

**PROTECTING HUMAN RIGHTS AND PRESERVING CIVIL LIBERTIES:**

**ROLE OF COURTS IN A DEMOCRACY**

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**Introduction**

1. Good morning. I am delighted to speak at King's College and thank the Dickson Poon School of Law, King's India Institute, and Jindal Global Law School for organizing this event. I would like to thank Prof. (Dr.) Shitij Kapur, President and Principal, King's College London, Prof. (Dr.) Alexander Turk, Executive Dean, Dickson Poon School of Law and Prof. (Dr.) Lousse Tillin, Director, King's College London for extending a warm invitation to me to speak on a topical issue that is increasingly relevant in our times.
2. The relationship between India and United Kingdom has often been called an "unusual one". The legacy of the Empire and the struggle for freedom form part of our history. Yet the last seventy five years have been witness to the two nations being drawn close in diverse areas of human endeavour.<sup>1</sup> Today, the relationship is based on a shared history, a jurisprudential tradition founded on the common law, ties of friendship and family, culture and entertainment and the seamless flow of business and capital in the globalized era. The two countries have much in common – a parliamentary democracy, the common use of the English language and the presence of a significant Indian diaspora

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<sup>1</sup> Andrew Wyatt, 'India and the United Kingdom: finding a new equilibrium', in Sumit Ganguly, ed., *Engaging the world: Indian foreign policy since 1947* (New Delhi: Oxford University Press, 2016), pp. 225–44

in the UK, which connects us politically, socially and culturally. Indian students studying in the UK have contributed to creating a shared culture of knowledge and values. There is also growing economic and strategic cooperation between the two countries.

3. Many individual rights have originated in common law, which then have become universal. India and the UK have created a robust legal framework for the protection of human rights. However, rights in themselves are paper tigers unless they are given teeth by the courts. In today's lecture, I would be discussing how the courts in India have played a role in protecting human rights and preserving civil liberties. In the process, I will highlight how the Indian Supreme Court has interacted with the global community of judges and influenced or has been influenced by their work. As Justice Ahron Barak, a former judge of the Supreme Court of Israel has expressed, "*The purpose of ...comparison is inspiration.*"

### **Conceptions of Human Rights**

4. One may ask what is the relevance of a global judicial dialogue on human rights? Why is it necessary to look at international judicial trends while examining issues of human rights in one's own country? A possible answer is that typically human rights are characterized as inherent and universal. An individual possesses human rights by virtue of being a human being. This definition of human rights often finds its source in "natural law", which can be a reference to God, reason, the universe or any other transcendental source.

Human rights are universal because they are natural.<sup>2</sup> The invocation of human rights in this conception is not contingent on their recognition by State laws. Courts also tend to protect certain “outside rights” or unenumerated rights which may not be explicitly stated in a statute.

5. The origin of human rights was not restricted to one geographical region, legal system or country. Human rights developed in different parts of the world with reference to religion, ancient customs and traditions and cultures. Perhaps the earliest reference to human rights was found in the ‘*Cyprus Cylinder*’, which details an account of the conquest of Babylon by Cyprus in 539 BCE and provides support for religious tolerance, freedom of movement, and for racial and linguistic equality.<sup>3</sup> In the East, the beginnings of human rights are traced to the Sanskrit treatise *Arthashastra* written in the fourth and early third century BCE, which spoke of promoting justice, creation of a just penal system, equal protection of the laws regardless of caste or political belief and the like.<sup>4</sup> In the West, the emergence of human rights is traced to the 1215 Magna Carta and the 1689 English Bill of Rights. A defining moment in this history was the Declaration of the French Revolution in 1789 which reinforced the concept of human rights as natural and inalienable rights.<sup>5</sup>

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<sup>2</sup> Marie-Benedicte Dembour, What are Human Rights? Four Schools of Thought, *Human Rights Quarterly* 32 (20) (1)

<sup>3</sup> Paul Gordon Lauren, *The Foundations of Justice and Human Rights in Early Legal Texts and Thought*, in *The Oxford Handbook of International Human Rights Law* Edited by Dinah Shelton (Oxford University Press 2013) 168.

<sup>4</sup> *Id* at 171.

<sup>5</sup> S. Wheatley, *The Idea of International Human Rights Law*, 19 (2019).

6. Developed in the aftermath of the Second World War, the modern conception of human rights, ushered in “the age of rights”.<sup>6</sup> The moral transgressions during the war shocked the conscience of the world, leading to the adoption of the Universal Declaration of Human Rights in 1948. This history of human rights however, failed to recognize the anti-colonial struggle and atrocities suffered by the people of the Global South. As Professor Samuel Moyn suggests in his book, *'The Last Utopia: Human Rights in History'*, it is only in the 1970s that human rights became a common vocabulary and people from around the world learnt to speak its language.<sup>7</sup>
  
7. The decades between the 1940s and 1970s witnessed the decolonization of a majority of nations in the world and new constitutions, based on anti-colonial, freedom struggles and the principle of self-determination and self-governance were adopted. Adopted on 26 January 1950 and regarded as the lengthiest constitution in the world, the Indian Constitution was a product of these societal realities and struggles. The drafters of the Constitution did not envision it only as a document governing the transfer of political power. The Constitution is a transformative document which attempts to remedy discrimination grounded in caste and patriarchy. Part III of the Constitution details the Fundamental Rights which enure to every person or citizen of the country depending on the nature of rights, including the right to equality, freedom of speech and expression, protection of life and liberty and freedom of religion. However, these rights were not absolute or free from intervention by the State. The burden that lay on future

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<sup>6</sup> Louis Henkin, 'The Universality of the Concept of Human Rights' (1989) 506 *Annals of the American Academy of Political and Social Science* 10, 13.

<sup>7</sup> Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap 2010) 218.

generations was to transform society and rid it from the shackles of class, caste and patriarchy - none of which would have been possible without intervention in these individual liberties. For instance, the practice of free religion would have included abhorrent practices of *sati* or devadasi, which were not in consonance with the idea of a truly free India. The complete right to equality, without providing for affirmative action, would have ignored the economic and social conditions within which these rights exist- which necessarily benefit the upper class. The unrestricted right to the freedom of speech and expression could lead to public disorder, which would have been a death knell to a fragile, new, divided country.<sup>8</sup>

8. The history of human rights protection in India has been centered around Articles 14, 19 and 21 of the Constitution and their interpretation by the Supreme Court of India. During the drafting of the Constitution, Dr. BR Ambedkar, the Chairperson of the Drafting Committee, reposed faith in the constitutional courts of this country. He proclaimed that Article 32 of the Constitution, the right to seek constitutional remedies and enforcement of fundamental rights, was the soul of the Constitution without which the Constitution would be a writ in sand.

### **Role of the Supreme Court in interpretation of rights**

9. In the long history of India as an independent nation, the Supreme Court has often been central to the realization of constitutional goals and values and the protection of the rights and liberties of citizens. Due to its position in the

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<sup>8</sup> G. Austin, *The Indian Constitution: Cornerstone of a Nation*, 82 (2014).

Constitution - as a constitutional court and as an appellate court - and the breadth of its power to do "complete justice" under Article 142 of the Constitution - the task of adjudication is challenging. How has the Supreme Court responded to it? It is almost clichéd to say that Supreme Courts, even in democratic nations governed by the rule of law, are not final because they are right but they are right simply because they are final. Judges are not infallible. Decisions once thought to be final are reviewed by succeeding generations. However, would the country's social, political, and economic status have been the same but for the Supreme Court's interventions? The debate in individual cases aside, the answer to the question is in the negative. I will briefly deal with the role of the Supreme Court in conceptualizing civil rights in the recent years.

10. In realizing the true potential of civil liberties under the Constitution, one of the most important conversations that the Supreme Court has engaged in has been around 'gender'. In the decades after Independence, the focus of both the judiciary and the Parliament was to ensure protection of the economic interests of women and to eradicate societal practices that led to manifest discrimination. Instance of these include amendments to succession laws in India, particularly the Hindu Succession Act, the development of jurisprudence pertaining to Section 125 of the Code of Criminal Procedure 1973 to grant maintenance to a woman from her spouse, enhancement of criminal laws to target societal practices such as dowry, domestic violence and female infanticide. With the changing times however, the Supreme Court has attempted to move beyond these manifest forms of discrimination and has engaged with the binary division of gender into men and women, gendered notions of certain professions, and

discrimination on the basis of gender- in the workplace, within the confines of one's homes, or in the society, among others. In **Anuj Garg v. Hotel Association of India**<sup>9</sup>, the Supreme Court heard a challenge to the provisions of the Punjab Excise Act of 1914 which prohibited men under the age of 25 years and "**any** woman" in premises in which liquor or drugs were consumed. The provision sought to create a distinction between the two genders based on cultural norms and stereotypes. The Court allowed the challenge and upheld the right to privacy which grants autonomy to a person to choose their profession. I have heard similar arguments when I was presiding over a batch of petitions concerning the denial of permanent commissions to women officers in the Armed Forces in the case of **Babita Puniya v. Secretary, Ministry of Defence**. The challenge was raised by women officers, who were employed for a limited tenure of up to 10 years and were not granted permanent commission as opposed to their male counterparts. Arguments such as women officers have to deal with pregnancy, motherhood and domestic obligations which are not well suited for the life of a soldier or that there are physiological limitations of women officers and that the environment in areas where Armed Forces operate are not suitable for a woman were advanced to deny the grant of permanent commission, which were ultimately rejected by the Court. Recently, the Supreme Court has issued directions for protection of sex workers, who are adults and participating in the profession with consent- separating the need for

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<sup>9</sup> (2008) 3 SCC 1

protection of women from illegal trafficking from respecting the choice of women to voluntarily engage in the profession.<sup>10</sup>

11. Instances of 'protective discrimination' which either assume that women are incapable of performing certain professions or decide that such professions pose a security risk to women originate from a deep-seated patriarchal mindset that views 'men' as the 'normal' and any deviation as the exception. To paraphrase Justice Ruth Bader Ginsburg, when the Government or the society obstructs the choice of profession of women under the garb of protection, the woman is being treated as less than a full adult human responsible for her own choices. The outlook then focusses not on transforming or fostering a social environment where all citizens flourish, but instead on modifying the environment to a particular section of the society. The Supreme Court has realized that it is not merely enough that women are granted the opportunity to sit on the table, but also to ensure that their lived experiences are factored in to ensure that they can avail such opportunities. Very often, social barriers and conditions that only impact a particular section of the society are overlooked. For instance in **Lt. Col. Nitisha v. Union of India**<sup>11</sup>, the policy that the Government had formulated to assess the eligibility of women officers for permanent commission following the earlier verdict in **Babita Puniya** was in challenge. The policy of the Government imposed, among others, on women in their forties the same physical evaluation criteria that a male officer would have would have to pass a decade or two earlier to get permanent commission for

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<sup>10</sup> Budhadev Karmaskar v. State of West Bengal, 19 May 2014, Criminal Appeal No. 135/2010.

<sup>11</sup> 2021 SCC OnLine SC 261



female officers. However, the issue at hand, was that while for male officers that assessment was made when they were between the age group of 25-30, these women officers who had been denied permanent commission, were to be evaluated at the age of 45. The Bench of which I was a part, declared the evaluation criteria to be "arbitrary and irrational" and "causing systemic discrimination", as it disproportionately impacted them as against their male counterparts. The Court while rendering the above decision analyzed the concepts of direct and indirect discrimination. The Court noted that in the UK, the fault-line that separates direct discrimination from indirect discrimination is not the intention of the discriminator but the fact that direct discrimination cannot be justified in any circumstance, while indirect discrimination is susceptible to justification. The Court held that the absence of an intention to exclude women from the grant of permanent commission is irrelevant under an indirect discrimination analysis and the Court has to look at the effect of the concerned criteria, not at the intent underlying its adoption. In light of the fact that the pattern of evaluation would exclude women from the grant of permanent commission on grounds beyond their control, it was held that the criteria indirectly discriminated against women officers.<sup>12</sup>

12. Another issue that the Supreme Court has focused on is that of intersectional discrimination, where many factors including gender, caste and disability play a role in the commission of heinous offence on say, a visually challenged woman belonging to the Scheduled Caste. In **Patan Jamal Vali v. State of**

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<sup>12</sup> 2021 SCC OnLine SC 261 Pg 47

**Andhra Pradesh**<sup>13</sup>, the Court stressed that the factors causing intersectional discrimination must be assessed while determining the sentence of a convict. These factors do not operate in isolation and are deeply imbedded in our society. The only possible way of creating a more inclusive society is to recognize these causes of discrimination through our judicial work and even in our every day lives.

13. The struggles of the LGBTQ community have found a voice in the courts. The members of the LGBTQ community have lived, thrived, endured and loved through the beginning of time. In the face of stigma and prejudice, many have been forced to live their lives closeted from the “straight” society. In turn, they have created their own communities, found liberation in solidarity as they together resisted the heteronormative order and have crafted their own language of “being” when the labels that the society gave them fell short of the diversity that they had to offer to the world. LGBTQ liberation movements are gaining momentum today in India and have achieved certain legal milestones that I will be discussing today.
14. The first significant case that advanced the rights of the LGBTQ community was **National Legal Services Authority v. Union of India & Others**<sup>14</sup>. The judgment of the Court detailed the deep cultural, societal and religious recognition given to transgender persons in India. It recognised the different kinds of communities of transgender persons in India and the suffering they had witnessed. In recounting the discrimination faced by transgender persons, the

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<sup>13</sup> 2021 SCC OnLine SC 387

<sup>14</sup> WP No. 400 of 2012, WP No. 604 of 2013.

Court held that non-recognition of the true identity of transgender persons led to exacerbation of the social stigma they faced. This made them vulnerable to exploitation, and hindered their access to public places, employment opportunities and placed a bar on their freedom of expression. Such a life without dignity struck at the heart of the fundamental rights guaranteed under the Indian Constitution.

15. The judgment in **NALSA** also surveyed the comparative law in question to ground India's understanding of recognition of gender identity. In doing so, it reviewed the Yogyakarta Principles in relation to Sexual Orientation and Gender Identity, jurisprudence of courts in the UK, Australia, New Zealand, Malaysia and of the European Court of Human Rights. It also surveyed legislation in countries such as Australia, South Africa, Argentina, and Germany. Benefitting from the comparative analysis, the Court adopted the principle of a psychological test, rather than a biological test, to determine the identity of a person. In terms of relief, the Supreme Court used its powers to give detailed instructions to the government to recognise persons, apart from binary gender, as a third gender and allow transgender persons to self-identify their genders, among others. The identification to a specific gender identity was not premised on the requirement of having any sort of medical intervention. Following **NALSA**, the High Courts in India have rendered decisions granting protection to transgender persons and giving specific directions to State Governments for reservation in public employment and educational institutions

for them<sup>15</sup>, upheld self-identification of transgender persons in individual cases<sup>16</sup>, and recognised marriage between a man and a transwoman as a valid marriage under the Hindu Marriage Act<sup>17</sup>.

16. On September 6, 2018, a long-drawn court battle to decriminalise consensual sex between persons of same-sex culminated in the Indian Supreme Court in the case of **Navtej Johar v. Union of India**<sup>18</sup>. The Court did not limit itself to reading down a penal provision, Section 377, removing the prohibition on engaging in certain consensual sexual acts but also provided an expansive affirmation of the rights of LGBT individuals. While Section 377 was neutrally worded, symbolically by criminalising “unnatural sex” it pathologized and created negative social identities of LGBT persons. In terms of the material harm, Section 377 became a tool of harassment, extortion, extrajudicial arrest, detention and violence against queer individuals by police. Though all queer persons were vulnerable to such harms, working class transgender persons and gay men who did not conform to a masculine presentation of their gender in public were especially targeted.<sup>19</sup>
17. In my opinion in **Navtej Johar**, I invoked the principle of indirect discrimination to argue that although Section 377 is neutrally worded, its effect and operation infringes the fundamental rights of the members of the LGBTQ community. Article 15 of the Constitution prohibits discrimination on the ground of sex.

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<sup>15</sup> Rano v. State of Uttarakhand, 2018 (4) RCR (Civil) 671; Sumana Pramanik v. Union of India WA No. 9187 of 2020, Calcutta HC;

<sup>16</sup> X v. State of Uttarakhand, AIR 2019 Utr 138.

<sup>17</sup> Arunkumar & Sreeja v The Inspector-General of Registration, WP No. 2145 of 2019.

<sup>18</sup> (2018) 10 SCC 1

<sup>19</sup> (Saptarshi Mandal), Section 377: Whose Concerns Does The Judgment Address?, Economics and Political Weekly, Vol. 53, Issue No. 37, 15 Sep, 2018

Section 377 is premised on stereotypes about men and women, which results in unequal treatment on the ground of sex. As I note, “Statutes like Section 377 give people ammunition to say “this is what a man is” by giving them a law which says “this is what a man is not.” Thus, laws that affect non-heterosexuals rest upon a normative stereotype: “the bald conviction that certain behavior—for example, sex with women—is appropriate for members of one sex, but not for members of the other sex.” Further, the rights of LGBTQ persons cannot be restricted to private spaces. I note in my opinion in **Navtej Johar** that, “the right to sexual privacy, founded on the right to autonomy of a free individual, must capture the right of persons of the community to navigate public places on their own terms, free from state interference.” Hence, it is imperative to cast the right to privacy in terms of decisional autonomy rather than a narrow conception of spatial privacy.

18. In decriminalising consensual same-sex intercourse, the Indian Supreme Court also referred to several European community decisions including **Dudgeon v. United Kingdom**<sup>20</sup> and **Norris v. Ireland**<sup>21</sup>, and **Modinos v. Cyprus**<sup>22</sup>, in which provisions similar to Section 377 were found to be violative of Article 8 of the European Human Rights Convention, 1948 that seeks to protect the right to privacy of a person<sup>23</sup>. The Indian Supreme Court also referred to the Wolfenden Report of 1957,<sup>24</sup> which proposed that there “must remain a realm of private morality and immorality” and recommended that homosexual acts between two

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<sup>20</sup> 7 App No 7525/76, (1981) ECHR 5

<sup>21</sup> Application no. 10581/83

<sup>22</sup> 16 EHRR 485 (1993)

<sup>23</sup> (2018) 10 SCC 1 at Pg. 159.

<sup>24</sup> Report of the Departmental Committee on Homosexual Offences and Prostitution (1957) (“Wolfenden Report”)

consenting adults should no longer be a criminal offence. The Court specifically noted that, on the basis of this report, important legislations were enacted in the United Kingdom, such as the Sexual Offences Act 1967, which abolished penal offences involving consenting same-sex adults and the Policing and Crimes Act 2017 which pardoned persons who were cautioned or convicted under legislation that prohibited homosexual acts<sup>25</sup>.

19. In 2019, the Botswana High Court declared a law criminalising same sex relations as unconstitutional by relying heavily on **Navtej Johar**. It is also encouraging to note that the Indian High Courts post the decision in **Navtej Johar** have started recognizing romantic relationships between the queer women<sup>26</sup> and granting them protection<sup>27</sup>. This has been possible because of the expansive conception of rights in the judgement.
20. In recent years, the Indian Supreme Court's jurisprudence has also advanced in the field of disability law. At the legislative level, efforts had already been made to ensure that persons with disability are not subjected to discrimination with the introduction of the Rights of Persons with Disabilities Act. In **Vikas Kumar v. UPSC**<sup>28</sup>, the Indian Supreme Court held that an individual suffering from writer's cramp is entitled to the provision of a scribe for appearing in Civil Services Examination. The court held that denial of the scribe on the basis that the petitioner did not have a benchmark disability of 40 per cent or more violated the provisions of the Rights of Persons with Disabilities Act since every person

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<sup>25</sup> (2018) 10 SCC 1 at Pg. 152-156.

<sup>26</sup> Sreeja S. v. The Commissioner of Police, Thiruvananthapuram and Ors. W.P. (Crl). No. 372/2018.

<sup>27</sup> Delhi High Court grants Police protection to 23-year-old lesbian woman who escaped matrimonial home, corrective procedures for cure, Bar and Bench, March 10, 2021.

<sup>28</sup> Civil Appeal No. 273 of 2021

with a disability is entitled to reasonable accommodation. The Court recognized that the principle of reasonable accommodation is at the heart of the values of substantive equality and human dignity recognized by the Constitution. Writing the judgement, I emphasized that, “[w]hen competent persons with disabilities are unable to realize their full potential due to the barriers posed in their path, our society suffers, as much, if not more, as do the disabled people involved. In their blooming and blossoming, we all bloom and blossom.” The court also relied on the United Nations Convention on the Rights of Persons with Disabilities, which interestingly refers to dignity 22 times.

21. In **Ravindra Kumar Dhariwal v. Union of India**<sup>29</sup>, the Indian Supreme Court addressed workplace discrimination against persons with mental health conditions. In that case, a central reserve police force officer was diagnosed with OCD and secondary major depression and was found to be having 40-70% mental disability. In a judgement authored by me, the Supreme Court held that initiation of disciplinary proceedings against him was indirectly discriminatory because persons with mental disability are at a disproportionate disadvantage of being subjected to such proceedings in comparison to their able-bodied counterparts. We held that while all para military personnel may be subject to disciplinary proceedings on charges of misconduct, the appellant was more vulnerable to engage in behavior that could be classified as misconduct because of his mental disability. As a relief, we directed that the officer to be reasonably accommodated and be given a suitable post. Cases such as

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<sup>29</sup> 2021 SCC OnLine SC 1293

**Ravindra Kumar Dhariwal** give us an insight into how discrimination may stem from a number of factors and is fluid.

22. Having spoken on the role of the Indian Supreme Court in ensuring protection to marginalized communities, there is one more group whose rights must be considered, deliberated upon and noticed- that of convicts who have been granted death penalty sentences. The constitutionality of capital punishment was upheld by the Supreme Court in **Bachan Singh v. State of Punjab**<sup>30</sup>. Applying the rarest of rare cases standard, the court had also given broad guidelines or indicators for sentencing which account for aggravating and mitigating factors, while cautioning that this assessment must account for the dignity of human life. These principles have further evolved in **Macchi Singh**<sup>31</sup>, where the court categorized cases under five broad heads. Through the years however, there has been a concern over non-uniform, inconsistent sentencing which has permeated to the district courts and the High Courts. Recently, the Supreme Court in **Manoj & Others v. State of Madhya Pradesh**<sup>32</sup>, has recognised the need of ensuring that mitigating circumstances are considered at the trial stage itself such that proper evaluation of the progress of the accused and their mental state, family background and education can be conducted to arrive at an appropriate sentence. The need for a uniform pattern of sentencing while accounting for various psychological, social and biological factors is

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<sup>30</sup> (1980) 2 SCC 684

<sup>31</sup> 1983 AIR 957

<sup>32</sup> Criminal Appeal No. 248-250 of 2015, 20 May 2022.



necessary to ensure that criminal law does not appear, in its application, to be inconsistent and a game of chance.

## **Conclusion**

23. All of these instances and more show the path that the Indian Supreme Court has taken to protect human rights and civil liberties for different sections of the society in a democracy. The role of courts in a democracy is informed by the civil and political structure, the social fabric, and the customs and traditions of society. Very often however, the Supreme Court, is thought of as the first line of defence or the one stop solution to resolve complicated issues of policy and society. The use of the court as the first line of defence to solve complicated social issues is a reflection of the waning power of discourse and consensus building. If we allow our local laws, institutions and practices to be co-opted by the forces of racism, casteism and discrimination, all our social problems will have to be taken out of deliberative fora and placed before the court. Our ever-expanding list of rights risks trivialising the essential core of rights without really advancing the important social issues that we have reconceptualised as rights. The growing litigious trend in the country is indicative of the lack of patience in the political discourse. This results in a slippery slope where courts are regarded as the only organ of the State for realization of rights- obviating the need for continuous engagement with the legislature and the executive. It is true that the Supreme Court of India must protect the fundamental rights of persons and perform its constitutional duty. However, it cannot and must not transcend its role by deciding issues requiring

the involvement of elected representatives. That would not only be a deviation from its constitutional role but would not serve a democratic society, which at its core, must resolve issues through public deliberation, discourse and the engagement of citizens with their representatives and the Constitution. Refining our rights rhetoric to include participative processes and as well as substantive outcomes is one step towards recognising the complementary roles the political and legal spheres of the Constitution play in protecting our human rights. The fulfillment of the ideals of our Constitution and the protections guaranteed under it cannot only be achieved by exercising our role as citizens once every five years. There must be a continuous engagement with all the pillars of democracy.