

THE FIRST ANNUAL DR. K.R. NARAYANAN

MEMORIAL LECTURE

AT JAMIA MILLIA ISLAMIA UNIVERSITY

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**THEME: PROBLEMS OF SOCIAL INEQUALITY AND POSSIBILITIES OF
JUDICIAL INTERVENTION**

I am indeed happy and feel privileged to give the First Annual Memorial Lecture named after Dr. K.R. Narayanan, at the instance of Jamia Millia Islamia University. This University is a prestigious institute. This institute, which was originally started at Aligarh in United Provinces in 1920, became a centre of education. In 1928 Dr. Zakir Husain became the Vice-Chancellor of the University and his contribution to this University was phenomenal. So many eminent personalities have been associated with this University. Father of our nation Gandhiji wanted to see this institute to

become a great centre of learning. This University had survived the turmoil that prevailed in the pre-independent India.

Dr. Kocheril Raman Narayanan was born in a poor family in a village Uzhavoor in Kottayam district in the State of Kerala. He was a very bright student and passed out successfully his matriculation. He joined the CMS College Kottayam for his graduation. A freedom fighter and social activist helped him to pursue his studies. Later, with the help of TATA institute he continued his studies in London School of Economics and obtained his B.Sc. (Econ.) degree. When he returned from London, his future was a baffling one and his teacher Harold Laski of the London School of Economics gave him a letter of introduction to Pandit Jawahar Lal Nehru, who was also a former student of Harold Laski. Dr. K.R. Narayanan made repeated attempts to meet Panditji who was then the Prime Minister of India. Lastly, he got an opportunity to meet him in the Parliament House. He had a brief interview with Panditji. At the end, he gave the letter of Harold Laski to Panditji and quickly walked out of the room. While he was moving through the corridors of Parliament House, he saw Panditji beckoning him to come back and asked "Why did not you give this letter to me earlier?" He replied, "I am sorry. I thought it would be enough if I just handed it over while leaving." Panditji asked him to join the Indian Foreign

Service. Then started the bright career of Dr. K.R. Narayanan as a member of Indian Foreign Service. He worked as an Ambassador in various countries and retired from Indian Foreign Service in 1978. Later, he became the Vice-Chancellor of the Jawahar Lal Nehru University. He held various positions with utmost satisfaction. He was a scholar of eminence, great leader and prolific writer. As an Advocate, I had the opportunity to meet him frequently. Once he told that when the Chinese Government celebrated the 50th year of *Panchsheel* various world leaders were invited to Beijing and there he was treated as the most important person who attended the conference – the conference in which world leaders were present. His commitment to social justice and principles of the equality and rule of law was known to all. I congratulate the Jamia Millia Islamia University for having thought it fit to have a memorial lecture in the name of Dr. K.R. Narayanan.

The Indian Constitution embraces the goal of achieving social equality in express terms. The constitutional scholar Granville Austin, in his magisterial work, “Working a Democratic Constitution: the Indian Experience”, states that probably no other Constitution in the world “*has*

provided so much impetus towards changing and rebuilding society for the common good”.

Indeed, it is perhaps one of the most rights-based constitutions in the world. Interestingly, around the same time, the Universal Declaration of Human Rights (UDHR) also saw the light of day, in 1948. Article 1 of the UDHR has become central to the functioning of the United Nations, and recognizes that equality is the core value that lies at the very root of human dignity. The reality of inequality, and its possible solution, is manifest in the Preamble, followed by the Fundamental Rights and Directive Principles. The Preamble makes explicit, the resolve to create a “socialist and democratic republic” in order to secure political justice, equality, liberty and dignity. Many of the principles espoused can also be found in the UDHR. The principle assertion being that in order to obliterate social injustice, upholding the dignity of the human personality is paramount. The Indian Constitution, as a social document, seeks to foster this by striving to create the requisite social, cultural, political and economic conditions that are required to attain this noble goal. Its ideals are based on the grim experience of colonialism, and India’s bitter struggle against that imperial regime, which consistently violated the rights of the people of India, and

worked relentlessly to create inequalities within the social strata. There was intense and extensive social and economic discrimination due to irrational prejudices, which resulted in certain sections of society to suffer severe handicaps in practically all walks of life. However, it is also true that the British brought with them certain reforms that were largely influenced by Western thought. Notable among these, were the abolition of slavery in 1843, abolition of the practice of Sati in 1829 and prevention of female infanticide. However, despite these measures, the problems of social inequality were deep rooted in India, and at that time, possibilities of judicial intervention were limited.

After the adoption of our Constitution, large scale social and economic changes have taken place. It is true that in many areas, we could not achieve the desired results, but even then the powers of law and legislation have tremendous impact in society. Law is essentially marginal to the process by which society changes; law is an effect rather than a cause. It is only within the limits given there that change can be accomplished. Legislation is always based on the quintessence of the public opinion. But inevitably, it often lags behind the real life and Goethe once said of law as the rule of dead over the living. This is too a

conservative view and sees law as passive and reactive, something that accommodates change rather than causes it.

India after attaining independence by a series of social welfare legislations based on the mandate of our Constitution proved that law could be active and dynamic. No longer was the State seen as standing to one side of the society and performing the role of a night watchman, but as a manager of social and economic interests. The State has become the centre of political and economic power and source and distributor of basic legal rights and material standards. The operation of law with numerous regulations brings about change in the society.

Society is constantly in motion, economies strengthen and fail, technology moves on, new social institutions emerge, even there is fundamental alteration of the structure of the society. We cannot point out any single legislation or judicial decision which has changed society or its relationship between members just as in America by single stroke of pen Abraham Lincoln freed the slaves of America.

Law and legal system have impact on the changes either originating from within or from outside. But these social changes are easier if the commitment to an activity is not high as here the law can tip the balance in favour of other behaviour. Sometimes it is difficult and uncertain process. See for example, the tribal laws made for restoration of their lands from the persons who are in illegal occupation. Many members of the tribal community owned lands and their lands were usurped by cheating them and law was enacted to restore those lands. It was partly implemented in the sense that they filed applications for restoration and the Revenue Divisional Authorities passed orders for restoration of these lands. But the execution of these orders was resisted by the trespassers who formed a powerful section of community. The law had ultimately to be abandoned and new law was enacted just to appease the Tribals with mirage that they would be given lands freely; a promise which cannot be fulfilled for various reasons.

Any goal of law, must be realisable through law, that is, the change required must be capable of being communicated to the bulk of the people and must have a compatibility with the existing values. It is probably

difficult to stop people from doing what they have always thought right. The required change should be capable of being implemented.

Law has wide variety of powers to enforce law, much more than the sanction under criminal law. Freund has categorized manifestations of government power to realise law; the police force, taxation system, the ability to manage public property and resources. For example, the pollution from exhaust emissions for motor vehicle could be checked not only prohibiting or modifying it, but by widening the categories of tortious liability to allow claims to those who are affected by setting standards in manufacture or by negative financial incentive¹.

There are also wide varieties of implementative techniques to translate a legislative aim into a social behaviour. Law does not work only by straightforward command; it defines, gives status and rights and selectively distribute burdens and incentives. It sets up facilities and standards, creates disabilities and operates in private sphere to arrange things; it sets up agencies to operate the system. Law thus has spectacular effect to bring about social change. But the change through

law is difficult to plan, complex to execute and often uncertain in its consequences.

Justice is often understood, in a narrow sense, to mean justice according to law or justice of law. But, nowadays, the word “justice” is used in a wider sense and includes its different forms like social, economic and political justice. The concepts of social justice are varied, but equality is integral to most contemporary theories of justice. The urge for social justice gathered momentum when India became an independent sovereign republic. The concept of social justice deals with all aspects of human life. **Harold J. Lasky** remarked **“that the more equal are the social rights of citizens, the more likely they are to be able to utilize their freedom in realms worthy of exploration.”** The purpose of social justice is to maintain or to restore equilibrium in the society and it envisages equal treatment of equal persons in equal or essentially equal circumstances. The social solidarity is brought about by the concept of social justice.

The framers of our Constitution then toiled hard to inject equality, justice and good conscience at the heart of the social system, since any

thought of social betterment of the nation would be a teasing illusion if the requisite social conditions based on social equality did not exist.

In the Constituent Assembly, on 25th November, 1949, Dr. Ambedkar stated:

“On the 26th January, 1950, we are going to enter upon into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment else those who suffer from inequality will blow up the structure of democracy which this Constituent Assembly has so laboriously built up.”

Thus, realizing that the masses had suffered for long, and recognizing the reality of prevailing social inequalities, the founding fathers placed the

mandate of social equality at the helm of the Constitution, and attempted to create a system where every member is empowered to participate in the liberties and the freedom provided under the Constitution.

Pandit Nehru embodied the essence of this goal in the following words to the Constituent Assembly:

“The first task of this Assembly is to free India through a new Constitution, to feed the starving people and to clothe the naked masses and to give every Indian the fullest opportunity to develop himself according to his capacity”.

With this noble aim, the founding fathers inserted the Fundamental Rights and Directive Principles in the Constitution, which find their roots in the Constitution of India Bill, 1895 and the 1931 Karachi Resolution respectively. They form the soul of this living document, and connect India’s past, present and future into one single thread, giving greater credence to the pursuit of social equality.

In the words of Justice Learned Hand, of the United States' Supreme Court:

“... such constitutional limitations arise from grievances, real or fancied, which their makers have suffered and...they withstand the winds of logic by the depth and toughness of their roots in the past.”

In his Article titled “Challenge to the Living Constitution” by Herman Belz, the author says that the Constitution embodies aspiration to social justice, brotherhood and human dignity. It is a text which contains fundamental principles.

In *M. Nagraj v. Union of India (2006) 8 SCC 212*, the Supreme Court explained the concept of social justice as flowing out of the Fundamental Rights in the following words:

“...Social justice is one of the sub-divisions of the concept of justice. It is concerned with the distribution of benefits and burdens throughout a society as it results from social institutions - property systems, public organisations etc. The problem is - what should be the basis of

distribution? Writers like Raphael, Mill and Hume define 'social justice' in terms of rights. Other writers like Hayek and Spencer define 'social justice' in terms of deserts. Socialist writers define 'social justice' in terms of need. Therefore, there are three criteria to judge the basis of distribution, namely, rights, deserts or need. These three criteria can be put under two concepts of equality - "formal equality" and "proportional equality". "Formal equality" means that law treats everyone equal and does not favour anyone either because he belongs to the advantaged section of the society or to the disadvantaged section of the society. Concept of "proportional equality" expects the States to take affirmative action in favour of disadvantaged sections of the society within the framework of liberal democracy. Under the Indian Constitution, while basic liberties are guaranteed and individual initiative is encouraged, the State has got the role of ensuring that no class prospers at the cost of other class and no person suffers because of drawbacks which is not his but social... Therefore, axioms like secularism, democracy, reasonableness, social justice etc. are overarching principles which provide linking factor for principle of fundamental rights like Articles 14, 19 and 21."

Thus, the Fundamental Rights, through Articles 14, 15, 16 and 17 reflect the right to equality in its various aspects and aim to foster social equality by empowering the citizens to be free from any form of coercion or restriction by the state or private people. The Directive Principles aim at creating an egalitarian society whose citizens are free from the abject physical conditions that had hitherto prevented them from fulfilling their best selves. They are the creative part of the Constitution, and fundamental to the governance of the country. It is interesting to note that at the time of drafting of the Constitution, some of the Directive Principles were part of the declaration of fundamental rights adopted by the Congress party at Karachi. Mr. Munshi had even included in his draft list of rights, the “rights of workers” and “social rights”, which included provisions protecting women and children and guaranteeing the right to work, a decent wage, and a decent standard of living. The primordial importance of Part IV can be understood by the following words of Dr. Ambedkar, when he insisted on the use of the word “strive” in Article 38:

“We have used it because it is our intention that even when there are circumstances which prevent the Government, or which stand in the way of the Government giving effect to these directive principles, they shall,

even under hard and unpropitious circumstances, always strive in the fulfillment of these directives. ... Otherwise it would be open for any Government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go.”

Thus, the enforceability of measures relating to social equality was never envisaged as being dependent only on the availability of state resources. Going further, though the Fundamental Rights and Directive Principles may resemble Western constitutional provisions, they can be distinguished in their innate desire to end the inequities of traditional social relations and enhance the social welfare of the population. Other provisions furthering social equality include Article 334, and those relating to the upliftment of Anglo Indians. Again, Article 23 prohibits the trafficking of human beings and other forms of forced labour and Article 24 protects children under the age of fourteen from enduring the hazards of employment in difficult conditions. Freedom of Religion, freedom of conscience and free profession, practice and propagation of religion; freedom to manage one's religious affairs; and freedom to attend religious instruction or religious worship in certain educational institutions has been

ensured through Articles 25, 26, 27 and 28 of the Constitution. Articles 29 and 30 deal exclusively with the Cultural and Educational Rights of Minorities while ensuring equal opportunity for all citizens to take admission in any educational institution.

The Courts have taken recourse to these provisions often, in their crusade to bring justice to the poor. Through innovative and creative strategies, they have expanded the scope of the Fundamental Rights, in order to render justice to women, children, bonded laborers and other oppressed sections of society. The Courts have also played a significant role in bridging the divide between the colonial legal system and the value based jurisprudence of our Constitution. Notably, over the decades, the Supreme Court has affirmed that both the fundamental rights and Directive Principles must be interpreted harmoniously. It was held, in *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, that the directive principles and the fundamental rights supplement each other and aim at the same goal of about a social revolution and the establishment of a welfare State, also envisaged in the Preamble. Furthermore, in *Unni Krishnan, J.P. v. State of A.P.*, (1993) 1 SCC 645, Justice Jeevan Reddy declared, at p. 730, para 165, that:

“The provisions of Parts III and IV are supplementary and complementary to each other and not exclusionary of each other and that the fundamental rights are but a means to achieve the goal indicated in Part IV”.

This would go a long way to help create the necessary social conditions that would ultimately result in social equality.

The Right to Education

The theory of the complementarities of rights and their harmonious nature has laid the foundation for the realization of primary education being declared a fundamental right, through two judgments of the Supreme Court.

The use of education as tool for achieving socio-political justice was largely ignored until the judgment in *Mohini Jain v. State of Karnataka (1992) 3 SCC 666*. The Court held that:

“the right to education flows directly from the right to life” as “the right to life and the dignity of an individual cannot be assured unless it is accompanied by the right to education”, and “the fundamental rights guaranteed under Part III of the Constitution of India, including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity”.

The Supreme Court also referred to the UDHR principles and to Article 41 of the Constitution. Later, in *Unni Krishnan*, the Court took support from UDHR and Article 13 of the International Covenant for Economic, Social and Cultural Rights and for the first time articulated education as a “social” right.

The Right to Health

Article 47 declares that the *“State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties”*. The right to health also has its reference in Articles 38 (social order to promote the welfare of the people),

39(e) (health of workers, men, women and children must be protected against abuse), 41 (right to public assistance in certain cases, including sickness and disability) and 48A (the State's duty to protect the environment) of the directive principles. The right to health has also been articulated as an integral part of the right to life. In *Consumer Education and Research Centre v. Union of India (1995) 3 SCC 42*, the Supreme Court dealt with the health hazards faced by workers engaged in the asbestos industry. Reading concurrently Article 21 with Articles 39(e), 41 and 43, the Supreme Court held that

“the right to health ... is an integral facet of a meaningful right to life”
(para 24).

The Supreme Court and Article 21

The Right to Life enshrined in Article 21 has also been interpreted to include the right to be free from degrading and inhuman treatment, the right to integrity and dignity of the person, and the right to speedy justice.

In the words of Justice Bhagwati, in *Francis Coralie vs. Union Territory of Delhi* (1981) 1 SCC 688:

“we think that 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 over the head and facilities for reading, writing and expressing oneself in diverse forms.”

In *Maneka Gandhi v. Union of India* (AIR 1978 SC 597), it was stated by the Supreme Court that equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned with traditional and doctrinaire limits. Thus, it is the Courts that have given these Rights and Principles their real meaning. They have adopted substantive equality, and aimed for a result oriented approach. This approach tends to encourage the downtrodden and underprivileged to redeem themselves of previous inequalities, and has resulted in greater judicial activism, and has opened new vistas for judicial innovation and creativity, in order to fulfill the mandate of achieving social equality. Commenting on judicial activism, the scholar S.P. Sathe, in his work, “Judicial Activism in India”, opines that the

judicial process has changed from an adversarial, bilateral process to a polycentric, conflict-resolving process.

Enforcement of social rights through judicial intervention can also be seen in other countries such as Argentina, Brazil, Colombia, Finland, Latvia and South Africa, as well as almost all regional and international human rights courts and quasi-judicial committees. In *Social and Economic Rights Action Centre (SERAC) v. Nigeria*, the African Commission on Human Rights drew on the UN Committee on Economic, Social and Cultural Rights's General Comment No. 4 on the Right to Housing to condemn forced eviction of the Ogoni people in Nigeria, while in *Plan de Sánchez v. Guatemala*, the Inter-American Commission on Human Rights quoted the same General Comment as it ordered Guatemala to implement an adequate housing program as part of a remedial package for survivors of a 1982 massacre.

Therefore, timely judicial intervention has made social rights adjudication in India vibrant and dynamic, leading to the enforceability of rights such as the right to food, the right to education, and the right to

health, even though they have not been included a express fundamental rights in the Constitution.

Bonded Labor

Bonded labor in all its forms, of children or adults, expressly violates the Bonded Labour System (Abolition) Act, 1976 and in the case of children, the Children (Pledging of Labour) Act, 1933, as well as certain constitutional provisions, namely, Article 23 (1), Article 24 and Article 39. The former prohibits the creation of bonded labor agreements and contains penal offences against people engaging in attempts to engage in bonded labour, and the latter penalizes any parent, middleman, or employer engaged in making or executing a pledge of a child's labor.

However, the implementation of these legislations was often callous, requiring the intervention of the Supreme Court to deal with this serious issue, which was fast emerging as a pressing concern. Thus, in *People's Union for Democratic Rights v. Union of India [Asiad Workers' Case]*, **AIR 1982 S.C. 1473**, the Supreme Court defined the ambit of "forced labour". According to the Court, "*forced labour*", includes any situation "*where a*

person provides labour or service to another for remuneration which is less than minimum wage . . .”

Subsequently, in *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161, the Supreme Court embarked on the process of identifying, releasing and rehabilitating bonded labourers, ensuring minimum-wage payments and availability of wholesome drinking water and setting up dust-sucking machines in the stone quarries. These orders of the Court were monitored through a monitoring agency, which would check the implementation of those directions.

These interpretations by the Supreme Court were powerful steps towards the realization of a social order based on equity.

Rights of Indigenous People

The Indian Judiciary has been at the forefront of protecting the rights of tribal communities, in order to promote social justice. In *Samantha v. State of A.P.* (1997) 8 SCC 191, the Supreme Court observed that:

“Agriculture is the only source of livelihood for scheduled tribes, apart from collection and sale of minor forest produce to supplement their income. Land is their most important natural and valuable asset and imperishable endowment from which the tribals derive their sustenance social status, economic and social equality and permanent place of abode and work and living. It is a security and source of economic empowerment. Therefore, the tribes too have great emotional attachment of their lands. The land, on which they live and till, assures them equality of status and dignity of person and means to economic and social justice and is a potent weapon of economic empowerment in a social democracy.”

Thus, with this, the Court opened another vista for judicial intervention, and ensured that even the forest communities enjoy the rights and protections guaranteed to them under our Constitution, such that slowly but surely, we would achieve the sagacious ideal of social equality.

Gender Justice

Instances of sexual harassment at the workplace were on the rise, and were often seen as a tool to deny women equal opportunity at work. The

judgment of the Supreme Court in the *Vishaka Case* [*Vishaka v. State of Rajasthan (1997 6 SCC 241)*] ushered in judicial activism in the area of gender justice, thereby ensuring social equality at the workplace. The Court, assisted by international conventions and norms which encapsulate these rights, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), stated that:

“Sexual harassment of women in the workplace results in the violation of the fundamental rights of gender equality and the right to life and liberty; It is a clear violation of the rights under Articles 14, 15, 21...and 19(1)(g)... and; Gender equality includes protection from sexual harassment and the right to work with dignity, which is a universally recognized basic human right.” It was also observed that, “the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment...particularly at workplaces...”

Thus, the judgment recognized that in the absence of legislation dealing with such situations, it was imperative for the judicial process to intervene and facilitate the process.

Land Reform

In the area of land reform, the Supreme Court has championed the cause of promoting social equality that the British had zealously kept away, fearing that any such social change would pose as a threat to their rule. One of the earliest examples are the cases of *Shankari Prasad v. Union of India* [AIR 1951 SC 458], in 1951, and the *Kameshwar Singh* case [AIR 1952 SC 252] of 1952, where the federal vestiges of the British rule were finally removed from the social stratum, and land reform measures were upheld by the courts, since they furthered the goal of a social order that found foundation in social equality. The courts were well aware of the issues of social inequality and made constructive efforts to promote equality in means of livelihood and in equal ownership and control of material resources of the community, such that they are disbursed to serve the common good. These early decisions reflect a progressive attitude that greatly contributed to social change and promotion of social equality and justice, as enshrined in Article 38 of the Constitution. The Courts ensured that the Indian judiciary never stood in the way of the implementation of both radical and welfare measures by the Legislature and Executive.

Rather, it has ensured that a number of social legislations made for the benefit of the poor and downtrodden are implemented in the proper spirit.

I would like to conclude with the following words, by Dorothy Day, an American social activist, who espoused the cause of the impoverished and underprivileged:

“What we would like to do is change the world- And, by fighting for better conditions, by crying out unceasingly for the rights of the workers, of the poor, of the destitute...we can, to a certain extent, change the world; we can work for the oasis, the little cell of joy and peace in a harried world. We can throw our pebble in the pond and be confident that its ever widening circle will reach around the world.”