Source : www.thehindu.com Date : 2020-05-22

A VIOLATION OF RIGHT FOUND, BUT NO REMEDY GIVEN

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

The maxim *Ubi Jus Ibi Remedium* (where there is a right, there is a remedy) has anchored the common law for centuries. In India, the Constituent Assembly regarded the principle as so foundational that, through Article 32, it granted the Supreme Court the authority to issue a set of prerogative writs to enforce the fundamental rights guaranteed by the Constitution. Over the last four decades, though, the idea of remedies moving in parallel with rights has come to wither. In this period, the Supreme Court has enunciated a number of rights which it found ought to be manifest on a proper reading of the Constitution. These have included the rights to clean air, health, shelter, human dignity, and privacy. But this articulation, stentorian as it might have been, hasn't always led to just results. The court's history is littered with cases where a violation of a right is found, but a remedy hasn't been forthcoming. The ruling delivered on May 11, in *Foundation for Media Professionals v. Union Territory of Jammu and Kashmir* is, in many ways, symptomatic of this trend. It ought to enjoin us to think more deeply about what the Court's institutional role really should be.

The judgment begins thus: "Again, this Court is called upon to address a very important but a sensitive issue… we have to ensure that national security and human rights can be reasonably and defensibly balanced, a responsibility, that this Court takes with utmost seriousness." But while the Court found that a prohibition of 4G Internet in J&K was potentially disproportionate, it could not extend itself to remedying the wrong by issuing a writ to the state. What it did instead was to relegate the decision-making to a newly formed committee comprising officials from the executive. In doing so, it effectively reversed the age-old principle that no person shall act as a judge in his own cause.

Editorial | Indelicate imbalance: On Supreme Court and Kashmir

What was the reason for the Court's dithering? The answers are hard to find in the judgment. The Constitution, and the debates that went into its making, are clear on what the judiciary's role ought to be. It is meant to act as an independent check on parliamentary and executive actions. But the Court remains mired in a vagueness of purpose. When must it strike down legislation? When must it show deference to Parliament? Do social welfare measures demand greater deference than ordinary criminal laws? Should the level of scrutiny of executive actions be higher than that employed in testing statutes? Under what circumstances do executive acts call for special respect? These questions should have been settled by now. But the Court still wavers in its answers every time a new case comes before it. In January, when, in *Anuradha Bhasin*, the Court recognised something akin to a fundamental right to access the Internet, the judgment was widely acclaimed. But of what use is the fashioning of a new right to the people of J&K if a decision on whether that right has been violated is consigned to the very authority that made the original call?

Indeed, the petitioner in *FMP* relied on the Court's judgment in *Anuradha Bhasin* to argue that a blanket restriction on 4G Internet across the region had had a deleterious impact on a slew of rights, including the rights to free speech and expression, education, freedom of trade, and health. The Court's own past decisions, including that of the very bench which heard *FMP,* prescribes a standard of proportionality to judge cases where a fundamental right is limited by state action. The test would have required the Court to engage in a rigorous analysis of the

facts, to examine whether the state's rationale for limiting access to the Internet was, one, predicated on legitimate grounds; two, was the least intrusive measure available to the government; and three, whether on a balance of the competing interests the restriction was justified. Given this doctrine and given that the Supreme Court often functions as a court of first resort, it cannot absolve itself from the job of fact-finding. In a system of justice that is adversarial, it is incumbent on the Court to appreciate the rival versions of the facts submitted before it and arrive at what it deems to be the truth. And once it does so, should it find the state's actions illegitimate, it must issue a writ to remedy the wrong, unless it finds compelling reasons not to do so. And if such reasons do exist, they require voicing.

Also read | Supreme Court orders setting up of panel to consider pleas seeking 4G in J&K

There is no doubt that there might be instances in which appreciating evidence can prove to be a confounding exercise. But judicial review is not meant to be easy. What we need today is a reversion to first principles — where the Court seeks to treat the art of delivering a judgment as an exercise in persuasion, where there is a clear link drawn between rights and remedies. In far too many cases the Court has inverted the basic logic of judicial review: it has either enunciated a violation of rights only to deny a remedy or it has granted remedies without articulating what right has been violated.

In her 2002 Reith Lectures, the philosopher Onora O'Neill began by quoting Confucius, who held weapons, food and trust as necessary for the government. O'Neill retold this theorem not to stress on any need for arms, but to emphasise on what she believed was a crisis of trust. It was telling, she thought, that ancient philosophies held trust to be the dearest of qualities. If a ruler, said Confucius to his disciple Tsze-kung, could not hold on to all three necessities for government, he should give up the weapons first and the food next. Trust, he said, had to be guarded to the end. Unlike governments, trust is all the judiciary has. When that belief begins to dissipate, courts lose their moral sway. They are rendered meaningless.

Courts build trust not through ambiguous snippets of wisdom, but through an adherence to basic norms. Principle over policy and consistency over randomness are the lodestar tenets of moral courage. The separation of powers cannot, as American writer Gore Vidal wrote, be allowed to work simply as a useful device under which "any sin of omission and commission can be shifted from one branch of government to another." We need it to do more. We need it to uphold the rule of law.

Suhrith Parthasarathy is an advocate practising at the Madras High Court

END