the state involves the security of the nation. But in expressed cases of executive excesses the court could interfere. However in case of *Additional Distt. Magistrate Jabalpur V/s Sadha Kant Shukla* (AIR 1976 S.C., 1207), the Supreme Court took very pessimistic and disappointed attitude. It was held that the executive action could not be challenged during the period of Emergency. Now the legal position is no very clear, everything is under uncertainty. Now a lot of change is required in emergency provisions, so that the liberty of person, human rights and federal and culture of society cannot be curbed or abrogated unnecessarily. Judicial finding has also to be corrected by court itself to protect fundamental rights • Although emergency provisions have been made stringent but severe limitations are required to be imposed to check its misuse in future. It should be made obligatory to the Government in power to exercise these powers with great caution, and its violation should be made a penal offence so that defaulter can be punished.

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and 64th constitutional amendment Act which provides for declaration of an internal emergency in a part of the whole of the State. Some critics have gone to the extent of asserting that if misused, this measure can convert India from a federal Parliamentary democracy to a centralized dictatorship. This amendment has been amended from time to time. It was said to be temporary measure designed to tackle the increasing menace of terrorism which has assumed disconcerting dimensions and led to the erosion of credibility in the administration's capacity to insure peace and safety of life in the disturbed area. This amendment also empowered the union government to postpone elections throughout India by extending the term of Parliament and the State assemblies even if an emergency is declared in any Punjab district. This measure has not assumed, as it appears, a permanent form. 64th Amendment Act has largely repealed 59th amendment Act, But it has introduced provision like that to some extent. The desiring results have not proved, it to be a successful law. The terrorism is on rampant position. It is continuing. This law has failed to cope with terrorism except to some extent. Hence, the continuing applicability of this law, which can change the nature of the parliamentary democracy, if misused should be dropped and instead of it some other strong measure should be taken either under ordinary law or under other special law for that purpose only to curtail terrorism. It is only possible if such laws are implemented truly and strictly without fear or favour to any group or part; by authorities concerned independently. The position of Kashmir is not different from Punjab where such laws are limitations are required to be imposed to check its misuse in future. It should be made obligatory to the Government in power to exercise these powers with great caution, and its violation should be made a penal offence so that defaulter can be punished.

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if misused should be dropped and instead of it some other strong measure should be taken either under ordinary law or under other special law for that purpose only to curtail terrorism. It is only possible if such laws are implemented truly and strictly without fear or favour to any group or part; by authorities concerned independently. The position of Kashmir is not different from Punjab where such laws are trusting the Judges to lay down the limitations of the fundamental rights themselves laid down all the limitations and exceptions in very case. Here one important and pertinent fact is that experience shows that the politicians of India did not trust the Judges, they only trust themselves.

(5) Critics also points out that there is more emphasison rights than duties. However, it is pointed out that rights and duties are the two sides of the same coin, if duties are fulfilled, rights take care of themselves. Hence likewise fundamental rights, fundamental duties having force like these rights should be inserted in the constitution. Present set of fundamental duties are only idle provisions of law with out any force or sanction of law. Equal force should be given to rights as well as the duties. What is required is a change in the atmosphere prevailing in the country. The constitution, public opinion, jurist and law itself should denounce the actions of Individual and groups who subvert the rights of others.

(6) Another criticism is the heavy cost involved in the process of moving the Supreme Court or High Court for the protection of fundamental rights. It is also a fact that every person cannot go to Supreme Court or High Court. It also causes heavy extra burden of cases to Supreme Court and High Court. In Supreme Court alone huge number of cases are pending for disposal. The cases for the protection of fundamental rights constitute atleast 65% of the total pendency of case work. Shri Venkat Ramayya C.J.O I. (Ex.) once upon a time at the time of his retirement suggested for the amendment of the constitution to award constitutional powers of protection of the fundamental rights under art. 32, 136 and 226 to subordinate judiciary of each and every district headed by District and Sessions Judge. It shall be, as we think, cheap; easy and assessable to all. It shall also reduce the burden of High Court and Supreme Court. The subordinate judiciary can deal with the situation at gross root level. If these constitutional powers are conferred to subordinate judiciary for the protection of fundamental rights, then the ground of rejection dismissal and return of writ petition on the ground of availability of alternative remedy shall automatically be washed out.

It shall be all smooth and several other technicalities and procedural problems shall also be out of date and inapplicable.

(7) The constitution of Nepal is, like ours, democratic one. It is, undoubtedly, ideal, modern and latest one. It has been framed and implemented in the year 1990.

It has certain special provisions, which are of distinguished character and base @ not only of human rights and social justice, but

also of democracy itself. I am of the opinion that about these provisions either we are ignorant or negligent. These are those ideal provisions which should be imported in our constitutionally protected scheme of fundamental rights. These are as under :

(i) Section 16 provide that each and every citizen of Nepal has a right to obtain or have each and every information of public utility from Government or its institutions. No Government can withhold any information of aforesaid character on any ground whatsoever. The Government or its agencies are compelled to disclose the information on demand.

(ii) Section 21 provide that each and every citizen of Nepal has a right against his expulsion from country. It means no one can be expelled from country on any ground whatsoever. It is a Utopia for Indian system future.

[iii] Section 22 provide that each and every citizen of Nepal has a right of privacy for his life, liberty and property, in society against any kind oral or written public disclosure or invasion from others including Government. Thus each man can protect his life, liberty and property from public disclosure on ground of Rights to privacy against others in society.

If we see these three provisions jointly and simultaneously then a glance of ideal constitution enlightens clearly. Government or its agencies cannot withhold any information of public importance while on the other hand individual can protect his life, liberty or property on the ground of right to privacy from public disclosure. Individual can protect himself while the Govt, tries to speak the truth. Thus individuals can live comfortably and can protect his interest from Government, then the interest of each and every individual is safe then hundred percent individuals and citizens are safe then society itself is safe, and no chaos at all in society. It shows the patriotic feeling of individuals towards Government and Governmental feeling of protection to Individual on other hand.

(8) The utility and enforcement of fundamental rights depend upon the smooth and clear functioning of federalism. When federalism is not in proper order, these rights shall not be able to protect peoples. They shall lose their utility. The federal pattern is under grave threat from several corners. The federal structure bifurcates the executive and legislative powers between union of India and state Governments. This division of power is a grand example in world which is resorting for the last days. It is trying to survive. The demand of more powers to states, Central Government's interference in state Government working, disobedience by state government of Central Government etc. pressed very hard the need for review of centre state relations i.e. federalism in India. But we should try to count the problems, which have created this problem. Firstly an argument has been advanced that ethnic social

groups are highly dis-satisfied with the federal structure of the Nation. They are demanding to get the constitution re-written to refederalize the country according to their wishes. Secondly, the secessionist problem of Kashmir and Punjab and of other states are major issues. Thirdly, mistaken policies of administration and wrong approaches of political leaders can finish federalism upto the last resort of division of Nation.

Firstly, the problem of Tamils, in Tamil Nadu, is a severe headache between the relations of India and Shree Lanka. Bodo problem of Assam, a rid Gorkha problem of West-Bengal also cover major ethnic problem. In substance these ethnic problems always lead to social collision because if it is encouraged, its claimant stress will be on pure ethnic identity. India will witness brutal civil war and forced transfer of population with in country. If ethnicism is encouraged against pluralist and accommodative Indian nationalism. It can be easily linked with religion, which can lead to communalism and religio-f ascism in the country. On the other hand any exclusive social and cultural identity in any part of India will generate inter-ethnic, inter-religious, inter caste and insider - outsider conflicts. This is grass root reality of India. The task is to build secular and modern identities by eliminating local parochial and exclusive social assertions. We have to understand and implement secularism in its true sense. Government should neither be indifferarit to or ignore any religion or its sentiments nor it shall give preference to any religion or its sentiments. All religions shall be treated equality. There shall neither be any revengeful attitude or policy of appeasement towards any religion from government. Government shall maintain the balance between various faiths and belief. Followers of each faith shall flourish and enjoy the fruits of their faith and culture whether they are in majority or minority, Government shall not attach any benefit or privilege if any particular group, sect or religion. Government shall not interfere into any religious activity. But it shall protect, flourish and develop the culture at local, state or National level.

Secondly, the secessionist attitude by various groups in the state of Kashmir and Punjab are highly dangerous signals of rift in the federal structure of the nation. If timely and prompt actions are not taken and the remedies are not enforced to get the malady corrected, then certainly India shall be further divided like the division in the year 1947. It is also sure the foreign agencies may be behind these groups. We should not hesitate to take all actions fo curb these activities for the integrity of the nation. Unless harsh, strict and offensive attitude is adopted, this problem cannot be solved. It is also a fact that due demand of these groups should immediately be fulfilled. For example the demand of prosecution against those whose are responsible for the atrocities against Sikhs during . assassination Indira Gandhi in 1984 is not only justified, but also a healing balm for them.

Thirdly, the mistaken policies of Government or administration are often disastrous for the federal structure. We have seen that several

times, the State Governments of Tamil Nadu, Bengal, Assam and all the nori congress government always raised the question of relation between state and central government - particularly for the division of power and interference by central government in the sphere of state government. The use of power of art. 356 of Constitution has always remained under fire. I mean to say that Government decisions and administrative policy should be cautiously drawn and implemented. Cautious but mistaken implementation of policies and decision by central government or its officers might cause fathomless sea of rift between relations of state and central causing consequent failure of federal structure of nation.

The continuous keeping in abeyance of the implementation of River Kaveri water dispute by centre and states of Karnataka and Tamil Nadu, is a signal of crippling status of federalism in India. The previous decision of Farukh Abdulla Government of Jammu and Kashmir To grant citizenship on all those persons who left India after 1947 and who are now residing in Pakistan and want to return to that state of Jammu and Kashmir is a fatal one, to the Nation itself. The governmental decision of review whether the national song 'Bande Matram' should be accepted or not, is also a unhappy event. The slow and steady demand of separate Bodo. land in Assam and Gorkha problem in Bengal, Jhar-Khand state in Bihar are highly inflammatory and sensitive. These problems are the by product of several wrong policy decisions in India.

Now we should see those cases in which govt. failed to protect the basic civil and political rights or individual or group or persons. It was the court only which came to rescue of aggrieved ones. There are huge examples under broad spectrum of equality before law and equal protection of law itself. Apex court of land directed to maintain parity in matter of pay and allowances, in various departments among same and similar categories of employees. In Police department of Delhi administration and air hostages of Civil aviation services, the court directed to maintain parity among similar group of employees. Reservation policies, in educational institutions, employment or otherwise to schedule caste and schedule tribes have not yet fully complied with. Equality among pensioners ought to be maintained. It was the dictum of the supreme court to the Government of India and to all state Governments. But this direction has not yet fully complied by the authorities so far. The discriminating division of pensioners on the basis of date of retirement and fixation of higher pension to employees retired subsequent to that fixed date (1.1.1983) is still continuing, which has already been declared unconstitutional by court.

The seniority disputes among officers of state and central services are pending among various departments, Police ; Administrative judicial departments are not exception to it. Supreme Court had directed various times in various judgements that seniority should be fixed on the basis of dates of joining. But in spite of direction

of court, Government, yet, has not hetded altogether. Several contempt petitions have also been filed for rion obedience of court's order but; yet .the matter is pending.

Government never took, so far, expeditious step to appoint judges - in High Court and vacancies are existing. The Government has failed to comply with the dictum of court in the case of Ratlam Manucipality v/s Bidhi Chandra (AIR 1980 S.C. 1622), in which court directed the government, partintly local bodies to keep the cities neat, clean and hygienic. But, you, yourself can see how far this direction has been complied with. The practice of bonded labourers in Haryana, Rajasthan & Madhya Pradesh, Uttar Pradesh and Bihar is still in operation of large scale level inspite of direction of Supreme Court to abolish this practice. But no effective step has been taken in any state. Asiad labour case (1982) is apparently clear in which minimum wages was, even, not paid to labourers. There are millionsof labourers who are still not properly paid and they are working at low profile. In villages of U.P. only nominal wages is paid. I have heard that in villages of District Unnao and Farrukhabad of (U.P) Rs.5 per day is paid to each labour with one time diet and Rs10 per day without diet. Is it not denial of civil and political right? The poor man can-not go to seek remedy and where because he is poor, devoid of money and illetrate. He, also can—not face big land lord or capitalist under whom he is working. Hence, we can say that although court of law had tried to uphold equality rights but these obvious examples of government of noncompliance, are perfect denial of rights and failure scture.

Right to freedoms, and liberty is always subjected to severe attack from government itself or from its' \ officers, In day to day working several unreasonable restrictions are being imposed ©n freedom of speech, freedom of press, freedom of assembljdig at any place etc. various freedoms are crushed always on the ground of law and order or otherwise. Journalists are arrested and beaten so that they cannot raise their voice against arbitrary action. Several meetings are dispersed violently by police at the instance of some influensive personality. Bihar blinding cases are obvious instances of misuse of power and disregard of liberty and human right. Several undertrials were tortured up to the blindness in police station or in jail in several districts of Bihar. Flesh trade in protective home at Agra is a shameful matter. Supreme Court took strong action in this matter. But whether it is sufficient for those who are still suffering in other protective homes or elsewhere. Generally, arrest under N.S.A. and Gangster Act are found by court illegal and accused persons are released. Judicial norms in these matters are least followed. Hurried action or whimsical steps are taken at the instance of some one else. Liberty is always curtailed. It should be attended too.

Child lab our practice has not been stopped inspire of the law in this respect. Child welfare Boards have not been established in several district

or if they have been established then due to non appointment of full office bearer these are not working properly. This child exploitation cases have reached up to world organizations and action are awaited although government of India has answered to check this practice before international platform. It has to be seen, how far this assurance is carried out in practice.

Religion and minority rights are always infringed, Gangaji pollution removal order at Kanpur from Supreme Court has not yet been carried out inspite of court? Clive step taken by Supreme Court. Although coircive step have shown results. Supreme Court recently directed the closure of about half Leather factories at Kanpur with immediate effect, which have failed to check pollution in Holy river Gangaji. Although pollution has been reduced but let should be removed vigourly to keep holy river Ganga neat and clean. Right to property is the worst effected right. Now it has been deleted from the list of fundamental rights.

Let us take all timely action to attain the objectives of Constitutional provisions of fundamental rights and federalism.