

CONSTITUTIONAL IDEALS AND JUSTICE IN PLURAL SOCIETIES

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"It is a curse to live in interesting Times"

- Confucius

*"Thou does not know my son, with how little wisdom
the world is governed"*

- Count Axel Oxenstierna

This great institution National Institute of Advanced Studies is associated with a hallowed name in Indian Industry: J R D Tata, a legend in his own life time. He was a true Parsee in the tradition of Zarathustra, a prophet born 3500 years ago who declared that life is a struggle between the forces of good and evil and good will vanquish evil and that man is God's ally in this struggle against evil. The House of Tata's had a philosophy different from the traditional corporate philosophy of maximising profits, share-holder-value and sharpening the edge of business competition. Tata's did not ask "what enterprise is the most profitable"? But "What does the Nation needs?" Alfred Sloan said "What is good for General Motors is good for America". But J R D said "What is good for India is good for Tatas!" The House of Tatas lived by that philosophy. They lived on the side of the Right. J R D gave the House of Tatas an inspiring ethical leadership.

Even in the beginning of the last century Sir James Tata planned production of steel in India. Sir Fredrick Upcott, Chief Commissioner for Railways in India, heard that Tatas were planning to set up a steel plant and said "Do you mean to say that Tatas propose to make steel rails to British specifications? Why, I will undertake to eat every pound of steel-rail they succeed in making".

In the next decade itself Tatas supplied 1500 miles of steel rails to the British which made Sir James Tata's son Dorab Tata to remark that "if Sir Upcott kept his promise he would have had a slight indigestion?". Much of these legendary stories are immortalised by Russi Lala in his "Beyond the Last Blue Mountain" a remarkable story of JRD's life.

Indeed the patriotic legacy of J R D is awesome. He declared he was against the British Rule. An incident that occurred on the occasion of his return along with his newly wed wife from Darjeeling on a biting cold winter morning is memorable. The then Governor of Bengal, Sir Stanley Jackson was travelling on the same road. The traffic was stopped for over an hour for the sake of the Governor putting some five hundred people to wait in the bitter cold. J R D got down and gave a bit of his mind. "Who the hell you think you are; keeping five hundred people, women and children, in the cold for an hour? You damn fool!".

About the National Institute of Advanced Studies (NIAS)

In a fast changing scenario of increasing convergence of various fields of knowledge, which Donaldson in his 'consciencies' called the 'loanian enchantment', the philosophical under - pinnings of NIAS emphasises the institutional foundation for this emerging convergence which is noteworthy. Study of subjects like Mathematics,

Physics, Biology, Psychology, Philosophy etc., as insular areas of intellectual enquiry may build knowledge; but does not build ability. Science is knowledge; Technology is ability. For Science to become Technology various intellectual and material convergences become imperative. These are indeed the bigger questions than what the scientists love to pursue in their cloistered Laboratories. The concern of both Science and Religion is the welfare of mankind. Both seek that fundamental unity from which all knowledge springs and to which they finally return. Bertrand Russell, who cannot be accused of sentimentality speaks of this in his "Mysticism and Logic and other Essays".

Sir Joseph Needham's riddles as to why China and India whose famous Technologies and mathematical computational expertise respectively, helped the intellectual revolution of Europe, did not themselves achieve the same success Europe did, have evoked many responses. Indian mathematical genius is said to have travelled to Spain through Islamic scholars.

The formal objective of NIAS is to broaden the cultural and academic backgrounds of the executives and professionals. This breadth of vision enables them to realise that the apparent conflicts between scientific temper and religious faith ignores a deeper unity. That is why it is said:

"When in any field of human observation, two truths appear to conflict, it is wiser to assume that neither is exclusive and that their contradiction, though hard to bear, is part of the mystery of things"

The External Committee which reviewed its performance said:

“ The National Institute of Advanced Studies is a remarkable and perhaps unique institution of great value to India and to the world. In the last decade NIAS has moved towards fulfilling the high hopes of its founder, JRD Tata. The quality of the faculty is consistently excellent. As a multi disciplinary unit, NIAS combines scientific with humanistic perspectives on topics of importance for India and the world”.

I am privileged to be with you this afternoon to place before you some of my impressions of the Nation’s predicament. I am beholden to Prof. Baldev Raj for the honour of this invitation.

Making of the Indian Constitution

The Constitution of a country is its supreme law and is regarded as the vehicle of a nation’s progress. The purpose of good government is to bring about the security, welfare and happiness of the people. Plato asks: “ What do men organise themselves into society for?” and he answers: “To give the members of the society, all the members and the best chance of realising their best selves”. It is the very purpose of social organisation. All “human beings incomplete in themselves seek their ordainment of fulfilment and destiny in enriching human company and that institutions of democracy provide the richest and the most profound opportunities of that mutual enrichment”.

When the Constitution makers, under the leadership of Nehru, made Republicanism as one of the basic principles, it was described as the “biggest gamble in history”. In the fifties of the last century western press was greatly sceptical of India’s experiment with universal adult franchise and of the very survival of Indian democracy. But the American TIME (13.8.2007) on the occasion of

60 years of Indian Independence, saluted Indian democracy though it was described as robust but the rowdiest! Democracy may not be an ideal form; it tosses-up mediocrity; quite often tends to degenerate into elective despotism and become a mere statistical version of Democracy. That is why Sir Winston Churchill called Democracy the worst form of government except for all other systems tried so far. We have seen how, as Alan Bullock said of Hitler's Germany: "Street gangs came into the possession of a great modern state, Gutter came to power. But Hitler never ceased to boast that it was by the popular democratic vote". We had the case of an African potentate erecting his own statue in front of the High Court and etching underneath in granite, in distortion of a noble biblical exhortation. "Seek ye the kingdom of politics; all else shall be annexed into you!". Many of our contemporary politicians seem to have taken this advice quite seriously!

The product of the vision of the makers of the Constitution represents a high watermark of consensus in our history. Consensus and accommodation form a significant and integral part of Indian culture and cornerstone of our survival as one nation. At the time the Constitution was made, India was, and still is, the most diverse collection of humanity, with the greatest diversity witnessed in any part of the world with varied life-styles, religious faiths and within each many 'Sampradayas', wide array of languages, dialects, varieties of food and attire, and mind boggling levels of development. The debates in the constituent Assembly rose to spiritual heights. Their deliberations were noble and lofty. Their one concern was to save the posterity from the scourge of communalism. One can imagine the complexity of their remit that even the right of a person professing the sikh faith to carry a 'kripan' has had to be expressly accommodated in the constitutional document.

“Values”, said Learned Hand, “are ultimate; they admit of no reduction below themselves “. So too are certain irreducible constitutional values which underpin the survival and success of constitutional order and a concordial society. What are these values? What are the tools for effectuating them? The basic values of the constitution are reflected in the Preamble, the Fundamental Rights and the Directive Principles which along with the charter of fundamental duties may be said to constitute the conscience of the constitution.

“The preamble to the constitution is a “declaration of our faith and belief in certain fundamentals of national life, a standard from which we must not depart and a resolve which must not be shaken”. The emotive words “Justice, Liberty, Equality, Fraternity” open up a vast music of hope. They are words of passion and power and may be said to be the spiritual pillars of the constitution. These concepts along with the spirit of constitutionalism and rule of law form the bedrock on which a conflict-free society rests. “Peace is the fruit of justice; Justice is the greatest interest of man on earth. It is what cements the fabric of a secure society “.

‘...Fraternity means a sense of common brother hood of all Indians’. In a country like ours with so many disruptive forces of regionalism, communalism and linguism, it is necessary to emphasize and re-emphasize that the unity and integrity of India can be preserved only by a spirit of brother hood. India has one common citizenship and every citizen should feel that he is Indian first irrespective of other basis.

It is this spirit of brother hood that the preamble refers to and its awareness and practice are so very essential today. Article 1 of the Universal Declaration of Human Rights, 1948 exhorts : “All

human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brother hood". Fraternity is a political and social objective; perhaps even greater is its moral objective.

Dr. Ambedkar cautioned us that with the advent of the constitution India was entering into an era of contradictions. We have constitutional equality; but inequality in reality and on account of these contradictions there is a threat of India losing its independence.

Justice in Plural Societies

The question "what is Justice" in the maze of the irreconcilabilities of interest in pluralist societies "is an invitation to the most abstract sort of philosophical speculation" of its metaphysical elements. What ready answers can be given to questions of our times such as "what makes a government legitimate?" What is justice to the poor people living virtually next to people who have more money than they could ever possibly spend? Is it fair that hard-working people of considerable talent go unrewarded, while others, smiled-upon by fortune and raised with wealth and power, are constantly "rewarded" in return for no work and no contribution to society whatsoever? Do people whose ancestors were treated unfairly deserve compensation for what their grandfathers suffered? Can a legal system impose upon an individual the burden of personal sacrifice so as to ensure opportunity to others? What then should be done to equalise a condition of those with inherited disadvantages?

Lord Scarman asks much the same questions and says:

"..It is a platitude that society must be just. But what in the context of plural society do we mean by justice? Are we seeking justice as between groups? Or do we remain

true to our western philosophy that what ultimately matters is the right and duty of the individual human being and that justice implies for each one of us 'equal justice under the law' ... to quote the inscription over the portico of the U.S. Supreme Court building. Clearly we desire both justice as between groups and equal justice under the law for every one of us. The dilemma of the plural society is that it is not always possible to achieve both. How, then, does one regulate justly, the clash of interest between the group and the individual".

This is the in-built dilemma of all human organisation. As Lord Scarman observed. "... plural societies are the product of irreversible movements of mankind. Short of genocide or mass transportation, most of them are here to stay... Pluralism is not a mere transient vestige of a historical condition but a permanent feature of the culture of modern democracies". The American answer was the civil war. It proved the Nation's determination. The 'separate but equal' doctrine which ruled America for over a century was dismantled. The Dred-Scolt, the Plessy versus Ferguson legacy was dismantled by the great judicial victory over segregation in America achieved by a splendid judicial exploit in the Board of Education case.

In this land, Hindus, Muslims, Christians and followers of many other faiths have lived for ages in harmony and peace. Islamic culture has made its own splendid contribution to the enrichment of this composite culture. Justice and Equity are the values on which this liberal culture is sustained. The average percentage of Muslim's representation in the Lok Sabha since independence has been just 5.8%. At the time of framing of the Constitution when the idea of reservation of seats for minorities was given up, Jawahar Lal Nehru exhorted that it was an "act of faith above all for the majority

community. They will have to show after this that they can behave with others in generous, fair and just way. Let us live up to that faith". In one of the larger States not long ago, the legislature did not have even one Muslim member. These inequities need to be removed. That apart, the base of opportunities for modern education for Muslims needs to be greatly expanded.

It is this universal vision and the sanctity and validity of religious truths of all religions that the founding fathers of the Indian constitution envisioned by extolling religious freedom and freedom of conscience for everyone to believe what he considers true, and duty to honour and respect the composite culture of this ancient land where from time immemorial, great caravans from distant lands arrived and settled down together in a spirit of brotherhood and harmony. It is a mistake to think that democracy survives only if the composition of society is homogeneous. A strong democracy in the words of Benjamin Barber:

".... rests on the idea of a self-governing community of citizens who are united less by homogenous interests than by civic education and who are made capable of common purpose and mutual action by virtue of their civic attitudes and participatory institutions rather than their altruism or their good nature. Strong democracy is consonant with – indeed it depends upon – the politics of conflicts, the sociology of pluralism and the separation of private and public realms of action".

Constitution and the Courts

The creative, activist role of the courts are an answer to the compelling changes of the times and the task of applying enduring

constitutional values to ever changing social realities and economic changes and down-turns. When a feudal social order grimly struggles to transform itself into a modern egalitarian industrial society, much of the norms of the society change, values of conventional morality tend to collapse. Such transformations are painful and often violent. At such crucial bends of history, disillusionment with the democratic institutions generate cynicism which is a tool of destruction. A negative social critical mass is generated which will in turn unleash a chain- reaction of destructive forces.

The plausible anti-majoritarian nature of judicial review is counter-balanced by judicial restraint whose chief proponent was Professor James Bradley Thayer.

This philosophy of judicial restraint which was the hall-mark of judges like Holmes, Cordozo, Frankfurter, Brandeis and Hugo Black was echoed in the early decisions and famous dissents of the Supreme Court. To Chief Justice Harlanstone the only check on the judges exercise of power was their own sense of self restraint. Who, then, prescribes the standards of self-restraint?

Chief Justice Kania said in Gopalan's case(SC27(42) (AIR 1950):

“ But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of Justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the

judiciary powers too great and too indefinite either for its own security or the protection of private right”.

But the outcome of Gopalan case has embarrassed the court to no end. While Article 21 of the Constitution exhorted that no person shall be deprived of life or liberty otherwise than in accordance with the procedure established by law, the court’s interpretation which read the provision in positivist terms, virtually read “procedure established by law”, to mean “procedure prescribed by legislature” and made law a mere enacted apparition. This case had a familiar ring of an earlier decision of the House of Lords during the world war in *Liver Sidge Vs Anderson*. But later that case was relegated to where it belonged, the war museum’. The case was considered, at best, as the judges’ contribution to war effort.

But a more expansive statement of the judicial review was expressed by chief justice Bhagawati:

“ Judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its consistent power of judicial review is abrogated or taken away the Constitution will cease to be what it is”.

In the face of our abandonment of the “vague contours” of the Due Process Clause to nullify a measure which majority of the Court believed to be economically unwise, in distinct period of American judicial history, the expression ‘due process’ acquired distinct connotations. The judges of *Lochner* era were all born before the industrial revolution. They had their own mind-set. It almost tended to make the Supreme court of United States the third house of legislature. This interpretation of ‘Due Process’ enabled the Court to

strike down a law on the ground of unconscionability. But America saw the demise of this extreme view of Courts' powers. Later the Court said " We refuse to sit as a "super legislature to weigh the wisdom of legislation and we emphatically refuse to go back to business and industrial conditions, because they may be unwise, improvement or out of harmony with a particular school of thought".

The court recalled Justice Holmes' earlier objection to the intrusion by the judiciary into the realm of legislative value judgments. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets', Justice Holmes had declared:

" I think the proper course is to recognise that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain".

Justice Holmes said:

" I do not think the United States would come to an end if we lost our power to declare an act of the Congress void"

In his "Making Democracy Work" Justice Stephen Brayer describes a meeting with a Chief Justice of an African country who asked him " Why do Americans do what the court says?" Justice Brayer's answer was "there was no magic words on paper. Following the law is a matter of custom of habit of widely shared understanding as to how those in government and members of the public should,

and will act when faced with a court decision they strongly dislike. The answer lies not in doctrine but History”.

Human Rights and National Sovereignty

Great global thrust towards democracy, increasing patterns of internationalisation of domestic issues, global economic Interdependence, have a close connection with the philosophy of Human Rights that changed the scenario. Traditional high walls of domestic sovereignty are crumbling. The close interdependence of pluralism and Democracy is emphasised.

Historically the political theory of sovereignty and of domestic jurisdictions came under an unconscious influence of similar post-war introspection's of the 17th century. The writing of some major theorists on International Law had undoubtedly, influenced the changing conception of the relations between the State and its subjects. The influence of the International Human Rights order on State's sovereignty, Parliamentary supremacy and generally as limitations on Government, are fascinating developments of the second half of last century.

Michael and Reisman say:

“ Although the venerable term ‘sovereignty’ continues to be used in international legal practice, its reference in modern international law is quite different. International law still protects sovereignty rather than the sovereign's sovereignty”.

Democracy and Development

Man's capacity for justice, says Reinhold Neibuhr makes democracy possible; but man's inclination to injustice makes

democracy necessary. But the same democratic system produced a Hitler in the heart of cultured Europe. The choice of democracy as a system of government is beset with its own repercussions. Democracy may not be the best form of government. But it is the least harmful. And therefore, wisdom lies in making it work effectively for the larger common good.

The Grand Inquisitor in Dostoevsky's *Brothers Karamazov* confronted the apparition of Christ on precisely this question: whether to leave the determination of what is right to the freely questioning masses and risk unrest, turbulence, riot, murder, and war or to take choice out of the hands of the masses, stilling their unrest by bread, the circus, a myth, a hierarchy, and the infallibility of a doctrine enforced by imprisoning and torturing the disobedient.

Authoritarian regimes often argue that they have advantages in building strong states that can make tough decisions in the interests of people. They also argue that democratic processes create disorder and impede efficient management – “that country must choose between democracy and developments, between extending political freedom and expanding incomes”. This trade-off between democracy and development was the favourite theme of Lee Kuan Yew of Singapore. Human Development Report 2002, however rejects, this thesis.

Democracies, the Report argues, are better than authoritarian regimes in managing conflicts and catastrophes. Democracy provides for political space and institutional mechanisms for debate and change, particularly in managing sudden down-turns that threaten human survival. The Human Development Report says:

“ Consider China, India and Democratic People’s Republic of Korea. In India famines were common under colonial rule – for example 2 to 3 million people died in 1943 Bengal famine. But since independence and democratic rule, there has been no recurrence of famine – despite severe crop failures and massive losses of purchasing power for large segments of population as in 1968, 1973,1979, and 1987. Each time the government acted to avoid famine. Food production fell largely in 1973 during drought in Maharashtra, but famine was averted partly because 5 million people were put to work in public works projects. IN contrast in 1958-61 famines in China killed nearly 30 million people. And one of the worst famines in history continues in the Democratic Republic of Korea, having already killed 1 in 10 citizens”.

Constitutional Morality

Dr Ambedkar referred to what Grote, the Greek historian said: The diffusion of constitutional morality, not merely among the majority of the community but throughout the whole, is the indispensable condition of the Government at once free and peaceable. By constitutional morality Grote meant a paramount reverence for the forms of the Constitution, enforcing obedience to the authority, acting under and within these forms yet combined with the habit of open speech, of action, subject only to definite legal control. He went on to say that the form of administration has a close connection with the form of Constitution and it is perfectly possible to pervert the constitution without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution. People have to be saturated with constitutional morality which is not a natural sentiment. It has to be

cultivated. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic.

When asked why he had drafted an elephantine document which was a lawyers' paradise, Dr. Ambedkar said, he was not apologetic about it. India's soil was yet to acquire an adequate sense of Constitutional morality and that all institutions had to be bound by Constitutional bonds. A bad administration could destroy Constitutional ideals.

Implicit idea of a representative democracy is the notions of a filter and a microcosm. In a mass society, it is regarded as not only necessary but also a positive benefit that the volatile nature of raw public opinion should be refined through an electoral process that gives representatives the opportunity to deliberate and exercise their judgements free from factional interests or majority intolerance. By the same token, a representative democracy has to approximate as closely to the society it seeks to represent, in order to maintain its legitimacy as a system of government.

Science and the 21st Century

If the 20th century was a 100 years of science, with such splendid discoveries in nuclear energy, Human genome project etc., the 21st century will be 20000 years of science of hitherto unimagined dimensions. The world, as Jeffrey Sachs says, was no more be divided by ideology, but divided by technology.

One phenomenon which will further confuse the situation will be those changes in the demographic profile. The reduction of the younger population can 'cause great upheavals if only because nothing like this has happened since the dying countries of the Roman Empire'. 'For the first time in America history' says 'Time'

Magzine (March 2, 2015), 'the number of people over sixty exceeds those under age 15'. There will be marked shifts in the manufacturing patterns. Prof. Peter Drucker says that consumption pattern will split into two: a middle-age determined mass market and a much smaller youth determined one.

But that is not all. The stunning exploits of science will change the ways of our thinking. This is what Raymond Kruzweil has to say:

“Most of our conceptions of human life in the 21st century will be turned on their head. Not the least of these is the expectation expressed in the adage about the inevitability of death and taxes. We'll leave the issue of the future of taxes to another book, but belief in the inevitability of death and how this perspective will soon change is very much the primary theme of this book. As we succeed in understanding the genome and the proteome, many dramatic advances in treating disease and even reversing aging will emerge. The first two decades of the 21st century will be a golden era of biotechnology”.

Many experts believe that within a decade we will be adding more than a year to human life expectancy every year. At that point, with each passing year, your remaining life expectancy will move further into the future (Aubrey de Grey believes that we will successfully stop aging in mice – who share 99 percent of our genetic code – within 10 years, and that human therapies to halt and reverse aging will follow 5 to 10 years after that)

This was written some ten years ago. 'Time' Magazine of March 2, 2015 attests to the success of this prediction. It says:

“ If there were Guinness World Record dedicated to high-achieving rodents, Mouse UT 2598 would deserve a mention. The average life span for a mouse is 2.3 years- so at age 3 and still going strong. Mouse UT2598 has a shot at beating the record for longest lived, which stands at about 4. Translating that to a human life span, he's hovering around the centennial mark”.

“ What gives Mouse UT 2598 his edge is a compound called rapamycin, which seems to slow aging and the damage it can do”.

This is just the beginning. More astounding exploits of science are yet to unfold. The real problem is humanity's ability to absorb these civilisational changes and grapple with these mind boggling issues that arise in the interface between the New Science on the one hand and of social security on the other.

Epilogue

What is the future of mankind like? Would it be able to handle the great changes that these forces change. In just about four decades ahead, demographers predict population of the world would be around eleven billion – something that the earth and its ecology will not be able to sustain. Serious thought has been bestowed by scholars and futurologists on some of these irresolvable issues of man's future.

Great confusion persists over whether life gets better or worse, and we are not even clear about the nature of progress itself. What

exactly is it that progresses, increases or decreases or improves? Physical growth, such as the number of people and their wealth? Or is it subjective factors, such as quality of life and happiness? Controversy over the causes of evolution reflect a similar dichotomy. Most educated people support scientific theories of Darwinian evolution; but many others believe that life is guided by transcendent forces.

St. Augustine described our contemporary attitudes aptly: "Oh Lord, make me holy, but not today". That is the expedience of men and institutions. If men were angels, said Madison, no Government would be necessary. We undoubtedly live in interesting times.

The 21st century will be the most stunning century. Science and Technology will change the world. The next society will have no resemblance to the one we live in today. Economic development without social equity can produce intolerable levels of inequality. Such growth was described as Ruthless, Rootless, Voiceless, Jobless and Futureless. Society is increasingly becoming a cruel place for the weak. All our political institutions are in moral shambles because they have failed to bring human rights centre-stage. Despite great changes for many people security means protection from disease, hunger, political repression and environmental hazards. For them not the dark shadows of the global war to fear; but their concerns are within their own nations: about worries of daily life. Will they and their families have enough to eat? Will they lose their jobs? Will their neighbourhood be safe from crime? Will they be victims of violence because of their gender? Will their ethnic origin target them for persecution?

In dysfunctional societies, money replaces real values. Money is not the measure of man; it is a measure of how small a man could be.

At such times it is our duty not to surrender to agnosticism nor worship doubt. I may invoke this exhortations for the Shewthasheworhora.

*Eko avarno bahuda shaktiyogad
Varnan anekan nihitartho dadhathi
Vichaiti chanthe vishwamadev Sadevah
Sanobudhaya shubhaya samyunkthu*

“He who is one; who is above all colour distinctions; who dispenses the inherent needs of men of all colours; who comprehends all things from their beginning to the end, let Him unite us to one another with the wisdom which is the wisdom of goodness”.