

HUMAN RIGHTS AND THE RULE OF LAW

The Jaya Prakash Memorial Lecture, 1995

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I am deeply gratified to have been asked to deliver the JP Memorial Lecture for 1995. This is an honour that I deeply cherish. The memorable role played by Jai Prakash Narayan both during the days of the freedom struggle and in the post-1947 period will always be remembered. He had exceptional qualities both of courage and commitment which enabled him to play the historical role that he did.

What is particularly missing from today's political scene is the absence of a person like him. He was made in that mould of nobility and moral depth which did not flinch in the face of a challenge. If I may venture to say so, it is the absence of this quality in our public life which is a cause for concern as also a certain undertone of helplessness.

I am also happy about another related fact, and that is the venue of this lecture. That the PUCL annual lecture should have been organized in the North-East is a matter of considerable significance. No other part of the country has witnessed so much turbulence as the North-East has done.

This is not the occasion to go into details but it is clear that both human rights and the rule of law have been conspicuously weak, if not also absent, from the way things have been conducted in this part of the country. This is a cause for serious disquiet. The fact that it was decided to organize this function at Imphal speaks for itself. I hope that this initiative will be the precursor of many similar initiatives. The North-East of India needs a new wind to blow through its somewhat tangled and politically surcharged situation.

Coming to the issue in hand, I have decided to speak on human rights and the rule of law. Both these concepts are relatively new in our country. Except for some vague reference to the rule of law during the reign of Sher Shah Suri, one does not come across a clearly formulated concept like the rule of law in our past history. The concept of *Ram Rajya* has existed for several centuries. But it is more in the nature of an ideal in the traditional Indian sense than a set of well defined and precisely laid-down rules. Without going into the history and genealogy of this concept, it is time to turn to how the whole thing got started.

While the decline of the Mughal Empire is traced back to the death of Aurangzeb in 1707 AD, it took almost a century for that empire to fade out. By the close of the 18th century, the Marathas had emerged as an important regional power in western and northern India. But soon thereafter, the British

virtually took over in Delhi and even in Maharashtra. They ousted the Marathas and after the Mutiny in 1857, the Crown took over and the East India Company was replaced.

What requires to be noted is that before the end of the 18th century lawlessness had become the order of the day in large parts of India. The rise of the Pindaras and the Thugs and various other similar cults betokened the breakdown of central authority and the rise of local chieftains. Everything depended upon the administrative skill of the local ruler though the situation varied from one part of the country to another.

It was in this context that the British gradually introduced the concept of the rule of law to which they were accustomed in their own country. It will be recalled for instance that soon after the British consolidated their power in Bengal, they established what they called the Supreme Court in Calcutta. Courts were one of the earliest institutions to be introduced by the British in India.

In course of time, as they came to grips with the local situation and customary law and various other details of that kind, a system of administration began to grow up. It dealt both with civil and criminal matters and one of the things for which Macaulay deserves to be remembered is that he was the first man (on behalf of the East India Company) to have codified these laws in India.

Once this job of codification had been done and a judicial system established, things got somewhat professionalised. One does not have to go into the details of how this was done and how the gradual introduction of a new legal system helped the British government to win acceptability for itself.

For anywhere between half a century and a century, there had been a state of undisguised anarchy in most parts of the country. What the British did was to introduce a modicum of order and a system of judicial administration which in course of time became one of the planks on the basis of which the British won a considerable amount of goodwill for themselves. One can go to the extent of saying that one reason why the British won a certain measure of legitimacy for their rule was the fact that they introduced a system in which equality before law was one of its fundamentals.

This had not been the situation in India till the advent of the British. The traditional Indian system hinged upon the kind of ruler that a particular region or area had. Under his overall

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lordship, some kind of a legal system also existed but it was not formally organized as in modern times.

With the advent of the Muslims in India for example, in certain parts of the country two parallel systems began to exist side by side. Muslim jurisprudence came to be applied in a large number of cases. But this did not mean extinction of the traditional Hindu system. Depending upon the area one is talking about, sometimes it was only one system at work and sometimes there were two concurrent systems at work. In neither of them was the principle of equality given the kind of importance which is characteristic of the modern age. The British were the first to introduce it in India and this had a marked impact upon the consciousness of the people.

It should not be necessary to go into the history of Britain and how, beginning with the Magna Carta in 1215 AD, the British won step by step all kinds of rights at the expense of the monarch. For instance, what is called *habeas corpus* today was a matter of slow and reluctant concession by the ruler. Similarly, battles were fought in regard to the right of Parliament to approve or disapprove allocations to the budget and its approval by the House of Commons and so on.

There are many dimensions of this continuing conflict between the common people and the king and this was spread over several hundred years. In the final analysis, it was the beheading of Charles I and a civil war which led to the eventual de-fanging of the powers of the king. Initially the fight was led by the feudal lords. It is they who reduced the king to the status of a constitutional monarch. In course of time, this power got transferred to the common people.

What happened in Britain over several hundred years happened in France in the wake of the French Revolution in 1789. To put it differently, it took quite some time for the democratic political process to evolve throughout western Europe. By the time the British came to India the principle of the supremacy of the people over the king and of equality before law had got established in that country. To the extent it could be applied elsewhere, it was applied in India.

There were exceptions however. The Ilbert Bill for instance, mooted in the 70s of the 19th century, sought to exempt British residents in India from being tried by Indian judges. It led to such an outcry that eventually the move had to be dropped.

On the whole however, people came to have faith in the working of the judicial system which the British had instituted. A law once put on the statute book was applied uniformly to everyone. There were instances when the law was bent to suit the convenience of certain people but this did not always happen. There were also instances when people with a high status in social life were tried for all kinds of offences and convicted. Altogether therefore, the British were seen as being fair and this went to the undoubted benefit of the British empire.

In regard to certain more controversial matters like untouchability and the status of women and such other matters, the British trod rather cautiously. For example, they abolished 'Sati' even though it led to a lot of controversy. But when it came to the status of women, they introduced only marginal changes and no more. The same was true in regard to the removal of untouchability. Discrimination against lower caste people was so widespread that it could be seen to be almost the hallmark of Hindu society. The British therefore did not choose to meddle with it, if one may put it this way, beyond a point.

To go on any further with this recapitulation of recent Indian history should not be necessary except to underline one point. When we talk of the rule of law today, we talk in the idiom of the last two centuries. We do not talk of what existed earlier and whether it was good or bad. Like so many other things introduced by the British into India, the rule of law may be described as one of their more enduring legacies.

By the time the British left in 1947 and it came to the stage of giving a new Constitution to ourselves, these notions had become more or less a part of daily life and were generally accepted. One evidence of it is to be seen in the composition of the Constituent Assembly. A large number of people with a legal background were elected its members and took a lively part in the discussions that preceded the formulation of the various Articles of the Constitution. As a document which embodies the hopes and aspirations of the Indian people, the Constitution adopted in 1949 is unrivalled in a number of ways.

All the doctrines of equality before law, freedom of speech, association and organization, the right to profess and propagate different views and different religions and scores of other things about which we feel justly proud are incorporated in the Constitution. When it comes to the rule of law, this too is embedded in the Constitution. Indeed it can be described as its cornerstone.

In plain words, when it comes to being governed by the appropriate kind of constitutional framework, there may be a few reservations that some people can offer, but by and large the Constitution is a document of which the country is proud and with good reason. It is in the implementation of the rule of law that we have not only stumbled badly but made a mess of the whole thing and it is to that aspect that we should turn our attention.

Nothing illustrates the difference in our perception and in our actions more than the Indian reaction to the Rowlatt Act which in turn became the occasion for the Jallianwala Bagh tragedy and the way TADA was enacted and placed on the statute book and subsequently enforced.

When the Rowlatt Act was being passed, Indian reaction was summed up in the three slogans that were raised at that time. The Act was criticized on the ground that it provided for no Dalil (reason), no Vakil and no Appeal. Indians objected to the passage of that law because these crucial safeguards which

had existed in the judicial system earlier were sought to be done away with in this new Act.

When in 1985 TADA was first enacted, it was not met with any resistance. Indeed it was seen as a legitimate response to the plastic bombs which had exploded in different parts of the capital city. It was an extraordinary situation and the response was this extraordinary law. Any one arrested under TADA does not have to be produced before a court of law within 24 hours as is required otherwise. Nor is he required to be produced before a judicial magistrate as is the general practice. A confession extracted from him in the presence of a Superintendent of Police (without a judicial magistrate being in attendance) is regarded as conclusive evidence against him and so on.

There is so much more that can be said on the subject but most of us are familiar with the excesses committed under TADA. According to the figures made public in 1994, since 1985 over 65,000 people have been arrested under TADA and around 15,000 in one State, the state of Gujarat. The way it was applied in States like Gujarat speaks for itself. The ugly truth is that the police took it as the easy way out for dealing with any kind of crime and it is this approach to things which brings us to the related issues of human rights.

It is all very well to talk of terrorism and subversion. These are facts of life and cannot be denied. Nor they be equated with civil disturbances. To deal with such an extraordinary outbreak of disruption may call for extraordinary ways of dealing with things. Generally human rights are the first casualty in any kind of war or an act of aggression. This much one can concede. But one has to go a little beyond that and, unless we do that, we would never understand the situation fully and properly.

Has anybody stopped to ask the question: why these plastic bombs were exploded in the summer of 1985? Several months had gone by since the organized killing of the Sikhs in October-November 1984. It was not any kind of rioting that had taken place. What the state had done was to abdicate its role in favour of gangs organized by a political party so as to put the Sikhs in their place.

Some of them had been killing Hindus in Punjab sporadically and, to cap it all, two Sikh security guards had killed the Prime Minister. In retaliation, it was decided by some people that the Sikhs should be taught a lesson. Two things may be stated here. One, it is not the function of the state to retaliate against its own citizens. Secondly the calculations of those who took the initial decision not to enforce law and order for some time misfired. Instead of a 100 or so being killed which, perhaps, was visualized in the first instance, thousands were killed and it became a kind of *pogrom* of the kind that the Nazis under Hitler used to organize in Germany.

As in Germany, the legal system was, so to speak, suspended. Those who had committed plunder and murder were never put on trial and everything was winked at and buried under the carpet. So much so that even the appointment of an

inquiry into the November 1984 killings had to wait for an agreement between the Prime Minister and Sant Longowal.

Till then, unofficial inquiries had taken place but no official inquiries convicted the Congress party as having organized the killings. But because the Congress party had been returned to power with a massive majority, no action could be taken against the guilty. This bred anger and sullenness and led to the use of those plastic bombs.

This is how TADA came to be put on the statute book. And this, if one may add, illustrates the process at work in our political life. Whether it is Punjab, Kashmir, Assam, the North-East, Andhra, Orissa, Madhya Pradesh and several other parts of the country, the starting point is always the same. There is a genuine political problem and acute social and political discontent. The problem is not taken care of. Instead it is sought to be crushed.

Sometimes it is done through the police, sometimes with the help of the paramilitary forces and occasionally the army is directly used. Whatever be the details, the fact remains that political problems are not solved politically; instead, force is used.

One has only to look at the way various paramilitary organizations have proliferated; expenditure on security forces has been increasing year after year and the consequential loss of life and limb has continued to mount and one can see that we have taken the wrong turning. What we have to do is to evolve a political system wherein problems are solved as they require to be solved. Instead of doing that, we opted for state violence, violation of human rights and oppression of the poor and the defenseless.

Is this the way to build the country? If any one thinks that this is the way, all that one can say is that he should re-do his sums. By raising the temperature of political life and riding roughshod over the sentiments and aspirations of certain categories of our population, we are acting against the interests of the country. Whether it is the interests of a certain section of people or a political class or community, or that of a political party or grouping are matters of detail. The unavoidable truth remains that tolerance has got replaced by intolerance and goodwill by violence. This in turn has given rise to some of those tendencies which can ultimately dig the grave of the fragile democratic structure that we have been trying to build in the country.

One of the things we take pride in is that we are a democratic country. We certainly are. Our record during the last half century points in that direction. And there is good reason to be proud of it. Parties have lost and parties have been replaced. And the ones who came were replaced subsequently, and so on. This is one of the fundamentals of a democratic structure. But is that all? This is the basic question that we have to ask.

Unless human rights are accepted as fundamental to civil society and there is the rule of law, we would sooner or later create situations where certain extreme political philosophies

like the one that was manifested in the demolition of the Babri Masjid would take over. Or we would have the kind of situation which is to be seen in its most naked form in Bihar. Other states are not exempt from this process. One sees evidence of it in Andhra, Orissa, UP, on occasions even in States like Gujarat and Maharashtra. Certain states which have been in the news for years together like the Punjab, Kashmir and Assam do not have to be mentioned.

Two other inter-connected things may be stated here. One relates to the way the police force has been systematically misused in pursuit of questionable selfish and political ends. The second relates to the role of the various political parties in misusing the police. As a matter of fact, there is little to choose from amongst them. Political parties talk in one way when they are out of power. Once in power, they do exactly the same things of which they accused the others.

Not many people realize that, amongst other things, one reason why the ICS played a supervisory role in respect of the police before 1947 was that the ICS entrants were selected by competition whereas those who belonged to the Indian Police Service were distinctly inferior in quality. The Aitchinson Commission on public service put it tellingly in 1888 when it said that officers in the police were to be nominated from "youths who failed to succeed in examinations held in England and who came to India in the hope of nomination in the police force".

In course of time the system began to be modified but it never became satisfactory enough. Not only that, the Indian component in the police at the higher level was exceedingly skimpy as well as unsatisfactory. Before 1947, hardly a handful of Indians had reached the stage of commanding the police force in the States. As far as intelligence was concerned, it was handled more or less exclusively at the senior levels by the British.

The point in giving these details is that, unlike the civil service, the police did not have much of a tradition of public service. It was always used for repressive purposes and no other purpose. Even in the civil service, the older tradition could not survive beyond a couple of decades. In the case of the police, it never got established.

If, into the bargain, the police became brutal, corrupt and self-serving, this was partly owing to the social background that they came from and partly to the politicians misusing their services. Human rights therefore more or less unavoidably became a victim of this combination of two unholy elements in our public and administrative life.

Our political masters have had no compunction in using the police for their factional and political ends. This thing is so widely recognized that to seek to document it would be utterly pointless. The very fact that a Police Commission was appointed by the Janata government and the Congress government did not implement its recommendations speaks for itself.

The plain fact is that no party in power wishes to let go its hold over what the police can do. It is possible to blame the police but the real blame must attach to their political masters. Going further, one can say that the real blame goes to us, the voters, who have not always taken care to punish our political masters.

They deceive us year after year and at every election and we vote for people who do not deserve to be in office. Can anyone of us recall a single instance since 1947 where a politician should have been convicted of an offence? They know how to manipulate the system and manage to get away with their misdeeds.

The political masters have not only undermined the working of the police, they have also neglected to do anything meaningful to improve the system of judicial administration. Judges at every level are too few in numbers. Furthermore, they are grossly underpaid and their conditions of work are most uncongenial. Even the higher judiciary is not exempt from some of these handicaps. To say anything more in this regard should not be necessary.

In conclusion, what has been argued above may be recapitulated in this manner.

1. Both the concepts of human rights and the rule of law as understood today are comparatively recent concepts. It was the British who introduced the concept of the rule of law. In course of time it got embodied in the legal system and was implemented to a considerable extent as long as the British were here. The other concept of human rights is even more recent. The developed world treats it as an article of faith by now whereas countries like India subscribe to it in theory but do not put into practice what they have committed themselves to do.

2. The basic responsibility is that of the political parties which have to ensure two things. One, that laws are amended appropriately and, secondly, that they are also complied with. Even such a simple amendment as holding the police authorities responsible for any custodial death if it occurs when an individual is in their charge is not being introduced. The police system being followed in the country is more or less the same as prevailed before 1947. There is one difference however. Before 1947, the system was at least enforced. Now it is not even enforced in the way it ought to be done. Political factors obtrude much too much.

3. Because of faulty leadership and several other reasons, political problems are not being solved politically. Instead political activity is sought to be curbed and, when people rebel, they are sought to be crushed.

4. The painful truth is that our political parties, regardless of the ideology that they have, function in a manner which is primarily self-seeking and unprincipled. Without a major political shift, any possibility of the law being amended and enforcement being made more honest and more exacting is remote. In plain words, the battle is political rather than administrative.

5. Should people therefore continue to suffer? That would be a wrong conclusion to draw. What bodies like the PUCL have to do is to generate much greater support for the cause of human rights and the rule of law than has been done so far. The battle is long and even unremitting. Still the battle has to be fought.

Some progress has already been made. We have a National Human Rights Commission. It is a ghost of what it ought to be. But would it have been there but for the strength of public opinion against repeated violations of human rights? International trends are also working in that direction. What we in India have to do is to make the movement for human rights one of the key issues in regard to which the political parties should adopt a more positive and citizen-responsive attitude.

No less important, the functioning of the police should be re-organized along the lines suggested by the Police Commission. One particular proposal relates to a State Security Commission under the State Home Minister. Such a Commission would be obliged to have a certain number of non-officials also. It is this very arrangement that the political parties do not wish to set up. But without such initiatives things will never improve.

6. Two immediate tasks before all those interested in human rights are: (i) repeal of TADA; and (ii) the establishment of a State Security Commission in each State. Once these two steps are taken, the situation will register a marked improvement. ■

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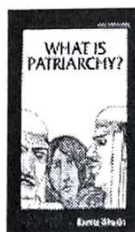


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