LEGAL REASONING, JUSTICIABILITY AND CONSTITUTION

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This essay is concerned with justiciability as a species of legal reasoning to be distinguished from legal reasoning that is non-justiciable. This does not involve describing non-justiciable reasoning beyond pointing out that it lies beyond the pale of justiciability as defined. Constitutional texts throughout the world have varying proportions of justiciable and non-justiciable language and dispositions. Here we will seek to explore briefly into the phenomenon of the use of these two kinds of legal reasoning in written constitutions.

For purposes of this discussion, at least, justiciability may be defined as a situation of sufficiently precise a nature that a court can decide that the law requires certain specific results. The situation of our concern is that of constitutionality, especially constitutional texts. For a segment of constitutional text to be justiciable, then, it must be sufficiently developed and independent of itself, without any need for complementary action, to require the specific conduct or results upon which the courts can pronounce. The language of such texts are normally directive, permissive or descriptive — requiring or authorizing action or defining conditions, powers and functions. Most of the non-justiciable language found in constitutional texts is in the nature of hortative, ideological and programmatic; at most it may provide clues for interpretation and "constitutional intent" for the handling of justiciable issues raised otherwise, but does not frame dispositive issues for judicial determination.

The American constitution represents a particularly high percentage of justiciable language. Apart from the Preamble and a few arguably "programmatic" aspects of the provisions relating to the presidency and to Congress, the document presents an almost entirely justiciable character. Most of the constitutional litigation has in fact clustered around a relatively

few phrases and articles, notably "due process", "full faith and credit", the interstate commerce clause, and such popular favorites. But most of the balance of the text either has been subjected to some judicial scrutiny or could be, including some issues the Supreme Court has declined to handle on the grounds of inappropriateness of subject-matter rather than of non-justiciability of language of the constitutional text involved.

In this the Americans have reflected the highly developed judicial orientation of their legal heritage from the English system of the common law. It was natural that the reasoning they would bring to bear in framing their constitution should construct provisions that would look to the judiciary as the familiar and reliable agency for the creative function of making constitutional decisions. Indeed, at least as dominant American legal thought subsequently developed, nothing other than justiciable texts could be properly or truly classified as "legal". And if a constitution is *the* fundamental law of the land, here if anywhere should one stick to clear legality (equivalent to justiciability) and avoid the non-legal mists of hope and ideology; the romanticists must content themselves with a few poetic phrases in the disjunctive Preamble, and thereafter take their distracting predilections elsewhere. Such an outlook is epitomized at its extreme by the position of Justice Holmes, controversial as a general philosophical proposition, that the law amounts to a prediction of how the courts would decide.

The American constitution is not unique in the highly justiciable character of its text. Clearly, there must be a certain minimum of such language in any meaningful constitution. Yet many modern constitutions, particularly those of newly independent states, contain much language of non-justiciable character. These are typically in the sections devoted to basic principles and to human rights. Random examples of such provisions, like these taken from the constitution of 1967 of South Vietnam, would include:

"The State respects human dignity."

"The State shall endeavor to create employment for all citizens."

"The State encourages family cohesion.

"Sovereignty resides in the whole people."

An insistence on justiciability as the only appropriate legal reasoning for constitutional texts would require a total proscription of provisions of this type. What could any court possibly do with them if they were to be presented as a primary issue of law around which a piece of litigation revolved? Yet it must be accepted as axiomatic that a constitution — all of it — functions as the basic law of the state from which all other municipal law depends for its validity. It will have been very deliberately so framed and adopted and so recognized by the apparatus of the state and by the citizenry at large. Often the atmosphere surrounding the adoption of a constitution is highly charged politically and emotionally. Nevertheless, the document that is ultimately promulgated represents the results of the intensive application of the time and talents of many qualified professional people, particularly jurists. This being so, it would require a most parrochial view of the nature of law to characterize these non-justiciable aspects of constitutions as being something other than "law". To phrase it otherwise and more positively, it must be that the legal reasoning to be found in constitutions properly includes legal reasoning that is of a non-justiciable nature.

Such a conclusion denies to the courts sole occupancy of the pinnacle of the legal edifice. If all of a constitution is "law" yet parts of it are not susceptible to the judicial process, then it must follow that legal reasoning other than justiciable exists and has a legitimate role to play in constitutional draftsmanship. All officials of the state, not merely judicial ones, have the duty to behave in accordance with the constitution, by implication if not in terms of a formal oath of office itself. Whether they are ultimately judicially accountable for their actions or not, they must make interpretations of the constitution without assistance from the courts in deciding on actions within their competence. Where there is no potentiality of judicial determination, their accountability must lie elsewhere, somewhere in what may be generically called the political processes in the broad sense.

It is interesting to note that the constitution of Nepal of 1962 addressed itself specifically to the point under discussion. Part Four of that constitution is entitled "Objectives and Principles of Social Policy". It opens with Article 18, which states: "*Application of Principles.* The principles laid down in this Part are for general guidance and they shall not be enforceable by any court." If the constitution is "law", then the list of social desiderata that follows this article is also "law" but from which judicial authority is expressly excluded. Here, then, is a conscious recognition that a constitution has both judicial and non-judicial aspects, with no particular assignment of primacy between them.

A further aspect of our topic is the matter of the authority to make decisions as to the constitutionality of legislation and official actions. In the United States this authority is lodged with "the judicial power" through Article III of the constitution. Accordingly as this Article has been interpreted, the Supreme Court is the ultimate authority, but inferior courts all up and down the ordinary judicial system are competent to take a hand in solving constitutional enigmas. There are generally no special procedures for constitutional issues and they are raised and processed the same as any other kind of issue in litigation. This principle of judicial constitutional review is settled doctrine in the United States, and is consistent with the predisposition to justiciability in legal reasoning discussed above. It has not, however, been without some continuing expressions of discontent and criticism; and even Holmes, grand paladin of the justiciability of law though he was, commented that he would not anticipate the demise of the United States should the power of review of constitutionality be lifted from the Supreme Court.

At the opposite extreme are those systems which consider the courts as an inappropriate exclusive agency for determining issues of constitutionality. Since the constitution is the progenitor of the internal legal system, it is not viewed as "legal" in the same sense as ordinary legislation and other actions pursuant to the constitution which raise "legal" issues properly submitted to the ministration of the regular judicial system. In effect,

each of the three governmental departments — executive, legislative and judicial — determines for itself the constitutionality of functions it discharges pursuant to the constitution. This theory inferentially also permits a self-determination as to whether such functions are indeed being discharged *pursuant to the constitution,* and leaves uncomfortably open the question of who is to arbitrate rival claims among the three contenders to the discharge of a particular function.

The classic French system and those of a similar nature have rejected the idea of a supreme judicial review. Yet there was a partial modification of this position in the French constitution of 1958, which provides for a Constitutional Council. As the expression "council" suggests, this is at most a quasi-judicial body, and certainly is not part of the "judiciary". But it does seem to be responsive to a feeling that there should be a final authority to determine constitutional issues. The constitutions of some other countries of systems similar in pattern to the French have established constitutional courts functioning totally outside the judicial system and not reachable through procedures of litigation. Another variant of this concept is to confer on the highest national court jurisdiction over constitutional matters but to provide special procedures for the raising of such issues. All of this implies non-justiciable reasoning with regard to constitutionality in the sense that constitutional issues are removed from the regular judicial organs or at least from the regular judicial processes. It may be parenthetically noted that due to the peculiarities and singularities of the British system it is difficult to allign their notions of judicial review in terms of the polarities here presented, despite the strong British penchant for justiciability; though the British refer to their "constitutional law" they don't have a constitution in the sense of a concise document, and it is possible to cite instances looking in opposite directions as to whether their system envisages the principle of judicial review of "constitutionality".

This brief exposé cannot go very far in raising all the issues it suggests, let alone in offering conclusions. But both analytical and historical evidence shows that justiciable and non-justi-

ciable legal reasoning are to be found universally in matters of constitutionality. Controversies regarding the handling of such issues may be analyzed in terms of disagreement over the proper proportions of these two elements applicable to the situation. This is one way of looking at the controversies in the United States over the Supreme Court in the administration of Roosevelt in the 1930's and in recent years over the activism of the "Warren Court". Likewise, the movements cited above in the French and similar systems may be said to reflect a feeling that the justiciable (or at least quasi-justiciable) element was inadequately represented in their methods for dealing with problems of constitutionality.

All this suggests the broad conclusion that justiciability per se is neither a virtue nor a vice with regard to matters of constitutionality. While it must be minimally present, it cannot lay claim to a monopoly or even inherent primacy. Thus the degree of its employment, beyond an uncertain minimum, must be a matter of choice and discretion on the part of the state and society being served by a particular constitutional system. Such selections are normally made on the basis of the traditions, circumstances and legal mentality of the society involved, and they are to be characterized as "good" or "bad" in terms of internal effectiveness of results rather than in terms of abstract doctrine. In making such selections it can be highly instructive to be aware of the experiences of other constitutional systems regarding justiciability. In so viewing such foreign systems one should be restrained in both criticism and admiration, never forgetting that one man's meat may be another man's poison.

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