Mrs. *Pushpavati* and Kum. *Durga* are not only obedient but also sincere in discharging their duties. I express my thanks to all of them.

I once again express my sincere thanks to My Lord, the Hon'ble the Chief Justice for his unfailing courtesy and affection, brother Judges, Sister Justice *Maruthi*, learned Advocate-General, Members of the bar, Registrars and Members of the High Court staff.

Thank you verymuch

Justice P.Ramakrishnam Raju

INDIAN CONSTITUTION AND SUPREME COURT

By

Hon'ble Justice, **H.R. KHANNA**
Former Judge,
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I deem it a great privilege to deliver the First Memorial Lecture of Mr. Justice *K. Madhava Reddy* Memorial Lectures. Justice Madhava Reddy was one of the most eminent lawmen of Andhra Pradesh and came to be looked upon as a doyen of Andhra Pradesh Bar. He was the Chief Justice firstly of the Andhra Pradesh High Court and thereafter of the Bombay High Court. Later he was appointed the First Chairman of the Central Administrative Tribunal at Delhi. After retirement he practised in the Supreme Court of India for nearly a decade. He was also associated with a number of educational institutions and social organisations. He made deep impression on a very large number of persons in various fields. It was with a view to commemorate his services and his way of life that his admirers, friends and followers, including members of his family formed a Thrust and also an Association.

India, during the post-independence era and also before that, produced galaxy of great jurists some of whom adorned the Bench while others preferred to remain at the Bar. It is an irony that while in other countries like United States and United Kingdom a lot has been written and spoken about the eminent men of law, there is in India much less awareness of the contribution made by those jurists in the life of the nation and its onward march. The nation owes a great deal to the eminent men of law who played a significant part in the liberation of the country during the pre-independence years and later in post-independence era in the development, amongst others, of the Constitution of India. It is, therefore, in the fitness of things, that a Trust has been created in the memory of Justice *Madhava Reddy* and the present Lecture named after him has been arranged. The subject on which I propose to speak is ''the Constitution and the Supreme Court''.

The proceedings of the Constituent Assembly show that the Supreme Court attracted considerable interest of the members. Next to fundamental rights, the Court captured their imagination and they brought a touch of idealism in their deliberations about the Court. The Supreme Court was to be not only the final authority on the interpretation of the Constitution, it was to carry special responsibility for safegaurding the fundamental rights. Much less attention was paid to the High Courts and the subordinate judiciary. The members of the Constituent Assembly then deliberated on the question of the Supreme Court being the custodian of liberty whenever the question arose about the balancing of individual's rights and society's needs. The task of preparing draft provisions for the establishment of the Supreme Court was entrusted to a committee consisting of *Varadachariar*, *B.L. Mitter*, *Munshi*, *Ayyer* and *B.N. Raju*. This Committee in its report sent in May, 1947 dealt with the jurisdiction

of the Supreme Court. According to the Committee the Court was to have exclusive jurisdiction in disputes between the Union and State as well as disputes between States. As to protecting individual's liberties, the Court was to have appellate and writ jurisdiction. The Court jurisdiction in dealing with cases concerning rights was not to be exclusive; High Courts would also have jurisdiction in these cases. The Court was also to exercise advisory jurisdiction. *Ayyar* and *Munshi* in separate memoranda expressed the view that the power of judiciary review, which was being vested in the Supreme Court would have a more direct impact basis in our Constitution than simple due process as in the U.S Constitution.

The alternative Suggestions were made for appointment of Judges to the Supreme Court the first suggestion was that the appointment of Judges should be with the concurrence of the Chief Justice of India. The second suggestion was that the approval of the Parliament of Judge to the Supreme Court. Dr. *Ambedkar* did not accept any of these suggestions. To make appointment subject to the veto of Parliament would be cumbersome and might involve the possibility of political pressures being exerted. He also expressed the view that giving the power of veto to an individual, however eminent, like the Chief Justice, would be a dangerous proposition. He observed that the article as drafted did not make the President the supreme and the absolute authority in the matter of making appointments. It did not also import the influence of the Legislature. The provision in the article required that there should be consultation of persons, who are ex-.....well qualified to give proper advice in matters of this sort and that this sort of provision may be regarded as sufficient for the moment.

Rejecting the suggestion that the appointment should be with the concurrence of the Chief Justice of India Dr. *Ambedkar* observed:

> ''With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate the proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and prejudices which we as common people have; and I think to allow the Chief Justice practically a veto upon the appointment of Judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I, therefore, think that this is also a dangerous proposition.''

As years rolled by those in power at the Centre, for two decades after the coming into force of the Constitution, showed due deference to the concept of independence of judiciary. The first blow that was struck to the independence of judiciary was in the year 1973 when, immediately after the Supreme Court gave its judgment in the case of *Kesavanda Bharati*, three senior-most Judges of the Supreme Court were passed over for the office of Chief Justice of India and some one junior to them was appointed to that office. This act of the Executive was plainly calculated to convey to the judiciary that the Judges who did not toe the line of the Government would have to pay the penalty therefor.

The concept of committed judiciary was also propounded by those in power. Inspiration for this concept was taken from the USSR Constitution. It was, however, forgotten that under the scheme of our Constitution commitment of the judiciary can only be to the Constitution and the laws of the land and it cannot deviate from that in furtherance of the ideology of the party in power. Leading members of the bar deprecated the act of the Government in superseding three senior-most Judges for appointment to the office of Chief Justice of India. A more crucial test for independence of the judiciary came when Emergency was imposed in the year 1975 and question arose as to whether the Court could go into the question of the legal validity of an order of the Executive directing detention of a person under the Maintenance of Internal Security Act. On behalf of the

Government it was argued that as the right to move the Court for enforcement of Article 21 had been suspended during the Emergency, petitions for *habeas corpus* should be dismissed indimini and the High Court should not consider the validity of the order of detention. Article 21 of the Constitution, as you all know, provides that no one shall be deprived of his life or personal liberty except according to the procedure established by law. All the nine High Courts before which this question was agitated repelled the contention of the Government that the habeas corpus petitions should be dismissed indimini and held that the High Court could examine the validity of the order of the detention. The Government came up in appeal against those orders of the High Courts. A very piquant situation arose for the Government when question was put to the Attorney-General that Article 21 related not merely to the right of personal liberty but also to the right to life. The question was that if a police official, for reasons which had nothing to do with the State but for personal enmity shot and killed some one, would there be a remedy against it ? The Attorney-General's reply to that question was ''Consistently with my submissions, my Lords, there would be no remedy against such killings as long as the emergency lasts'', and he added ''it shocks my conscience, it may shock yours, but consistently with my submissions there would be no remedy as long as Emergency Lasts''. Ultimately, the Supreme Court, while accepting those appeals on behalf of the Government held by majority of four to one :

> ''In view of the Presidential Order dated 27th June, 1975 no person has any *locus standi* to move any writ petition under Article 226 before a High Court for *habeas corpus* or any other writ or order or direction to challenge the legality of an order of detention on the ground that the Order is not under or in compliance with Article. Or is illegal or is vitiated by *mala fides*, factual, legal or is based on extraneous considerations.''

Ultimately the Judge who dissented was passed over for the Office of the Chief Justice of India.

A great danger which is some times faced by the judiciary is the tendency, raising its ugly head in some countries, of using judicial processes by those in power to arrest and prosecute their political opponents. Prosecution in such cases degenerates into persecution of the opponents it is such cases which put a strain on and give an uneasy time to the independence of the judiciary and provide a real test of the judiciary's claim and allegiance to independence. It is no test of the independence of judiciary that it can hold the scales even in ordinary run of cases between obscure citizens. The real test of independence of judiciary arises when times are abnormal, when there is a brooding sense of fear, when important personalities get involved and when judicial processes are used by those in power to persecute political opponents under the garb of prosecution At such times, it is not so much the person arraigned as the accused who is on trial, as it is the judiciary which is on trail. Such moments can well prove to be the twilight of the rule of law. It is indeed then that our allegiance to the principle of the independence of the judiciary is put to the real test. Law knows of no finer hour than when it cuts through formal concepts and transitory emotions to come to the rescue of the oppressed citizens.

Experience not only in India, to which I have already referred, but also in other countries shows that when those in power are strong and aggressive many of those in the judiciary cave in and abide by the wishes of those in power. This happened when Jews and political opponents were sought to be exterminated during the *Nazi* regime in Germany. This also happened in Pakistan during the time of *Zia* when *Bhutto* was put on trial. Judicial independence calls for spiritual and mental toughness and willingness to suffer for and pay the price of independence. Timidity of character ill goes with the office of a Judge. Weak characters cannot be good Judges.

I may also add that the concept of independence of judiciary should not be used as a mask for intransigence in obstructing progressive measures as was done by Chief

Justice *Tancy*, speaking for the majority of US Supreme Court in the case of *Dred Scott*, when the question of the validity of anti-slavery law was decided. The scene in the US Supreme Court when *Tancy* pronounced that judgment has been described as follows:

> ''Chief Justice *Tancy*, once a towering figure, now at 80 bent with pain and palsied, read, his voice fading at times, the opinion that denied one man's freedom while protecting another man's property.''

It was also held that *Scott* could not sue as he was not a citizen of United States because he was a negro and a slave. The judgment of Chief Justice *Tancy* was denounced by *Abraham Lincoln* and it led to the American Civil War.

Years ago, learned *Hand* warned against the danger of political or other extraneous considerations influencing judicial decisions. While stressing need for Judges to keep away from political battles and assuming the role of Legislators or seeking solution from their bosom for every problem which besets the nation, he observed:

> ''If an independent judiciary seeks to fill them from its bosom, in the end it will cease to be independent. And its independence will be well lost, for that bosom is not ample enough for the hopes and fears of all sorts and conditions of men, nor will its answers be theirs; it must be content to stand aside from these fateful battles. There are two ways in which the Judges may forfeit their independence, if they do not abstain. If they are intransigent but honest, they will be curbed; but a worse fate will befall them if they learn to trim their sails to the prevailing winds. A Society whose Judges have taught it to expect complaisance will exact complaisance; any complaisance under the pretence of interpretation is rottenness.''

If our Constitution visualises that judiciary should be kept out of politics, we have also to ensure that politics is kept out of judiciary. Indeed if there is one branch of the State which must steer clear of political controversies and not get involved in or aligned with any of the political parties and personages in their disposal and struggles, it is the Judiciary.

The most important judgment on Constitution Law which can be regarded as a path-setter is that given in the case of *Kesavanda Bharti*. The Court in that case dealt with the question as to what is the import of the words amendment of the Constitution'' and the scope and extent thereof. Since my judgment in that case embodies the majority view, I reproduce the following passage from that judgment:

> ''The word 'amendment' postulates that the old Constitution survives without loss of identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old constitution cannot be destroyed and done away with; it is retained though in the amended form. What then is meant by the retention of the old Constitution. It means retention of the basic structure of framework of the old Constitution. A mere retention of some provisions of the old Constitution eventhough the basic structure of framework of the Constitution has been destroyed would not amount to the retention of the old Constitution. Although it is permissible under the power of amendment to effect changes, however, important and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutions - pattern. The words ''amendment of the Constitution'' with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution. It would not be competent under the garb of amendment, for instance, to change the democratic Government into dictatorship or hereditary monarchy nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha. The secular character of the State according to which the State shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. Provision

regarding the amendment of the Constitution does not furnish.''

> ''a pretence for subverting the structure of the Constitution nor can Article 368 be so construed as to embody the death wish of the Constitution or provide sanction for what may perhaps be called its lawful hara-kiri. Such subversion or destruction cannot be described to be amendment of the Constitution as contemplated by Article 368''

I may mention that some of those who were critical of the view taken in that judgment have subsequently veered round to accepting the correctness of the law laid down in that judgment. It is that judgment, they aver, which ensures the continuity of the secular character of our polity and bars the establishment of a theocratic State.

Some of the weaknesses that are manifested in the administration of justice by the Supreme Court has been the long delay that takes place in the disposal of cases. Till about the year 1977 the Supreme Court was concerned primarily with disposal of cases earmarked by the Constitution relating to the appellate and writ jurisdiction of the Court. The motion bench matters including the special leave petitions and writ petitions would not take more than 10 or 15 minutes, except on Monday when some heavy matters were listed and they would normally take 20 to 25 minutes. Thereafter the Judges would start hearing regular matters. The backlog of motion bench matters started accumulating in eighties when a very liberal approach was adopted. Special leave petitions in effect became routine or ordinary leave petitions. The trend was checked in nineties when the cases were streamlined and those raising the same questions of law were put together so that the decision in one would result in the disposal of the entire group of similar cases, Judges also became more strict in the matter of grant special leave petitions. The trend to give due deference to Judgments of the High Courts also come into vogue.

While dealing with the role of the Supreme Court it is necessary to remove some mental cobwebs. The Supreme Court and High Courts have been vested with the power to afford redress to the aggrieved party in case there is violation of fundamental rights. The Courts, in doing so, do not act as super-Legislatures but only in the discharge of their obligation that has been imposed upon them by the express provisions of the Constitution. The function of the Court is to look into the constitutional validity of the laws and decide accordingly. Apart from the laws made by the Legislature, the Courts also look into the validity of the acts of the executive in order to ensure that they do not infringe the provisions of the Constitution and are also not violative of the statutory laws made by the Legislature.

View has been expressed and complaint has been made by many in the political field that the judiciary, in making the investigating agencies to look into the acts of the political corruption and amassment of ill-gotten wealth by political bosses, has overstepped the limits of its authority. This too is an erroneous idea. It is one of the primary functions of the judiciary to ensure the rule of law. The investigating agencies and the vigilance officers till about five or six years ago, shirked from their duty in investigating gross acts of political corruption and amassment of ill-gotten wealth by Ministers and other high personages because the investigating officers were subordinate to and under their administrative control. As such, they were turning a blind eye to such acts of political corruption and amassing of wealth lest they offend their bosses. The judiciary in doing so has removed the shadow of fear and made the investigating officers to enforce the rule of law so that none may carry the notion that he is above the law. The judiciary has upheld the basic principle that howsoever high one may politically or administratively be the law is above him and he cannot avoid the penalties for the infraction of the law. It is as a result of ensuring the rule of law that many skeletons in the cupboard of Ministers and other political high ups have been revealed and acts of amassment of huge amounts of wealth through corrupt means have come to light. As such, any charge against the judiciary of having overstepped the limits

of its authority by enforcing the rule of law, is wholly ill-founded.

At the same time, it needs to be emphasises that it is the elected representatives of the people enjoying the confidence of the Legislature and answerable and accountable to the people at the time of elections who have to govern the country with the help of civil servants. Care has, therefore, to be taken to ensure that the Courts do not usurp the functions of the executive agencies. There have been occasions, the critics point out, that in issuing directions in matters which are administrative and about which the Courts do not possess the requisite expertise and proficiency, they have overstepped the limits. Such decisions, it is stated, land the administrative agencies in practical difficulties and make them bear the brunt of judicial decisions, some of which were wholly oblivious of the administrative needs, and, as such, ill conceived.

Although judicial craftmanship and creativity resulting in the evolution of law and its sweep is welcome, it must also recognised that our Constitution has demarcated different fields of operations of the three wings of the State. As long as each organ of the State operates within its demarcated field and shows due deference for the other two organs, no difficulty would arise in the working of the Constitution. The trouble arises when one wing of the State tries to encroach upon the field of the other. It is in the above context that special responsibility devolves upon the Judges to avoid the over-activist role and to ensure that they do not overstep or trespass upon the sphere earmarked for the other wings of the State. In certain situations the appeal has to be the Legislature or the executive and the Judges ought not to be seduced by Quixote temptations to encroach upon other fields to set right very fancied wrong paraded before them.

The bosom of the judiciary, it is asserted, is not wide enough for all kinds of hopes and fears of men, nor is it in a position to provide solution for any and every problem, although human ingenuity would not be lacking to give it some kind of shape or semblance of a legal or constitutional issue. A Judge like *Epictetus*, it has been aptly put, must recognise the impropriety of being emotionally affected by what is not under one's control. The Courts, it is also pointed out, have to be much more circumspect in ensuring that they do not overstep the limits of their powers, because to them is assigned the function of being the guardian of the Constitution. It is a faith and trust reposed by the farmers of the Constitution in the Courts and their position in this respect is akin to that of a trustee. When the other agencies or wings of the State overstep their limits, the aggrieved parties can always approach the Courts and seek redress against such transgression. When, however, the Courts themselves are guilty of such transgression, to which forum would the aggrieved parties appeal ? If mankind, while passing through the successive stages of political consciousness, has done away with despotism of Kings and Dictators, it would be puerile to except it to put up with depotism of judicial wing of the State.

It is also necessary for all sections of the Society to bear in mind the warning that a society so riven that the spirit of moderation and discipline is gone, no Court can save; that in a society where that spirit flourishes, no Court need save; that in a society which evades its responsibility by thrusting upon the Courts the nurture of that spirit, that spirit in the end will perish. The ramparts of a free liberal society are ultimately in the hearts of the people and not in the laws and the Courts, important though they may be. If the ramparts become weak and crumble, no law, no Court would be able to do much in the matter.

Before concluding, I must observe that by and large and looking into the totality of situation, the Supreme Court of India has played a very vital role in the onward march of the nation and we can feel legitimately proud of that. I thank the organisers for giving me an opportunity to express my views on this vital matter.
