POWERING RESPONSIBILITY, CONSCIENCE KEEPING IN PUBLIC LAW: THE SCHOLARSHIP OF S. P. SATHE

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§ Introduction

Good wine, one is told, ripens with age. Similar claims are not always made about ageing scholars who are often described as burnt out or repetitive. Prof. Sathe was one of those who falsified this opinion, as in him, youthful exuberance combined with the glowing confidence of wisdom and maturity. It was this joie de vivre, which makes his sudden departure so difficult to take, though one cannot but notice that even the final exit bore his characteristic trademark of unassuming grace.

I am not a formal student of Prof. Sathe but have learnt from him in collegial conviviality. As ours was a work mediated relationship, this piece in tribute and remembrance is being written by reviewing his writings. In revisiting his books and articles I hope to highlight the major concerns of his scholarship, and learn from his scholastic evolution. Prof. Sathe was a prolific writer and it is not possible within the space of one article to do justice to his prodigious scholarship. In fact his colleagues at ILS Pune are hard put to compile a comprehensive list of his writings[1]. In this article therefore I have primarily limited my attention to five of his major books[2] in the realm of public law. The overarching theme of each of these books is the relationship between power and accountability. This concern is constant, irrespective of which of the power wielders he studies. Where he alters, is in devising different mechanisms of accountability, for different occupants of the seat of power.

§ Document to Analyse: The Tribunal System in India

As a scholar of public law Prof. Sathe had a natural interest in institutions of adjudication and conflict resolution. This interest was kindled and fuelled by the large scale employment of tribunals to perform dispute resolution functions. There are, he informed " 95 tribunals set up under 88

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1 Remembering S.P. Sathe 79-81 (ILS Law College Pune 2006).

2 These are *Constitutional Amendments 1950-1988 Law and Politics* (Tripathi Bombay 1989); *The Tribunal System in India* (Tripathi Bombay 1996); *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford University Press New Delhi 2002); *Administrative Law* (Seventh Edition Lexis Nexis Butterworths New Delhi 2004) and *Right to Information* (Lexis Nexis Butterworths New Delhi 2005).

central statutes[3]". Such widespread use was not accompanied with reasoned literature informing the general public on the need to employ these adjudicatory institutions. Thus, whilst "(t)he tribunals have grown up sporadically[4]" through ad hoc legislations there is " no official document regarding the general principles applicable to the tribunals[5]". It is this informational vacuum which caused him to take up the study on Tribunals "to find out the common principles and policies that appear in the central statutes under which tribunals are set up"[6]. This exercise he contended was necessary to undertake if tribunals were to be inducted as a deliberated component of legislative design.

In order to appreciate the situations which are better managed through tribunals it was necessary to define a tribunal. He defines a tribunal for the purpose of the study as those institutions which are set up under statutes for discharging the judicial function and are structurally independent of the government[7]. Insofar as tribunals along with courts and special courts are "formally structured adjudicative bodies with judicial function"[8] Sathe found it necessary to ponder on those conceptual distinctions which differentiate special courts and tribunals. A special court, he informed, was set up to deal with a specific subject matter, however, except for some minor variations to promote speedy disposal it followed the same procedures as the courts. Special courts are not "expected to possess any expertise or policy commitment[9]". Instead the judges are required to be neutral and independent. The speciality thus lies in the particular subject matter or the special procedure[10].

In order to lay the foundational base required for the study Sathe elaborates on the test of "trappings of a court" devised by the Supreme Court to identify tribunals in the context of Articles 227 and 136. A body he pointed out had trappings of a court if it had certain powers of a court such as summoning of witnesses, taking evidence on oath, compulsory production of documents[11]. Insofar as such powers were conferred on several quasi-judicial bodies these bodies could not be viewed as tribunals but "are mere investigating commissions which can either recommend or report or initiate some action in court"[12]. Consequently the Supreme Court has also made it

3 The Tribunal System in India at 1.
4 Ibid.
5 Ibid.
6 Ibid.
7 Id at 2.
8 Ibid.
9 Ibid.
10 Id at 3.
11 Id at 8.
12 Id at 9.

clear that in order to be a tribunal for the purposes of judicial review "the body must in addition to having trappings of a court, be vested with judicial power of the State"[13]. Since a quasi-judicial authority could fulfil this requirement, hence for the purposes of this study Sathe clarifies, along with these two requirements a body would be termed a tribunal if it is conferred with judicial powers only, which it can exercise independent of the Department or Government.[14] Each of these aforementioned requirements Sathe demonstrates have to be cumulatively present for a body to be termed a tribunal. Thus the Election Commission was independent of the government but not a tribunal and as a Lokayukta was not conferred only with judicial power it was not a tribunal but a quasi-judicial body[15].

The reason why I have dwelled on these distinctions introduced by Sathe in such detail is to show the integral connection between the conceptual categories and the objective of the study. If the purpose of the study is to unearth common policies and principles prompting the creation of Tribunals then it is necessary that there should neither be incorrect inclusion nor wrongful exclusion. If Sathe has not included a body merely because it was described as a tribunal; he has also not excluded an institution solely because it was not so named[16]. And if the substance and not the form was to dictate the collation of facts on various kinds of adjudicatory bodies, it was essential that the process of definition should be a rigorous one.

Subsequent to this elaborate definitional exercise Sathe has comprehensively described various kinds of tribunals set up under central statutes. On the evidence collected from this examination he provides information on: the appointment process, qualifications, and service conditions, tenure of appointment, powers and procedures[17]. The study finds that there is wide but unnecessary variations in the legislative designs on tribunals. On the strength of this evidence he recommends the enactment of "a common law on tribunals prescribing the procedures, powers, mode of appointment, qualifications of members and provisions for appeal or review"[18]. And "if special provisions are required for any tribunal they alone could be provided in the statute of incorporation"[19].

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13 Ibid.
14 Ibid.
15 Id at 12.
16 See for example chapter 11 from 205-14 where he has treated arbitrators appointed under various statutes as tribunals.
17 See chapter 12 of the study.
18 Id at 221.
19 Ibid.

Sathe had undertaken the exercise in the belief that there are situations and circumstances in which tribunals are the appropriate decision-making body. Therefore he wanted that their establishment as adjudicatory bodies should be a considered and not a mechanical exercise. As he did not think that Tribunals per se endangered the independence of the judiciary he questioned the decision of the Delhi High Court[20] whereby they found the Debts Recovery Tribunal as well as the Debt Recovery (Appellate) Tribunal to be ultra vires the Constitution. In fact as he believed that tribunals could be useful alternatives to courts, and could facilitate access to justice, he expresses the hope that the decision of the Delhi High Court be overruled by the Supreme Court[21]. And "Parliament should legislate on tribunals with a view to establishing them as an alternative system of justice on sound principles of openness, fairness and independence[22]"

Indian legal scholars have often been criticised for the fact that their writings are heavy on collation of information but weak on analysis. A possible reason could be that the exercise of collation is carried out without sufficient thought being devoted on the objective of the collection. The Tribunal System in India provides useful insights on how to collate and document information without compromising analysis. Or rather the study shows what kind of inquiry necessarily requires extensive documentation and how such documentation should be undertaken.

§ Law in Context: Constitutional Amendments 1950-1988

Another charge which is often levelled against Indian legal scholars is of undertaking the study of law divorced from the socio-political context. In failing to appreciate the connection between law and society they propagate superficial and acontextual legal understanding. Prof Sathe's treatise on constitutional amendments belies this popular charge. In fact his study successfully shows how it would be impossible to understand the legal process of constitutional amendments divorced from the political process. It is the necessity of appreciating this connection, which explains why "law and politics" is the second title of the book.

Sathe has undertaken a detailed narration of all amendments to the Constitution from 1950-1988[23]. In undertaking this narration, he has shown

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20 *Delhi High Court Bar Association v. Union of India* AIR 1995 Del 323.

21 The Supreme Court in *Union of India v. Delhi High Court Bar Association*, Case Appeal (civil 4679) of 1995 decided on 14.3.2002 has fulfilled this wish but not perhaps in consonance with the reasoning proffered by Sathe as the court has been greatly influenced by the amendments introduced in the impugned law.

22 Supra note 3 at 221.

23 Incidentally this book was published nearly seven years before the Tribunal study. Thus the research technique of creating an information base before voicing opinion or undertaking analysis

how a number of the early amendments[24] were prompted by the need to overturn certain judicial decisions. Thus the first amendment was introduced, according to the objects and reasons, because " the citizen's right to freedom of speech and expression guaranteed by Article 19(1)(a) has been held by some courts ... to be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence"[25]. And the Fourth and the Seventeenth amendments were introduced "to remove roadblocks to social and economic reconstruction". To exemplify this contention, Sathe points out how whilst by the fourth amendment new categories of laws were accorded the immunity of Article 31A, this immunity unlike the original article,[26] protected these laws only from any challenge under articles 14, 19 and 31. This shows, he opines that "(t)he Constitution makers were not against the right to property. They were against unequal distribution of property"[27]. He finds further confirmation for this opinion, by the second proviso of Article 31-A introduced by the Seventeenth amendment, which required that full compensation was to be paid for land held within the ceiling limit[28]. By referring to the circumstances surrounding the textual changes, Sathe demonstrates, how this round of amendments was prompted by ideological differences between the legislature and the judiciary.

In order to ensure a political understanding of the process of amendment he distinguishes between the Nehruvian amendments and those mooted during the governance of Indira Gandhi. And here too he makes a distinction between the amendments which were introduced before[29] and after her unseating by the Allahabad High Court. The Constitution (thirty eighth) Amendment was the first amendment made during the emergency and it "started the trend towards authoritarianism"[30] as it amended Article 123 to provide that the President's satisfaction on the necessity of promulgating an Ordinance shall not be questioned in any court. This trend was carried further by the thirty-ninth amendment which he describes as "a very

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seems to be an integral part of Sathe's writing style. This finding is confirmed by his other books. Thus for example in his treatise on Administrative Law he voices his opinion with regard to the different writs after outlining how the jurisdiction has been exercised by the High Courts and the Supreme Court. And the monograph on Right to Information carries a comprehensive description of the various state statutes legislating upon information rights before analyzing the central statute.

24 See especially the descriptions surrounding the First, Fourth and Seventeenth amendment of Constitutional Amendments, supra note 2 from pp.7-16.

25 Id at 15.

26 The original article made the included laws immune from the challenge of all fundamental rights. *Constitutional Amendments* at p.15.

27 Ibid.

28 Id at 16.

29 He describes the amendments introduced by the 31st to the 37th Constitutional Amendment Act from 1973 to 1975 id at pp.24-25 to show their routine nature.

30 Id at 25.

personalised amendment"[31]. Again in true Sathean style he informs that the amendment added *inter alia* the Representation of Peoples Act 1951 with the 1974 amendments; the Maintenance of Internal Security Act 1971; the Foreign Exchange Regulation Act 1973. And then explains that "we are mentioning the names of these Acts because they were totally alien to the culture and pattern of the IX Schedule as it had emerged since 1951"[32]. These inclusions showed that "(o)riginal thematic loyalty as well as discretion to include minimum number of laws seemed to have deserted the decision-makers"[33].

Sathe was a great believer in institutional integrity[34]. He was of the opinion that every institutional entity was suited to perform a particular function, and responsible public functioning required that no public entity should trench into the role of another. Thus whilst he did not believe that the power of constitutional amendment was uncontrolled, he believed that the control should be exercised by the political instead of the judicial process[35]. It was due to this belief that he took issue with the basic structure doctrine. However he had little hesitation in reconsidering his views when he found the political process providing what he called a command performance. It was as he said not the substance but the speed with which the 39th Constitutional Amendment barring prime-ministerial elections from being challenged in Court was passed,[36] which caused him to question, whether the political process should be viewed as the sole guarantor of the responsible exercise of constituent power.

It is scholastic integrity which causes him to view an amendment shorn of its populist perception. Thus whilst evaluating the 52nd Amendment, he acknowledges that the anti-defection legislation was welcomed because the country was so fed up with defections. This popular endorsement does not

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31 Id at 28.

32 Ibid.

33 Id at 29. In tune with this contention of original thematic loyalty he continually presses for the Supreme Court to weed out those laws, which have been included in the 9th schedule after *Kesavananda Bharti* if they have no connection with articles 31-B and 31-C. Id at 83-84. The ruling of the Supreme Court in *I R Coelho v. State of Tamil Nadu* Civil Appeal 1344-45 of 1976 decided on 11.1.2007 seems to be a step in this direction.

34 The above discussion on tribunals shows that he took issue with requiring any one kind of body to perform the function of another. And to that end it was necessary for him to continually probe into the core functions of each institution of governance.

35. On the implied limitation on the constituent power of amendment see S.P. Sathe, Fundamental Rights and Amendment of the Indian Constitution (1968) as cited in Constitutional Amendments id at 72.

36 The 39th Amendment was introduced and passed in the Lok Sabha on 7th August. The Rajya Sabha passed it on 8th August. It was ratified by the requisite number of State legislatures on 9th August and received the assent of the President on 10th August. And Mrs. Gandhi's appeal against Allahabad High Court was to come up for hearing on the 11th of August.

prevent Sathe from pointing to the severe restrictions on freedom of speech and expression imposed by the anti-defection legislation. It could prevent a member from voting in accordance with his conscience, as the cost of such voting could be that he loses his membership of the house. This anomalous situation causes him to comment that "(d)efections have to be banned but that should be achieved without sacrificing an individual's freedom to vote. Otherwise the anti-defection legislation instead of liberating democracy would make it more crippled"[37]. The fact that the proposal to appoint jurists to the High Court was proposed in the infamous 42nd Amendment did not prevent Sathe from applauding the proposal as "well conceived[38]" however he simultaneously conceded that "such was the low stock of the government with the people that it was misunderstood. It was felt that it was meant to facilitate politically motivated appointments"[39].

The ability to see both sides of an issue was an integral feature of Sathe's scholarship. It was this ability which caused him to both interrogate and accept the basic structure doctrine which he said was a mechanism to save democracy from democracy. However this endorsement was not absolute and uncritical. Thus whilst holding that "(t)he basic structure doctrine if used with farsight and judiciousness could lend stability to the Constitution without robbing it of its dynamism"[40]. He took care not to give the judiciary a free hand in discerning these basic features and consequently opined:

> *"What is basic structure will depend upon what is vital to Indian democracy and that cannot be determined except with reference to history, politics, economy and social milieu in which the constitution functions. The Court cannot impose on society anything it considers basic. What judges consider to be basic structure must meet the requirement of national consciousness about the basic structure."*[41]

With this formulation, Sathe whilst recognising the need for judicial intervention and activism, introduced a caveat against its indisciplined use. Thus the people and their will were put forth as the check to balance the power of the Court. This theme of who shall judge the judges he pursued in greater detail in his book entitled "Judicial Activism in India". And perhaps to foreground his concern with questions of institutional integrity the second title of the book is "Transgressing Borders and Enforcing Limits".

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37 Id at 56.
38 Id at 35.
39 Ibid.
40 Id at 75.
41 Id at 94.

§ Responsive and Responsible Exercise of Power: Judicial Activism in India

In this book, which in many a way can be termed Sathe's *magnum opus*, one encounters all the various features of Sathe's scholarship, albeit in a more evolved form. Thus as in Constitutional Amendments, he undertakes his discussion of judicial activism, by firstly putting in place the conceptual building blocks. Since the monograph is about the role of judicial review in a democracy, he begins his exegesis of judicial activism by defining judicial review, and then showing how in the constitutional construction of judicial review lie the seeds of judicial activism.

Sathe defines judicial review to mean "overseeing by the judiciary of the exercise of power by other coordinate organs of government with a view to ensure that they remain confined to the limits drawn upon their powers by the Constitution[42]."

This power of oversight he next informs differs from jurisdiction to jurisdiction. As in England, Parliament has been accorded absolute supremacy; the English courts have no power to review legislation enacted by the Parliament. Thus the power of review is limited to ensuring that the executive acts in accordance with the dictates of the legislation. This tenet of parliamentary supremacy was not extended to the British colonies, and courts here were given the power to both review legislative and executive acts in the light of the Constituent Acts, enacted by the British Parliament. However because these Constituent Acts had no bill of rights, the power of review was limited. The courts in countries ruled by Britain, had imbibed the mother country's culture of legislative deference and maximum restraint.

However once a country adopts a written constitution with a Bill of Rights, it is difficult to confine judicial review within these narrow contours. Judicial Review under such a constitution cannot remain technocratic, because a number of expressions in the bill of rights are open- textured, which change meaning as the society grows and develops. "A constitutional court therefore cannot remain a technocratic court forever"[43]. And a court "giving new meaning to a provision so as to suit the changing social or economic conditions or expanding the horizons of the rights of the individual is said to be an activist court"[44].

The above delineation is an effort to show how Sathe proceeds brick by brick to pave the connection between judicial review and judicial activism.

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42 S.P. Sathe, *Judicial Activism in India* (Oxford University Press 2002) at p.1.
43 Id at 4.
44 Id at 5.

This basic building blocks method continues through the study as Sathe introduces the distinction between negative[45] and positive activism[46] and then between judicial activism, populism[47], excessivism[48] and adventurism. With these categorisations, which he only illustratively explains, Sathe does not enter into the dichotomous dialogue of activism and restraint, but plots the interventions of the Court on a more complex matrix.

It is possible to appreciate this nuanced analysis, if we recognise that for Sathe the responsible exercise of power was more important than, which body had assumed the responsibility. Thus he was no fetishist who viewed separation of powers as good for its own sake. He wanted the separation to be observed to the extent possible, provided the body on which the power has been conferred exercises it responsibly. He was agreeable to assumption of power by another organ, if circumstances so warranted, provided the intervention was reflexive and not a reflex exercise. He was thus neither an ardent votary of judicial activism nor a compulsive critic. This finding is confirmed again and again, as Sathe painstakingly evaluates judicial decisions from 1950 to 2002, to assess whether the choices of the Court strengthened the democratic polity[49] or assisted the disadvantaged[50].

As already mentioned Sathe did not seek the due observance of technical rules for their own sake. In *Basheshwar Nath v. Commissioner of*

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45 Negative activism results when the court uses its ingenuity to maintain the status quo. Id at 5.

46 In positive activism the court is engaged in altering the power relations to make them more equitable. Ibid.

47 He refers to the *Unnikrishnan* decision (1993) 1 SCC 645 as an example of judicial populism, as it merely amounted to conversion of a non enforceable directive principle into a non enforceable fundamental right. For a discussion on judicial populism see id at 118-120. Also see pp 143-44.

48 In *All India Judges Association v. Union of India* AIR 1992 SC 165 the Supreme Court issued directions to the Government to create an all India judicial service. The Court, says Sathe, "clearly exceeded its authority". Id at 127.

49 Thus he applauds *Sakal Newspapers Private Ltd v. Union of India*, AIR 1962 SC 305 as the first instance of judicial activism by the Supreme Court because it held that "certain fundamental rights the existence of which was prerequisite to the operation of the democratic process needed to be given greater judicial protection". Id at 54-55. Dwells on the relative merit of *Kesavananda* AIR 1973 SC 1461 and *Golaknath* AIR 1967 SC 1643 to opine "the basic structure doctrine is an improvement over the *Golaknath* doctrine insofar as it is not located in any specific provision such as Article 13(2). Therefore it becomes difficult for Parliament to override it through another constitutional amendment". Id at 78. And is unequivocal in stating that the majority decision in *P.V. Narasimha Rao v. State* (1998) 4 SCC 626 is wrong. This is because "freedom is given to a member of the legislature in his capacity as a representative of the people. He can neither barter it away for a bribe nor be deterred from exercising it due to fear of expulsion from the party. Prosecution for taking bribe does not restrict his freedom on the contrary it enhances it." Id at 91. In *Bommai*, AIR 1994 SC 1918 he adopts a more complex position where whilst conceding that the court could be criticised for acting politically he is quick to point out "that the courts politics has helped the politics of governance become more principled and democratic." Id at 158.

50 Herein of interest is the chapter on public interest litigation (ch 6) where Sathe shows how the Supreme Court made a "subtle shift from a neutralist adversarial judicial role to an inquisitorial affirmative" one. Id at 210.

Income Tax,[51] the Court ruled that fundamental rights could not be waived. The point of dispute in the case could have been decided without going into this question of waiver. Sathe unlike Seervai[52] does not disapprove, because the court in making this pronouncement was protecting the people against themselves.[53] He is impatient with judicial inability to utilise technical rules, where reliance on them, could result in a more socially just or politically astute decision. For example in *State of Rajasthan v. Union of India*,[54] he was of the opinion that the Court could have refused to intervene on the reasoning that the President's action was not justiciable. "But after saying that the matter was justiciable, its endorsement of the action which was palpably the worst possible abuse of article 356 was indefensible."[55]

At several points in the book, Sathe does desire that the Court should not be trigger happy with the basic structure doctrine, but use it with the utmost restraint. At the same time he also commends the doctrine as a counter-majoritarian check on temporary legislative majorities. He thus neither wants the court to be overly activist nor needlessly passive. Whilst pronouncing upon the Constitution (Fifty Second Amendment) Act, the Supreme Court used the doctrine of severability to save the Anti Defection law, whilst striking down paragraph 7. Sathe points out that when a law is not enacted in accordance with the prescribed procedure, it must fall as a whole. Thus the doctrine of severability did not apply. In tune with his line of matching cure to illness, he forcefully opines "that this was the most deserving case for using the basic structure and the judicial restraint was misplaced".[56]

Sathe evidently believed that to create a political culture of intellectual rigour and honesty, it was necessary that scholars practised what they preached. A standard which he himself did not compromise. Thus he has no hesitation in admitting that in condemning the adoption of the basic structure doctrine he had not understood how the controls exercised by political power needed to be supplemented with judicial power. And whilst analysing the *Mohd Hanif Qureshi v. State of Bihar*[57] decision he firstly demonstrates how a politically charged issue was converted into a legal issue by the court. The Court tried to satisfy the majority's religious sentiment by upholding the ban on cow slaughter, at the same time, it ruled that the slaughter of cattle other than cows should not be banned, if they are neither

51 AIR 1959 SC 149.

52 H.M. Seervai *Constitutional Law of India* 2nd ed Vol 1, p 94 (1976) as cited in supra note at 198 refers to *Basheshar Nath* "as an example of extreme undesirability of a Court pronouncing on large constitutional questions which do not arise"

53 Supra note at 198.

54 AIR 1977 SC 1361.

55 Id at 150.

56 Id at 93.

57 AIR 1958 SC 731.

capable of yielding milk nor useful for insemination. Sathe had in a piece he wrote in the sixties[58] criticised the decision as a compromise with the concept of the secular state. Commenting on the decision nearly 40 years later, he most disarmingly opines "today I look at that decision as an act of statesmanship. Judicial decisions cannot be doctrinaire. A court is always negotiating between reality and idealism".[59] Sathe who at another point in the book, bemoans that legal education in India seldom looks to law as a process,[60] shows that scholastic integrity is not in just taking positions but in changing them if events so require you to do.

Even whilst he sees merit in judicial activism, as in his study on Constitutional Amendments, Sathe is anxious about the huge power that the judiciary has acquired. His anxiety is exacerbated by the fact that the Supreme Court through a process of interpretation has also usurped the power of judicial appointments to itself. It is this situation, which causes Sathe to exasperatedly exclaim, "I do not know of any democratic country in which the power of appointing the judges vests in the judiciary itself".[61] By this act, he holds, the Court has under the guise of interpretation changed the basic structure of the Constitution. The basic structure consists of division of powers between the legislature, executive and the judiciary.[62]

However despite this anxiety Sathe cannot see an escape from judicial activism. In fact he unequivocally states that even if the political establishment were to perform its job with due efficiency, judicial activism would be required, to give voice to the most marginalised of communities.[63] Having conceded the need for activist intervention by the Court, he then finds it necessary, to devise suitable mechanisms of accountability. Here again, as in the monograph on Constitutional Amendments, he sees the power in the will of the people. It is the faith of the people, he holds, that constitutes the legitimacy of the court and judicial activism. By the will of the people, Sathe does not mean that the court should bow down to populist pressures, but he does require the court to have the pulse of popular expectations. And for the court to forge a healthy and vibrant relationship with the polity, he asks it to be less sensitive and more inviting of criticism.[64] "Criticism of judicial decisions" he asserts "serves as feedback to the judges"[65]. And to allow for

58 S.P. Sathe, "Cow Slaughter: the Legal Aspect" in A.B. Shah (ed), *Cow Slaughter Horns of a Dilemma*, 69 (Lalvani Bombay 1967) as cited in supra note at 271.
59 Id at 271.
60 Id at 173.
61 Id at 126.
62 Id at 126-27.
63 Id at 279.
64 Id a 286.
65 Id at 290.

this criticism to be available without fear he seeks amendments to the law of contempt.[66]

§ Peoples Power and Accountability: The Right to Information[67]

The descriptive analysis made above, shows the importance Sathe accorded to the citizen in obtaining accountability from the governors of power and authority. In this book, he turns his attention to the means and mechanisms by which, the citizens can perform these vigilance duties. Sathe had, in an earlier publication, whilst elaborating on how the Indian Supreme Court had read the right to know in the right to freedom of speech and expression, and asserted, that the right to education should predate the right to information.[68] As without education, people would be hard put to exercise the right to information. Subsequent to those lectures, the right to education has been inducted as a fundamental right, in the Constitution. He notes this enhanced importance accorded to the right to education, but points to the equivocation in the constitutional provisions, and hence alerts that "considerable amount of social pressure will be needed to make education for all children below 14 years free and compulsory". Sathe continues to lay stress, on the connection between education and information, which he had made in the earlier study, but also informs that the crusade for the right to information has been spearheaded, by workers and peasants who lacked formal education but had acquired grass roots consciousness of their entitlements as citizens.[69] This reality again brings home the fact that literacy should be only viewed as one of the components of the right to education.

In characteristic style, Sathe begins his study, by distinguishing between a freedom and a right. And how whilst a guaranteed freedom only required the State not to impede the flow of information; a guaranteed right placed a more positive obligation of making information available to the people.[70]

In line with his belief of the need to understand law as process, he extensively details in the second chapter of the study, how the law has moved from secrecy to transparency; the circumstances in which there was a duty to inform and when information can be withheld, in the relationship between two individuals, between the individual and the state.

In order to appreciate the altered regime that could be ushered in by the new statute, he has recapitulated, the case law relating to one kind of

66 Id at 286-87.
67 S.P Sathe, *The Right to Information* (Lexis Nexis Butterworths 2005).
68 S.P. Sathe,*The Right to Know* (1991) as cited in supra note 64 at 9.
69 Supra note 64 at 21-22.
70 Id at 15, 27-28.

documents for which the government can claim privilege; the secrecy surrounding the advice of cabinet ministers and the requirements of the Official Secrets Act. Of special interest here, is his re-examination of the decision of the Supreme Court,[71] rejecting the constitutional challenge to section 18 of the Atomic Energy Act 1962. The Court had upheld the non disclosure safeguards employed in nuclear plants, on grounds of security of state. Sathe contends that the safeguards should be disclosed to the people, to save them from future hazards. And the Court should reconsider its ruling, in the light of the transparency regime, ushered in by the new statute. He recognises that security of state is a ground to refuse information even in the Right to Information Act 2005, but insists that such refusal can only be on reasonable grounds, even though the word reasonable has not been included in the new law. The word reasonable, he contends, will have to be read into the new Act, as right to information has been found to be a right concomitant with the right to freedom of speech[72].

The above discussion shows that Sathe wants transparency to be practised for all manner of information. He is not saying that there may not be circumstances in which security of state may prevail. Instead what he is challenging is the manner in which, the justification of "security of state" is being employed, to halt public scrutiny. In the same spirit, of not creating any holy cows, he has questioned the decision of the Supreme Court in *Indira Jaisingh v. Registrar General Supreme Court of India*[73] where the petitioner sought access to the report of a Karnataka High Court Committee, investigating into the conduct of some judges of the High Court. The Supreme Court ruled that it had no power over the High Court, and could not ask for the publication of the report. The best course would be for the petitioner to approach the High Court. Questioning the decision of the Supreme Court, Sathe asks, "did the court not shirk its responsibility...? Is a High Court not within its jurisdiction so far as fundamental rights are concerned? Since the Court has held that the right to information is included within the right to freedom of speech and expression, could it not have issued a writ of mandamus against the High Court asking it to release the report?[74]" And then most evocatively, "why should the conduct of the judges be shrouded in secrecy?[75]" Curiously, Sathe does not subject the regimes of copyrights and patents to a similar scrutiny instead he views them as striking the correct balance between the right to privacy and public access to knowledge[76]. It is

71 *People's Union for Civil Liberties v Union of India* AIR 2004 SC 1442.
72 Supra note 64 at pp 52-53.
73 (2003) 5 SCC 494.
74 Id at 54.
75 Ibid.
76 Id at 54-55.

worth speculating, as to whether he would have continued to hold this opinion, upon encountering the arguments of the copyleft and open source movements[77].

This monograph, like all his other publications, has provided comprehensive documentation of all relevant materials be it : the constitutional recognition of the right to know;[78] or a comprehensive analysis of all state legislations;[79] and the central act[80]. Possibly because the book is dealing with a legal development, which would empower the people, and hence strengthen democracy, there is a noticeable optimism in its tone and tenor. He sees immense possibilities for people enforced accountability, and believes that "an informed citizenry is a condition precedent to democracy"[81]. In awareness of the distrust of our times, he points out, "despotism and oppression thrive on secrecy and lack of information. Terrorism thrives on secrecy and hate. Both need to be combated through information"[82].

§ The Evolving Scholar of Administrative Law

In the last segment of this piece, I am elaborating on Prof Sathe's commentary on Administrative Law, which has run into its seventh edition[83]. This book was primarily planned as a study aid for the teachers and students of administrative law. The challenge here was how to balance the demands of information and analysis, because if the book was exclusively analytical, then it lost the fresh initiate into the subject. And if an overly descriptive approach was adopted, then the duty to develop critical understanding got sacrificed. This is how Sathe responded to the challenge.

He firstly laid out, the basic building blocks of every key concept in administrative law and then moved on to discuss, how this issue has been dealt with by the legislature and the courts. Thus for example: he would describe the difficulties of classifying an administrative function as quasi-judicial and yet why is it necessary to do so.[84] What is a jurisdictional question?[85] And what are the main features of a tribunal;[86] special features of the writ jurisdiction under the Indian Constitution;[87] the difference between

77 For a sample of these arguments see the sarai reader on public domain http://www.sarai.net/journal/reader1.html (last visited 4.2.2007).
78 Supra note 64 at pp 61-90.
79 Id at pp 91-130.
80 Id at pp 131-160.
81 Id at 2.
82 Id at 4.
83 S.P. Sathe, *Administrative Law* (Lexis Nexis Butterworths 7th edn 2004).
84 Id at 142-43.
85 Id at 269.
86 Id at 300.
87 Id at 460-63.

legitimate expectation and promissory estoppel;[88] or how the doctrine of proportionality has expanded judicial review[89] before embarking on more detailed discussion of the area.

Baxi, in his introduction to Massey's Administrative Law,[90] has bemoaned that Indian textbooks in Administrative Law, often deal with their subject in an acontexual manner. In Sathe's book, however, the legal formulae of administrative law are referred to, after explaining the reason for their adoption and how they are operating in practice. Thus, when he deals with parliamentary control of delegated legislation, he informs, how pre-enactment control is exercised by requiring legislations providing for delegated legislation to "be accompanied by a memorandum explaining such proposals, drawing attention to their scope, and also stating whether they are of exceptional or normal character"[91]. This rule, he further informs, does not mean much as "the memorandum is usually scrappy and inadequate and fails to give adequate information"[92]. He next informs that the Committee on Subordinate Legislation has taken note of this deficiency and asked for its rectification. However, "inspite of this suggestion the quality of the memorandum annexed to the Bills has not improved much in the matter of giving information".[93] Thus Sathe assesses parliamentary control of delegated legislation, not just by referring to the normative efforts, but by also examining the ground level operation of the norms.

One of the major difficulties, in attempting a contextual analysis of administrative law, is the wide terrain of the subject. Sathe has crossed this hurdle by introducing sub-classification. Thus for example, in the introductory chapter itself, he alerts the reader to the patterns of administrative law questions which, arise in different kind of legislations.[94] In the chapter on tribunals, commissions and regulatory authorities, he has distinguished not lumped, by providing dedicated space to the various kinds of tribunals, commissions and regulatory authorities[95].

And whilst looking at administrative review of administrative discretion, while his main headings refer to the principles evolved by courts to review discretionary powers, his sub-headings inform us of the operation of these

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88 Id at 184-86.
89 Id at 276-78.
90 Upendra Baxi "Introduction" to I.P. Massey, *Administrative Law* at xvi (Eastern Book Company 6th Ed 2005).
91 Id at 73.
92 Ibid.
93 Ibid.
94 Id at 14-16.
95 Id at 289-383.

principles, in specific contexts.[96]

As administrative law is almost entirely judge made law in India, one of the difficulties a textbook writer has to reckon with, is the volatility and inconsistency of judicial law making. Often textbook writers undertake their task, seemingly oblivious, to these contradictions. Sathe has continually referred to the contradictions whether with[97] or without comment[98].

It needs to be appreciated that Sathe grew with every edition of his book, and whilst the informative thrust of the book remained, there was both a subliminal and explicit growth, of the critical content. However as he did not wish to alter the primary thrust of the publication, the critical content, primarily came in the shape of thought-pregnant one-liners[99]. This generous use of the one-liner, for a pithy articulation of complex ideas, was an integral part of the Sathean writing style[100] which held him in good stead to continue providing basic information, even as he personally was increasingly more attracted, to analyse what was happening.[101]

§ In Conclusion

I have already admitted in the introduction that a single piece cannot do justice to the scholarship of Prof Sathe. This task is further complicated by the fact, that Prof Sathe had a penchant for continually stretching himself. Hence whilst constitutional and administrative law were his primary areas of interest, he did not undertake an acontexual and black letter study of these

96 See for example his treatment of non-application of mind at 418-422 or non examination of relevant considerations from 422-430.

97 In the chapter on judicial review, whilst dealing with the various tests devised by courts to deal with error apparent on the face of the record ,Sathe refers to Justice Chagla's ruling in *Batuk Vyas v Surat Borough Municipality*, AIR 1953 Bom 153 that an error was apparent if it obvious and self evident, and not become apparent by a process of examination or argument. Sathe concedes that this test should hold good for a majority of cases. However even that test could not handle inconsistency "because an error which may be considered by one judge to be self –evident may not be considered by another". Id at 273.

98 Thus see for example his pointing out how the Supreme Court upheld a provision providing for repeal in *A.V. Nachane v Union of India*, (1982) 1 SCC 205 after opining in *In Re Delhi Laws Act*, AIR 1951 SC 332 that the power of repeal could not be delegated. Id at 47.

99 See for example : "The excessive delegation argument remains the only bulwark against government authoritarianism" id at 55; "It may be worthwhile to consider whether Press Council could be provided greater teeth to deal with recalcitrant journalism" id at 329; "Appointments of judges should not depend upon the veto of a few judges. If they should not be at the mercy of the government they should not be at the mercy of the judges" id at 535; "PIL must be constrained by considerations of feasibility as well as propriety" id at 546.

100 See for example "Transparency in administration was therefore perceived to be a lethal weapon against corruption and abuse of power" supra note 67 at 22 "When populism prevails over legal requisites, the rule of law suffers and in the long run adversely affects the legal culture" supra note 42 at 144.

101 Prof. Sathe, while visiting NASLAR Hyderabad in August 2004, for a series of lectures at the University, admitted in a private conversation that the commentary no longer excited him, and wondered whether he would do another edition.

areas. How principles of administrative and constitutional law impact on excluded and marginal populations, was a constant concern.[102] Amongst his last completed pieces, was an article exploring the freedom of sexuality for women and persons with different sexual orientation.[103] The piece, uses principles such as prospective overruling, to expose the limitations of the Supreme Court ruling in *Sakshi vs Union of India*[104]. Prof Sathe was no orthodox but neither was he a compulsive radical. He saw moderation as an integral component of scholarship, and it is this ability to see both sides of an issue, which makes his argument for the freedom of sexuality constitutionally compelling.

I have already referred to his ability to raise complex questions through pithy one- liners. However what needs to be even more particularly noted is the simplicity of his writing style. His style is testimony to the fact that deep scholarship neither requires jargon nor is dependent on ponderous language. Or more appropriately as he knew his mind and spoke it, he used language to communicate and not to camouflage. He continually shows himself as firm of conviction but open to reason. Further the manner in which he critiqued his own positions, shows that he believed that wrongness was in sticking to an incorrect position, rather than in making an error of judgement.

Our scholastic growth often depends upon the company we keep be it of teachers, colleagues or friends. This intellectual and emotional debt often goes unacknowledged. Herein again Prof Sathe blazed his own trail. Three of the five books I have reviewed in this article have been dedicated to professional colleagues.[105] In his book on Right to Information he most generously acknowledges his colleague Ms Sathya Narayan to go so far as to say that "she actually wrote out the full text of chapter 4".

Prof Sathe saw legal academics as the conscience keepers of the legal system, which is why he bemoaned the absence of a juristic culture of criticising judicial decisions.[106] In critiquing judicial decisions, he believed, academics provided judges the much required feedback on their work. He adopted the voice of reason backed with evidence, to present his standpoint, and thus kept the dialogue going. The inherent danger of a polarised position is that its opponents find it easy to label and dismiss. However those who show that they are listening as they are speaking, stand a better chance of being able to

102 Administrative Law for the Poor in U. Baxi (ed), *Law and Poverty Critical Essays;* Amita Dhanda and Archana Parashar (ed), *Engendering Law Essays in Honour of Lotika Sarkar*.

103 Archana Parashar and Amita Dhanda (eds) *Redefining Family Law* (Routledge Forthcoming).

104 (2004) 5 SCC 518.

105 Thus Constitutional Amendments was dedicated to Prof A.B. Shah; The Tribunal System in India to his extended ILS family and Judicial Activism in India to Justice V.M. Tarkhunde with the byline "from whom I learnt humanism and human rights".

106 Supra note 42 at 229.

persuade the opposition to also provide a hearing. Prof Sathe's genre of legal writing, gently prodded his readers to distinguish between right and wrong, by helping appreciate the distinctions between the legally permissible and the legally desirable. The fact that no technical legal wrong has been committed is no reason to believe that the act done or the decision taken was fair and just. In bringing out this distinction between the ethical and the legal, he convincingly shows, why there is need to continually interrogate the legal. He tirelessly carried on this work in his writings and lectures and taught not just his students but so many of us by just being. In saluting his efforts, I on behalf of Indian academia, celebrate the best in Indian legal scholarship.