

LATE SHRI BALCHANDJI LOHIA MEMORIAL LECTURE: 2015-16

TEXT OF EX TEMPORE SPEECH DELIVERED BY **HON. SHRI R. M. LODHA**,
Former Chief Justice of India

THEME-THE ROLE OF SUPREME JUDICIARY IN PROGRESSIVE SOCIAL CHANGE

Hon. Shri R, M, Lodha, Former Chief Justice of India, delivered a Memorial Lecture at Akola Law College, Akola on 7th February 2016. He said, “Judges do what others avoid. They make decisions. By making decisions, by discharging its onerous obligations and by understanding its role the Supreme judiciary can bridge the gap between the law and the society. The ultimate function being the protection of Constitution and democracy. It is not beyond the domain of the superior in bringing social change”. Excerpts

I am thankful to the Akola Education Society and Akola Law College for inviting me to the UGC sponsored two-day national dialogue at Akola and on the top of it crown me with the privilege of delivering the late Shri Balchand Lohia Memorial Lecture 2015-2016. I am impressed by the theme chosen for the two-day dialogue, “The Role of Supreme Judiciary in Progressive Social Change”. I am even more impressed by the symbolism shown on the invitation card and so also the ‘Nectar 2016’, the magazine ‘Law Beacon’ where community of honey bees is shown. I was reminded of a political choice which would always employ a community as honey bees for a model society, for an organized society. Albert Einstein had said if honey bees disappear from the surface of the earth, the human beings would not last for more than four years. As you all know, honey bee is the only species in the universe which not only does not destroy the environment but also improves; the only species which does not prey on any other species.

Before I touch upon the subject, it needs to be understood that when We, the people of India gave the Constitution to ourselves, we had prepared a structure of governance. As it happens in all democracies, the governance has three organs- the legislature, the executive and the judiciary. Way back in the 16th century, Montesquieu, a French thinker, propounded the theory of separation of powers. His view was that if the three organs i.e. the legislature, judiciary and executive are handed over to one organ or exercised by one person, the sure outcome is tyranny. Taking this preposition further, while drafting the American Constitution in 1787, an express provision of separation of powers has been made. In many other countries, Australia is one of them; there is a demarcated express provision for separation of powers. Unlike American and Australian Constitution, Indian Constitution does not have any defined or express provision of separation of powers, yet the separation of power amongst the three organs- the legislature, judiciary and executive is visible throughout the Indian Constitution. This is the beauty of Indian Constitution that without making express provision of separation of power, except that we have one Article, Article 50 which says about separation of the judiciary from the executive, the separation of power is omnipresent.

The question then arises with the separate roles assigned to the three organs; to the legislature, the law making, the executive, the implementation of law and the judiciary, judicial adjudication in the event of breach of law, what is the role of the Supreme Judiciary in bringing social change? The core work assigned to the judiciary is dispute resolution, while discharging the function, how do you bring social change? Besides the dispute resolution which is the integral part of any court, the two central elements of the Supreme

Judiciary are to bridge the gap between society and law, and the other to protect the constitution and the democracy. With these two central elements, I shall refer very briefly, of course, the judgments of the Supreme Court from 1950 until date, which has led evolution of the Constitution and tremendous impact on socio-economic issues, resulting in direct or indirect social change. As you all know, it was on 26th January 1950 that we got our constitution. I will actually divide the journey of Supreme Court in three eras. The first era began with the birth of Indian Constitution until it acquired adolescence and then the age of maturity. The first era is a period from 1950 to 1970 or about. That was an era when the Supreme Court emphasized more on the text of the Constitution. The approach was conservative and the principal focus was on the protection of property rights. The efforts initially made by the executive or for that matter by the parliament in bringing changes to socio-economic issues were largely declared unconstitutional. During the period precisely from 1950 to 1967 about 128 legislations were nullified by the Supreme Court. The Parliament did not keep quiet and amended constitution by bringing in Article 31A and 31B. Many of the legislations were incorporated in Schedule IX to ensure that they remain insulated from the judicial scrutiny. That was the time when bank nationalization law was held unconstitutional, the law relating to privy-purses was also set at naught. The first twenty years of the Supreme Court, in fact, centered around its role in adjudicating matters, deciding the constitutionality of laws and taking a conservative view. This was also a period when despite earlier two decisions about parliament's power to amend the Constitution, in 1967, in Golaknath's case, the Supreme Court read Article 368 in a way that curtailed the powers of the parliament in amending the constitution. The government of the day was not prepared to accept such interpretation. They thought- Parliament is supreme without really appreciating the distinction between parliamentary supremacy and parliamentary sovereignty. The effort of the executive was to have Golaknath reversed. Judges were appointed under the banner 'committed judiciary'. Ultimately, in 1973, the matter was referred to a thirteen-judge bench every one of you know, it was in Keshvanand Bharti the Supreme Court propounded the theory of basic structure, while holding that parliament has power to amend the constitution but limiting its power that such amendment cannot extend to the subjects which are the basic structure of the constitution. It is no exaggeration to say that the basic structure theory is a theory which has really saved the Indian democracy but you will be surprise to know that this theory was first propounded by a Christian judge of the Pakistani Supreme Court somewhere in 1968 which was expanded and taken to its logical conclusion in Keshavanand Bharti. The jurists are unanimous not this is one judgment that has protected the constitution. This is the one judgment that has protected the democracy. With this, diverse prepositions came to evolved over a period of time. The separation of power itself has been held to be the basic structure of the Constitution, Rule of law is held to be the basic structure of the Constitution. Independence of judiciary is held to be the basic structure of the Constitution. This was the beginning of a new era in the Supreme Court where a clear assertion was made about the supremacy of the Constitution.

In the era past 1970, the activity of the Supreme Court increased. It dealt with the matters relating to violation of human rights abuse of state power, custodian rapes, lack of dignity to prisoners in the public interest litigation. Charles Shobhraj, Sunil Batra, etc were the cases where the Supreme Court breathed life into the directive principles by treating them as supplementary to Part III. Effectively, this was the beginning of filling the gap between the society and the law. While doing so the Supreme Court had innovated the instruments. It was felt that due to the formalized procedure, the people whose rights were violated were not able to approach the court. That was the beginning of the relaxation of *Locus Standi*, The rules of pleadings were in as much as the complaint could be lodged to the Supreme Court on a post-card. Rights were given to the NGOs, the public spirited citizens, to espouse the cause of marginalized people. formalizing these instruments, the common man was empowered to approach the constitutional courts High Courts in the State and the Supreme Court.

The second phase of the second era commenced when the Supreme Court started dealing with the socio-economic entitlement. The right to shelter, food, education, health care were read as integral part of Article 21. In *Mohini Jain*, followed by *Unnikrishnan*, the right to education was held to be the right flowing from Article 21. Article 45 was non-enforceable but fifteen years after the judgment of the Supreme Court in *Mohini Jain* and *Unnikrishnan*, the provision now forms part of Part III, that is, Fundamental Rights, in the form of Article 21A. This is how the Supreme Court bridged the gap between the law and the society. Article 45- a Directive Principle became a positive Fundamental Right under Article 21A.

Followed by these two phases of second era, the third era began. In few matters, the Supreme Court framed rules and guidelines which judicial people called overreach judgments. First in 1994, in *Laxmikant Pandey*, the Supreme Court framed rules for adoption of children by foreigners. The rights of children who were adopted by foreigners were being abused. Confronted with this huge problem the Supreme Court framed rules and said that all adoption of children by foreigners will be guided by these rules. Then in *Visakha* case, relating to sexual harassment of women at work places in the absence of any law which would protect the women from sexual harassment at a work place. The Supreme Court laid down guidelines law was made by building parliament and guidelines were made applicable to government institutions and work places, this again was an attempt by the Supreme Court to bridge the gap between the society and the law. In the late nineties, the Supreme Court also passed many orders and issued direction for protection and improvement of environment and wildlife and forest. The laws were found to be wanting and the abuse not actionable. The Supreme Court that prompted to issue directions to ensure that there is no illegal mining, there no deforestation and there is no endangerment to the wildlife.

In this era the court was also seized of the matters relating the abuse of political and state apparatus- lot of corruption flowing in the governance with no accountability, the large being distributed at the pleasure of government to the persons they liked causing huge loss to the public exchequer. At this time the Public Trust Doctrine was enforced. In *Vineet Narain*, the Special Directive which protected senior bureaucrats from the prosecution was lifted and bureaucracy was made accountable for their acts. Recently in two cases, the government dispensation was made answerable to the public in the *Spectrum Allotment* i.e. 2G case and the *Coal Block* allocations. In the later case, the Supreme Court held that disposal of natural resources by whatever mode done, must be in a transparent, fair and reasonable manner. These decisions have helped the government to garner huge revenue for use in the social welfare schemes such as MNREGA etc.

Now coming back to the basic structure, theory propounded by *Keshvanand Bharti*, it may be noticed that in *Supreme Court Advocates Association*, independence of judiciary has been held to be the basic structure of the Constitution. The Supreme Court took upon itself the task of appointment to the superior judiciary namely the High Courts and Supreme Court judges; by holding that if this was done by the executive it could impact and affect the independence of judiciary. The endeavour of the supreme judiciary in bridging the gap between the society and the law would not have been possible if the judiciary was not independent.

Unless judiciary is independent, there is no question of the Supreme Judiciary being able to bring social change. A recent judgment by the Supreme Court has invited criticism that the interpretation given by it can weaken the democracy? Haryana legislature enacted a law prescribing minimum eligibility for contesting panchayat elections in the State. Besides other eligible criterion, one of the conditions was that the candidate must be a tenth pass to be eligible to contest the elections. Its constitutionality was challenged in *Rajbala*. The matter reached the Supreme Court challenging its constitutionality it was argued that in a democracy if all persons who are of adult suffrage are not allowed to contest the election, the democracy

would be weakened. The exact opposite view was canvassed that without an educated class, the democracy cannot grow. The Supreme Court was persuaded to uphold the law as in its opinion it is the education that would really bring lot of liberalization in the society. If the ruling class at local self-governance is not educated, the traditional myths would continue to prosper the idea of educated society and citizenry perhaps saved the law.

The two events that recently happened in Maharashtra deserve to be touched upon relating to women's entry in the sanctum of two places Shani Shingnapur (near Aurangabad) and Haji Ali Dargah (Mumbai). The question is- are we not discriminating with half of our population? Of course, these matters are sub-judice and would be decided in due course but in prima facie deliberation it is difficult to justify denial of women's entry into the temples or dargahs or any other religious place? Every religious tradition has to be weighed in light of the constitutional scheme and our constitution gives full liberty to its citizens to follow the religion in the manner they like. In any case the decision by the Superior judiciary is definitely going to have an impact on the society.

The discussion on the subject would remain incomplete without reference to two recent decisions which have helped in bringing the social change. One of them is the order passed by the Supreme Court in the matter of acid attacks. By the order, the Supreme Court has prohibited the sale of acids over the counter without following the guidelines framed by it in the form of rules and the provision for the compensation to the victims. The people, who are the victims of acid attack, need stem grafting and love treatment. In an international conference at Petersburg (Russia) where about 80 countries' participated through the chief justices, prime ministers, law ministers, judges, academicians, etc. I was honored to speak in the Plenary Session along with Mr. Medvedev, Prime Minister of Russia. In the course of discussion a question was put to me by a delegate about the order I had passed in the matter of rehabilitation of acid attack victims. I said on seeing the victims who appeared before the court, the first thing that struck me was that this lady must be suffering death every moment. This is living death. In death, at least, one gets peace but her suffering was much more. It was the feeling that persuaded me to exercise my constitutional power and pass some order so that the victims get the treatment instantaneously. The order came to be passed. The hospitals were directed to admit victims and treat them, the states were asked to bear the medical expenditure.

The other, when I was the chief justice of India, in a matter before us, we were told that large number of under-trial prisoners were languishing in jails either because there was nobody who could stand surety for them or they possessed no financial means to file even personal bonds. The depressing situation necessitated the order and directed that within 3 months, if half of the maximum sentence provided in the law for the alleged offence has been undergone as under trial prisoners such under trial prisoner must be released immediately for that purpose we directed the District Judges to either go themselves or send the Chief Judicial Magistrates to jails and ensure that the order is complied with. In my view, we have to be sensitive about human rights and they cannot allowed to be violated. It is the court's duty, more particularly superior court's duty to ensure that violation of human rights is stopped forth-with.

Of all the matters I have dealt with as a judge and chief justice of the High court and a judge and chief justice of the Supreme Court of India, one matter not very big or significant deserves a mention as it is this matter which has given me satisfaction. I was a judge of the Bombay High Court and presiding over the bench, lady appeared before she had filed a petition and did not seem to be educated. She was a Class IV employee in Bombay Municipal Corporation. In answer to my observation as to what has made her to file the petition, she said, "I have a four year old son. I'm living alone. Though I've not taken formal divorce; my

husband is not living with me. I want my son to be educated in an English convent school. I've applied in so and so English school but they have refused to give admission to my child. I did not want any fee waiver but I want my child to be educated in good English Convent School. This is my life's mission." The School in which she wanted her son's admission was a private educational institution.

The brother judge who was sitting with me said, "Brother what can we do? It is a private educational institution; there is no violation of legal right. We can't help. We must tell that lady sorry". I, however, felt something should be done. What I found was that ultimate desire of the lady was to see that her son get education in an English school. I thought if we were able to provide her the relief that would be true justice. I wanted to find some solution. I told the brother judge that we could issue notice of short returnable date and then we would see what could be done we gave three days notice. On the returnable date a battery of lawyers, senior advocates appeared for the management. It was a prestige issue for the management. Their autonomy was under challenge. It was argued on behalf of the management that they were not amenable under Art. 226, being not State within the meaning of Art. 12. After hearing them for one hour, my brother again insisted, "Nothing can be done "I said if ultimately we find no merit, we would dismiss but let us make Constitution work. Then I told the lawyers, who were appearing for the management to bring before us the last three years accounts of the institution to see the type of private educational institution and to know the affairs of the educational institution. The lawyers got disturbed and perturbed. I said that Art. 226 empower the court to summon documents. I told the lawyers that we have to look into the objection about maintainability of the petition. The lawyers very hesitatingly left the court room. On the next date, the account books were not placed before us. One of the senior lawyers, who appeared before us, told us that the court was not required to look into the accounts. He smilingly informed with a pause that school has given admission to the petitioner's son. Without any order, the lady got the relief and we were satisfied that we have been able to do justice to the child.

Ladies and gentlemen, it is said, "Judges do what others avoid, they make decisions." By making decisions, by discharging its onerous duties and by understanding its role the superior judiciary can bridge the gap between law and society. The ultimate function being the protection of the Constitution and democracy. It is not beyond the domain of the superior judiciary in bringing social change.

Thank you.