The Constitution and the Court- Sentinel on the Qui Vive

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The advent of democracy and limited government heralded the 'State' and transformed the status of the governed to citizens. Constitutions provide the means to guard against the States' capacity for invading the liberties available and guaranteed to all civilized people. A modern constitution empowers citizens and also controls and disciplines power. By defining competences and entrenching rights the constitution limits powers and protects liberties. It unfolds a vision and a goal and charts a nuanced path for its realization.

The constitution of a country is *suprema lex*. A written constitution with a bill of rights, like ours, seeks to place certain human rights and fundamental freedoms beyond the reach of ordinary laws because these rights do not depend on the whims of an amoral majority or the outcome of any election. Such rights are not the gift of any law or the constitution. Instruments like bills of rights respond by recognizing rather than creating or conferring them.

The movement in favour of legally enforceable human rights grew after World War II. "What was deplorable became recognized as inevitable and was next applauded as desirable", as deSmith remarked.[1] The case for guaranteed rights is simple and irrefragable. The limitations imposed by constitutional law on the actions of government are essential for the preservation of public and private rights, notwithstanding even the representative character of political institutions. The philosophy underlying bill of rights and judicial review is that constitutional limitations are the only way of ensuring the survival of basic human

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[1] S.A.DESMITH, THE NEW COMMONWEALTH AND ITS CONSTITUTIONS 163 (Stevens & Sons London 1964).

freedoms. When human rights are incorporated into the municipal law and guaranteed by a written constitution they are justiciable and enforceable.

A written constitution with judicial review is adopted by a country because it refuses to believe in 'the Divine Right of Parliaments', which Herbert Spencer called 'the great superstition of the present.'[2] Rene Cassin, the principal architect of the Universal Declaration of Human Rights when asked as to why an entrenched bill of rights was necessary said, "Because men are not always good." The creation of constitutional government, says Raymond Moley, is the most significant mark of distrust of human beings in human nature. It signalizes a profound conviction, born of experience, that human beings vested with authority, must be restrained by something more potent than their own discretion.[3]

The vision of our Constitution and the values it seeks to cherish and promote are reflected in the Preamble and in Parts III and IV. The Preambular exhortation encapsulates the constitutional vision. This is the conscience of the Constitution; the judiciary is the conscience keeper. The ideal is to achieve the goals in Part IV while protecting the rights in Part III. The Constitution provides for stability without stagnation and growth without destruction of essential values.

Peace is the fruit of justice. Justice is the greatest interest of man on earth, it is the ligament which holds civilized beings and civilized nations together, said Daniel Webster. A peaceful and orderly society is what we all look for. Justice is what all beings seek and which cements the fabric of a secure society. The Constitution apart from being a legal document is also, and even more, a political and social testament created to secure the goals set out in the Preamble- justice, liberty, equality and fraternity. The individual lies at the core of the Constitutional focus and the ideals envisioned in the Preamble animate the vision of securing a dignified existence to the individual.

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[2] *See*, HERBERT SPENCER, THE MAN V. THE STATE (Williams & Norgate, London & Edinburgh 1884)

[3] ALFRED A. KNOFF, A PROGRAM FOR POLITICAL ACTION 4 (1952).

The Constitution speaks of justice- social, economic and political. Equality of opportunity is the soul of social equality and social justice and is perhaps the most important foundation that supports the democratic polity. One cannot hope to enjoy one's rights individually if others are not treated equally. Economic and social inequalities rupture the fabric of civil society. An inclusive society fuelled by inclusive growth is imperative. That is the challenge of conflict of social institutions and an inequitable economic order. Wealth has a social mission. It must find expression and fulfillment in human well being with a sensible balance between economic growth and advancement of the welfare of society as a whole. Electoral reforms and reforms of political parties are inevitable for democratic institutions to maintain their legitimacy. The checks and balances in the constitutional scheme which may have decayed must be strengthened and correct, effective systems put in place. Access to justice is extremely important. When justice is denied expectations may darken into depression and engender despair, rebellion and anarchy.

The Constitution envisages and endeavours to ensure justice and remove injustice. That is the constitutional vision. The consummation of the Constitution is when justice reaches out to everyone, everywhere as contemplated and mandated by the Constitution. In endeavouring to entrench the constitutional vision of justice and realize the constitutional goals, all the three wings have a part and responsibility. But the Court is the custodian of the Constitution and the guardian of our liberties. "The Constitution has devised a structure of power relationship with checks and balances. It is for the Court to uphold the constitutional values and enforce the constitutional limitations."[4] This ensures securing constitutional justice. The Supreme Court took great strides in developing constitutional law. The great theme in the history of our constitutional law is the concept of law as a check upon public power. That idea has been given practical reality in the decisions of the Supreme Court. Those decisions are, to paraphrase Justice Holmes, a virtual magic

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[4] *See* generally, State of Rajasthan v. Union of India, AIR 1977 SC 1361; Minerva Mills v. Union of India, AIR 1980 SC 1789.

mirror in which we see reflected our whole constitutional development and all that it has meant to the nation.

A shrewd US politician referring to their Constitution remarked, "*We the People* is a very eloquent beginning. But when that document was completed on 17.9.1787, I was not included in that *We the People*. I felt somehow for many years that George Washington and Alexander Hamilton just left me outside by mistake. But I realized that it is through the process of interpretation and Court decision that I have been finally included in *We the People*."[5] This also describes the role of the Indian judiciary particularly the Supreme Court. By interpretation and Court decisions it has broadened the reach of the Constitution's provisions and made them meaningful to the common man.

The rights and values envisaged by the Constitution are not merely material. Constitutionalism implies limited government. Its history has been the movement from a culture of authority to one of justification where power and its exercise is made answerable. The judiciary, particularly the Supreme Court, as a vital institution of democratic governance has helped to inculcate and foster a constitutional culture and infuse all State actions with constitutional ethos. All seemingly wide and unfettered powers of the State are tempered by constitutional limitations to be exercised in accord with public law principles and subject to judicial review and correction depending on the nature of the function.

It is now universally recognized that certain minimum standards of a basic core of rights come within the ken of judicial enforceability. "Access to life- sustaining water, adequate housing to enable life to go on, a primary education, essential medical services and food sufficient to make a right to life meaningful, are hardly so exotic or beyond the reach of societies as to make minimum guarantees unrealistic."[6]

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[5] Rep. Barbara Jordan, Statement before the House Judiciary Committee on the Articles of Impeachment of President Nixon, 25 July, 1974.

[6] *See*, PHILIP ASTON, PROMOTING HUMAN RIGHTS THROUGH BILL OF RIGHTS (Clarendon Press 1999)

In India the scheme for the realization of the socio economic agenda comprises both the justiciable Fundamental Rights and the non-justiciable Directive Principles. The judicial contribution to their synthesis and integration has been crucial to the realization of the goals set out in Part IV both as a means to effectuate the rights guaranteed under Part III and also as a source of law for a welfare State. Civil liberties without economic freedom and progress can be counter-productive and an invitation to discontentment and chaos. It is against this backdrop that the State undertakes socio economic reforms and brings in legislation. The Constitution promised a peaceful revolution. The role of the judiciary assumes importance in the context of socio economic rights as distinguished from personal freedoms. The judicial enforceability of these rights presupposes certain essential enforceable minimum standards. The Supreme Court, particularly after the first two decades, harmoniously interpreted Parts III and IV. Government's constant reiteration of the social justice theme nurtured hopes. In a nation dedicated to the rule of law, the judiciary has great responsibilities and arouses great expectations. The judiciary has much to be proud of.

"What is fundamental in the governance of the country cannot be less significant than what is fundamental in the life of an individual… The basic object of conferring freedoms on individuals is the ultimate achievement of the ideals set out in Part IV. If the State fails to create conditions in which the fundamental freedoms can be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish."[7] It is this approach of balancing and harmonizing that has helped Indian society and the legal system to forge ahead with our social welfare measures endeavouring to create a climate of happiness and security. The various socio economic rights and legislative measures in a way "represent the myriad lights and shades of India's life, the contrasting tones of poverty and wealth and of bread so dear and flesh

[7] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 (per Y.V.Chandrachud, J).

and blood so cheap, the deep tints of adventure and enterprise and man's ageless struggle for a brighter morn."[8]

Judicial interpretation led to the reading into and inclusion of various rights as emanations successfully attempting to translate human rights rhetoric into action. The experience has been fascinating and heart warming. The endeavour has been towards integration of Fundamental Rights and the Directives in the process of constitutionalising socio economic rights. It may be said that Human Rights and Public Interest Litigation have reinforced each other. In the evolution of our constitutional and judicial experience there is evident a continuous flow of thought as to how values of human rights and international instruments can inspire constitutional interpretation for establishing and promoting an egalitarian society.

The Constitution's greatest gift has been an open society. The Constitution places the individual at the forefront of its focus. In a constitutional democracy it is the right to question, to examine and to dissent that enables an informed citizenry- the governed to scrutinize and rein in the government. The full growth and flowering of the human personality and the development of the community can take place far better in conditions of freedom. Development is not "merely the process of increasing inanimate objects of convenience."[9] The value of accomplishing such conveniences must depend on how it impacts on the life and freedom of the people- whether people have the 'freedom to do what they have reason to value.' Development is really expansion of people's freedom. That is the blending of the guarantees in Part III and the objectives in Part IV. The judiciary has been endeavouring, and to a large extent successfully, to realize this.

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[8] Nani Palkhivala – The Awe – Inspiring Economist, All India Federation of Tax Practitioners, https://aiftponline.org/journal/2021/january-2021/nani-palkhivala-the-awe-inspiring-economist/, (last visited March 6, 2021)

[9] AMARTYA SEN, THE COUNTRY OF FIRST BOYS (1st Edn OUP India 2015)

Over 50 years ago Prof. Gadbois had paid the richest tributes to our Supreme Court: "The Justices of the Supreme Court of India occupy a unique place among the public-policy decision making elite of the nation. More than any other segment of this elite they are viewed as exemplars of honesty and integrity in public life…. The close observer of India's paramount judiciary will find that the Indian Supreme Court Judges are men of more than ordinary talent whose elevation to the Court has done much to enhance the Court's prestige."[10] One hopes that the Court always proves this true and lives up to the reputation.

Qui vive is a French phrase which means alert, especially vigilant, carefully keeping watch. The expression was used by Chief Justice Patanjali Sastri in *V.G.Row's* case[11] referring to the Court as a sentinel on the *qui vive* as regards protection of fundamental rights. Indeed, it may be said that the structure of the government is designed in such a way that each branch is a sentinel on the *qui vive* against the other two, lest they become too powerful or autocratic.

The separate institutions fashioned by the Constitution are intended to bring about a form of government that would ensure that democracy and liberty are not empty promises. The separation of powers serves the end of democracy by limiting the roles of several branches of government and protecting the citizens and the various parts of the State itself against encroachment from any source. The root idea of the Constitution is that man can be free because the State is not.

It has been unequivocally laid down by the Supreme Court that all organs of State are creatures of the Constitution from which alone they all derive their power and authority; no branch has powers unfettered and unrestricted by the Constitution; the Constitution has devised a structure of power relationship with checks and balances; it is for the Court to uphold the constitutional values and enforce the constitutional limitations. This captures the essence of the doctrine of separation of powers and its working in our constitutional scheme and that is to be

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[10] George H Gadbois Jr., Indian Judicial Behaviour, 5 Economic and Political Weekly 149 Issue No. 3/5 (1970).

[11] AIR 1952 SC 196

overseen and guarded by the Court. "The concentration of powers in any one organ may, by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic Government to which we pledged."[12]

It is in the background of all this that we have to examine the working of the judiciary- whether it has been delivering as expected and envisaged by the Constitution, whether there has been an overreach or it has been found wanting.

At the very beginning the *Gopalan* judgment[13] was virtually a disaster for personal liberty. M.K. Nambyar, the great constitutional lawyer who argued for the petitioner in that case said, "Almost at the inception of the Constitution, at the very threshold of its life, one of the main articles declaring life and liberty as fundamental rights became still-born." Thereafter the track record of the Court in matters concerning liberty has been generally exemplary, though it took a couple of decades to undo the mischief of *Gopalan*.

The right to life and liberty received an explosive expansion with cases of jail reforms and rights of under trials. The law, and particularly criminal law, was humanized. The evolving jurisprudence re: death sentence infused this area of law with constitutional values. The echoes of *Ediga Anamma*[14] were heard in the English courts. In the Privy Council Lords Scarman and Brightman referred to this Indian precedent in *Noel* v. *Att. Genl*.[15] Of course, the constitutionality of death penalty has been upheld. But it has been tempered with constitutionalism and humanism. It has been laid down that death penalty may be imposed only if there are special reasons for doing so- in the rarest of rare cases.

Article 21 reached its full plenitude when it was emphasized that life is not mere animal existence but it is to live with dignity and the inhibition against its deprivation extends to all limbs and faculties by

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[12] Indira Gandhi v Raj Narain, (1975) Supp SCC 1 260 (per Y.V.Chandrachud, J).

[13] AIR 1950 SC 27

[14] AIR 1974 SC 799

[15] 1982 Criminal Law Review 679

which life is enjoyed. A poor litigant ought to have the benefit of legal services in certain situations as part of his fundamental right. *Gideon's* Trumpet[16] found its echo in our Supreme Court. There was relief against handcuffing. The right to remain silent and refuse to answer incriminating questions was recognised in *Nandini Satpathy's* case.[17] The Court's role and reputation as the protector and defender of liberty, barring *ADM, Jabalpur*[18], has been outstanding. Remedy for public tort--the award of compensation in writ jurisdiction for violation of Art 21 was recognized. *Olga Tellis*[19], is a classic example of second generation rights being judicially recognized and protected. Thereafter the Court has travelled far and wide in this direction.

Vishaka[20] is an example of the Court stepping in to ensure gender justice and protection of women against harassment in workplaces. Protection against custodial violence and other prison reforms were given a great fillip in *Nilabati Behera*[21] and *D.K.Basu*[22]. The Court has taken note of international treaties and conventions particularly those touching human rights and fundamental freedoms and when there is no conflict with the municipal law, adopted and adapted them in interpreting the domestic law.

In endeavouring and achieving all this, construing the sounds of the Constitution's speech and finding meanings even beyond the text as well as plumbing and giving voice to its silences, plays a vital role.

While in many areas the Court's functioning has been praise worthy, there is also cause for concern because of judicial overreach sometimes. The principle of separation of powers is a principle of

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16 372 US 335 (1963)

17 AIR 1978 SC 1025

18 AIR 1976 SC 1207

19 AIR 1986 SC 180

20 (1997) 6 SCC 241

21 (1993) 2 SCC 746

22 (1997) 1 SCC 416

restraint which "has in it the precept, innate in the prudence of self preservation, that discretion is the better part of valour."[23] In the field of constitutional law the delicate balance between the various institutions whose sound and lasting quality Dicey in *The Law of the Constitution*[24] likened to the work of bees when constructing a honeycomb is maintained to a large degree by the mutual respect which each institution has for the other. This is as much a prescription for the future as it was for the past, a profound truth and equally relevant everywhere.

Law including constitutional law cannot and does not provide for every contingency and the vagaries and varieties of human conduct. Many times it is open ended. The majestic vagueness of the Constitution, remarked Learned Hand, leaves room for doubt and disagreement.[25] [*The Spirit of Liberty*, Papers and Addresses of Learned Hand, Hamish Hamilton, London (1954), p. 204] It is, therefore, said by critics and scholars that this also leaves room for, and so invites, government by judges- especially those who are free not only of appellate review, but of elections as well and have an assured tenure.

In this imperfect setting judges are expected to clear endless dockets and uphold the rule of law. Judges must be sometimes cautious and sometimes bold. They must respect both the traditions of the past and the convenience of the present. They must reconcile liberty and authority, individual freedom (human rights) and State/national security, environment and development, socio-economic rights of particularly the weaker sections of society and development; the whole and its parts, the letter and the spirit. "The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licence; and the difficulty has been to discover the practical means of achieving this grand objective and to find

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[23] JULIUS STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 688 (1966).

[24] A.V. DICEY, THE LAW OF THE CONSTITUTION 3 (10th edn , W.F. Alinson, 1959).

[25] The Spirit of Liberty, Papers and Addresses of Learned Hand, Hamish Hamilton, London (1954), p. 204

the opportunity for applying these means in the ever shifting tangle of human affairs."[26]

All this throws up matters of great moment and in a way summarises the contemporary issues and challenges for the judiciary. These challenges and issues have always been there but they have acquired new dimensions and poignancy. Imbuing all acts of all authorities with constitutionalism and constitutional culture, entrenching the constitutional vision of justice -making it real and meaningful for the people, vitalizing democracy and achieving all this within the framework of separation of powers and democratic functioning is the real challenge for and the goal of judicial review in a constitutional democracy. It is also essential to ensure consistency and continuity in judicial functioning and determination. Continuity is to judicial law what prospectivity is to legislation: the means by which men know their legal obligations before they act. Both stability and change are indispensable for a healthy, vibrant society. We have to distinguish the Constitution and law in general from those passionate, personal commitments that are called justice. The courts, in our scheme of things, administer justice according to law.

This contest and reconciliation between conflicting principles and goals is not limited to law. "When in any field of human observation, two truths appear in conflict, it is wiser to assume that neither is exclusive, and that their contradiction though it may be hard to bear, is part of the mystery of things But as Justice Frankfurter points out judges cannot leave such contradictions as part of the mystery of things, they have to adjudicate and if the conflict cannot be resolved to arrive at an accommodation of the contending claims. This is the great challenge for a judge and "the agony of his duty."[27]

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[26] Indira Gandhi v Raj Narain, 131 (1975) Supp SCC 1 (per Mathew, J).

[27] Some Observations of Felix Frankfurter, J., on the Nature of Judicial Process of Supreme Court Litigation, 98 Proceedings AM Phil Society 233 (1954). *See* also, A.M. Mathur v. Pramod Kumar Gupta AIR 1990 SC 1737.

Constitutional choices have to be made, so also policy initiatives and choices and legislation consequential to or supportive thereof. Whose right is it to choose and experiment and may be err? Should judges exercise the 'sovereign prerogative of choice'? That should belong to and be exercised by the executive and legislative branches of government. Only in case of illegality or unconstitutionality should the court intervene, ie, only in cases that leave no room for reasonable doubt. The Constitution outlines principles rather than engraving details and offers a wide range for legislative discretion and choice. And whatever choice is rational and not forbidden is constitutional. Governmental power to experiment and meet the changing needs of society must be recognized. To stay experimentation may be fraught with adverse consequences. In the exercise of the high power of judicial review, judges must ever be on the guard not to elevate their prejudices and predilections into legal principles and constitutional doctrines. It has been rightly remarked "How easy the job of activist judges….. No great effort, intelligence or integrity is required to read one's merely personal preferences into the Constitution; a great deal is required to keep them out."[28] No one does this perfectly; some are more capable of objectivity and detachment.

If judicial modesty and restraint are not accepted and if judicial activism is to be the rule in matters of policy and law making, some basic issues remain. Is government by judges legitimate? Democratic processes envisage a 'wide margin of considerations which address themselves only to the practical judgment of a legislative body'[29] representing a gamut of needs and aspirations. The legislative process, it is trite, is a major ingredient of freedom under government. Politics and legislation are not matters of inflexible principles or unattainable ideals. As John Morley acutely observed, politics is a field where action is one long second best and the choice constantly lies between two blunders.[30]

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[28] WALLACE MENDELSON, SUPREME COURT STATECRAFT: THE RULE OF LAW AND MEN 16 (Iowa State Press 1985).

[29] James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harvard Law Review, 129, 135 (1893).

[30] *See*, PRESIDENT J. F. KENNEDY, PROFILES IN COURAGE (Pickle Partners Publishing 2015).

Legislation is necessarily political requiring accommodation, compromise and consensus. It is often a slow and cumbersome process which "when seen from the shining cliffs of perfection appears shoddy, but when seen from some concentration camp of the only alternative way of life, appears but another name for what we call civilization and even revere…"[31] The legislative process does not seek the final truth, but an acceptable balance of community interests. To intrude upon such pragmatic adjustments by judicial fiat may frustrate our chief instrument of social peace and political stability. If the court is to be the ultimate policy making body, that would indeed be judicial imperialism without political accountability. The inputs that the judiciary can get would be inadequate and not reflecting the diversity of interests and "inadequate or misleading information invites unsound decisions."[32] Moreover, such a system will train and produce citizens to look not to themselves for the solution to their problems but to a small and most elite group of lawyers who are neither representative nor accountable. This cannot be the democracy or the rule of law to which we are wedded. May be it is not unrealistic to doubt or despise the political processes and it may also be that the people cannot be fully trusted with self government. But it would be naïve to believe that guardianship is synonymous with democracy.

There are areas where the distinction between what is constitutionally permissible and what is not is hazy and grey. "It is the court's duty to identify, darken and deepen the demarcating line of constitutionality. The complexities of the strands in the web of constitutionality which the judge must alone disentangle do not lend themselves to easy and sure formulations one way or the other. All distinctions of law are matters of degree."[33] Justice Holmes believed that judges should defer when the legislature reflected the pervasive and predominant values and interests of the community.

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[31] T. V. SMITH, THE LEGISLATIVE WAY OF LIFE 91 (1940).

[32] HOROWITZ, D.L, COURTS AND SOCIAL POLICY 171 (Brookings Institution Press 2010)

[33] Kihoto Hollohan v. Zachillhu, (1992) Supp (2) SCC 651, 679.

To refer to a couple of instances, the *NJAC* judgment[34] is an example of what the Court ought not to do. It was not constitutional interpretation, but rewriting the Constitution in the image of the majority opinion, a classic case of misunderstanding and misapplying the basic structure doctrine. Similarly interference in matters of religion and faith may be treading on thin ice.

But what is the position now? There is an impression among many- and not wholly unjustified- that the Court seems to have relapsed into a mood of complacency. One reason for such impression is that we Indians seem to be obsessed with the idea of legal solubility of all problems and the Court has fanned that idea. That is neither practical nor wise. When things don't happen as people expect, many a time may be wrongly, or the expectations are too tall, it engenders frustration and despair. But too little judicial activism is as bad as too much activism, as Lord Bingham wisely endorsed in the *Belmarsh Prison* case.[35]

Constitutional courts- the Supreme Court and the High Courts- are constituted to be the protectors and guarantors of the rights and liberties of the people and to ensure that all organs of the State function within the confines of their powers. But today it is not uncommon or unjustified for right thinking and well meaning people to wonder whether the judiciary, particularly the Supreme Court, is playing its seminal role as the sentinel on the *qui vive*. There is more fusion than separation as between the legislature and the executive in a parliamentary system. But the judiciary is separate and has to keep its distance. The relationship between the judiciary and the other wings has to be correct and proper, not cordial. Some struggle and tension is inevitable. Reciprocal influence is a continuing process. Indeed, a Canadian judge, Marshall writing about judicial independence a few decades ago, observed that even unavoidable interactions between the top echelons of the judiciary and the executive can be harmful to judicial independence.

There is a perception-right or wrong-that the Court is not keen to take up cases concerning challenge to various legislative and executive

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[34] (2016) 5 SCC 1

[35] A v. Secretary of State for the Home Deptt. (2005) 2 AC 68

actions touching fundamental rights-Article 32 petitions- assailing electoral bonds and scrapping of Article 370, to mention just a couple. These cases brook no delay. It may be that the challenge is without substance, but that should be taken up and decided. However, the Court gives the impression and is seen by many as a court of trivial disputes. One is tempted to recall the *Bearer Bonds* case almost 40 years ago. The impugned Ordinance was promulgated on 12.1.1981 and was replaced by the impugned Act on 27.3.1981. That was challenged in writ petitions under Article 32 in 1981. The matter was taken up and heard and disposed of by the Constitution Bench on 2.9.1981 with reasons therefor coming a few weeks later.[36] It is no answer that the Court has no time. It will have to make time. Otherwise, it may lead to the issue of the justification of its existence. The final guarantee of our rights is the personality and intellectual integrity of our Supreme Court judges, as Palkhivala said insightfully. You cannot evade or avoid facing a situation. Good leadership demands appropriate action at the proper time.

The judicial role in protecting human rights, particularly life and liberty and upholding the rule of law has to be robust and activist. Judicial restraint is expected in matters of policy and legislation. The protection and enforcement of fundamental rights and freedoms is both the power and duty of the courts and the grant of appropriate remedy is not discretionary but obligatory. Even in England with no Bill of Rights it was said over a century ago: "To remit the maintenance of constitutional rights to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand."[37] There are also the unnecessary and unwarranted occasions, though happily not many, of the Court invoking the criminal contempt jurisdiction-scandalizing the court- when the whole idea is anachronistic and has a chilling effect on freedoms. That is nothing but contempt powers being designed to try to maintain a good public image for the judiciary. The attitude and ability to shrug off is what is required and commendable.

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[36] R.K. Garg v. Union of India, AIR 1981 SC 2138

[37] Scott v. Scott (1913) AC 417, 477

However, it is heartening that the Court has also shown concern for liberty and there has been interference with some orders of High Courts which are unsupportable. One cannot miss mentioning that the Court emphasized the importance of open courts, of not stifling reporting and the need for judges to exercise greater restraint and sobriety in expressing themselves and also that the Court frowned upon cases of sedition and reiterated the principle of reading it narrowly. Mere criticism of government without any incitement to violence does not constitute sedition. The right to utter honest and reasonable criticism is a source of strength to the community, rather than a weakness. Public criticism, even brutally strong, of all institutions is essential to the working of democracy, as the Court pointed out long ago.

President Theodore Roosevelt voiced passionately some profound words: "The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood, who knows the great enthusiasms, the great devotions and spends himself in a worthy cause; who at best, if he wins, knows the thrills of high achievement, and, if he fails, at least fails daring greatly, so that his place shall never be with those cold and timid souls, who know neither victory nor defeat."[38] Equally telling are the momentous words of Edward O. Wilson: "If those committed to the quest fail, they will be forgiven; when lost, they will find another way. The moral imperative of humanism is the endeavour alone, whether successful or not, provided the effort is honourable and the failure memorable." Every institution appears to be failing. In different and changing times one thing holds true for all institutions. They cannot afford to be clever. To paraphrase the words of Peter Drucker- in times of crisis adherence to truth and time tested values may not ensure success but not doing so guarantees failures.

"In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Government is the potent omnipresent teacher. For good or ill, it teaches the whole people by its example. .... If the government becomes a law breaker, it breeds

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[38] Roosevelt T. Citizenship in a Republic. Speech made at the Sorbonne, Paris, France; April 23, 1910. Available at : https://www.theodoreroosevelt.org/content.aspx?page_id=22&club_id=991271&module_id=339364 Accessed on 25.08.2021.

contempt for the law; it invites every man to become a law unto himself; it invites anarchy."[39] These are the wise words of Brandeis, J. This is true of every institution. The Court is the institution which tends the gate between law and anarchy.

In a speech, not long ago, Chief Justice Bobde insightfully said, "The judicial branch is the ICU of a constitutional democracy, and essentially a public service of a critical nature; not another public employment opportunity. There is no legitimacy or rationale for the existence of this branch if some of us are unable to deliver even the minimal quality of justice that is expected of this sentinel on the *qui vive*." And in a recent judgment of the Supreme Court, Justice D.Y.Chandrachud observed, "Patanjali Sastri, J. immortalized that phrase of this Court as the *sentinel on the qui vive* in our jurisprudence by recognizing it in *V.G. Row*…. Familiar as the phrase sounds, Judges must constantly remind themselves of its value through their tenures, if the call of constitutional conscience is to retain meaning."[40]

The question –Is the Judiciary acting and delivering as the sentinel on the *qui vive* cannot be answered in any strait-jacket. As in life, so in law, nothing is an unmitigated disaster or an unalloyed blessing. Even so, the memorable words of Hughes, CJ at the foundation stone laying of the US Supreme Court building in 1932 apply and hold good in the case of our judiciary as well: "The Republic endures and this (Supreme Court) is the symbol of its faith."[41] And one hopes they always do.

In the ultimate analysis, we cannot forget that democracy is always a beckoning goal, not a safe harbour, for freedom is an unremitting endeavour, never a final achievement and no office in the land is more important than that of being a citizen. The Constitution has survived for over seven decades despite all the ups and downs, a happy

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[39] Olmstead v. US (1928) 277 US 438.

[40] Gujarat Mazdoor Sabha v. State of Gujarat (2020) 10 SCC 459, 492.

[41] Arthur John Keeffe, *Inside the Supreme Court*, 61 A.B.A. J. 1509 (1975).

and proud achievement by any reckoning. But the Constitution is not just for the passing hour. It is meant to survive and flourish for an enduring future. For this it is important and essential that constitutional values and aspirations become internalized in the psyche of the nation and that the spirit of the Constitution animate our beings and its light illumine all our thoughts, words and deeds.