In Memoriam: Justice JS Verma's Contribution to the Development of Constitutional Law in India

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"I would rather be a conscientious lone dissenter than a troubled conformist"

– Justice Verma in *K. Veeraswami* v. *Union of India,* (1991) 3 SCC 655

Justice J.S. Verma's contribution to the march of the law, particularly constitutional law, is not only epochal but also unorthodox. The fact that he has, through his judgments, innovated and invented a new constitutional jurisprudence has had mixed reactions from jurists, scholars, lawyers, judges, and significantly from the government. In the last few days the government of India has chosen to introduce the 99th Amendment to the Constitution of India to provide for the Judicial Appointment Commission, a step clearly directed at undoing the judgment of in *Supreme Court AOR Association (SCAORA)* v. *Union of India*[1] of which Justice Verma was an integral part.

In *SCAORA* Justice Verma held[2] that the majority opinion in *S.P Gupta* v. *Union of India* insofar as it took the contrary view relating to the lack of primacy of the role of the Chief Justice of India in matters of appointments and transfers, did not lay down the correct law. Article 124(2) [and correspondingly Article 217(1) for the High Courts] was instead interpreted to mean that the opinion of the Chief Justice of India has primacy in the matter of all judicial appointments

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1 (1993) 4 SCC 441.

2 *Id.* at ¶486(14).

to the Supreme Court; and no appointment can be made by the President under this provision *unless it is in conformity with the final opinion of the Chief Justice of India.* However, while doing so, the Bench further held[3] as follows:

> "In matters relating to appointments in the Supreme Court, the opinion given by the Chief Justice of India in the consultative process has to be formed taking into account the views of the two senior most Judges of the Supreme Court. The Chief Justice of India is also expected to ascertain the views of the senior-most Judge of the Supreme Court whose opinion is likely to be significant in adjudging the suitability of the candidate, by reason of the fact that he has come from the same High Court, or otherwise. Article 124(2) is an indication that ascertainment of the views of some other Judges of the Supreme Court is requisite. The object underlying Article 124 (2) is achieved in this manner as the Chief Justice of India consults them for the formation of his opinion. This provision in Article 124 (2) is the basis for the existing convention which requires the Chief Justice of India to consult some Judges of the Supreme Court before making his recommendation. *This ensures that the opinion of the Chief Justice of India is not merely his individual opinion, but an opinion formed collectively by a body of men at the apex level in the judiciary.*" (Emphasis supplied.)

Critics would argue that the judgment in *SCOARA* rewrote the law, introduced language that did not exist in the legal provision and thereby overreached the judicial process of interpretation of the plain letter of the law. However, the contrarians would argue (perhaps with

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3 *Id.* at 478.

greater force) that the judgment restored the independence of the judiciary, freeing it from the ominous control of the executive, which had caused some disturbing precedents of very fine judges being superseded for reasons other than merit. More significantly, the judgment conceded the scope for abuse (actual or perceived) by the CJI acting by himself and introduced the concept of the 'collegium' that would act together in rendering binding advice of the government. The framework introduced was as follows:[4]

> "In matters relating to appointments in the High Courts, the Chief Justice of India is expected to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the views of one or more senior Judges of that High Court whose opinion, according to the Chief Justice of India, is likely to be significant in the formation of his opinion. The opinion of the Chief Justice of the High Court would be entitled to the greatest weight, and the opinion of the other functionaries involved must be given due weight, in the formation of the opinion of the Chief Justice of India. The opinion of the Chief Justice of the High Court must be formed after ascertaining the views of at least the two senior most Judges of the High Court."

The fact that the collegium system is seen to have failed in practice is hardly a fault of the judgment itself. The *manner* in which the system has been worked may have let down the ideal that was espoused in the judgment. One can scarcely detract from the spirit (and historical context) behind the decision. More so, one must do well

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4 *Id.*

to remember the further guidelines laid down in *SCOARA* to ensure fulfillment of this ideal. The judgment further provides thus:

> "The Chief Justice of India, for the formation of his opinion, has to *adopt a course which would enable him to discharge his duty objectively to select the best available persons* as Judges of the Supreme Court and the High Courts. The ascertainment of the opinion of the other Judges by the Chief Justice of India and the Chief Justice of the High Court, and the expression of their opinion, *must be in writing* to avoid any ambiguity." (Emphasis supplied.)

The onus was therefore clearly on the successors of Justice Verma to live up to this ideal. The judgment, if nothing else, tremendously raised the bar for the honourable judges to act with precision and commitment not only on the judicial side, but equally, on the *administrative* side. This can scarcely be underplayed in a Constitutional republic such as ours where the constitution is only as good as the people who administer it.

Justice Verma's approach to situations where law was inchoate was best reflected by his views in *Nilbati Behara (Smt) Lalita Behera (Through the Supreme Court Legal Aid Committee)* v. *State of Orissa and Others*[5]:

> "[I]n the *Bhagalpur Blinding cases: Khatri (II)* v. *State of Bihar* and *Khatri (IV)* v. *State of Bihar* .... it was said that the court is not helpless to grant relief in a case of violation of the right to life and personal liberty, and it should be prepared "***to forge new tools and devise new remedies***" for the purpose of vindicating

[5] (1993) 2 SCC 746, at ¶19.

> these precious fundamental rights. It was also indicated that the procedure suitable in the facts of the case must be adopted for conducting the inquiry, needed to ascertain the necessary facts, for granting the relief, as the available mode of redress, for enforcement of the guaranteed fundamental rights. More recently in *Union Carbide Corpn.* v. *Union of India* Misra, CJ, stated that 'we have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with the unusual situation which has arisen and which is likely to arise in the future...there is no reason why we should hesitate to evolve such principle of liability ...'"

This propensity to "forge new tools and devise new remedies" enabled Justice Verma to push the contours of the law in many of his judgments dealing with the protection, enforcement and in some senses, the *creation* of the rights of the citizens. In doing so, reference was also placed on Article 9 (5) of the International Covenant on Civil and Political Rights, 1966 to indicate that "an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right."

It was no coincidence that he also referred to the observations of Justice M.N. Venkatachaliah (as he then was) in the *Bhopal Gas case* that "the court is not helpless and the wide powers given to this Court by Article 32, which itself is a fundamental right, imposes a constitutional obligation on this Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. The power available to this Court

under Article 142 is also an enabling provision in this behalf."[6] Justice Verma regarded Justice Venkatachaliah as his soul-mate, on and off the Bench, a sentiment that was warmly reciprocated by the latter. Together, they forged a formidable partnership that furthered the enforcement of human rights and the development of a new constitutional jurisprudence of the Supreme Court of India.

These "new tools and new remedies" sharply came to light in *Vishaka & Ors.* v. *State of Rajasthan &Ors.*,[7] where the Supreme Court laid down binding guidelines to deal with the recurring menace of sexual harassment at the workplace. In doing so, Justice Verma held thus:[8]

> "In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. *Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.* This is implicit from Article 51 (c) and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in the Seventh Schedule of

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6 *Nilabati Behara,* at ¶20.
7 (1997) 6 SCC 241.
8 *Id.* at ¶7.

> the Constitution. *Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till Parliament enacts legislation to expressly provide measures needed to curb the evil.*" (Emphasis supplied)

The canons of international conventions not incompatible with chapter III of the Constitution of India were read into the constitutional scheme – a giant leap for our jurisprudence (though not new). More subtly, the approach to a situation where there was *no* domestic law in place was filled by judicial dicta by relying on the fact that the executive too had failed to act under Article 73 in the absence of legislation. No doubt, Courts cannot and do not legislate *per se*. But this novel approach relying on the inaction of the executive to justify judicial intervention *till such time a legislation or executive order was passed* was astute and far-reaching. It acts, even today, as a *Brahmastra* for the Supreme Court to combine with its sweeping powers under Articles 141 and 142 to fill a legislative void, provided of course, fundamental rights are at threat.

This method was further applied in *Vineet Narain and Others* v. *Union of India and Others*[9] wherein it was reiterated that there are ample powers conferred by Article 32 read with Article 142 to make orders *which have the effect of law* by virtue of Article 141 and "there is mandate to all authorities to act in aid of the orders of [the Supreme] Court as provided in Article 144 of the Constitution." The said power could be exercised "by issuing necessary directions to fill the vacuum

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9 AIR 1998 SC 889.

till such time the legislature steps in to cover the gap *or the executive discharges its role.*"[10] (Emphasis supplied)

Consequently the judgment issued a series of directions with respect to the manner in which the Central Vigilance Commission (CVC) and the Central Bureau of Investigation (CBI) are to function in the matter of achieving transparency and efficacy in investigation. The striking aspect in this decision is the minute attention to detail in the matter of laying down binding qualifications with respect to the functioning, term and tenure of senior officers, and other aspects relating to the effective investigation by the CBI. Many of these minutia are such that they make one wonder as to whether these are fully within the expertise of the courts. But the fact remains that such directions have been issued till such time legislature or the executive steps in to substitute them by appropriate legislation or notification as the case may be. The greater motivation (and therefore the justification) is to uphold and implement the rule of law and the fundamental rights of the citizens envisaged there under. The fact that the Central Vigilance Commission Act came to be passed in 2005, and the fact that the CBI itself has now filed an affidavit before the Supreme Court in the ongoing coal scam case pleading for freedom from the clutches of the bureaucracy, underscore the need for a legal framework that was foreseen by the judgment of the Supreme Court.

(The concept of a 'continuing *Mandamus*' applied in this case also enables the Constitutional courts to oversee the due implementation of their directions, and has been frequently invoked by successive judgments of the Supreme Court.)

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10 *Id.* at ¶51.

A subsequent decision in *Naga People's Movement of Human Rights* v. *Union of India*[11] referred loosely as the *AFSPA* case, too deployed this technique in a lesser degree in holding that[12] "While exercising the powers conferred under clauses (a) to (d) of Section 4 the officers of the armed forces shall strictly follow the instructions contained in the list of "Dos and Don'ts" issued by the army authorities which are binding and any disregard to the said instructions would entail suitable action under the Army Act, 1950" and further that "The instructions contained in the list of "Dos and Don'ts" *shall be suitably amended* so as to bring them in conformity with the guidelines contained in the decisions of this Court and to incorporate the safeguards that are contained in clauses (a) to (d) of Section 4 and 5 of the Central Act."[13]

Once more, by way of judicial interpretation, the statute was 'refined' by incorporation of guidelines issued by the Court and perhaps saved from the stigma of being in conflict with the chapter on fundamental rights in the Constitution of India.

End Note

The discomfiture of the government with the jurisprudence of Justice Verma does not stop with the proposed 99th Constitutional amendment. It is interesting to note that the judgment in *Prakash Singh and Others* v. *Union of India and Others*[14] relating to police reform, though rendered after the retirement of Justice Verma, relied squarely on his techniques of adjudication by holding that:[15]

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11 (1998) 2 SCC 109.
12 *Id.* at ¶74(19).
13 *Id.* at ¶20.
14 (2006) 8 SCC 1.
15 *Id.* at ¶30.

> "Article 32 read with Article 142 of the Constitution empowers this Court to issue [such] directions, as may be necessary for doing complete justice in any cause or matter. All authorities are mandated by Article 144 to act in aid of the orders passed by this Court. The decision in *Vineet Narain case* notes various decisions of this Court where guidelines and directions to be observed were issued i*n the absence of legislation and implemented till the legislatures pass appropriate legislations.*" (Emphasis supplied)

Accordingly, the Court hoped that the preparation of a model Police Act/s by the Centre and the States would provide for the composition of the State Security Commission and "wholly insulate" the police from political pressure so that the rights of the citizens under the Constitution are secured. However the Court held further thus: "*It is not possible or proper to leave this matter only with an expression of this hope and to await developments further. It is essential to lay down guidelines to be operative till the new legislation is enacted by the State Governments.*" (Emphasis supplied.)

This could so easily be mistaken to be a judgment of Justice Verma's – for its intent and effect. However, the governments of Maharashtra, Andhra Pradesh and Uttar Pradesh have recently, seven years after this judgment, made a submission before the Supreme Court in follow-up proceedings to the effect that the said directions in *Prakash Singh* were an "encroachment on the executive's function", outside the seisin of the Supreme Court and thereby "unconstitutional".

Both these reactions aforesaid (the 99th Amendment Bill and the stand of the three state governments), albeit belated, demonstrate the

far-reaching effects of several judgments of Justice Verma and the fact that they remain a sore point in the interface between the judiciary and the political establishment.

Such sweeping innovation and interpretation to quasi-legislate in the absence of law is ironical coming from Justice Verma who, while dissenting in *Veeraswami*, had held in no uncertain terms that:[16]

> "May be, need is now felt for a law providing for trial and punishment of a superior Judge who is charged with the criminal misconduct of corruption by abuse of his office. If that be so, the Parliament being the sole arbiter, *it is for the Parliament to step in and enact suitable legislation in consonance with the constitutional scheme which provides for preservation of the independence of judiciary and it is not for this Court to expand the field of operation of the existing law to covering the superior Judges by* ***usurping*** *the legislative function of enacting guidelines to be read in the existing law by implication*, since without the proposed guidelines the existing legislation cannot apply to them. Such an exercise by the court does not amount to construing an ambiguous provision to advance the object of its enactment, but *would be an act of trenching upon a virgin field of legislation* and bringing within the ambit of the existing legislation a category of persons outside it, to whom it was not intended to apply either as initially enacted or when amended later" (Emphasis supplied)

Was it that this judgment dealt with an existing legislation as opposed to the *absence* of legislation altogether? Or was it that His Lordship had a change in bent of mind afterwards?

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16 *Veeraswami*, at ¶74(19).

Regardless, the later *avatar* of Justice Verma surely did more to espouse the vibrant growth of constitutionalism in India. He was a "conscientious dissenter" in that he was happy to take a view that was not orthodox, happy to unsettle some conventional methods of adjudication and happy to push the contours of the law. Some would grumble that in so doing, he 'stretched' the law. But then, when the larger good of many depends on the interpretation of the law, the law would rather be stretched than curbed.