JUDICIARY *VIS A VIS* PARLIAMENT & EXECUTIVE

by

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"Free Enterprise was born with man and shall survive as long as man survives."

—**A. D. Shroff**
1899-1965
Founder-President
Forum of Free Enterprise

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"Judiciary vis-a-vis Parliament and the Executive": What does that phrase mean? The dictionary tells us that "vis-a-vis" literally was a light carriage with two persons sitting face to face: derivatively, two persons or things facing or situate opposite each other. On many occasions, the judiciary is facing Parliament and the Executive but that is because they are asked to perform different functions under our constitutional scheme of limited Government. Sometimes in the three decades of its history, the Supreme Court has had a face to face confrontation. After the new Government raised the issue of mass transfers of High Court Judges and transfer of Chief Justices, could it be called an "eyeball to eyeball" confrontation? That is for future historians to research and record.

Historical Perspective: "We have received a rich heritage from a very variegated past. But it is a treasure which can only be kept at the cost of ceaseless and watchful guarding. There is no room for complacency for in the absence of constant vigilance we run the risk of losing it. It can happen here", said Justice Vivian Bose J., (Bidi Supply Case —AIR 1956 SC 479 at 488).

The early history of the independence of judiciary starts in Stuart England. The fight between the Stuart Kings and Parliament ended in 1701 with the Act of Settlement. This ensured the Judges being appointed "till good behaviour" and not "till the King's pleasure" as before. Parliament

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achieved this by the force of arms, by beheading Charles I and later driving away James II from the throne.

The role of Sir Edward Coke, Chief Justice in the fight for the independence of the Judges against the King, is epic in its dimensions.

It is a cold wintry morning at Westminster Hall on November 13, 1608. James I is bent on establishing the power of the Crown in absolute terms. In his way stand Parliament and the Royal Law courts. Under the leadership of Sir Edward Coke, Chief Justice, the courts have been interfering in the matter of prerogative powers, seizures and detentions and also issuing writs to review the decisions of the local, feudal and ecclesiastical courts. On that historic day the King claimed that: "Since the Judges were but his delegates he could take any case he chose, remove it from the jurisdiction of the courts and decide it in his royal person." "To which it was answered by me", says Chief Justice Coke: "In the presence and with the clear consent of all the Judges ..... that the King in his own cannot adjudge any case ..... but that it ought to be determined and adjudged in some Court of Justice, according to the law and customs of England." To this James replied: "That he thought that the law was founded upon reason, and that he and others had reason as well as the Judges". Then followed the celebrated reply of Coke which sends a thrill of pride in every lawyer and every judge after so many centuries. He said that: "That true it was that God had endowed His Majesty with excellent science and great endowments of nature; but His Majesty was not learned in the laws of his realm of England and causes which concern the life or inheritance or goods or fortunes of his subjects are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognisance of it that the law was the golden metwand and measure to try the causes of the subjects."

James was greatly offended and said: "This means that I shall be under the law which is treason to affirm." To

which Coke replied: "That Bracton saith that the King should not be under man but should be under God and law."

In 1616, James I, sent a Royal Order (issued by Sir Francis Bacon as Attorney General) to Coke and his fellow Judges, not to proceed with the hearing of an action because the King's prerogative was in question. The Judges answered in a letter: "That they considered that order to be contrary to law and such as we could not yield to the same by our oath." (The Case of the Commendams). When summoned by the King, the other Judges caved in and humbled themselves and promised to do as the King desired. Chief Justice Coke alone stood firm and replied: "That when the Case should be, he would do that should be fit for a Judge to do." The indomitable courage of this answer inspires and thrills every Judge and Lawyer through the Centuries.

As a result, in 1616, Coke was dismissed from his position as Chief Justice of the King's Bench. After his dismissal the courts became merely the mouthpieces of the King's will.

In the reign of Charles I, the commissions of appointments of the Judges were changed from "appointments daring good behaviour" to "appointments during the King's good pleasure." The famous historian Henry Hallam sums it up in the following words: "The Courts of Justice did not consist of men consciously impartial between the King and the subject. Some corrupt with the hope of promotion many more fearful of removal or awestruck by the frowns of power."

Charles I was tried and beheaded but after Oliver Cromwell and the Restoration of Charles II, followed the reign of James II. He was determined to restore absolute royal power. He tried to repeal the Habeas Corpus Act and the Test Act (guarantee of Protestantism). He utilised his power (in the words of Holdsworth) of dismissal of Judges to secure "a packed bench of Judges" to establish the legality of his prerogative power.

It was only after the Glorious Revolution and the Act of Settlement (1701) that the Judges' tenure was firmly entrenched for good behaviour and made secure against the royal power.

The lessons of Stuart England have contemporary flavour in India. A Judiciary under fear cannot function independently. Its independence can be very easily subverted in a short time. The reign of James II was hardly for four years (1685-1688). The only method of securing an independent Judiciary is to ensure that the Executive can in no manner remove judges, hurt them, humiliate them or virtually exile them from their hearth and home by a transfer.

James Madison, one of the Founding Fathers of U.S.A., wrote in "Federalist": "If men were angels no Government was necessary." While framing the American Constitution, the colonists and founding fathers were greatly under the spell of Sir Edward Coke. Many of them had migrated from England when Protestants were being persecuted. The famous case of Dr. Bonham decided by Coke considerably influenced them. That was the case in which Coke had held that the common law of reason would even control the Acts of Parliament and sometimes adjudge them to be utterly void. Here was the doctrine of judicial review in embryo.

The United States Constitution ensures the complete independence of the higher Judiciary by making appointments of judges for life and they are only removed by a cumbersome procedure of impeachment before the Houses of the Legislature.

Alexander Hamilton (1787-1788) has this to say about the independence of the courts: "The complete independence of the Courts of justice is peculiarly essential in a limited Constitution ..... Without this all the reservations of particular rights or privileges would amount to nothing."

"If the courts of justice are to be considered as bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the Judges, which must be essential to the faithful performance of so arduous a duty."

Let us see how the courts functioned under the British Rule in India. Here is a Vignette from the days of the British Rule in India. The year is 1828. The High Court of Bombay is presided over by Chief Justice Sir Edward West, and two puisne Judges, Sir Peter Grant and Justice Chambers. The Court issued writs of Habeas Corpus for production of one Moro Raghunath and Bapu Ganesh. They were imprisoned beyond the territorial limits of the town of Bombay. The British Governor refused to obey the writs which were returned unexecuted. The Court reissued the writs. The Executive still refused to obey. By this time the Chief Justice had retired and gone to England and Justice Chambers had died. Justice Grant alone constituted the Bench. On April 1, 1829, history was created. Sir Peter Grant declared that the High Court had ceased to function on all its sides and would remain closed until it received an assurance that its authority would be respected and its process obeyed. Ultimately the Judges by a Petition referred the matter to the Privy Council. The Privy Council decided that the court had no territorial jurisdiction to issue the writs and yet the bold stand of Sir Peter Grant struck a blow for the Independence of the Judiciary. The principle that the Executive could not sit in judgment over the validity of the court's order and writs was forcefully demonstrated by him. (The Privy Council decision is reported at I Knapp 1 (P.C.)=12 E.R. 222).

It is 1943, Britain is locked in the Second World War, yet Sir Morris Gwyer presiding over the Federal Court declared **ultra vires** Rule 26 of the Defence of India Rules. Rule 26 authorised preventive detention. He observed:

"Though it is well to remember that ..... courts of law ought to abstain from harsh and ungenerous criticism of acts done in good faith by those who bear the burden and responsibility of Government specially in times of dangers and crisis, we are not on that account relieved from the duty of saying that the Executive Government does not seek to exercise its power in excess of those which the Legislature has thought fit to confer upon it, however drastic and far reaching those powers may be and however great the emergency which they are designed to meet." (AIR 1943 P.C. page 1 at 5: Keshav Talpade vs. Emperor).

FRAMING OF THE CONSTITUTION

The Constituent Assembly Debates clearly indicate that all participants wanted an independent judiciary. Jawaharlal Nehru said: "It is important that those Judges should not only be first rate but should be acknowledged to be first rate in the country and of the highest integrity, if necessary, people who can stand up against the executive government and whoever may come in their way." Dr. B. R. Ambedkar expressed a similar view. In fact, the Special Committee, appointed by the Constituent Assembly to report on the powers and constitution of the Supreme Court, opined that the executive should not have unfettered discretion in appointing Judges of the Supreme Court. They recommended approval by a panel. The Constitutional Adviser, B. N. Rau, was also of the view that the appointments to the Supreme Court should be made by the President with the approval of two-thirds of the then contemplated Council of State which was to be modelled on the Privy Council. He recommended that the machinery must be such as to secure freedom from party bias.

At the first Sitting of the Supreme Court of India on 28th January 1950, the Attorney General opened the proceedings. He emphasised the vast jurisdiction and powers of the Court and observed that: "They are wider than those exercised by the highest court of any country in the Commonwealth or by the Supreme Court of the United States."

Chief Justice Kania replied and gave us the ideal and the norm for which our early judges were striving. He said: "Under the Constitution of India, the Supreme Court is established to safeguard the fundamental rights and liberties of the people ..... Clothed with the duty of performing such important functions, it is obvious that as in all democratic countries, the Supreme Court should be quite untouchable by the legislature and the executive authority in the performance of its duties. No civilised democratic society can subsist and no nation can make progress if this position of the Supreme Court is not **conceded and maintained** ..... "We hope that political consideration will not influence appointments to High Courts." He exhorted the Members of the Bar in the following words: "While in the name of independence, confusion and disorder cannot be permitted, the **Lawyer's profession will naturally resist encroachment attempted in the name of law and order** on the liberty of the citizen and on fundamental human rights." (Emphasis supplied). He expressed what according to him was the role of the Supreme Court: "The Supreme Court of India **will stand firm and aloof from party politics and political theories.** It is unconcerned with the changes in the Government ....." (emphasis supplied).

Has the Supreme Court lived upto this standard? Has it remained untouched by the legislature and the executive authority? What are the assaults on its powers? And more importantly, are the sentiments of the first Chief Justice of India as to the function of the Court adhered to by the succeeding Judges?

The spirit in which the Supreme Court started exercising powers of judicial review are truly reflected in the classic words of Justice Patanjali Sastri in the famous case of State of Madras Vs. V. G. Row. "If, then, the courts in this country face up to such important and none-too-easy task, it is not out of any desire to tilt at the legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This especially

is true as regards 'fundamental rights' as to which this Court has been assigned the role of a sentinel on the **qui-vive."**

Before evaluating the work of our highest tribunal in the 1950s, let us see a few landmark cases in important areas.

Personal Liberty: On May 19, 1950, Judgments were delivered in Petition No. 13 of 1950 (Gopalan Vs. State of Madras) which seemed certainly an unlucky petition number. A narrow and restricted concept of personal liberty completely excluded, fairness and reasonableness of procedure in enacted law. The concept of "due process" was eliminated by one fell stroke. The freedoms enumerated in Article 19 were regarded as unconnected with Article 21. If law was enacted, all life and liberty would vanish: Of course, subject to Article 14 and Article 32.

M. K. Nambiyar, one of our great constitutional lawyers who argued the case, described the decision later in the following terms: "Almost at the inception of the Constitution at the very threshold of its life, one of the main articles declaring life and liberty as fundamental rights became still-born." The mischief of this decision was not to be laid at rest till almost at the end of the seventies. It was a slow and step by step process. The Bank Nationalisation case, Shambhunath Sarkar, Hardhan Saha, Khudiram Dass, and finally Maneka Gandhi's case almost totally demolished it.

Equality - Discrimination: During the first decade, the doctrine of equality, the concept of discrimination and the theory of classification were clearly evolved and by and large have stood the test of time. There has been sophistication and developments in the later decades but a number of statutes and orders were struck down with the Sword of equality. Surajmal Mohta (Income-tax Investigation Commission case) is a case in point. Anwarali Sarkar (Special Courts Case) however met with immediate fatality, after Kathi Raning Rawat's case.

In the field of equality and discrimination, however, two not so well known cases appear to be of prime importance. These strong judgments destroyed a pernicious tendency in its infancy. Legislations specially made for individuals in an effort to resolve disputes and depriving them of their rights and right to adopt the normal processes of law were struck down.

In Ameerunissa Begum's case (AIR 1953 SC 91—Per Mukherji J.) the Waliuddowala Succession Act was struck down. It tried to end certain disputes as to succession to the personal estate of a Nawab in Hyderabad. The claims of the Petitioners were dismissed on the basis of an adverse report by the State's Legal Adviser. The aggrieved parties were prevented from agitating their rights in a court of law unlike other citizens. The Court held the legislation as "arbitrary and unreasonable" and, therefore, violative of Article 14.

One sees the seeds of the explosive extension of Article 14, in this phrase which was carried through in Royappa's case in the Seventies. But still more instructive is a striking down of the Bihar Sathi Lands (Restoration) Act in Ram Prasad Sahi's case (AIR 1953 S.C. 215). The Congress Working Committee went into certain complaints and decided that certain villages in the Bettiah Estate were to be restored to the erstwhile disqualified owners.

Thereupon the Act was passed to deprive the owners of these lands. Chief Justice Sastri compared the legislation to English Bills of Attainder and castigated special legislation directed against named persons because a political party had so decided. Justice Mukherji in his judgment described it as the worst form of discrimination. It is noteworthy that one hardly comes across legislation of this

type after this stern warning of "hands-off" by the Supreme Court.

Justice Vivian Bose in his inimitable prose captured the essence and soul of Article 14. He said: "Article 14 sets out an attitude of mind, a way of life rather than a precise rule of law". (The Bidi Supply case). He further observed: "That the Constitution is not for the exclusive benefit of Governments and States ..... It also exists for the common man for the poor and the humble ..... for the 'butcher, the baker and the Candlestick Maker'."

Right to Property: One need not dilate on these cases. Chintaman Rao, Bela Bannerji, Dwarkadas Srinivas and Subodh Gopal are well-known cases. The legislature after each invalidation, particularly in relation to acquisition and compensation, started to plug the loopholes by amendments to the Constitution. Ultimately in 1978-79, during the tenure of the Janata Government, the Forty-Fourth Constitution Amendment was passed, which deleted property rights under Article 31 and Article 19(1)(f) from Part III.

Other Freedoms: The leading decisions in the first decade on reasonableness of restrictions and regulation of the right to carry on trade or business have by and large stood the test of time. Chintaman Rao and V. G. Row are the leading examples.

The first decade of 1950s can be characterised as the era of the conservatives. The approach, restraint and manner of judicial review is reminiscent of the Privy Council. While giving the greatest deference to legislative judgment, the Supreme Court in various areas acted with firmness and resolve in striking down impermissible legislative action. Parliament reacted by passing some constitu-

tional amendments particularly in relation to Land Reforms and property rights. In the area of personal liberty, the condition in the country may be borne in mind. The Kashmir War and the communal disturbances before partition were fresh in the minds of the people. Pandit Nehru throughout the fifties was at the height of his power and regarded with great affection and respect by all sections of the citizenry. This was, therefore, an era where solid foundations of judicial review were laid down without any acrimonious confrontation either with the legislature or the executive.

Let us look at the contemporary political and social calendar. The more one reflects about the performance of the Supreme Court, the more one is convinced that there is a strong co-relationship between the judicial review of legislative and administrative action and political and contemporary events.

On the political field, in October 1962 India faced the Chinese aggression. The ascendancy of the ruling Congress Party was no more and it was losing popularity fast in several northern States. The increasing corruption and arbitrariness in the administration was the order of the day. In September, 1965 came the Pakistani aggression. In 1969 July/August, the Ruling Congress Party itself suffered a convulsion and split.

On the judicial scene, one sees judges with massive intellects and dominating personalities such as Gajendragadkar, Subba Rao, Hidayatullah and J. C. Shah who were men of extraordinary talent and intelligence. The third important factor influencing the Sixties are the landmark decisions in England and America. They have had a profound influence on our Indian decisions. Ridge Vs.

Baldwin gave an explosive dimension to natural justice. Anisminic and Padfield revolutionized the certiorari jurisdiction. Conway Vs. Rimmer put an end to the oppressive doctrine of Crown privilege after almost 25 years. Professor H. W. R. Wade in his Hamlyn Lectures (1980) characterised Ridge Vs. Baldwin as the starting point of what he picturesquely describes as "the Renaissance of Administrative law".

Gideon's Trumpet (Gideon Vs. Wainwright) had been sounded in America securing the right of counsel to the accused. The Warren Court in the U.S.A. was in full cry expanding the horizons of civil liberties. It embarked successfully upon the most active role of the Supreme Court in the history of the United States. Its tidal waves crossed the Atlantic engulfing England and its salutary effects were also felt in India. In England Lord Denning was carrying out a revolution in Administrative law under his charismatic leadership.

Natural justice comes into its own in India with two landmark decisions of Bina Pani De and Kraipak. Personal hearing becomes an essential requirement of all administrative orders which have civil consequences. No longer is the administrator entitled to decide behind the back of the citizen. The distinction between quasi-judicial powers and administrative powers is swept away by Kraipak. This decision carries our administrative law well beyond the English and American decisions. In the Anglo-Afghan case a moral dimension is added to governmental action. The doctrine of equitable or promissory estoppel is revived. The Government is bound to fulfil its promise if the citizen has altered his position to his detriment and the court would enforce such an obligation by necessary directions. In Pratap Singh's case, a powerful Minister who tried to wreck vengeance is exposed and absence of denial on affidavit of allegations of **mala fide** proved fatal. All this is a judicial reaction to arbitrariness, casualness, unfairness and the increasing corruption in the area of administration.

The Court is sharpening its tools to do justice to the citizen in response to the dynamics of social or political conditions. It is going ahead full steam with a no-nonsense approach.

The Court strikes down an ex-proprietory and arbitrary tax law, Travancore-Cochin Land Tax Act, 1957. It holds that it is not only discriminatory but procedurally unreasonable (K. T. Moopil Nayyar). A new dimension is added to the equality clause. Unequals cannot be treated equally and lack of classification can be regarded as fatal. The Court is anxious to undo clear injustice done by the legislature by similar treatment of unequals. These are the ratios of several cases including New Manek Chowk and Raja Reddy.

The Constituent Power: The year 1967 marks a watershed in Indian Constitutional history. The Golaknath Case (the most controversial decision in the history of our Supreme Court) by a majority of 6 to 5 assumes the power to strike down a Constitutional amendment. The ground is that it is "Law" within the meaning of Article 13 and, therefore, cannot abridge or take away fundamental rights. It also adopts the theory of prospective over-ruling and declares that: "Parliament will have no power, from the date of this decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein."

The Judges for the first time rejected the Blackstonian theory of declaring the law and consciously intervened to make the law. This is the first open and unabashed assertion of the law-making role of the judiciary.

A Division Bench of the Uttar Pradesh High Court issued a show cause and granted interim bail to a pamphleteer detained in jail for contempt of the U.P. Vidhan Sabha. The Assembly resolved that not only the pamphleteer but the two judges were in contempt and they be brought in custody before the Assembly. The Judges as

Petitioners under Article 226 approached the High Court for relief including stay. A Bench of 28 judges heard the matter and issued a Rule and granted stay. The High Court made a show of strength. The message was clear. Dare if you will, try and arrest all of us. An unprecedented crisis was created. The President intervened and made a Reference to the Supreme Court.

In a momentous judgment, the Supreme Court upheld the power of Judicial Review. It held that no contempt was committed by the Judges and the High Court had jurisdiction to deal with the Petition of the pamphleteer. It also held that the Assembly had no jurisdiction to direct production of the two Judges and the Advocate in custody or to call for their explanation.

The work of the Supreme Court in the first two decades has earned a rich tribute from an American Professor which truly reflects the public confidence enjoyed by the Court. Kuldip Nayar has given a gist of the Professor's work in his book "The Supersession of Judges". He refers to the analysis made by Dr. Gadbois, an Associate Professor of Political Science, University of Kentucky, who made an empirical study of the decisions of the Supreme Court. The study was completed in 1970. He studied 3,272 decisions reported in the official series and prepared tables. His analysis showed that 40 per cent of the decisions which came up by way of appeals from the High Courts were set aside and over one-half of the appeals from Tribunals were allowed. The Government in some way or the other was a party to two-third of the reported decisions. 40 per cent of such cases were decided against the Government. Professor Gadbois' view was: "This is substantive proof that the Judges do not cower before the Ministers and the Legislators. Few, if any, other Governments in the world fare as poorly in encounters with their citizens before the nation's highest judicial Tribunal."

According to Professor Gadbois in 128 cases out of 487, legislations were struck down as unconstitutional. He paid

the highest tribute to the Supreme Court in these words: "The Justices of the Supreme Court of India occupy a unique place among the public-policy decision making elite of the nation. More than any other segment of this elite they are viewed as exemplars of honesty and integrity in public life." He concluded by saying: "The close observer of India's paramount judiciary will find that the Indian Supreme Court Judges are men of more than ordinary talent where elevation to the Court has done much to enhance the Court's prestige."

The Seventies divide themselves clearly into three broad periods. The first ends with 24th June, 1975, i.e., before the proclamation of Internal Emergency. The second ends with March 1977 with the revocation of the Emergency and a new Janata Government in power at the Centre and the third ends with the end of 1979 and the Election results of 1980 January when the Congress(I) is voted back to power.

The Constituent power: In a historic and unprecedented judgment in Keshavananda Bharati's case, a 13 Judge bench of the Supreme Court struck down a constitutional amendment in part. Golaknath was expressly overruled but the theory of basic structure was propounded to imply a limitation on the amendment power. In other countries constitutional amendments have been struck down but only if there is defect "in manner and form" (i.e. requisite majority or consents have not been obtained)! But never on the ground of inherent or implied limitations of the constituent power. The basic structure theory was adopted by a majority of 7 to 6. This decision has such far-reaching consequences that it is probably the greatest blow in any civilized country by the Judiciary for the preservation of the democratic form of Government. Golakhnath's case was expressly over-

ruled and given a quietus. This view has now been followed in other cases and the Supreme Court has struck down other constitutional amendments on the principle of the basic structure.

In Indira Nehru Gandhi v. Raj Narain, Article 329-A(4) was struck down. In Minerva Mills, Articles 368 in part and 31C (part) were struck down and in Writ Pet. No. 350/1977 and others (The Urban Land Ceiling Case) a certain section of the impugned Act was struck down for the first time piercing the Ninth Schedule.

Personal Liberty: The record of the Supreme Court on preventive detention is outstanding. The court has by a series of decisions given vitality to the procedural safeguards contained in Article 22 and in statutes dealing with Preventive Detentions. It has shown the greatest solicitude for detenus deprived of their liberty without trial. Unreasonable delay in dealing with representations, vagueness of grounds, non-supply of material to enable the making of an effective representation and any type of lethargy in the discharge of duties of the administration have led to the invalidating of detention orders. In the important case of Ram Bahadur, a student leader, Justice Chandrachud held, dealing with the student agitation, that, "The glorious history of our freedom movement exemplifies that agitations may be primarily intended to be and can be peaceful. In this regard Gandhiji's life and work had no parallel."

In Khudiramdas's case, most of the well established principles of nullifying administrative action were brought into the field of subjective satisfaction, a condition for preventive detention. A dangerous power was being gradually "cribbed and confined."

The second period starts with 25th June 1975, the date of the proclamation of Internal Emergency. The Habeas Corpus Case (ADM Jabalpur vs. Shrikant) brought down the reputation of the Supreme Court to its lowest ebb. It was rendered during the Emergency under the leadership of

Chief Justice Ray. In the words of a leading constitutional authority, H. M. Seervai: "Coming at the darkest period in the history of India, it made the darkness complete."

An effort to review the Keshavananda Bharati's case in November 1975 by a Constitution Bench of 13 Judges did not succeed. Chief Justice Ray was unable to carry most of the Judges with him and had to dissolve the Bench after 2 days' hearing without making any speaking Order and in a most unprecedented manner.

In the landmark case of Maneka Gandhi, a conscious attempt was made to widen Article 21 and natural justice was given a very firm foundation. The concept of procedural due process was sought to be injected in Article 21.

In the now-famous Six Hooseinara cases, the rights of undertrials receive an explosive enlargement. Fair and reasonable procedure became the requirement of Article 21. A poor litigant ought to have the benefit of legal services in certain situations as part of his fundamental rights. Here was Gideon's Trumpet (Gideon v. Wainwrights) finding its echo in the portals of our Supreme Court. These series of judgments would mean a revolutionary enlargement of the right to life and liberty and was one of the last blows to the Gopalan Judgment. Similarly, relief was given against hand-cuffing of prisoners.

In a milestone decision in the case of The International Airport Authority (Ramana Reddy vs. IAA) the power of distributing patronage or largesse by the Government through contracts or otherwise was brought under judicial review. Arbitrary dealings or discriminatory dealing with Government's own property was now subject to the test of fairness and lack of arbitrariness.

The meaning of the word 'State' in Part III was considerably enlarged to include State Corporations and instrumentalities.

The doctrine of Promissory Estoppel was given a scholarly and juristic foundation and the executive was held to its promise in the case of Motilal Padampat.

The writ jurisdiction under Article 32 and the Special Leave Jurisdiction under Article 136 were given a dynamic and activist direction. The court declared that it was not bound merely to issue the traditional writs and directions. It would impose a positive scheme and give affirmative redress. In the case of medical admissions (State of Kerala vs. Roshana) the Court framed a scheme with directions to administer it. The adversary system of trial was gradually being given a go-by in public interest litigations. Directions were being given against parties and authorities against whom no relief was claimed and against whom there was no cause of action merely with a view to giving affirmative redress. Thus the Medical Council and the University were directed to appear before the Supreme Court to enable it to work out a scheme. The Court would also give relief to people who had not come before it seeking relief.

This and the Hoosseinara Judgments mark a complete break with the traditional exercise of writ jurisdiction. The Court has now openly stated that it has an activist approach, and it will act as an instrument of social reform and social dynamics.

In the last three years of the Seventies, the Supreme Court has basically changed in its manner and method of functioning. Under the leadership of the present Chief Justice and his senior colleagues, the ethos has changed. There is a great desire to remedy the smallest injustice for the littlest man or woman. The Court has truly become the conscience of the entire judicial system. In their desire to do justice and their intolerance of the smallest injustice, the Courts will interfere and throw their weight in the smallest litigation. This means a great congestion of the docket of the Court and a flood of petitions. The Court is overwhelmed by a tidal wave of people having a sense of injustice because they feel that they will have a sympathetic ear in the highest Court. But this great virtue has also a drawback. Cases cannot be expeditiously heard and the arrears are mounting. Many constitutional matters have

to wait their turn. This is one of the problems we must consider.

The dilemma is to have expedition without curtailing the great beneficient power exercised by the Court.

Some of the problems that will have to be faced in the eighties by our highest judiciary have already started casting their shadows. The Emergency transfers stand unequivocally condemned by all five Judges of the Supreme Court in the historic judgement of Union of India vs. Sankalchand Seth. There is however one clear and happy commitment. The Law Minister has said that he does not want committed Judges except in the sense of their being committed to the Constitution and further that the manner and mode of transfers can be left to the Chief Justice of India.

Assurances, however, are not legal rights and assurances have been known to be broken. One cannot easily forget the then Law Minister's assurance in 1963 on the floor of the House while debating the Constitution Fifteenth Amendment Bill. After adverting to the unbroken convention in the matter he assured the House that there has been no case of a transfer without the consent of a High Court Judge.

It is well to remember what Edward Coke advised Parliament at the time of the discussion on the Bill on the Petition of Rights and at a time when the King was sending soothing messages and assurances. Coke said that: "It was the law of the realm that counted not mere gracious promises from the Throne. The messages of love never came into a Parliament. Let us put up a Petition of Rights. Not that I distrust the King but I cannot take his trust but in a Parliamentary way."

The result was the famous Petition of Rights enacted as a law, the second great Constitutional document in English history after the Magna Carta.

It is thus seen that a court can play a highly activist role in some decisions. The adversary system has disappeared in Public interest cases. Thus judges are consciously utilising their powers in making law which carries them neck-deep in policy matters. Taking their cue from the American appointment and de-segregation decisions, the Court has given positive orders in admissions to educational institutions.

Prof. H. W. R. Wade in his recent Hamlyn lectures has referred to Lord Devlin's comment that: "The British have no more wish to be governed by judges than they have to be judged by administrators." There is much truth in this observation. Sometimes, an overactive thyroid may be more harmful than an underactive one.

These then are the three great questions in the coming decade.

First, how far Judicial Activism? What should be its limits? What are the dangers if the system is overstrained?

Second, Is a Constitutional Amendment necessary insulating the higher judiciary completely from the Executive both in the field of appointments and transfers? Is there any other alternative?

Third, what are the possible lines of reform by which delays in disposal of the Cases in the Supreme Court can be neutralized without the Court's lustre in doing justice to the smallest man being dimmed?

It is said that England's Constitutional history is obliged far more to its wicked than to its righteous monarchs. The greater the assaults on our Judiciary, the stronger will it become, because the expression used for the American Supreme Court that "The Republic endures and this is the symbol of its faith", truly applies to our Supreme Court.

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—**Eugene Black**

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