THE CONSTITUTION AND INDIVIDUAL RIGHTS: A COMMENT ON DR. ABHISHEK SINGHVI'S *INDIA'S CONSTITUTION AND INDIVIDUAL RIGHTS: DIVERSE PERSPECTIVES*

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Dr. Abhishek Singhvi's article, "India's Constitution and Individual Rights: Diverse Perspectives," provides an instructive survey of the status of individual rights in India, as specified and guaranteed by the Indian Constitution, and specifically through the articles in the constitution that set out the "Fundamental Rights." He notes the shifting balance between the demands of acting in the public interest and upholding individual rights and claims that, as "a general trend," the judiciary generally has struck the correct balance.[1] Like others, Singhvi laments what he calls the "chasm" between the charter of rights set out in the constitution and what he terms their enforcement—"the sustained striving to operationalize them, in real actualisation terms."[2]

Overall, the Indian Constitution has certainly been a vital anchor for individual democratic freedoms. Since the constitution has its primary enforcer in the form of the judiciary, it may be helpful to provide a little political context. I will therefore focus my remarks around the two issues noted above—namely, the "balancing" of the public good and individual rights and the gap between specified rights and their achievements. Before I go any further, however, I should make clear that I write here not as a trained lawyer, nor as a scholarly expert in constitutional law. I approach such questions from an interest in political theory and in India's democratic practice.[3]

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1. Abhishek Singhvi, *India's Constitution and Individual Rights: Diverse Perspectives*, 41 GEO. WASH. INT'L L. REV. 327, 328 (2009).

2. *Id.*

3. My remarks are much influenced by, and in line with, the analysis developed by Pratap Bhanu Mehta. I owe much to my personal conversations with him, his numerous writings in the Indian press, and his forthcoming work on religion and law. My sense of these issues also owes much to conversations with Vikram Raghavan.

Singhvi's text conveys an overly optimistic sense of the status and progress of fundamental individual rights in India and of how the relationship between the legislature and the judiciary works toward upholding those rights. The central issue in that relationship focuses on which branch bears the responsibility and possesses the authority to enforce such rights, and where that authority originates. In what follows, I will not enumerate all the ways and instances whereby rights are restricted and suppressed, either by the Indian state or by members of the society acting against one another. That is, I do not want to dwell on the many and real socioeconomic constraints facing Indians in their pursuit of individual well-being through the acquisition and exercise of their rights.

Instead, I will focus on the general predicament of Indian constitutionalism and its fraught relationship to democratic electoral politics. This requires discussing the basic arrangements concerning the guarantors of rights in the Indian polity, which shifts focus away from the constitutional text, and the jurisprudence immediately surrounding it, to the context whereby claims about rights are identified, lexically ordered, and traded-off or balanced. The fundamental issue at stake is irremediably, profoundly political: where, ultimately, do decision-making powers over such matters lie? Who decides how to balance definitions of the public good or interest or security and individual rights? Does this power ultimately lie with the elected representatives of the Indian people and those who speak in its name? On the contrary, does this power lie with the most senior judges on the Supreme Court, who are non-elected, fiercely protective of the procedures whereby they are appointed, and have come to view themselves as charged with the mission of advancing the Indian project?

This conflict of authorities has now become quite central in contemporary India and has had consequences for individual rights. How and why has this issue—which is inherent in any system of limited government, based on the separation of powers—come to acquire such an edge in India today?

The background story is fairly known. During the Nehru period, there was plenty of sparring between parliament and the judiciary about their respective powers and their demarcation; indeed, there were some acute confrontations. These were routine contests between the two branches (with probably, on balance, more deference shown by the judiciary to the legislative branch). I call these routine because there was some broadly shared conception of the

public good both across the polity at large and across the branches of government. The judiciary and the other branches, though they could be at loggerheads, were both seen as engaged in legitimate disagreement over how best to achieve what was a shared conception of public good. The first really forceful effort by the judiciary to assert its own independent authority vis-à-vis fundamental rights, was Golaknath (1967), followed some years later by the remarkable exposition of the "basic structure" doctrine (based on the German Constitutionalist Dieter Conrad's conceptual reading), which extended the scope of judicial review.

Such activism can be seen as early responses to unease about claims to popular sovereignty in the post-Nehru—claims that were supposed to underpin and legitimate a redefinition of the public good. That unease became full-blown by the early 1970s when Mrs. Indira Gandhi, invoking her popularity and electoral mandates, sought to establish a populist and collectivist definition of the public good. After the wholesale but temporary hijacking of the constitution during the Emergency period in the mid-1970s (in the name of this new specification of the public interest), the court reacted still more vigorously against the legislative and executive branches. It developed a number of formulations that enlarged the scope of its own authority in relation to Parliament. Even more significantly, the court also began, now with greater confidence, to offer its own, independent conception of just where the public interest really lay—which was often opposed to that advanced by the other branches.

Such expansion of judicial authority, especially in the normative domain, has continued, even as the character and texture of Indian parliament and government has undergone radical transformation since the end of the 1980s. Central to that transformation has been a move away from strong governments in the hands of leaders who could notionally discipline parliamentary support, to precarious governments dependent upon fragile and often obstructive coalitions. One consequence of weak parliaments has been an alarming disregard for legislative procedure, as shown by the executive's massive increase in using ordinances and by the bypassing of debate over crucial legislation concerning rights (in recent sessions of parliament, numerous bills have been passed without any debate at all).

The self-acquisition of powers by the court has accelerated in recent years. Singhvi himself notes various recent judgments (for

example, *Ashoka Kumar Thakur v. Union of India*[4]), which seek to transform the Directive Principles of State Policy—that expansive, benign, but also mostly incoherent set of expressions of intent that are lodged as Part IV of the Indian Constitution—into rights justiciable in the courts. The court has taken this view even though Article 37 of the constitution quite transparently states that none of the Directive Principles can be enforced in court and that their function is simply to orient the State, who must "apply these principles in making laws."[5] That is to say, they must guide the legislative arm, not the judiciary. Recent governments have sought to give effect to these Directive provisions—the earlier National Democratic Alliance (NDA) government (1999-2004) with legislation on the right to education, the current United Progressive Alliance (UPA) government (2004-present) with more tentative legislation that addresses (though does not enact) the right to work. The court, however, as Singhvi notes, has taken the view that Directive Principles are "co-equal" with fundamental rights, which suggests an alarming expansion of the court's powers, one that could presage a transformation of its powers and identity into a legislative agency. Equally, the scope of judicial review has steadily expanded to encompass not just amendments and fundamental rights, but legislation across a range of issues, some quite vague and subject to highly discretionary political definition. The court has taken upon itself the role of defining a range of political values and ends.

What is driving this is a self-conscious sense among the judiciary that it must engage in a more active role at a moment when it senses a legislative vacuum—a point that has been made forcefully by the constitutional scholar Arun Thiruvengadam.[6] Now, it also happens to be the case that someone like myself might in many respects agree with and support the particular efforts by the courts to extend definitions of the public interest and to insist upon some of the many developmental goals that the Indian state set itself at its founding as an independent sovereign entity.

There are reasons based on principle and pragmatic politics, however, to be wary of the expansion of judicial power and of its consequences for individual rights. What we are seeing being enacted is a fair-weather view of constitutionalism, and this may not

4. Ashoka Kumar Thakur v. Union of India, (2008) 6 S.C.C. 1.

5. India Const. art. 37.

6. *See generally* Arun Thiruvengadam, Evaluating Contemporary Criticisms of "Public Interest Litigation": A Progressive Conception of the Role of a Judge (forthcoming 2009).

necessarily be the most reliable or trustworthy way of determining how to protect rights and of entrenching a broader "culture" of individual rights. What we are seeing can be described as a drift from a "court of law" to a "court of justice."[7]

Indian politics today is characterized by an absence of any agreed specification of the common good. One indication of such absence of a shared definition of the public interest or common good is in the current crisis of political representation in India. This crisis is demonstrated in numerous ways; for instance, the long-term decline of national parties (in the most recent, May 2009 general election, while the Congress Party managed to reverse its electoral decline, the two main national parties, the Bharatiya Janata Party and Congress, together gained less than 50 percent of the national vote), sharp ideological divides (between parties of the left and right, between those committed to secular principles and advocates of Hindutva, and between India's many regional parties and its national ones), and the decline of political parties as a means to concentrate and sustain political will. Indian democracy faces the absence of any mechanisms to bring together into a coherent form a representative political will, which speaks of a crisis of and in political representation. In a fragmented polity, neither particular parties nor their leaders, nor even parliament as a whole, can claim the mandate of popular sovereignty. This makes it very hard to sustain the claims of those who would defend a putative common good and decide in its name.

This is the political context in which the judiciary today seeks to legitimate its authority as it stretches forward its domain. Now, such active conflict between the courts and the legislative or executive branches is hardly a predicament that is specific to India. This describes the situation in the United States, in many European democracies, and in South Africa. In each case, courts have been significant actors in the rising prominence of non-elected authorities. So, one comparative question immediately presents itself: what are the general processes that might explain this pattern of conflict between courts and elected parliaments? What, on the other hand, are the particular elements that make these conflicts contextual and specific to different national conditions? There is also a directly political question, particular to each state and jurisdiction: what is the precise role of the court in the task of guaranteeing constitutionally-specified rights?

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7. Shubhankar Dam, *A Court of Law and Not of Justice—Is the Indian Supreme Court Beyond the Indian Constitution?*, PUB. L., Summer 2005, at 239.

Recently, in developing further what was always a relatively expansionist conception of their role, the Indian courts have been quite deft in how they have sought to sustain their legitimacy. One has in many ways to commend their balletic skills in negotiating the constitutional text, the broader political circumstances, and their own conception of their mission and role. The judiciary has kept on the right side both of elected legislatures, and of the broader popular opinion; establishing what Pratap Mehta has called a "modus vivendi"—reasoning not by first principles or using intentionalist constructions, but acting more like a meditational entity, making full use of delay and deferral to draw fire from highly contentious subjects. This has made for a decidedly more consequentialist form of reasoning, which is not a perspective that is at all reliably associated with defending individual rights.

Returning to Singhvi's paper, there are, therefore, reasons to be concerned about the progress of entrenchment of individual rights in India. Singhvi seems comfortable with a view that has been described as "government by judiciary," which is a belief in the persistently benign operations of the court. I am much less comfortable with this view. It opens up a realm of uncertainty regarding individual rights, introduces too high of a degree of discretion in the courts' safeguarding, and makes individual rights too much like feathers in whichever political winds happen to be blowing. A perfect instance of this uncertainty is the damage that has been done to individual rights of free expression, repeatedly curtailed in recent years on the grounds of causing offense to sentiments. The uncertainty is also shown by the threat to individual freedom as embodied in the Indian State's extraordinary powers of preventive detention.

The conflict of authorities—judicial, legislative, executive—which today is the central drama of Indian constitutionalism, is not, in this instance, a routine one, as it may have been in the first two decades after independence. Rather, it is a conflict that is becoming more critical in nature. How it is contained or resolved will determine the status and progress of the individual rights of the citizenry of the world's largest, most unusual democracy.