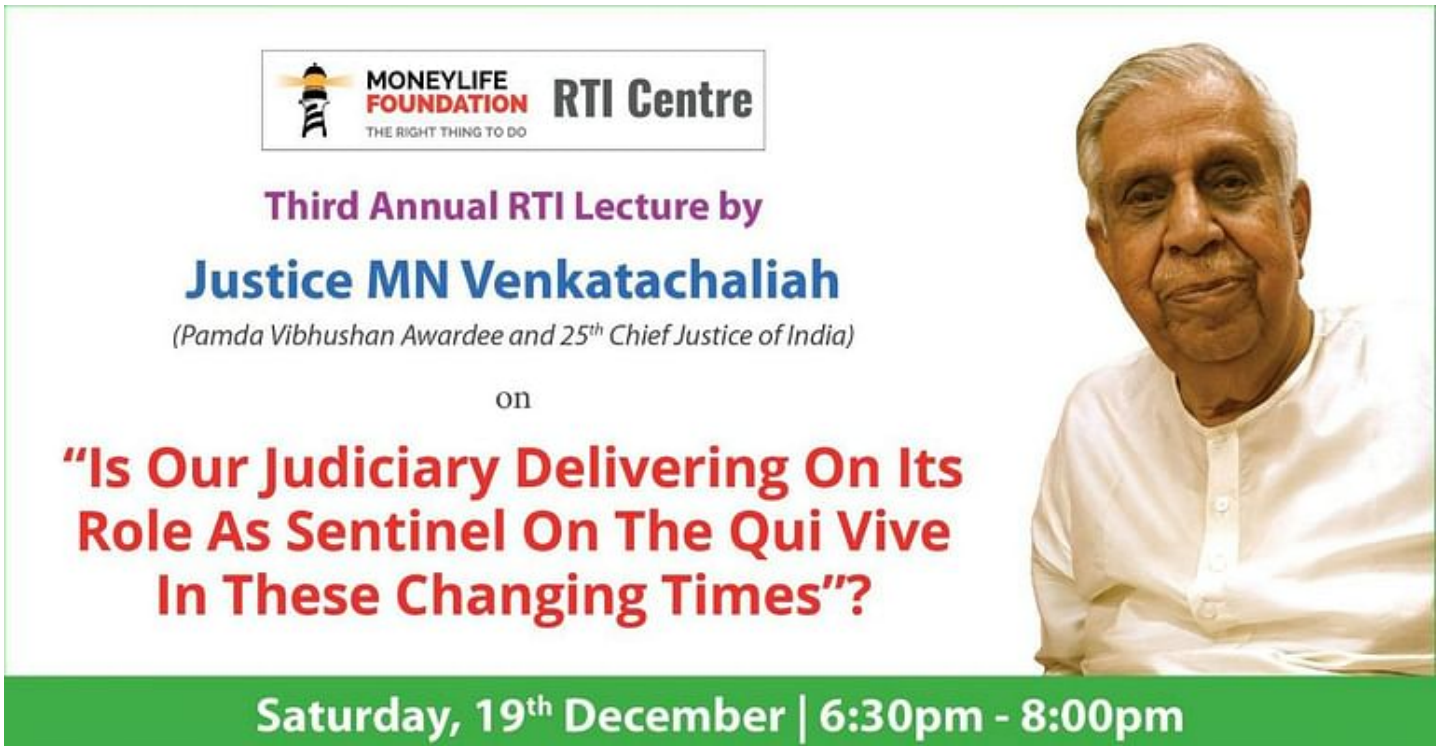
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"Is our judiciary delivering on its role as a sentinel on the qui vive in these changing times?"

Former CJI MN Venkatchaliah to deliver lecture shortly as part of Moneylife Foundation's 3rd Annual RTI Lecture.

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The talk will be followed by a panel discussion with Former Supreme Court Judge, Justice AK Sikri and Senior Advocate Indira Jaising.

The session will be presided by TS Krishnamurthy, Former Chief Election Commissioner and Trustee Moneylife Foundation

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Event begins. Sucheta Dalal renders the introductory address.

@suchetadalal

TS Krishnamurthy welcomes the gathering

"I have never seen a more humble person than Justice Venkatchaliah", he adds as part of his introductory remarks.



Former Chief Justice of India MN Venkatchaliah begins his lecture on "Is our judiciary delivering on its role as a sentinel on the qui vive in these changing times?'

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Venkatchaliah: I am here because I could not disobey my esteemed friend Sri TS Krishnamurthy who has a splendid record both as an acclaimed administrator and as the chief election commissioner of this nation.

Justice (retd.) Venkatchaliah: COVID pandemic has changed everything. What will the post COVID world be like? The leaders of the world must sit down, take a deep breath and formulate what this post COVID world needs

Justice (retd.) Venkatchaliah: I propose to share some thoughts of a 92-year-old extinguished judge on what Indian Judiciary has done to promote the egalitarian philosophy of the Constitution, to protect individual liberty and the philosophy of legal control of the government

Justice (retd.) Venkatchaliah: The expression "Qui Vive" was first introduced into the constitutional parlance by Justice Patanjali Sastri, in the famous case of VG Row in 1952.

Justice (retd.) Venkatchaliah: It expresses the constitutional philosophy of checks and balances.

It simply means a structure of government should be so designed that each branch is a sentinel on the qui vive against the other two, lest they become too powerful/autocratic.

Justice (retd.) Venkatchaliah: The judiciary in the classical mould of an adversarial system is just an umpire as in the game of cricket.

Justice (retd.) Venkatchaliah: It still is, but great changes occurred between the system.

It is the advent of the public law principles, that has changed the system and has changed the Judge from the position of mere Umpire, into something more important

Justice (retd.) Venkatchaliah: Making of the Indian Constitution is an inspiring historic, spiritual event; it’s not a mere political event.

Justice (retd.) Venkatchaliah speaks on how the Constitution was framed in the backdrop of World War II which exhibited barbarous inhumanity and cruelty

Justice (retd.) Venkatchaliah: In this context, the debates in the constituent assembly rose to spiritual heights, in its concern to lay the future foundation for a new social order based on the spectre of human life and save it from the cusp of communalism.

Justice (retd.) Venkatchaliah: Traditional threshold limitations and the entry to the courtroom had to be relaxed. We call it the locus standi.

Justice (retd.) Venkatchaliah: The second equally important transformation was of the role of the judge himself. No longer a mere Umpire.

Justice (retd.) Venkatchaliah: Thirdly, the court had to fashion new tools for legal control of the government. Every action of the government had had to have a legal pedigree.

Justice (retd.) Venkatchaliah: The PIL... and the innovation of the appointment of commissioners, and amicus curie are extraordinary exploits of a new judicial era. As sentinel, there are great cases that illustrate the changed role of the court as a sentinel of the qui vive

Justice (retd.) Venkatchaliah cites the examples of the Keshavananda Bharti case, Satwant Singh, Vishaka case, Maneka Gandhi case etc.

Justice (retd.) Venkatchaliah: Some critics say that India is an ancient, great civilization in an advanced state of decay

Justice (retd.) Venkatchaliah adds: But there is no denying the grandeur of its legacy

Justice (retd.) Venkatchaliah: When India declared the universal adult franchise and parliamentary democracy at the advent of its independence, the western press was cynical about its access... It was called the biggest gamble in history.

Justice (retd.) Venkatchaliah: But the same Press, 60 years later in 2007 called the Indian democracy robust, though described as the rowdiest democracy.

Justice (retd.) Venkatchaliah: Democracy is not the best form of government, but it is the least hostile of all the systems tried so far.

Justice (retd.) Venkatchaliah: When somebody said, that in a democracy people get the government they deserve, Barnard Shaw’s improvisation was that democracy is a system that ensures that people don’t get a better government than they deserve.

Justice (retd.) Venkatchaliah: In the unpredictable words of Justice Frankfurter, democracy involves hardship of the unceasing responsibility of every citizen. That’s why no office in the land is more important than that of being a citizen.

Justice (retd.) Venkatchaliah: Constitutional democracy is one where the majority will and rule are controlled and directed by constitutional principles. Otherwise, it will sooner or later degenerate into elective despotism and then mobocracy.

Justice (retd.) Venkatchaliah: Without constitutionalism. only a husk of democracy remains and democracy becomes a mere statistical interpretation of numbers.

Justice (retd.) Venkatchaliah: it is perfectly possible to convert the constitution without changing its form or merely changing the form of administration and to make it inconsistent opposed to the ... Constitution. This is exactly what is happening in the country.

Justice (retd.) Venkatchaliah: As someone in the old days said that he preferred Russian laws enforced with English procedures, to English laws with Russian procedure.

Justice (retd.) Venkatchaliah: We can have democracy and we can have the concentration of wealth in the hands of a few, but we cannot have both.

Justice (retd.) Venkatchaliah: ... representative democracy has to approximate closely to the society it seeks to represent in order to maintain its legitimacy as a system of government.

Justice (retd.) Venkatchaliah: There is perceptible democratic fatigue all over the world. I call it a "democratic fatigue."

Justice (retd.) Venkatchaliah: Various surveys around the world show a considerable increase in calls for a strong leader, who does not have to bother with parliament and elections. Trust in governments and political parties is at a historical low.

Justice (retd.) Venkatchaliah: This is the pendulum effect, as they call it. If you go to the other end, you think the next opposite end is heaven.

Justice (retd.) Venkatchaliah: It appears that people like the idea of democracy but not the reality. They love the idea, but not the result.

Justice (retd.) Venkatchaliah: Political parties are among the most distrusted institutions in society. But then, the idea of a benevolent dictator is a contradiction of terms in itself.

Justice (retd.) Venkatchaliah: In the Gopalan case ... the Indian Supreme Court made the same mistake of declaring the law as a mere positive stump...

Justice (retd.) Venkatchaliah: They said procedure established in the law virtually degenerated itself the hands of the court to the procedure prescribed by the legislature... Gopalan case was the first embarrassment to the libertarian court.

Justice (retd.) Venkatchaliah recounts that Somebody once asked, "why does humanity need a universal declaration of human rights?"

He was answered as follows - "... we need a declaration of human rights because men are not always good."

Justice (retd.) Venkatchaliah adds: It is perhaps the greatest understatement of the century.

Justice (retd.) Venkatchaliah: After the judicial debacle in Gopalan case, came the fresh breeze in Maneka Gandhi's case. In fact, in this case, there was no cause surviving in the Supreme Court at all... The govt agreed to hand the passport.

Justice (retd.) Venkatchaliah: ... but even so, the court said, we will not lay down the law

Justice (retd.) Venkatchaliah recounts more landmark cases, including Ediga Annama case, Satwant Singh case, Bombay Hawkers case, Royappa, Ramana, Vishaka cases.

Referring to how Indian judiciary relaxed rules of locus standi in public interest matters, Justice (retd.) Venkatchaliah says: It was applauded by distinguished judges abroad.

Justice (retd.) Venkatchaliah: Lord Chief Justice of England and Wales, Lord Wolf confessed to having been astounded at first by the provocative approach of the Indian Supreme Court in these and other respects

Justice (retd.) Venkatchaliah: However, he (Lord Wolf) went on to say,

"I soon realised that if the court was to perform its essential role in Indian society, it had no option but to adopt the course it did and I congratulate it for the courage it has shown."

Justice (retd.) Venkatchaliah: Judicial activism can be a slippery slope. Generally, policy issues are a difficult area for future penetration.

Justice (retd.) Venkatchaliah: Public policy, Lord Denning once said is an unruly horse. But it is for an able and competent judge to ride that unruly horse, and bring it down on the side of justice.

Justice (retd.) Venkatchaliah: But I don’t know how many of our judges are good horsemen at that.

Justice (retd.) Venkatchaliah: But one thing we must understand, the judiciary does not have enough stock of socio-economic wisdom to say that the law is wise or otherwise.

That’s what a great judge exhorted. He said that "all that I want is what the crowd wants."

The event is being live-streamed here:

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Watch LIVE:

https://t.co/NekG9V3Wmf

Justice (retd.) Venkatchaliah: The courts, however, must not ignore the caution that a judicial decision has to be reasoned out. It has to be arrived at with logical coherence and political neutrality.

Justice (retd.) Venkatchaliah: ... Constitutions are made to... to avoid the concentration of power by built-in checks and balances and constitutes the foundation of the legal system. This is the sentinel of the qui vive.

Justice (retd.) Venkatchaliah: The purpose of a bill of rights is to entrench certain cherished democratic, political, republican values - beyond the sway of majoritarian, capitalist ... democracy.

Justice (retd.) Venkatchaliah: Fundamental rights are not conferred rights. Nobody has conferred them upon man. They are inalienable, inheritable ... above ordinary laws.

The laws cannot change them they are not built into the law but are placed above the law.

Justice (retd.) Venkatchaliah: If the spirit of liberty is in the hearts of men, nobody can take it away. If it’s not in the hearts of men, nobody can confer it. This is the reality.

Justice (retd.) Venkatchaliah: Lord denning apprehended that if judges were given the power to overthrow acts of parliament, they would become political, their appointments will be based on political grounds and the reputation of a judiciary will suffer accordingly.

Justice (retd.) Venkatchaliah: One has only to see in the great Constitutions of the US and India, the conflicts which arise from time to time between judges and the legislature.

I hope we shall not have such conflicts in this country.

Justice (retd.) Venkatchaliah: Initially the Court was a mere precedent court. It was at the second stage that it became an "activist court", developing tools for legal control of the government.

Justice (retd.) Venkatchaliah: In the matter of purity of elections the contributions of the court is most impressive...

In 2019 elections, 43% of the MPs had criminal cases pending against them … SC directed political parties to upload on their criminal antecedents on websites

Justice (retd.) Venkatchaliah: By some estimates - not official - money spent by the candidates in the 2019 general elections is estimated around Rs 30,000 crore. Money and power is the biggest enemy of democracy.

Justice (retd.) Venkatchaliah: The increased functions of the State have changed its concept as an instrument of power into an agency of society.

As part of concluding remarks, Justice (retd.) Venkatchaliah speaks of the importance of procedural fairness and the trust placed in the Indian Supreme Court as a sentinel on the qui vive.

"History of liberty is the history of procedure", he quotes.

TS Krishnamurthy thanks Justice (retd.) Venkatchaliah for his address.

Panel discussion featuring former Supreme Court Judge, Justice AK Sikri and Senior Advocate Indira Jaising to commence shortly.

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Justice (retd.) Sikri: One of the very powerful statements made by Justice Venkatchaliah is that civil society should control political society and the office of the citizen is most important... the citizen is the centre of democracy.



Justice (retd.) Sikri: When compared with other systems, democracy may be so far the best or "the least worst", if I say in a negative manner. But it all starts with the civilians or the citizens.

Justice (retd.) Sikri: Today, it is not a person - it is the Constitution which is the instrument of governance and it is the Constitution which is supreme.

Justice (retd.) Sikri: Power should not be with one. So it rests on three pillars - the legislature, the executive, the judiciary. They work in tandem, but their roles are assigned and they act as checks and balances on each other also.

Justice (retd.) Sikri speaks on limited government: Any government acting in consonance with the Constitution cannot take away the fundamental rights of the individuals. It is based on the liberty of individuals which is to be respected.

Justice (retd.) Sikri refers to Hitler, Mussolini's regime, to observe: Even a Constitutionally elected government may act in a despotic way.

Justice (retd.) Sikri: Many governments' efforts to subvert democracy are legal. They are approved by the legislature and approved by courts.

Justice (retd.) Sikri: If there is some effort to topple the democracy, that is where the role of the judiciary comes in. Judiciary's role is to protect rule of law. Any onslaught on the Constitution or the freedom of the people, the judiciary has to step in.

Justice (retd.) Sikri: Indian Supreme Court has seen its ups and downs in the last 70 years.

Justice (retd) Sikri notes that starting from a conservative role, post the emergency and the "black spot" of the ADM Jabalpur case, there was a "total transformation in the judiciary" and the advent of transformative constitutionalism and judicial activism

Justice (retd.) Sikri adds that of late some issues have been raised over the judiciary's functioning, including whether it is selective, whether exercise of contempt powers is justified, role of CJI as master of roster, whether it is being a "procrastinating institution" etc.

Justice (retd.) Sikri muses on whether this may be because with the expanding role of the Courts, PIL jurisdiction, activism - although it has done wonders for public welfare.

However, "the expectation of society has also gone high", he adds.

Justice (retd.) Sikri: Judiciary cannot act as a catalyst. Change in society has to come from other sources. The question is what kind of role judiciary should play?

Justice (retd.) Sikri adds that there must be some introspection so that cases are appropriately prioritised and so the system does not appear opaque.

On the whole, the judiciary has been able to play the role over time as a sentinel on the qui vive. But some introspection is needed on how to go forward: Justice (retd.) Sikri concludes.

Senior Advocate Indira Jaising begins her address: Whether the judiciary delivers or not depends on the people who get appointed as judges. Who makes these appointments?

@IJaising



Jaising: It was during the period of Justice Venkatachaliah's tenure that the Supreme Court made a tectonic shift, from judges being appointed primarily by the President of India ... to judges being appointed by the judiciary, in consultation with PM, no doubt.

Jaising speaks on various landmark PILs over the course of history.

Jaising: We are yet to evaluate the impact of the opening of the doors of the court to everyone.

Jaising: Now one resident of Delhi, through a PIL, can question a whole movement of #farmers on the ground that he is a “taxpayer“ and has the locus to stop protest of a whole community. Individual rights have the potential to defeat collective rights, a very dangerous precedent

Jaising: I say no more, except that this voice of the generation of "taxpayer lawyer" - a generation which sees its own individual inconvenience over all else

Jaising: It is only recently that we have seen young lawyers align themselves with social, political movements defending those unlawfully detained in the name of conspiracies in #Delhi riots/ those unjustly prosecuted for social media posts

Jaising: This gives hope for the future

Jaising speaks on what is termed "the ideological court"

Some have called it the Executive Court: Jaising

Jaising: The evidence is on the table. From the decision in Babri Masjid, to the decision to put in cold storage CAA, electoral bonds, challenge to abolition of Article 370, from grant of bail to some journalists but not to others, we see the evidence of a self-conscious court

Jaising: A “pick and choose“ policy is what we see, perhaps the power vesting with the master of the roster.

Jaising: A majoritarian government brings with it, its own perils. Can we say the judiciary succumbs to a majoritarian government? Are we seeing a threatened judiciary? Are we seeing a repeat of ADM Jabalpur?

Jaising speaks on the appointment of Judges in the US, commenting that it is transparent: Judges are questioned on their ideology and questioned on the issues of our times - abortion, the separation between church and state and LGBTQIA rights.

Jaising on Judge appointments: In India, we have the worst of both worlds. We do not have that kind of transparency.

Jaising: I propose instead equal opportunity in the manner of appointment of judges. I propose that applications be invited from interested people, putting on record their bio data.

Jaising: This will ensure that women, Dalits, people from LGBT community will all have an equal opportunity to be appointed as judges and the judiciary will reflect the issues of this very diverse nation.

Jaising: Not surprisingly, the pandemic has made the rich richer and the poor poorer. Our challenges are many. The primary challenge today is our food security, which is sought to be dismantled through a threat to supply change being monopolised by big business.

Jaising says that these are the kind of challenges that will find its way to the Courts, sooner or later.

She concludes by saying that India must be prepared to have the best possible judges on the courts.

@IJaising

The event concludes after a Q&A session and the vote of thanks.