INAUGURAL ADDRESS

by

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The basic theme in the discourse on human rights to which we must address ourselves is how we can convert the rhetoric of human rights into reality. The rhetoric of human rights draws on the moral resources of our belief in the significance of a common humanity and points in the direction of a type of society which ensures that the basic human needs and reasonable aspirations of all its members are effectively realised in, and protected by, law. The language of human rights carries great rhetorical force of uncertain practical significance. At the level of rhetoric, human rights have an image which is both morally compelling and attractively uncompromising. But what is necessary is that the highly general statements of human rights, which ideally use the language of universality, inalienability and indefeasibility should be transformed into more particular formulations, if the rhetoric of human rights is to have major impact on the resolution of social and economic problems in a country.

It is obvious that a certain degree of positivization or particularisation is required, if specific human rights are going to have practical force, because it is only when they are positivized or particularised that they can become a basis for challenge to legislative or executive action which is violative of them as also for compulsive generation of effective executive action. There are certain human rights which operate as a restraint on the power of the State and such restraint is necessary because of the possibility of abuse or misuse of power or excess of power on the part of the State which is inherent in the legitimate possession of monopoly of force within a society and equally there are certain other human rights which require affirmative action to be taken by the State in order for their realisation. The State is thus the necessary friend as well as the recurrent enemy of human rights.

But the process of translating broad idealized objectives or statements of human rights into specific rules requires clarity in formulation untypical of ideological discourse. This can best be done through the mechanism of a strong and independent judiciary which is in tune with the ideologue of human rights. The Bill of Rights can at best only enumerate broad and general statements of human rights but to positivize 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.

The judges have to be careful while positivizing human rights and giving them meaning and content, to ensure that they do not in the process, out of ambition or weakness or excessive zeal for protecting the State interest dilute human rights but enlarge their scope and ambit and advance the purposes for which they are enacted as part of the fundamental law of

the country. It would be no exaggeration to state that human rights would remain safe in a society governed by a written Constitution so long as its judges are strong and independent, do not cave in to pressures, influences or centres of power and are committed to the cause of human rights. The threats of human rights, it may be noted, arise not only from State lawlessness - where the State and its agencies are guilty of abuse or misuse or excess of power or act outside the law, but also from violation by other centres of power, social and economic and it is these latter violations which are not so easily perceptive and hence not attracting sufficient attention of human rights activists and the community.

The judiciary has to be ever alert to repel all attacks, gross or subtle against human rights and they have to guard against the danger of allowing themselves to be persuaded to attenuate or construct human rights out of misconceived concern for State interest or concealed political preference or sometimes ambition or weakness or blandishments or fear of executive reaction. Judicial somnambulance, indifference or timidity can be the source of greater threat to human rights enforcement than the aggression of the violators, for the greatest bulwark against State authoritarianism or arbitrainess would then be gone.

We, in Asian countries, live in a troubled world with many threats to the security and well-being of our society - threats external as well as internal. Smaller nations are being used as ploys or playthings by super powers in the name of security, and conflict between different ideologies within a country is seeking to tear apart the political fabric of the country and there are also sometimes destabilizing forces working within a country. In such an atmosphere, there is often a tendency to advocate draconian measures to protect the society against real and imagined ills. The necessity for such measures can frequently appear plausible even to well-intentioned citizens and be activated by high negative emotions, uncertainty, fear and anger. They may be tempted to advocate the principle that "the end justifies the means". It is sufficient to point out that history is replete with the disastrous consequences of the smothering and suppression of human rights by the dictates of expediency.

We must therefore take care to ensure that in no situation, however grave it may appear, shall we allow basic human rights to be derogated from, because once there is a derogation for an apparently justifiable cause there is always a tendency in the wielders of power, in order to perpetuate their power, to continue derogation of human rights in the name of security of the State. Effective respect for human rights must place two kinds of restrictions on the forces of derogation. It must limit the circumstances and specify the procedures under which derogation may be legitimately invoked and it must also identify and reserve certain core human rights such as the right to life or the right to personal liberty or freedom from ex post facto criminal laws which are the most vital from a political science perspective, as absolutely non-derogable.

It then becomes the foremost duty of the judiciary to see that the executive, in order to perpetuate its power, does not violate or cross those limits and declare a state of exception just to cover its misdeeds or to perpetuate the regime of a particular political group. Sometimes pressure - not overt but covert, not direct but indirect, not obvious but suggestively - may be brought on the judiciary to secure its acquiescence in such a conspiracy, but the judges must, in such a situation, not wilt

under pressure or blandishments but exhibit courage of conviction and commitment to constitutionalism and prevent the executive from abusing or misusing the power of derogation and protect the non-derogable human rights, if necessary, by expanding their reach and content and thus build up the strong edifice of human rights jurisprudence. The executive must also accept interpretation by the courts gracefully as part of mature constitutionalism.

I might also say a word about the different categories of human rights which need promotion and enforcement. The first categcry consists of civil and political rights. The Universal Declaration of Human Rights laid greater emphasis on civil and political rights than on other categories of human rights because the world was still haunted by the nightmarish experiences of the horrible Nazi and Fascist regimes, and the Western countries which had a hand in framing the Universal Declaration - the majority of developing countries being then still under foreign domination - had attained a fairly high stage of development in material and economic resources and the social and economic rights did not therefore find much preoccupation in their minds. But it soon came to be realised that civil and political rights are priceless and invaluable, because without them freedom and democracy cannot survive, they do not exist for the large masses of people in the developing countries who are suffering from poverty, want and destitution. They want food and shelter and clothing. There is a revolution of rising expectations amongst them and today they are demanding freedom not only freedom to vote but also freedom from hunger and starvation.

It is only if social and economic rights are ensured to these large masses of people that they will be able to enjoy civil and political rights and become equal participants in the democratic process. With this realisation, we reached the second stage in the evolution of human rights. Social and economic rights which constitute the second stage are as much part of human rights as civil and political rights. Both categories of human rights are equally important. There is a close inter-linkage between the two categories of human rights because all human rights and fundamental freedoms are indivisible and inter-dependent and each category of human rights is indispensable for the enjoyment of the other. Hence, it is axiomatic that the promotion of respect for and enjoyment of one category of human rights cannot justify the denial of the other category of human rights.

We have now reached the third stage in the evolution of human rights and that is the recognition of the right to development. It constitutes the culminating point in the evolution of the concept of human rights. This "super right" transcending the differentiation of civil and political rights and social and economic rights into the future dimension, has been called a third generation right. It has received recognition both as an individual and a collective right and the General Assembly has also adopted the Declaration on the Right to Development in its 41st Session. All these three categories of rights I would subsume under the label "rights to happiness". That is the most comprehensive human right.

These three categories of human rights depend fundamentally on the right to life and personal liberty which is a core human right. The right to life is now confined merely to physical existence but it includes also the right to live with basic human dignity - with the basic necessities of

life such as food, health, education, shelter etc. The right to food and the right to shelter have received considerable recognition in recent times and sometime back Professor Ian Brownlie, QC prepared a study for the Commonwealth Secretariat, working out the parameters of the international legal regime on food. Last year was also declared by the United Nations as the International Year of the Homeless. These human rights fall within the category of social and economic rights and they can be realised only by affirmative action on the part of the State and if the State fails to carry out its constitutional or legal obligations in enforcement of these human rights, it may have to be compelled to do so by an activist judiciary. We in India have done so, by compelling affirmative State action in cases where the State was under a constitutional or legal obligation to do so. See Agra Protective Home's case, Sanjit Raj's case, Nakra's case and Wiraja Chaudray's case.

It is also necessary to bear in mind that sometimes there are apparently conflicting human rights which need to be balanced in order to achieve a just and humane social order. I will give only two examples. For instance, the right not to be deprived of property arbitrarily is a human right embodied in Article 17 of the Covenant on Civil and Political Rights but this right may conflict with the right of everyone to an adequate standard of living including adequate food, clothing and housing and to the continuous improvement of living conditions enshrined in Article 11 of the Covenant on Economic, Social and Cultural Rights. Similarly the right to privacy is a right which may conflict with the right to information or the right of free speech and expression as embodied in the freedom of the press. These are rights which have to be harmonized and a fair and just balance has to be struck, keeping in view societal interest. This delicate balancing function is entrusted to the judiciary and has to be performed by the judiciary with wisdom and sagacity: it needs a high degree of judicial statesmanship and an insightful vision.

Since this is a Judicial Colloquium, I have referred to the role of the legal system in domestic jurisdiction in the implementation of international human rights norms. But it should never be forgotten that the legal system alone cannot ensure formation or implementation of these norms. Human rights are for the people. We lawyers and judges are only technicians and we are therefore obsessed with the idea of their legal enforcement, though even in regard to our role in the implementation of human rights - particularly social and economic rights - there is considerable scepticism in the minds of the people. Steven Lawenstein, an American lawyer who was executive secretary to the Chile Law Programme from 1967 to 1969 said:

> "Lawyers, when they come into contact with development programmes, are nearly always, in a posture of opposition, of citing positive law that prevents what is sought from being done: seldom have lawyers had the perspective or resourcefulness to think originally, contributing fresh ideas and impetus to the effective solution of problems".

These are harsh words but we must pay heed to them. We must forge new methods, fashion new tools and innovative new strategies for securing promotion and enforcement of human rights norms and ensuring their application in our domestic jurisdictions. How we can best do so is a matter which will have to be discussed by us in this Judicial Colloquium.

It is necessary to have more judicial colloquiums of this kind in different regions of the globe, because international human rights norms will remain sterile unless we lawyers and judges can pour life into them and infuse them with vigour and strength so that they become vibrant and meaningful for the entire humanity and their universality becomes a living reality. But it must be recognised that the enforcement of human rights cannot just be the pressure of lawyers, judges and courts nor is adjudication by the courts the only method by which human rights can be enforced. A wide range of alternatives has to be explored in order to secure promotion and implementation of human rights. It is necessary to change some old ways of thinking on this subject and of rooting out deep-seated prejudices in regard to race, colour, sex, caste, religion etc. To this end it is essential to embark upon a complementary programme of education designed to produce new thinking on the part of the people in regard to human rights. We must accelerate social movements to protect human rights, for it is only through social movements using a multiple range of techniques that human rights can be realised. We lawyers and judges have to play a vital role in the promotion and enforcement of human rights through wide-ranging strategies and de-symbolize the constitutional and legal perceptions in regard to human rights by an activist goal-oriented approach.