

Justice Konda Madhava Reddy Memorial Lecture

The Least Dangerous Branch And Civil Society

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"THE LEAST DANGEROUS BRANCH AND CIVIL SOCIETY"

Fourteenth Justice Konda Madha Reddy Memorial Lecture

By

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President of today's meeting, Hon'ble Justice Narasimha Reddy, members of the family of the late Hon'ble Chief Justice Madhava Reddy, distinguished members of the Legal fraternity, Ladies & Gentlemen!!!

I am honoured that you have conferred upon me this privilege to give the Chief Justice Madhava Reddy Memorial Lecture this evening. There is a unique coincidence in the occasion: the person presiding over it and the speaker chosen as the Guest for the occasion and person being commemorated Late Chief Justice Madhava Reddy, have a common link. Hon'ble Justice Narasimha Reddy is known as a Judge with a finely turned sense of judicial conscience and very high profile of probity. As far as I, the Guest of the evening is concerned, though not a legal professional in the normal sense, I do have more than a nodding acquaintance with law and its process having studied Constitutional Law in my young days-more than half-a- century ago.I do endeavour to bring up my legal knowledge upto date, though not in sufficient depth.

Chief Justice Madhava Reddy had a versatile life.Even as a student, he was actively involved in the struggle for freedom in the then Nizam's Kingdom. Joining the famous Ferguson College, Pune, for his graduate studies, he did his legal studies in Bombay. Joining the Hyderabad Bar in 1944 he picked up good practice, was appointed Government Pleader and later was elevated to the High Court Bench, subsequently becoming the Chief Justice.

His judicial conscious was of a very high order.For instance, when once he was arguing a case, he restrained himself from using an argument on the basis which he won a previous case.However, he felt that his argument then were flawed.In the case under reference, his friend asked him why he chose not ot use those arguments .He had the candour to admit that his earlier arguments were wrong.It takes a high sense of not only professional integrity but also individual high-mindedness to do so. He had the distinction of becoming the first Chief Judge of the Central Administrative Tribunal, then a fledgling body to which he gave a robust

foundation and is remembered for that.

After his retirement as Chief Justice, he started practice at the Supreme Court won high laurels. Beyond, the professional achievements, being a scion of a great family dedicated to public cause, he founded many educational and cultural institutions that enriched our region and Hyderabad in particular. To be associated with the commemoration of such a noble human being is high honour. I once again thank that my hosts for the privilege given to me.

The phrase, "The Last Dangerous Branch" is taken from Alexander M Bickels well known book of the title published in 1962. How this 'Least Dangerous Branch' converted itself into a mighty institution as the saviour of rights and in general of the Civil Society is a well known saga of constitutional in modern times. In India, in particular, the Least Dangerous Branch at times comes to be regarded as the dangerous branch by the Legislatures and Executives on the one hand, and as benign instrument for the well being of Civil Society by this Society at large on the other. It is the theme of my lecture this evening. As to the text of the lecture which may be in your hands by now, I have to apologise for any reading is as reasonably high, my proof reading is very poor. That would account for the errors contained in the draft.

The emergence of the Indian judiciary as a very prominent organ of the state which got closer to the Civil Society as the decades of Indian Constitution evolved is my basic point. However, this has not always been the case. For Legislature and the executive till nearly six decades after commencement of the Constitution, proved quite close to the Civil Society. Theoretically, these two organs are indeed the proposers, promoters and processors of Civil Society's needs. This theory was vindicated for decades in modern Indian constitutional history. During that period relatively the strict role of the umpire of reference of the constitutional 'game'.

However, since recent decades the deep decline of the Legislature, and its appendage, the executive created a baneful situation. I present this picture of the decline briefly.

The supreme legislature, caught up in the contradictions of coalition politics, is functioning in a milieu in which the political executive grossly violates the accepted conventions of individual and collective responsibility. Parliamentary sessions resemble bedlam and Billingsgate. A hostile and even a vicious state of interpersonal relations characterize the atmosphere in Parliament, as also in many state legislatures.

The main functions of a democratic legislature are more observed in this branch. Passing laws is done as if the House is Kangaroo court with rules of procedure frequently waived. The Zero Hour and the question period are seriously compromised with suspension of business becoming the daily bread rather than a timely medicine. We witness the sordid spectacle of people's representatives demanding payments for raising questions. And outside the legislatures, even at the hustings (i.e. election time 'paid news') has become the twin brother of 'paid questions'.

The opposition in Parliament seems incapable of playing the honourable role as the English phrase 'Her Majesty's Opposition' connotes. Its role in stultifying the legislatures 'functioning has been the tragedy that brought down Parliament's duty and dignity.

Because of the political executive's perennial embarrassments on the integrity front, direct confrontations between Parliament and other constitutionally mandated authorities have become yet another characteristic element of the constitutional system. I refer, in particular, to the open breeches between the office of the Controller and Auditor General and Parliament. Even the scope and extent of CAG ambit of powers is questioned, while there can be two views whether the procedures and findings of CAG, and the way in which the executives perceive it to attribute an unholy nexus between the opposition and the CAG smacks of a spirit of vendetta. The point is that, in this affair, the Executive is throwing discretion to the wind and bent on bringing down the credibility of CAG. It is as if Parliament and the Executive would rather ditch other constitutional instrumentalities while its own reputation is sinking. The same tactics are evident in dealing with the G2 scam. The reopening of more than 15 years of telecom policy, while in itself unobjectionable, can be seen as a too-clever by half tactic of shielding its reputation by exposing the opposition's own possible misdeeds. There cannot be a more sorrowful spectacle of the Government's humiliating confessional posture.

You will notice that in referring to Parliament's tussle with other constitutional organs, I did not mention the judiciary. Prima facie, this should be seen as a serious omission. But, I did this advisedly, for the simple reason that the Legislative-Judiciary relationship has epochs of adversarial nature and I intend to visit this then in some length in pages to follow.

For the present moment my purpose is to set the stage for the eruption of civil society's anger against the state institutions and then link it with the special type of benign nexus that connects to the judiciary and the civil society. If I lingered rather long on the malaise of the Legislature and Executive, it is because these two institutions are responsible for inciting the explosive outbreak of society's frustration and anger. In this process, the judiciary's role is to provide the Constitution's systemic rationale in providing the society the right to doubt, question and finally challenge the Parliament-Executive combine to account for their actions.

To a great extent it is the judiciary that mandated the investigations on almost all the mind-boggling corruption cases - the 2G, the Commonwealth Games scam and the foreign bank accounts scandal. In so doing the Supreme Court brought into the scenario of the unsavoury impact of the Indian corporate world. Now, this aspect of the State-private linkage has a paradoxical theoretical connection between the economic sector in the State Vs Civil Society dichotomy.

The Supreme Court in leadership of eminent Chief Justice paved the way for new Constitutional percepts to emerge. In this, I should mention in particular, the role of the present Chief Justice Kapadia in strengthening this role in taking the initiative to bring to light the horrendous dimensions of the, sleaze graft and breach of trust of other public institutions.

Democratic politics provide for a positive nexus between State and Society. As already caused in the model, the Legislature is purported to be the trusted of Civil Societies' ends are not always identical. On the many fronts they may even be conflicted. For the very fact of social diversity comes raise to diversity of clients for support identities. It is a phenomenon i.e. now called by the neologisms like 'identity politics' and 'politics of inclusivism'. Party politics is the vehicle by which diverse interest of articulate and attained.

But, as already mentioned these devices that bring about positive good relations, are not sufficient in themselves. In fact, internal contradictions within the Civil Society thwart a viable Civil Society consensus in even a well meaning State engaged in promoting Civil Society well being cannot always be overcome. Democratic politics tend to favour majoritarian interest, and a 'devil talks the hind most' syndrome operates. The electoral system does not necessarily ensure fair and equitable representative. Add to this , the role of many powers and mostly power. Then we have a mockery of representative democracy. The 'paid news' scantily is but one example of this malignant condition.

It is in this context that the corporate sector's sometimes malevolent role comes to the fore. I have referred earlier that the economic sector was once regarded an integral part of civil society leading the opposition to the political state. But now we have an entirely new ball game. While historical and civilisational baggage of social stratification and gross inequity constitutes one huge albatross around our necks, the contemporary trend of corporate hegemony now loads the social system with more inequalities, nauseating consumerism and above all, ecological disasters.

Therefore, the economic sector far from being a robust component of civil society now became a force working against the interests of civil society. In fact, what it does is to create vested interests within the societal domain. A new and affluent class of managers and manipulators emerged whose sympathies for those, 'excluded' from the Cornucopia of liberalization, are suspect. The philosophy of 'tooth and claw' capitalism once again says that the poor have themselves to blame for being poor.

The overall effect of this denouement is to rouse a righteously indignant social consciousness among many sections of society. The legacies of the Freedom Movement with its Gandhian verities tends to re-manifest. One need not equate the Team Anna Hazare with that of a pure Gandhian lineage. Yet that it did galvanize the public is enough proof of a resurgence of a civil society ethos. It is also probable that extending its agenda may prove to be less successful. At times the correct Civil Society claims to superior to state instrumentalities. Over enthusiasm occasionally leads to exaggerated claims. Even so, intimations of its recovery slow, grit and courage to take on the state. In the best of times state and civil society intermesh with complementary of purpose and action. Their borders are indeed porous. In an important sense, the porosity of the conceptual boundaries between the institutionalized state, and the amorphous, but yet, live society, is an important component of Civil Society theories.

For reasons already alluded to, the decline of legislative and executive branches seemed to have closed that process of porosity.

Civil Society and the Judiciary

With the judiciary, mercifully, this is not case. There is a paradox here. For the relationship between judiciary and society was not held to be that intimate. It was only rarely did the members of society choose to seek legal remedy. Indeed, as we are aware, in traditional society going to the court was regarded as neither wise nor prudent. When a person got into the tenacles of law that relationship became patently adversarial and hence relations become

disharmonious.

But under Constitutional democracy the equation has changed. The opening up of the Civil Society dimension as a salient aspect of the judiciary's concern cannot be seen as deliberate case of social engineering by the judiciary. It came as part of the court's conventional function of interpreting the Constitution. Indeed, it may seem to be a figment of my imagination to import the suggestion of the judiciary being partial to the Civil Society as against the state. For the Supreme Court could never openly own up to a patent bias or prejudice. In spite of an epoch of new jurisprudence, the tradition of judicial restraint prevails in making the Court rather speak in moderate tones.

Still the tenor of the court, especially since the trend in the last three decades exhibits is not subtle. A transformation is set in motion. It is fashionable to call this trend as judicial activism. But this phrase is as heavily loaded as it is misleading. Judicial activism can signify both a regressive interpretative posture and a very progressive endeavour. Similarly, in the terms 'literal' and 'liberal' approaches to interpretation, there is no correspondence to the Conservative V Radical profiles. Broadly speaking, a trend when the courts with due caution, adopt a sterner stance towards the State is said to constitute judicial activism.

It is not my purpose to discuss the history of judicial activism. That will be beyond my depth. Though trained in the area of judicial interpretation more than 50 years ago my familiarity with case law has also become that old: I have no doubt kept myself aware of the broad contours in the Constitution's sojourn, as they gained the Supreme Courts imprimatur. Tussles between the Legislature and the judiciary dot the landscape of our Constitution's journey. To begin with almost all of these ended with Parliament changing the Constitution, using the Amendment article. But then came, in 1967, the Golaknath case when a majority of judges ruled that generally the Constitution cannot be amended. Was this regressive decision? And was this an instance of literal or liberal interpretation. Was this liberal because it sought to shut down the shutters to governmental action? These, indeed are the sort of the questions that make identification of the nature of judicial activism a problematique.

To come back to our main theme, the Legislature after gaining the requisite strength in numbers further amended the Constitution overcoming the near insurmountable obstacle that the Golaknath case erected. Then again followed a period when 'progressive' legislation had to battle judicial scrutiny, the former often ending on the losing side. The Emergency was a challenge to the judiciary's provenance. This proved to be rather poorly served by the judiciary. The court resorted to a traditionally purist literal interpretation sanctioning the whole gamut of the Emergency regime and regimen. The suspension of the Fundamental Rights came along and the courts theoretically even acquiesced in summary execution of individuals. This Pro-State and anti Civil Society judicial stance is difficult to digest. The state's response was to pit individual rights as against social rights. Apparently, when the Court cast a Nelson's eye at the social predicament, it is the other branch, Parliament, that sought to appeal to the neglected sections of society resorting to populist policies.

But the paradox is that society at large revolted against Parliament and the executive. The Emergency was avenged. An epic victory was won by the Civil Society despite the judiciary's

lamentable slumber during the Emergency.

But then began, what I may be permitted to call the "halcyon days of judicial profile". Once again the resolution of the pith and substance of the Amendment Article engaged the Legislative-Judiciary relations. Finally, with Keshavananda Bharathi case invoked a rather riddle-ridden formula of the unamendability of the Basic Features of the Constitution. As to the precise definition of what are the basic features, happily it is consigned to the realm of Trishanku Swarga. Better to say, that while some basic features, like federalism, secularism and even socialism form its inarticulate premises, other features like the Directive Principles are left in the limbo. Yet, it is a happy compromise. "Don't indulge in too audacious things", says the judiciary to its colleague branches. Because then things will remain calm and cool. The judiciary's response was to afford the Constitution a wide berth not only for individual rights but accord the Directive Principles a new judicial cognizability. Incidentally, Chapter-IV of the Constitution can be seen as Civil Society-oriented as distinct from Chapter -III, which is still perceived as individual oriented. The Supreme Court's jurisprudence has for quite some time dexterously conflated Directive Principles as an ancillary dimension of Fundamental Rights, and in many ways with Parliament doing its own bit, as in removing the Property Right from the former's category. Even in the area of individual rights as for instance, the Right to Life, a paradigmatic change took place among many other facets of the right, even environmental factor as a part of this. Many other instances of the conflation mentioned above followed.

Even more important is the way in which the judiciary stepped in subtly into the area of executive function. In this process the orthodoxies of Montesquane's Separation of Powers are given the short shrift. There is loud criticism from the Executive. The Prime Minister himself came out categorically against the higher judiciary's efforts at 'over reaching' its functional limits. That he chose the occasion of the opening of the 17th Commonwealth Law Conference is of added significance. He stated: "The power of judicial review must be used to enforcement of accountability, but it must be never used to erode the legitimate role assigned to the other branches of government. This is vitally necessary to pressure the integrity and sanctity of the constitutional scheme premised on the diffusion of sovereign power."

Perhaps Dr. Manmohan Singh advisedly refrained from the use of term separation of powers. His choice of the word diffusion conveys a permeable boundary delineation than the word separation. But, as to his rather stern stand that judiciary review should never exceed his prescribed limits, there appears to be a deficit in his understanding of the constitutionalism's dynamics. As a living system with assigned functions to perform, the operation of the sociological doctrine of structural-functional balance applies even in social and political institutions context. Simply put, this doctrine means that when structures assigned to perform specific functions fail in the process, other prevailing structures step into the vacuum. This routinely operates in the case of living organism. And so it does in the case of social systems including Constitutional arrangements that societies provide for themselves.

I have earlier referred to the sad phenomenon of Indian legislatures, including Parliament, sliding into a chaotic state of disfunctionality either as enactors of necessary legislation or as the forum as the grant inquest of the nation. The enforcement wing also got afflicted with either

ennui senility or plain venality. This is context in which the judiciary filled the void, as it were not so much in resorting to judicial law -making, as to asking the executive to do or not to do their ex-constitutional scheme. To take only a few examples , the Ratlam municipality case, later the instance of the courts directing reallocation of petrol stations and in imposing fines on errant politician and civil servants, the judiciary might have crossed the Lakshman Rekha of strict Constitutional limitations. You will bear with me if as a non legal professional, I see in this activist profile of the court as an expanded version of mandamus, certiorari, and quo-warranto, all merged as the context demanded. The writ of habeas corpus has already been altered both in the procedural requirements of its invocation by the aggrieved, as also in the ambit of circumstances under which judicial redress is given.

At this point, I refer to the very seminal recent work in habeas corpus titled: Habeas Corpus: From England To Empire, by Paul D. Halliday, a historian and not a legal scholar, published as late as last year (2010) by The Harvard University Press. This volume traces the metamorphosis of the writ from being "actually a writ of power" into, what we call, 'the Great Writ of Liberty'. The process of the metamorphosis of this legal instrument is documented by Halliday. The work is well summarized thus: "In the decades around 1600, English judge used ideas about royal power to empower themselves to protect the king's subjects. The key was not the prisoners' "right to liberty"- these are modern idioms-but the possible wrongs committed by a jailers or anyone who ordered a prisoner detained. The focus on wrongs gave the writ the force necessary to protect ideas about right as they developed outside the law. This judicial power carried the writ across the world, from Quebec to Bengal. Paradoxically, the representative impulse, most often expressed through legislative action, did more to undermine the writ than any thing else. And the need to control imperial subjects would increasingly control imperial subjects, The imperial expense is thus crucial for making sense of the broad sweep of the writ's history and of English law."

I helped myself to this long quotation because this book directly impacted the U.S. Supreme Court in its decision in *Bommediene V Bush*, in 2008, denouncing the illegality and the inhumanity of the infamous Guantanamo detention camps.

The foregoing long quotation has a contemporary resonance too. Some points stand out. First, the conversion of royal prerogative into individual liberties. Secondly, the point that this conversion "developed from outside the law." Thirdly ,colonial legislatures endorsed by the practice of imperial scrutiny of "disallowance" did much to undermine the writ.

All these point out to the judges standing forth to the rights of the individual. We are entitled to read the 'individual' as a synonym for what the present perspective of the 'Civil Society' stands for. Therefore, the judiciary, though theoretically a branch of the state, is Janus faced, to borrow from Greek Mythology one persona as an integral part of the state, another persona siding society and its individual components.

The Indian judiciary's is a prime example of this Janus face metaphor. And all tributes to it. Whatever the critiques about judicial activism's virtues and vices may be, the ubiquitous Public Interest Litigation, PIL has been the device that makes for the intimate interface between the society and the judiciary. Though PIL is not without its critics even within the judicial,

establishment itself, it is now an established instrumentality.

It should be realized that the higher judiciary has seen a turnover of three to four generations of judges. In the beginning, constitutional litigation was a novel feature, indeed less than a decade old experience under the 1935 Act. But as a new generation of judges came along, there have been a socialization with constitutional jurisprudence accompanied by a more sharper articulation of the judicial power. One example would give a sample of judicial orientation as to the nature of the judicial process itself characterizing its early trend. Chief Justice Hidayatullah, in the first B.N.Rau Memorial Lecture in 1969, entitled Judicial Methods, (and remember this is after Golaknath) contrasted the new trend towards radicalism and the cautious traditionalism of the former times. He says "There are many radical judges who stretch a point consulting their conscience and making plausible arguments in their own support. This is hardly to be advocated. Here the judge is going against the law and he cannot do that." Then he proceeds to use a metaphor that today would sound rather astounding. He says: "He (a judge) must more move with what may be called the speed of a glacier." Speed of a glacier!!! In fact, some sections of the society would like that changes should move with galactic speed. Of Course, not even those impatient with slow image will advocate galactic velocity. While *Res judicata* and *stare decisis* cannot be totally jettisoned, yet, clever and even wiser ways of changing jurisprudential paths can be paved.

Hence, I pause to introduce as the events relating to the path-breaking desegregation decision of the U.S. Supreme Court in 1954. No decision before it or after it involved the same magnitude of judiciary-Civil Society linkage.

Chief Justice of the U.S. Earl Warren, in the Brown decision used the famous phrase, "With all deliberate speed." And there is hoary history behind this by then innocent phrase. As James T. Patterson in his magisterial *Brown V Board of Education* (2001) says: "There is probably no Supreme Court language so hotly disputed as 'all deliberate speed.'" To the very radical critics of Brown, "all deliberate speed" degenerated into "all deliberate delay".

Here enters the never ending lag between the judicial writ and civil society (sections of it, to be precise). Long ago Roscoe Pound, an epitome of jurisprudential wisdom, said "Law makes habits, it does not wait for them to grow."

It was 'not waiting for habits to grow' that made Warren to harp on 'all deliberate speed.' This was an instance of sensing the pulse of the society. It is well to reiterate the point that Civil Society is not always a homogeneous whole. The American South, in particular, was rent asunder between White and Black and to which civil society should the Court pay heed? Most of the members of the court then knew that 'a mob' of a 'society' that swears by segregation is not 'Civil'. Obviously, the Court was in favour of the 'Black' community. Therefore, with all the speed-breakers that 'all deliberate speed' was destined to face, in the Brown decision, the Warren Court was responding to Civil Society's dilemma.

How Warren persuaded the lingering minority of judges sensing then any dissent would be disastrous to the acceptability of the ending of the equal but separate position. He zeroed in on the point that even with *Plessy V Ferguson*, overturned much of the Southern society (white i.e.)

will be hell bent on sabotaging the implementation of the new dispensation. And if there was to be dissent in the court, that only adds to the society's revanchism in the South. So Warren's persuasive exercise in the conference of the judges went beyond normal standards. This is but a game-changing exercise in the judiciary's positive sensitivity to civil society's response-all in the cause of human equality.

Brown V Board of Educating Topeka, is so seminal not only for its judicial audacity to reverse a nearly 60 years old precedent, but the revelation that the cases decision brought out. The pros and cons of the reception of a judgement by the civil society, especially the generations of Ku Klux Klan progeny, or to put it more politely the revanchism of the still influential Southern white communities not willing to lose their space in the arena of racial relations.

Such as the pressure the hearings in the Brown case that the then U.S. President Dwight Eisenhower, otherwise a paragon of political propriety, himself resorted to gross impropriety in trying to influence Chief Justice Earl Warren while the Brown case was in progress. This is indeed a very insensitive, if not an unconscionable event in twentieth century U.S. Constitutional History. We have this nugget of information from a most eminent British judicial source, who himself cites a British political science authority. I am quoting from Lord Justice Town Bingham's *The Rule of Law*, (1910) in full and seek your indulgence for a lengthy quotation.

"He (Eisenhower) invited Warren (the Chief Justice) to the White House for a stag dinner, along with Brownwell, the Attorney General of the United States, and John W. Davis who was counsel for the segregationists and a number of other lawyers. Eisenhower had Davis sit next to Warren, who in turn was on the President's right hand. During dinner, Eisenhower, according to Warner 'went to considerable length to tell me what a great man Davis was.' And as guests were filing out of the dining room, Eisenhower took Warner by the arm and said of the Southerners, these are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes." And these lines are from President of the U.S. to its Chief Justice.

Can there be a more indecent missive from the Head of the State, to his Chief Justice? And this was when the most significant case in U.S. was on the docket. We may even forgive our own former Chief Justice's private missive to our Prime Minister during the Emergency!!!

Such was the intense pressure the U.S. Government on the one hand and the Civil Society's expectations on the other, that the President had to put in a soft word to the Chief Justice to be rather circumspect in deciding the Brown case. But the Chief Justice, himself an appointee of Eisenhower, stood firm and the Brown decision, outlawing segregation, issued forth.

Even so, Warren was circumspect. While successfully persuaded the nine-judge court towards unanimity, he managed to introduce the famous phrase: 'With all deliberate speed'.

In India, PIL can also be seen as a direct interjection of society's agency in to the litigation's field. Not only the plaintiff an 'outsider', under strict jurisprudence, the nexus the plaintiff has to cause is also strictly outside the ambit of the strict view of judicial remedy. Whatever the legal

form a judgement in PIL, the remedy is directly aimed at society's interests, even if it were to be for a section of that society. The PIL's origins can be seen even within the otherwise conservative English Common Law tradition.

The orthodox Common Law legal problem of, 'Who may sue?' forever engages the litigant, the litigator and the judge. The PIL's innovation affords a solution to the problem in sync with contemporary needs. In case of public purposes, only the State's highest legal officer could sue on behalf of the public. This mostly pertains to the subject of Administrative Law. But, now the innovation of PIL squarely intrudes into Constitutional litigation and that too without the agency of the Attorney General and Advocate General in India.

The process of the earlier Common Law practice and the gradual change that occurred even in English practice is analysed by the late S.A. de Smith in his Constitutional and Administrative Law, first published in 1971. Quite apart from the prominence that he held in the field even during his short life-time, I personally have the great pride to have had been his student from 1955-1959. He supervised my research for the PhD. Degree at the London School of Economics and Political Science. You will forgive this indulgence in personal biography.

de Smith in his book, in the chapter on Remedies (Chapter 27) comes nearest to the Indian situation as to PIL's credentials, "Who may sue?". He poses the question categorically, then proceeds to answer this with a combination of age old practice as well as contemporary modifications. He says:

"The answer usually, though not uniformly, is that only the Attorney General, acting in his sole discretion, can institute such proceedings on behalf of the public for the vindication of their rights. The Attorney General may also sue for an injunction to restrain breaches of regulatory legislation when the sanctions of the criminal law have proved inadequate. In general, a private individual cannot sue to restrain a public wrong unless his own legal rights have been encroached upon. There are numerous discretionary bars to the award of injunctions."

In the above mentioned state of English Law, there is not much scope for PIL. Yet, de Smith also enters an exception that while non-statutory remedies are coercive and not always available, this is not the case with declaratory orders. "The declaratory judgement is basically a twentieth century judicial remedy and has come to be used for a great variety of public and private law...." The rules governing locus standi, are in practice more liberal than in proceedings for injunction.

What de Smith is stating is precisely the reasoning behind the formal legalization of PIL jurisprudence. Whether, through a declaratory judgement or other orders, a flexible corpus of procedural law now ensures a direct linkage between the public and the Courts to remedy public wrongs.

However, I also realise that the open sesame scenario is not always endorsed by the judiciary. Only the other day, the Court refused to concede that any person can demand from the Courts an order to probe into the irregular and allegedly corrupt actions of ministers or officials or even private persons.

Yet, on the whole, age is set over the last three decades that confers upon public-spirited individuals to seek remedies for public-purposes. I am tempted to draw the analogy with the very old, and now disused, even a defunct, Common Law institution of the Citizen's Arrest, by which "anybody (not only a police officer), under prescribed conditions, effect an arrest."

Does the PIL come close to this antique English institution, extending its ambit to serve wider public purpose?

The judiciary's credibility vis-a-vis the society is not always to be taken for granted. At one level, the judiciary confronts the Legislative -Executive duo in prescribing limits to the duo's response to sectional demands but then, as if there is a compulsive reason for persisting in the claims of society, the Executive chooses, to push on regardless of the judiciary's laying down of prudent limits. Here I refer to the creamy layer doctrine, with the prudent advice on 'reservations' not exceeding a 50% limit. We know parts of the country ignore the limit. In fact, the breaching of the limit prompts further breaches. Further, the 'creamy layer' formula has become a very sensitive issue for the society. Should the formula's application to a defined class of reservations, be extended to broader 'affirmative action' groups, i.e. the B.Cs. and the O.B.Cs? Here, the nature of the divisive character of a diverse social plane can be seen as the difficulty in identifying the very definition of Civil Society.

But these are the travails of the Civil Society theory itself in a democratic polity. The point, however, is that Civil Society, with all its umbilical links with the legislatures, still develops a sense of frustration with its so-called creature-the Legislature. The Legislature wings own failure to justify its real representative responsibility feeds society's frustrations and despair.

Even as one has to cause to rejoice at the Judiciary becoming the amicus publicus (friend of public purpose)-a sort of an inverse category to amicus curie. Still as regards the Courts provenance there is bound to arise the question: "Quis custodiet ipsos custodes?" (Who will guard the guardians themselves?). This will be asked and, indeed, is being asked by the public, and even more so by the Legislative-Executive branches. The brighter the Halo of a public trustee, the greater the burden of a transparent image. Would self-regulation sufficient to make the judiciary regain its former image? It should guard against its own hubris and must realise that of the Legislative wing is trying to say: 'Physician heal thyself.'

There is already 'The Judicial Standards and Accountability Bill, 2010' on the anvil. I have had occasion to read the draft text as also the reports of the Parliamentary Committee concerned. I am sure that the judges and lawyers have done so also. There are quite a few scary provisions compromising the independence of the Judiciary. Will the Civil Society rally round to protest against the objectionable parts of this proposed legislation?

Once again I pay my sincere respects to the Rule of Law that the Judiciary endeavours to guard as also my thanks to my hosts who gave me this honour this evening.
