Two Historical Judgements

Mastram Kapoor

The Supreme Court Bench of Justice Sudarshan Reddy and Justice SS Nijjar, has delivered an historical judgement on July 4, 2011 which has triggered a serious discussion among the intellectuals. This judgement was given on the petition of senior advocate Ram Jethmalani who had requested the court to intervene in getting back the black money stashed in the foreign banks.

The Bench expressed dissatisfaction over efforts made in this connection by the government and said that it was a failure that goes to the very heart of the constitutional imperatives of the government. It said: "unaccounted monies, especially large sums held by nationals and entities with a large presence in the nation, in banks abroad, especially in tax-havens or in a jurisdiction with a known history of silence about sources of monies, clearly indicate a compromise of the ability of the state to manage the affairs in consonance with what is required from a constitutional perspective."

The court appointed a 13-member Special Investigation Team (SIT) headed by former judge, Justice B.P. Jeevan Reddy, assisted by another retired Supreme Court Judge, Justice M.B. Shah, as vice-chairman and directed that the high level committee, constituted by the government recently to look after the issue of black money would be part of the Special Investigation Team.

Justifying the creation of SIT the court said: "we are of the firm opinion that in these matters, fragmentation of the government expertise and knowledge across many departments, agencies and across various jurisdictions, both within the country and across the globe, is a serious impediment to the conduct of a proper investigation. It is therefore necessary to create a body that coordinates, directs and where necessary, orders timely and urgent action by various institutions of the state." The court said that the SIT would have continued involvement of this court in a broad oversight capacity.

The court rejected the government's argument that the double taxation agreement with some countries, was an obstacle to disclosure of the black money deposited in foreign banks. The court said that it did not find merit in such arguments since such agreements transgressed upon the boundary erected by our Constitution and that could not be permitted.

The court ordered the government to disclose the names of all individuals who have accounts in Liechtenstein, as revealed by German authorities, against whom investigations have been concluded, partially or wholly and show cause notices have been issued and proceedings initiated. The court, has directed the government to file compliance reports.

The other judgement delivered by the same Bench two days later, relates to the recruitment, training and use of special police officers, against the Maoists by the Chhattisgarh government, under the name of Salva Judum. The Bench asked the Union Government to cease and desist forthwith from using any of its funds in supporting directly or indirectly, the recruitment of SPOs for the purpose of engaging in any form of counter-insurgency activities against Maoists-Naxalite groups. It observed that appointment of tribal youth as SPOs, who are barely literate for temporary periods, will necessarily endanger the human rights of others in society. In this judgement, the court has also criticized the socio-economic policies of the government in the following words: "The primordial problem lies deep within the socio-economic policies pursued by the state on a society that was already endemically and horrifically suffering from gross inequalities. Consequently, the fight against the Maoists-Naxalites is no less a fight for moral, constitutional and legal authority over the minds and hearts of our people." According to the S.C. Bench, the policy of privatization has also meant that the state has incapacitated itself, actually and ideologically from devoting adequate financial resources in building the capacity to control the social unrest that has been unleashed. Both these judgements have created a furor among the votaries of the status-quoism, hard state and the neo-liberal economic policies dictated by the corporate regime.

Shekhar Gupta, editor, *Indian Express*, in his article wrote on July 9, that the ideological bent of the higher judiciary has never been a significant aspect of glorious (and sometimes not quite so) uncertainties

of democratic politics in India. Commenting on the judgement, the article said: "Not only is the language out of tune with the time, it is also as if the apex court had made a dramatic ideological shift or almost as if a new president in America had just made a bunch of his own appointments. Large parts of these judgements are just lectures on political economy that makes you ask a legitimate question. What is the job of the judges, to interpret law or to criticize make/change economic policy."

The funny argument, the writer has advanced against the judgement is that it is not the economic reforms, that is responsible for the corruption but the too much discretion still left in the system, is the real cause of prevailing corruption and to overcome this corruption, all discretion on the part of the government functionaries should end and give place to free-for-all loot by the corporate sector. In this connection Karnataka Lokayukta Justice Santosh Hegde's report on mining in the so-called 'zero-permit-regime' of Yeddyurappa will make an interesting reading.

Andhyarujina, the former solicitor general of India, has also criticized the judgements in his article dated July 20, in '*The Indian Express'*. It said: "Regrettably, given the pressure of work from such PILs and other minor cases on its working, the Supreme Courts' historic and essential role of laying down the constitutional and national law of the country in important matters is being sidelined - as if the court is only meant to be a supreme correction body for administration in the country." Quoting Justice Jackson of the U.S. Supreme Court, he said that the doctrine of judicial activism which justifies easy and constant readiness to set aside decisions of other branches of government is wholly incompatible with a faith in democracy. He however, adds that the legitimacy and accountability of the judicial activism depends on its being exercised within the confines of the power conferred by the Constitution on the judiciary.

An other dignified court singer of the neo-liberal economic policies, Pratap Bhanu Mehta of the Centre for Policy Research in his article in *Indian Express* of July 22, connects this debate with 20th anniversary of this neo-liberal economic revolution and deplores that the Congress party is doggedly determined to undo the major gains of economic reforms, by empowering an intellectual climate where all the constricted psychological inhibitions are coming back and by shifting the emphasis from vibrant job-creation and empowerment to welfare as if success will be measured by the more people we can make dependent. He says that the two pillars of the current crisis are: (1) The sense that the gains of growth are uneven and (2) The scale and depth of corruption has irremediably eroded us. But surprisingly, he does not blame the economic reforms for this crisis. Instead he blames the government saying that uneven governance is primary cause of uneven growth. It is indirectly an attack on the judgement criticizing economic policies. Explaining it further, he says that our conflicts on land or mining are not a sign that economic reforms did not work, it is a sign that two tectonic plates are colliding: a pre-liberalisation state practice that has failed to understand the new dynamics of aspiration. Even after admitting that no society, whether the United State, Korea, Japan, China or Britain experienced rapid growth without massive corruption accompanying it, it is unpalatable to these intellectuals if the highest court comments on the injustice that result from these policies. Shri Mehta, compares the economic revolution with mythological episode of churning of the ocean and corruption with the poison which requires a Neelkanth (Shiva) to hold. Perhaps he wants to assign the role of Neelkantha to Prime Minister, Dr. Manmohan Singh and of Vishnu to himself.

Not satisfied with all this denunciation of the judiciary this paper on 5th August brought out a full page article by Krishnadas Rajagopal on recent pronouncements of Supreme Court judges against the government policies of neo-liberalism and counter-terrorism and their contradiction by eminent people.

But these judgements must have been silently hailed by the dumb masses and are definitely appreciated by intellectuals sympathetic to these masses. '*The Mainstream*', a reputed weekly founded by Nikhil Chakravarty, commented in its editorial of July 9 issue, that "those who are well aware of the ground realities and whose vision is not blurred by the machinations of vested interests, have no hesitation in conveying their whole-hearted endorsement of such rulings which definitely help in restoring the concepts of a welfare state and justice for all in equal measure.

Nandani Sundar, a Delhi University scholar, on whose petition (along with co-petitioners) the judgement relating to Salva Judum was given, called this judgement

against the institutionalisation of the policing paradigm (*Indian Express* July 22). She described this judgement, as continued views of the Supreme Court which has observed in 2008: "You cannot give arms to somebody (a civilian) and allow him to kill. You will be an abettor of the offence under section 302 of the Indian Penal Code." The article further says that if the government succeeds in review petition, the court will be going back on the collective wisdom of at least 10 judges who have heard this matter at one time or the other. Endorsement of the judgement appointing Special Investigating Team to supervise the black money operations, has also come from the former secretary and chairman of the TRAI, Nripendra Mishra who had given authentic detail of the black money in the foreign banks, in his article in Hindi Daily *Dainik Bhaskar* of July 22, 2011.

Happily, these two judgements, one against the corrupt state and the other against the brute state, have come at the moment when the needs of the two-third population of this country are being contemptuously ignored by the advocates of the one-third population benefited by the neo-liberal economic policies. The corporate regime, which is creating a new heaven for the one-third and new hell for the two-third of population, has only two things to give to the masses i.e. corruption and terror, and it has made the state an agency to deliver these two 'rewards' to them. It is but natural that the votaries of the corporate regime, react maliciously to these judgements, but these judgements will remain as memorable judgements in the history of our democracy, like the judgement of the Supreme Court of USA in the case

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Latest Lokpal Bill –Vital Changes Still Needed

Rajindar Sachar

The much awaited Cabinet approved Lok Pal Bill is no surprise. The decision to exclude the Prime Minister is maintained, notwithstanding the proclaimed stand of. Manmohan Singh,the Prime Minister since 2004, that he wants to be included, but has had to yield because of the cabinet decision. This surrender of one's conscientious opinion on a matter of vital public importance at the altar of petty considerations of party politics ill serves Prime Minister's reputation because in spite of all the scams in the present government. even his worst opponents preface their criticism by reiterating their faith in his personal integrity. His well wishers still hope that the Prime Minister will still assert himself and respect the sentiments of the masses than that of a small coterie for whom party is above the nation and principled politics secondary. Why should he be the whipping boy – let his successor when time comes face the people's wrath by suggesting a change.

The argument that if allegations of corruption against Prime Minister are allowed to be examined by Lokpal, it will prejudicially affect the working of the government is a non-starter. Bofors scandal was not about the quality of guns purchased, but the pay off received in lieu thereof. Similarly Kargil coffins scandal was not about the quality of the product but about the alleged pay offs. The tragic-comic provision that the Prime Minister will be covered after he demits office is like bolting the stable after the horses have run away. Can there be more callous absurdity in public life than a corrupt Prime Minister continuing in office with immunity. If the decision on Prime Minister's exclusion is not modified, a veritable storm will ensue.

Keeping judiciary out may be acceptable provided simultaneously legislation like Judicial Standards and Accountability Bill and other connected Bills are similarly brought in legislation. One may call this legislation as Lokpal (Judiciary).

Members of Parliament are putting their case for exclusion from the Lokpal Bill by seeking cover under Article 105 of the Constitution, and for this they apparently have some marginal support from the widely criticized majority judgment of (3 against 2) in Narsimma Rao case (1999). It may apparently be technically correct but it is certainly morally reprehensible conduct and cannot certainly be pleaded by MPs to be excluded from the jurisdiction of Loppal.

The minority Judgment very apply pointed out the absurdity of the argument that Article 105(2) exempts the legislator from being convicted on a charge of taking bribes and observed that this interpretation could lead to charter for corruption so as to elevate Members of Parliament as "super-citizens, immune from criminal responsibility".

It would indeed be ironic if a claim for immunity from prosecution

founded on the need to ensure the independence of Members of Parliament in exercising their right to speak or cast their vote in Parliament, could be put forward by a Member who has bartered away his independence by agreeing to speak or vote in a particular manner in lieu of illegal gratification that has been paid or promised. By claiming the immunity such a Member would only be seeking a licence to indulge in such corrupt conduct.

In other countries such a conduct of MPs is treated as criminal. Thus as far back as 1875 Australian Courts have taken the view that an attempt to bribe a member of the legislature assembly in order to influence his vote was a criminal offence and that there is no difference at paying money to Member of Parliament to use his vote in a particular manner and paying him money for the said purpose outside parliament.

The exemption of MPs from the ambit of Lokpal would make a mockery of the legislation – public already has a low opinion of legislators. Their criminal antecedents already cast a doubt on their honest working.

Amazing that the Cabinet did not heed even the pain and anguish of Vice President of India who speaking at All India Whips' conference gave warning of danger in public life thus; "Most important issue of concern today is the decreasing credibility of our legislatures as effective institutions capable of delivering public good and contributing effective formulation of laws". "Exactly 23 percent of MPs elected in 2004 had criminal cases registered against them – over half of these cases could lead to imprisonment of five years or more. The situation is worse in the case of MLAs," failing to discharge its two fold brief, legislate and deliberate, and that the country's top lawmaking body had fallen short of people's expectations."

The cynicism of political parties is shown by the facts that in spite of this warning in recent state elections which show another trend to criminal nexus in elections, thus of 824 newly elected MLAs of recent elections in the States a total of 257 have criminal cases pending against them.

In view of the above one expects sensitivity of legislators that they should take steps to seek the Amendment of Article 105 of our Constitution. I have one more suggestion. As is well known the politicalization of criminal is a stark and dangerous reality. Even in Parliament there are nearly over 100 MPs. having criminal cases pending against them. There has been demand that tainted persons should not be allowed to contest elections. I feel that the law of Lokpal should provide that whenever Lokpal takes a decision, after having the matter investigated that the legislator has to be prosecuted for his misdemeanor, he should be deemed to be ineligible to continue as legislator till he is proved innocent.

A serious flaw in Government Bill is the denial of power to Lokpal to prosecute those accused of corruption. This is totally unacceptable. No self-respecting person will agree to be on Lokpal body if his decisions are subject to control by Government.

If all parties could simultaneously agree to provide a strong Lok Ayukat, much criticism of the lower officials not being included under Lokpal will disappear. (Personally I myself feel that extending jurisdiction of Lokpal right from the lowest official may hinder expeditious working of Lokpal) – Lok Ayukat should be able to do so. But in this BJP would have to come in open because Modi is resisting constituting Lok Ayukat at Gujarat for the last nione years.

The power for removal of a Lokpal should be vested in the 7-Judge Bench of the Supreme Court of India.

The Government should not treat Lokpal Bill as a battle of people versus the Parliament, as some indiscrete remarks of some Ministers seem to suggest. The Government needs to be humble enough to recognize that power to take the ultimate decisions rests with the real sovereign under our Constitution – namely the people and not the temporary occupant government which remains subordinate to the people.

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of Brown vs Board of Education, which broke the colour bar in America.

Of course, the three wings of the state – legislature, executive and judiciary - are autonomous but they together are there to protect the state and if one or two fail to act in the interest of the state due to neglect or compulsion, the third must come forward to help them even if it means going beyond its jurisdiction. This was what Eart Warren's judgement did in USA and this is expected of our judiciary now. What else does the organic unity of the Constitution mean?