

Role of the Judge in a Democracy*

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Introduction: Why This Topic?

Why to have memorial lectures?

I see the importance of these lectures in two ways. First, we remember and tell the noble soul that we have not forgotten you. Secondly, we also tell him that on this occasion we are saying on solemn affirmation that we would endeavour to tread the path which was led by your wisdom.

When I was invited to give Justice Hans Raj Khanna Memorial Lecture, I treated it as an honour given to me. At the same time, I was in little dilemma about the topic which I need to choose for this lecture. So much is said and written about Justice Khanna during his life time and thereafter. Therefore, the challenge was to say something new or, at least, in the manner in which his personality has not been projected earlier and, at the same time, it should also be befitting his stature and aura. While deliberating in my mind on this aspect, it suddenly struck me that Justice *Aharon Barak*, the former Chief Justice of the Supreme Court

of Israel, has written a book titled ***The Judge in a Democracy***. I found that Justice Khanna is one Indian Judge who can be treated as a role model for how a Judge needs to acquit himself/herself in a constitutional democracy.

In any democracy, though governed by the rule of law, moments come when people face and suffer dark forces of division and State suppression. In Indian context, we underwent this period during the Emergency days between 1975-1977. It is during this period the liberty and freedom of the people were suppressed with the oppression exercised by the State machinery. As is well-known, numbers of persons were taken into preventive custody. Spate of *Habeas Corpus* writ petitions came to be filed in various High Courts. These writ petitions were contested by the State with the plea that during the Emergency citizens did not enjoy any fundamental rights as these rights, including right to life and personal liberty enshrined in Article 21, stand suspended. Rejecting this contention of the State, many High Courts issued the writ

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declaring preventive detention to be bad in law and ordering the release of the detainees. The matter then reached the Supreme Court and the judgment of the Supreme Court in **ADM Jabalpur & Ors. v. Shivkant Sukla**¹ was the outcome. Plea of the State was accepted by the Supreme Court by a majority of 4:1. Lone dissenting voice was that of Justice H.R. Khanna who proved to be a valiant soul and embodiment of strength and tenacity. Justice Khanna was the lone dissenter. In his dissent, he stated: *‘what is at stake is the rule of law ... the question is whether the law speaking through the authority of the Court shall be absolutely silenced and rendered mute...’*. He rejected the ruthless formalism of law and its *Kafkaesque* outcomes. The Nazi Regime too had been strictly legal, he tersely observed, in response to the argument that detention was legal. On that day, he single-handedly defended our cherished values and dreams from being trampled by the forces of tyranny.

This sacrifice came at a great cost. Next in line to become the Chief Justice of India, he was superseded, and he eventually resigned. It was not that he did not possess any inkling of the repercussion. In his autobiography **Neither Roses Nor Thorns**, Justice Khanna writes of what he had told his sister – *‘I have prepared my judgment, which is going to cost me the Chief Justice-ship of India’*, he said to her. Despite knowing of an adverse outcome, he did not flinch or waver and remained true to his oath.

1 (1976) 2 SCC 521

This lone crusader of democracy upheld the dignity of the Court during the most testing times and has been immortalized for this act ever since. The New York Times, on April 30, 1976, came out with an editorial which has become a classic and is cherished by many. It said:

“If India ever finds its way back to the freedom and democracy that were proud hallmarks of its first eighteen years as an independent nation, someone will surely erect a monument to Justice H.R. Khanna of the Supreme Court. It was Justice Khanna who spoke out fearlessly and eloquently for freedom.”

He may not have had a monument erected in his honour (notwithstanding the portrait adorning the Court Room No.2 of the Supreme Court), but more than 41 years after the infamous **ADM Jabalpur** decision, Justice Khanna’s uncompromising integrity and courage has been rewarded. The Supreme Court, in its recent landmark judgment in **Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors.**² (famously known as the Right to Privacy case), set aside the majority judgment in **ADM Jabalpur**. The Nine Judge Bench finally granted an imprimatur of authority to the revered and lauded dissent of Justice Khanna, which has been the shining beacon through the murkiness of our Democracy. Justice D.Y. Chandrachud observed that:

“The view taken by Justice Khanna must be accepted, and accepted in reverence for the

2 (2017) SCC Online SC 996

strength of its thoughts and the courage of its convictions.”

Justice R.F. Nariman included Justice Khanna’s dissent in one of the three great dissents of Indian Judiciary.

Therefore, I say that Justice Khanna, an audacious personality, showed courage and independence in upholding human rights, the rule of law and the independence of the judiciary. He upheld the Constitutional democracy. This continues to inspire and remind generations of Judges of their role in a democracy.

So, what is the role of a Judge in a Democracy that Justice Khanna fulfilled? This question has perplexed jurists, philosophers and Judges for as long as democracies have existed. It is the question which Justice Khanna faced and provided us the answer by his action. No doubt, Justice Khanna has inspired me to choose this topic. At the same time, I am inspired by Justice Aharon Barak, retired Chief Justice of the Supreme Court of Israel.

In the words of *Justice Aharon Barak*, ‘each Judge is a distinct world unto himself. Ideological pluralism and not ideological uniformity is the hallmark of judges in a legal system’. The common thread amongst all the diverse opinions, however, is that every Judge has a minimum role and responsibility in a constitutional democracy. This emanates from the Constitution, the fundamental ethos of a democracy and extends beyond mere dispute resolution. On that parameter, he delineates

two basic roles which judges are supposed to perform in a democracy and these are: (i) to uphold the Constitution and the rule of law; and (ii) to bridge the gap between the law and the society.

The First Role:

Let me advert to the first role, namely, protecting the Constitution and upholding the rule of law in a democracy. Here, let us first understand fundamental of the Constitution. In the first place, we are talking of democracy in a constitutional set up, i.e. as provided under the scheme of our Constitution. In this sense, a constitutional democracy is not merely a formal democracy which is a Government of majority rule (of, by and for the people), but a substantive one. Let me explain here the basic feature of this constitutional democracy. It enshrines values such as the Rule of law, separation of powers, the independence of judiciary, human rights, political, social and economic justice, dignity, equality, peace and security. *Justice Aharon Barak* calls these values ‘*the inner morality of a democracy*’, ones which make a democracy a substantive democracy.

The American jurist, *Ronald Dworkin*, in his book ***A Bill of Rights for Britain***, had described a true democracy as:

“not just a statistical democracy, in which anything a majority or plurality wants is legitimate for that reason, but communal democracy ...

where everyone must be allowed to participate in politics as an equal ... political decisions must treat everyone with equal concern and respect. Each individual must be guaranteed fundamental civil and political rights which no combination of other citizens can take away, no matter how numerous they are or how much they despise his/her race or morals or way of life.”

The values of a constitutional democracy are protected by the Constitution, a formal document which enjoys a normative supremacy over the general law of the land by defining the roles and powers of the State. The three wings of the State are supposed to act within the domain prescribed by the Constitution. It also specifically limits their interference with individual rights which are enshrined as fundamental rights in Part III of the Constitution. Our Constitution also recognizes ascendancy to the substantive values of the democracy over its formal rules and acts as a counter-balance to majoritarianism.

Let me also explain the significance of common law for advancing and realizing the goals set out by the Constitution. We have adopted common law system in this country, which of course is given to us by the Britishers. What is significant about common law is that it indelibly marks our constitutional system of parliamentary democracy. Its central pillar is the rule of law. Its guardians are the Judges. They have preserved and protected this pillar through consistent renewal to meet the needs of time and circumstance. Evidence based fact

and reason based interpretation have been the principle judiciary deals for this purpose and for advancing the precepts of rule of law in a common law system.

Rule of law is the basic feature of our Constitution. In that sense, common law jurisprudence is imbibed in our Constitution, though impliedly.

Like the common law, the Constitution ensured separation of powers. And most uncommonly it relied on the Judge to ensure that all power in India delivered, in letter and spirit, the kind of India that the Constitution mandated. Power of judicial review of legislative as well as executive actions makes the judiciary final arbiter. From the year 1950 onwards, the Judge, especially in the constitutional courts, became the centre piece of the Indian State not only as the testing point of Parliamentary authority and Executive actions, but also the agency to ensure that institutions delivered justice, political, economic and social, to all Indians. The Indian judiciary was the common law guardian armed with the power of judicial review to make it function according to constitutional ethos, morality and values to ensure constitutional fraternity. The Fundamental Rights Chapter empowered it to ‘enforce’ equality and reasonableness as spelt out in it. The Directive Principles Chapter informed it about the reasonable Indian society as a fundamental principle of India’s governance, of which the judiciary constituted a critical part.

This very broadly described scheme of the Constitution brings out one distinctive feature. No doubt, the principle of separation of powers is a back bone of the constitutional system. It ensures that the power is not concentrated in the hands of any one Government branches and that they operate independently. The three branches of the Government, namely, Legislature, Executive and the Judiciary, play an equally important role in the governance of the country and there are checks and balances as well. At the same time, insofar as the Judiciary is concerned, not only its independence is ensured (which again is treated as inalienable basic feature of the Constitution), it is also given power of judicial review. This power extends to administrative/executive as well as legislative function. Thus, any act of the executive is amenable to challenge and it is the Judiciary which is to ultimately decide as to whether the said executive act was within the domain of the Executive. Likewise, the validity of any law made by the Legislature can be tested by the Judiciary in exercise of its rights of judicial review and to find out that the particular statute was within its powers (and not *ultra vires*) and also that it did not infringe any provision of the Constitution, including fundamental rights. In that sense, Judiciary becomes the final arbiter when it comes to testing the acts of the other two pillars of the State, namely, the Legislature and the Executive. Enforcement of laws is the function assigned to the Judiciary and it is the Judiciary which has to ultimately determine as to what a particular law is, by interpretative process.

This makes the impartial independent Judge the corner stone of the constitutional edifice. In his inaugural address at the Bangalore Judicial Colloquium in the year 1988, the late Chief Justice of India, P.N. Bhagwati, underlined this by stating, inter alia: *'The Bill of Rights can at best only enumerate the broad and general statements of human rights. But to positivise them, to spell out their contours and parameters, to narrow down their limitations and exceptions and to expand their reach and significance by evolving component rights out of them while deciding particular cases, is a task which the judicial mechanism is best suited to perform, provided of course the judges are fiercely independent and have the right attitudinal approaches.'* In a globalised world there is a global understanding that the role of a Judge in a democracy is meaningful only if the Judge is independent and impartial. Accordingly, the 1997 Beijing Principles on the Independence of the Judiciary in the Law Asia Region summarised the role of Judge in Article 10 in terms of the following objectives:

- (a) To ensure that all persons are able to live securely under the rule of law;
- (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
- (c) to administer the law impartially among persons and between persons and the State.

When we keep in mind the aforesaid pivotal

role of the Judiciary, it becomes apparent that the major task of the Judge is to protect the Constitution and rule of law, and thereby the democracy itself.

Protecting The Constitution

Thus, first role is that of protecting the very Constitution under which a Judge has been appointed. How this is achieved? This part was performed by the majority Judges who decided the case in ***His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr.***³, when they held that the Parliament, representing the sovereign will of the people, could not use its amending power to alter the basic structure or framework of the Constitution. Above all, it could not use its amending power to shut out judicial review for finding whether a statute enacted by a Legislature is in respect of the subject for which judicial review has been excluded. In this sense, judiciary protects the Constitution by striking down unconstitutional constitutional amendment, when it is found to be offending the basic feature of the Constitution. What are the parameters that a Judge must take cognizance of in deciding the width, scope and span of the power to amend the Constitution. Justice H.R.Khanna used a two pronged approach. First, how to protect the fundamental rights in the context of the unquestionable need for public welfare, and second, how to preserve the right of the future generation to seek their own destiny as they may like to see it. The first he achieved by holding that while the power of amendment of the Constitution could not

be denied by describing fundamental rights as natural rights or human rights, yet the *'basic dignity of man does not depend upon the codification of fundamental rights, nor is such codification a prerequisite for a dignified way of living.'* The right to property was not part of the basic structure of the Constitution. The second he achieved by declaring that there were no implied limitations on the power of amendment.

In a telling passage of *Judge Learned Hand* in ***The Contribution of an Independent Judiciary to Civilization***, he indicated the limits of the judicial role, by stating *inter alia*: *'...but this much I think I do know - - that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.'* Five years later in 1978 the 44th Constitution Amendment deleted the right to property from Article 19 of the Constitution.

A critical test of the judicial role in preserving the essence of the Constitution by going beyond it came up in ***ADM Jabalpur's*** case. Justice Khanna's voice rang out loud and clear concerning judicial review even when Article 21 has been suspended during an Emergency. In a lonely struggle as part of a five Judge Bench, he declared: *'I am unable to subscribe to the view that when right to enforce the right under Article 21 is suspended, the result would be that there would be no remedy*

³ (1973) 4 SCC 225

against deprivation of a person's life or liberty by the State even though such deprivation is without the authority of law or even in flagrant violation of the provisions of law. The right not to be deprived of one's life or liberty without the authority of law was not the creation of the Constitution. Such right existed before the Constitution came into force. The fact that the framers of the Constitution made an aspect of such right as part of the fundamental rights did not have the effect of exterminating the independent identity of such right and of making Article 21 to be the sole repository of that right . . . Recognition as fundamental right of one aspect of the pre-constitutional right cannot have the effect of making this less favorable so far as the sanctity of life and personal liberty is concerned compared to the position if an aspect of such right had not been recognised as a fundamental right; because of the vulnerability of fundamental right, accruing from Article 359.'

Two years later, in 1978, the 44th Constitution Amendment solved the problem for good by declaring that Article 21, along with Article 20, would remain unaffected by the Presidential Order under Article 359.

The role of the Judge on political questions was crystallised in the case of **Minerva Mills Ltd. & Ors. v. Union of India & Ors.**⁴ by a five Judge Bench. The Court would decline to entertain a controversy which is political in character. Pure political questions are outside its domain. However, where the question related to the interpretation of the Constitution,

it is the duty of the Supreme Court to interpret it regardless of the fact that the answer to the question would have a political effect.

Again there was the brooding presence of Justice Khanna from the **Kesavananda Bharati's** case 'that all constitutional interpretations have political consequences should not obliterate the fact that the decision has to be arrived at in the calm and dispassionate atmosphere of the court room, that judges in order to give legitimacy to their decision have to keep aloof from the din and controversy of politics and that the fluctuating fortunes of rival political parties can have for them only academic interest. Their primary duty is to uphold the Constitution and the laws without fear or favour and in doing so, they cannot allow any political ideology or economic theory, which may have caught their fancy, to colour their decision.'

The protection of constitutional democracy necessitates an independent judiciary that protects not only its own independence but also the base of a parliamentary democracy - free and fair elections. In **People's Union for Civil Liberties v. Union of India** (NOTA Case), the Supreme Court developed the already established concept of democracy as a basic feature of the Constitution to hold that free and fair elections are the necessary means for ensuring this basic feature. It declared: "Free and fair election is a basic structure of the Constitution and necessarily includes within its ambit the right of an elector to cast his vote without fear of reprisal, duress or coercion.

⁴ (1980) 2 SCC 591

Protection of elector's identity and affording secrecy is, therefore, integral to free and fair elections and an arbitrary distinction between the voter who casts his vote and the voter who does not cast his vote is violative of Article 14. Secrecy is required to be maintained for both category of person." Further, "Giving right to a voter not to vote for any candidate while protecting his right of secrecy is extremely important in a democracy. Such an option gives the voter the right to express his disapproval with the kind of candidates that are being put up by the political parties. In **Kihoto Hollohan v. Zachillhu & Ors.**⁵, concerning the validity of the Xth Schedule of the Constitution the Court held: "Democracy is a part of the basic structure of our Constitution and rule of law and free and fair elections are basic features of democracy. The judiciary constantly tried to purify the electoral process to protect this basic feature. In **Common Cause (A registered society) v. Union of India & Ors.**⁶ while dealing with the issue of money power in elections, the Supreme Court held that the Election Commission has power under Art 324 to ask the candidates about the expenditure incurred by them and their political party for ensuring the purity of elections, which is fundamental to democracy. In 1998, **Vineet Narain & Ors. v. Union of India & Anr.**⁷, the court spelt out its obligation under Article 32 to protect and enhance fundamental rights even in the absence of legislation by Parliament, as emanating from Art.32 and the Beijing Statement of Principles of Independence of the Judiciary in LAWASIA region. Continuing

5 1992 Supp. (2) SSC 651

6 (1992) 2 SSC 752

7 (1998) 1 SSC 226

the right to know declarations in **State of U.P. vs Raj Narain & Ors.**⁸, the judicial role in a democracy based on free and fair elections was further enhanced by declaring that in a nation wedded to republican and democratic form of government, where election of an MP or an MLA is of the utmost importance for governance of the country, voters have a right to know relevant particulars of their candidates. Accordingly, Article 324 is a reservoir of power to ensure free and fair elections even in the absence of a law by Parliament. Voters had a right to know the criminal antecedents, the educational qualification and the assets and liabilities of the candidate.

I am deliberately eschewing the discussion on the development of human rights jurisprudence and the manner in which, through the method of purposive interpretation of legal text as well as bold and expansive interpretation of the fundamental rights, particularly, Articles 14, 19 and 21 of the Constitution. The Courts have liberally interpreted the concept of equality as well as the meaning of the words 'life', 'liberty' and 'law' in Article 21. I have avoided discussion on this aspect only because of the reason that this itself would consume substantial time and we will deviate from the fulcrum of the topic. However, some of the judgments which have social impact would be referred to by me while discussing the second function of the Judge, viz., bridging the gap between the law and the society.

With this, I advert to the aforesaid second function.

8 (1975) 4 SSC 428

The Second Role:

Relationship between Law and Society in a Democracy

In order to describe the second role, it is necessary to first understand the relationship between the law and the society. The law sets down the legal norms and thereby controls and governs the behaviour of the society. At the same time, there are certain ethical and moral norms which the society lays down for itself from time to time. Without going into the discussion insofar as connect between the law and morality is concerned, suffice is to say that in many areas there is an overlap between the law and the morality. Many laws are influenced by moral and ethical values, thereby converting those moral norms into legal norms and, in the process, providing consequences for violating these norms. In this context, there has always been a debate as to whether societal norms influence the law making or it is the law, prescription thereof, which leads to change in the behavioural norms in the society. Short answer would be that at times it is the society which influences a particular law making and at times it is the law which changes the society. In this process, in exceptional circumstances, judges act as catalyst, though that is not their normal function. This happens while accomplishing this second role of bridging the gap between the law and the society.

In a modern and democratic society, the objective of the rule of law should not be simply to maintain peace in a frozen or paralyzed state. Rather, the rule of law should have the

dynamism of life itself, and it should adapt itself to the constant process of transformation which characterizes all living organisms. Law is a fact of transformation and growth of human society, and it is the Judiciary that ensures that this process takes place in an orderly, non-violent, and peaceful fashion, while at the same time contributing towards greater justice.

How a judge, in a democratic society, performs the role of bridging the gap between law and society? It is done in two ways:

(I) Interpretative Process

One way is by interpretative process, i.e. by giving purposive interpretation to the statutes. No doubt, the Legislature makes the law, however, while enforcing that law by applying the same in a given case; it is the Judge who states, by interpretative process, what actually the law is. It is, therefore, a myth that a Judge merely states the law and does not create it. The reality is that, while interpreting a statute and declaring what the Legislature meant thereby, Judge is the final arbiter in deciding as to what law is. So, what is interpretation of law? It means the extraction of legal meaning from semantic meaning, the translation of “human” language into “legal” language. An interpretation system must resolve the relationship between text and context, words and its spirit.

In both constitutional and statutory interpretation, a judge must sometimes exercise discretion in determining the proper

relationship between the subjective and objective aspects of the law. A Constitutional interpretation is however, very different from a statutory one. To quote **Justice Dickson** of Supreme Court of Canada, who rightly enunciated the difference:

“The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A Constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental powers and, when joined by a Bill or Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted its provisions cannot be easily repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind”

The words of **Holmes** while dealing with the U.S. Constitution said:

“The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.”

The Supreme Court and High Court of our country have a rich tradition of interpreting the Constitution and upholding its values. The laws are often interpreted to incorporate principles of human rights, democracy, social justice and equality.

In **State of Karnataka & Anr. v. Shri Ranganatha Reddy & Anr.**⁹, the Court speaking through Justice Krishna Iyer observed:

“The social philosophy of the constitution shapes creative judicial vision and orientation. Our nation has, as its dynamic doctrine, economic democracy sans which political democracy is chimerical. We say so because our Constitution, in Parts III and IV and elsewhere, ensouls such a value system, and the debate in this case puts precisely this soul in peril.... Our thesis is that the dialectics of social justice should not be missed if the synthesis of Parts III and Part IV is to influence State action and court pronouncements. Constitutional problems cannot be studied in a sociocultural vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process the new equity-loaded legality. A Judge is a social scientist in his role as constitutional invigilator and fails functionally if he forgets this dimension I his complex duties.”

In **Dattatraya Govind Mahajan & Ors. v. State of Maharashtra & Anr.**¹⁰ he observed;

“Our Constitution is a tryst with destiny, preamble with lucent solemnity in the words

9 (1977) 4 SCC 471

10 (1977) 2 SCC 548

'Justice- Social, economic and political.' The three great branches of Government, as creatures of the Constitution, must remember this promise in their fundamental role and forget it at their peril, for to do so will be a betrayal of those high values and goals which this nation set for itself in its objective Resolution and whose elaborate summation appears in Part IV of the Paramount Parchment. The history of our country's struggle for independence was the story of a battle between the forces of socio-economic exploitation and the masses of deprived people of varying degrees and the Constitution sets the new sights of the nation... Once we grasp the dharma of the Constitution, the new orientation of the karma of adjudication becomes clear. Our founding fathers, aware of our social realities, forged our fighting faith and integrating justice in its social, economic and political aspects. While contemplating the meaning of the Articles of the Organic Law, the Supreme Court shall not disown Social Justice"

Thus, the role of a judge today is charged with the job of bridging the gap between law and society. The role of a judge today is to understand the purpose of law in society and to help the law achieve its purpose. In most cases, if not all, a change in the law is the result of a change in social reality.

As Barak puts it, the legal norm is flexible enough to reflect the change in reality naturally, without the need to change the norm and without creating a rift between law and reality. Often however, the legal norm is not flexible

enough, and it fails to adapt to the new reality. A gap may be formed between law and society. It is this gap that judges seek to fill in the form of interpretation and Judicial Activism. The judge may give a statute a new meaning, a dynamic meaning, that seeks to bridge the gap between law and life's changing reality without changing the statute itself. The statute remains as it was, but its meaning changes, because the court has given it a new meaning that suits new social needs.

The attempts of the Courts to bridge the gap between provisions of existing law and the requirements of justice, is the occasion for the development of new dimensions of justice by way of evolving juristic principles within the framework of law for doing complete justice according to the current needs of the society. It is the quest for justice in the process of administration of justice which occasions the evaluation of the "New Dimensions of Justice", the phrase used by Justice J.S. Verma, former Chief Justice of India. The new dimension is actually not really a new dimension. It only seeks first to bridge the gaps in existing laws, and then it fulfills the needs of the society by evolving juristic principles within the framework of law and with the objective of doing complete justice.

As I understand, such cases, where gap between the law and the society can be bridged, with the objective of doing complete justice, through interpretative process, may fall in two categories:

(a) Where there is a clear recognition of a right in the law and the society also accepts such a right. Still it is found that in reality that particular class which is given the right in law is not able to enjoy the same and is deprived thereof. The judge in such a case enforces the right and bridges the gap. Examples in this category would be the cases of child labour, bonded labour, trafficking, etc.

(b) In second category, those cases would fall where the society recognises or accepts a particular right and there is a legal norm as well. However, having regard to the fact situation, by applying the technique of purposive interpretation, the scope of the right is widened thereby achieving the purpose of justice and bridging the gap between the law and the society. The Supreme Court has done so by invoking its powers under Article 142 of the Constitution. For example, passing orders of termination of pregnancy of a raped minor girl even when pregnancy is for more than twenty weeks, which is the limit prescribed under the Medical Termination of Pregnancy Act, 1971, after verifying from medical experts that such termination would not endanger the life of the pregnant women/girl¹¹.

11 Though Section 3 of the Medical Termination of Pregnancy Act, 1971 prescribes the limitation of twenty weeks beyond which the termination is impermissible, this provision has become outdated having regard to the advancement in medical science which ensures safe termination of pregnancy even after it is more than twenty weeks old. In a particular case where termination is in the interest of the pregnant women/

Another example is the recent judgment of the Supreme Court in **Independent Thought v. Union of India & Anr.**¹² wherein sex with a minor (even when she is a wife) is treated as rape, after finding dichotomy in law insofar as child marriages are concerned.

Likewise, it is by purposive interpretation that rights of destitute women, persons with disability and children have been expanded.

In 2013, the Supreme Court in **Badshah v. Urmila Badshah Godse & Anr.**¹³ while recognizing the duty of a Judge to bridge the gap between law and society, and the need to give a purposive interpretation to the provisions of Section 125, Cr.P.C. stated “*While dealing with the application of destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalized sections of the society. The purpose is to achieve “social justice” which is the Constitutional vision, enshrined in the Preamble of the Constitution of India. Preamble to the Constitution of India clearly signals that we have chosen the democratic path under rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the Courts to advance the cause of the social justice. While giving interpretation to a particular provision, the Court is supposed to bridge the*

girl and also in larger public interest, the powers are exercised by the superior courts making it a classical case of bridging the gap between the law and the society.

12 Writ Petition (C) No. 382 of 2013, decided on October 11, 2017.

13 (2014) 1 SCC 188

gap between the law and society.” Likewise, awarding a compensation of Rs.10 lakhs to a disabled person, who was deboarded from a plane by an airline, the Court observed:

“41. Earlier the traditional approaches to disability have depicted it as health and welfare issue, to be addressed through care provided to persons with disabilities, from a charitable point of view. The disabled persons are viewed as abnormal, deserving of pity and care, and not as individuals who are entitled to enjoy the same opportunities to live a full and satisfying life as other members of society. This resulted in marginalising the disabled persons and their exclusion both from the mainstream of the society and enjoyment of their fundamental rights and freedoms. Disability tends to be couched within a medical and welfare framework, identifying people with disabilities as ill, different from their non-disabled peers, and in need of care. Because the emphasis is on the medical needs of people with disabilities, there is a corresponding neglect of their wider social needs, which has resulted in severe isolation for people with disabilities and their families.

42. However, the nations have come a long way from that stage. Real awareness has dawned on the society at large that the problems of differently-abled are to be viewed from human rights perspective. This thinking is reflected in two major declarations on the disability adopted by the General Assembly of the United Nations on 20-12-1971 and thereafter in the year 1975. The position was reiterated in the Beijing Conclave by the

Government of Asian and Pacific Countries that was held from 1-12-1992 to 5-12-1992 and in order to convert the resolutions adopted therein into reality, the Indian Parliament also passed the enactment i.e. the 1995 Act.

43. All these rights conferred upon such persons send an eloquent message that there is no question of sympathising with such persons and extending them medical or other help. What is to be borne in mind is that they are also human beings and they have to grow as normal persons and are to be extended all facilities in this behalf. The subject of the rights of persons with disabilities should be approached from human rights perspective, which recognised that persons with disabilities were entitled to enjoy the full range of internationally guaranteed rights and freedoms without discrimination on the ground of disability. This creates an obligation on the part of the State to take positive measures to ensure that in reality persons with disabilities get enabled to exercise those rights. There should be insistence on the full measure of general human rights guarantees in the case of persons with disabilities, as well as developing specific instruments that refine and give detailed contextual content of those general guarantees. There should be a full recognition of the fact that persons with disability were integral part of the community, equal in dignity and entitled to enjoy the same human rights and freedoms as others. It is a sad commentary that this perception has not sunk in the mind and souls of those who are not concerned with the enforcement of these rights. The persons suffering from mental or

physical disability experience and encounter nonpareil form of discrimination. They are not looked down by people. However, they are not accepted in the mainstream either even when people sympathise with them. Most common, their lives are handicapped by social, cultural and attitudinal barriers which hamper their full participation and enjoyment of equal rights and opportunities. This is the worst form of discrimination which the disabled feel as their grievance is that others do not understand them.”

The approach adopted in aforesaid cases in order to advance the cause of justice, and in particular, to impart justice to the weaker and marginalized section of the society, is also known as, “*social justice adjudication*” or “*social context adjudication*”. Professor N.R. Madhava Menon has eloquently assigned following meaning to this manner of judging:

“It is therefore, respectfully submitted that social context judging” is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the socio-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the

imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication.”

Courts in India have adverted to this social context adjudication technique, by drifting from strict adversarial approach for dispensing equal justice.

(II) Law Creating Process

By interpretative process the judge is required to fill the gap. In this hue, the judge decides what the law is and may lay down a new norm as well. In that sense, the judge may ‘create’ law. However, in this category I may refer to those cases where the Supreme Court has, in fact, assumed the role of Legislature in creating the law while enforcing the rights of a particular class of persons, thereby bridging the gap between the law and the society. It may be clarified that the discussion is confined to human rights aspect only.

A classical example where the Court endeavored to bridge this gap between the law and the society is the judgment in **Vishaka & Ors. v. State of Rajasthan & Ors.**¹⁴ where Court dealt with the menace of sexual harassment of women at workplace. Taking aid of the International Convention (CEDAW) to which India is a signatory, the Court stepped in even when there was no law to tackle the aforesaid problem and laid down various guidelines with the direction that these guidelines would prevail till the Parliament steps

¹⁴ (1997) 6 SCC 241

in and enacts a law. It is a matter of record that the Parliament has passed the law, *albeit*, after 16 years from the said judgment, in the year 2003 by enacting the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

Another case which needs to be highlighted is **Aruna Ramachandra Shanbaug v. Union of India & Ors.**¹⁵ dealing with the subject of passive euthanasia. Here again, there was no statutory framework to deal with this important facet of human dignity. Again, after extensively discussing the law in other nations/ jurisprudence and referring to earlier judgment in **Gian Kaur v. State of Punjab**¹⁶, the Court laid down the guidelines which are to be governed till the law is made by the Legislature. We may also refer to the NALSA judgment wherein rights of transgender as third sex have been recognised.

Likewise, in the **National Legal Services Authority v. Union of India & Ors.**¹⁷, the Supreme Court had observed that

*“The **basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set up.** Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard*

15 (2011) 4 SCC 454

16 (1996) 2 SCC 648

17 (2014) 5 SCC 438

of the people and to give opportunities to every person to develop his/her personality.

[...]

By recognizing TGs as third gender, this Court is not only upholding the rule of law but also advancing justice to the class, so far deprived of their legitimate natural and constitutional rights. It is, therefore, the only just solution which ensures justice not only to TGs but also justice to the society as well. Social justice does not mean equality before law in papers but to translate the spirit of the Constitution, enshrined in the Preamble, the Fundamental Rights and the Directive Principles of State Policy into action, whose arms are long enough to bring within its reach and embrace this right of recognition to the TGs which legitimately belongs to them.”

D.K. Basu v. State of West Bengal¹⁸ is another example where the Supreme Court laid down specific guidelines which are required to be followed while making arrest.

BALANCING JUDICIAL RESTRAINT AND ACTIVISM – A NOTE OF CAUTION FOR THE FUTURE

Let me touch upon the aspect of judicial activism, at this stage. Some of the judgments which I have mentioned above clearly reveal that judges have ‘created’ law thereby. However, I have chosen those judgments where the Supreme Court, by doing so, not

18 (1997) 1 SCC 416

only tried to bridge the gap between the law and the society but ensured that human right based on human dignity to a particular class becomes a reality. It is for this reason those judgments have always been commended by one and all for their scholarship, and thereby advancing the rule of law. At the same time, there are many other judgments, particularly those touching upon the policy matters or the governance etc. which are criticised on the ground that by entering into the said arena the courts have trampled into the domain that belonged to either the legislature or the executive and, therefore, violated the principle of separation of powers. It can be said that at times it may have happened. However, I am not touching that particular area in the present speech, which revolves around “rights issues” and the need for a judge to show “activism” in guaranteeing these rights.

At the same time, it has to be kept in mind that judicial activism and judicial overreach have different connotations. According to me, the concept of judicial activism is to be seen as judicial pragmatism, i.e. adopting a pragmatic approach to a particular issue, but at the same time confining this within the boundaries of law. Here the distinction is to be made between judicial activism and judicial restraint. There are various jurisprudential yardsticks propounded in this behalf.

However, in the context of today’s topic, I would like to borrow and adopt what Aharon Barak defines as judicial activism or judicial restraint. According to him, activism and self

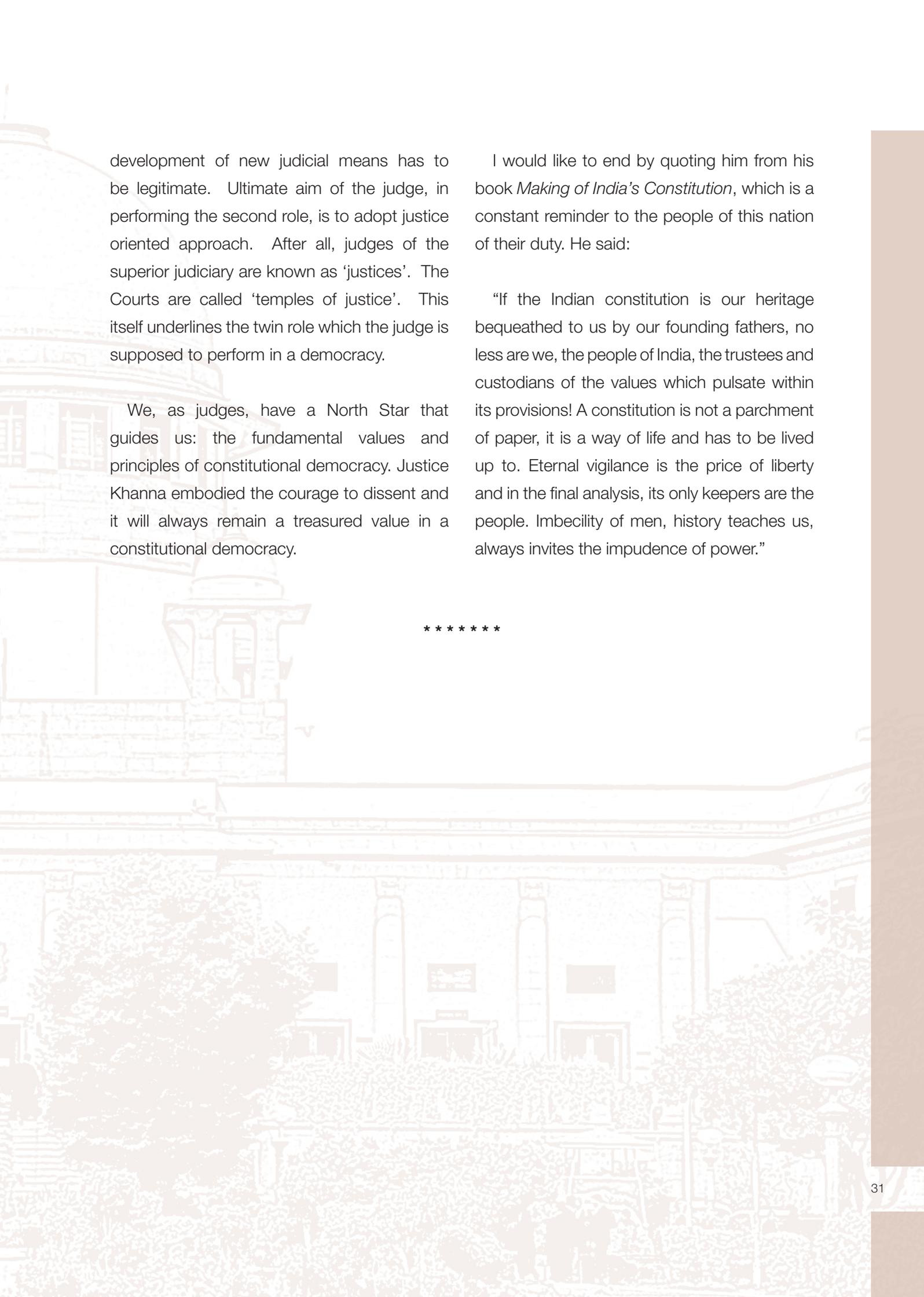
restraint must relate to how well they realize the aforesaid twin judicial roles. Against this background, he defines judicial activism as under:

“judicial activism is the judicial tendency – conscious or unconscious – to achieve the proper balance between conflicting social values (such as individual rights against the needs of the collective, the liberty of one person against that of another the authority the authority of one branch of government against another) through change in the existing law (invalidating an unconstitutional statute i8nvalidating secondary legislation that conflicts with a statute, reversing a judicial precedent) or through creating new law that did not previously exist (through interpreting the constitution or legislation, through developing the common law).”

In contrast, he defines ‘self restraint’ as under:

“It is the judicial tendency – conscious or unconscious – to achieve the proper balance between conflicting social values by preserving existing law rather than creating new law. It finds expression in a judge’s reluctance to invalidate a legal policy that was determined in the past.”

Judicial activism, therefore, would not mean changing the law or creating new law. An activist judge tends to develop new means, including new systems of interpretation, in order to play an activist role. However, any



development of new judicial means has to be legitimate. Ultimate aim of the judge, in performing the second role, is to adopt justice oriented approach. After all, judges of the superior judiciary are known as ‘justices’. The Courts are called ‘temples of justice’. This itself underlines the twin role which the judge is supposed to perform in a democracy.

We, as judges, have a North Star that guides us: the fundamental values and principles of constitutional democracy. Justice Khanna embodied the courage to dissent and it will always remain a treasured value in a constitutional democracy.

I would like to end by quoting him from his book *Making of India’s Constitution*, which is a constant reminder to the people of this nation of their duty. He said:

“If the Indian constitution is our heritage bequeathed to us by our founding fathers, no less are we, the people of India, the trustees and custodians of the values which pulsate within its provisions! A constitution is not a parchment of paper, it is a way of life and has to be lived up to. Eternal vigilance is the price of liberty and in the final analysis, its only keepers are the people. Imbecility of men, history teaches us, always invites the impudence of power.”

