

# CONSTITUTIONAL DHARMA AND CONTEMPORARY CHALLENGES

**R. Venkataramani\***

India has been a laboratory of sorts. It has explored both the outer and inner world. It kept its frontiers open and found no reason to abjure, shut out, or denigrate any faith, belief, or way of life as is evident from myriads of ways of life which have flourished and continue to exist within its shores. The little skirmishes which occasionally flare up are only ripples which die even before they are born and after all the little heats of the human mind manage themselves. Writing about this India as a laboratory, Dr Radhakrishnan has this to say :-

“Throughout the history of Indian thought, the ideal of a world behind the ordinary world of human strivings, more real more intangible which is the true home of this spirit, has been haunting the Indian race. Man’s never-ceasing effort to read the riddle of sphinx and raise himself above the level of the beast to a moral and spiritual height finds a striking illustration in India.

The survey of Indian thought, as of all thoughts, impresses one with the mystery and the immensity of existence as well as the beauty and persistence of the human effort to understand it.

After, all the attempts of the philosophers, we stand today in relation to the ultimate problems very near where we stood far away in the ages - where perhaps we shall ever stand as long as we are human bound, Prometheus-like, to the rock of mystery by the chains of our finite mind.

It is not the end of the voyage that matters, but the voyage itself. To travel is a better thing than to arrive.<sup>1</sup>”

We have chosen to travel through the constitutional route, a route which has promised to practice several Dharmas. It will be my humble

---

\* Senior Advocate, Supreme Court of India & Member, Law Commission of India

<sup>1</sup> S.Radhakrishnan, “Indian Philosophy”, Vol II, 2<sup>nd</sup> ed., Oxford India Paperbacks, pp. 715, 716

endeavor to show in endorsement of Dr. Radhakrishnan, that a wise process of this travel, can, as it goes, erect some ends and goals and make the travel less quarrelsome, and less frictionous.

If it is not the end of the voyage but the voyage itself that matters, for almost a century and a half, good part of humanity has not only laboriously convinced itself that it is the end of the voyage, known to be certain that matters - namely, an Utopia or a Communist society or progress culminating in egalitarian social order - which is more important and those ends thus gave meaning to the voyage itself. As experience turned out, the courses of these voyages in the erstwhile communist countries began to seriously undermine the end of the roads thought to be clearly visible and available within the human reach. So we have stories of the collapse of socialistic governance in good parts of the world. Felipe Fernandez-Armesto in his book "Civilizations" observes thus:

"There is no convincing evidence that all societies have any common tendency, except to be social. Progress towards any historical climax - whether it is the classless society or the Age of Holy Spirit or the Thousand-year Reich or liberal democracy or some other 'end of history' - is illusory."<sup>2</sup>

While progress towards any historical climax may or may not be illusory, the idea of progress, by way of shedding or discarding those unnecessary apparel or armoury we have burdened ourselves with as perennially valid whether caste, vestiges of feudal authority, or any other need not be illusory. This process of discarding our historical waste, we will notice to be a matter of connection between governance and citizenship.

While we would be talking about the fine web of connection between the role, the purposes and the responsibilities of governance and freedom and autonomy of the individual, we also need to be attentive to the complex dimensions involved in this connection.

Given the nature of the human mind with its unquenchable yearnings to look for meanings and securing explanations about the world and life, I understand that all freedom is a matter of reasoned judgment by the individual and the very act of engagement in such reasoned judgment

---

<sup>2</sup> Felipe Fernandez-Armesto, "Civilizations", 2001, Pan Books, P. 18

is an act of responsibility. The community and the State are therefore perennially called upon to enable, facilitate and even inspire the Individual's engagement in reasoned judgments. The human mind is both the author, the script-writer and the actor in the most incredible dramatic performance viz. the life of an individual, and Shakespeare therefore did not say in vain,

*All the world's a stage,  
And all the men and women merely players;  
They have their exits and their entrances,  
And one man in his time plays many parts*<sup>3</sup>

Ernst Kurt Godel the mathematician cautioned us that "no finitely describable system or finite language can prove all truths. Truth cannot be fully caught in a finite net". But as somebody said that "In our conscious life we are all midwives to reality. We are a bridge between the realm of potentiality and the world of actuality....."<sup>4</sup> The challenge therefore is to understand our fine role as midwives, who aid births and not the one who aborts.

Let me however attempt a few working definitions. Laws of nature, or natural laws, whether of the physical, material part of the universe or of mind, and consciousness-howsoever defined or stated, connote intricate orders. The English word 'Rhythm' or the Sanskrit word, '*Rit*', deeply grasped the profundity of order in the Universe. Dharma can be said to be, the capacity of the human mind to thus grasp the relevance of order in any aspect of life and to fashion individual and collective human conduct. The human mind, is also frail enough to turn its back to order and relevance. We thus have violence, war, oppression of the weak and indulgence in mere pleasure seeking. Dharma is not mere good conduct, but the appeal to the human mind to constantly engage itself in the pursuit of order in all respects, which means beauty and elation. It is this pursuit which could bring about well-being and adjustment of all conflicting contours of a human being. Who else but a great mind than Sri Aurobindo could have written about it, and he says:

---

<sup>3</sup> Shakespeare, "As You Like It", Act II, Scene VII

<sup>4</sup> Danah Zohar & Ian Marshall, "The Quantum of Society", Flamingo, 1994

The business of the ancient Rishi was not only to know god, but to know the world and life and to reduce it by knowledge to a thing well understood and mastered with which the reason and will of man could deal on assured lines and on a safe basis of wise method and order. .... [I]n older India Shastra meant any systematised teaching and science; each department of life, each line of activity, each subject of knowledge had its science or Shastra. The attempt was to reduce each to a theoretical and practical order founded on detailed observation, just generalization, full experience, intuition, logical and experimental analysis and synthesis, in order to enable man to know always with a just fruitfulness for life and to act with the security of right knowledge.<sup>5</sup>

I understand that this is not very different from what Holy Quran says:

“Measure correctly  
And weigh properly  
With a balance  
That is not faulty.  
It is not only just to do so,  
But also most advantageous.” (Surah XVII- 35)

The ancients understood ‘autonomy’ or ‘freedom’ as matters of self-government and so blended with responsibility, that responsibility was, seen as accountability to the community as well. In other words, freedom was not freedom unless accountably exercised, accountable to oneself and to the clan or the kin. In a fascinating analysis of the rights versus responsibilities discourses, a perceptive observation has been made :-

Our analysis of the rights-responsibilities dichotomy will emphasize that a leading source of the problems in this area is the failure to distinguish and relate to two different conceptions of responsibility: responsibility as autonomy or self-government and responsibility as accountability to community.<sup>6</sup>

<sup>5</sup> Sri Aurobindo, “The Foundations of Indian Culture”, Sri Aurobindo Ashram Publication Department, 1998 at p.172.

<sup>6</sup> James E. Flemin and Linds McClain, “Ordered Liberty: Rights, Responsibilities and Virtues”, Harvard University Press, 2013, p. 3

St. Catherine of Siena in her famous, 'the Dialogue' muses thus:

“Keep in mind that each of you has your own vineyard, But everyone is joined to your neighbors' vineyards without any dividing lines. They are so joined together, in fact, that you cannot do good or evil for yourself without doing the same for your neighbors.”

It is indeed a difficult task to be engaged in any discussion on contemporary India, without reference to Dr. Ambedkar and Mahatma Gandhi. It would be like talking about beauty or adorability of a building without referring to its architect or like asking the question what is history and not being able to answer it. Historians of Indian Constitution and its making generally talk about the enormous influences of the American Constitution making and the European experiences. Both Dr. Ambedkar and Mahatma Gandhi were exposed to western political thought in good measure. The whole concept of rights of individuals against a potentially repressive and authoritarian State and the need for articulating limitations on the power of Government, were clearly in their minds. The convergence of their thought processes, stopped somewhere here and on the understanding of the Indian history and its present condition and the road forward, they stood deeply divided or at least as it seems from the mutual exchanges of opinions or their other writings.

A recent introduction to the famous book authored by Dr. Ambedkar titled “*The Annihilation of Caste*” attempts to creatively posit the connection between them and their points of departure. Without being contradicted, it can be stated that both of them felt deeply pained and affected by the depressed and alienated conditions of sections of the Indian community on grounds of caste. While we might have moved away to a considerable extent from those unthinkable days - poignantly captured by that great writer Mulk Raj Anand in his books “*The Coolie*” and “*The Untouchable*” - we have not yet proclaimed freedom, and that freedom which can be said to be real and free, for large number of our countrymen and women. Our rural and urban landscape is still littered with deep divides between sections of community. My intent is not merely to address the question of caste but to look at the whole issue of the fragile foundations of freedom, autonomy, individual morality and choices for these large numbers of people, and the large spaces occupied by unprincipled

governance. Do we see a visible conflict between these two? Have we failed to perceive the new hazards and dangers, inherent in the inability of the State and Government in not being able to act as a high moral agents setting standards for community adoption, and not being able to create or generate greater spaces for individual autonomy, rooted in a deep sense of responsibility to oneself and the community?

Thanks to the Constitution, the State has become the controller, the guardian, the stipulator and the dispenser of justice and it is often said that justice requires democracy and it is further said that democracy means rule of law. What a great responsibility it is that on foundations of rule of law, the state today has assumed such vast extent and proportions of authority. After all it could be argued that the vastness of such authority notwithstanding, the state is bound by the law and rule of law principles and being an open society, we need not be unduly concerned about the Orwellian warning that the State can be totalitarian if it wants. The Supreme Court, in some of its benign moments also catching upon the rhetorical phrases in the preamble to the Constitution keeps talking about social, political and economic justice and as if to satisfy the catching eyes of legal historians, proclaim, that economic and social empowerment are fundamental rights.

Before I begin to bestow attention to the essence of my address namely that excessive affinity to certain doctrines and expositions of western political thought has considerably weakened the affinity between the dharma of the State and peoples' individual dharmas, I would like to journey briefly into some aspects of western political thought which have made life different generally for people all over the globe.

The onset of capitalism and the industrial mode of production, innately demanded freedom from external restraints. Free movement of persons, ideas, generation of wealth and prosperity and production of goods and commodities, were all contingent upon the absence of any external authority. Thus Adam Smith could not have propounded his ideas during the medieval period or let us say in any of the Asian countries. It was thus vigorously canvassed that only the free engagement of people in generation of wealth, can guarantee a life far removed from, that nasty brutish primitive life and the guarantee against authoritarianism of all sorts. The state must therefore, be a least governing institution. Hundred odd

years of living with the above thoughts, did not however really remove them from doubts. The emergence of socialistic thoughts and the grave doubts that were generated regarding the scope for human emancipation and freedom from hunger and exploitation, within the liberal autonomy framework, seriously engendered the liberal autonomy agenda itself. We have clashes of both these schools of thought, the Marxist version on the one hand and thinkers like F.A. Hayek and Karl Popper on the other, both competing on the desirable model of the State.

The emergence of western jurisprudence during this period, thus closely corresponds to the need for legal articulation of the demands, the claims and excuses of conflicting set of interests. We thus see parallel developments. The command of the sovereign, the positivist school of thought, the freedom of contract principle, finely tuned statements on individual liberty, on the one hand, and claims to equality and socio-economic justice on the other hand, have been the pre-occupation of these parallel developments. But at the end of the day two clear articulations are visible and whose variables are written and re-written even in contemporary times. The one is that the State is an institution not to be too deeply trusted and any process of concentration of power will have to be watched with great amount of circumspection and hesitation. The other one is that the State has to transform itself as an institution and as an agent for transforming the exploitative social structure and no amount of private benevolence of those engaged in the generation and production of wealth can be trusted to be willing aids to claims of equality and social justice. The controversial period of Marxist rule in certain parts of the world has contributed equally to the strong debates about the wisdom of the State becoming the modern messiah for deliverance of freedom.

It is therefore said now, that capitalism, science and technology and all those fruits of industrial adventures, are common properties of all people. The socio-economic laboratories of the western world generally speaking has virtually show-cased these aspects of modern history and provided a market place of ideas and exchange, as if people can freely borrow and apply them, as easily as cooking one's food and singing one's favourite song.

The pace of science and technology in the past 200 years has virtually seem to have shrunk the long march of history, compared to

millions of years of earth and life formation. They have overturned closely cherished views on life and the universe. The contributions to the study of human evolution, by Darwin or Lamarck or the later day evolutionists have also seriously undermined those schools of thoughts and systems of philosophy which were closely rooted in religion or any thing which sounded metaphysical. Marx will famously state that “Philosophers have only hitherto interpreted the world; the point however is to change it.”

The further contributions in the field of Physics has thrown open several questions on the fundamental nature of universe, the laws of nature, and the place of the human species in the scheme of things. It is as if a virtual reorganization of human thinking about itself has taken place. It is no wonder that in the midst of all this momentous changes, the capacity of the human mind to rejuvenate or to rearticulate religious and moral foundations and to be able to justify views of the old in contemporary terms, is under strain.

While as we notice science and technology were taking great strides, three significant political events contributed to the need for greater and continued attention to the fundamental principles of organization of communities and their governance. The French Revolution ushered in those important dimensions of freedom and liberty and later on productive of several conceptions of rights; the American war of independence establishing the relevance of the sovereignty of people and rule of law as the founding principle of an open society; the Bolshevik Revolution of Russia seriously questioning received views on the neutral role of the State in social transformation and affirming the vesting of power to do so in the hands of the deprived classes which in due course, after and despite its collapse has continued to be a point of return against vesting of all power and authority in the hands of economic agents. Freedom and autonomy are now matters of riddled conceptions!

It is in the midst of these very intricately connected changes and developments that one has to assess, study and evaluate the very idea of a Constitution and particularly without closing one's eyes to the vast landscape of our country's history. It is in this context that Mahatma Gandhi's rather interesting embrace of Indian contribution to life and its meaning, and ways of living in a fine amalgam of relationship with nature has some interesting dimensions. I would also say that while Dr. Ambedkar



was in a way right in his demand for annihilation of caste and all those foundations (viz. varnashrama) which are associated with that, there is something deeper in the connection between, governance, morality, responsibility and human autonomy, which seemed to have missed his close attention. The annihilation of caste could be a necessary condition for rewriting our much maligned history; but annihilation of other obstacles to real freedom and responsible autonomy, demand attention and the courage to demolish all those other economic and socio-cultural factors which have scripted new codes on social divisions or what one may call 'the ideology of development', which would perennially call for sacrifices by the voiceless and ask of them to pay for development.

The point that is attempted to be made here is that, given sixty odd years of constitutional governance, and with the heavy as well as loaded repetitions of the secular logic in all aspects of governance, we have virtually wrenched the quintessence of dharma and responsible conduct from constitutional dialogue. We seem to have reached a stage of general acceptance that Constitution, is nothing but a secular contribution and a product of pure objective factors of history and that all constitutional and governance discourses must take place within the secular matrix. There is a serious problem here and that is why I would like to use the expression 'constitutional dharma' to denote that view of the constitution and the discipline of governance, which will neither frustrate nor alienate adherence to a new fabric of values relevant both for personal and community conduct. To explain, it has to be the constitutional dharma of every individual to act in promotion of equality and the dignity of every member of the community and it has to be the constitutional dharma of all governing institutions to act in promotion of individual autonomy and liberty, perhaps which is what Rabindranath Tagore had in mind in his Gitanjali verse 32 :-

Where the mind is without fear and the head is held high;  
Where knowledge is free;  
Where the world has not been broken up into fragments by  
narrow domestic walls;  
Where words come out from the depth of truth;  
Where tireless striving stretches its arms towards perfection;

Where the clear stream of reason has not lost its way into the  
dreary desert sand of dead habit;

Where the mind is led forward by thee into ever-widening thought  
and action...

Into that heaven of freedom, my Father, let my country awake.<sup>7</sup>

Jalaluddin Rumi, the mystic poet catches this theme in an equal  
measure:

“Every war and every conflict between human beings  
Has happened because of some disagreement about  
names. It’s such an unnecessary foolishness, because  
just beyond the arguing there’s a long Table of  
companionship, set and waiting for us to sit down.”

A few more digressions need your permission. We are now well  
too familiar with the pundits of economic freedom, endlessly chanting about  
the virtues of the freedom of the market and of the producers of wealth  
as well as other social goods. We still have the opposite camp, of some  
voices, if not dim, which continue to question the above wisdom. Let us  
read what *Jeffery D. Sachs, Director of Earth Institute and Professor  
of Sustainable Development at Columbia University* has to say:

If good governance has become the dominant mantra of those  
looking for instant solutions to development problems, its closest  
rival is surely economic freedom. Once again, basically correct  
insight- that market economies outperform centrally planned  
economies - has been taken to the extreme, and then used as a  
substitute for analysis..... But free market ideologues took the  
argument to extremes that are utterly unsupportable by evidence  
or good economic reasoning. First, they maintained that markets  
should rule every nook and cranny of the economy, not just the  
basic productive sector of farms, factories, and service trades,  
but also health, education, social security, and core infrastructure  
like water, energy transmission, roads and rail. Second, they  
argued that all short falls in growth can be accounted for by the  
absence of free markets. And, they posited, become superfluous,

---

<sup>7</sup> Rabindranath Tagore, “The Gitanjali.”

even dangerous (as a delay to market reforms). All that is needed is the will to liberalize and privatize.<sup>8</sup>

Periodically newspapers or the media draw our attention to the decline in the economic growth rates and point accusing fingers towards governance deficits. Comparisons are made with other countries particularly China with its ability to catch up with projected growth rates. Regardless of new phrases and terminologies being coined, namely gross domestic happiness, higher economic growth rates, seem to be a vehicle which we cannot afford not to board.

Jeffery Sachs himself notices the contradictions between ‘economic freedom’ and ‘high economic growth’ when he says, “there are many cases where the score on economic freedom is rather low but economic growth is rather high China being the notable case. On the other hand there are many cases where the score on economic freedom is good and yet economic growth is low like Switzerland and Uruguay.” Follows his very important conclusion or inference:

Most important, all single factor explanations fail the scientific test of accounting for the observed diversity of development experience. Dozens of recent statistical studies have shown that difference in economic growth rates across countries depends on a multiplicity of factors: initial incomes, education levels, fertility rates, climate, trade policy, disease, proximity to markets, and the quality of economic institutions, just to name a few of the relevant variables. The real challenge is to understand which of these many variables is posing particular obstacles in specific circumstances - what I mean precisely by “differential diagnosis.”<sup>9</sup>

These digressions were only to notice that the engagement of the nation in relevant and fruitful economic activities is not merely an economic question but on a fundamental level a social, political and what I would call a ‘dharmic’ question.

---

<sup>8</sup> Jeffery Sachs, “The End of Poverty: How can we make it Happen in Our Lifetime”, Penguin Books, 2005. P. 318

<sup>9</sup> Jeffery Sachs, “The End of Poverty: How can we make it Happen in Our Lifetime”, Penguin Books, 2005. P. 322

Let me gather all the strands of thought shared with you and to piece them together within the matrix of constitutional dharma. If you go strictly by the catalogue of what is famously declared as the basic features of the Constitution, we may encounter several constitutional dharmas. I do not propose to talk about the basic features of the Constitution. But let us start with what I perceive to be some fundamental constitutional dharmas. One of the fundamental dharma would be that the State should endeavor to promote citizenship, which means a free union of autonomous and responsible individuals and accountable and therefore necessarily a responsible State. The dharma which promotes citizenship must protect citizenship. This aspect of protection means that the organization and structure of the community will not only aid individual autonomy but will also not impede in any matter freedom and autonomy as has been noticed earlier.

It is instructive to go ahead with some of Karl Popper's formulations, namely, "that the idea of a free and open society involves the demand that the state should exist for the sake of the human individual - for the sake of its free citizens and their free social life - that is, for the sake of the free society - and not the other way round. This implies the demand that we should make it the function of the state to serve and to protect the free society of its citizens."<sup>10</sup>

The great Tamil poet Thiruvalluvar devoted a whole chapter of his famous Thirukkural, to governance based on dharma, and citizenship nurtured by dharmic values. I thus prefer to use the word Dharma instead of morality, as the former expression has wider connotations. However, the issue as to individual autonomy and the role of the State in protecting and promoting such autonomy as a value in itself, was not found to be necessary in the distant past because when both the individual and the State pursued their ends by reason of Dharma, no conflict exists. Question may be asked, is this, a matter of universal truth? This question is a question which has bothered people throughout the ages, regardless of the differences in perceptions and world views.

The other constitutional dharma is in the context of claims to equality and social well-being. The simplistic notions of equality articulated

---

<sup>10</sup> Karl Popper, "After The Open Society", (Special Indian Edition), Routledge 2008, p.240

by the French Revolution and the Utopian pursuits, were relevant when communities were moving away from monarchy, and concentration of political power, feudalism and concentration of the land and other economic wealth in some hands. Contemporaneously the claim to equality may have entirely different connotations. Besides the constitutional guarantee of access to public employment, or to non-discrimination, are emerging, fields of social activities and social engagements, which seem to fall both within State regulation and control and those which cannot be controlled at all. Access to education, as well as access to higher education is one such area. What about housing or shelter and what about equality of remunerations, in the face of disproportionate use of housing space by the high and have-fulls, surrounded by slums and shanties, and the CEOs anointed as the new barons of free economy. The claim to equality can mean equal access to all material resources of the community, natural or man-made, in order that a citizen is able to secure conditions favourable to pursuit of her well-being. The sagacious intervention of the Supreme Court, is sought to settle issues of transparency in governance relating to material resources of the community. As the Automobile industry continue to dwarf the public transport system, do we suggest that the automobile industry is subject to equality claims?

While ensuring such equal access to any or all material resources, the State cannot perhaps shut its eyes to the other great challenges of contemporary times. Today we have realized that humanity shares a common fate on a crowded planet and that challenge is the challenge of the availability and the use of natural resources in such wise ways that may save the human species from possible chaos, disorder if not extinction. Large number of people have written about this problem, from biologists to environmental sociologists and they say that the worlds current ecological and economic trajectory is highly unsustainable and that we cannot continue with business as usual. Here again Jeffery Sachs notices four causes for such potential crisis.

- Human pressures on Earth's ecosystems and climate, unless mitigated substantially, will cause dangerous climate change, massive species extinctions, and the destruction of vital life-support functions.

- The world's population continues to rise at a dangerously rapid pace, especially in the regions least able to absorb a rising population.
- One sixth of the world remains trapped in extreme poverty unrelieved by global economic growth, and the poverty trap poses tragic hardships for the poor themselves and great risks for the rest of the world.
- We are paralyzed in the very process of global problem solving, weighed down by cynicism, defeatism and outdated institutions.<sup>11</sup>

This is the paradox of a divided global society seeking unification through a global economy and there are the fault lines of globalization, with its hegemony of the economically strong countries. It should take some historical time before real equality in economic bargains and free trade can emerge. The dictating countries will have to shed their old garments of power and superiority-virtually surrendering their claims to superior civilizational status. The constitutional dharma of answering the domestic claims to equality in its emerging dimensions has this problem to handle. The handling of the problem is further confounded by the pressures of a unified global economy as every economic domestic activity, if not to fail in existence or not to perish, will have to be tune with global demands and global demands in the ultimate analysis may mean impositions from economically or globally strong power centers. This may as well mean an economic neo-colonization. Easy and comfortable solutions are not on hand but the Indian State is undoubtedly under the constitutional dharma of creatively responding to the equality claims of its deprived and weaker sections. To put it poignantly when can that little frail figure selling tickets in a bus have a spare time to be part of a music orchestra in the evening? Or when will our domestic aides be able to volunteer themselves as teachers in a neighbourhood school? With free market economy virtually dictated by globalization, right to equality is undergoing change. Despite Article 21A and right to education, no segment of education is free market forces. The public funding of rural employment generation, subsidies, tribal

---

<sup>11</sup> Jeffrey Sachs, "Common Wealth: Economics for a Crowded Planet" Penguin Books, 2009, page 6.

areas development, are also under challenge. How are we going to definitively and beyond the vagaries of political ideologies, protect the equality claims and fulfil them?

Let us also look at another major contemporary concern, an important aspect and dimension of autonomy or freedom, namely, freedom of expression. Freedom of expression of controversial ideas are no longer controversially prohibited even though both the civil society and prevailing notions of justice may muzzle to some extent such Freedom of expression of ideas and views. Highly reputed publishing houses may be asked to withdraw publications which are perceived to be offending the sensibilities of a certain set of people. But what is becoming problematic is the virtually unlimited scope for expression and which includes the proclaimed independence of the press and the media which is based on the following syllogism. “Free expression is guaranteed; free expression uses certain media; ergo those media are to be protected.”<sup>12</sup> A learned author writing in this regard makes the following pertinent observation:

“We are thus confronted with a transfer of safeguard from free expression to one of its means, and thence to the position where the means are to be protected in their own right; in other words, whatever these media produce are held to be free expression and thus require protection.”

To construct and exemplify, this rationale can be logically articulated thus : X (wine) is protected; in order to be distributed X (wine) requires Y (a bottle); Y (the bottle) is protected because it is used to contain X (wine); thence anything-even-water-that Y contains is protected because the safeguard has been transferred from the substance to the container.

In other words, the sense of freedom of expression, as a political freedom enjoyed by individuals and the groups in which they associate, has been progressively lost and has become attached to persons who can at most be considered instrumental in the diffusion of the thought of others.

---

<sup>12</sup> Vincenzo Zeno-Zencovich, “Freedom of Expression: A Critical and Comparative Analysis”, Routledge-Cavendish, 2008, p. 7

A moment's consideration of the multifarious product of the printing press is enough for us to realize it is subject to protection not of itself, but because it reproduces 'thought'.<sup>13</sup>

The result is that broadcasting from being an entertainment industry, is now a free expression industry abhorring or avoiding any restraints. I submit that avoidance of any restraint on any freedom means that the elements of responsibility or accountability, all inherent in every conduct, action or even thought, are burdensome and unnecessary.

Free and unhindered access to information and knowledge are fundamental values of a free and tolerant social order. Science, Technology and understanding of history are all built on these values. The practice of democracy demands People's knowledge about the fitness of candidates and of the electoral process. However the media-both print and electronic-have assumed to themselves the agency and authority to pump any, and all information into people's heads coupled with the argument that it is the wisdom and choice of people to avoid or reject the unnecessary or the unpalatable. This argument is faulty, as when the flow of information is like an avalanche, there is no choice of hiding. Thus, we are see that Freedom to do a business or avocation of the agents has become the primary freedom of expression? Where is the principle of reasoned judgment and accountability?

It is not very clear that the State can reasonably lay its hands upon this titanic phenomenon without fundamentally hampering the free expression of ideas which are so essential and interlinked with justice and equality. After all it is argued that justice requires equality, since, in the absence of equality, unequals or the powerless will have to first claim the power to be heard. Thus freedom of expression and the constitutional dharma of ensuring due restraints on that freedom as well to secure justice to victims of too free an exercise of that freedom, are in conflict.

That takes us to another dimension of constitutional dharma namely, the dharma of the Constitution to protect and promote democracy. There can be no two opinions on the relevance and indispensability of democracy.

---

<sup>13</sup> Vincenzo Zeno-Zencovich, "Freedom of Expression: A Critical and Comparative Analysis", Routledge-Cavendish, 2008, p. 7



The difficulty lies with the assumption that all competing voices or conflicting claims in society can be conciliated through the democratic process. After all certain conflicts require complete dissolution or elimination of the problematic foundations of the conflicts themselves whether in the realm of equality of status or well-being or gender relationship. With the best of intentions being translated into Governmental exercise, it is said that it is a feature of the representative democracy that Governments get things wrong and as a tailoring exercise spend much of their efforts seeking solutions to problems of their own causing. Humorously it is stated that no political system can get their trains to run on time. However one of the virtues of democracy is its ways of coping with errors.<sup>14</sup> The problem is not with the admirable capacity of democracy of coping with its errors but as to the avoidance of the practice of transparency and openness.

Thus we have the virtues of an open society which is as open as the State and the society can accommodate non-controversial claims, without unduly sacrificing entrenched claims of free market and other economic freedoms, and an open society which may grudgingly allow claims to equality, challenging entrenched positions in status and wealth. How do we continue to travel on this uncertain terrain without settling goals, without removing fences and boundaries, without insisting on citizens' adherence to constitutional dharmas and constitutional convergence with citizen autonomy?

The basic features of the constitution identified by the Supreme Court are relevant both for the community as a collective, equally for the citizen as an individual and free exercise of citizenship. The question however is not the theoretical existence of these features on the constitutional fabric, but their conversion as vibrant agents in the hands of the last, illiterate citizen. The clash between current conceptions of constitutional dharmas, which are mechanical, and worn out, and emerging citizenship demands can be overcome only by re-articulation of principles of and accountability in governance and reaching out to enrich the citizen autonomy, the autonomy of the least endowed.

I wish to come back to where I began. Human Rights dialogues, discourses and enforcements were necessary and continue to be necessary

---

<sup>14</sup> Dudley Knowles, "Political Philosophy", Routledge, 2001, pp. 317-18

to convert a partisan state into a dharmic state which would accord no preferred position to any individual or groups in the enjoyment of the common goods and fruits of the common wealth. The economic wealth production agents cannot claim freedom from commitment to others and that is why I say no freedom is freedom unto oneself alone - except on matters of personal prerogatives or engagements - All my references to individual autonomy is not mere paraphrasing of the liberal conception of personal liberty. To repeat, autonomy has to be nourished with its twin dimensions of responsibility to oneself and to the community and this nourishment has to be zealously ensured by the collective engagement of constitutional dharmas.

The purity of the air we breathe, the lands that are tilled, the nature that demands care and concern from all of us, the roads we walk, the ideas we exchange - including gossips one cannot avoid - the gadgets we produce, the faiths and beliefs to which we wake up to every morning and return to every evening, are both collectively and individually precious.

I find that I am not alone in the thoughts that have been shared. Responding to arguments in the recent years that the US constitutional system has exalted individual rights over responsibilities, the following is stated as dimensions of the “constitutional liberalism” that aspires to pursue ordered liberty :-

We propose an account of rights that (1) takes responsibilities as well as rights seriously, permitting government to encourage responsibility in the exercise of rights but not compel what it holds is the responsible decision; (2) supports what we, following Michael Sandel, call a “formative project” of civil society and government promoting responsibility, inculcating civil virtue, fostering citizens’ capacities for democratic and personal self-government, and securing ordered liberty and equal citizenship for all; (3) justifies rights of autonomy on the basis not to “empty” toleration, but of toleration as respect, together with the capacity for responsibility and the substantive moral goods furthered by securing such rights; and (4) protects basic liberties (such as freedom of association and rights of autonomy) stringently but not absolutely, through reasoned judgement concerning ordered

liberty without precluding government from encouraging responsibility or inculcating civil virtues.<sup>15</sup>

The dangers however are that we have not leant through any self-induced cerebral mutations of the brain/mind, as to make every shoulder of ours free for the other to lean on. Coercions of totalitarian State - its high economic growth notwithstanding - cannot be any comforting alternative. We need to travel and as I said, to travel with a difference, constitutional dharma and individual autonomy are neatly plaited like that of a woman blessed with long hair.

\*\*\*\*\*

---

<sup>15</sup> James E. Flemin and Linds McClain, "Ordered Liberty: Rights, Responsibilities and Virtues", Harvard University Press, 2013.