

Shri Anand Mohan Mathur Law Lectures
Organised by High Court Advocates' Bar Association, Jabalpur
(November 14, 2009 – Jabalpur)

Keynote address by Honb'le Mr. K.G. Balakrishnan, Chief Justice of India

My esteemed colleagues Justices R.V. Raveendran / Dalveer Bhandari / V.S. Sirpurkar and Deepak Verma,

Justice A.K. Patnaik (Chief Justice, High Court of Madhya Pradesh)

Shri Anand Mohan Mathur, Sr. Adv.

And Ladies and Gentlemen,

I would like to begin by thanking the High Court Advocates' Bar Association of Jabalpur for inviting me to speak at this programme in honour of Shri Anand Mohan Mathur. The theme that I am supposed to touch on is 'How to check the erosion of the rule of law'. This is indeed a very open-ended topic and I must admit that it is difficult to capture all the contours of the issue in definite terms. However, I will try to provide a broad outline of my thoughts on the same.

The very idea of what constitutes 'rule of law' has been deeply contested in the philosophical tradition. In Ancient Greece, Aristotle had described the 'rule of law' as the rule of reason which entailed that all public activities and transactions should be guided by rational argumentation instead of the whims of a few individuals. Much later Thomas Aquinas and St. Augustine located the idea of 'rule of law' in the natural law tradition by arguing that there were some transcendent rights which should form the basis of legal systems. The origins of liberal political theory are of course traced back to the writings of Thomas Hobbes, John Locke and John Jacques

Rousseau, all of whom had highlighted the importance of ‘rule of law’ in their respective formulations of a ‘social contract’ between the sovereign and the people. In our times, the dominant idea is the one propounded by A.V. Dicey which emphasises right-based liberalism and the judicial review of governmental action. This formulation has been further enriched by scholars such as Lon L. Fuller who have emphasized that the maintenance of the ‘rule of law’ requires publicly promulgated rules, laid down in advance, and adherence to at least some natural-law values.

However, the understanding of this phrase is often quite nebulous and it is frequently invoked as empty rhetoric to advance all kinds of claims and arguments. It is in this regard, that there is a need for some clarity and consistency about what it means. In the words of Richard Fallon, Jr.:

“ ... Leading modern accounts generally emphasize five elements that constitute the Rule of Law. To the extent that these elements exist, the Rule of Law is realized.

(1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it.

(2) The second element of the Rule of Law is efficacy. The law should actually guide people, at least for the most part. In Joseph Raz's phrase, "people should be ruled by the law and obey it."

(3) The third element is stability. The law should be reasonably stable, in

order to facilitate planning and coordinated action over time.

(4) The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.

(5) The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures.”¹

Of course it is one thing to engage in an academic discussion on the virtues of clarity, efficacy, stability, authority and impartiality in the administration of justice. It is altogether another matter if we start examining the extent to which these qualities have been inculcated in our legal system. Even though the judicial system is the main catalyst for cultivating adherence to the ‘rule of law’, the responsibility must be shared by the entire web of public as well as private institutions that regulate our behaviour.

John Locke stated that “the end of law is not to abolish or restrain, but to preserve and enlarge freedom.”² Most modern legal systems recognize certain basic liberties of the citizens. They include the freedom of expression, freedom of assembly and association, the right of free movement, the right to acquire property and the right to enter into contractual agreements. Some of these rights have been assigned constitutional protection in different nations so that the core of these rights

¹ Refer: Richard Fallon, Jr., ‘The rule of law as a concept in constitutional discourse’, 97 *Columbia Law School* 1 (January 1997)

² See John Locke, *Of civil government*, (Everyman’s Library Edn. , 1924)

may not be infringed by legislative or executive action. Historian Arnold Toynbee had remarked:

“Man cannot live without a minimum of freedom, any more than he can live without a minimum of security, justice, and food. There seems to be in human nature an intractable vein ... which insists on being allowed a modicum of freedom, and which knows how to impose its will when it is goaded beyond endurance.”³

However, the liberties granted to citizens are also liable to be abused and they must therefore be subject to certain restraints in the interest of maintaining public order. The total absence of restraints on these freedoms can of course lead to problems. Anarchic political freedom can turn into dependence upon private usurpers of power. Unlimited economic freedom can lead to monopolies. For that purpose, historically men have been prepared to allow their personal freedom to be subjected to socially beneficial controls. The search for balance between the extent of personal liberty and governmental control has been at the core of liberal constitutionalism. In the words of Chief Justice Harlan Stone⁴:

“Man does not live by himself and for himself alone. There comes a point in the organisation of a complex society where individualism must yield to traffic regulations, where the right to do as one will with his own must bow to zoning ordinances, or even on occasion to price-fixing regulations. Just where the line is to be drawn which marks the boundary between the appropriate field of individual liberty and right

³ See Arnold Toynbee, *A historian's approach to religion* (London, 1956)

⁴ Cited from: Harlan F. Stone, *The Common law in the United States*, 50 *Harvard Law Review* 4 (1936), at p. 22

and that of government action for the larger good, so as to insure the least sacrifice of both types of social advantage is the perpetual question of constitutional law.”

In this sense, the role of the judiciary is to constantly evaluate and re-work this balance between the rights of citizens and governmental action. As you are all aware, the notion of ‘judicial review’ in India has evolved in three dimensions – firstly, that of ensuring fairness in administrative action, secondly to protect the fundamental rights of citizens and thirdly to rule on questions of legislative competence. The power of the Supreme Court of India to enforce these fundamental rights is derived from Article 32 of the Constitution and it exercised by way of writ jurisdiction. Besides the Supreme Court, the High Courts located in the various States are also designated as constitutional courts and Article 226 permits citizens to file similar writs before the High Courts. With the advent of Public Interest Litigation (PIL) in recent decades, Article 32 has been creatively read to shape innovative remedies such as a ‘continuing mandamus’ for ensuring that executive agencies comply with judicial directions. In this category of litigation, judges have also imported private law remedies such as ‘injunctions’ and ‘stay orders’ into what are essentially public law-related matters.⁵ Successful challenges against statutory provisions result in measures such as striking down of statutes or even reading down of statutes,

⁵ See: Ashok H. Desai and S. Muralidhar, Public Interest Litigation: Potential and Problems’ in B.N. Kirpal et. al. (eds.), *Supreme but not Infallible – Essays in Honour of the Supreme Court of India* (OUP, 2000) at p. 159-192

the latter implying that courts reject a particular approach to the interpretation of a statutory provision.⁶

However, across several jurisdictions - questions have been asked about the proper understanding of ‘judicial review’. There are two principled objections offered against the very idea of ‘judicial review’ in a democratic order. The first theoretical objection is that since the judiciary is an unelected body, it is not accountable to the people through any institutional mechanism. In most countries judges are appointed through methods involving selection or nomination, in which ordinary citizens do not have a direct say. It is argued that allowing the judiciary to rule on the validity of the enactments passed by a democratically constituted legislature is in itself a violation of the idea of ‘separation of powers’. Skepticism is also voiced against judges using their personal discretion to direct action in areas in which they have no expertise. This critique locates the role of the judiciary as purely one of resolving disputes between parties and showing deference to the prescriptions of the elected legislature while doing so. In the Common Law realm, this critique is based on the age-old notion of ‘parliamentary sovereignty’. With respect to the inherent value of a written constitution that also incorporates ‘judicial review’, I would like to quote an observation made by Justice Aharon Barak, which is self-explanatory:

“To maintain real democracy and to ensure a delicate balance between its elements -a formal constitution is preferable. To operate effectively, a constitution should enjoy normative supremacy, should not be as easily

⁶ In the United Kingdom, Courts have developed another tool for ruling on legislative action – i.e. issuing a ‘declaration of incompatibility’ for statutory provisions that contravene the ECHR.

amendable as a normal statute, and should give judges the power to review the constitutionality of legislation. Without a formal constitution, there is no legal limitation on legislative supremacy, and the supremacy of human rights can exist only by the grace of the majority's self-restraint. A constitution, however, imposes legal limitations on the legislature and guarantees that human rights are protected not only by the self-restraint of the majority, but also by constitutional control over the majority. Hence, the need for a formal constitution.”⁷

However, we must also consider another nuanced objection to the doctrine of ‘judicial review’. It is reasoned that the substantive contents of a constitution which is adopted by a country at a particular point of time reflect the will of its framers. However, it is not necessary that the intent of the framers corresponds to the will of the majority of the population at the time. In the Indian setting, it is often argued that the members of the Constituent Assembly were overwhelmingly drawn from elite backgrounds and hence they did not represent popular opinions on several vital issues. Furthermore, the adoption of a constitution entails a country's precommitment to its contents and the same become binding on future generations.⁸ Clearly the understanding and application of constitutional principles cannot remain static and hence a constitutional text also lays down a procedure for its amendment.

⁷ Cited from: Aharon Barak, ‘A judge on judging: The role of a Supreme Court in Democracy, 116 *Harvard Law Review* 16 (2002)

⁸ See: Stephen Holmes, ‘Precommitment and the Paradox of Democracy’ in Douglas Greenberg et. al. (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press, 1993) at p. 195-240

This power of amendment by the legislature is not unlimited and the idea of ‘judicial review’ designates the higher judiciary as the protector of the constitution. This scheme works smoothly as long as the demands and aspirations of the majority of the population correspond with the constitutional prescriptions. However, a cause for dissonance between the wings of government arises when majoritarian policy-choices internalized in legislative or executive acts tend to infringe on constitutional provisions. In discharging its’ role as the protector of the Constitution, the judiciary is then required to scrutinize the actions of its co-equal branches of government. Some scholars have argued that fact-situations of this type involve tensions between the understanding of the words ‘constitutionalism’ and ‘democracy’ respectively. Hence, it is postulated that the provision for ‘judicial review’ gives a self-contradictory twist to the expression ‘constitutional democracy’.⁹

In this regard the role of the judiciary can be described as one of protecting the countermajoritarian safeguards enumerated in the Constitution. It is apt to refer to an opinion given by Justice Robert Jackson where it was held that citizens could not be compelled to salute the U.S. national flag if the same offended their religious beliefs.¹⁰ He observed as follows:

‘The very purpose of the bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as

⁹ Refer: Jurgen Habermas and William Rehg, ‘Constitutional democracy: A paradoxical union of contradictory principles?’, *Political Theory*, Vol. 29, No. 6 (December 2001) at p. 766-781

¹⁰ *West Virginia State Board of Education v. Barnette*, 319 US 624 (1943)

legal principles to be applied by the Courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote: they depend on the outcome of no elections.'

In a similar vein, the courts in our country have also been discharging a vital countermajoritarian role, especially in cases involving violations of fundamental rights. I am sure that I do not need to survey some of our leading decisions before this learned audience. The responsible exercise of 'judicial review' is both a pre-condition as well as a characteristic feature of a society which values the maintenance of the 'rule of law'. In some instances, there are competing ideas which challenge the validity and legitimacy of certain rules. However, the first principle of liberal constitutionalism is that all disagreements can be resolved through informed dialogue. There is no place for deliberate violence and coercion to make one self heard. The Courts are an important space for conducting such a dialogue wherein conflicts arising out of competition for material resources and identity-based differences can be resolved through due deliberation. The willingness of citizens to engage with our public institutions is a basic postulate for building democracy and the 'rule of law'. If we lose faith in them, then there will indeed be an irreversible erosion of the rule of law.

I thank you all for your patience.
