

SEPARATION OF POWERS – DRAWING THE DIVIDING LINE

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For the purpose of this presentation, I delved deep into the life and works of **Acharya Dr. Durga Das Basu** and I found myself overcome by a feeling of despondency. There was no way I could introduce him adequately (though of course he would need no introduction to this audience) unless I set apart the 45 minutes or one hour that has been allotted to this speech to give a vivid description of the man, his life and his achievements. His academic efforts have resulted in monumental and classic books whose relevance will stand the test of time. I am honoured to be invited to deliver the lecture in his memory. I have been informed that this annual lecture has been instituted by Dr. Durga Das Basu's son, Dr. Saradindu Basu and I wish to congratulate him on the same.

What is unique about Dr. Durga Das Basu is that he began writing the commentary on the Indian Constitution even when the debates on the draft Constitution were taking place in the Constituent Assembly. To write from day to day his *magnum opus*, which was ready for publication by November of 1950, scarcely ten months after the adoption of the Constitution of India, is something unbelievable. I have to confess that it is impossible to adequately deal with the contribution and

works of this great human being and I would therefore be content by dealing with the topic on which I am going to address you, and that is: “**SEPARATION OF POWERS – DRAWING THE DIVIDING LINE**”.

For dealing with the topic we have to accept a few basic principles. These are, that in a written constitution, quasi-federal in character, the three organs of State are co-equal and having coordinate powers, with the heads of legislation being distributed between a Central Government and the State units. This would necessitate the existence of a Supreme Court to maintain the checks and balances inbuilt in such a written constitution. The three organs of State being co-equal and coordinate through a broad division of powers would not be entitled to encroach upon the area, jurisdiction and powers distributed by the Constitution between the three departments of State. In the words of the great constitutional law writer, Dr. Durgas Das Basu,

“So far as the courts are concerned, the application of the doctrine (the theory of separation of powers) may involve two propositions: namely,

- a. that none of the three organs of Government, Legislative Executive and Judicial, can exercise any power which **properly** belongs to either of the other two;
- b. that the legislature cannot delegate its powers.”

He has, therefore, summed up pithily the basic foundation of the theory of separation of powers, unlike *Montesquieu* who had a far more complicated approach to this issue.

What is significant is that Dr. Durga Das Basu uses the word “**properly**” and therefore conceives of a **broad division of powers** where the **core function** is one which is exclusively conferred on that particular organ of State, though there may be some overlap in regard to the fringe areas of the topics so entrusted. And that is how the Constitution of India has been interpreted by the courts in the country during the subsequent years. The pronouncement on this aspect of law by the courts is that under the Indian Constitution there is a **broad** separation of powers.

It is with this hypothesis that we would proceed to examine as to whether even this **broad** separation of powers has been the *sine qua non* of the functioning of the three organs of State under the Constitution of India. In deciding upon the provisions to be injected into the Constitution for the purpose of achieving separation of powers, the Parliament and the legislatures of the States were set up with the power to make laws, which as pointed out, is a power which cannot be delegated. The Central Government and the State Government exercises executive powers which are co-extensive with the powers of Parliament or the State legislatures to make laws, respectively, and most importantly, the superior courts consisting of the High Courts, and the Supreme Court of India as the apex court having been set up for what one would normally conceive of as the exercise of the adjudicative powers of the State.

In regard to the last aspect, the powers that were granted by the Constitution to the High Courts, to the extent that we are concerned with, is mainly contained in

Article 226 of the Constitution, which authorizes the High Courts to issue writs in the nature of *certiorari*, *mandamus*, and so on which are mentioned in the said article. But the Supreme Court of India, which normally should only deal with cases which are brought up from High Courts, was also conferred the original Jurisdiction of issuing the very same writs, but limited to the enforcement of fundamental rights. To that extent the powers given to the High Courts and the Supreme Court would overlap in regard to this area of enforcement of fundamental rights. The very special nature of this power under Article 32 of the Constitution is evident from the fact that Article 32 was itself embedded among the fundamental rights in Part III of the Constitution. Dr. Ambedkar described Article 32 of the Constitution as the “**the very soul of the Constitution and the very heart of it**”. The very precious rights which were essential for the purpose of sustaining democracy, included, the freedom of speech and hence the freedom of the press, the right to life and liberty, the protection against discriminatory laws and executive action, and a plethora of other rights were all declared to be sacrosanct by the Constitution. These were rights which, if infringed, could directly be the subject-matter of a Writ Petition in the High Court and the Supreme Court of India. By making the right to approach the Supreme Court itself a fundamental right, one could not even conceive of a situation where the Supreme Court would turn around and say:

“this court has not time today even to dispose of cases which have to be decided by it alone and by no other authority. Large number of cases are pending from 10 to 15 years. Even if no new case is filed in this Court hereafter, with the present strength of Judges it may take more than 15 years to dispose of all the pending cases.”

This is a quote from the order passed in 1987 by a bench of the Supreme Court of India by Justice E.S. Venkataramiah in **P.N. Kumar v. Municipal Corporation of Delhi (1987) 4 SCC 609** wherein the Court relegated the writ petitioner under Article 32 to the High Court, without deciding whether fundamental rights were violated or not:

Having armed the superior courts with vast powers and jurisdiction, it would be interesting to note the comments of some among the jurists who were members of the Constituent Assembly:

Sir Alladi Krishnaswamy Iyer declared –

“The doctrine of independence is not to be raised to the level of a dogma so as to enable the judiciary to function as a kind of super-legislature or super-executive.”

Shri T.T. Krishnamachari said –

“It might be that by giving the judiciary an enormous amount of power – a judiciary which may not be controlled by any legislature in any manner except by the means of ultimate removal – we may perhaps be creating a Frankenstein monster which could nullify the intentions of the framers of the Constitution. I have in mind the difference that was experienced in another country.”

In this context I also remember a speech by **Pandit Jawaharlal Nehru** delivered, at the time the Constitution was framed, which said:

“No Supreme Court and no judiciary can stand in judgement over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. Therefore, if such a thing occurs, they should draw attention to that fact, but it is obvious that no court, no system of judiciary can function in the nature of a third House, as a kind of third House of correction. So, it is important that the judiciary should function with this limitation.”

There were many others, including the constitutional advisor, **B.N. Rau**, who also voiced his consternation at such unlimited and unbridled powers being conferred on the Supreme Court of India. Nevertheless, the draft articles were debated upon and became part of the Constitutional law of the country. It should be remembered that both Article 32 and Article 226 provide for the issuance of writs, including writs of *certiorari*, *mandamus*, *quo warranto* and so on. These are outlandish words not found in the Government of India Act of 1935, on which the major part of the Constitution was based. Therefore, to imagine that the Indian courts would feel confined to the powers, exercised by the Queen’s Bench in England in regard to the exercise of its powers when England had neither a written constitution nor the power to declare laws made by Parliament invalid, would have been unthinkable. The superior courts in India shrugged off the trammels and limitations which hamstrung the courts in England, who were subservient to Parliament in the sense that they could not possibly declare a law made by Parliament to be void. It is therefore only to be expected that once the superior courts threw off the shackles sought to be placed on their jurisdiction by confining them to these writs, of course among others, it would not hesitate to widen the scope of its interventions into areas which would trench upon the

jurisdiction and powers of the other organs of State, provided the Executive and the Legislatures raised no serious objections to such encroachments.

It is not as if the Constitution of India had not attempted to insulate each one of these organs against their powers being trenched upon by the other departments of State. For example, Article 121 of the Constitution of India prohibited any discussion taking place in Parliament with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his duties. A similar provision in regard to the State legislatures is Article 211 of the Constitution of India. Equally, the courts were enjoined from calling in question the validity of any proceedings of the legislature or of Parliament on the ground of any alleged irregularity of procedure and, more so, no officer or member of the legislature of a State or of Parliament would be subject to the jurisdiction of any court in respect of the exercise of powers vested under this Constitution for regulating procedure or for maintaining order.

Article 361 declared that the President or the Governor shall not be answerable to any court for the exercise and performance of the powers and duties of his office. There is, however, one facet in any democratic constitution which cannot be wished away, and that is, the necessity to have a machinery by which an authority is brought into existence to decide on the interpretation of constitutional provisions, or as to what the Constitution says and means and to resolve disputes, with finality, between the Central Government and the States, or between the three organs of the State *inter se*.

In every such democratic Constitution it is the apex court of the country which is conferred such jurisdiction and powers.

As all of us are aware, the United States Constitution has a more rigid separation of powers than the Constitutions of other democracies. Even so, the President of the United States has the power to send messages to the Congress regarding laws and, what is more, has the final power of vetoing legislation passed by Congress, unless the Congress by a two-thirds majority overturns the veto. **Alexander Hamilton**, one of America's first constitutional lawyers had stated that:

“the judiciary was the least dangerous branch of government, with no influence over either the sword or the purse.”

And that is how in ancient days when the Supreme Court Justice, **Roger Taney**, directed the arrest of the commander of an outpost, a President no less than Abraham Lincoln publicly refused to implement this decision. Some scholars have even argued that **Abraham Lincoln** issued an arrest warrant against **Justice Taney** for violating the order of suspension of *habeas corpus*. In more recent years, the famous case which dealt with the infamous issue of the “segregation in schools and busing” was delivered in ***Brown vs. Board of Education (347 US 483, 1954)*** decided in the year 1954. But even today segregation in busing and in schools continues in Alabama though on more than one occasion the militia was called out to enforce the orders of the Supreme Court. Another incident which comes to mind is when **President Andrew Jackson** refused to implement a judgment of the Supreme Court

declaring invalid a piece of oppressive Georgian legislation, which enabled the complete destitution of the rights of the American Indians. He then made his famous remark: **“well, John Marshall has made his decision. Now let him enforce it.”**

I should say that the Indian Supreme Court is in a far happier position. Article 144 of the Constitution declares that all authorities, civil and judicial, shall come to the aid of the Supreme Court. Article 141 is to the effect that the law declared by the Supreme Court is binding on all courts within the territory of India. Articles 129 and 142(2) expressly confer the power of contempt on the Supreme Court of India and Article 215 correspondingly confers such power on the High Courts of the country. This, history has shown, is the most potent weapon in the hands of the superior courts to compel obedience to its will. I remember appearing a few decades back before the Chief Election Commissioner of India in regard to the claim of two rival political parties in Tamil Nadu to the symbol of the ruling party, on the death of the then Chief Minister. One of the lawyers who was aggrieved by a few of the comments of the Chief Election Commissioner, who was sitting alone to hear the matter, made a few rude remarks about the Chief Election Commissioner. I heard the Chief Election Commissioner say:

“You are daring to say all this because you know that I have no power of contempt.”

This is absolutely true. If the courts are not armed with the power of contempt, the court system in the country would be in shambles. It is only the fear of being sent

to jail, which makes the clients and lawyers to be disciplined and respectful to the judges and to faithfully carry out their judgments and orders. It is therefore clear that the founding fathers did not allow the Indian Supreme Court to go the way of the US Supreme Court where a belligerent President could turn around and say, *“the judge has made his decision, let him now enforce it.”* In India, since such a statement by any office-holder, however high he may be, would not be in the official discharge of his duties, but, on the contrary, a gross violation of his duties, undoubtedly, the Supreme Court, which would be concerned about its authority and jurisdiction being undermined, so that larger public interest would be seriously affected, would not hesitate, according to me, to compel that authority or office-holder to toe the line, to respect the order of the court and to implement the same.

With this background, we would now examine, very briefly, what separation of powers meant under other constitutions.

I should point out at the beginning itself that *Montesquieu*, a jurist living in the 18th century has been credited with being the father of this theory of separation of powers and this is what he said in 1758:

“there would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, of executing public resolutions, and of trying the causes of individuals.”

I am afraid that though he was a very eminent jurist, I cannot accept the illustrations that he has given of Great Britain as being a model for Separation of Powers.

In England, the Lord Chancellor as of right, presides over the House of Lords and sits on the **woolsack**. He then transfers himself to the meeting of the Council of Ministers and participates in the discussions on policy and implementation of such policies through legislation. What is surprising is that as Lord Chancellor he is entitled to preside over the sittings of the House of Lords in disposing of appeals. How can a person who wears three hats ever come under the definition given by *Montesquieu*, cited earlier.

Equally, the members of the House of Lords, some among them being Law Lords, who would hear appeals sitting in the Privy Council or the House of Lords, would be entitled also to hear appeals arising out of the very laws which they helped to pass. All this would be wholly impermissible with today's concept of separation of powers. But *Montesquieu* was prepared to praise England as the **ideal state** where such separation prevailed. I do not think that he was right in using England as the example though, of course, the theory propounded by him is universal and has been accepted on all sides.

Of course, England has realized that it has to bring about reforms and such reforms were brought about by passing the **Constitutional Reform Act, 2005**. Under this Act, the Supreme Court of the United Kingdom was set up. The judges of the Supreme Court of UK need not necessarily be Law Lords and in case Law Lords were appointed, they would no more sit in the House of Lords. Eminent Queen's Counsel were also elevated to the Supreme Court of England and the drastic change which has been brought about is that the Lord Chancellor could no more, as of right, sit on the **woolsack** but would have to be elected in which event he could no more be in the Cabinet or in the House of Lords if, on the other hand, he was in the House of Lords, he could not place his candidature for election as Lord Chancellor.

It is pertinent to point out that to a great extent these reforms were compelled by Great Britain being a member of the **European Union** and thus bound by the **European Convention on Human Rights, 1950**, to which it was a signatory. The **Strasbourg Court**, namely, the **European Court of Human Rights**, had the jurisdiction and competence to entertain individual petitions from the citizens of England who had complained to the courts in England against violation of their rights. In case they lost the appeal in the highest court, they would be entitled to file an independent petition before the European Court of Human Rights. The European Court of Human Rights would then look into the question as to whether the structure and framework of the three organs of State in England would satisfy the requirements of the Convention which (under Article 6) requires the separation of judiciary from the executive and, if not, it could correct this violation. If the European Court

delivered a judgment in relation to human rights, the judgment would not directly bind the English courts. But in case a British citizen brought such a case to the European Court and the matter was decided in his favour, the executive government in England had to implement it. It is, therefore, obvious that no advantage whatsoever would be gained by Great Britain by not adopting the principles in relation to human rights enunciated by the European Court as part of the law which it was bound to implement. And thus came about the transition whereby one was prepared to say that Britain, though it had no written constitution of its own, had the constitutional law declared in the European Convention on Human rights and the Convention on Civil and Political rights as part of the law of their land which, would in substance and in effect, be their written constitution.

England, therefore, has solved the complaint that no true separation existed in that country. Among the other countries, neither Australia nor France was faced with such a problem. The Commonwealth of Australia Constitution Act, 1900 clearly demarcates the boundaries of the three organs and therefore provides for a very rigid separation of powers. Similarly, the French Constitution also provides for separation of powers and divides the national government into the executive, legislative and judicial branch.

And hence we come back to India to find out as to whether the organs of State functioning under our written constitution had observed faithfully and truly the doctrine of separation of powers.

I am afraid it would be very difficult to compliment the Supreme Court of India as having maintained this constitutional separation faithfully and strictly. On the other hand, as I would presently demonstrate, there has been a gradual erosion of the dividing line, which at times has become blurred. Before embarking upon this aspect, it is necessary to give a little background about the status occupied by the Supreme Court of India in the polity. Among the three organs of State, undoubtedly, and I do not think that there can be a dissent on this, it is the judiciary which commands the greatest credibility and hence the maximum respect from the people, from the civil society and, what is important, from the media which, in this country, has assumed the role of an umpire on many occasions. The media has always respected the superior courts and their judgments. But if you see a trend to the contrary, then one may have to sit back and ask oneself the question: Is there a reason for concern? I have with me an editorial in **The Hindu** of March 1, 2012, with the title, “**Chasing a mirage.**” It starts by saying:

“However well-intentioned it might be, the Supreme Court’s direction to the Centre to constitute a special committee to pursue the outdated plan of linking India’s rivers is based on a misplaced premise....”

“.....Achieving huge inter-basin transfer of waters in the Himalayan and peninsular river systems is a complex goal for a variety of reasons, not the least of which is the displacement of a large number of people.”

The editorial is critical of the court embarking upon such a venture when it did not really have the expertise to monitor or implement a mindboggling project of this nature.

Not content with this, on the 2nd March, **the Hindu** in its Op-ed page carried a long and erudite article, the title of which was **“With all due respect, My Lords”** and with the subheading **“It is not for the Supreme Court to decide how the Government should ensure the right to water, in any case, the connection between this right and the river-link project is tenuous.”**

And that is why the courts from time immemorial have said that the area of policy is one which is too dangerous for a court to tread on. However, judges frequently, when seized of highly controversial and populist issues, sometimes find it difficult to resist the temptation to deal with matters which, to even a lay man, would clearly belong to the area of policy making. There are very many other examples which I would briefly mention to show as to how the fears which were expressed by the founding fathers, of the Supreme Court treading into areas which were reserved by the Constitution for the executive and the legislative wings of the State, have proved more than once to be true.

Perhaps there is a good reason as to why law making, evolution of policy and laying down of guidelines for exercise of rights or for imposing liabilities should all be left to the true law makers, namely, the elected representatives of the people, who man the State Legislatures and Parliament. The very method of appointment of judges today through the collegium does not inspire confidence; the method is neither transparent nor open and does not necessarily inspire confidence, as there is nothing to show that the principles, guidelines or criteria used are perforce objective in character, so that in addition to seniority, religious and regional representation, it is the best among the experienced judges, who, through their judgments, have proved their deep and pervasive knowledge of constitutional law, criminal law, civil law and commercial law, and are the ones who are selected to man the Benches of the Supreme Court of India. It should be remembered that judges are not elected and they do not have a constituency to which they are accountable. They come from diverse backgrounds which may be highly conservative and they may not be able to appreciate and uphold legislation which is dynamic and is in keeping with the march of time. A particular approach on predilections may decide the fate of cases which has gone through the court system for a period of over 20 years and the result may well be dependent upon the philosophy and the background of the particular two judges who constitute the bench out of as many as, 13 divisions, functioning at present, in the Supreme Court, each one of the benches being the Supreme Court of India.

I am not so concerned about the High Courts as there is always an appeal to the Supreme Court, where grave error has been committed by the judges of the High Court. But the decision of the Supreme Court is final and there is no appeal. The review by circulation in chambers is no remedy at all. The idea of a writ to challenge the judgment of the Supreme Court under Article 32 of the Constitution enunciated in **Antuley's case**¹ has been jettisoned in **Hurra's case**.² Now a curative petition is available, but curative petitions are more like a mirage.

It is not that judges of the Supreme Court do not want to do justice. Like all other human beings, they believe that the considered opinion expressed in a judgment is the final word on the issues arising in the case and there can be no rethinking on it. Secondly, the Supreme Court of India disposes of about 50,000 cases a year and since this is the final court against whose judgment no appeal lies, every case, could possibly, give rise to a review petition and in some cases to curative petitions as well. As a result, preferring review petitions and curative petitions have been found to be an exercise in futility. The result is that the judges of the Supreme Court of India are masters of their own decision making powers which cannot be questioned once they come to a particular conclusion and then deliver a judgment. Of course, there may be a few cases where the Court may reopen the matter. In the short history of curative

¹ 1988 (2) SCC 602

² 2002 (4) SCC 388

petitions, I have only come across one such Petition which has been allowed by the Supreme Court.³

These are the considerations which I think should result in the Supreme Court practising self-restraint in cases where Public Interest Writ Petitions bring to their notice environmental issues, degradation of forests, large scale devastation caused by illegal unregulated and uncontrolled mining and violation of building bye-laws and so on. The eminent Queens Counsel and President of the Trinity College, Oxford, **Michael J. Beloff** once said that judges must exercise a great deal of self-restraint and ensure that they do not subvert well-established legal principles. He went on to add that **“enthusiasm” of judges - particularly when it comes to human rights issues - have sometimes taken them beyond the bounds of accepted law.**

It is here that a balancing of priorities ought to occur. Are the courts really equipped to decide these issues, which also involve questions of policy or are they stepping across the dividing line, which demarcate the powers and jurisdiction of the executive and the legislature under the distribution of powers under different provisions of the Constitution of India.

³ State of Madhya Pradesh v. Sughar Singh & Ors (2010) 3 SCC 719 – Where acquittals were reversed without affording an opportunity of being heard and therefore resulted in a serious violation of the principles of natural justice.

Let me illustrate with a few cases. I have already referred to the judgment of the Supreme Court for setting up a Committee to examine the inter-linking of rivers which committee will be responsible for carrying out the project of interlinking of rivers.⁴ But this is an area not relating to the application of pure legal principles and constitutional interpretation unlike the cases in **Golaknath**⁵ and **Keshavananda Bharati**.⁶ *Golaknath* had the choice of holding that a provision relating to the amendment of the Constitution, namely, Article 368, would necessarily imply that such a power exists in Parliament as otherwise the introduction of such a provision was a meaningless exercise. The Supreme Court of India, however, held that what was contained in the Article 368 was only the procedure for amending the Constitution, and as a result the provision for amendment was not the exercise of amendatory powers of Parliament to amend the substantive provisions of the constitution, but was merely the exercise of legislative power like the making of any other law. This would mean that a mere law made by Parliament could well be tested against Article 13 of the Constitution, which declares that all laws violative of Fundamental Rights would be void. Any law which amends a Fundamental Right, for example, Article 31 of the Constitution relating to Property Rights, would by the mere making of the law be still born.

The consequences, of course, were horrendous. The Zamindars would have to be given back their land. Land reforms would not only come to a standstill but huge

⁴ *In Re: networking of Rivers, WP No. 512 of 2002 dated 27.02.2012*

⁵ 1967 2 SCR 762

⁶ 1973 (4) SCC 225

amounts of money would have to be paid out from the State funds to the original land owners, if the land was not available to be given back to them. Hence, the theory of prospective over-ruling had to be evolved by the Court to prevent the consequences of its own holding, when it opted for one of the two alternatives of interpreting Article 368, mentioned by me earlier.

It is in this case (*Golaknath*) that my father, late Shri M.K. Nambiar, who earlier had argued **A.K. Gopalan's**⁷ case, enunciated the basic structure theory by citing a renowned German jurist, **Prof Dietrich Conrad**.

This was the genesis of the subsequent Judgment in *Keshavananda Bharti's case*. By the time, *Keshavananda Bharti* was argued my father, M.K. Nambiar, was quite unwell and could not participate. He passed away two years later.

By way of digression I may mention an interview by a researcher, Shri Raghul Shudheesh with his Holiness Shri Kesavananda Bharati, who was only in his late 20's or early 30's at the time the case was argued and was 73 when his interview was reported by the legal website, "**Bar & Bench**", and when he was asked about his memories and experiences regarding the case, he mentioned:

H. H. Keshavananda Bharathi: I don't remember much about fighting the case. The entire thing was handled by lawyers, who I think did a

⁷ 1950 SCR 88

good job. I was in my late twenties or early thirties when the case came up before the Supreme Court. All our property was about to be acquired by the Government, and we could not afford that to happen. The money we needed for running the mutt was being generated from this property. We approached Mr. M. K. Nambyar, who was a renowned lawyer. He prepared the initial files for the case. Later, Mr. Nambyar introduced us to Nani Palkhiwala. Of the judges, I don't remember all of them. However, I do remember Justice H. R. Khanna and Justice K. S. Hegde well.”

The foundation which was laid in *Golaknath's case*, though not expressly mentioned or dealt with by the judges, bore fruit in *Keshavananda*. When the basic structure theory was enumerated in *Kesavananda*, which forbade the Parliament from amending the Constitution so as to abrogate the very foundation on which the Constitution rested, it was the last straw on the camels back, as it were. Parliament under the written Constitution, was not sovereign, but was supreme in regard to the field allocated to it, but this judgment emasculated Parliament in regard to one of its most important functions which had to be resorted to if the time and place required it to do so. A Constitution is not cast in stone. It has to take note of changing times and the changing needs of the people. If the Constitution was immutable, then a revolution would be required for the purpose of altering it. Surely this could not have been the intention of the Founding Fathers. But the decision in *Keshavananda Bharti* brought about such a result. Parliament was not prepared to accept it. Very soon the Emergency was declared under Article 352 of the Constitution.

At this juncture I recall the **Dred Scott [15 L.Ed. 691 (1856)]** judgment rendered by Chief Justice Taney wherein he held that slaves were property and could not, therefore, be transported across the State borders, thus reducing them from the status of human beings to that of chattel. In response, **Abraham Lincoln** said

“with this the credibility of the judiciary is at an end. It would no more be possible to accept this judgment.”

As a result the civil war was inevitable.

Similarly, in India, two consequences arose. The judges were chastised by the then Law Minister, **H.R. Gokhale**, who on 28th October 1976 issued a strident warning to the Judges of the Supreme Court, and I quote:

“An atmosphere of confrontation was sought to be created by those whose duty it was to see that they did not encroach upon the field which did not legitimately belong to them. Nothing should be left undone now to ensure that such a situation did (sic, does) not recur. If even after the amendment confrontation continues, then I think it will be a bad day for the judiciary.”

And again:

“We are trying to save them from the temptation to intrude into powers which do not belong to them. What we are doing today is not to save the people from the judges but really enabling the judges to save them from themselves.”

Mohan Kumarmangalam, the Minister of steel in a monograph titled “Judicial Appointments”, dealing with the period after 1967, wrote

“the experience of the last 6 years, an unfortunate period of virtual confrontation between the judiciary and Parliament, of confusion and

uncertainty in the law, has to be understood, and the conclusions drawn from it.”

A very resurgent judiciary which under dynamic chief justices of the country had not hesitated to deliver its judgments on matters of far-reaching importance to the people, irrespective of whether it would tread upon the powers rightfully allotted to the other two organs of State, or not, was with one blow as it were, rendered subservient.

Judicial activism and encroachment on legislative and executive powers went out of the window, with the judgment of the majority in the **ADM Jabalpur case**.⁸ Four out of the five judges, manning the Constitution Bench, were prepared to go to the extent of holding, that by reason of the suspension of fundamental rights, the individual lost all protection to life, to liberty and of course, to free speech as well. The court was not prepared to uphold the primordial rights of man, that no person can be deprived of his right to life or liberty other than by the procedure established by law. According to the Attorney General, **Mr. Niran de**, if a policeman wished to take his revenge on a neighbour, for private and personal reasons, and had threatened to shoot him the next day, the victim could not approach the High Court or the Supreme Court and seek remedy against the policemen. The result is that he had to necessarily suffer death. This was the extent to which the Court surrendered the vast powers

⁸ 1976 (2) SCC 521

which had been given to it by the Constitution consciously and deliberately by the Founding Fathers.

I fear to think as to what would have been the position if the elections which had been called in May, 1977 had not resulted in the then ruling party being wiped out of power and a new coalition of political parties called the Janata Party having come into power. They spared no time in reversing the Constitution 42nd Amendment through the Constitution 44th Amendment.

You may wonder where all this leads to. There can be no doubt whatsoever that it is the striking down of laws relating to land reforms, striking down of Constitutional Amendments and the release of political detainees by the High Courts, which resulted in a militant political party deciding to once and for all tame the judges, confine them to the area of adjudication and debar them from any attempt at judicial activism.

The 42nd Amendment is a clear sign of the extent to which the ruling party and the Parliament would travel to defang the Courts, thus seeking to alienate the dividing line. Article 32A which was introduced prohibited the Supreme Court from considering the Constitutional validity of any State law unless the constitutional validity of a Central law was also an issue in the same proceedings. Art. 131A which was introduced in the Constitution declared that the Supreme Court *shall*, to the

exclusion of any other court, have jurisdiction to determine all questions relating to the Constitutional validity of any law. Art. 144A required that the minimum number of judges of the Supreme Court, who shall sit for the purposes of determining any question as to the constitutional validity of any Central law or State law *shall be seven*. A simple majority was not sufficient to invalidate a law but $2/3^{\text{rds}}$ of the seven judges had to so declare the law to be invalid. Similar fetters were placed on the High Courts as well.

What will be noticed is that these amendments were an outright attack on the powers of judicial review conferred by the original Constitution. The 42nd Amendment was brought into force in January, February and April, 1977. *Keshavananda Bharati* had been in force for about five years. Would the Supreme Court of India have the courage to strike down what was a clear encroachment by Parliament on the judicial power of the State? Fortunately, as already mentioned, this became unnecessary in view of the elections being held and a new political party coming into power which forthwith passed the Constitution 44th Amendment Act, which came into force on 20th June 1979, whereby all the objectionable provisions of the 42nd Amendment which violated the doctrine of separation of powers and encroached upon the powers allocated by the original Constitution on the Supreme Court of India were deleted.

After the Emergency and after the 44th Amendment was passed, the Supreme Court did not hesitate to regain the mantle of dominance, which it had held earlier,

among the three organs of the State. It then embarked upon a period of judicial activism unparalleled in the history of any democracy in the world. In doing so it compelled obedience to its will through its power of contempt. The Court thereafter recognised that India has a vast population of disadvantaged sections of society who on account of poverty, illiteracy and ignorance are unable to have access to justice. The Court devised the tool of ‘public interest litigation’, which did away with the issue of *locus standi*, permitting an NGO or a lawyer to espouse the cause of an individual or group, which was unable to approach the Court to seek relief for itself.⁹ The formalities of adversarial litigation were dispensed with and as a result of its activism the Supreme Court forged remedies and brought about dramatic and far reaching changes in areas of prison justice¹⁰, environment,¹¹ right to legal aid,¹² right against sexual harassment,¹³ etc.

Article 21 of the Constitution declares that “*No person shall be deprived of his life or personal liberty except according to procedure established by law*”. The Supreme Court held that the right to life was not a right to a mere animal existence, but a right to live with human dignity.¹⁴ It expanded the scope of this basic right to include the right to go abroad¹⁵, the right to reputation,¹⁶ the right to shelter,¹⁷ the

⁹ S.P. Gupta v. Union of India, AIR 1982 SC 149

¹⁰ Sunil Batra v. Delhi Administration, (1978) 4 SCC 494; Hussainara Khatoon v. Home Secy, State of Bihar, AIR 1979 SC 1360

¹¹ Vellore Citizens Welfare Forum v. Union of India, (1996) 5 SCC 647; Subhash Kumar v. State of UP (1991) 1 SCC 598

¹² M.H. Hoskot. V. State of Maharashtra, (1978) 3 SCC 544

¹³ Vishakha v. State of Rajasthan, (1997) 6 SCC 241.

¹⁴ Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180

¹⁵ Satwant Singh Sawhney v. D. Ramarathnam, AIR 1967 SC 1836

¹⁶ Kiran BEdi v. Committee of Inquiry, (1989) 1 SCC 494

right to privacy,¹⁸ the right to education¹⁹ and the right to a clean and healthy environment. The Supreme Court today continues to expand the scope of Article 21 and the Supreme Court has also held that many of the non-justiciable directive principles embodied in Part IV of the Constitution are enforceable as fundamental rights under Article 21.

Every time the Court has played an activist role, it has been accused of governance. However, what is significant is that in all of these cases, the Court was bringing relief to the people and the judgment of the court was in the interest of the people of the country. Therefore, to that extent the criticism levelled were muted and the allegation of judicial overreach took a back seat as all these judgments were accepted by the people and the other two organs had no choice but to accept the same. Some of the most prominent cases which have resulted in a boon to the nation includes the case where the lustrous marble of the Taj Mahal in Agra was progressively yellowing because of the pollution created by a large number of industries in the area. The Supreme Court was able to single-handedly salvage this ancient Indian monument from deterioration. The survival of the Taj Mahal is owed to the statesmanship of a Supreme Court judge who directed that no polluting industry would be permitted in its vicinity.

¹⁷ Shanti Star Builders v. N.K. Totame, (1990) 1 SCC 520

¹⁸ Gobind v. State of M.P., (1975) 2 SCC 148

¹⁹ Pradeep Jain v. State of U.P. AIR 1984 SC 240; Mohini Jain v. State of Karnataka, (1992) 3 SCC 666

In very many of the cases adjudicated, the Supreme Court was able to achieve dramatic results through its activism. The relocation of polluting industries outside Delhi, the cleansing of the River Yamuna and the conversion of motor-vehicles in Delhi from petrol to a cleaner fuel, namely, Compressed Natural Gas (CNG) are all such examples. But the most striking one is the directive to the Government to re-open the closed Public Distribution Shops and supply the surplus food grains through the public distribution system to people living below the poverty line. Surely, no other court in the world could have achieved all this by which, not hundreds, or thousands, but hundreds of thousands of people were benefited.

The techniques, which the court adopted for achieving these results, were many. It appointed committees to investigate and report on Public Interest Petitions complaining of environmental degradation of forests, rivers and lakes. It called upon expert bodies of the Government or the private sector to submit solutions for remedying the serious health hazards caused by the emission of noxious gases from motor vehicles in the cities. It laid down guidelines for preventing sexual harassment of women at the work place,²⁰ until such time as the legislature passed a law for the said purpose and guidelines for regulating the adoption of Indian children by foreign parents.²¹

²⁰ Vishakha v. State of Rajasthan, 1997 (6) SCC 241.

²¹ Lakshmi Kant Pandey v. Union of India, (1984) 2 SCC 244

In regard to the environmental cases, the Supreme Court has even created a separate bench known as the forest bench, and in 2002, the Supreme Court through its orders created the Central Empowered Committee, which is constituted by experts in the field and regularly reports to the Supreme Court on issues of environmental degradation. In 2009, the Supreme Court took a further step and directed the establishment of the CAMPA (Compensatory Afforestation Fund Management and Planning Authority)

Does this mean that I whole heartedly support the judicial activism undertaken by the Supreme Court of India? In this connection, we must remember the warnings expressed by the founding fathers as well as the great jurists of yore.

Montesquieu said:

“when the legislative and executive powers are united in the same person, or on the same body or Magistrates, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the legislative and executive powers...”

Madison had said:

“The accumulation of all powers-legislative, executive and judiciary, in the same hands whether of one, a few, or many, and whether hereditary self appointed or elective, may justly be pronounced the very definition of tyranny.”

Blackstone had also declared:

“Wherever the right of making and enforcing the law is vested in the same man or one and the same body of men, there can be no public liberty.”

I have met with friends who are parliamentarians who have a perennial complaint that the Supreme Court of India is trenching upon their rightful area of functioning. They have given examples of **the Jagadambika Pal Case²², Jharkhand Assembly Case²³, the CBI Case²⁴, the Black Money Judgment²⁵, the Salwa Judum case²⁶** etc. I do not think it is the power of contempt vested in the Supreme Court which is responsible for their tolerance of judicial encroachments on their authority. But it is really constitutionalism and a belief that the judges are competent and are capable of setting right vast ills which haunt the country that has resulted in this attitude of the parliamentarians. But I dread the day when the executive government and the Members of Parliament together decide that enough is enough.

Take for example the judgment in the *Salwa Judum case*. Was the Court really equipped to decide on the means to be used by the State to combat the atrocities committed by Maoists/Naxalites, without being aware of the ground realities that the State and its police force had to face? The judgment even quotes the novella *Heart of Darkness* by Joseph Conrad and also has sentences which may be more appropriate in a political thesis. For instance, the judgment states:

“12...the culture of unrestrained selfishness and greed spawned by modern neo-liberal economic ideology, and the false promises of ever-increasing spirals of consumption leading to economic growth that will lift everyone, undergird this socially, politically and economically unsustainable set of circumstances in vast tracts of India in general...”

²² Jagadambika Pal v. Union of India, (1999) 9 SCC 95

²³ Anil Kumar Jha v. Union of India (2005) 3 SCC 150.

²⁴ State of West Bengal v. Committee for Protection of Democratic Rights, (2010) 3 SCC 571.

²⁵ Ram Jethmalani v. Union of India (2011) 8 SCC 1.

²⁶ Nandini Sundar v. State of Chattisgarh (2011) 7 SCC 547.

I do not think it would be permissible to inject political philosophy and policy approaches into judgments. The Maoists would not hesitate to sever a constable's head and throw it on a road for all to see. No person instructed in law and human rights would ever condone revenge being perpetrated on the Maoists through equally brutal means. But you have to contain them and it is for the State to decide how and when.

In 2010, a Constitution Bench of the Supreme Court of India delivered a judgment in *State of West Bengal & Ors. v. The Committee for the Protection of Democratic Rights, West Bengal & Ors.*,²⁷ (also known as the *CBI case*), where the Constitutional Bench of the Supreme Court was called upon to decide whether a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State would impinge upon the federal structure of the Constitution or violate the doctrine of separation of powers. The Court responded to this question in the negative and upheld the validity of such directions on the reasoning that the Supreme Court and High Courts, being the protectors of civil liberties of citizens, have not only the power and jurisdiction but also an obligation to protect fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution, in particular. It found that a restriction on Parliament by the Constitution and on the Executive by Parliament

²⁷ (2010) 3 SCC 571.

under an enactment, does not amount to a restriction on the power of the Judiciary under Articles 32 and 226 of the Constitution and that the doctrine of separation of powers cannot curtail the power of judicial review conferred on the constitutional Courts especially in situations where fundamental rights are sought to be abrogated or abridged under the garb of these doctrines.

It is interesting to observe that the Court's judgement in the *CBI case* is filled with extracts from its own previous decisions which recognise and emphasize the importance of the separation of powers doctrine in India's constitutional scheme.²⁸ However, in coming to its verdict in this case, it carefully side-stepped the principle of restraint inherent in the doctrine by enlarging the field of *checks and balances* to encompass not only the traditional dimension of governmental excesses and violations, but also, and more urgently, governmental inaction.

The Court saw this expansion of its role as a natural corollary of its obligation in relation to social and institutional engineering in the current context of positive rights and justiciable social and economic entitlements. While some observers may be heartened by the activist, fundamental rights-based approach the Court has taken, particularly in view of the shocking lapses out of which this case arose, others may be more concerned by the Court's overriding express Constitutional and Statutory

²⁸ The Court considered at some considerable length the application of the separation of powers doctrine in Special Reference No. 1 of 1964, (1965) 1 SCR 413; *Indira Nehru Gandhi v. Raj Narain & Anr.*, 1975 (Supp) SCC 1; *State of UP & Ors. v. Jeet Bisht & Anr.*, (2007) 6 SCC 586 and *I.R. Coelho (D) by LRs v. State of Tamil Nadu*, (2007) 2 SCC 1

prohibitions and diluting of the doctrine of separation of powers under the guise of judicial review of executive action, or, more appropriately in the instant case, non-action.

Again, look at the direction on inter-linking the rivers. The judgment in paragraph 62 states:

“it will be very difficult for the Courts to undertake such an exercise within the limited scope of its power of judicial review and even on the basis of expanded principles of Public Interest Litigation.....The Court can hardly take unto itself tasks of making of a policy decision or planning for the country or determining economic factors or other crucial aspects like need for acquisition and construction of river linking channels under that program. The Court is not equipped to take such expert decisions and they essentially should be left for the Central Government and the concerned State.”

But, what is surprising is that, having said this, in paragraph 64 it issues directions constituting a committee called “**A special committee for inter-linking of rivers**” and this committee is mandated with the duty of preparing and submitting plans for carrying out the inter-linking of river programme. What is more, the committee constituted is also made responsible for carrying out the inter-linking project and the Court specifically states that the decisions of the committee shall take precedence over all administrative bodies, created under the Court or otherwise. What is worse, the Court specifically granted liberty to the *Amicus Curiae* to file a contempt petition in the event of default or non-compliance of the directions contained in this order.

These are the irritants which may gradually create deep wounds in the two other organs of the State, and God help us if the drastic elimination of the dividing line would result in confrontation between the Executive and the Legislatures on the one hand and the judiciary on the other. To invite such a confrontation would not promote constitutionalism, but on the other hand, would result in a serious erosion of the very fundamentals on which the Constitution today stands.

Except during the Emergency and through the 42nd Amendment to the Constitution, I am unable to find any overt and drastic effort made on the part of the other two wings of the State to nullify judicial independence or to subvert judicial review. On the other hand the Supreme Court of India was prepared even to turn Art. 124 and 215 on their heads and to usurp the exclusive powers to appoint judges to the High Courts and the Supreme Court, with the executive having only the right to return the recommendations of the collegium of five judges once. If however, the same name is recommended again, the President (i.e., the Council of Ministers) has to accept such recommendation and to issue a warrant of appointment of the judge, so recommended. Is there any single lawyer or jurist including the judges belonging to the higher judiciary itself, who would dispute the fact that the Constitution never intended the Supreme Court of India to take over the exclusive powers of appointment of the judges of the Higher Courts. As a matter of fact, in no other country in the world has an executive been excluded from the appointment process to the higher judiciary.

Many countries have specialised judicial commissions which deal with the appointment of judges.

I am happy to say that a Bench of the Supreme Court has, recently, referred²⁹ the correctness of the judgment in **Advocates on Record Association v. Union of India**³⁰ to the Chief Justice, to constitute an appropriate Bench for reconsideration of the earlier case. I am not trying to be pessimistic but only pointing out the dangers of the Supreme Court of India and its judges not sitting back and realising that they are not the unquestioned decision makers of the destiny of this country, that governance of the State is no part of their functions and that policy making is foreign to judicial decision making. Judicial law making in the sense in which *Vishaka*³¹ etc has evolved rules of conduct, which really is the exercise of legislative power, is no part of the functions of the court. If the court finds that serious violation of human rights may take place if a law is not put in place, it has to draw the attention of the Parliament to remedy the absence of any such law. But it can never draft a law for the legislature and implement it even during an interregnum, until such a law is made.

The silver lining is, however, that the executive and the Parliament have accepted these over-riding powers exercised by the Supreme Court of India and as long as there are no repercussions and retaliations, all is well. But all this does not

²⁹ Suraz India Trust v. Union of India, (2011) 4 SCALE 252.

³⁰ **1993 (4) SCC 441**

³¹ Vishakha v. State of Rajasthan, (1997) 6 SCC 241.

mean that the Courts should be sanguine and rest in the belief that the executive and legislatures will accept the mantle that they have donned as a superior law giver in the sense in which I have explained it earlier.

Let us hope that there will be no occasion in future for repeating the harsh words used by **Krishnamachari, Alladi Krishnaswamy Ayyar, Mohan Kumarmangalam, Pandit Jawahar Lal Nehru** and the most serious among them being the one made on 28th October 1976 by Shri H.R. Gokhale.

Having said this, there is one aspect which requires analysis and research before concluding that the courts have crossed the dividing line. The question that I would ask myself is whether the principles and guidelines would be the same for a western developed country with a fully educated and economically viable population as to a developing democracy like India?

Today, statistically, in India, there are about 350 million people out of a total of 1.2 billion who live below the poverty line.³² India has one of the worst records in human development. The rate of child mortality is one of the highest in the world.³³

³² According to 2010 data from the United Nations Development Programme, an estimated 37.2% of Indians live below the country's national poverty line.

³³ As per the World Bank Index of mortality rates for children under 5 years old, as of 2010, 62.7 deaths take place for every 1000 new births in India.

Death at child-birth of mothers is also one of the highest in the world.³⁴ Equally, there is a total population of about 250 million who are illiterate.³⁵ The deprivation suffered by this large section of the population, whose basic rights to food, shelter and employment remain unsatisfied, results in an equal deprivation of human rights. Environmental degradation due to mining and illegal depletion of the forest cover of the country, the pollution present in our holy rivers due to the discharge of effluents and waste by factories into the rivers, the endemic corruption which facilitates such violations and which renders sterile the efforts of Government to bring about food security, education and job creation, can only mean that there has been a failure of the Constitution and of governance.

All this can be attributed to corruption and inefficiency and apathy of the political parties and the Governments in power. Faced with such an assault on human rights and environment and all other requirements which are basic to human existence and not a mere animal existence, can the Supreme Court of India, when armed with the tools to remedy such unpardonable deprivation of basic rights, be a mute spectator?

If I were a judge and faced with a public interest litigation pointing out that an entire village, where one member of each family was to get daily wages through the

³⁴ According to the World Bank Index of 2007-2011, the Maternal Mortality Deaths in India are 230 for every 100,000 live births. The figures for the United States of America is 24 for every 100,000 births and for United Kingdom is 12 for every 100,000 births.

³⁵ The Literacy rate is 74.04% as per the census of India, 2011.

National Rural Employment Guarantee Act (NREGA) was deprived of the benefit of the scheme, because the public servants entrusted with the implementation had diverted the funds into their own pockets or the pockets of their relatives. If nothing was being done about it by the Governments, perhaps, because their own political leaders were responsible for the frauds, how could one expect the courts not to be proactive? This is the conundrum which faces the judiciary day after day when from far-away parts of the country cases are brought directly to the Supreme Court under its Article 32 jurisdiction by way of public interest litigation pointing out the involvement of public servants or even of Ministers of the Government in being parties to the conspiracy to commit fraud. We have the case of the devastation brought about by unregulated illegal mining in the Bellary area in the States of Andhra Pradesh and Karnataka where Cabinet Ministers were alleged to be responsible and are now in jail, which would obviously explain the inaction of the executive governments. The solution fell on the shoulders of the Supreme Court, which directed the CBI to step in.

We have to realize, in such cases, the judges being human beings with a conscience, would certainly intervene and exercise their jurisdiction, irrespective of the constitutional theory of separation of powers, unless there was an executive government which, through their law officers, would tell the court, **“You cannot cross the *Lakshman Rekha*”**. Equally, one would not expect the law officers to prevent the court from taking the responsibility on its own shoulders to prevent the destruction of forests and to ensure its rehabilitation by building up a fund from its

Net Present Value (NPV) and also by compelling re-forestation of double the extent of land which has been degraded. Perhaps Parliament and the State legislatures and the executive at the Centre and the States may welcome the Supreme Court of India taking over this area of the governance so that the stability of their governments may not be affected in any manner. Would it, therefore, be fit and proper that the same yardstick should be applied to the theory of Separation of Powers existing under the Constitution of a developing country in the same manner as that of a western democracy?

The question which this discussion throws up is whether the principles and guidelines enumerated by the text book writers would be apposite to the case of a developing country like India? It is here that the assistance of Acharya Dr. Durga Das Basu, if he were alive, would have been of invaluable assistance.
