

ADDRESS OF
HON'BLE THE CHIEF JUSTICE OF INDIA
SHRI JUSTICE DIPAK MISRA
ON
DYNAMIC ASCENDANCE OF CONSTITUTIONAL RIGHTS: A
PROGRESSIVE APPROACH

Hon'ble Ms. Justice Gita Mittal, Acting Chief Justice of Delhi High Court, Dr. Lalit Bhasin, President, the Bar Association of India, Shri Prashant Kumar, President-elect, the Bar Association of India, Shri Yakesh Anand, Hony. General Secretary, the Bar Association of India, Learned Members of the Bar, Friends from the Electronic and Print Media, Ladies and Gentlemen.

For describing Motilal Chimanlal Setalvad any superlative would not suffice, but we have to start somewhere. The man was a 'legend', in the true sense of the word. Mr. M.C Setalvad was well revered by both, his peers at the Bar as well as by the judges on the Bench. In the year 1911, Mr. Setalvad joined the Bombay Bar and within no span of time he made a distinguished mark for himself in the legal fraternity. Mr. Setalvad went on to occupy the office of the Attorney General of India in 1950. He served as an

Attorney General of India for a record time of thirteen years. Mr. Setalvad's endeavors are still recounted both in the bar rooms as well as in judge's galleries, as he always laid stress on professional ethics. He also chaired the first Law Commission of India for contributing towards his first love which was Nation service. Swami Vivekanada had said:

"That a man has reached immortality who is disturbed by nothing material"

In this sense, Mr. Setalvad is immortal in our memory and will remain so, for generations to come. Today's legal fraternity should let his memory and excellence serve as a lodestar for embracing the etiquettes of professional ethics and Nation service. This would perhaps be the best tribute to Mr. Setalvad.

Constitutional rights define and shape the life of citizens and societies in general. Their positive exposition and assertive and energetic appreciation constitute the lifeblood of progressive societies. These rights would become a dead letter without their dynamic, vibrant and pragmatic interpretation. Constitutional rights have to be construed and developed in such a manner that their real intent and existence percolates to the lowest rungs in the society. That is the *raison d'être* for the Constitution and the

constitutional rights. This also gives birth to an equally important role of the State to implement the constitutional rights effectively. The State action has to be concrete and not such that its effects leak into so many rivulets that they dissipate. Mere rhetoric and passivity by the State without reflection of serious commitment will only result in reducing the solemn duty of the State to that of a feigned act of affectation.

At the outset, let me begin this address by taking you all through the journey of the Supreme Court of India, as the highest Constitutional Court of the country, over a period of nearly seventy years when we adopted our Constitution. With every passing year the Supreme Court, while performing its most important function, as the final arbiter of the Constitution has, in this process, adorned the role of protector of the rights guaranteed under the Constitution by embarking upon the journey of judicial engagement. The judiciary has always remained alive to its solemn duty placed upon its shoulders by the Constitution, that is, to protect the constitutional rights of the citizens of our country.

The Supreme Court realized it quite early that in a society undergoing fast social and economic change post independence,

static judicial interpretation of the Constitution would stultify the spirit of the Constitution. And it gave birth to a saga of judicial engagement for fulfilling its obligation to act as *sentinel on qui vive* for ardently guarding the fundamental rights and other Constitutional Rights of individuals bestowed upon the citizens of our country by our Constitution.

Before we delve to examine and contemplate on the progression of rights under the supreme law of our country, that is, the Constitution of India, we must first understand that the concept of constitutional rights is different from the concept of fundamental rights. The expression 'Constitutional rights' is not synonymous with the concept of 'fundamental rights'. Constitutional rights are in fact the genus and fundamental rights are the specie. To put it in a simple manner, fundamental rights are those which are guaranteed under Part III of the Constitution of India, whereas Constitutional Rights not only include the fundamental rights but also include other rights guaranteed under various other Articles of the Constitution such as Right to property under Article 300A, Freedom of trade, commerce and intercourse under Article 301 and Reservation for Scheduled Castes and Scheduled Tribes and women in

Panchayats and Municipalities under Articles 243D and 243T, amongst others. The distinction between the two sets of rights is that the fundamental rights are natural rights in an organic constitution and they have been so recognized in a series of decisions of the Court.

Let us sit in a time machine and travel to the past. Edmund Burke delineating upon the dynamic and the perpetual growing nature of a constitution had said that a constitution is an ever-growing thing and it is perpetually continuous as it embodies the spirit of a nation. It is enriched at the present by the past experiences and influences, and makes the future richer than the present. The same has been laid down by the Supreme Court in a number of cases, recent authority being ***Manoj Narula***¹, wherein the Court recognized the dynamic nature of the Indian Constitution and observed that it is a living document with capabilities of enormous dynamism. It is a Constitution made for a progressive society and the working of such a Constitution depends upon prevalent atmosphere and conditions.

¹ *Manoj Narula v. Union of India*: (2014) 9 SCC 1

With this in hindsight, when we talk about constitutional rights it has to be firmly borne in mind that when the expression 'rights' is qualified by the term 'constitutional' then such rights no longer remain stagnant and confined, rather constitutional rights are also ever growing, perpetually continuous and embody a telescopic and expanded vision for a nation to enrich the future life of its citizenry.

The Supreme Court of India, has inculcated the same philosophy and has adopted a sense of judicial engagement by virtually touching upon every sphere of human life, beginning from right to life with dignity, right to livelihood, right to clean air and water, right against bonded labour, series of rights of an accused in the criminal justice system, right of women against sexual harassment at work place and so on and so forth. The Constitutional Courts have, thereby, assumed the role of an ardent guard for strengthening democracy in our country. This, in turn, triggered a process of judicial creativity for Constitutional interpretation which has paved the path for the ascendance of Constitutional rights.

On 26th November, 1949 when we gave to ourselves the Constitution, the scope of Constitutional rights was very

theoretical and was broadly limited to six broad categories of fundamental rights that is Right to Equality, Right to Freedom, Right against Exploitation, Right to Freedom of Religion, Cultural and Educational Rights and Right to Constitutional Remedies. Ever since the date of adoption of constitution, with each passing day, the scope, extent and the ambit of constitutional rights, fundamental rights in particular, have constantly ascended. The Constitutional Courts of our country have refused to adopt a strait jacket formula for interpretation of all constitutional rights rather the approach of Constitutional Courts in interpretation of Constitutional rights has always been progressive, advanced and forward-looking.

Now I would like to share with you all, the dynamic and steady ascending process adopted by the Supreme Court for recognizing some of the most important constitutional rights, including fundamental rights. The Court through its judgments kept establishing one milestone after the other in its progressive approach of creatively interpreting the Constitution of India.

Article 14 of the Constitution of India which guarantees equality before law and equal protection of laws has, with the efflux of time, also expanded its length and breadth. Doctrine of

non-arbitrariness has become the new norm and Article 14 is no longer limited to the doctrine of reasonable classification. It is the progression of Article 14 and its interpretation by the Constitutional Courts that grants protection against arbitrary State actions and also makes the law made by the legislature susceptible on the foundation of arbitrariness which encompasses reasonableness. Therefore, if a law is arbitrary or irrational it would fall foul of Article 14.

Adopting a progressive approach and recognizing the dynamic nature of the Right to Equality, the Court in ***E.P. Royappa***² refused to give Article 14 a narrow, pedantic and lexicographic approach and added a new dimension to Article 14 by ruling that equity being a dynamic concept cannot be cabined or confined within the traditional limits and therefore an act which is arbitrary, per se, is violative of Right to Equality and thereby offends Article 14, which makes it liable to be struck down. The Court observed that when an act is arbitrary, it is implicit that it is unequal, both according to political logic and constitutional law, and thus violative of Article 14.

² *E.P. Royappa v. State of Tamil Nadu and Anr.*: 1974 SCR (2) 348

Now coming to Article 15, which prohibits discrimination against citizens on the grounds of religion, caste, sex, race or place of birth. The exceptions to Article 15 in the form of clauses (3) and (4) are more important than the Article itself and demonstrate the dynamic nature of Constitutional rights as they allow the state to take affirmative action for the upliftment of a certain class of citizens. Both Clauses (3) and (4) of Article 15 are provisions which allow the State to undertake affirmative action through the Executive or through the Parliament, exercising its constituent power or its legislative power.

Clause (3) to Article 15 enables the State to confer special rights upon women and children. Article 15(4) is also another exception to the main clauses of Article 15 as it enables the State to make special provisions for advancement of socially and educationally backward classes of citizens, Scheduled Castes and Scheduled Tribes.

The Parliament, while exercising its constituent power, inserted Articles 243D and 243T for providing reservation for Scheduled Castes, Scheduled Tribes and Women in Panchayats and Municipalities, respectively. Both these Articles are protected under clauses (3) and (4) to Article 15 and underscore the

progressive and ascending trend of Constitutional rights in favour of Scheduled Castes, Scheduled Tribes and women as the same were not present at the time when the Constitution was initially adopted and were inserted by the Seventy-third and Seventy-fourth Amendment, respectively.

Article 15(4) also protects the affirmative action of the State for upliftment and advancement of socially and educationally backward classes of citizens or for Scheduled Castes and Tribes. Though, Scheduled Castes and Scheduled Tribes are defined under clauses (24) and (25) of Article 366, the Constitution does not define backward classes. However, Article 340 has empowered the President to appoint a commission for investigating, within the territory of India, the socially and educationally backward classes. The President may upon receiving the report of the Commission, specify a class as backward which though is subject to the power of judicial review.

The anatomy of all these provisions clearly divulge the forward-looking dynamic and ascending nature of the rights protected under these provisions of the Constitution as a class of citizens may not have been backward at the time when the Constitution was adopted but it may become so with the passage

of time due to several factors. That apart, backwardness for the purpose of Article 15(4) has to be both social as well as educational. The Supreme Court in **Balaji**³ observed that reservation under Article 15(4) has to be reasonable and should not be of such magnitude which would nullify the main rule of equality in Article 15(1). Therefore, reservation by the way of affirmative action should not exceed 50% of the total seats.

As far as the issue of whether a caste by itself can be a factor in assessing backwardness, the Constitutional Courts have been of the view that a caste is also a class of citizens and if therefore an entire caste is found to be both socially and educationally backward on the basis of some relevant and verifiable data then inclusion of such castes in the backward list would not violate Article 21.

In **Indra Sawhney**⁴, the Court observed that a caste can be important or even the sole factor in determining the social backwardness and that poverty alone cannot be such a parameter.

³ *M. R. Balaji And Others v. State of Mysore*, AIR 1963 SC 649

⁴ *Indra Sawhney v. Union of India And Others*, AIR 1993 SC 477

Thus, the approach of the constitutional Courts to give importance to some relevant and verifiable data for deciding whether a caste at the time of adjudication, is socially and educationally backward shows that the court is concerned about the current prevalent scenario and not the historic scenario. In this sense, Courts have been pragmatic and progressive while interpreting Article 15(4) and have recognized the principle of dynamic ascendance of the affirmative action undertaken by the State for the protection of Constitutional Rights of Scheduled Castes, Scheduled Tribes and backward classes.

Again, it is the ever-growing and perpetually continuous character of Constitutional Rights, in the backdrop of which the 93rd Constitutional Amendment was conceived and as a result of which Article 15(5) was inserted in the Constitution. Article 15(5) enables the State to enact laws for the advancement of socially and educationally backward class of citizens, SC and STs for their admission into educational institutions. In pursuance of object of Article 15(5), the Parliament enacted Central Educational Institutions (Reservation in Admission) Act, 2006 which provided 15% reservation for Scheduled Castes, 7.5%

reservation for Scheduled Tribes and 27% for other backward classes in central institutions of higher education and research.

The insertion of Article 15(5) was challenged in the Court in ***Ashoka Kumar Thakur***⁵ as being violative of the basic structure of the Constitution but the Court recognized the dynamic and progressive nature of Constitutional Rights i.e Equality and observed that affirmative action, though apparently discriminatory is calculated to produce equality on broader basis. The Court went on to observe that a constitutional amendment which moderately abridges or alters the equality principle but does not abrogate it, would not violate the basic structure and if such an approach is not adopted then our constitution would not be able to adopt itself to the changing dynamic society.

Article 19 guarantees the citizens certain freedoms, most important of them being freedom of speech and expression protected under Article 19(1)(a). The Court has always adopted progressive approach in interpreting the rights under Article 19 keeping in view the ascending nature of these rights. What the Courts have kept in mind, while interpreting the Constitutional right of freedom of speech and expression is that it is the bulwark

⁵ *Ashoka Kumar Thakur v. Union Of India And Ors*, (2008) 6 SCC 1

of a democratic government. Starting from ***Romesh Thappar***⁶, wherein the Courts observed that freedom of speech and of the press lay at the very foundation of democratic government, for without free political discussion no public education, so essential for proper functioning of the process of popular government, is possible.

Recently, in ***Viacom 18 Media Private Limited and Ors***⁷ the Court ascended the right of freedom of speech and expression and it lifted the ban imposed by four States for screening the movie 'Padmaavat' by holding that the expression of an idea through the medium of cinema which is a public medium has its own status under the Constitution. The Court went on to observe that if intellectual prowess and natural or cultivated power of creation is interfered without the permissible facet of law, the concept of creativity paves the path of extinction; and when creativity dies, values of civilization corrode.

Another area for surge of constitutional rights in our country has been human rights and their implementation. The Universal Declaration of Human rights and the International Covenant on

⁶ *Romesh Thappar v. The State of Madras*, AIR 1950 SC 124

⁷ *Viacom 18 Media Private Limited and Ors. v. Union of India (UOI) and Ors.*

Civil and Political rights have served as an important stimulus for all the three wings of the State, the Judiciary in particular, for implementation of human rights by raising their status to that of fundamental rights. Justice H.R. Khanna, while delivering his dissenting opinion, in **ADM Jabalpur** ⁸ observed that constitutional courts should preferably adopt such an interpretation which is not in conflict with Universal Declaration of Human rights. Then in **George Varghese** ⁹, Justice Krishna Iyer while interpreting Section 51 of the CPC, referred to Article 11 of the International Covenant on Civil and Political rights and came to hold that civil imprisonment of an honest and bonafide judgment debtor in execution of money decrees is violative of Article 11 of the International Covenant on Civil and Political rights and Article 21 of the Indian constitution. The concept of public law remedy witnessed its affirmance in **Nilabati Behera**¹⁰, where the Court after referring to Article 9(5) of the International Covenant on Civil and Political rights held that anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation.

⁸ *ADM Jabalpur V. Shukla* AIR 1976 SC 1291

⁹ *Jolly George Varghese v. The Bank of Cochin* AIR 1980 470

¹⁰ *Nilabati Behera v. State of Orissa* AIR 1993 SC 1960

In ***Dr. Mehmood Nayyar Azam***¹¹ the Supreme Court upheld the supremacy of the concept of dignity and while condemning the act custodial torture meted out by police authorities made the following observations:

“The reverence of life is inseparably associated with the dignity of a human being who is basically divine, not servile. A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, ‘a brief candle’, or ‘a hollow bubble’. The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of “creative intelligence”. When a dent is created in the reputation, humanism is paralysed. There are some megalomaniac officers who conceive the perverse notion that they are the ‘Law’ forgetting that law is the science of what is good and just and, in very nature of things, protective of a civilized society. Reverence for the nobility of a human being has to be the corner stone of a body polity that believes in

¹¹ *Dr. Mehmood Nayyar Azam v. State Of Chattisgarh And Ors : 2012 (3) SCC Cr.733*

orderly progress. But, some, the incurable ones, become totally oblivious of the fact that living with dignity has been enshrined in our Constitutional philosophy and it has its ubiquitous presence, and the majesty and sacrosanctity dignity cannot be allowed to be crucified in the name of some kind of police action.”

Let us now advert to Article 21, the interpretation of which by the Constitutional Courts is the most potent and substantive illustration of the dynamic growth of Constitutional rights. A plethora of rights have been recognized as facets of Article 21 because of judicial creativity. The progress of Constitutional rights under Article 21 which guarantees Right to life and Liberty has been the most gigantic. In the 1960s, the Court in ***Kharak Singh***¹² refused to give personal liberty a narrow definition limited to bodily restraint or confinement to prisons but rather defined it as a compendious term including within itself all varieties of life that go on to form the personal liberty of a man other than the those dealt under Article 19(1). In the 1970s came ***Maneka Gandhi***¹³ which became the cornerstone of progression

¹² *Kharak Singh v. The State of U. P. & Others*, 1963 AIR 1295

¹³ *Maneka Gandhi v. Union of India*: AIR 1978 SC 597

of Constitutional rights opened a whole new space for the right of personal liberty. The Court interpretatively conceived a new interrelation between Articles 14, 19 and 21 and observed that a law which deprives a person of his personal liberty must not only stand the test of Article 21, but it must also stand the test of Article 14 and 19. What the Court meant was that for depriving a person of his personal liberty there has to be, not only a valid law prescribing a procedure but it must also be reasonable, in view of Article 19, and it must not be arbitrary too, both from procedural and substantive point of view, as per the Article 14.

After ***Maneka Gandhi***, the progression for the right of personal liberty became perpetual. The fundamental right of personal liberty protected under Article 21 of the constitution became synonymous with a whole new range of fundamental rights, a few burning examples being the right to sleep being declared as a fundamental right in ***Ram Lila Maidan Incident***¹⁴, then came the most significant ruling of the recent times in ***K.S. Puttaswamy***¹⁵, where the supreme court lifted the right to

¹⁴ *Ram Lila Maidan Incident v. Home Secy, Union of India*, (2012) 5 SCC 1

¹⁵ *K.S. Puttaswamy v union of India* (2017) 10 SCC 1

privacy to the pedestal of fundamental right protected under article 21 of the constitution. This ruling has also paved the way for enormously enlarging the scope of constitutional rights protected under article 21.

Right to live in a healthy atmosphere had, long ago, been recognized as a part of right to life under Article 21 of the Constitution. But recently, a Constitution Bench of the Supreme Court in **Common Cause**¹⁶ recognized the right to die with dignity as a constitutional right protected under Article 21. The Court accepted the principle of a living will and passive euthanasia.

In **Shakti Vahini**¹⁷, the Court treated the right to choose a life partner as a pillar of individual liberty by stating that assertion of choice is an insegregable facet of liberty and dignity. The Court quoted with approval the statement of the French philosopher and thinker, *Simone Weil* who had said:

“Liberty, taking the word in its concrete sense consists in the ability to choose.”

¹⁶ *Common Cause (A Regd. Society) v Union of India* W.P. (CIVIL) NO. 215 OF 2005

¹⁷ *Shakti Vahini v. Union Of India* , W.P. © 231 of 2010

Elaborating further, the Court said that when the ability to choose is crushed in the name of class honour and the person's physical frame is treated with absolute indignity, a chilling effect dominates over the brains and bones of the society at large.

Slightly earlier in ***Shafin Jahan***¹⁸, popularly known as ***Hadiya case***, the Court emphasizing on the marital status of two adults despite from which class or religion they come from stated:

“It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible.”

And further:-

¹⁸ Criminal Appeal No. 366 of 2018

“Non-acceptance of her choice would simply mean creating discomfort to the constitutional right by a Constitutional Court which is meant to be the protector of fundamental rights. Such a situation cannot remotely be conceived. The duty of the Court is to uphold the right and not to abridge the sphere of the right unless there is a valid authority of law. Sans lawful sanction, the centripodal value of liberty should allow an individual to write his/her script. The individual signature is the insignia of the concept.”

In ***Shreya Singhal***¹⁹ the freedom of speech and expression was elevated to a new pinnacle when the Court declared Section 66A of IT Act, 2000 as unconstitutional on the ground of being violative of Article 19(1)(a). The Court observed that the Section 66A took within its sweep, protected speech and speech that is innocent in nature, which, resultantly, has a chilling effect on the fundamental right of freedom of speech and expression and hence deserves to be struck down on account of being vague and overbroad.

¹⁹ (2015) 5 SCC 1

In ***Charu Khurana***²⁰ the Court dealt with the issue of gender equality, when a petition was filed challenging the bye-laws disqualifying women from applying for the position of make-up artists in the film Industry. The court declared the bye-laws as unconstitutional in the backdrop of Article 14 and 21 by stating that the said provisions of the Constitution worked against the bye laws which had the effect of creating a dent in the 'right to livelihood'.

In ***Vikas Yadav***²¹ the Court introduced the concept of dignity of dead by saying that the criminal proclivity of the accused persons is demonstrable from the fact that they neither showed any respect for human life nor did they have any concern for the dignity of a dead person and they had deliberately comatosed the feeling that even in death, a person has dignity and he or she deserves to be treated with dignity. The Court held that brutality displayed by the accused persons clearly exposes their depraved state of mind.

Rights are not ephemeral or transient. They are eternal, sublime and constitute the soul and spirit of humanity. The

²⁰ (2015) 1 SCC 219

²¹ (2016) 9 SCC 541

constitutions of different countries across the world have incorporated basic human rights or bill of rights to sub serve the “people’s good” which is the “highest law”.

Nelson Mandela had said:

“To deny people their human rights is to challenge their very humanity”

And, therefore, constitutional and human rights have to be honoured and enforced with a tenacious, indomitable and indefatigable spirit keeping in mind the words of Justice Thurgood Marshall who said that:

“in recognizing the humanity of our fellow beings, we pay ourselves the highest tribute”.

It is this quintessential spirit that keeps the torch of justice burning bright. It is our strong allegiance and fidelity to this ethos that will lead us on the path of constitutional renaissance and constant awakening thereby ensuing protection of constitutional rights for all.

Thus, I am convinced that since the constitution is itself a dynamic and forward spirited document then it would be fallacy

to think that the constitutional rights guaranteed therein will remain static. The constitutional rights also being dynamic, were on the ascendance in the past, are on the ascendance in the present and will always remain in the ascendance in the future, as well. Constitutional rights cannot and should not, for the sake of democracy, stop growing and this I say with a certain degree of confidence as perpetually expanding constitutional rights will only contribute towards strengthening of a constitutional democratic set up like ours.

I intend to conclude this address by quoting a couple of lines of Justice William J. Brennan Jr. which read thus:

“The Constitution will endure as a vital charter of human liberty as long as there are those with the courage to defend it the vision to interpret it, and the fidelity to live by it.”

Thank You.