

“Protection of Human Rights –Role of Judiciary”*

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I feel greatly honoured to be invited to deliver Sri J. K. Mathur Memorial Lecture arranged by Rural Litigation & Entitlement Kendra, alongwith Late Justice Mathur’s family, friends and admirers, who are present in this august gathering. The presence of so many distinguished judges, lawyers and prominent citizens shows the reverence in which Shri J. K. Mathur was held. In must thank the organizers of the Kendra for giving me this privileges to pay my tribute to a great personality. It is, appropriate that the lecture to perpetuate his memory has been scheduled on “Protection of Human Rights – Role of Judiciary”.

“Human Rights” are those rights, which inhere in every human being by virtue of being a human being. These are the modern names of what had been traditionally known as “natural rights” i.e. rights bestowed upon human beings by nature. “Human rights are based on mankind’s increasing demand for a decent civilized life in which the inherent dignity of each human being is well respected and protected. Human rights are fundamental to our very existence without which we cannot live as human beings. The basic human rights constitute, what might be called “sacrosanct rights” from which no derogation can be permitted in a civilized society. Fundamental human rights and freedom find expression in constitutions and legal systems throughout the world and in the international human rights institutions. Human rights are universal and cut across all national boundaries and political frontiers.

International Human Rights norms received an impetus 50 years ago following the harrowing experience of the two World Wars and holocaust.

*Extract of the speech delivered by Hon’ble Mr. Justice A. S. Anand, the then Chief Justice of India, on September 22, 2001 during the second “Late Justice J. K. Mathur Memorial Lecture”.

The world community was appalled by man's capacity to destroy him. For the first time the concept of human Rights asserted itself formally and prominently in an official international document, the U. N. Charter. The Universal Declaration of Human Rights, which followed on the 10th December, 1948, was a standard setting declaration of value judgments; but had no legal sanction of its own. It was not a self-executing document. Thereafter, came the two Covenants of 1966: One on Civil and Political Rights and the other on Economic, Social and Political Rights.

The UN Charter hoped to save succeeding generations from self-destruction by proclaiming and establishing equal and inalienable rights of all members of human family – great or small, virtuous or vicious, rich or poor, wise or foolish and their inherent dignity, regardless of birth, status, race, colour, sex, language, religion or political or other opinion. Article 55 of the Charter of the United Nations required the United Nations to promote: “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Article 56 enjoins that: “All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”

In India, the Universal Declaration has greatly influenced the constitution making particularly the concept of fundamental rights. The Indian Constitution was adopted shortly after the Universal Declaration. It provided Chapter II dealing with Fundamental Rights.

No society is free and no State is truly democratic, unless human rights are actualized by every citizen. In emerging world legal order, the brooding presence of human rights culture, affecting the thought ways of nations and of community of lawyers and judges is always present. The dialectics of current political realities, however, point to violations of the democratic order in many countries even after the normative prescriptions in the great charter, the Universal Declaration, the International Covenants and a host of other instruments which have since come into being. Every violation of human rights, wherever it occurs, is a threat to the welfare of entire human family. The protection of human rights is, therefore, a worldwide responsibility.

Judicial institutions have a sacrosanct role to play not only for resolving inter-se disputes but also to act as a balancing mechanism between the conflicting pulls and pressures operating in a society. Courts of law are the products of the Constitution and the instrumentalities for fulfilling the ideals of the State enshrined therein. Their function is to administer justice according to the law and in doing so, they have to respond to the hopes and aspirations of the people because the people of this country, in no uncertain terms, have committed themselves to secure justice-social, economic and political – besides equality and dignity to all.

In human affairs, there is a constant recurring cycle of change and experiment. A society changes as the norms acceptable to the society undergo a change. The judges have been alive to this reality and, while discharging their duties, have tried to develop and expound the law on those lines while acting within the bounds and limits set out for them in the Constitution.

The Supreme Court of India has been consistently expanding the dimensions of Art. 21 (Right to life & personal liberty) within the bounds of law by purposeful interpretations. More than fifteen years ago in *F. C. Mullin v. The Administrator, Union Territory of Delhi & Ors.*, Justice Bhagwati observed:

“The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self. Every act which offends against or impairs human dignity, would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law, which stands the test of other fundamental rights.”

The journey of the Indian Supreme Court from A. K. Gopalan to Maneka Gandhi via Bank Nationalization and Hardhan Saha's case is dramatic and educative. The Court in India have attempted to mould and shape the law to respond to the society's desire that human rights must be effectively protected. Decisions on such matters which deal with right to live with dignity, free from exploitation are a tribute to the judiciary in India. Strategy of public interest litigation was evolved to bring justice within the reach of the poor and underprivileged sections of the society. The Court in India have been making judicial interventions in cases concerning violation of human rights as an ongoing judicial process in discharge of its constitutional obligations.

The progress of the society is dependent upon proper application of law to its needs and since the society today realizes more than ever before its rights and obligations, the judiciary has to mould and shape the law to deal with such rights and obligations. The mere existence of a particular piece of beneficial legislation cannot solve the problems of the society at large unless the judges interpret and apply the law to ensure its benefit to the right quarters.

The endeavour of the Supreme Court of India is a virtual judicial incorporation of the treaty-law into the *corpus juris* is demonstrated by its opinion in Vishaka and Ors. v. State of Rajasthan & Ors. The Supreme Court of India said:

"The remaining and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of Judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law."

In Nilabati Behera v. State of Orissa, while justifying the award of compensation for infringement of the right to life, the Court referred to the

Covenant of Civil and Political Rights, 1966 which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right.

And in *D. K. Basu & Anr. v. State of West Bengal & Anr.*, the Supreme Court noticed a specific reservation made by the Government of India, at the time of the ratification of the International Conventions of Civil & Political Rights, 1966 in 1979, to the effect that the Indian Legal System does not recognize a right to compensation for victims of unlawful arrest or detention influenced, by the convention, the Supreme Court evolved the right to compensation in cases of established unconstitutional deprivation of personal liberty or life. The Court said:

"Article 9 (5) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) provides that 'anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation'. Of course, the Government of India at the time of its ratification (of ICCPR) in 1979 had made a specific reservation to the effect that the Indian legal system does not recognize a right to compensation for victims of unlawful arrest or detention and thus did not become a party to the Covenant. That reservation, however has not lost its relevance in view of the law laid down by this Court in a number of cases, awarding compensation for the infringement of the fundamental right to life of a citizen."

The judiciary has, thus, been rendering judgments which are in tune and temper with the legislative intent, while keeping pace with time and jealously protecting and developing the dimensions of fundamental human rights of the citizens so as to make them meaningful and realistic. New contents are being provided to criminal justice also resulting in prison reforms and humanitarian treatment of the prisoners and the under trials. The doctrine of equality has been employed to provide equal pay for equal work. Ecology, public health and environment are receiving attention at the hands of the Courts. Exploitation of children, women and labour is receiving the concern, it deserves. The Executive is being made more and more to realize its responsibilities.

Judicial activism in India essentially encompasses an area of legislative vacuum in the field of human rights. Judicial activism reinforces the strength of democracy and reaffirms the faith of the common man in the Rule of Law. The judiciary, however, can act only as an Alarm-clock but not as a time-keeper. After giving the alarm-call, it must ensure to see that the executive performs its duties in the manner envisaged by the Constitution.

It would be seen that judicial activism, which is the search for the spirit of law, has been profitably used by powerless minorities, such as bonded labour, prison inmates, under-trial prisoners, sex workers and such other powerless minority groups as are crusading for protection of human rights of women and children or seeking redressal against government lawlessness, or relief against developmental policies which benefit the haves at the cost of the have-nots.

Judicial activism, however, is not an unguided missile. It has to be controlled and properly channelised. Courts have to function within established parameters and constitutional bounds. Decision should have a jurisprudential base, with clearly discernible principles. Limits of jurisdiction cannot be pushed back so as to make them irrelevant. Courts have to be careful to see that they do not overstep their limits because, to them is assigned the sacred duty of guarding the Constitution. People of this country have reposed faith and trust in the Courts and, therefore, the judges have to act as their trustees. Betrayal of that trust would lead to judicial despotism – which posterity would not forgive.

We must always remember that the Judges in exercise of their power of judicial review are not expected to decide a dispute or controversy which is purely theoretical or for which there are no judicially manageable standards available with them. The Court do not, generally speaking interfere with the policy matters of the Executive unless the policy is either against the Constitution or some Statute or is actuated by *mala fides*. Policy matters, fiscal or otherwise, are thus best left to the judgment of the Executive. The danger of judiciary creating a multiplicity of rights without the possibility of adequate enforcement will in the ultimate analysis be counter productive and thus undermine the credibility of the institution. Courts cannot “create rights” where none exist, nor can they go on making orders which are incapable of enforcement or violative of other laws or settled legal principles.

The Courts have the duty of implementing the constitutional safeguards that protect individual rights but they cannot push back the limits of the Constitution to accommodate the challenged violation. 'Judicial Activism' is a delicate exercise involving creativity. Great skill is required for innovation. Caution is needed because of the danger of populism imperceptibly influencing the psyche. Public adulation must not sway the judges and personal aggrandizement must be eschewed. It is imperative to preserve the sanctity and credibility of judicial process. The Court of India, however, do not shy away from discharging their constitutional obligations to protect and enforce human rights of the citizens and while acting within the bounds of law the Courts rise to the occasion, as guardians of the Constitution, criticism of 'judicial activism' notwithstanding.

There is one other aspect to which I would like to make a reference in the context of protection of human rights. One of the greatest threats today, to human rights, comes from international and intra-national terrorism. Though with different origin, it has become a global phenomenon. Terrorism arising out of religious extremism poses a great challenge to civilization and humanity. Terrorism, of course, is not a new phenomenon. It has existed for decades, What is new, however, is the international nature of terrorism. International terrorism is, therefore, a special problem for civilized democracies. The growing menace of terrorism which is a fight between barbarism and civilization and is a morally degrading means of struggle, with no justification whatsoever, compounded by internal dynamics and external linkage, poses a formidable challenge to the enjoyment of human rights. Terrorism is most vicious, irrational and senseless kind of violence, which aims at achieving personal, religious or political ends through acts of terror. The main aim of such acts is not to kill or harm a particular person or persons but to create a sense of terror and fear among the people generally, and senselessly violate human rights of innocent citizens. To check terrorism, the State sometimes adopts counter-terrorism measures, which may also be violative of human rights of those engaged in such activity. State terrorism, however, is not answer to combat terrorism. It may on the other hand provide legitimacy to terrorism for the citizen would not know who violates whose human rights. Scientific means and concerted efforts are, therefore, needed to combat terrorism and in this effort all civilized democracies must join.

On 04 December, 1997, The Institute for National Strategies Studies. U. S. National Defence University organized a dialogue on the subject of terrorism. The participants included strategies analysts from India and the United States. Mr. K. Subrahmanyam, s strategic affairs analyst from Indian pointed out at the meet:

“You Ayatollahs of nuclear non-proliferation are not listening to us. You are obsessed with your theories. You refuse to put your ear to the ground and hear what is happening. They want to hurt us. they will hurt you too.”

The wide ranging incidents like the Bombay Blasts in 1993 or the continuing proxy war in Kashmir and the latest act of terrorism on the “Terrible Tuesday” of 11th September in the United States – taking in its toll World Trade Centre and Pentagon, with thousands of innocent dead and missing, exposes the grim reality of terrorism.

The challenge of terrorism stares us in the face. It negates all human rights. No super power, howsoever powerful, no judicial courts, howsoever committed and dedicated to protect human rights, can stand against this lawlessness unless concerted efforts are made to eliminate it. It is therefore, necessary that all civilized nations throughout the world must join not so much to mourn the dead, but, to defend the liberty of the living. Terrorism needs to be fought as a common enemy of civilized society and the humanity. Let us wake up to the reality of the clash of civilizations and the desperate attempt of highly motivated terrorist groups to dictate “Their World Order”. Terrorism poses a serious threat to protection of Human Rights everywhere. We must, therefore act in unison to meet this threat.

Ladies and Gentlemen, it has been indeed a great pleasure to be with you this afternoon.

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