"The Role of Courts in the Development of Law"

Speech by HMJ Swatanter Kumar,

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Development of a nation depends upon the development of its society which, in turn, is dependant upon the character and values of its members. Both these factors are variable and directly proportionate to the dispensation of education. The law develops with the increasing dimensions of the field of education. Any democracy in the world would flourish and achieve its ultimate goal of social welfare only if its citizens feel protected under the umbrella of governance.

The Indian Constitution is an enduring beacon for liberty and justice. On 26th of January, 1950, the people of India gave unto themselves the Indian Constitution. Let us fully understand the Preamble of our Constitution. "To all its citizens" means, to every citizen, without distinction. "To secure" is an expression which conveys a guarantee, a confident assurance of availing, for now and for the future, that which had earlier been lacking. "Justice", "liberty", "equality" and "fraternity" have been placed in that order. Unless there is justice, liberty is meaningless, nor would liberty survive without justice. Justice and

Liberty would secure equality. Also, Justice and Liberty, in their interplay, would express themselves into "equality". "Fraternity" would be a mere wishful thinking but for justice, liberty and equality. The four words placed in that order is a philosophical travel of thought and ideology, as also a forceful indication of how the Constitution shall work. Of all the four concepts, the most significant, thus, is justice. Justice Beg, in the landmark *Keshavnanda Bharti* decision, found it clear from the Preamble, read with provisions of Part III and IV of the Constitution, that the framers of the Constitution sought to secure *"salus populi suprema lex"* – "the good of the masses in our country is the supreme law". "The people" of India were thus constituted a "sovereign democratic republic." *(Keshawananda Bharti, para 1797).*

Nani A. Palkhiwala affirmed that, "The Constitution represents charters of power granted by liberty, and not charters of liberty granted by power. Liberty is not the gift of the state to the people; it is the people enjoying liberty as the citizens of a free republic who have granted powers to the legislature and the executive." The people of India are assigned a place of pride and predominance like a mark on the forehead of the Constitution. The resolution contained in the Preamble is not just any off-the-cuff remark; it is a solemn and binding resolution.

The Parliament and State Legislatures exercise, absolutely, their constitutional powers to frame laws within their respective jurisdictions. But, the Constitution subjects these laws to a test – a test on the touchstone of the principles enshrined in the very soul of the Indian Constitution – conducted under the auspicies of the Judiciary. These are the checks and balances on power, which make the Rule of Law possible. An otherwise-unattainable dream of a "democracy" which is simultaneously "constitutional", thus a "constitutional democracy", is made possible by the seamless integration of the institutions of the Legislative power and the Judicious mind. I hope to take you through the course of the Indian rights jurisprudence, from the unique lens of the Supreme Court.

Galanter has observed that the Indian judiciary is accorded "extraordinary respect" and "enormous popular regard", taking forward the rights jurisprudence of the U.S. Constitution. The Constituent Assembly itself recognized the Supreme Court as "an arm of judicial revolution", with judicial review as an "essential power". This was reiterated by **Dr. B. R. Ambedkar, the chairman of the drafting Committee, who declared that this right to judicial review is**

> "...*the most important* – an Article *without which this Constitution would be a nullity*...the *very soul* of the Constitution and the *very heart* of it." [1]

Such inherent rights, and explicit Constitutional recognition of so-called judicial activism are rare.

To contextualize the rest of this speech, I shall briefly mention some of the leading jurisdictions and the powers of their respective judiciaries. The U.S. Judiciary is known for its subservience to the Legislature, and can hardly be conceived as an equal partner in the development of law. Chief Justice Earl Warren, in 1962, delivered the *Baker v. Carr* decision, in which the majority permitted judicial review of "apportionment" or the manner of delineation of districts. In a majoritarian democracy, such apportionment can affect electoral outcomes, and when done without transparency, can affect the "minority" communities adversely. Nevertheless, Justice Felix Frankfurter delivered a sterling dissenting opinion, arguing that this was a political question; and that the right of a Republican form of government required judicial non-interference on grounds of imagined equity effects. Judicial review in USA remains tenuous.

Britain's entire "common law constitutionalism" emerged in an age where statutory enactment was the exception, rather than the norm. Having an unwritten constitution, as compared to the U.S., wider powers do vest in the U.K. Supreme Court. But the Israeli rights jurisprudence, surprisingly, rivals India's. One Israeli Chief justice once said:

> "Like an eagle in the sky, that maintains its stability only when it is moving, so too is law, stable only when it is moving."

The Indian Supreme Court is among the most accessible courts in the world. The Supreme Court and the High Courts are enabled to accept letter petitions, public interest litigations and much more.

In reality, the relationship between various organs of the Government is not always concordant and quite often, may be highly contentious. We hear much of the criticism of an over-powerful Judiciary – what is termed, rather derisively, as "judicial activism". The Judiciary is not an elected or even representative body, and outsiders often mistake it as catering to a "constituency of judges and lawyers" so naturally, it evokes unsustainable apprehension that its dicta is mindless of the needs of the "real world".

The Judiciary is perceived as making a statement of the law, in the same terms as the Legislature does, when enacting a law. Therefore, the initial statement of law in its promulgation is interpreted, or re-stated, by the Judiciary in the course of its judgments, while still leaving it open for the Legislature to "reply" to its comments thereafter –by corrective amendments to the legislation which remove the deficiencies pointed out by the Judiciary. And thus, the conversation continues, with minor innovations and tweaking, as necessary, with changing legislative and legal intent, sometimes spread over the course of centuries and several generations. Hundreds of individuals, officials and actors participate, or are affected by, this conversation. The role of the judiciary in the development of law can be seen reflected in the statement of Justice Krishna Iyer,

> "A nineteenth century text, when applied to twentieth century conditions, cannot be construed by signals from the grave."

However, that does not go to say that Judiciary alone is self sufficient to take upon itself the task of governance of the nation. All the three limbs of administration, the Executive, the Legislature and the Judiciary need to make coordinated effort towards making the Constitutional

commitments a reality. These three main organs of the Government as well as the entire mechanics of their functioning has been fashioned in the light of the objectives the Preamble, the nature of polity mentioned therein and the grand vision of a united and free India in which every individual, high or low, is assured of justice.

A responsible Judiciary must do its best to only *respond* to this conversation. Directly initiating this conversation, independent of a prior statement by a different actor, places the Judiciary at the risk of lacking democratic legitimacy. But judicial contribution to the development of law is sourced from the fact that the conversation need not begin only by virtue of a positive statement by the Legislature.

In the present liberalized and democratic world view, the conversation must equally be capable of initiation by private actors like public spirited persons or organizations. In such a situation, the Court cannot refuse to reply, or make a well-informed statement, simply on the grounds that there has been no Legislative statement on the subject.

The Court is the one and only public forum where, any citizen, regardless of their identity, has an instantaneous right to be heard. The contribution of Courts to the development of law is obvious when this fact is understood in perspective; given that the arguments made before the Court, their reasoning and rational application, are the key influence on the judicial mind, any citizen may, with well-founded argumentation and *litigational competence*, urge the Court to impact society. As Justice Arthur T. Vanderbilt observed:

> "...If they (citizens) have respect for the work of the Courts, their respect for law will survive the shortcomings of every other branch of government."

This is so, because, the Courts are the one institution in the constitutional framework, which (expressly or impliedly) are faced with the repercussions of Legislation. Access to the Courts also cuts across diverse cultural, ethnic and socio-economic strata.

To repeat, in this situation, the Court cannot but bring to bear a creative interpretation of the enacted laws, to match the ideals originally in the mind of the Legislature. For instance, the ambit and sweep of Article 21 of the Constitution, the primacy of the "right to life" in India, have – I hope – lived up to the expectations of the Constituent Assembly and have

truly reflected their sentiments.. Assurance of the right to approach the Court and get such relief has liberated even the poorest of the poor citizens of our country, to live their lives with peace of mind.

The first two decades of independent India were marked by a somewhat conservative jurisprudence – perhaps, these decisions were simply never publicized in the manner of contemporary decisions. The Judiciary became the cynosure of the public eye only after the *Keshavananda Bharti* judgment, and the political fallout thereafter.

Thereafter, the basic structure doctrine has become the judge-made principle that certain features of the Indian Constitution are beyond the limits of powers of amendment of the Parliament. A full Bench of the court, in this case, ruled that although the 25th Constitutional Amendment of 1971 was valid, the court still reserved for itself the discretion to reject any constitutional amendments passed by the Parliament by declaring that they cannot change the "basic structure" of the Constitution.

Primarily, the Judiciary has chosen to take upon itself the monumental task, of recognizing and rectifying any worrying lapses of the Executive,

which might impact and affect the welfare of an Indian citizen and which are brought to its notice. The extention of judicial review over constitutional amendments was itself another innovation of the Indian Supreme Court. The Court has also, relying on the landmark *Vishaka* case, issued guidelines to protect minor children adopted by foreigners (*Lakshmi Kant Pandey* case); and even students subjected to "ragging" in educational institutions (*Vishwa Jagriti Mission v. Central Govt.*). In the recent Right to Food case (*PUCL v. UoI*), the directives were given range, from mere monitoring of timely implementation of the Mid-Day Meal Scheme to directing that the benefit of this Scheme in drought-affected areas be extended all-year around; and not suspended during the vacation time of the implementing schools. Further, the Court has directed that the Scheme not merely cover the supply of provisions to children – the school authorities are bound to provide a freshly cooked meal to meet the nutritional requirements of students.

Education had itself been recognized as a Fundamental Right by the Supreme Court, as early as 1992, in *Mohini Jain*, whereafter the Court has stepped in to prevent "profiteering" by private suppliers of education.

Thereafter, the Legislature followed the initiative of the Judiciary, with the amendment to introduce Article 21-A into the Constitution and

thereafter, the formal enactment of the Right of Children to Free and Compulsory Education Act, 2009. Thus, the scope of Article 21 of the Indian Constitution stands widened largely on account of the creativity of the Indian judiciary, so as to serve the people and to give voice to concerns relevant to modern life. In a rapidly developing country like India, unleashing all the potential of a youthful population by attaining the goal of universal education will be a worthwhile legacy, not only for the future generations of India, but for the betterment of the world at large.

Further, the word "advocacy" itself comes from a Latin term, meaning "to add to a voice". Contrary to common perception, the Judiciary is far from the "ivory tower" syndrome of abstract theory. The judicial role, in fact, is one of distillation and refinement of jurisprudence, so that these theories might have practical application to a case before the Court and generally, see the light of day in the public forum of debate. The Supreme Court is rightly called **"the fountainhead of jurisprudence"** (B. N. Kripal, ed., "Supreme But not Infallible")

Therefore, the role of the Court postulates **"intelligence without passion"** – though, perhaps, with an addition of compassion – and

"reason, free from desire". The Judiciary is able to give Voice to the Voiceless masses, merely because, by virtue of reason and Rule of Law, the Law is transmuted into Dharma :

"Law is the King of Kings;

Nothing is superior to law;

The law aided by the power of the King;

Enables the weak to prevail over the strong."

As Thomas Paine said,

"When the people fear the government, there is tyranny. When the governments fear the people, there is liberty."

We may infer that there have been three waves of interpretation of individual and public Rights, starting with this Article 21 jurisprudence and proceeding to proactive protection of the environment and ecology, before finally culminating in the ultimate judicial role of a regulatory watch-dog over good governance. The Judiciary insists on the transparency and integrity of governance without compromise – and therefore, ironically, transparent and integral performance invariably results.

Nani A. Palkhivala once said,

> "We keep on tackling breezily fifty-year problems with five-year plans, staffed by two-year officials, working with one-year appropriations; fondly hoping that somehow, the laws of economics would be suspended because we are Indians."

In 1990, he also wrote "the most persistent tendency in India is to have too much government but too little administration; too many laws and too little justice; too many public servants and too little public service; too many controls and too little welfare."

Thus, it falls upon the Judiciary to provide continuity where it might be missing; to have in mind the big picture, where no other entity is poised to view the same. To walk with the rich and the poor, to preserve virtue in a system, without loosing the common touch.

Nani A. Palkhiwala –

> "The survival of our democracy and the unity and integrity of the nation depend upon the realization that constitutional morality is no less essential than constitutional legality. *Dharma* lives in the hearts of public men; when it dies there, no constitution, no law, no amendment can save it."

A creative and unique form of Justice is called for. In India, the courts through its judicial dictums have not only developed the law to meet the requirements of the constitutional Preamble, but have helped in developing the jurisprudential philosophy of mankind.