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VIVIAN BOSE AND THE LIVING CONSTITUTION : A TRIBUTE

*Suchindran B.N.**

Blackstone memorably defined a judge as a 'living oracle of the law'. What he referred to was the onerous and sacred charge given to every judge- to ensure the timelessness of the law; to make sure that the law is able to adapt and meet the varied requirements of a changing society. Under our constitutional scheme, a High Court or Supreme Court judge is the Constitution's voice against any arbitrary, illegal and hasty actions of the legislature or the executive. Come to think of it, a judge is that rare employee whose duty it is to circumscribe her employer's powers, duties, and rights. That charge cannot be fulfilled by obedience or subservience, but by them being true to themselves and the document to which they are oath bound to protect. To them, the government and citizen are alike – parties with a dispute to be resolved with the even and equal hand of dispassionate justice. In our little over 60 years of history as a republic, there are many who have served the office of a judge with distinction and fearlessness. But, even amongst this gathering of the august, some names stand out. Vivian Bose is one such.

In the essay that follows, I have tried to analyse Vivian Bose's attitude to constitutional adjudication – his liberalism, and his unique brand of 'activism'. I have quoted extensively from his judicial statements – more than is probably permitted in an analysis of this kind. But for this I make no apology for, apart from his catholicity and clarity of thought, it is in the felicity of his expression that Bose[*] remains unsurpassed by any other Supreme Court judge – past or present. M.C. Setalvad[1] tells us that Chief Justice Patanjali Sastri had himself told him that whenever the judges wanted to put forward their views in elegant language, the task was entrusted to Justice Bose.[2] His indelible 'footprints', speaking in dissent or for the majority, adorn the law reports and reflect his precision, intellectual integrity, honesty and unfailing courtesy. His constitutional judgements mark jurisprudential pathways paved with original thought, creativity,

* Advocate, Madras, High Court. The author is indebted to Arvind P. Datar, V. Niranjan, and Malavika Raghavan for their comments and editorial assistance. In this essay, I have in most places, referred to 'Mr. Justice Bose' by name as 'Bose' unless I have wished to place emphasis on his judicial character. I do this not out of disrespect, but for the sake of continuity in the narrative.

1 First Attorney General of India.

sustainable innovation and an abiding passion for justice.

As a judge and later Chief Justice of the Nagpur High Court, Bose J. had already acquired a reputation for being a 'lover of liberty.'[3] In 1951, he was the first judge to be elevated (along with Chandrashekar Aiyar J.) after the creation of the Supreme Court. He was (as is argued in this article) the first 'activist' judge of the court. But the discerning feature was that he was no knight errant of the law – doing away with strict legalism only when he could forge new ground and lay down sound judicial principles – believing, above all that a judge's highest duty is to do justice through the rule of law.

Constitutional Interpretation

Bose viewed the Constitution with great sanctity and would not be a party to any narrow interpretation of the great rights. Time and time again, often unsuccessfully, he exhorted his brothers to view the fundamental document armed with a liberal spirit. He constantly reminded them that they were beginning with a new and blank Constitution into which they were asked to breathe life and energy. He stated his own view of this judicial function thus:

> *I am not advocating sudden and wild departure from doctrines and precedents that have been finally settled but I do contend that we, the highest Court in the land giving final form and shape to the laws of this country, should administer them with the same breadth of vision and understanding of the needs of the times...The underlying principles of justice have not changed but the complex pattern of life that is never static requires a fresher outlook and a timely and vigorous moulding of old principles to suit new conditions and ideas and ideals. It is true that the Courts do not legislate but it is not true that they do not would* (sic) *and make the law in their processes of interpretation.*[4]

His education in the black letter law tradition did not prevent him from suggesting that our Constitution was a sovereign document which need not follow those that had come before it, and had to be adapted to the unique Indian climate and ethos. In the same judgment, after referring to the law and practice in other countries, he explained:

2 M.C. Setalvad, *My life: Law and Other Things, (1970),* at page 165.
3 M.C. Setalvad, *My life: Law and Other Things, (1970),* at page 165.
4 *K.S. Srinivasan v. Union of India,* AIR 1958 SC 419.

> *I make no apology for turning to older democracies and drawing inspiration from them, for though our law is an amalgam drawn from many sources, its firmest foundations are rooted in the freedoms of other lands where men are free in the democratic sense of the term. England has no fundamental rights as such and its Parliament is supreme but the liberty of the subject is guarded there as jealously as the supremacy of Parliament.*[5]

In *Dwarkadas Shrinivas v. Sholapur Spg. and Wvg. Co.*[6], a case arising out of a challenge to the Sholapur Spinning & Weaving Company (Emergency Provisions) Ordinance, 1950, Mahajan J., speaking for the Court, held that the majority judgement in *Chiranjit Lal Chowdhuri* v. *Union of India*[7] was not applicable, with the consequence that the plaintiff could challenge the constitutionality of the Ordinance because the effect of the legislation was that the plaintiff and the company were left with the "mere husk of title." Bose J. had added a valuable word of caution that has been, unfortunately, subsequently ignored by the Courts:

> *With the utmost respect I deprecate, as I have done in previous cases, the use of doubtful words like "police power", "social control", "eminent domain" and the like. I say doubtful, not because they are devoid of meaning but because they have different shades of meaning in different countries and because they represent powers which spring from widely differing sources. In my opinion, it is wrong to assume that these powers are inherent in the State in India and then to see how far the Constitution regulates and fits in with them.* ***We have to interpret the plain provisions of the Constitution and it is for jurists and students of law, not for Judges, to see whether our Constitution also provides for these powers*** *(emphasis supplied) and it is for them to determine whether the shape which they take in India resemble any of the varying forms which they assume in other countries.*[8]

But this was not mere patriotic grandstanding because he never hesitated to take the aid of authorities from those countries where

5 *K.S. Srinivasan v. Union of India*, AIR 1958 SC 419.
6 AIR 1954 SC 119.
7 AIR 1951 SC 41.
8 AIR 1954 SC 119.

general principles could be adapted and adopted. He never shirked a precedent, and whether he followed it or distinguished it he always stated his reasons for doing so.[9] Application of mind is as important for a judge of the Supreme Court, as it was for the administrative authorities over whom they exercised supervision under their extraordinary jurisdiction.

Liberty – Defined and Liberated

Bose understood the true nature of the Constitution – as a charter of power granted by liberty and the people and not a charter of liberty granted by power. The duty of the Court was to see that the rights maintained their liberal and fundamental outlook, and that fullest scope was given to the rights under Articles 19, 21, and 22. He often reminded the Court that it was the rights that were fundamental and not the fetters and limitations imposed in the necessary guise of 'reasonable restrictions'. Any doubts in the interpretation of these provisions must be resolved, he insisted, in favour of the subject and not the State. His approach to constitutional interpretation is best described in his own words:

> *Brush aside for a moment the pettifogging of the law and forget for the nonce all the learned disputations about this and that, and "and" or "or", or "may" and "must". Look past the mere verbiage of the words and penetrate deep into the heart and spirit of the Constitution. What sort of State are we intended to be? Have we not here been given a way of life, the right to individual freedom, the utmost the State can confer in that respect consistent with its own safety? Is not the sanctity of the individual recognised and emphasised again and again? Is not our Constitution in violent contrast to those of States where the State is everything and the individual but a slave or a serf to serve the will of those who for the time being wield almost absolute power? I have no doubts on this score. I hold it therefore to be our duty, when there is ambiguity or doubt about the construction of any clause in this chapter on fundamental rights, to resolve it in favour of the freedoms*

9 The length to which he would go can be seen in the instance related by Justice Hidayattullah, when he had cited a French precedent before him, admitting that the all the ones in English went against him. Bose immediately called for a translation and Hidayatullah won the case. Justice Hidayatulluah honestly admits that "No other judge would have looked into those authorities. Vivian's passion for justice was my asset."

> *which have been so solemnly stressed.....Read the provisions which circumscribe the powers of Parliament and prevent it from being supreme. What does it all add up to? How can it be doubted that the stress throughout is on the freedoms conferred and that the limitations placed on them are but regrettable necessities?*[10]

The people of India, as he put it, through their constituent assembly "hammered out solemnly and deliberately after the most mature consideration and with the most anxious care" and fashioned a document that was not a "cold, lifeless, inert mass of malleable clay but created a living organism, breathed life into it and endowed it with purpose and vigour so that it should grow healthily and sturdily in the democratic way of life, which is the free way."[11] To Bose, the Constitution was a:

> *...frame-work of government written for men of fundamentally differing opinions and written as much for the future as the present. They are not just pages from a text book but form the means of ordering the life of a progressive people. There is consequently grave danger in endeavouring to confine them in watertight compartments made up of ready-made generalisations like classification.*[12]

Sense of History

Bose had a keen sense of the moment and of the past that preceded it. He was acutely aware (more than many of his contemporary colleagues) of the place and time in the history of his nation that he was asked – as one of the judges of the highest Court - to exercise the judicial power of the state. He was also deeply aware of the trials and tribulations that had preceded the Constitution from which he derived his power. As he said:

> *I find it impossible to read these portions of the Constitution without regard to the background out of which they arose. I cannot blot out their history and omit from consideration the brooding spirit of the times. They are not just dull, lifeless words static and hide-bound as in some mummified manuscript, but, living flames intended to give life to a great*

10 *S. Krishnan v. State of Madras*, AIR 1951 SC 301 : 1951 SCR 621.
11 *S. Krishnan v. State of Madras*, AIR 1951 SC 301 : 1951 SCR 621.
12 *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75.

> *nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide the present. The Constitution must, in my judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs. I feel therefore that in each case judges must look straight into the heart of things and regard the facts of each case concretely much as a jury would do; and yet, not quite as a jury, for we are considering here a matter of law and not just one of fact: Do these "laws" which have been called in question offend a still greater law before which even they must bow?*[13]

Conscious that a people who forget their history are condemned to repeat it, he recalled and left for future generations of lawyers and judges, in law reports, the real price of our Constitution and why we should jealously guard it against the State (as the enemy within) as much as any other external enemy. As he said in the context of equality clause in Article 14:

> *They arose out of the fight for freedom in this land and are but the endeavour to compress into a few pregnant phrases some of the main attributes of a sovereign democratic republic as seen through Indian eyes. There was present to the collective mind of the Constituent Assembly, reflecting the mood of the peoples of India, the memory of grim trials by hastily constituted tribunals with novel forms of procedure set forth in ordinances promulgated in haste because of what was then felt to be the urgent necessities of the moment. Without casting the slightest reflection on the judges and the courts so constituted, the fact remains that when these tribunals were declared invalid and the same persons were retried in the ordinary courts, many were acquitted, many who had been sentenced to death were absolved. That was not the fault of the judges but of the imperfect tools with which they were compelled to work. The whole proceedings were repugnant to the peoples of this land and, to my mind, Article 14 is but a reflex of this mood.*[14]

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13 *State of West Bengal v. Anwar Ali Sarkar,* AIR 1952 SC 75.
14 *State of West Bengal v. Anwar Ali Sarkar,* AIR 1952 SC 75.

No finer tribute to the freedom struggle and the founding fathers exists in any other judicial pronouncement. He recognised a 'structure' in the Constitution of which democracy and the rule of law were the most basic constituents. Recognising that the price of liberty is eternal vigilance, he added in *Bidi Supply Co. v. Union of India:*

> *In a democracy functioning under the Rule of Law it is not enough to do justice or to do the right thing; justice must be seen to be done and a satisfaction and sense of security engendered in the minds of the people at large in place of a vague uneasiness that Star Chambers are arising in this land... There is no room for complacency, for in the absence of constant vigilance we run the risk of losing it. "It can happen here."*[15]

And it did happen here. The emergency gave us a glimpse of the price of complacency.

Preventive Detention

It was in cases relating to preventive detention that Justice Bose would display his genuine love of liberty and would propound a theory of constitutional interpretation that does credit to the best traditions of constitutionalism. In the Nagpur High Court itself, he had been known as a "grilling judge" in preventive detention cases.[16]

In *A.K. Gopalan v. State of Madras*[17], the Supreme Court had already by a narrow 3-2 majority delineated the relationship inter se the various rights under Part III and specifically in relation to Article 22 providing for preventive detention. The views of the majority and the 'constitutional status' given to preventive detention were best expressed by Patanjali Sastri J.:

> *This sinister looking feature, so strangely out of place in a democratic constitution which invest personal liberty with the sacrosanctity of a fundamental right and so incompatible with the premises of its preamble is doubtless designed to prevent an abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant republic.*[18]

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15 AIR 1956 SC 479.

16 M. Hidayatullah's beautiful tribute to Justice Vivian Bose in, M. Hidayatullah, A judge's miscellany (1972), at page 143.

17 *A.K. Gopalan v. Union of India*, AIR 1951 SC 27.

18 *Ibid.*

If a judge, who writes so well, praises the style and language of Vivian Bose, it is high praise indeed!

In *S. Krishnan v. State of Madras*[19], Bose would display (as the junior-most judge) his independence of mind, his forensic ability in differentiating *A.K. Gopalan*'s case, and his trademark narrative style of prose. The issue before the Court was whether the Preventive Detention (Amendment) Act, 1951 which authorised detention beyond the expiry of one year was *ultra vires* and inoperative on the touchstone of constitutionality. The majority held that it was not. Bose alone dissented 'ploughing a lonely furrow' holding that Article 22(4) conferred a fundamental right not to be kept beyond 3 months in preventive detention unless certain conditions are fulfilled and that no law can be made authorising detention under either clause 4(a) or (b) unless Parliament has itself exercised its power and prescribed a maximum period of detention under Clause 7(b). As he memorably put it, "Until the road is built, there is no right of way."

Bose believed that the Court must not construe those provisions in a manner that would whittle down those sacred rights, but should be conscious of the bitter struggle that preceded it and not allow them to be "curtailed by some accidental side wind which allows virtual delegation of the responsibility for fixing the maximum limits which Parliament is empowered to fix to some lesser authority, and worse, for fixing them ad hoc in each individual case, for that (*in my opinion*), is what actually happens, whatever the technical name, when Parliament fixes no maximum limit and lesser authorities are left free to decide in each case how long the individual should be detained." To hold otherwise would not only be a shirking of responsibility by the Parliament but an abdication of the Courts' responsibility to liberty.

On the question of whether these guarantees must be exercised in favour of the detenus who themselves did not harbour any allegiance to the Constitution, he answered memorably quoting Lord Justice Scrutton and Justice Oliver Wendell Homes that the true test of principles is to apply them to cases which would not normally have your sympathy – freedom of thought not for the those we agree with but for the thought we hate:

> *It is perhaps ironical that I should struggle to uphold these freedoms in favour of a class of persons who if rumour is to be*

19 AIR 1951 SC 301.

accredited and if the list of their activities furnished to us is a true guide, would be the first to destroy them if they but had the power. But I cannot allow personal predilections to sway my judgment of the Constitution.

The message was this: the constitutional guarantees need not be whittled down in fear of individuals for it is larger than the individuals who attempt to overthrow it. The greatest danger to the Constitution lies from the so called arguments of fear. These were the insecurities from which the guardians of the Constitution must protect insidiously without fear or favour for if they did not, governments slowly but surely would encroach on the fundamental rights – rights that the people had reserved for themselves. This is the inherent nature of power - and the judges of our Supreme Court were expected to understand this.

Legislative and Judicial Power: The Pragmatic Radical

Soon after his elevation to the Supreme Court, Justice Bose was part of a 7 judge full Court bench which heard a presidential reference seeking an advisory opinion under Article 143.[20] The opinion was sought on the constitutional validity of 3 provisions of laws (specially selected to reflect the three significant stages in India's constitutional development) i.e. legislative power under the Government of India Act, 1915, under the Government of India Act, 1935 as amended by the Indian Independence Act, 1947, and finally Parliament's legislative power under the Constitution. Kania C.J. and Mahajan J. held that all the three provisions were *ultra vires*. Fazl Ali J., Patanjali Sastri J. and Das J. held that all the provisions were *intra vires* the respective legislations. Mukherjea and Bose JJ. held that the provisions of the Delhi Laws Act, 1912 and the Ajmer-Mewar (Extension of laws) Act, 1947 were valid and constitutional. However, Section 2 of the Part C States (Laws) Act, 1950 was found to be of doubtful validity by both the judges (in separate opinions), finding that the concluding portion of the section empowering the central government to repeal and amend a provincial law in a Part C state, was *ultra vires* Parliament power.

The judgment of Bose reveals that he was acutely aware of the pragmatic reality of India and the solutions required for the nascent republic. Parliament was free to delegate, except in cases where the

20 *In re Delhi Laws Act, 1912*, AIR 1951 SC 332.

Constitution has expressly provided for and entitled the people of India to "the fruits of Parliament's own mature deliberation, to its patriotism, and to its collective wisdom."[21] Unlike the British Parliament, under the new Indian order, Parliament was not sovereign and was bound by the Constitution which gave it life.[22] His understanding of the importance of unsettling settled law and the importance of judicial discipline can be seen from the following passage:

> *I see no reason for extending the scope of legislative delegation beyond the confines which have been hallowed for so long. Had it not been for the fact that this sort of practice was blessed by the Privy Council as far back as 1878 and has been endorsed in a series of decisions ever since, and had it not been for the practical necessities of the case, I would have held all three Acts ultra vires.*

How much this went against his natural strain can be evidenced from the following excerpt:

> *I confess I am not enamoured of this kind of legislation. I do not like this shirking of responsibility, for, after all, the main function of a legislature is to legislate and not to leave that to others. Its primary duty is to weigh and consider the desirability or otherwise both of introducing new laws and of abolishing or modifying old ones in essential particulars. But, speaking judicially, I am unable to hold, in view of our past history and in view of the necessities of a modern State, that the matters I have set out above, subject to the limitations I have indicated, are beyond the competence of Parliament. I trust however, that these powers will be used sparingly both on grounds of principle as well as of practical expediency, for the experience of this case and the lessons of the past show only too clearly the risks involved. Legislation of this kind is liable to be called in question at any time and it is always a gamble which way the dice will fall.*[23] *This is the sort of case*

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21 AIR 1951 SC 332, at 437.

22 AIR 1951 SC 332, at 436.

23 Seervai took great exception to the last phrase of this sentence, without realizing that this was more a friendly warning to the legislature and manner of speech than an actual statement of judicial philosophy . It is also the prerogative of a final court to change its mind on such political questions faced with a similar law not necessitated with *bona fide* intention. The difference of opinion in the case under discussion itself – necessitating a

in which a stitch in time saves many nines.[24]

Parliaments, present and future, will do well to pay heed to his angst – for it is the angst of one who understands that all the three great institutions of the modern nation state must essentially be protected from within and cannot always be corrected from without if the essential balance is to be maintained. Like many great judges who preceded him, he busied himself with finding his own limitations and resisting the temptation to transgress.

Fair, Just and Legal

Bose was very aware that the season was one of change – when fundamental changes were required to be made in the social and political order. But he realised that his role was not be at the vanguard of that movement but to steer the horses and make sure they did not trample each other. For he realised, that if rules were bent for short term expediency, however laudable the motive in the first instance, power and its corrupting nature would always ensure that the subsequent exercise thereof might not always be as blemishless.

In a statesmanesque judgment in *Virendra Singh v. State of U.P.*, a precursor to the larger dispute that would engage the full court twenty years later in the Privy Purse case[25], he eloquently expressed the nobility of his station:

> *We have upon us the whole armour of the Constitution and walk from henceforth in its enlightened ways, wearing the breastplate of its protecting provisions and flashing the flaming sword of its inspiration.*[26]

The judgment was a gentle but firm reminder to the framers who manned the legislative and executive branches of the government that they should not, for the purpose of political expediency, act in a manner that will blemish the honour of the State.

separate opinion by every member of the bench – is evidentia of how such cases could be decided in the future. See H.M. Seervai, Commentary on the Constitutional Law of India: A Critical commentary, 4th edition, Vol. 3, page 2267. It is also interesting to note that before criticizing the statement, Seervai displayed his high regard for Bose by beginning the sentence with the words: "It is amazing that a judge of the high ability of Bose J. should knowingly prescribe a test which he likened to gambling by using dice."

24 AIR 1951 SC 332, at page 440.

25 *Madhav Rao Jivaji Rao Scindia v. Union of India,* (1971) 1 SCC 85 : AIR 1971 SC 530.

26 AIR 1954 SC 447.

He was still a strict legalist recognising that it was in the technicalities of the law that his primary tools of rendering justice lay. In *Harla v. State of Rajasthan,* where the legal validity of the Jaipur Opium Act, 1923 passed by a council of ministers (appointed by the British for the period of minority of the Maharaja) was challenged. The impugned Act had not been published in the Official Gazette as was required by law and was sought to be retrospectively validated 14 years after its original enactment, Bose held that:

> *The Council of Ministers which passed the Jaipur Opium Act was not a sovereign body nor did it function of its own right. It was brought into being by the Crown Representative, and the Jaipur Gazette Notification dated the 11th August, 1923, defined and limited its powers. We are entitled therefore to import into this matter consideration of the principles and notions of natural justice which underlie the British Constitution, for it is inconceivable that a representative of His Britannic Majesty could have contemplated the creation of a body which could wield powers so abhorrent to the fundamental principles of natural justice which all freedom loving peoples share. We hold that, in the absence of some specific law or custom to the contrary, a mere resolution of a Council of Ministers in the Jaipur State without further publication or promulgation would not be sufficient to make a law operative.*[27]

A man must know of the law by which he is sought to be punished and condemned. This proposition was traced not to any specific law but on a 'deeper rule that was founded on natural justice.' It was abhorrent to his sense of justice (derived legally by reference to British practice and also the Code Napoleon) that any person should be convicted on the basis of a law that was retrospectively validated but was not validly enacted in the first place. Similar to how the *ultra vires* doctrine was read into the unwritten British Constitution, he held that a body entrusted with creating laws could not have intended that the executive exercise its powers in the manner in which they were now seeking to do. This is a magnificent tribute from a foreign land to the power of the common law's sense of justice and its adaptability.

27 AIR 1951 SC 467.

In *J.K. Iron & Steel Co. Ltd. v. Mazdoor Union*[28], he would issue an early warning against the tribunalisation of justice and held that these new tribunals exercising quasi-judicial functions would come under the supervisory jurisdiction of the Supreme Court, stating that the 'heart of the matter' lies in the fact that a 'benevolent despotism is foreign to a democratic Constitution'[29]:

> *When the Constitution of India converted this country into a great sovereign, democratic, republic, it did not invest it with the mere trappings of democracy and leave it with merely its outward forms of behaviour but invested it with the real thing, the true kernel of which is the ultimate authority of the Courts to restrain all exercise of absolute and arbitrary power, not only by the executive and by officials and lesser tribunals but also by the legislatures and even by Parliament itself. The Constitution established a "Rule of Law" in this land and that carries with it restraints and restrictions that are foreign to despotic power.*[30]

His razor sharp mind saw through the subterfuges and attempts at hoodwinking judicial review. His disciplined judicial training allowed him to simplify the facts and the questions at hand, and found expression in clear and understandable language:

> *The heart and core of a democracy lies in the judicial process, and that means independent and fearless Judges free from executive control brought up in judicial traditions and trained to judicial ways of working and thinking. The main bulwarks of liberty and freedom lie there and it is clear to me that uncontrolled powers of discrimination in matters that seriously affect the lives and properties of people cannot be left to executive or quasi executive bodies even if they exercise quasi judicial functions because they are then invested with an authority that even Parliament does not possess... if under the Constitution, Parliament itself has not uncontrolled freedom of action, it is evident that it cannot invest lesser authorities with that power. If the legislature itself had done here what the Central Board of Revenue has done and had*

28 AIR 1956 SC 231 : (1955) 2 SCR 1315.

29 A phrase that he borrowed from Mahajan J. in *Bharat Bank Ltd. v. Employees,* AIR 1950 SC 188 : 1950 SCR 459.

30 *Bidi Supply Co. v. Union of India,* AIR 1956 SC 479.

passed an Act in the bald terms of the order made here transferring the case of this petitioner, picked out from others in a like situation,from one State to another, or from one end of India to the other, without specifying any object and without giving any reason, it would, in my judgment, have been bad. I am unable to see how the position is bettered because the Central Board of Revenue has done this and not Parliament.[31]

Fairness in Taxation: Is it Possible?

For all his activism, he deplored the Court giving an interpretation that went against the plain words used. He stressed on the importance of clarity, certainty and fairness in the law. And this can be seen most clearly in his interpretation of the power to tax interstate sales. To have expected anything else from governments in constant need of resources would be naive and foolish, but the courts should have checked this tendency within strict boundaries of legality. As he said in *Tata Iron & Steel Co. Ltd. v. State of Bihar*:

But what I do most strongly press is that a Constitution Act cannot be allowed to speak with different voices in different parts of the land and that a mundane business concept well known and well understood cannot be given an ethereal omnipresent quality that enables a horde of hungry hawks to swoop down and devour it simultaneously all over the land: "some sale; some hawks" as Winston Churchill would say.... I would therefore reject the nexus theory in so far as it means that any one sale can have existence and entity simultaneously in many different places. The States may tax the sale but may not disintegrate it and, under the guise of taxing the sale in truth and in fact, tax its various elements, one its head and one its tail, one its entrails and one its limbs by a legislative fiction that deems that the whole is within its claws simply because, after tearing it apart, it finds a hand or a foot or a heart or a liver still quivering in its grasp. Nexus, of course, there must be but nexus of the entire entity that is called a sale, wherever it is deemed to be situate. Fiction again. Of course, it is fiction, but it is a fiction as to situs imposed by the Constitution Act and by the Supreme Court that speaks for it in these matters and only one fiction, not a dozen little ones.[32]

31 *Bidi Supply Co. v. Union of India,* AIR 1956 SC 479.
32 *Tata Iron & Steel Co. Ltd. v. State of Bihar,* AIR 1958 SC 452.

He concluded not without a sarcastic tinge of permissible humour, which unfortunately has passed legislatures by ever since:

> *My point is simple. If you are allowed to tax a dog it must be within the territorial limits of your taxable jurisdiction. You cannot tax it if it is born elsewhere and remains there simply because its mother was with you at some point of time during the period of gestation. Equally, after birth, you cannot tax it simply because its tail is cut off (as is often done in the case of certain breeds) and sent back to the fond owner, who lives in your jurisdiction, in a bottle of spirits, or clippings of its hair. There is a nexus of sorts in both cases but the fallacy lies in thinking that the entity is with you just because a part that is quite different from the whole was once there. So with a sale of a motor car started and concluded wholly and exclusively in New York or London or Timbuctoo. You cannot tax that sale just because the vendor lives in Madras, even if the motor car is brought there and even assuming there is no bar on international sales, for the simple reason that what you are entitled to tax is the sale, and neither the owner nor the car, therefore unless the sale is situate in your territory, there is no real nexus. And once it is determined objectively by the Constitution Act or in Supreme Court how and where the sale is situate, its situs is fixed and cannot be changed thereafter by a succession of State legislatures each claiming a different situs by the convenient fiction of deeming.*[33]

He did not want the intent of the framers in making a clear distinction between the taxing powers of the Parliament and the state legislature to be blurred by frequent resort to judicial adjudication. To tax and to be liked is not given to any body of men so empowered, but I cannot help think that if we had heeded these words of Justice Bose, our tax laws might just have been effused with greater clarity, fairness and a definite certainty.

In *Bengal Immunity Co. v. State of Bihar*[34], Bose would enjoy the opportunity of his minority view expressed earlier in *State of Bombay v. United Motors*[35] validated by a larger bench. Both cases involved interpretation of the power of the State legislatures to tax interstate

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33 *Tata Iron & Steel Co. Ltd. v. State of Bihar,* AIR 1958 SC 452.
34 AIR 1955 SC 661.
35 AIR 1953 SC 252.

sales. It is rare for a sitting judge to see his minority view accepted by a larger bench in his own tenure on the court and this can only be seen as testament to his persuasive ability.[36]

Citizen's Judge

Justice Bose recognised the system of government in India required separation not only between the executive, the legislature and the judiciary but also a wall of separation between the ministerial executive and the permanent executive. That is why he chastised an officer of the State of Assam when he 'settled' a lease and then unsettled it, on directions of the government, to grant it to another 'person or body more to its liking', adding sarcastically, in whom it has discovered "fresh virtues hidden from its view in its earlier anxious and mature deliberations."[37]

In *Commissioner of Police v. Gordhandas Bhanji*[38], he would hold that when law required a public authority to exercise a discretion and pass orders it is that authority alone that is required to act it cannot act on the direction of anybody else not even the State government for public authorities cannot "play fast and loose with the powers vested in them, and persons to whose detriment orders are made are entitled to know with exactness and precision what they are expected to do or forbear from doing and exactly what authority is making the order." When a defence sought to explain and justify the subsequent orders passed by the Commissioner of Police, he firmly added that

> *public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do.*

And when the appellant State argued that the rule merely vested a discretion in the Commissioner but did not require him to exercise it, he cited and agreed with Earl Cairns LC in *Julius v. Lord Bishop of Oxford*, where it was held that power may be coupled with a duty, and make it the duty of the person in whom power is reposed to exercise that power when called upon to do. He held that the

36 This can best be evidenced in the judgment of Bhagwathi J. who was a part of the majority in the earlier decision but changed his mind. He extensively cites the minority opinion of Bose J. to support his new conclusions.

37 *State of Assam v. Keshab Prasad Singh,* AIR 1953 SC 309 : 1953 SCR 865.

38 AIR 1952 SC 16.

Commissioner cannot abdicate this duty to any other authority or act on the directions of another, stating that the discretion vested in the Commissioner of Police

> *has been conferred upon him for public reasons involving the convenience, safety, morality and welfare of the public at large. An enabling power of this kind conferred for public reasons and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor can it be evaded; performance of it can be compelled under Section 45 (of the old specific relief act).*

This was judicial activism in its finest mould where the citizen was placed at the highest pedestal and could hold public authorities accountable for their action or inaction.

In *K.S. Srinivasan v. Union of India,*[39] where a wartime post was 'reduced' and the incumbent was transferred to a temporary post and subsequently made quasi permanent, the majority held that the subsequent order was made under a mistake and could not give rise to any rights. Bose sought to give an early start to the doctrine of estoppel against the state and legitimate expectation by stating that though there was a mistake which was discovered later, it was a 'unilateral mistake' of the government and others cannot be made to suffer because of it. The majority judgement went so against his justice oriented approach that he was forced in a chastising tone to state that:

> *Here is Government straining to temper justice with mercy and we, the Courts, are out Shylocking Shylock in demanding a pound of flesh, and why? because "t'is writ in the bond." I will have none of it. All I can see is a man who has been wronged and I can see a plain way out. I would take it.*

The last two sentences sum up his judicial approach: justice oriented but only when the path is available or can be freshly laid as precedent for future travellers. For he was not going beyond the judicial function, as has often been the case in recent times, but finding the means of justice in his creative application of the facts to the legal principles. He never shirked an existing precedent.

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39 1958 SCR 1295.

Similarly, he would dissent in another case, preventing a constitutional guarantee under Article 311 from being subverted by clever wording and procedure. It was argued that since the order did not specify a time limit it was not a 'punishment' but only a penalty. Knowing the vagaries of the arbitrary state, he plainly stated that the effect of the order was that it would result in the petitioner not being promoted to a like post until some other officer chooses to think he has "made good his previous short-comings." He held that such sentence in the order introduces an arbitrary and 'evil consequence' amounting to punishment attracting the protection of Article 311 which is not merely against "harsh words but against hard blows."[40]

In his characteristic rhetorical style, he said in a magnificent worded passage:

> *After all, for whose benefit was the Constitution enacted? What was the point of making all this other about fundamental rights? I am clear that the Constitution is not for the exclusive benefit governments and States; it is not only for lawyers and politicians and officials and those highly placed. It also exists for the common man, for the poor and the humble, for those who have businesses at stake, for the "butcher, the baker and the candlestick maker". It lays down for this land "a rule of law" as understood in the free democracies of the world. It constitutes India into a Sovereign Republic and guarantees in every page rights and freedom to the side by side and consistent with the overriding power of the State to act for the common good of all.*[41]

According to the radical and respected civil rights lawyer, K.G. Kanabiran, Bose "alone of all the judges past and present understood the Constitution in terms of the people, their struggles, and the necessity of ensuring the rights secured by them in their struggles."[42] It is a fine tribute from a man not in the habit of being in awe of others.

A 'Common Law' of Equality?

The 'intangible' equal protection clause contained in Article 14 would also receive his searing and razor sharp analysis and his

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40 *Parshotam Lal Dhingra v. Union of India,* AIR 1958 SC 36.

41 *Bidi Supply Co. v. Union of India,* AIR 1956 SC 479.

42 K. G. Kannabiran, "Personal liberty after Independence" in *The Wages of Impunity: Power, Justice, and Human Rights*, at page 37.

interpretation, as always, tempered with fairness and a deep sense of justice. His thought processes reveal a modern, fearless mind willing to go beyond accepted definitions and beyond existing legal dogmas and rationales:

> *Article 14 sets out, to my mind, an attitude of mind, a way of life, rather than a precise rule of law. It embodies a general awareness in the consciousness of the people at large of something that exists and which is very real but which cannot be pinned down to any precise analysis of fact save to say in a given case that it falls this side of the line or that, and because of that decisions on the same point will vary as conditions vary, one conclusion in one part of the country and another somewhere else; one decision today and another tomorrow when the basis of society has altered and the structure of current social thinking is different. It is not the law that alters but the changing conditions of the times and Article 14 narrows down to a question of fact which must be determined by the highest Judges in the land as each case arises. Always there is in these cases a clash of conflicting claims and it is the core of the judicial process to arrive at an accommodation between them. Anybody can decide a question if only a single principle is in issue. The heart of the difficulty is that there is hardly any question that comes before the Courts that does not entail more than one so-called principle.*[43]

In a concurring judgement in *State of West Bengal v. Anwar Ali Sarkar* where the Court struck down the Special Court constituted by the West Bengal Special Courts Act, 1950, Bose would go further than the majority and propound a 'common law of equality' holding that the Constitution cannot be interpreted "by simply taking the words in one hand and a dictionary in the other, for the provisions of the Constitution are not mathematical formulae which have their essence in mere form." Since he was not merely applying past precedent but breaking new ground, he explained in detail that what he was concerned with was not merely equality in an academic sense but

> *whether the collective conscience of a sovereign democratic republic can regard the impugned law, contrasted with the*

43 *Bidi Supply Co. v. Union of India,* AIR 1956 SC 479.

ordinary law of the land, as the sort of substantially equal treatment which men of resolute minds and unbiassed (sic) views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be. Such views must take into consideration the practical necessities of government, the right to alter the laws and many other facts, but in the forefront must remain the freedom of the individual from unjust and unequal treatment, unequal in the broad sense in which a democracy would view it. In my opinion, 'law' as used in Article 14 does not mean the "legal precepts which are actually recognised and applied in the tribunals of a given time and place" but "the more general body of doctrine and tradition from which those precepts are chiefly drawn, and by which we criticise them." ....But that will not be because the law has changed but because the times have altered and it is no longer necessary for government to wield the powers which were essential in an earlier and more troubled world. That is what I mean by flexibility of interpretation.

This brilliant exposition was more than twenty years before the court would adopt a similar position in the momentous decisions in *E.P. Royappa v. State of Tamil Nadu*[44] and *Maneka Gandhi v. Union of India*.[45] He took this view, as he explained, not with a view to embarrass the legislative or executive wings, but because of his view of the judicial function and the history of the land. As he said:

It is not that these laws are necessarily bad in themselves. It is the differentiation which matters; the singling out of cases or groups of cases, or even of offences or classes of offences, of a kind fraught with the most serious consequences to the individuals concerned, for special, and what some would regard as peculiar, treatment....It may be that justice would be fully done by following the new procedure. It may even be that it would be more truly done. But it would not be satisfactorily done, satisfactory that is to say, not from the point of view of the governments who prosecute, but satisfactory in the view of the ordinary reasonable man, the man in the street. It is not enough that justice should be done. Justice must also be seen to be done and a sense of satisfaction

44 (1974) 4 SCC 3: AIR 1974 SC 555.
45. (1978) 1 SCC 248 : AIR 1978 SC 597.

> *and confidence in it engendered. That cannot be when Ramchandra is tried by one procedure and Sakharam, similarly placed, facing equally serious charges, also answering for his life and liberty, by another which differs radically from the first.*[46]

But would that not introduce arbitrary subjective standard capable of varying from judge to judge allowing them to decide for themselves without reference to any 'tests' or guidelines? He answered, in what is a classic tribute to the judge as law maker:

> *I realise that this is a function which is incapable of exact definition but I do not view that with dismay. The common law of England grew up in that way. It was gradually added to as each concrete case arose and a decision was given ad hoc on the facts of that particular case. It is true the judges who thus contributed to its growth were not importing personal predilections into the result and merely stated what the law applicable to that particular case was. But though they did not purport to make the law and merely applied what according to them, had always been the law handed down by custom and tradition, they nevertheless had to draw for their material on a nebulous mass of undefined rules which, though they existed in fact and left a vague awareness in man's minds, nevertheless were neither clearly definable, nor even necessarily identifiable, until crystallised into concrete existence by a judicial decision; nor indeed is it necessary to travel as far afield. Much of the existing Hindu law has grown up in that way from instance to instance, the threads being gathered now from the rishis, now from custom, now from tradition. In the same way, the laws of liberty, of freedom and of protection under the Constitution will also slowly assume recognisable shape as decision is added to decision. They cannot, in my judgment, be enunciated in static form by hide-bound rules and arbitrarily applied standards or tests.*[47]

Conscious that the Constitution should not be viewed with gilded glasses he read into Article 14, a doctrine of fairness:

> *The law of the Constitution is not only for those who govern*

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46 *State of West Bengal v. Anwar Ali Sarkar,* AIR 1952 SC 75.

47 *State of West Bengal v. Anwar Ali Sarkar,* AIR 1952 SC 75.

> *or for the theorist, but also for the bulk of the people, for the common man for whose benefit and pride and safeguard the Constitution has also been written. Unless and until these fundamental provisions are altered by the constituent processes of Parliament they must be interpreted in a sense which the common man, not versed in the niceties of grammar and dialectical logic, can understand and appreciate so that he may have faith and confidence and unshaken trust in that which has been enacted for his benefit and protection.... When the froth and the foam of discussion is cleared away and learned dialectics placed on one side, we reach at last the human element which to my mind is the most important of all. We find men accused of heinous crimes called upon to answer for their lives and liberties. We find them picked out from their fellows, and however much the new procedure may give them a few crumbs of advantage, in the bulk they are deprived of substantial and valuable privileges of defence which others, similarly charged, are able to claim. It matters not to me, nor indeed to them and their families and their friends, whether this be done in good faith, whether it be done for the convenience of government, whether the process can be scientifically classified and labelled, or whether it is an experiment in speedier trials made for the good of society at large. It matters not how lofty and laudable the motives are. The question with which I charge myself is, can fair-minded, reasonable unbiassed (sic) and resolute men, who are not swayed by emotion or prejudice, regard this with equanimity and call it reasonable, just and fair, regard it as that equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which obtain in India today? I have but one answer to that. On that short and simple ground I would decide this case and hold the Act bad.*[48]

Article 14, the Constitution, the judges who administer it, and the law in general have not had a more eloquent spokesperson and standard bearer.

Again, in *Syed Qasim Razvi v. State of Hyderabad*, Bose dissented (along with Ghulam Hasan J. who wrote a separate dissent) from the

48 *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75.

majority and held that the Special Courts created by the military governor of Hyderabad State in the aftermath of the 'Police action' was illegal and hit by Article 14.[49] According to him there were many infirmities in the proceedings not least of which was the fact that although the proceedings were conducted in English, one of the accused was denied the services of a King 's Counsel stating that Rules required counsel to know Urdu. All this would have been fine, but for the fact that the traditional court language in Hyderabad was Urdu and English was a language alien to the President of the Tribunal and all but one of the accused. There was something 'grotesquely fantastic' in insisting on counsel being proficient in Urdu in a tribunal whose proceedings are to be conducted in English. This was 'discrimination in fact' and sufficient to require a retrial. Bose stated that this was not retrospective application of the Constitution but is its present and immediate mandate since the fundamental rights "breathe a message of hope to those who have not known equality of treatment before, and give a guarantee of security to those who have, a guarantee which came into effective being the moment the Constitution was born." The judges were, in his words, 'the keepers and interpreters of the social conscience of a sovereign democratic republic.' And to the arguments of necessity that a retrial would be a heavy burden on government time and money, he responded, fairly and firmly, that although he was of the opinion that the proceedings were conducted in a proper and fair manner by the prosecution, it was still discriminatory after the commencement of the Constitution:

> *The money and time which would be wasted were my view to prevail would be unfortunate but all that is part of the price to be paid for the maintenance of the principles which our Constitution guarantees, part of the price of democracy.*[50]

In another dissent in a 'special court' case, he expressed his genuine anguish and pain and while submitting to the will of previous majorities, he was unwilling in all conscience to yield a single inch of ground except where compelled to do so. He stated his own position as follows:

> *I am not concerned here with reasonableness in any abstract sense, nor with the convenience of administration nor even with the fact, which may well be the case here, that this will*

49 AIR 1953 SC 156.
50 AIR 1953 SC 156.

> *facilitate the administration of justice. The solemn duty with which I am charged is to see whether this infringes the fundamental provisions of the Constitution; and though I recognise that there is room for divergencies (sic) of view, as indeed there must be in the case of these loosely worded provisions, and deeply though I respect the views of my colleagues, I am nevertheless bound in the conscientious discharge of my duty to set out my own strong views so long as there is, in my opinion, scope still left for a divergence of view.*[51]

He never forgot that before a court of law, the all powerful state was just another party and that necessity and expediency are not arguments to be raised in defence of infringement of the constitutional rights of the people. A civilization, and a Constitution, must be judged on how it treats its worst and not it highest, in the trying times of winter and not in the pleasant spring.

And Finally...The Man!

> *[Faramir] is bold, more bold than many deem; for in these days men are slow to believe that a captain can be wise and learned in the scrolls of lore and song, as he is, and yet a man of hardihood and swift judgement in the field. But such is Faramir. Less reckless and eager than Boromir, but not less resolute.*
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> -Gandalf's description of Faramir, in J.R.R. Tolkien's Lord of the Rings

Like Tolkien's Faramir, Vivian Bose was "modest, fair-minded and scrupulously just, and very merciful".[52] This much we can tell from his judgments. But he was also much more than that, for he was essentially a lover of life infused with a natural curiosity and spirit of adventure. A "man of varied humours" as his close friend and colleague, Justice Hidayutallah, put it. Bose was a leader of the scouting movement, a regular trekker, a motoring enthusiast who had driven from India to Europe and the reverse trip in a specially fitted caravan, a photographer, and a dinner table entertainer whose repertoire

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51 *Kedar Nath Bajoria v. State of W.B.,* AIR 1953 SC 404 : 1954 SCR 30.

52 J.R.R. Tolkien; Humphrey Carpenter, Christopher Tolkien (eds.), *The Letters of J.R.R. Tolkien,* Letter 244, (undated, written circa 1963).

included claims to be a water diviner and a magician.[53] His love for making friends[54], adventure, outdoor life, and rugged existence, only go to confirm my belief that the best judges are as much lovers of life and it is these curious and peculiar interests and experiences that enrich their view of the everyday travails of human existence that they are asked to adjudicate upon.

Vivian Bose belongs to distant memory now, but thankfully, he is not forgotten. Even in these cynical times, one cannot read his judgements without being moved by the thoughts and its elegant expression. Like all great artists and unlike many of his successors, he did not lose sight of his canvas when painting his masterpieces. We could no better than turning back to him, to aid us in reviving our threatened constitution.

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53 M. Hidayatullah's beautiful tribute to Justice Vivian Bose in, M. Hidayatullah, A judge's miscellany (1972), at page 143.

54 *Ibid*. According to Justice Hidayatullah, in A judge's miscellany (1972), Bose had a "larger circle of friends than any man I know and this circle is all around the world." This would also explain his popularity in the International Commission of Jurists, an organization that he served as its President.