violate the law with impunity – undoubtedly for a price. The order of the Court left the Government looking red faced and forced a rethinking on planning.

In a working democracy, there should be no occasion, for the Courts to deal with such issues. If the High Court has to deal with nursery admissions, it is because the Government (which is supposed to oversee education) did nothing to address the trauma caused to little children by the "interview" – which they were ready to condemn in Court. If the Court has to give directions to reform the police system it is because the political system refused to implement the reforms recommended by one police commission after the other for the principal reason that it would dilute the control of the politician over the police force. Scrath an order of the Court, and underlying it a story of bad governance. True, higher Judiciary is called upon to interpret the law and to sit in judgment on the legality and constitutional validity of a law. Equally true is that all constitutional validity of a law. Equally true is that all constitutional interpretations have political consequences. Nonetheless, the requirements in a nascent democracy like ours remains that the Judges perform their designated tasks in a manner as not to give the impression of their playing the politician's game.

Call for Restraint

Hat the Supreme Court stated :

* Judges a must have modesty and not behave like emperors.
* They must exercise judicial restraint.
* They must not encroach into executive or legislative domain.
* Judiciary has forayed into the domain of other two organs.
* If Judges do not exercise restraint, politicians will step in and curtail their powers and take away the independence of Judiciary.
* Judges must know their limits and must not try to run the Government.
* SC had erred in 1998 and 2005 by interfering in UP and Jharkhand Assembly cases.
* If Judges act like Legislators or bureaucrats, it follows that Judges should be elected like Legislators or selected and trained like bureaucrats.
* The constitutional tradeoff for independence is that Judges must restrain themselves from the areas reserved for the other branches.

MAJESTY OF JUDICIARY

By

–G. SRINIVASULU, M.Sc., L.L.M.
Inspector of Police,
Vigilance & Enforcement,
A.P. TRANSCO, Hyd.

The Judiciary is the most sublime instrumentality in the country. *David Pannick*, in his delectable book 'Judges' wrote "Judicial independence was not designed as, and should not be allowed to become, a shield for judicial misbehaviour or incompetence or a barrier to examination of complaints about injudicious conduct on apolitical criteria.

"That a man who has an arguable case that a Judge has acted corruptly or

maliciously to his detriment should have no cause of action against the Judge is quite indefensible".

Quoting Judge *Jerome Frank* – a great author (*Courts on Trial*) – *Pannick* wrote, "Some politicians, and a few jurists, urge that it is unwise or even dangerous to tell the truth about the Judiciary. Judge *Jerome Frank* of the US Court of Appeals sensibly explained that he had little patience with, or respect for, that suggestion. I am unable to conceive… that, in a democracy, it can ever be unwise to acquaint the public with the truth about the workings of any branch of Government. It is wholly undemocratic to treat the public as children who are unable to accept the inescapable shortcomings of man-made institutions … The best way to bring about the elimination of those shortcomings of our judicial system which are capable of being eliminated is to have all our citizens informed as to how that system now functions, it is a mistake, therefore, to try to establish and maintain, through ignorance, public esteem for our Courts…"

Justice *Jackson* of the US Supreme Court once remarked. "We are not final because we are infallible. We are infallible because we are final".

Judges are human, though they are ordinarily of high standards and rarely commit serious solecisms, fundamental flaws and grave goofs. Justly, therefore, even high bench pronouncements do desiderate decisional review and correctional reversal. So we must abandon the populist superstition about judicial supremacy or curial papacy. Judges are under the Constitution, not over it. It becomes necessary to make a thorough scrutiny of the robed brethren's moral, materialist and value-based opinions if they stultify established principles of justice and violate Constitutional vision[1].

In a judgment of far-reaching consequence in *Rupa Ashok Hurra v. Ashok Hurra*[2], a five Judge Constitution Bench of the Supreme Court has unanimously held that in order to rectify gross miscarriage of justice in its final judgment which cannot be challenged again the Court will "allow" curative petition by the victim of miscarriage of justice to seek a second review of the final order of the Court. A Five Judge Bench headed by Chief Justice *S.P. Bharucha* said "we are of the view that though Judges of the highest Court do their best subject to the limitation of human fallibility yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final judgment to set right miscarriage of justice" Justice *S.S. Quadri*, Justice *S.N. Variava*, Justice *V. Patil* and *D.C. Benerji* agreed with the CJI, *S.P. Bharucha*. The Court said that it would be the legal and moral obligation of the Apex Court to rectify error in such a decision that otherwise would have remained under the cloud of uncertainty. This judgment was given in a bunch of petitions on the question whether a petitioner could question a final judgment even after the dismissal of a review petition.

Some writers expressed the views that this judgment of the Apex Court is not sound. First, the framers of the Constitution have given the Supreme Court power to hear petition and do justice at two levels: (i) under Art. 32 where it entertains petition and after extensive arguments and detailed examination delivers the final judgment and (ii) power of review under Art. 137 if anything remains left to cure the defect and do justice. In spite of this as the Bench has said the Judges as human beings are likely to do mistake and hear a second review and for the sake of justice prefer justice over certainty of judgment. The acceptance of judicial decision is based on its certainty. But what is the guarantee that the petitioner would be satisfied that he got justice and the

1. Justice *V.R. Krishna Iyer* – D.C. 19.2.2007.

2. AIR 2002 SC 1771.

Judges also anticipated that, in spite of human failing they are able to do complete justice. Secondly, this judgment would not benefit the common litigant. Majority of them are satisfied with the final decision of the Court under Art. 32 and do not file a review petition. It would help only the rich who had enough money to pay senior lawyer's fee for his certificate for filing the curative petition.

Thirdly, the Court has imposed certain conditions to prevent its abuse. Similarly, Justice *Bhagwati* (as he then was) has imposed certain conditions to prevent the misuse of public interest litigation. In spite of this, it is abused by irresponsible litigants. Recently, for instance, in *Balco's* case a Public Interest Litigation was filed challenging the Central Government's Policy decision to disinvest its share to private persons. In this case lot of precious time of the Apex Court was wasted, hearing was done and it had to reiterate the principles of public interest litigation and to give warning against its misuse. Thousands of cases of common litigants are pending in the Apex Court. It is hoped that the Court will decide these cases expeditiously. It is an old maxim that "delay defeats justice". For the foregoing reasons, it was felt that, there was no need to invent this new mechanism of curative petition which is beyond the purview of the Constitution.

THE INDIAN Constitution today is far different in content and concerns from what it was at the commencement of the Republic. The original text has undergone many changes, some of which are beyond the imagination of even the framers of the Constitution. Parliament made nearly 100 amendments, some inconsequential in nature, some corrective of the distortions that had crept in, and still others to advance developmental goals.

As compared to this, what the Supreme Court has done through a couple of judgments is indeed radical enough to alter the very character of the Constitution as originally conceived by the Constituent Assembly. Among such radical changes rendered by the Court are the discovery of the "basic features" beyond the amending powers of Parliament, the introduction of the "due process clause" in its substantive and procedural aspects in the reading of Article 21 and Article 14, and the generation of numerous rights and freedoms not expressly given in Part III of the Constitution.

In doing so, the Supreme Court has assumed powers that many constitutional scholars believe do not belong to it. How did it happen and why are questions seldom asked?

Accountability

The former Chief Justice of India, Dr. *A.S. Anand*, in his Millennium Law Lectures[3], while defending judicial activism emphasized the need for caution to ensure that activism does not become "judicial adventurism". Otherwise, he warned, it might "lead to chaos and people would not know which organ of the state to look for to stop abuse or misuse of power". Quoting approvingly the observations in respect of policy making of Lord Justice *Lawton* in the *Laker Airways* case[4], he reiterated the principle that" … the role of the Judge is that of a referee. I can blow my judicial whistle when the ball goes out of play; but when the game restarts must neither take part in it nor tell the players how to play". Dr. *Anand* added that the "judicial whistle needs to be blown for a purpose and with caution. It needs to be remembered that Court cannot run the Government. The Courts have the duty of implementing the constitutional safeguards that protect individual rights but they cannot push back the limits of the Constitution to accommodate the challenged violation".

3. (October, 1999) at the Kerala High Court Advocate's Association
4. 1977 (2) WLR 234 at 267.

Lack of remedy:

Wise words indeed for Judges to remember. The problem, however, is the absence of an effective remedy when Judges cross the Lakshman Rekha consciously or otherwise, leaving no remedy to restore the constitutional balance. Such situations may be rare but they do exist. All the three wings of the State are creatures of the Constitution and are bound by it. As co-ordinate organs of the State there is to be complementary among the constitutional institutions and no one institution can claim superiority over the other.

Unfortunately, on many occasions this did not happen and issues to be decided through political and legislative processes were brought before the Courts for adjudication. While so adjudicating, Courts have to review the constitutionality of the law and interpret its scope *vis-à-vis* the powers given under the Constitution.

In doing so, it is not to be understood that the Court is a super Legislature and sits in judgment on the wisdom of policies adopted by the Legislature. It is only ensuring the observance of the Constitution, which is the legitimate function of the Court. Judicial review is fundamental to the rule of law though *prima-facie* it may appear to a layman as anti-democratic and elitist. Courts of law are creatures of the Constitution and can act only within the sphere of its jurisdiction.

The second type of situation in which the Court proactively involved itself in what is generally called the executive function, is where the laws are left unimplemented for whatever reasons and individual rights or public interest are adversely affected thereby. Many decisions on environmental law, directing executive action even where budgetary reallocation is required are illustrative of judicial activism is the *Vineet Narain* case[5] where through the devise of continuing *mandamus* the Supreme Court directed the investigation of high level corruption and monitored its progress till its completion with the filing of the charge-sheet.

Where does this discussion on judicial role in constitutional law-making lead one in terms of parliamentary democracy, democratic accountability and constitutional governance? The answer depends on how one perceives the performance of the executive and legislative wings of the state and what constitutes public interest in the given situation. It is difficult to resolve this question in terms of the original intent of the Constitution – makers or the presumed will of WE, THE PEOPLE OF INDIA. Nor can it be addressed by textbook definitions of democracy, the rule of law and constitutional governance.

Accountability, of course, is a key issue. The over-concentration of power in anyone institution is inimical to democratic accountability and good governance. There is need for restraint and the development of healthy constitutional conventions and practices.

In the present context, judicial appointments, judicial independence and judicial accountability are issues that warrant informed and responsible debate if parliamentary Government is to remain the central theme of Indian Democracy.

To quote again Justice *V.R. Krishna Iyer*, one of the most eminent Judges of the Supreme Court of India.

"The judicature has a sublime status and commands the reverence of the people which is a great tribute to this national institution. Necessarily, Judges have the highest duty to the people of administering justice, based on fearless truth, moral rectitude and negation of addiction to power and lucre. Austerity,

5. AIR 1996 SC 3386

never ostentation, is the essence of forensic parameters. Declaration of wealth and high code of conduct are binding principles. High education, professional ability, advanced technology and mega-factories and wealth belong to the rich and they control the country's resources, police power and incarceratory power. If this superior class manages to gain judicial power too, Indian law is likely to be interpreted and adjudicated in favour of the creamy layer and the robber sector. The weaker sector finds law to be its enemy if the instrument of law is in the hands of the higher class".

"There is no doubt that we are surrounded in our adult life with a wealth of humbugs : fame humbugs, wealth humbugs, patriotic humbugs, political humbugs, religious humbugs and humbug poets, humbug artists, humbug dictators and humbug psychologists," said *Ling Yutang*.

Once *Winston Churchill* said in the Commons, "The Courts hold justly a high, and I think, unequalled preeminence in the respect of the world in criminal cases, and in civil cases between man and man, no doubt, they deserve and command the respect and admiration of all classes of the community, but where class issues are involved, it is impossible to pretend that the Courts command the same degree of general confidence. On the contrary, they do not, and a very large number of our population has been led to the opinion that they are, unconsciously, no doubt, biased".

As *David Pannick* wrote, "We need Judges who are trained for the job, whose conduct can be freely criticized and is subject to investigation by a Judicial Performance Commission; Judges, who abandon wigs, gowns, and unnecessary linguistic legalisms; Judges who welcome rather than shun publicity for their activities".

DEVELOPMENT OF CRIMINAL LAW AND HUMAN RIGHTS — ROLE OF JUDICIARY

By

—G. SRINIVASULU, M.Sc., L.L.M.
Inspector of Police,
Vigilance & Enforcement,
A.P. TRANSCO, Hyd.

The Criminal Law jurisprudence is based upon certain important dicta.

1. Every person must be presumed to be innocent till he is proved guilty.
2. Let 100 criminals escape but not one innocent person be punished.
3. In criminal law the proof should be established beyond a reasonable doubt to punish the accused.

The Supreme Court diluted the application of Proof beyond reasonable doubt doctrine to show its sensitivity towards societies' needs to ensure the punishment of guilty. In *Bhagwan Din v. State of Madhya Pradesh*[1] the Supreme Court confirming death sentence on several members of MCC for murdering 35 people from another caste in Bihar seriously questioned that the doctrine was leading to too many acquittals and laid down that it was not required to meet every hypothesis put forward by the accused. But the Court definitely deviated from application of the 'rarest of the rare cases' principle enunciated

1. (2002) 4 SCC 85