

Separation of Powers and the Judiciary

V. Sudhish Pai

In ancient times all authority was vested in the King. The onward march to modern constitutional polities saw the diversification of the State's functions. It is now axiomatic that the three wings of the State perform different functions. This may be said to be conventional wisdom but like most conventional wisdom it is only partly true.

A few fundamentals on the subject may be stated. In a written Constitution, like ours, quasi-federal in character, the three wings of State are co equal and have coordinate powers with legislative powers distributed between the Centre and the States. This necessitates the existence of a tribunal- the Supreme Court- to maintain the checks and balances inbuilt in such a written Constitution. No wing or organ is even remotely supreme, all being creatures of the Constitution which envisages not only a democracy of men but also of institutions in which no institution is conferred with absolute authority or unlimited power. The three organs of State being coequal and coordinate would not be entitled to encroach upon the area, jurisdiction and powers distributed by the Constitution between them. As Durga Das Basu puts it the doctrine of separation of powers postulates that none of the three organs of Government can exercise any power which properly belongs to either of the other two.

But as laid down in *Ram Jawayya* (AIR 1955 SC 549), "The Indian Constitution has not recognized the doctrine of separation of powers in its absolute rigidity, but the functions of different branches of the Government have been sufficiently differentiated. One organ cannot assume functions that essentially belong to the other. Our Constitution though federal in structure is modeled on the British parliamentary system. The Council of Ministers consisting as it does of legislators is like the British Cabinet 'a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part'. The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions." In that sense there is more fusion and blending than separation of powers.

As Cardozo, J. said in *Panama Refining Co vs Ryan* [293 U.S.388,440 (1935)] the principle of separation of powers “ is not a doctrinaire concept to be made use of with pedantic rigour. There must be sensible approximation, there must be elasticity of adjustment in response to the practical necessities of Government which cannot foresee today the developments of tomorrow in their nearly infinite variety.”

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

It has been unequivocally laid down by the Supreme Court that all organs of State are creatures of the Constitution from which alone they all derive their power and authority; no branch has powers unfettered and unrestricted by the Constitution; the Constitution has devised a structure of power relationship with checks and balances; it is for the Court to uphold the constitutional values and enforce the constitutional limitations. This captures the essence of the doctrine of separation of powers and its working in our constitutional scheme and that is to be overseen and guarded by the Court. “The concentration of powers in any one organ may, by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic Government to which we pledged.”

Having set out these broad parameters, we may examine how far the various organs of State functioning under our Constitution have adhered to and observed the doctrine.

Art 50 – the Directive Principle envisages separation of judiciary from executive in the public services of the State. While there may be no strict water tight separation at least as between the legislature and the executive, the judiciary is separated from the other two. However, many times now with the court embarking upon all types of PIL, the court enters the arena of policy and law making which rightly belong to the other branches. Among the three organs the judiciary

commands greater credibility and respect. But it may be difficult to compliment the court (Supreme Court) as having maintained the constitutional balance of separation of powers.

Judicial review which is the power of superior courts to test the legality of any State action is considered the life breath of a vibrant, working constitutional democracy. The purpose of public law is to discipline the exercise of power, judicial review is the means of achieving it. Chief Justice Coke confronting his King repudiated government under man in favour of government under law. Rule of law which is a prime principle in our way of life is regarded as the cornerstone of a democratic polity. Rule of law is protected and upheld by judicial review. That is the exercise of a constitutional power which the rule of law requires.

But all this is not self executing. The power of judicial review is exercised through the agency of Courts. The Court is no doubt an institution, but it is composed of persons who with all their diversities of outlook, talent and experience determine the course of its destiny. If most judges are more law abiding than kings were, it is, perhaps, because the appellate process achieves what it is supposed to achieve. But what of those at the judicial summit whose decisions are not subject to appellate review and correction? We cannot forget Justice Jackson's profound observation, "We are not final because we are infallible, but we are infallible because we are final."

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

In this imperfect setting judges are expected to clear endless dockets and uphold the rule of law. Judges must be sometimes cautious and sometimes bold. They must respect both the traditions of the past and the convenience of the present. They must reconcile liberty and authority, individual freedom (human rights) and State/national security, environment and development, socio-

economic rights of particularly the weaker sections of society and development; the whole and its parts, the letter and the spirit. “The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licence; and the difficulty has been to discover the practical means of achieving this grand objective and to find the opportunity for applying these means in the ever shifting tangle of human affairs.”

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

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

Constitutional choices have to be made, so also policy initiatives and choices and legislation consequential to or supportive thereof. Whose right is it to choose and experiment and may be err? Should judges exercise the ‘sovereign prerogative of choice’? That should belong to and be

exercised by the executive and legislative branches of government. Only in case of illegality or unconstitutionality should the court intervene, ie, only in cases that leave no room for reasonable doubt. The Constitution outlines principles rather than engraving details and offers a wide range for legislative discretion and choice. And whatever choice is rational and not forbidden is constitutional. Governmental power to experiment and meet the changing needs of society must be recognized. To stay experimentation may be fraught with adverse consequences. In the exercise of the high power of judicial review, judges must ever be on the guard not to elevate their prejudices and predilections into legal principles and constitutional doctrines. It has been rightly remarked “How easy the job of activist judges..... No great effort, intelligence or integrity is required to read one’s merely personal preferences into the Constitution; a great deal is required to keep them out.” No one does this perfectly; some are more capable of objectivity and detachment.

If judicial modesty and restraint are not accepted and if judicial activism or aggression is to be the rule in matters of policy and law making, some basic issues remain. Is government by judges legitimate? Democratic processes envisage a ‘wide margin of considerations which address themselves only to the practical judgment’ of a legislative body representing a gamut of needs and aspirations. The legislative process, it is trite, is a major ingredient of freedom under government. Politics and legislation are not matters of inflexible principles or unattainable ideals. As John Morley acutely observed, politics is a field where action is one long second best and the choice constantly lies between two blunders. Legislation is necessarily political requiring accommodation, compromise and consensus. It is often a slow and cumbersome process which “when seen from the shining cliffs of perfection appears shoddy, but when seen from some concentration camp of the only alternative way of life, appears but another name for what we call civilization and even reverence...”[T. Smith, *The Legislative Way of Life*, 91-92]. The legislative process does not seek the final truth, but an acceptable balance of community interests. To intrude upon such pragmatic adjustments by judicial fiat may frustrate our chief instrument of social peace and political stability. If the Court is to be the ultimate policy making body, that would indeed be judicial imperialism without political accountability. The inputs that the judiciary can get would be inadequate and not reflecting the diversity of interests and “inadequate or misleading information invites unsound decisions.” Moreover, such a system will

train and produce citizens to look not to themselves for the solution to their problems but to a small and most elite group of lawyers who are neither representative nor accountable. This cannot be the democracy or the rule of law to which we are wedded. Maybe it is not unrealistic to doubt or despise the political processes and it may also be that the people cannot be fully trusted with self government. But it would be naïve to believe that guardianship is synonymous with democracy.

The fundamental distinction between judicial power or function and legislative power or function is well settled and so recognised in all jurisdictions, both common law and civil law. Judicial function is to decide upon the legality of claims and conduct, to determine what the law is and what the rights of parties are with respect to transactions already had. Legislative function is making the law to govern new controversies; it prescribes what the law shall be in future cases arising under it. The former concerns past and present transactions; the latter governs the future. In the process of interpretation and in deciding issues, judges, no doubt, make law. The power of the courts to determine what the law is, if unwritten, or what it means, if written, vests in them an authority which in effect, whether or not in form, is a law making one. This is broadly done i) By interpreting an ambiguity or contradiction in a statute; ii) By gradually giving meaning to deliberately vague terms in statutes by a succession of interpretative decisions; and iii) By declaring the content of the common law. This kind of judge made law is brought about and exists in the sense that judges by interpretation, by changing their views, by overruling earlier decisions make law. The law is moulded and sometimes changed by this process. This is, of course, subject to legislative oversight - of being overruled by the legislature by enacting a new law. It is thus subject to correction by popular sovereignty – the people who elect legislators can influence and have the law changed. That is the theory in any case.

“The ultimate objective of the doctrine of separation of powers is a synchronised limitation of function without paralysing action.” Judges do and must legislate but they do so only interstitially. Judicial law making in this sense is only minor. The law makers have put in place the major architectural features which judges preserve, adding only filigree. Done wisely and with necessary circumspection this is laudable and legitimate but in the guise of interpretation the Court cannot seek to rewrite a provision or make one, however tempting it may appear. Such instances are not wanting.

These days, however, it is not uncommon for the court to undertake virtually an exercise of full fledged legislative power as also executive power and travel into domain clearly not its own. In the process of this new found tendency to legislate or issue directions touching matters of law and policy, many constitutional limitations are breached. Actions, legislative and executive, are tested and corrected and remedied by the judiciary. But judicial action which partakes of both executive and legislative character leaves one aghast. If the salt has lost its savour wherewith can it be salted?

Government is man's unending adventure. No system is perfect. Some free play in the joints is necessary and legitimate. The actual unfolding of democracy and the working of a democratic constitution and institutions under it may suffer from inadequacies and imperfections. But all that cannot be sought to be addressed and redressed by judicial drafting or re-drafting of legislative provisions or formulating policy. There is valid reason and justification as to why law making, formulation of policy and laying down principles and guidelines for exercise of rights and imposition of liabilities should be left to where it rightly belongs- the legislatures consisting of elected representatives of the people. Judges are not elected and have no constituency to which they are accountable.

Quite a few instances of what may be called judicial expansionism or judicial overreach or even judicial despotism come to mind. Apart from the *Second Judges' case* (1993)4 SCC 441 and the *NJAC case* (2016) 5 SCC 1, *Jagadambika Pal* (1999) 9 SCC 95, *Jharkhand Assembly* (2005) 3 SCC 150, *CBI case* (2010) 3 SCC 571, *Salwa Judum* (2011) 7 SCC 547, *Black money judgment* (2011) 8 SCC 1, *Sahara case* (2014) 8 SCC 470, *BCCI case* (2015) 3 SCC 251 are some of the telling examples. It is interesting that in many of these judgements the court refers to earlier decisions recognising and emphasising the importance of the doctrine of separation of powers in our constitutional scheme. And yet in giving its verdict the Court sidesteps the principle of restraint inherent in the doctrine and enlarges the field of checks and balances. *BCCI* is an instance of the Court assuming power and also one of abdicating its essential power and function. The Court observed that it was not proper to clutch at the jurisdiction of BCCI to impose a suitable punishment, yet it directed a committee to do that and declared that the order of the committee shall be final and binding upon BCCI and the parties concerned. It delegated and out-sourced its power to adjudicate, pronounce definitive binding judgments and impose

punishment which it is not competent to do. Such delegation is unknown to law. Jurisdiction cannot be conferred except by law.

One only prayerfully hopes that the drastic breach of the dividing line would not result in confrontation between the legislature and the executive on the one hand and the judiciary on the other. That would not promote constitutionalism or be conducive to its maintenance, rather it would bring about a serious erosion of the fundamentals of our constitutional scheme and ethos. All this brings home the truth of President Franklin Roosevelt's assertion that sometimes we need to save the Constitution from Court and the Court from itself; and we should find a way of taking an appeal from the Court to the Constitution. And in 1976, the then Union Law Minister, H.R.Gokhale echoed the same idea when he said (talking of the Constitution Amendment Bill) that 'we are trying to save them (judges) 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.' It is hoped that these sentiments do not have a familiar ring in the present times.

It is to be noted that except during the spurious Emergency and through the 42nd Constitution Amendment there has been no overt and drastic effort by the other two wings to nullify judicial independence or to subvert judicial review. On the other hand it is the Supreme Court which is endeavouring to usurp the powers and functions of the other organs. In no area is it more glaring than in the matter of judicial appointments.

The Court appears to view its expanding role as a natural corollary of its obligation regarding justiciability and enforcement of socio- economic rights and good governance. While in some ways this may be heartening in the present context of failure of the other wings, the more vital question is about the propriety of and legal support for such action of the Court overriding express constitutional and statutory prohibitions and diluting or even obliterating the doctrine of separation of powers under the guise of judicial review of executive action or inaction. The even more serious issue is: what about the basic quality of the Court's essential work itself!

It is of utmost importance that such judicial action, even when it appears to be absolutely necessary and inevitable, should not be unilateral but should be consensual, involving the executive wing as well and with the assistance of specialists – *amicus curiae* from various fields

which are touched by such judicial acts. This is for the reason that in a parliamentary system, the Cabinet is 'the hyphen which joins, the buckle which fastens the legislative part to the executive;' and Government is primarily responsible for policy formulation and law making and can ultimately bring in proper measures. What is done by the court should be only pro tem and adhoc.

"They (judges) have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful. I think the difficulty has its origin in the failure to distinguish between right and power, between the command embodied in a judgement and the jural principles to which the obedience of the judge is due. Judges have, of course, the power, though not the right, to ignore the mandate of a statute and render judgement in spite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. Nonetheless, by that abuse of power, they violate the law." [Cardozo, *The Nature of the Judicial Process*-p129]

To ensure constitutional governance is part of the duty and function of the judiciary. In that sense judicial review and judicial activism is a duty. But this should not degenerate into private benevolence and the judges' personal opinions and preferences should not be raised to constitutional principles. It is to be remembered that it is for the government to govern; it is for the judiciary to check and ensure that the government is governing lawfully, but not whether it is governing wisely and well. Courts are concerned only with the legality and constitutionality of any action-legislative or executive-not with its wisdom and efficacy. 'Unconstitutionality and not unwisdom is the narrow area of judicial review.' For the removal of unwise measures appeal lies to the ballot box and the process of democratic government, not to the court. This idea has been very effectively and elegantly articulated in many judgments by Justice Krishna Iyer, perhaps the most radical and activist judge. He also observed that courts adopt a policy of restrained review when the situation is complex and intertwined with social, historical and other substantially human factors. If the courts were to test not only the legality of any action, but also its correctness and wisdom, then the law maker and the administrator would have to be endowed with the power of prophecy to foresee what the courts are likely to uphold at a future date. For

the removal of unwise measures appeal lies to the ballot box and the process of democratic government, not to the court.

There are areas where the distinction between what is constitutionally permissible and what is not is hazy and grey and it is the court's duty to identify, darken and deepen the demarcating line of constitutionality. The complexities of the strands in the web of constitutionality which the judge must alone disentangle do not lend themselves to easy and sure formulations one way or the other. All distinctions of law are matters of degree. Justice Holmes believed that judges should defer when the legislature reflected the pervasive and predominant values and interests of the community. It is apposite to refer to what one of the most liberal judges, Justice Vivian Bose, after enunciating the due process and the reasonableness of law, said. "This, however, does not mean that judges are to determine what is for the good of the people and substitute their individual and personal opinions for that of the government of the day, or that they may usurp the functions of the legislature. That is not their province and though there must always be a narrow margin within which judges who are human, will always be influenced by their subjective factors, their training and tradition makes the main body of their decisions speak with the same voice and reach impersonal results whatever their personal predilections or individual backgrounds. It is the function of the legislature alone, headed by the government of the day, to determine what is, and what is not, good and proper for the people of the land; and they must be given the widest latitude to exercise their functions within the ambit of their powers, else all progress is barred. But, because of the Constitution, there are limits beyond which they cannot go and even though it falls to the lot of judges to determine where those limits lie, the basis of their decision cannot be whether the Court thinks the law is for the benefit of the people or not. Cases of this type must be decided solely on the basis whether the Constitution forbids it." [*Anwar Ali Sarkar* AIR 1952 SC 75, para 83 @ 103]

PIL was originally conceived as a jurisdiction firmly grounded in the enforcement of basic human rights of the disadvantaged unable to reach the court on their own. This judicial activism in dispensing social justice has, over the years, metamorphosed into a correctional jurisdiction that the superior courts now exercise over governments and public authorities. The people of India seem to have become accustomed to seeing the Supreme Court correcting government action in even trifling matters which should not be its concern. These micro managing exercises

are hung on the tenuous jurisdictional peg of Art 32 read with Arts 21 or 14 and Art 142. No legal issues are really involved in such matters. The Court is only moved for better governance and administration and it does not involve the exercise of any judicial function. Art 142, it should never be forgotten, is a source of power only for doing complete justice in the cause or matter before it. That power is bounded by the requirement that the Court act within its jurisdiction and it should be exercised in accordance with law. It is not a source of unlimited power, not a *carte blanche* for the Supreme Court to implement what it considers its vision of justice, regardless of concerns of legitimacy and institutional competence and prestige.

In regard to the exercise of the power of judicial review in policing governance, we may usefully refer to what the Supreme Court enunciated recently: Jurisdiction of the Court under Art 32 is not a panacea for all ills but a remedy for the violation of fundamental rights. The judicial process provides remedies for constitutional or legal infractions. The Court must abide by the parameters governing a nuanced exercise of judicial power. When issues of governance are brought before the Court, the invocation and exercise of jurisdiction must depend upon whether such issue can be addressed within the constitutional or legal framework. Matters of policy are committed to the executive. The Court is concerned with the preservation of the rule of law. It is unrealistic for the Court to assume that it can provide solutions to vexed issues which involve drawing balances between conflicting dimensions that travel beyond the legal plane. Matters to which solutions may traverse different fields cannot be regulated by the Court by issuing mandamus. Courts are concerned with issues of constitutionality and legality. Every good perceived to be in societal interest cannot be mandated by the Court. An issue whose solution does not lie in a legal or constitutional framework is incapable of being dealt with in terms of judicially manageable standards. The remedies for perceived grievances regarding matters of policy and governance lie with those who have the competence and the constitutional duty in that behalf. [*Santosh Singh vs Union of India* (2016) 8 SCC 253].

The authority of the courts rests upon the public belief that courts apply law and not emotion or passion. But when judicial activism spans into areas not marked for courts, judges try to frame doctrine to dispose of matters on what sound as legal grounds. The case gets over, the doctrine remains. Lawyers and lower courts will rely upon it and new cases will be decided in accordance with it. As the doctrine was created in the first place to achieve something that the existing law

or legal principles did not permit, judicial power will have expanded to yet new area. Decisions are precedents; doctrines created are applied to new cases and what may very likely begin as an attitude of 'let us do it this one time' grows into and becomes a distortion of constitutional government. That indeed is the danger of unbridled judicial activism or expansionism which will tend to become judicial despotism undermining the neat but delicate constitutional balance. And that is what courts must wisely avoid and resolutely set their face against.

Thus, while one might agree that in the contemporary Indian context principled judicial activism is a necessary constitutional obligation, the decisions arrived at and the directions/redress given have to be on a principled, institutionalized basis, always bearing in mind that judicial response to various fact situations should be guided by wise discretion; and that even the cause of reform is best served by a sense of restraint and moderation. As held by the Supreme Court the essential identity of the institution as a court should be preserved, and if its contribution to the jurisprudential ethos of society is to advance our constitutional objectives, it must function in accord with only those principles which enter into the composition of judicial action and give to it its essential quality.

The exercise of judicial power is at times legislative in nature. There is, however, a fine distinction between what is legislative and what is legislation. Judicial law making is the process by which judges make law in the course of deciding cases by interpretation and declaration. This is done to fill the gaps, interstitial law making. This will bind the parties to the lis. The law declared will apply to others only in future. Judicial legislation is primary law making by the judiciary. The most vexed question is whether court can undertake primary legislative activity. In other words can the judiciary make a law where none exists. How far is such exercise legitimate and authorized. Sometimes judicial decisions of this nature adversely affect rights of persons who are not before the court.

It is well accepted that the court takes note of international treaties and conventions especially those touching human rights and fundamental freedoms and if there is no conflict with the municipal law, adopts and adapts them in the interpretation of domestic law. But that is very different from doing a codifying exercise. The reasoning and justification for judicial legislation is a constitutional conundrum. There does not seem to be any source of power for the courts to

undertake primary legislation. The proposition in *Vishaka* (1997) 6 SCC 241 and *Vineet Narain* (1998) 1 SCC 226 that when there is no law the executive must step in and when executive also does not act, the judiciary should do so, is tenuous. Executive power is co extensive with legislative power. If the field is un-occupied by law it is open to the executive to fill the gap. But there is no warrant that by virtue of those constitutional provisions which lay down that the executive power is co extensive with the legislative power the courts can come in and legislate. The argument that the larger power of the court to decide and pronounce upon the validity of law includes the power to frame schemes and issue directions in the nature of legislation is equally untenable. This is typically the converse case of bills of attainder.

Legislative determination of disputes/ rights has been held to be illegal and impermissible. *Ameerunnisa* (AIR 1953 SC 91), *Ram Prasad Narayan Sahi* (AIR 1953 SC 215), and *Indira Gandhi* (AIR 1975 SC 2299) are some of the telling cases. By the same logic and reasoning judicial legislation which is judicial determination of policy and law is difficult to be sustained and justified jurisprudentially. Indeed the profound observation in *Indira Gandhi's* case puts the matter in the proper perspective. "It is one of the basic constitutional principles that just as courts are not constitutionally competent to legislate under the guise of interpretation so also neither Parliament nor State Legislatures perform an essentially judicial function.None of the three constitutionally separate wings of the State can, according to the basic scheme of our Constitution today, leap outside the boundaries of its constitutionally assigned sphere or orbit of authority into that of the other. This is the logical meaning of the supremacy of the Constitution."

Lord Devlin's comment comes to mind: 'The British have no more wish to be governed by judges than they have to be judged by administrators'. Profound truth! All claims by the court regarding the power to make plenary legislation appear to be nothing more than mere ipse-dixit. It is really begging the question. There is no support for this in the Constitution or the law, there is no jurisprudential foundation for the exercise of such power. One recalls Sydney Harris' statement: Once we assuage our conscience by calling something a 'necessary evil', it begins to look more and more necessary, and less and less evil.

This is nothing to say about the need and the desirability of such measures. The question is one of legitimacy and propriety. Robert Bork's profound statement comes to mind: "... the desire to do justice whose nature seems obvious is compelling, while the concept of constitutional process

is abstract, rather arid, and the abstinence it counsels unsatisfying. To give in to temptation, this one time, solves an urgent human problem; and a faint crack develops in the American foundation. A judge has begun to rule where a legislator should.”

Any support or justification for a constitutional adjudication and even more for judicial legislation will have to be premised on sound legal reasoning. It cannot be sought to be justified for the reason that it produces welcome and desirable results. If that is done, law will cease to be what Justice Holmes named it, the calling for thinkers, and become merely the province of emoters and sensitives. Then naturally there are no rules, only passions. Legal reasoning rooted in a concern for legitimate process rather than desired results restricts judges to their proper role in a constitutional democracy. That marks off the line between judicial power and legislative power.

The summons to a better understanding of these issues presses for an answer.

Nature abhors a vacuum and the inaction of the legislative and executive wings creates pressures for judicial action which is quite tempting. Such judicial action may also win public acclaim and acceptance. But something more precious and vital is at stake. It is the survival of the fundamental constitutional system. Neither popular acclaim nor criticism can answer the long term issue of the appropriate legislative role of the judiciary and the desirable limits on the scope of such power and action. More paramount considerations must be decisive. It is a fact that courts work and apply the law not in the vacuum of intellectual dexterity, but to the hard and mundane realities. The hydraulic pressure of great events do not pass judges idly by. Even so there is the desideratum that all judicial actions and decisions should have visible legal support and rest on sound jurisprudential basis.

The judiciary fulfils an important role acting as an auxiliary precaution against the abuse of governmental power and excesses of majoritarian democracy. Judicial review provides the sober second thought of the community – that firm base on which all law should rest. But there is need to recognise that judicial power and process also have their limitations. “The Courts’ deference to those who have the affirmative responsibility of making laws and to those whose function is to implement them has great relevance in the context and when to this is added the number of times that judges have been over ruled by events, self limitation can be seen to be the path to judicial

wisdom and institutional prestige and stability. The attitude of judicial humility and restraint is not an abdication of the judicial function; it is a due observance of its limits.”

The courts will have to win public acceptability and esteem by exacting high standards of professional competence and moral integrity. As the late lamented Justice Khanna always reminded us, echoing the sentiment of Justice Holmes, the courts like every other human institution must earn reverence through the test of truth. The best and complete answer is the self imposed discipline of enlightened judicial restraint. The rarest kind of power in our troubled world, it is said, is one recognised but not exercised. Yet that is the sort of example we have a right to expect from the organ of the State that must define the limits of all organs including its own.

The last word may belong to the Supreme Court: “In a democracy based on the rule of law, the Government is accountable to the legislature and, through it, to the people. The powersare wide to reach out to injustice.....But the notion of injustice is relatable to justice under the law. Justice should not be made to depend upon individual perception of a decision maker on where a balance or solution should lie. Judges are expected to apply standards which are objective and well defined by law and founded upon constitutional principle. When they do so, Judges walk the path on a road well travelled. When judicial creativity leads Judges to roads less travelled, in search of justice, they have yet to remain firmly rooted in law and the Constitution. The distinction between what lies within and what lies outside the power of judicial review is necessary to preserve the sanctity of judicial power. Judicial power is respected and adhered to in a system based on the rule of law precisely for its nuanced and restrained exercise. If these restraints are not maintained the court as an institution would invite a justifiable criticism of encroaching upon a terrain on which it singularly lacks expertise and which is entrusted for governance to the legislative and executive arms of Government. Judgments are enforced, above all, because of the belief which society and arms of governance of a democratic society hold in the sanctity of the judicial process. This sanctity is based on institutional prestige. Institutional authority is established over long years, by a steadfast commitment to a calibrated exercise of judicial power. Fear of consequences is one reason why citizens obey the law as well as judicial decisions. But there are far stronger reasons why they do so and the foundation for that must be carefully preserved. That is the rationale for the principle that judicial review is confined to cases

where there is a breach of law or the Constitution.” [*Union of India vs Rajasthan High Court* (2017) 2 SCC 599].

These are very telling and profound words, the idea so wisely and neatly articulated. But the problem always is in its application, even by the highest court. It can only be hoped that the judiciary and particularly the Supreme Court is always conscious of this principle and its decisions are informed by this attitude and it adheres to it in letter and spirit. That alone will give the institution and its work both legitimacy and respectability.

But the difficulty always has been that more often than not there is complete mismatch between what the Court lays down and what it practises. It is difficult to find an answer as to how the nation has to cope with such unconstitutional assumption of power. Any suggested remedy is perhaps worse than the malady. The problem with all suggestions to counter the Court if and when it behaves unconstitutionally is that they would create a power which may tend to destroy the Court’s essential work which is vital in a constitutional democracy. The only safeguard against the excesses or abuse of power is the building of a consensus of how judges should behave and conduct themselves in their work, a consensus which by its intellectual and moral force, disciplines those who are subject, and rightly so, to no other discipline.

Madison in *The Federalist* wrote that no political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that the legislative, executive and judiciary departments ought to be separate and distinct. “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.” Viewed against the backdrop of this statement the serious question that some critics pose is whether, in the present context, we have judicial tyranny. That is a question for another day.

Under no Constitution can the power of the Court go so far to save the people from their own failure. “The essence of self-government after all, is self-government- not a nursemaid who lets the children play, if they behave. Freedom includes freedom to make mistakes- a far too

important function to be exercised by guardians. To rely upon others to save us from our faults is to repudiate the moral foundations of freedom. Surely all this is implicit in democracy. Fractured power of course means fractured responsibility. ...The same Separation of Powers with its corollary 'checks and balances' that was designed to impede evil government must *pari passu* impede good government (however these moralistic terms may be defined). Separation and democracy then have this in common: both are concerned with the use and misuse of power; both are precautionary. The one, however, is purely negative, overboard and non-selective. It blocks or hinders any use of power, however exercised, for whatever end or purpose, wise or unwise, good or bad. The other is principled and selective. It affirms and legitimizes some uses of power, repudiating others. Separation and democracy thus are mutually harmonious in some degree, beyond that they are in tension.”(Wallace Mendelson, *Supreme Court Statecraft- The Rule of Law and Men*).

The theory of separation of powers has been envisaged and adopted basically to preclude the exercise of arbitrary power. Some friction and tension between the three wings of government is inevitable. The churning process largely ensures that the people are saved from autocracy. What is essential is for all to appreciate this truism and function accordingly.
