

'treaty shopping', perhaps, it may have been intended at the time when Indo-Mauritius DTAC was entered into. Whether it should continue, and, if so, for how long, is a matter which is best left to the discretion of the executive as it is dependent upon several economic and political considerations. This Court cannot judge the legality of treaty shopping merely because one section of thought considers it improper. A holistic view has to be taken to adjudge what is perhaps regarded in contemporary thinking as a necessary evil in a developing economy.⁸⁹

In the author's view, those observations are apposite, not only to treaty shopping, but also to other phenomena that are endemic to the current international tax regime, including the widespread use of tax haven holding companies to avoid both residence and source taxation. The same observations could also be expressed by developed countries, many of which struggle to deal with tax avoidance in respect of both inbound and outbound investment. Any State that respects prevailing international tax principles or norms, including residence-based taxation, source-based taxation and separate entity accounting, faces difficulties in ensuring that the incomes of MNEs are subject to what that State views as an appropriate domestic tax burden. Nonetheless, a State does not want its tax system to repudiate these principles for fear that it would damage the State's investment climate.

It is perhaps unsurprising that tax administrations may take matters into their own hands, zealously pursuing what they see as the State's fair share of tax on international income. It is unfortunate that specific taxpayers, who have arranged their international affairs in a manner that appears to be legally permissible under prevailing tax rules, are driven to defend those rules in Court at their own expense. The Vodafone Essar dispute is one example of this pattern. In the dispute the ITD may make a variety of arguments under section 9 of the Act and Articles 7 and 13 of the India-Mauritius DTC, all in an effort to achieve some degree of taxation in respect of capital gains that largely derive – ultimately and economically – from a profitable business in India. Yet any such argument must be based on the proposition that separate corporate personality should be disregarded, separate corporate residence should be ignored, and separate entity accounting should be replaced. The ITD thus seeks to dispense with prevailing norms of international taxation and to impose a form of worldwide unitary taxation for MNEs operating in India. It is asking the Courts to do something which they are not empowered to do; make tax policy changes for the betterment of the country.

⁸⁹ Azadi Bachao Andolan v. Union of India, [2003] 263 I. T. R. 706, [S. C.] at ¶ 137.

GUEST ARTICLE

CONSTITUTIONAL CHALLENGES IN THE 21ST CENTURY

Justice S.B. Sinha*

In this illuminating piece, learned Supreme Court Judge, Justice S.B. Sinha examines the diversity of constitutional challenges facing the Supreme Court in the post-liberalization era. While acknowledging the importance of adhering to the constitutional design of separation of powers, Justice Sinha justifies and elucidates the need for a pro-active judiciary to ensure good governance. He provides an analytical elaboration on the legal dimensions of globalization by critically looking at the judicial approach towards "emerging actors" like multinational corporations. He further illustrates on the impact and influence of globalization on crucial essential public services and the apex court's response to the same. Thus, Justice Sinha argues for a more rights-based approach towards interpreting the Constitution in order to fully realize the social, democratic and human values enshrined therein.

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I. INTRODUCTION

According to Glanville Austin, it is that institution which is entrusted with interpreting a constitution that has the constitution in its custody.¹ In India, this institution would be the judiciary, and specifically, the Supreme Court, its apex body.

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¹ GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE (2000).

As the Supreme Court enters its 58th year, one can look back with pride at the success of the world's most powerful court² in sustaining a regime of Constitutional order and regularity. Known traditionally as the "least dangerous bench",³ it has been a steady and consistent upholder of the fundamental rights of its citizens. This has been possible only because of the purposive methodology of interpretation that it has adopted with respect to the provisions of the Constitution.⁴

In this paper, an attempt has been made to look at the need for and the effectiveness of judicial interference, through the means of Constitutional interpretation, in achieving good governance in our country, particularly in light of the radical changes sweeping the landscape after the liberalization.⁵ While this paper does not dwell on the pros and cons of globalization *per se*, a basic understanding of the concept is vital. It is often said that globalization is a matter of 3Ds – denationalization, disinvestment and deregulation.⁶ Traditionally, the

² Indeed, as far back as 1980, Rajeev Dhavan called the Indian Supreme Court "the most powerful court in the world," and another commentator claims that India possesses "the world's most active judiciary". CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 72 (1998) (citing RAJEEV DHAVAN, *JUSTICE ON TRIAL: THE SUPREME COURT TODAY* (1980) and Carl Baar, *Social Action Litigation in India: The Operation and Limits of the World's Most Active Judiciary*, in *COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY* 77 (Donald Jackson & C. Neal Tate eds., Greenwood Press, 1992).

³ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (Yale University Press, 1986). ("[J]udicial review is a counter-majoritarian force in our system... [W]hen the Supreme Court declares unconstitutional a legislative act... it thwarts the will of the representatives of the actual people of the here and now").

⁴ The Constitution of India is a living, breathing document. It must be interpreted accordingly. In construing an ongoing Act, the interpreter is to presume that the Parliament intended the Act to be applied at any future time in such a way so as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred, since the Act's passing, in law, social conditions, technology, the meaning of words, and other matters. In its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law. *See*, FRANCIS BENNION, *STATUTORY INTERPRETATION* 762 (4th ed., Lexis Nexis, 2002) cited with approval in *Zee Telefilms Ltd v. Union*, (2005) 4 S. C. C. 649 [S. C.] at ¶ 60. Keeping this in mind, the Supreme Court has, over the last few years through its decisions, raised several interesting propositions of law vis-à-vis the living Constitution to effectuate fundamental rights in a modern democratic State.

⁵ In 1991, when the current Prime Minister, Dr. Manmohan Singh, opened up the Indian economy, it was borne out of necessity. We had less than 2 weeks' reserves of foreign exchange. Had liberalization not been undertaken at that stage, India, in all probability, would have been declared a bankrupt country. Post-liberalization, while our economy has taken great strides (at the recently concluded World Economic Forum at Davos, India, along with China and Russia, was frequently referred to as an emerging superpower), the resultant wave of globalization has brought forth its own unique set of challenges. When one studies these issues, it must be kept in mind that the challenges in the post-liberalization era are inter-linked yet separate, each presenting their own problems and solutions.

⁶ Upendra Baxi is the famous creator of this concept.

term globalization was used with respect to the economic and financial aspects of international integration. However, it is no longer possible to discuss this phenomenon in such a narrow sense. As has been witnessed by all and sundry, globalization has far transcended the economy; it now has political, social, cultural and even judicial dimensions.⁷

Keeping this background in mind, this paper attempts to draw attention to the broad issue of whether the judiciary can utilize the instrument of the law to ameliorate the changing conditions. Can law be utilized as an instrument of change? Can the courts, *via* the normative powers of the Constitution, meet the demands of globalization and secure the vision of justice underlying the preamble of the Constitution? Perhaps these are questions for which there are no ready-made answers. However, the present situation requires us to at least make an attempt to answer them.

II. GOOD GOVERNANCE

Before analyzing the concept of "good governance", understanding the term "governance" is important. The concept of governance is not new. It is as old as human civilization itself. Simply put, governance means the process of decision-making, and the process by which decisions are implemented (or not implemented). Governance can be used in several contexts, such as corporate governance, international governance, national governance and local governance. An analysis of governance focuses on the formal and informal actors involved in decision-making and implementation, and the formal and informal structures that have been put in place to arrive at and implement decisions.

The government is one of the actors in governance. Other actors involved in governance vary, depending on the level of government. In rural areas, for example, other actors may include influential land lords, associations of peasant farmers, cooperatives, NGOs, research institutes, religious leaders, financial institutions, political parties, the military, etc. The situation in urban areas is much more complex. At the national level, in addition to the above actors, the media, lobbyists, international donors, multi-national corporations, etc. may also play a role in decision-making or in influencing the decision-making process.

All actors other than the government and the military are grouped together as part of the "civil society". In some countries, in addition to the civil society,

⁷ In essence, the New Economic Policy (NEP) adopted in 1992 represents a *program shift* from the ideas of State organization that the founding fathers envisioned. The inevitable changes that globalization brings about have its attendant problems, its attendant vagaries, and its attendant inequalities; only time will tell whether we have succeeded or failed.

organized crime syndicates also influence decision-making, particularly in urban areas and at the national level.

Similarly, formal government structures are one means by which decisions are arrived at and implemented. At the national level, informal decision-making structures, such as “kitchen cabinets” or informal advisors may exist. In urban areas, organized crime syndicates such as the “land mafia” may influence decision-making. In some rural areas, locally powerful families may make or influence decision-making. Such informal decision-making is often the result of corrupt practices or leads to corrupt practices.

Further, “governance” includes not only governing activities, but also development, maintenance of the centre-state relationship, stability, etc. Governability, as mentioned earlier, is the capacity of the rulers to do three things: maintain coalitional support, initiate solutions to problems perceived to be important and resolve political conflicts without force or violence. A democratic developing country is well-governed if its government can simultaneously sustain legitimacy, promote socio-economic development, and maintain order without coercion.

“Good governance” defines an ideal which is difficult to achieve in its totality. However, to ensure sustainable human development, actions must be taken to work towards this ideal.⁸ Good governance can be understood as a set of eight major characteristics:

- participation,
- rule of law,
- transparency,
- responsiveness,
- consensus orientation,
- equity and inclusiveness,
- effectiveness and efficiency, and
- accountability.⁹

These characteristics assure that:

- corruption is minimized,
- the views of minorities are taken into account, and
- the voices of the most vulnerable in society are heard in the decision-making process.¹⁰

⁸ Available at <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp>.

⁹ *Id.*

¹⁰ *Supra* note 8.

Sadly, today, if one is to look at that state of society, it can easily be inferred that the values of good governance are being eroded.

We may now note that, for the first time, although jobs grow faster than the population, a newspaper report stated that job growth for 77% of the population was still poor and they were still vulnerable, surviving on Rs. 20.30 or less per day.¹¹ The report blames this dismal situation on the lack of appropriate legislation, and on shoddy implementation of those laws that do exist.

Her Excellency, the President, in her recent Republic Day address stressed on the need for making economic growth inclusive by ensuring that the benefits of the social programme reach its beneficiaries. She also expressed concerns about the implementation of the government’s flagship programme, the National Rural Employment Guarantee Programme. “A question that we need to ask ourselves is how effective our delivery mechanisms are and what the weaknesses are. We have to find appropriate remedial answers”, said the President.

So, the sum total of all this is that we can say that “good governance” must therefore encompass all spheres of governmental action/inaction that have a public element in it. This means that it must apply at *all* levels – that is, *political governance*, which relates to the malfunctioning and non-functioning of the Government¹² and *corporate governance*,¹³ which involves the strict enforcement of regulations, and the promotion of corporate social responsibility.

III. NEED FOR JUDICIAL GOVERNANCE

The growing incapacity of Indian governments at the centre has led to a sort of crisis in governability. The failure of governance has become the subject-matter of much discussion in recent times. In fact, only recently, the Finance Minister, Mr. Chidambaram, has said that the government is “unable” to carry out its implementation of benevolent projects. He says that the government is not capable of performing its ‘erstwhile’ duties, and proposes that the government should enter into “Public-Private Partnerships”.¹⁴ He is, in essence, admitting to the failure of the State in providing effective governance.

¹¹ 77% Indians Poor, Vulnerable, THE TIMES OF INDIA, Aug. 11, 2007.

¹² This can be said to be in terms of culpable misfeasance and culpable nonfeasance on behalf of the State.

¹³ This need arises from the unparalleled increase in recent years in the number of influential transnational corporations.

¹⁴ See Chidambaram Hopeful of Progress in Financial Reforms, THE HINDU BUSINESSLINE, Dec. 3, 2007.

As a result of this, the conservative approach to governance (i.e. the traditional separation of powers approach) has become outdated. While the reasons for the government's incapacity will be discussed in greater detail in the subsequent section, a brief mention may be made of some of them. *First*, the rise of a new actor, whose actions have widespread public impact, has changed the nature of the problem itself. This new actor is the "transnational corporation", whose net worth is often more than the GDP of a small country. *Secondly*, the rise of judicial activism over the course of the last three decades has resulted in the increased recognition and enforcement of *rights*. Voices that were previously unheard are now coming to the fore, albeit slowly. *Thirdly*, there is almost no aspect of governance that remains outside the scope of judicial review. Thus, we have a vast array of governmental action, and more importantly, inaction before the judiciary and this is a subject of "Constitutional concern". Therefore, *judicial* governance must be embraced. This does not imply that the judiciary ought to govern the country. All that is meant by judicial governance is the development of internal mechanisms and institutions of control to keep a check on the activities of the above mentioned two actors. *The power of judicial review is born out of need and nothing else*. The judiciary has no vested interests and it has no hidden agenda.

IV. THE NEW ACTORS

Judicial governance raises several new questions.

- i) How are we to understand this failure of governance?
- ii) Does failure of governance automatically invoke the power of judicial review?
- iii) If it does, then must we devise new means, methods and justifications to control the actions of private actors?

If we accept that the power of judicial review is necessary, then whom are we protecting, and from what? The contours of the State should be discussed keeping in mind the fact that we are entering into a new age where human rights are given utmost importance. This new age of human rights generates an immense amount of discourse at its own level, and consequently, is in danger from a number of actors. A few of them are discussed below.¹⁵

¹⁵ An attempt will be made to answer these questions under the following categories/issues.

A. The State

The challenge that affronts us is the creation of an impartial and independent judiciary. The doctrine of separation of powers must be held in good stead. A manifestation of the problems that result from the collapse of the different organs of government into one arises with respect to tribunals. An institutional system of fair adjudication of rights is what is needed. Hence, judicial review is essential in such cases. In *Hatton v. United Kingdom*,¹⁶ it was noticed that Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms envisages the constitution of forums where complaints of violations of human rights can be adjudicated and, thus, be made subject to judicial review.

1. Terrorism

Terrorism has posited new threats to the rights of the individual.¹⁷ Even though we have no fixed definition of what constitutes terrorism, protection is a must. Protection against terrorism is inextricably linked with the level of protection accorded to human rights in general.

As the Supreme Court has observed, "[t]errorism often thrives where human rights are violated," and "[t]he lack of hope for justice provides breeding grounds for terrorism".¹⁸

In *Madan Singh v. State of Bihar*,¹⁹ while attempting to define terrorism, the Supreme Court observed that due to a lack of consensus on the definition of terrorism, all international efforts to curb the same had proved fragile. It therefore opined:

Finding a definition of "terrorism" has haunted countries for decades... The UN member States still have no agreed-upon definition, apparently on account of what at times reveal to be State sponsored terrorism, both at national and international levels. The lack of an agreement on a definition of terrorism has been a major obstacle to meaningful international countermeasures.

Another approach to the issue is the protection of the rights of the terrorists.²⁰ The court tries to strike a balance between innocent hostages detained

¹⁶ 15 B. H. R. C. 259 [European Court of Human Rights].

¹⁷ The emphasis on human dignity is laid down in the U. N. Charter, the UDHR and several international covenants, as well as in the Constitution of India, which mentions the dignity of the individual as a core value in its preamble.

¹⁸ People's Union for Civil Liberties v. Union, A. I. R. 2004 S. C. 456 [S. C.].

¹⁹ (2004) 4 S. C. C. 622 [S. C.].

²⁰ Jammu and Kashmir v. Jammu and Kashmir High Court Bar Association, (1994) Supp. 3 S. C. C. 708 [S. C.].

by militants in a shrine, the need to supply them with food, water, medical and sanitation facilities on the one hand, and to flush out militants on the other. The Supreme Court has laid down guidelines saying that food, water, lights and sanitation be provided to the terrorists and innocent hostages.

As was pointed out in *People's Union for Civil Liberties v. Union of India*,²¹ "[T]he court is to maintain a delicate balance between such State action and human rights. The fight against terrorism is respectful to human rights. The Constitution has laid down clear limitations on State action within the context of the fight against terrorism."

We all understand, and know of, the devastating effect that terrorism can have upon the development of our nation. At the same time, we also need to sensitize ourselves towards recognizing the basic human rights that terrorists possess, including the freedom from torture or cruel, inhuman or degrading treatment, freedom of religion, freedom of speech and expression, and the right to a fair criminal trial. Even at the purely strategic level, therefore, any effective effort to combat the extraordinarily complex problem of terrorism requires attention to a complex range of factors, not the least of which includes vigilant protection of human rights. The challenge to terrorism must be met with an innovative and ideal approach.

2. The Transnational Corporation

Mega-Corporations pose challenges in the following ways:

a) Health

In the recent decision of the Madras High Court in *Novartis AG represented by its Power of Attorney Ranjna Mehta Dutt v. Union of India (UOI) through the Secretary, Department of Industry, Ministry of Industry and Commerce and Ors.*,²² section 3(d) of the Patents (Amendment) Act, 2005 was challenged on two grounds, namely, (a) it is not compatible with the agreement on Trade Related aspects of Intellectual Property Rights (hereinafter "TRIPS"); and (b) it is arbitrary, illogical, vague and offends Article 14 of the Constitution of India.

The Court heard arguments questioning the validity of the amended section on the touchstone of Article 14 of the Constitution of India. Relying upon the statement of objects and reasons for the Amending Act 15/2005, it was held that, keeping in mind the object which the Amending Act wanted to achieve, namely,

to prevent "evergreening", to provide easy access to life saving drugs to the citizens of this country, and to discharge the Constitutional obligation to provide good health care to citizens, the section was not in violation of Article 14.

Given the fact that Novartis does not intend to challenge this judgment, this judgment has discharged an important function of governance i.e. allowing the cheap production of a cancer curing drug and making it accessible to one and all.

b) Food Security

For a long time, the favoured approach of agricultural management was to allow the sharing of useful biological resources and related knowledge across countries. The IPR regime has changed this strategy. Now, genetic resources are appropriated through the assertion of proprietary rights i.e. intellectual property rights (IPRs). This is of tremendous importance for most developing countries because agricultural management is directly linked to the meeting of food needs. It is, therefore, important to ensure that the property rights introduced in agriculture broadly contribute to a reduction in food insecurity. This is an issue which warrants further analysis because existing IPRs are designed to promote technological development but not necessarily to take into account socio-economic concerns, such as food security. As a result, the introduction of IPRs such as patents in agriculture does not, as such, ensure that socio-economic goals will be met. The special situation requires a special legal regime in developing countries to take into account the needs of local agriculture, and more broadly, of food security.

c) Cultural Rights

Traditional knowledge encompasses the wisdom, knowledge and teachings of these communities. In many cases, traditional knowledge has been orally passed for generations from person to person. Some forms of traditional knowledge are expressed through stories, legends, folklore, rituals, songs and even laws. So, in the case of Rajasthan, the traditional knowledge would be its folkdance. So how does one protect such knowledge? The Biological Diversity Act, 2002 was passed for the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the use of biological resources and knowledge. However, the act alone is not providing effective means of protecting traditional knowledge. Therefore, the country will now have a unique digital library of its rich and varied traditional knowledge, known as the Traditional Knowledge Digital Library (TKDL). The brainchild of Dr. V. K. Gupta, Head, IT Division, Council of Scientific and Industrial Research (CSIR), the library is designed to record traditional remedies for posterity, using ancient science and modern technology.

²¹ (2004) 9 S. C. C. 580 [S. C.].

²² (2007) 4 M. L. J. 1153 [Madras High Court].

d) Labour Rights

There has been a paradigm shift from a pro-employee approach (most markedly noted in the judgments of Hon'ble Justices Iyer and Chinappa Reddy) to a pro-employer approach. How may we de-globalize judicial access, that is ensure that the overseas and national capital does not ride roughshod over the livelihood and dignity rights of the working classes? The article on "Globalization is Worker Abuse", by Frank W. Hardy, warrants discussion here.²³ The author incorporates the two divergent views on globalization vis-à-vis the labour workforce. The proponents of globalization argue that globalization provides sustainable development for its citizens and encourages productivity, as also product diversity. The opponents, on the other hand, view it as the exploitation of developing nations and as something that is reducing labour standards on a global scale. It cannot be forgotten that the unorganized sector constitutes 93% of our workforce. These changes also constrain justices to abandon, without reasoned elaboration, the new rights they themselves have enunciated,²⁴ and to generate a tender solicitude for the rights (guaranteed by multilateral trade agreements of which the WTO is an example) of the multinational corporations and of the community of direct foreign investors, even at the cost of the not-so-benign neglect of the fundamental rights of Indian citizens.²⁵

e) Corporate Responsibility

The capture by transnational corporations (hereinafter "TNCs") of functions previously performed by the State has been a particularly contentious topic. A separate strand of international human rights law has, in recent years, begun to address the scope of corporate responsibility with respect to human rights. Traditionally, human rights law was thought to apply almost exclusively to States, and, in limited cases, to individuals.²⁶ Yet, in view of the increasing power wielded by TNCs, and their capacity to affect the enjoyment of human rights, scholars have argued that corporate actors should be bound, or at the very least guided, by international human rights norms. Very recently, this scholarly debate, coupled with mounting evidence of human rights abuses by

²³ Available at http://global-labour-issues.suite101.com/article.cfm/panacea_or_worker_exploitation.

²⁴ The rights of the unorganized, or rather more accurately disorganized labour force. See *Steel Authority of India Ltd. v. National Union of Waterfronts Workers*, (2001) 7 S. C. C. 1 [S. C.].

²⁵ Justices Krishna Iyer, O. Chinnappa Reddy, D. A. Desai and M. P. Thakar; See, People's Commission on GATT.

²⁶ See, Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443, 466 (2001). ("[T]he unstated understanding during the growth of the human rights movement was that the duties [with respect to human rights] were still those of [S]tates".)

TNCs, has led to the development of new legal norms. Perhaps most significantly, the U.N. Sub-Commission for the Protection and Promotion of Human Rights (hereinafter "U.N. Sub-commission") has approved the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (hereinafter "Draft Norms for TNCs"). The Draft Norms for TNCs list a series of obligations that TNCs and other businesses have with regard to human rights, including ESC rights, making it clear that human rights obligations bind not only governments and individuals, but corporations as well.

3. Other Individuals

Earlier, human rights were limited to the claim of individuals' right to health, to livelihood, to shelter and employment etc. as against the government. Now, human rights have started gaining a multifaceted approach. Now, property rights vis-à-vis individuals are also incorporated within the "multiverse" of human rights. Now, any claim of adverse possession has to be read in consonance with human rights. The activist approach of the European Court of Human Rights is quite visible from the judgments in *Beaulane Properties Ltd. v. Palmer*²⁷ and *J. A. Pye (Oxford) Ltd. v. Graham*.²⁸ Here, the basic issue that was raised was whether the operation of section 75 of the Land Registration Act, 1925²⁹ was in violation of Article 1 of the First Protocol of the ECHR.³⁰ The parties, whose land was claimed by virtue of adverse possession, said that this in violation of the Human Rights Act, 1980. The Court also tried to read the Human Rights position in the context of adverse possession. Though, ultimately, the Court adopted a different approach, and gave very limited attention to the point of human rights vis-à-vis adverse possession, what is commendable is that the dimensions of human rights have widened so much that now, property dispute issues are also being raised within the parameters of human rights. The Indian Supreme Court, recognizing the need for incorporating the same principle has, in *P.T. Munichikkanna Reddy v. Revamma*³¹ held:

²⁷ [2005] E. W. H. C. (Ch.) 817 (Eng.) [European Court of Human Rights].

²⁸ [2002] 3 All E. R. 865 [House of Lords].

²⁹ Subject to (a) section 18 of this Act, and (b) section 765 of the Land Registration Act, 1925 on the expiration of the period prescribed by this Act for any person to bring an action to recover land, including redemption action, the title of that person to the land shall be extinguished.

³⁰ Article 1 of the First Protocol reads:

Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possession, except in the public interest, and subject to the conditions provided for by law and by the general principles of international law. The proceeding provisions shall not, however, in any way impair the right of the State to enforce such laws, as it deems necessary, to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

³¹ (2007) 6 S. C. C. 59 [S. C.].

Adverse possession is a right which comes into play not just because someone loses his right to reclaim the property out of continuous and willful neglect but also on account of possessor's positive intent to dispossess. Intention to possess can not be substituted for intention to dispossess. Mere possession for howsoever length of time does not result in converting the permissible possession into adverse possession.

Further, in *Peter Smith v. Kvaerner Cementation Foundations*,³² the court allowed the appellant to reopen the case despite a delay of four years, as he had been denied the right to which Article 6 of the European Convention on Human Rights ("the Convention") entitled him – a fair hearing before an independent and impartial tribunal.

V. THREATS FROM GLOBALISATION AND SOVEREIGNTY

In order to discuss this issue, *first*, it is essential to develop an understanding of international law. Its formation consists of certain specified stages. It is essentially a bureaucrat who negotiates at international meetings with other bureaucrats. Soon, on the basis of these negotiations, a treaty is formed, which is eventually signed. These negotiations might happen with a limited knowledge of ground realities. The Parliament does not ratify such treaties. Bills may be passed with limited discussions. Now, the question that arises, one that I think is one of the biggest challenges that we are to face in the coming years, is what happens if we do not enact a law that conforms with our treaty obligations, or if the treaty obligations turn out to be in violation of the Constitution of India. The economic sanctions that are imposed by other countries for non-compliance are indeed severe, and no country can afford to be the subject of such sanctions, especially a developing country like India. So, where then, does the sovereignty of a country go? Is the international community developing new norms of transnational sovereignty?

Secondly, in judicial pronouncements, we often quote various conventions, resolutions, declarations and treaties. Yet we do not know how much reliance should be placed on different natures of international documents. We do not follow monism. We follow dualism. Still, our judgments are replete with liberal references to protocols, conventions, resolutions and treaties. In doing so, we may be committing a mistake, but in not doing so, we might commit a blunder. So, it is possible to call for international law scholars to conduct an empirical study to figure out the relative force to be given to treaties in our judgments.

Thus, judicial governance in India is inevitable, as it is mandated by the Constitution by which the Supreme Court has been given specific powers to do so. Article 142 of the Constitution gives the Supreme Court, and the Supreme Court alone, the power to pass any order, decree or direction in the interest of justice. This is judicial governance and the judges are the moral custodians of the Constitution.

VI. ISSUES IN IMPLEMENTATION: BALANCING RIGHTS IN JUDICIAL GOVERNANCE

Courts are often required to "balance" competing interests. The scales of justice are a powerful image in the law. Discretionary decisions by courts commonly involve weighing the benefits and detriments of a potential outcome. But this is usually done on the assumption that the interests or considerations to be weighed are in some way reasonably commensurate. We can only measure physical weights on a scale, but we cannot measure rights and we cannot measure values.

The questions that will concern the judiciary in this century are, first, what if two rights, neither of which is absolute, conflict, a court is required to decide, by a process of "balancing"; second, which of these two rights and to what extent, is to prevail; and, third, what is the intellectual process by which that task is to be accomplished?

This is a pertinent issue because of two conjunctive factors – judicial governance, which is an inevitable reality today, and the traditional Constitutional doctrine of separation of powers, as a result of which it is the mandate of the legislature to decide polity questions like conflict of rights. Since it is of the essence to judicial decision-making that reasons be given for a decision, so that the parties and the public may know that the procedure is rational, the intellectual process has to be able to survive scrutiny. To say, in a particular case, or generally, that one right or interest outweighs another right or interest is to announce a result. When rights conflict, a decision as to which is to prevail, and to what extent, can only be justified rationally by reference to some value external to the "balancing" process. Of course, it must be justified rationally. For example, if an exercise of legislative power is involved, an outcome may be justified democratically, by weight of numbers operating through the political process. The decision may be an exercise of power rather than judgment. A judicial decision, on the other hand, must be justified by a process of reasoning.

³² [2006] E.W.C.A. (Civ.) 242 (Eng.) (C. A.).

Weighing or balancing competing interests or considerations is a familiar part of the process of adjudication. We all do it, in a variety of ways, on a daily basis. Courts do it all the time. The work of the courts, however, is different from most everyday tasks of judgment in one respect. A judgment that says, "These are the considerations in favour of course A; those are the considerations in favour of course B; I will take course B", does not explain or justify the decision. It gives no reason for preferring B to A. That is the essential difference between the legislative and the judicial process.

In a new market economy, where everything is merit based, we must keep in mind the ideas of social justice which are primarily need-based. For this, we require need-based judging, or what I call "Social Context Judging".

A judgment delivered just yesterday by the Supreme Court in *Election Commission of India v. St. Mary's School*,³³ is a trite example of this challenge. In the instant case, the question arose as to how the conflict in two Constitutional rights should be balanced vis-à-vis the other – the right to conduct elections, a sovereign function, by employing the teachers of government schools and the right to education, a fundamental right under Article 21-A. The court, while referring to Article 45 and *Brown v. Board of Education*,³⁴ emphasized that providing education was one of the most important functions of the State and the State had a basic responsibility in providing the same. Further, it was also held that providing education was a basic human right, thus, taking it above the realm of fundamental rights. Thus, the services of the teachers could not be employed during school hours.

The other recent judgment is that of *Anuj Garg v. Hotel Association of India*,³⁵ in which the Constitutional validity of section 30 of the Punjab Excise Act, 1914 prohibiting the employment of "any man under the age of 25 years", or "any woman", in any part of such premises in which liquor, or an intoxicating drug, is consumed by the public was in question. The case presented a conflict between the right to employment of a single individual (women) vis-à-vis the public interest relating to security. Invoking the doctrine of proportionality, the court held that having regard to the approach of the European Court of Human Rights in cases that deal with matters of competing public interests, there was an absence of a reasonable relationship of proportionality between the means used and the aim pursued.

³³ (2007) 13 S. C. A. L. E. 777 [S. C.].

³⁴ 347 U. S. 483 (1954).

³⁵ (2007) 13 S. C. A. L. E. 762 [S. C.].

Hence, it is up to the judiciary and the Bar to rise up to the occasion. The Bar must prepare itself for a future of conflict of rights. For, if the Bar is not prepared, the hands of the judiciary will only have limited freedom.

VII. DELAY AND ARREAR REDUCTION OF PENDING CASES

A huge back-log of cases is not news to anyone. This has been a topic of discussion for a long time, and in the recent past the discussion has heated up. Over the years, the problems of arrears have assumed serious proportions, necessitating a search for alternatives and supplements to the more conventional mode of settling disputes through the adversarial system. The question then that arises is: what can be an alternative to the adversarial system?

Perhaps the solution lies in the alternative dispute resolution system, also known as ADR. The concept of ADR is not a new one. ADR, in its wider perspective, envisages various forms of dispute settlement, including arbitration, mediation, conciliation and the latest development, on-line dispute resolution (ODR). The most attractive characteristics of ADR are that it can be used at any point of time, even when the case is pending before a court of law. It can even be used to reduce the number of contentious issues between the parties, and it can be terminated at any stage by any party to the dispute.

The Parliament has, in a big way, recommended taking recourse to ADR, which is apparent from the Legal Service Authorities Act, 1987, the Arbitration and Conciliation Act, 1996, the Legal Service (Amendment) Act, 2002 and section 89 of the Code of Civil Procedure.

VIII. CONCLUSION

To conclude on a positive note, one aspect that is sure to hold us in good stead while ushering in this new era is the normative power we are able to exercise through our judgments. As MacLean has argued, in the ultimate analysis, there is no illegitimacy in the judicial function. The judiciary acts in dialogue with the legislature, not pulling against it. The function is democratic and judicial.

Judicial review has, beyond doubt, been established as a basic feature of the Constitution in *Kesavananda Bharthi v. State of Kerala*,³⁶ and more recently, in *I.R.*

³⁶ (1973) 4 S. C. C. 225 [S. C.].

Coelho v. State of Tamil Nadu,³⁷ making even the right to grant pardon by the Governor and the President subject to judicial review.³⁸ Even in the United States, that boasts of a living constitution, the Supreme Court has not gone to such an extent while adopting a creative interpretation of the law. It does not matter greatly whether we operate under constitutional instruments which fetter legislative action or under statutes which must yield to unambiguous legislation. We should all work to convince by reason, if we are to retain the confidence of the communities we serve. Ultimately, we are all accountable to the fundamental values underlying the Constitution. Our decisions have to fall within the contours of our Constitution.

Notwithstanding these judgments, there are certain questions that we seek answers for. This paper ends with these open questions:

1. How may we ensure that, in the making of new Indian global cities, and the enclaves/fortresses of special economic zones, the same range of human rights to the migrant and urban impoverished citizens?
2. How may we pour democratic and Constitutional content into the borrowed and imposed languages of good governance?
3. How long can the masses of impoverished Indian citizens be treated as mere objects of the development of policies that reproduce the lives of Indian citizens as receptacles of obscene political waste?
4. And finally, how may we all endeavour together for the restoration of the glory of the Indian Supreme Court, which finally converted itself, in the halcyon days of the democratization of access, as the Supreme Court for all hapless Indian citizens?

³⁷ (2007) 2 S. C. C. 1 [S. C.].

³⁸ *Epuru Sudhakar v. Andhra Pradesh*, (2006) 8 S. C. C. 161 [S. C.].

SHORT ARTICLES

PRIVILEGE, POLICE POWER AND *RES EXTRA COMMERCIIUM* – GLARING CONCEPTUAL ERRORS

Arvind P. Datar*

In this article, the author critiques the Indian Supreme Court's understanding of the concepts of privilege, police power and res extra commercium and suggests that these have been incorrectly applied in the context of trade in noxious substances. After tracing the evolution of these concepts through Indian case law and in other jurisdictions, he argues that the principles of privilege and police power originated in the United Kingdom and United States respectively in specific contexts. Therefore, they cannot be applied to the Indian constitutional scheme as the Constitution has other provisions to regulate the same subject matter. The author also contends that the Supreme Court has misinterpreted and misapplied the res extra commercium doctrine, and cannot use it to restrict the fundamental right to trade granted to all citizens in the Constitution.

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I. INTRODUCTION

For the last six decades, the Supreme Court has applied the concepts of privilege, police power and *res extra commercium* incorrectly. While the concept of privilege and police power is legally correct, it has no application to a Republic which has a Constitution. *Res extra commercium* has been completely misunderstood by all of us (including the present writer). This Latin expression has been held to be the foundation to declare that there is no fundamental right to trade in liquor

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