

Justice S. Natarajan Centenary Commemoration Lecture¹

“Checks and Balances under the Indian Constitution through a Looking Glass”

- **Vanakkam and Namaskar Hon’ble Judges (Sitting and Retired) of Madras High Court;**
- **Hon’ble Sri Justice D. Krishnakumar, Judge, High Court of Madras;**
- **Hon’ble Sri Justice P. Sathasivam, Former Chief Justice of India and Former Governor of State of Kerala;**
- **Hon’ble Sri Justice F.M. Ibrahim Kalifulla and Hon’ble Sri Justice C. Nagappan, Former Judges, Supreme Court of India;**
- **Sri P.S. Raman, Advocate General, Government of Tamil Nadu;**
- **Dr. G. Viswanathan, Founder & Chancellor, VIT University;**
- **Sri N. Ramesh Rajan, Sri S. Mahesh Rajan and Sri N. Suresh Rajan, the illustrious sons of Justice S. Natarajan and their families, Friends and Associates of Justice Natarajan;**
- **Learned Senior Advocates and Members of the Bar;**
- **Distinguished invitees, Dear Students;**
- **Members of the Media;**
- **Ladies and Gentlemen;**

¹ Justice S. Natarajan Centenary Commemoration Lecture by Hon’ble Mrs. Justice B.V. Nagarathna, Judge, Supreme Court of India, on the theme “Checks and Balances under the Indian Constitution through a Looking Glass”, to be delivered on 16.11.2024 at 1730 Hours at at Kalaivanar Arangam, No.1, Wallahjah Road, Anna Salai, Triplicane, Chennai-600005.

Introduction:

I deem it a privilege to deliver the Justice Sivasankar Natarajan Centenary Commemoration Lecture and make my humble contribution to the path of legal thought that Justice Natarajan's memory signifies. At the outset, I must extend my gratitude to Sri Ramesh Rajan and his family for inviting me to deliver this lecture.

Born on 29th October, 1924, Justice Sivasankar Natarajan witnessed and contributed to the development of independent India's constitutional legal system. He was a contemporary of my father who was born on 18th December 1924 and they shared many Benches together including two seven-Judge Benches in ***India Cements Limited, (1990) 1 SCC 12*** and ***Synthetics & Chemicals, AIR 1990 SC 1927***, in which by two dissenting judgments, 8:1, I have upheld those judgments as part of the nine-judge Bench in July and October this year.

Having received his early education in Salem, he joined Loyala College, Madras and then Madras Law College for his education in the law. Charting his journey as a member of the bar before the Madras High Court in August 1947, his versatility and deep grasp of law was in civil, criminal, industrial and labour laws. Appointed as

the Public Prosecutor of Salem in 1959, Justice Natarajan's legal acumen and moral fidelity to the law was rewarded soon and he was appointed as District and Sessions Judge (Grade-II) on 2.9.1965. His judicial service was characterized by a pragmatic and intellectual understanding of law. He was appointed as Additional Judge, Madras High Court on 15.2.1973 and as a permanent judge from 27.2.1974.

Appointed as a Judge of the Supreme Court in the year 1986, Justice Natarajan served until his retirement in October 1989, a time which he admirably used in rendering judgments of significant import for the times to follow. He was a part of Thakkar – Natarajan Commission which inquired into a controversy. His wife Smt. Bhagirathi was a source of strength to Justice Natarajan. He was socially very active after retirement.

The true measure of a judge's character and personality is through his/her judgments providing for development of law. I deem it fit to mention a few judgments of Justice Natarajan that reflect his incisive commitment to the pursuit of development of law and its employ as a tool for social justice.

Justice Natarajan demonstrated his legal acumen and deep wisdom in his judgments and contributions to the salient fourteen

Constitution Benches he was a member of. In ***A.R. Antulay v. R.S. Nayak and Another*, (1988) 2 SCC 602**² he was part of the leading majority opinion authored by Justice Mukharji, which by 5 : 2 set-aside an earlier Constitution Bench judgment.

His commitment to law as a tool for justice and respect for the Constitution shone in his judgment in ***Begum Subanu alias Saira Banu and Another vs. A.M. Abdul Gafoor*, (1987) 2 SCC 285**³. In what was hailed across the country's dailies as a '*trend-setting judgment*',⁴ Justice Natarajan held that the right of a Muslim husband to a polygamous marriage cannot act as a bar on operation of Section 125 of the CrPC 1973.

In a perfect confluence of judicial activism and restraint, Justice Natarajan was aware of the Court's limitations through the centrality of the doctrine of separation of powers. This mindfulness of the delicate but functional balance that needs to be maintained between different organs of the government is most visible in Justice Natarajan's opinion in ***State of J&K v. Mahmood Ahmed*, 1989 Supp (2) SCC 319**. Therein, the High Court had observed that

² (1988) 2 SCC 602

³ (1987) 2 SCC 285

⁴ "More on Muslim Law", The Tribune, 9 April 1987, p.4.

Sections 8 and 14 of the Evacuee (Administration of Property) Act, 1950 had outlived their purpose after thirty-nine years of the Act coming into force and directed officers of the State to not entertain any application made in future by persons laying claim to properties which had been notified as evacuee property. Justice Natarajan, espousing his respect for the constitutional separation of powers, effectively observed that the High Court was incorrect in nullifying a statutory provision by determining its utility, that being, a matter of decision for the legislature.

In my lecture, I will build up on Natarajan, J.'s respect for the functional distribution and the principle of checks and balances in our Constitution.

Checks and Balances:

The fundamental principle of checks and balances under the Constitution rests on the fulcrum that the exercise of power by any one authority namely, the legislature, executive and judiciary must be balanced and checked by the exercise of power by other authorities. Closely related to the principle of checks and balances is the functional principle of separation of powers. Its origins can be

traced to Locke's *Second Treatise on Civil Government* or Montesquieu's *The Spirit of Law*.

The French philosopher Montesquieu emphasized the mutual exclusiveness of the three organs of the Government, namely, the legislature, the executive and the judiciary. The purpose underlined in the Separation Doctrine is to defuse governmental authorities so as to prevent absolutism and guard against tyrannical and arbitrary power of the State for it is said by Lord Acton that power corrupts, and absolute power corrupts absolutely. This is also to protect the freedom of the people. In ***H.H. Kesavananda Bharati vs. State of Kerala, AIR 1973 SC 1463***, it was observed that separation of powers between the legislature, executive and judiciary is part of the basic structure of the Constitution which cannot be destroyed by any form of amendment.

The concept of separation of powers creates a system of “checks and balances” by reason of which the powers so distributed to each of the organs do not predominate or disable the other organs from exercising and discharging the powers and functions entrusted to them.

In practice, the theory of “checks and balances” is accepted with the hope of coordination and cooperation between the three organs of the State to achieve the aim of upholding constitutional values or constitutional Dharma, I may say, and the laws for the protection of people’s individual and collective rights.

P. Sathasivam. J. (as His Lordship then was) authored words of wisdom on the subject in ***Bhim Singh vs. Union of India, (2010) 5 SCC 538, para 78***. He opined that:

"While understanding this concept, two aspects must be borne in mind. One, that separation of powers is an essential feature of the Constitution. Two, that in modern governance, a strict separation is neither possible, nor desirable. Nevertheless, till this principle of accountability is preserved, there is no violation of separation of powers. We arrive at the same conclusion when we assess the position within the constitutional text. The Constitution does not prohibit overlap of functions, but in fact provides for some overlap as a parliamentary democracy. But what it prohibits is such exercise of function of the other branch which results in wresting away of the regime of constitutional accountability.

These instructive words encapsulate the pertinency and position of the doctrine of separation of powers in our Constitution and also expound my reason for choosing the topic for the lecture, 'Checks and Balances under the Indian Constitution through a Looking Glass'.

The basic structure of our Constitution aids as a Looking Glass and takes us to a clearer picture of testing any exercise of powers. In that spirit, over the course of my lecture, I would:

1. Trace the origins of doctrine of separation of powers and its place in the Indian Constitution.
2. Highlight how our constitutional scheme envisions parliamentary supervision of executive action.
3. Describe how judicial review ensures checks and balances on legislative and administrative action without crossing the *Lakshman Rekha*.
4. Finally, I put forth the centrality of judicial independence to rule of law.

The book *Judicial Process in Comparative Perspective* by Mauro Cappelletti⁵ contains the following observations:

“Clearly the notion of democracy cannot be reduced to a simple majoritarian idea. Democracy, as already stated also means participation and it means tolerance and freedom. A judiciary reasonably independent from majoritarian wings can contribute much to democracy and so can a judiciary active, dynamic and creative enough to be able to assure both the preservation of the system of checks and balances vis-à-vis the political branches and adequate control vis-à-vis those other non-governmental or *quasi-governmental* centers of power which are so typical for modern society.⁶

Before discussing the concept, I might refer to a recent order of the Supreme Court for an understanding of the concept **in re: Directions in the matter of demolition of structures in W.P.(C)No. 295 of 2022** and I quote,

⁵ Mauro Cappelletti, *The Judicial Process in Comparative Perspective*.

⁶ Mauro Cappelletti, *The Judicial Process in Comparative Perspective*, 46

*“71.....If a citizen’s house is demolished merely because he is an accused or even for that matter a convict, that too without following the due process as prescribed by law, in our considered view, it will be totally unconstitutional for more than one reason. Firstly, the executive cannot declare a person guilty, as this process is the fundamental aspect of the judicial review. Only on the basis of the accusations, if the executive demolishes the property/properties of such an accused person without following the due process of law, it would strike at the basic principle of rule of law and is not permissible. **The executive cannot become a judge and decide that a person accused is guilty and, therefore, punish him by demolishing his residential/commercial property/properties. Such an act of the executive would be transgressing its limits.***

72. The chilling sight of a bulldozer demolishing a building, when authorities have failed to follow the basic principles of natural justice and have acted without adhering to the principle of due process, reminds one of a

lawless state of affairs, where “might was right”. In our Constitution, which rests on the foundation of ‘the rule of law’, such high-handed and arbitrary actions have no place. Such excesses at the hands of the executive will have to be dealt with the heavy hand of the law. Our constitutional ethos and values would not permit any such abuse of power and such misadventures cannot be tolerated by the Court of law.”

Further, in an era of tribunalisation, the constant refrain is that the executive trenches into areas of adjudication and therefore accused of usurping judicial functions by appointing persons with executive bias. In ***Rojer Mathew vs. South India Bank, (2020) 6 SCC 1***, the Constitution Bench of the Supreme Court issued a Writ of Mandamus to the Ministry of Law & Justice to carry out a judicial impact assessment of all the Tribunals. The Central Government responded with the notification of Tribunal, Appellate Tribunal and other Authorities [Qualification, Experience and other conditions of Service of Members] Rules, 2020. This was again challenged in ***Madras Bar Association v. Union of India, [WP No.804 of 2020, SC dated 27.11.2020]*** on the ground that the rules were violative of

the principles of separation of powers and independence of judiciary. The Supreme Court has directed that the Union shall constitute a National Tribunals Commission, which shall act as an independent body to supervise appointments and functioning of Tribunals, to consider disciplinary proceedings and to take care of administrative and infrastructural needs of Tribunals. This is in order to maintain independence in judicial adjudication.

The doctrine of separation of powers can be interpreted in two dimensions: (i) in a restrictive or "negative" sense, where it imposes boundaries on each branch of government, preventing overreach; and (ii) in a constructive or "positive" sense, where it not only defines limits but also delineates the minimum range of powers within those boundaries, which courts can enforce to achieve constitutional objectives and uphold core values.

The call of modern technocratic, transparent and efficient governance structures beckons a constitutional regime of checks and balances that travels beyond traditional state actors. Rather, the structure of 21st Century Open Governance frameworks makes it prudent to acknowledge that regime of checks and balances also responds to citizen participation.

Prof. Jerome G.Kerwin, a professor of Political Science at University of Chicago, encapsulated in 1945 the inextricable link between structure and governance. He said, “*Forms of government, it is true, do not reform the men who administer them but they do make it easier for good administrators to do the job well and they do very often make it easier for the people to observe the operation of the government.*”

Thus, an efficient rendition of principle of checks and balances allows and emboldens responsible legislators to effectuate their scheme for the nation while still enabling harmonious coordination with other power-holders and also ensuring open governance.

The relationship between the President *vis-à-vis* the Parliament under Article 74 and Governors *vis-à-vis* State Legislatures under Article 163 have been the centre of controversy in a series of cases before the Supreme Court. Reflecting a malleability in law by amendments and judicial declarations, these cases have distilled the degree of primacy of elected legislatures and the control they exercise over executive action.

Although not entirely ceremonial in everyday exercise of executive power, the President and Governors have been relegated to

exercise of little degree of discretion. A.N. Ray, J. speaking for the Supreme Court in ***Shamsher Singh v. v. State of Punjab, 1974 AIR 2192***, explained that wherever the Constitution requires the exercise of any power or function, the satisfaction of the President or the Governor is not their 'personal satisfaction' or anybody else's satisfaction but the satisfaction in the "constitutional sense" particularly when the aid and advice of the Council of Ministers is not contemplated. This conclusion is a necessary exposition of rule of law and representative government in a constitutional democracy.

Such is the friction between political incentives and constitutional methods that in a contrary landscape, checks and balances are necessary even on the law-making power of Presidents and Governors acting on aid and advice of the Council of Ministers. Equivalent to parliamentary legislation, the Constitution authorises the executive to exercise original legislative power. The President may promulgate 'ordinances' under Article 123 provided that at least one House of Parliament must not be in session and that the President must be satisfied that 'circumstances exist which render it necessary for her to take immediate action'. Practically promulgated by the

President on 'satisfaction' of the Ministers, ordinances are products of legislative power, vested in the executive and beyond the ordinary grounds of judicial review. Nevertheless, ordinances must be laid before both Houses once the Parliament reconvenes. Finding a convenient path to law-making sans legislative approval, several Governments have abused the possibility of repromulgating ordinances. In ***DC Wadhwa vs. State of Bihar, (1987) 1 SCC 378***; the Supreme Court frowned on ordinances being kept "alive" for periods ranging from three to fourteen years merely by repromulgation and converted an 'exception' into a norm called ordinance raj. This usurpation of legislative power was held contrary to India's 'constitutional scheme'. More recently, in ***Krishna Kumar Singh v. State of Bihar, (2017) 3 SCC 1***, a seven-Judge Bench of the Supreme Court affirmed the view taken in ***DC Wadhwa*** and held that repromulgation of ordinances is a fraud on the Constitution and a subversion of democratic legislative processes.

On that note, I will now turn to judicial review of parliamentary and executive action.

Judicial Review of Parliamentary and Executive Action:

On September 17, 1787, George Washington, the then President of the Constitutional Convention put in two sentences as the essence of the judicial task. He said, “*Individuals entering into society must give up a share of liberty to preserve the rest...It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved.*” Drawing that line is, in my view, the core task of the Judicial branch.

Of all the unanticipated political developments since 1787, none has been more consequential than the acceptance of judicial review by the Supreme Court of the United States in ***Marbury v. Madison***, **2 L Ed. 60**.

At this point the words of James Madison from 1788 on separation of powers in Federalist Papers, No. 47 merit interest. He said,

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

Since then, this principle has been exported all over the world, including into India where the Constitution, since its inception, in Articles 13, 32, and 226 recognized the principle of judicial review. The principle has since been hallowed and cemented by reiteration by our constitutional courts.

The critique that judicial review is illegitimately grafted onto popular government is wholly misplaced and, in fact, improper. *For one*, this idea suggests that democracy is meant only to reflect one popular opinion. With all humility, I think it is reductive. The process of democracy in my view is meant also to refine and elevate public opinion from all angles and viewpoints. There cannot be only one public opinion applicable to all. Ultimately, democracy is also about arriving at a consensus by taking the best from a variety of ideas and opinions that emerge at a particular point of time. Therefore, in a true democracy, there cannot be scuttling of divergent opinion or thought nor a curb on ideas which may appear contrarian.

Secondly and more importantly, democracy is dedicated to preconditions: liberty and equality. Without the judicial protection of individual rights against their encroachment, the preconditions of liberty and equality would fall. To be sure, my submission is not that

majorities will necessarily fail those conditions but the truth is that they often do. And while majorities have a right to work their mistaken wills anyway, that right is not untrammelled: it is the Judiciary, therefore, which determines the limits of that right. In fact, the legitimacy of the courts comes precisely from the fact that courts act without reference to popular sentiment and by doing so, they address injustices which majoritarian institutions are fundamentally incapable of addressing.

In a succinct sentence in ***Marbury v. Madison***, Marshall, C.J. of the Supreme Court of the United States espoused the role of judicial review. He said,

“It is emphatically the province and duty of the judicial department to say what the law is.”

Under our transformative Constitution, the power of judicial review has time and again been invoked to prevent and remedy injustice.⁷ Such an injustice could be a result of State neglect or be

⁷ These norms informed the political and legal practice and ensured stability in India's diverse and complex political milieu. As this audience knows well, constitutional practice and actual functioning are the crucible upon which the workability and endurance of a constitution get tested. The constitutional practice is bound to continuously evolve with the changing times and challenges that confront a democratic society. Our dynamic constitutional practice is perceptible from legislative and executive responses to social realities and the judiciary's contributions towards holding such responses accountable to constitutional norms. Thanks to this robust and dynamic constitutional practice, the basic structure of the transformative Constitution has

a social malaise.⁸ To borrow the felicitous expression from Vivian Bose, J.,⁹ it had been a zealous endeavour of the Indian judiciary that the Constitution should work for the butcher, the baker and the candlestick maker. The judges of the highest adjudicatory body in the world's largest democracy consider it their duty to redeem their constitutional oath and do justice no less to the pavement-dweller than to the guest of the five-star hotel.” - *O. Chinnappa Reddy, J. in **Randhir Singh vs. Union of India, (1982) 1 SCC 618.***

Therefore, it will not be excessive or out of place to say that the Judiciary is at the epicenter of constitutional government. Our constitutional endeavor has been to ensure that judicial review acts as a measured but effective check on exercise of power by Parliament and the executive.

Beyond the challenge to *vires* of any Act of Parliament or a State Legislature as being violative of Part III of the Constitution, the judiciary is the bulwark against abuse of power by the Executive. Therefore, statutory provisions limiting the jurisdiction of courts and

endured. See Karl N. Llewellyn, The Constitution as an Institution, 34 COLUM. L. REV. 1, 21–29 (1934)

⁸ Sudhir Krishnaswamy, Basic Structure Doctrine and Democracy

⁹ Bidi Supply Co vs The Union of India, 1956 AIR 479

provisions seeking to exclude the jurisdiction of courts are strictly construed or struck down. In ***Kihoto Hollohan v Zachillhu, 1992 SCR (1) 686***, where a challenge was raised to Paragraph 6(1) of the Tenth Schedule to the Constitution, which seeks to impart finality to the decision of the Speaker/Chairperson as to whether a member of a House has become subject to disqualification because of defection, the Supreme Court held that such finality could not detract from or abrogate judicial review of the decision under Articles 136, 226, and 227 of the Constitution insofar as infirmities based on violations of constitutional mandates, mala fides, non-compliance with rules of natural justice and perversity, are concerned.

More concerned with day-to-day governance, judicial control of delegated legislation deals with the concept of excessive delegation, substantive and procedural *ultra vires* and such other grounds of review.

Additionally, judicial control is exercised over administrative discretion by way of judicial review when administrative duties are not undertaken in accordance with the recognized principles of administrative law. Some of the principles or the basis on which exercise of administrative discretion could be checked are,

promissory estoppel, legitimate expectation, proportionality, restitution and such other principles which are applied to strike down erroneous exercises of administrative discretion are of great importance in administrative law.

Furthermore, the checks exercised by the judiciary are not restricted to examining the compatibility of the content of laws with Part III rights but also extends to judicial overview of actions within the legislative bodies and the manner in which such actions are conducted. In ***Anil Kumar Jha vs. Union of India, (2005) 3 SCC 150***, the Supreme Court issued directives on the manner in which trust vote in the Jharkhand Assembly should be conducted.

To illustrate, judicial decisions have worked as checks and balances on prospective and sitting members of legislatures. In ***Union of India vs. Association for Democratic Reforms, (2002) 5 SCC 294***, the Supreme Court held that derivable from Article 19(1)(a) for voters is a right to know who they were electing. Therefore, the Court directed disclosure to every voter of detailed information relating to a candidate. This carving of Article 19(1)(a) has contributed to new rights in Article 19(1)(a). In fact, the theoretical basis has been acknowledged since long. In ***State of Uttar Pradesh***

v Raj Narain, (1975) 4 SCC 428, the respondent sought access to documents in an election petition. Rejecting the State's claim of privilege from disclosure, the Supreme Court traced the right to know from the freedom of speech as it built on the ideal of transparency of governance. This approach, I find, acts as a dual-use check and balancing mechanism: *firstly*, it acts a check on decisions of public functionaries who must factor that publicly relevant information need to be disclosed, except for certain exceptions. *Secondly*, it enables citizens to participate in political processes and empowers them to exercise checks and balances in the form of accountability from those who wish to govern. Therefore, a loop of demanding propriety and morality from legislators is set in motion between citizens and Parliament.

The 'Citizen-Parliament loop' must be discussed in the context of ***Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299***, wherein the Parliament used its amending power to amplify a moral and legal wrong, and furthermore to validate an invalidated election by withdrawing the jurisdiction of the judiciary.

The Court finally held that such an amendment declaring a judgment void without removing the basis for judicial decision

making and without any judicial application to the facts of the case, would, 'toll the death knell of the democratic structure of the Constitution'. H.R. Khanna, J. opined that if the Thirty-Ninth amendment was allowed to stand, the mechanism for determining the real representative of the people in an election as contemplated by the Constitution' would be destroyed and a judgment *inter se* parties pending appeal would be declared void without any judicial application of mind. Thereby, the separation of powers doctrine would have been truly discarded.

This brings me to the next theme of my address: legislative overruling of judicial pronouncements.

The legislative power to amend the enacted law with retrospective effect, is not only subject to legislative competence but is also subject to several judicially recognized limitations. Where the legislation is introduced to overcome a judicial decision, the power to amend cannot be used to directly subvert the decision without removing the basis of the decision. This is settled law per ***Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality, (1969) 2 SCC 283***. A court's decision must always bind unless the

conditions on which it is based are so fundamentally altered by the amendment that the decision could not have been given in the altered circumstances. Therefore, to reiterate, the validity of a validating law, depends not only upon whether the Legislature possessed the competence over the subject-matter but also whether in making the validation it has removed the defect which the court had found in the previous law.

By ensuring that the legislature cannot simpliciter overrule judicial decisions, the principle of separation of powers is maintained. It allows the legislative branch to retain its power to amend its laws; yet at the same time, it retains the judiciary's interpretive authority as the final and sole arbiter on questions of law. In this way, an equilibrium is struck between the powers of the two branches.

In ***NHPC Ltd. vs. State of Himachal Pradesh & Others, 2023 SCC OnLine SC 1137 35***, I elaborated the interlink between judicial review, separation of powers and its inextricable relationship with rule of law. The crystallized principle is that:

“35. ...a legislature cannot directly set aside a judicial decision.

However, where a legislature merely seeks to validate the acts carried out under a previous legislation which has been struck down or rendered inoperative by a Court, by a subsequent legislation without curing the defects in such legislation, the subsequent legislation would also be *ultra-vires*. Such instances would amount to an attempt to ‘legislatively overrule’ a Court's judgment by a legislative fiat, and would therefore be illegal and a colourable legislation.

The power of judicial review is a part of the basic feature of our Constitution which is premised on the rule of law. Unless a judgment has been set aside by a competent court in an appropriate proceeding, finality and binding nature of a judgment are essential facets of the rule of law informing the power of judicial review. Simply setting at naught a decision of a court without removing the defects pointed out in the said decision, would sound the death

knell for the rule of law. The rule of law would cease to have any meaning if the legislature is at liberty to defy a judgment of a court by simply passing a validating legislation, without removing the defects forming the substratum of the judgment by use of a *non-obstante* clause as a technique to do so.”

Equally crucial to rule of law is the procedure of the Parliament as is the content of laws. Recently, in ***Sita Soren v. State of Jharkhand, (2024) 5 SCC 629***, the Supreme Court addressed whether MPs and MLAs have constitutional immunity under Article 194(2) (for State Legislatures) and Article 105(2) (for Parliament) in cases involving allegations of bribery.

Overruling the judgment in ***P.V. Narasimha Rao v. State (1998) 4 SCC 626***, the Supreme Court undertook a thorough examination of Articles 105(2) and 194(2), which provide immunity to members of Parliament and State Legislatures for "anything said or any vote given" in the legislature. Bribery, the Court held, is inherently unlawful and does not qualify as an act essential to legislative duties. The judgment marks a significant precedent,

emphasizing that lawmakers are subject to anti-corruption laws and that legislative privilege cannot shield criminal or corrupt behaviour.

Recently, while interpreting Article 200, the Supreme Court speaking through Chandrachud, C.J. in ***State of Punjab v. Principal Secretary to the Governor of Punjab, 2023 INSC 1017***, reiterated and explained that the Governor is a symbolic head and cannot withhold action on bills indefinitely. In an exposition of checks and balances between different constitutional postholders, the Court explained that reconvening a sitting of the Legislative Assembly which had not been prorogued is an exclusive prerogative of the Speaker and not of the Governor. This instance surfaces the presence and strength of checks and balances. While in a different context, the wisdom of the judgment in ***S.R. Bommai*** has emboldened constitutional checks and balances and has empowered the judiciary to not shy away from questions having ‘political complexion’.

Instructive in this regard is the following paragraph from ***State of Punjab***:

“Political differences in a democratic polity have to be worked upon and sorted out with a sense of sobriety and

maturity. The dialogue between constitutional functionaries cannot degenerate into a race to the bottom.”

So long as there is deviation from the goal of constitutional methods and constitutional statesmanship being not the norm till then, I think the Constitutional Court will continue to be burdened with such cases and exercise its power of judicial review. Nevertheless, it is clear that a centripetal force of Indian separation of powers involves an activist role for the Supreme Court and the High Courts to ensure that institutions act within their spheres.

It is pertinent to acknowledge that when courts exercise judicial review they are not legislating or employing political power. They are applying the elementary principle of law that the acts of an agent in excess of his authority do not bind his principal: the agent being the state, the principal being the people, and the authority as defined and detailed in the Constitution. Judges in such instances have no choice but to enforce the Constitution as the law of highest obligation. Necessary to true enforcement is the judicial independence, which I will dilate on now.

Judicial Independence: a check to balance judicial powers:

The inception point of any understanding of independence of the judicial organ is the doctrine of separation of powers and the consequent independence of the judiciary from the executive and the legislature. Expansively, independence of judiciary is not limited to independence of an autonomous institution but also requires the absence of any extraneous influence in exercise of judicial duty *viz.* independence of the individual member of the judiciary.

Where independence exists, courts are able to be more forceful mechanisms for defence of constitutionalism and justice. Article 50 of the Constitution urges for separation of judiciary from the executive in the public services of the State.

In my view, only an independent and impartial judiciary can effectively exercise its power of judicial review. Judicial decisions, rendered by exercising the power of judicial review are the most significant *situs* for judicial independence to be secured.

The focus of institutional independence is on ensuring an appointments process which upholds independence of the judiciary and administrative independence of the Courts. Montesquieu's conception recognized the importance of institutional separation as

a prerequisite of judicial independence. Ultimately, the independence of the judiciary depends on the totality of a favourable environment created and backed by all state organs.

Political insularity is critical to the independence of the judiciary. In formulating a general definition of judicial independence, most scholars have placed a great deal of emphasis on impartiality and insularity.

The first is impartiality or the idea that judges will base their decisions on the law and facts and not any predilection toward any of the litigants. Impartiality can be thought of as related to judges' attitudes and beliefs as well as their behaviour *vis-à-vis* particular political and social actors.

On the other hand, insularity relates to the notion that Courts must not become grounds for realization of political aims. Insularity is believed to result, *inter alia*, from granting security of tenure to judges and providing significant checks and balances in their appointment.

While the other two traits of independence concentrate on the status of individual judges, the third component places emphasis on the position of the courts within the larger political system and their

functional relationship with other branches of the government. It makes the existence of significant levels of judicial independence contingent on the degree to which the judicial institution has a distinct and discrete role. Such a role must be detached from the interests of the political system or the concerns of powerful social groups. The role must solely be to regulate the legality of state acts, ensure justice and determine the general constitutional and legal values.

Judicial independence is the degree to which a judge decides cases consistent with his/her own interpretation of the law, sometimes, in opposition to what others think or desire in like matters. In other words, it is the degree to which judges actually decide cases in accordance with their own determination of facts, evidence and the law, free from coercion, blandishments or interference from other organs of government, or other citizens.

The concept of judicial independence is believed to be closely intertwined with the doctrine of separation of powers. Independence of the judiciary, is more closely related to the supremacy of the law.

Judicial independence and supremacy of the law work together to guarantee that the rule of law will not be eroded by the political

pressures in existence at any particular point in time. Insulating judges from political influence advances the same objective. Both these concepts are therefore important underpinnings to the rule of law which we cannot afford to take for granted.

The next question that needs to be addressed is as to the relationship between judicial accountability and independence. Are these mutually incompatible values, destined always to be in a state of tension? Alternatively, should accountability be viewed as a correlative obligation of independence, the one being the necessary complement of the other? In my view, these two values are to be perceived as complementary rather than antithetical. Judicial independence is merely the other side of the coin from judicial accountability. The two are not at war with each other but rather are complements. Neither is an end in itself but rather means to an end, or a variety of ends surrounding the constitutional ideals.

But judicial independence was not designed as, and should not be allowed to become, a shield for judicial misbehaviour or incompetence. Judicial accountability must seek to moderate decisional independence and other judicial behaviour that is

inconsistent with the ability of courts to achieve the role envisioned for them.

This idea has been conveyed in the most evocative manner by Justice Frankfurter of the US Supreme Court in ***Baker vs. Carr, 369 US 186 (1962)*** wherein it was observed and I quote: *“The Court’s authority- possessed of neither the purse nor the sword-ultimately rests on sustained public confidence in its moral sanction.”*

In the ultimate analysis, judicial accountability is owed to the Law itself. Accountability to the law, the idea that it is the duty of the judges to remain faithful to the law.

The rule of law, defended by an independent judiciary, plays a crucial function by ensuring that civil and political rights and civil liberties are safe and that the equality and dignity of all citizens are not at risk. It also helps protect the effective performance of the various agencies of electoral, societal and horizontal accountability from potential obstructions and intimidation by powerful State actors.

Ultimately, the extent of independence of the judiciary relates back to independence, impartiality and integrity of the men and women holding judicial office. It is therefore, all important that meritorious judges are appointed, who have the pulse of the Indian

society and the Country in their hearts and the rule of law in their mind, while seeking to render justice. It is the personality of the judges that will determine in the truest sense, the extent of judicial independence and autonomy.

In my view, independent exercise of judicial power is not only a judge's prerogative but also a judge's duty. It is therefore important that judges decide true to their own appreciation of the law and their conscience, unfettered by the views of another. It is ultimately conviction, courage and independence of Judges which decide matters before a court of law. From the aspect of judicial independence within the court system, separate opinions or dissenting opinions must be seen as an expression of mutual independence of the judges, i.e., independence of a judge from other judges. This is independence of the judiciary in its most enlightened form.

On that note, I conclude my lecture with the firm hope that all gathered here will reaffirm our commitment to securing independence of the judiciary, remain alive to the insidious challenges to it, and be vigilant in safeguarding and strengthening the judiciary.

I thank you all for your kind attention.

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