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College of Law

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JUSTICE V.R. KRISHNA IYER COMMEMORATIVE LECTURE SERIES

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HUMANISING JUSTICE AND JUSTICING IN JUSTICE V.R. KRISHNA IYER'S COURT

Lecture Delivered by
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About the Author

Prof. (Dr.) N.R. Madhava Menon - Biography

Born in 1935, Dr. N.R. Madhava Menon had his B.Sc. and B.L. degrees from Kerala University, LL.M. and Ph.D. from Aligarh Muslim University and M.A. Degree from Punjab University. He got enrolled as an Advocate in Kerala High Court in 1956 at an early age of 20. Thereafter, he joined the Aligarh Muslim University in 1960; moved to Delhi University in 1965, became Professor and Head of the Campus Law Centre. During this period he served on deputation as Principal of Government Law College, Pondicherry and Secretary of the Bar Council of India Trust.

In 1986, Dr. Menon moved to Bangalore at the invitation of Bar Council of India to set up the National Law School of India University and to initiate a new model of legal education, the Five Year Integrated LL.B. programme. He served NLSIU as its Founding Vice-Chancellor for 12 years. He was invited by the West Bengal Government to establish a similar law school in Kolkata. From 1998 to 2003, he served as the Founder Vice-Chancellor of the National University of Juridical Sciences. The Supreme Court sought his services to set up the National Judicial Academy at Bhopal, and was the Founder Director of NJA till 2006.

On retirement in 2006, the Government of India appointed him as Member of the Commission on Centre-State Relations (2006-2010). He was also the Chairman of Indian Statistical Institute, Kolkata and of the Centre for Development Studies, Trivandrum. He chaired the Government of India Committee to draft a National Policy on Criminal Justice and the Committee on Equal Opportunity Commission. He was a member of the Committee on Criminal Justice Reform and the Committee on Restructuring of Higher Education in India. He served two terms as member of the Law Commission of India.

Dr. Menon has been decorated with several awards by Government and professional bodies. The Rotary Club honoured him with the Vocational Excellence Award in 1992; the International Bar Association honoured him with the Living Legend of Law Award in 1994; the Government of India awarded him with PADMASHREE, the highest civilian award for outstanding public services in 2003; the Society of Indian Law Firms with the Best Law Teacher Award in 2009; the ET-NOW Group with National Education Leadership Award in 2013. He was also elected as the Chairman of Commonwealth Legal Education Association in 1997.

At present, Prof. Menon is the Chairman of Menon Institute of Legal Advocacy Training (MILAT), an Educational Charity, Trivandrum. He is also a member of the Governing Boards of Centre for Development Studies, Trivandrum; Nirma University, Ahmedabad; Dr. Ambedkar University of Social Sciences, Delhi; NALSAR University of Law, Hyderabad; National Law Universities at Jodhpur and Cuttack. He is also involved in professional development; training of lawyers and law teachers under the aegis of the IBA Chair at the National Law School. He is the author of over a dozen books on legal education, legal profession, legal aid, judicial training and administration of justice. A book "Turning Point" published by Universal Law Publishers, Delhi (2010) is on the life and works of Prof. Menon. There is an annual Best Law Teacher Award of a lakh of rupees and a plaque instituted in Prof. Menon's name by the Society of Indian Law Firms to commemorate his services to the legal profession and legal education for more than half a century.

Humanising Justice and Justicing in Justice Krishna Iyer's Court

I must congratulate the Principal and management of Ramaiah College of Law for having instituted a Commemorative Lecture Series in the name of the late Mr. Justice V.R. Krishna Iyer, a legend in his own right and a visionary par excellence. I am thankful to the College for having invited me to deliver the inaugural lecture as I knew Justice Iyer from close quarters for nearly 50 years and learned a lot from his thoughts and actions in shaping my own career as a legal academic.

When the Republic began its journey it had a Constitution much ahead of its times. At the same time, it was burdened with laws and legal institutions moulded by the British to serve its colonial purpose. The legal and judicial professions were relatively new to the concepts of human rights, constitutionalism and democratic governance. Justice Iyer's legal practice included the defense of rights of those who were considered by the British authorities as anti-establishment because of their political beliefs. When he became a Minister in the Namboodiripad Government of Kerala in 1950s and initiated a whole set of legislative measures including legal aid, prison reform, gender justice and land reform, the political leadership in Delhi took him to be a radical communist and delayed his elevation as a judge of the Kerala High Court. It was the late Mr. Mohan Kumaramangalam, the Law Minister of Indira Gandhi Government who could fight the then prevailing prejudice and get Justice Iyer elevated to the Supreme Court at a crucial time when the apex court was showing signs of 'status quoism' and unnecessary subordination to other two branches of Government. What has happened in the Supreme Court in the next decade of Post-Emergency years is now a matter of constitutional history widely celebrated as the Golden Era of Indian Judiciary.

Krishna Iyer's Conception of Justice

I got an early opportunity to work closely with Justice Iyer when I was nominated as a member of the Expert Committee on Legal Aid appointed in 1972 by the then Government of India. That was the time when Mrs. Gandhi was pushing the idea of "Garibi Hatao" and was seeking legal and judicial reforms towards the social revolution the Constitution envisaged for Justice — Social, Economic and Political! Justice Iyer was at his best in articulating how legal aid could bring revolutionary changes for "processual justice to the people". Indeed that was the title of his report on legal aid submitted in 1973 which later formed the basis for all legal aid policies and practices culminating in the National Legal Services Authority Act, 1987.

For Krishna Iyer justice is what justice does. He was unhappy with the technicalities of legal procedures coupled with manipulative lawyering by influential sections delaying and denying justice to weaker sections even where they have justifiable claims. He was against confining legal aid to representation by lawyer in litigation. He invoked Mahatma Gandhi to argue that in interpreting the law, one should adopt an approach in which one could wipe the tears of the larger number of people. In the legal aid committee report on "Processual Justice to the People" (1973), Krishna Iyer advocated that legal aid in a country like India divided between haves and have-nots with a Constitution promising equal justice for all should be pro-active, strategic and public-interest oriented. He would therefore conceive legal aid in India in seven different categories. They include (a) legal awareness building and legal mobilization activities; (b) legal advice and counselling work; (c) para-legal services; (d) legal research, social audit of welfare laws and law reform for the poor; (e) public interest lawyering and class action litigation; (f) legal services clinic in law colleges and (g) state funded lawyer services in litigation before courts and tribunals. According to him the bulk of legal aid services should be of a strategic and preventive nature rather than litigation oriented. The 1973 report also argued for a public sector in the legal profession which will have a public defender service equivalent to the public prosecution service.

Social Context Judging for Social Justice Delivery

Every judgment of Justice Krishna Iyer is acclaimed by the legal community for its jurisprudential content and juristic craftsmanship. Given the poverty, illiteracy and diversity of Indian humanity, he adopted novel methods in judging which were unknown to precedent-bound Anglo-Saxon jurisprudence. Yet he did not do violence to the substance of law and its continuity. This is what I call social context adjudication based on constitutional philosophy and principles. At the end of the day Justice Iyer succeeded in re-writing the science of constitutional interpretation and advancing the goal of Justice — social, economic and political. Let me give you a sample of this pattern in a select number of judgments which Justice Iyer wrote in his brief tenure in Supreme Court.

State of Kerala v. N.M. Thomas (AIR 1976 S.C. 490)

When the Government of Kerala decided to exempt Harijan employees from passing departmental test for becoming eligible for promotion, it was challenged before Supreme Court Justice Iyer interpreting Article 16(1) and (2) wrote

"Judges may differ in constitutional construction, but cannot discard the activism of the equal justice concept in the setting of deep concern for the weaker sections of the community without peril of distorting the substance... equal justice is an aspect of social justice, the salvation of the very weak and downtrodden, and the methodology for levelling them up to a real, not formal, equality, being the accent.... every step needed to achieve in action actual and equal partnership for the Harijans alone amounts to social justice, not enshrinement of great rights in Part-III and good intentions in Part-IV If Art. 14 admits of reasonable classification, so does Art. 16(1).

Jurisprudence, to be living law, must respond to the bhangi colony and the black ghetto intelligently enough to equalise opportunities within the social, political and economic orders, by making up for long spells of deprivation. Hence, if a court is convinced that the purpose of a measure using a suspect classification is truly benign, that is, the measure represents an effort to use the classification as part of a programme designed to achieve an equal position in society for all tribes and groups, then it may be justified in permitting the State to choose the means for doing so, so long as the means chosen are reasonably related to achieving that end".

C.B. Muthamma v. Union of India (AIR 1979 S.C. 1868)

Denial of promotion in Foreign Service on the ground the candidate was a woman was the issue in this case. Criticising the entrenched bias of the masculine culture, the judgment said.

"If a married man has a right, a married woman, other things being equal, stands on no worse footing. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-a- vis half of India's humanity that is, our women, is a sad reflection on the distance between Constitution in the book and law in action".

Akhil Bharatiya Soshit Karmachari Sangh v. UOI (AIR 1981 S.C. 298)

Opening the gates of writ jurisdiction to non-recognized associations with a common grievance, the Court held".. the current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad based and people-oriented, and envisions access to justice through class actions, public interest litigation and representative proceedings. Indeed, little Indian in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy".

Bangalore Water Supply and Sewerage Board v. A. Rajappa (AIR 1978 S.C. 548)

The Bangalore Water Supply case changed the course of industrial jurisprudence in the country through the ingenious interpretation given to the Industrial Disputes Act, 1947 by Justice Iyer. He wrote "Legalese and logomachy have the genius to inject mystique into common words, alienating the laity in effect from the rule of law. What is the common worker to do if he is bewildered by a definitional dilemma and is unsure whether his enterprise — say, a hospital, a university, a library, a service club, a local body, a research institute, a chamber of commerce -- is an industry at all?

Law, especially industrial law, which regulates the rights and remedies of the working class, unfamiliar with the sophistications of definitions, unable to secure expert legal opinion, what with poverty pricing them out of the justice market and denying them the staying power to withstand the multi-decked litigative process, de facto denies social justice if legal drafting is vagarious and court rulings contradictory... A worker-oriented statute must receive a construction where, conceptually, the keynote thought must be the worker and the community".

Babu Singh v. State of Uttar Pradesh (AIR 1978 S.C. 527)

Liberalizing bail law is an important contribution of Justice Iyer. He said "while deprivation of liberty is a sequel to conviction, antecedent incarceration amounts to punishment without trial, unless justified on some civilized principles bearing on the administration of justice. Courts have to take conscientious care not to be deflected by sentiment or scared by ghastliness but to be guided by the high principle that public justice shall not be thwarted and the course of the trial defeated or delayed by the accused person, be high or low. This is the policy regarding bail ... the significance and sweep of Art. 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorizing it is reasonable, even-handed, and geared to the goals of community good and State necessity spelt out in Art. 19 ... it makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody. And if possible justice is to be promoted, mechanical detention should be demoted".

The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles like intimidating witnesses and the like by the petitioner who seeks enlargement on bail from the court.

The system of pecuniary bail has a tradition behind it, and the time has come for rethinking the subject. It may well be that in most cases not monetary suretyship but undertaking by relations of the petitioner or organization to which he belongs may be better and more socially relevant.

Ediga Ananima v. State of Andhra Pradesh (AIR 1974 S.C. 799) and Rajendra Prasad v. State of U.P. (AIR 1979 S.C. 916)

Justice Iyer's contribution in refining the sentencing process in criminal justice administration is too well known. In the above two judgments, he made it judicially impossible to impose death penalty unless the circumstances are so overwhelming that the court has no other option. The retributive theory has had its day and is no longer valid. Deterrence and reformation are the primary social goals which make deprivation of life and liberty reasonable as penal panacea... The personal and social, and the motivational and physical circumstances of the criminal are relevant factors in adjudging the penalty. So also the intense suffering already endured by prison torture or agonizing death penalty banging overhead consequent on the legal process.

Social justice, projected by Art. 38 colours the concept of reasonableness in Art. 19 and nonarbitrariness in Art. 14. This complex of Articles validate the death penalty in a limited class of cases... We may suggest that life imprisonment, which strictly means imprisonment for the whole of the man's life, may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time again commit murder.

Death is not only an unusually severe punishment, unusual in its pain, in its finality, and in its enormity, but it serves no penal purpose more effectively than a less severe punishment; hence the principle inherent in the clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purpose invalidates the punishment". Thus came the "rarest of rare cases" principle in invoking death penalty in sentencing jurisprudence.

Sunil Batra v. Delhi Administration (AIR 1978 S.C. 1675)

Humanistic interpretation of the law which the technique employed by Justice Iyer is made the life of convicts in prison less unbearable as it has been for over a century. In the landmark judgment of Sunil Batra, Justice Iyer brought rule of law, human rights and constitutionalism inform treatment of prisoners in jails in the country. He wrote "In our constitutional order it is axiomatic that the prison laws do not swallow up the fundamental rights of the legally unfree and courts will guard freedom behind bars... The benign purpose behind deprivation of freedom of locomotion and expression is habitation of the criminal into good behaviour, ensuring social defense on his release into the community. This rationale is subverted by torture, antagonism and bitterness, which spoil the correctional process.

True, our Constitution has no "due process" clause; but in this branch of law, after Cooper and Maneka Gandhi decisions, the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary, and is shot down by Articles 14 and 19, and if inflicted with procedural unfairness, falls foul of Art. 21. Part III the Constitution does not part company with the prisoner at the prison gates, and judicial oversight protects the prisoners' shrunken fundamental rights...The necessary sequitur is that even a person under death sentence has human lights which are non-negotiable and even a dangerous prisoner standing trial has basic liberties which cannot be bartered away".

Strong words which made prison justice in tune with the constitutional philosophy of human dignity and public justice.

"Adversarial Legalism" Inhibits Social Justice - Equal Justice

Support in a study done of the American legal system in its functional dimensions. In a book published in 2003 in the United States, Prof. Robert A. Kegan argues that the American legal system is often unjust because of adversarial legalism model followed in the trial courts of America. (Robert Kagan, Adversarial Legalism The American Way of Law, 2003). According to him, "The complexity and unpredictability of its processes often deter the assertion of meritorious legal claims and compel the compromise of meritorious defenses. Adversarial legalism inspires legal defensiveness and contentiousness, which often impede socially constructive co-operation. Adversarial legalism's procedural tools exacerbates its potential for inconsistency and unequal treatment.

The outcomes in criminal justice are shaped by the shifting and often unequal balance of competence, commitment and resources between prosecuting attorneys on one side and defense lawyers on the other. In a regime of adversarial legalism, the quality of justice is especially dependent on equality in the quality of the duelling lawyers. Adversarial legalism therefore is far less effective for achieving equal justice in everyday criminal legal processes" (emphasis added).

"On the civil side, adversarial legalism is expensive and dilatory. By making litigation and adjudication slow, very costly and unpredictable, adversarial legalism often transforms the civil justice system into an engine of injustice, compelling litigants to abandon just claims and defenses. It encourages and rewards manipulative lawyering and extortive demands. It is a two-fold source of inequality; sophisticated litigants gain an advantage not only because they are better at withstanding the costs and uncertainties of adversarial litigation but also because they are better able to devise ways of circumventing it." (emphasis added).

It is submitted that the system we follow in the trial courts in India suffers from all the ills that Prof. Kagan found in American courts making it unfair, unjust and unreasonable because of the in-built inequalities in its operation. It is partly the recognition of inequality in accessing justice through adversarial adjudication that Parliament amended the civil and criminal procedure code enabling settlement through ADR methods in civil cases and through plea bargaining in criminal cases. The law of presumptions and of shifting the burden of proof has also been evolved in different legislations to moderate and neutralize the inequalities in the adversarial process of adjudication. When it was found that the system was still functioning unequally and unfairly particularly against the poor and marginalized sections of people like women and children, Parliament enacted separate legislations to create new judicial structures and procedures like the Family Court, the Juvenile Court and the like. If these institutions still fail to deliver equal justice under law to the under-privileged sections of society, the actors of the system including lawyers and judges have to be blamed as they continue with their old mindsets of adversarial legalism in these institutions ignoring the intentions of the law and the Constitution. This is where access to justice and human rights of the poor and marginalized suffer in the trial courts in the country.

It is my submission that in a lawyer-dominated adversarial system, there is no way to provide equal justice to the poor and the disadvantaged unless the judge is

sensitive to the structural and institutional imbalances in the system and consequent disabilities of the weaker sections in the litigative game. They need therefore to adopt a pro-active stance to overcome technical biases and manipulative lawyering inherent in the system of adversarial adjudication. In doing so, the judge is called upon to probe suspicious facts avoiding technicalities of procedure, appreciate the evidence and contentions in the peculiar social and cultural context of the case, seek legislative purpose in interpreting laws and drawing inferences, and adopt affirmative action measures in granting remedies and reliefs. This is the only way left if adversarial legalism were to be continued and at the same time equal justice-social justice were to be delivered to the poor and marginalized. This approach is indeed needed more at the trial courts level rather than at the level of High Courts and Supreme Court. This is what "social context judging" or "equal opportunity adjudication" is about.

There are many roads and by-lanes available to a judge interested in social context judging. For example he may invoke principles of fairness and equality essential for dispensing justice. He may in appropriate cases accept legislative history to reason his interpretation. He will use the power of appreciation of evidence in such a way as to remove possible disabilities tending to vitiate equality before law. He may try to understand the systemic disadvantages suffered by parties and seek the support of available empirical evidence impeding substantive equality. To be able to do so he may start by interrogating the inherited assumptions and presumptions which according to him, inhibit delivery of equal justice. He should be concerned with shifts in public policies; community expectations from courts; advances in scientific knowledge; power imbalances between the two parties and their possible consequences etc. He should be prepared to work with other functionaries in the system who may have specialized knowledge which the legislature desired (as in Family Court) to go into judicial decision- making. Problem solving should be a dominant goal in social context judging and this demands therapeutic approaches to the maximum extent that the law permits. Thus perceived, every judge in the family court, juvenile court, environmental court, tribal court, court for matters of the disabled, court hearing conflict of law cases etc., are typically to be social context judges. The core competence of such judges is equality consciousness and a willingness to respect diversity. Judging is not just deciding; it is strengthening social cohesion, pushing the development process, enabling co-existence of diversity, maintaining rule of law and legitimacy of governance. Contextual judging indeed helps to bridge the gap between law and life, between law and justice.

Judicial Activism - An Imperative Necessity for Equal Justice

Justice Krishna Iyer's work as a judge is important for all judges in the country to study and analyze critically in order to learn the potential scope and limits in realizing the constitutional vision through legal and judicial processes. He practised judicial restraint even while exercising activism and thereby upheld the integrity and independence of the judicial profession. Laws may change all the time to promote what is perceived just in different periods and situations. New institutions may be established to make law function effectively in the interest of justice. Yet social justice-- equal justice goal in unequal, plural societies may remain elusive unless new ways of thinking become the habit of professionals and actors of the system. Justice Iyer has succeeded to a large extent to shake up the system and provide avenues for new ways of thinking to those lawyers and judges who want to take the system seriously to advance the cause of Justice-- Social, Economic and Political.

About the Monograph

Prof. (Dr.) N.R. Madhava Menon's commemorative lecture on "Humanising Justice and Justicing in Krishna Iyer Court" presents its readers, a wonderful insight into the jurisprudential content and juristic craftsmanship of one of India's finest judges. The monograph is an excellent analysis of greatest vision of our Constitution Justice-Social, Economic and Political. Justice Iyer's work rightly illustrates the potential scope and limits of our legal and judicial process without affecting the goals of social justice. His idea of justice expands to all sections of the society without any discrimination through adoption of novel judicial approach. Through portrayal of brilliant case laws in the monograph, Prof. (Dr.) N.R. Madhava Menon has succeeded in his mission to provide its readers new ways of thinking that may be required to change the legal system for the cause of promotion of justice. The monograph is of immense benefit to those students, teachers and researchers in law who wish to know Justice Krishna Iyer's contribution to the Golden Era of Indian Judiciary post emergency period.

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