RULE OF LAW: Protecting the Constitution and Democracy

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We are in the age of democracy, that too substantive and liberal democracy. Such a democracy is not based solely on the rule of people through their representative which is known as “formal democracy”. It also has other percepts like Rule of Law, human rights, independence of judiciary, separation of powers etc. The framers of Indian Constitution duly recognized the aforesaid precepts of liberal and substantive democracy with rule of law as an important and fundamental pillar. At the same time, in the Scheme of the Constitution, judiciary is assigned the role of upholding rule of law. My focus in this article is to demonstrate that while upholding the rule of law, the courts perform a vital function viz. protecting the Constitution as well as democracy which are essential for not only for national integrity but are also the prerequisite of nation’s welfare. Before dealing with the deeper discussion on this central theme, let us first discuss, in brief, the meaning of rule of law, constitutionalism and democracy, as well as their interplay.

**Rule of Law:**

This principle highlights that the law is above all and is to be given supremacy. It is also emphasize the principle that every individual or corporation or all the branches of the Government are supposed to act according to law, with the underlying message; 'howsoever high and mighty one may be, law is above him.

The essence of rule of law is to preclude arbitrary action. Dicey who propounded the rule of law gave distinct meaning to this concept and explained that it was based on three kindered features which are as follows:

1. Absence of arbitrary powers on the part of authorities;
2. Equality before law; and
3. The Constitution is part of the ordinary law of the land.

There are three aspects of the rule of law which are as follows:

(1) A formal aspect which means making the law rule;
(2) A jurisprudential or doctrinal aspect which is concerned with the minimal condition for the existence of law in society.
(3) A substantive aspect as pre which the rule of law is concerned with properly balancing between the individual and society.

Though the three aspects of rule of law are overlapping and their boundaries blurred, we still find that there is an essential difference among them. It is, therefore, necessary to discuss the three aspects of rule of the law in brief.

(1) **Formal Aspect of Rule of Law:**

It is the fundamental concept of the rule of law that there has to be ‘rule of law’ as distinguished from rule of men and women. The rule of law, in this sense has a double meaning; the legality of Government and enforcement of the law. Here, we are concerned with the content of the law but the need to enforce it, whatever its contents. In that sense, it is governed by the principle of public order.

However, this idea is an impoverished notion of the rule of law, as it does not concern itself with the contents of law. In this weal form, the rule of law exists even in a dictatorship.

(2) **The Jurisprudential concept of Rule of Law:**
According to this concept, the rule of law includes certain minimum requirements without which a legal system cannot exist, and which distinguished a legal system from an automatic system where the leader impose his will on everyone else. Professor Lon Fuller has described these requirements collectively as the “inner morality of law”. However, among philosophers, there is disagreement about the contents of these minimum requirements. Fuller requires that the law be general; legal rules must be publicized, clear, intelligible, and stable enough to enable citizens to conform to them; the law must not be overly retroactive; statutes should be conflict with one another; the law should not demand the performance of acts beyond one’s powers; the rules must be administered as announced. Other philosophers have offered different lists of requirements. Notably among them are John Rawls (A theory of Justice) and Joseph Raz (The Rule of Law and its virtue). However, for our purpose it is not necessary to venture a detailed discussion on the list of requirements.

(3) The Substantive Concept of Rule of Law:

In addition to jurisprudential concept, which is important and an essential condition for the rule of law, the substantive concept of the rule of law is equally important and inseparable norm of the rule of law in real sense. It encompasses the ‘right conception’ of the rule of law, propound by Dworkin. It means guaranteeing fundamental values of morality, justice, and human rights, with a proper balance between these and the other needs of society. Justice Barak, former Chief Justice of Israel, has lucidly explained this facet of rule of law the following manner:

“The rule of law is not merely public order, the rule of law is social justice based on public order. The law exists to ensure proper social life. Social life, however, is not a goal in itself but a means to allow the individual to live in dignity and develop himself. The human being and human rights underlie this substantive perception of the rule of law, with a proper balance among the different rights and between human rights and the proper needs of society. The substantive rule of law “is the rule of proper law, which balances the needs of society and the individual”. This is the rule of law that strikes a balance between society’s need for political independence, social equality, economic development, and internal order, on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other. The Judge must protect this rich concept of the rule of law.”

The primary feature of rule of law, thus, is absence of arbitrary powers on the part of the governmental authorities and ensuring equality before law. But in fact the Rule of Law has conceptually transformed over a period of time. On this behalf, it may be of use to refer to the conference which was organized by the International Commission of Jurist in New Delhi in January, 1959. The idea of the Rule of Law as a modern form of law of nature, was formulated in this conference known as Delhi Declaration. It defined, broadly, that rule of law means to protect the individual from arbitrary Government and to enable to enjoy the dignity of man. This Delhi Declaration further stated the function of the legislature in a free society under the rule of law is to create and maintain the condition which will uphold as an individual. Another aspect of the rule of law is the existence of effective Government capable of maintaining law and order and of ensuring adequate social and economic conditions of life for the society. The most important aspect of the rule of law, as per this Declaration, is an independent judiciary. In Nutshell, the ‘Rule of Law’ which is a fine sonorous phrase, is dynamic and ever expanding and can be put alongside the brotherhood of man, Human Rights and human dignity. About the modern Rule of Law, Professor Garner observed:

“The concept in its modern dress meets a need that has been felt throughout the history of civilization, law is not sufficient in itself and it must serve some purpose. Man is a social animal, but to live in society he has had to fashion for himself and in his own interest the law and other instruments of government,
and as a consequence those must to some extent limit his personal liberties. The problem is how to control those instruments of government in accordance with the Rule of Law and in the interest of the governed.”

As the independent judiciary is pre-requisite of the rule of law and the role of Judge in a democratic society is to bring about the realization of the rule of law, it is for this reason that Courts are empowered to refuse to enforce a statute because it grants wide discretion or arbitrary power. The rule of law also leads to the conclusion that the final interpreter of the law should be the court and not the legislature or the executive. The doctrine of purposive interpretation is based on the rich aspect of the rule of law.

Concept of Liberal Democracy:

At this juncture, question arises as to what is democracy? Conceptually, it has two bases. The first is the sovereignty of the people. In that sense, sovereignty is exercised in free election wherein the people choose their representatives, who in turn represent their views. This aspect of democracy is manifests itself in majority rule.

However, second normative base of the democracy is ‘substantive or Liberal democracy’. It is equally, and under certain circumstances more important that the first base. In this sense, democracy has its own internal morality based on the dignity and equality of all human beings. The substantive requirement of democracy is based on such fundamental values and tolerance, food faith, justice, reasonableness and public order. Thus, two limbs of this substantive democracy would be (i) dignity and equality of all human beings & (ii) good governance.

The aforesaid two bases of the democracy are to be balances. Democracy is not just the law of rules and legislative supremacy; it is a multidimensional concept. Whereas it recognizes the power of the majority, and at the same time it also highlights the limitations on that very power. Power of the majority commands legislative supremacy, while liberal democracy enshrines supremacy of values, principles, and human rights. In case of an internal conflict, the formal and substantive elements of democracy must be balanced to protect the essence of each of these aspects. As the final arbiter in the matte of dispute, it becomes the duty of the Courts to achieve this balance.

The basic spirit of our Constitution is to provide each and every person of the nation equal opportunity to grow as a human being, irrespective of race, caste, religion, community and social status. Granville Austin while analyzing the functioning of Indian Constitution in first 50 years had described three distinguished strands of Indian Constitution; (i) protecting national unity and integrity, (ii) establishing the institution and spirit of democracy; and (iii) fostering social reforms. The strands are mutually dependent and inextricably intertwined in what he elegantly describes as “a seamless web” And there cannot be social reforms till it is ensured that each and every citizen of this county is able to exploit his/her potentials to the maximum. The Constitution, although drafted by the Constituent Assembly, was meant for the people of India and that is why it is given by the people to themselves as expressed in the opening words “We the People”. What is the most important gift to the common person given by this Constitution is “fundamental rights” which may be called Human Rights as well.

Speaking for the vision of our founding fathers, in State of Karnataka v. Rangnatha Reddy (AIR 1978 SC 215), the Court speaking through Justice Krishna Iyer observed:

“The social philosophy of the constitution shapes creative judicial vision and orientation. Our nation has, as its dynamic doctrine, economic democracy sans which political democracy is chimerical. We say so because our Constitution, in Parts III and IV and elsewhere, ensouls such a value
system, and the debate in this case puts precisely this soul in peril…. Our thesis is that the dialectics of social justice should not be missed if the synthesis of Parts III and Part IV is to influence State action and court pronouncements. Constitutional problems cannot be studied in a socio-cultural vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process the new equity-loaded legality. A Judge is a social scientist in his role as constitutional invigilator and fails functionally if he forgets this dimension in his complex duties.”

In Dattatraya Govind Mahajan vs. State of Maharashtra (AIR 1997 SC 915) he observed;

“Our Constitution is a tryst with destiny, preamble with luscent solemnity in the words ‘Justice-Social, economic and political.’ The three great branches of Government, as creatures of the Constitution, must remember this promise in their fundamental role and forget it at their peril, for to do so will be a betrayal of those high values and goals which this nation set for itself in its objective Resolution and whose elaborate summation appears in Part IV of the Paramount Parchment. The history of our country’s struggle for independence was the story of a battle between the forces of socio-economic exploitation and the masses of deprived people of varying degrees and the Constitution sets the new sights of the nation… Once we grasp the dharma of the Constitution, the new orientation of the karma of adjudication becomes clear. Our founding fathers, aware of our social realities, forged our fighting faith and integrating justice in its social, economic and political aspects. While contemplating the meaning of the Articles of the Organic Law, the Supreme Court shall not disown Social Justice”

In National Human Rights Commission vs. State of Arunachal Pradesh (AIR 1996 SC 1234), This Court observed:

“We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws.”

The description of rule of law constitutionalism and liberal democracy in modern ear, as outlines above, would clearly show not only close connection but overlap thereof. These are intertwined concepts. Foundation of liberal democracy is the constitutionalism with rule of law as its important pillar. Likewise, an ideal constitution will have the provisions for vibrant and substantive democracy with inherent features predicted on rule of law that ensures absence of arbitrary powers on the part of the authorities, equality of law and human rights. An ideal constitution, in its scheme would also have provisions of separation of powers with independent judiciary as well as good governance. Ultimately, in the scheme of the Constitution, judiciary is assigned the role of upholding the rule of law and while doing so, it is to protect the democracy as well as Constitution. It is in this sense, curiously, whereas rule of law draws sustenance from substantive democracy and a vibrant constitution and then forms the role of protecting the rule of law and democracy.

What is the role of a Judge, in the aforesaid scheme of things. Certainly, the first and primary role is to decide the disputes which come before a courts of law and in the process to determine the law by which the dispute before the Court should be decided. A Judge is supposed to decide the cases according
to the law of the country. However, if the role of a Judge is confined to the aforesaid, it would be taking a myopic view. It is now well recognized that the courts, while deciding the cases do not merely state the law but at times create it as well. Regarding the common law, this is certainly true. However, a historical study of legal system in a common law country (and that applies to India as well) would show that the legal system is not the same today as it was 60-70 years ago. Many changes have been brought and these changes are for the good of the society. The changes involve creation as well. This has happened because of judicial policy, purposive interpretation of legal text as well as bold and expansive interpretation of the fundamental rights, particularly Art. 14, 19 and 21 of the Constitution. In this manner, the Indian Courts have endeavoured to protect the Constitution and democracy. I would be limiting the discussion to the following aspects:

1. Expanding horizon of human rights with pre-dominant motive to accord proper human dignity to the citizens of this country.
2. Access to justice to the marginalized and vulnerable section of the society, with pre-dominant purpose of ensuring equality.
3. Mandating good governance as a basic feature of the Constitution.

EXPANDING HORIZON OF HUMAN RIGHTS:

The Concept of equality in Article 14 so also the meaning of the words ‘life’, ‘liberty’ and ‘law’ in Article 21 have been considerable enlarged by judicial decisions. While interpreting Art. 21, this Court has comprehended such diverse aspects as children in jail entitles to special treatment (Sheela Barse vs. Union of India [(1986)3 SCC 596], health hazard due to pollution (Mehta M.C. v. Union of India [(1987) 4 SCC 463], beggars interest in housing (Kalidas Vs. State of J&K [(1987) 3 SCC 430] health hazard from harmful drugs ( Vincent Panikurlangara Vs. Union of India AIR 1987 SC 900), right of speedy trial (Reghubir Singh Vs. State of Bihar, AIR 1987 SC 148), handcuffing of prisoners (Aeltemesh Rein Vs. Union of India, AIR 1988 SC 1768), delay in execution of death sentence, immediate medical aid to injured persons (Parmanand Katara Vs. Union of India, AIR 1989 SC 2039), starvation deaths (Kishan Vs. State of Orissa, AIR 1989 SC 677), the right to know (Reliance Petrochemicals Ltd. Vs. Indian Express Newspapers Bombay Pvt. Ltd. AIR 1989 SC 190), right to open trial (Kehar Singh Vs. State (Delhi Admn.) AIR 1988 SC 1883), inhuman conditions an aftercare home (Vikram Deo Singh Tomar Vs. Stet of Bihar, AIR 1988 SC 1782).

A most remarkable feature of this expansion of Art. 21 is that many of the non-justiciable Directive Principles embodied in Part IV of the Constitution have now been resurrected as enforceable fundamental rights by the magic wand of judicial activism, playing on Art. 21 e.g.

(a) Right to pollution-free water and air (Subhash Kumar Vs. State of Bihar, (AIR 1991 SC 420).
(b) Right to a reasonable residence (Shantistar Builders Vs. Narayan Khimalal Totame (AIR 1990 SC 630).
(c) Right to food (Supra note 14), Clothing, decent environment (Supra note 20) and even protection of cultural heritage (ram Sharan Autyanuprasi Vs. UOI, AIR 1989 SC 549).
(d) Right of every child to a full development (Shantistar Builders Vs. Narayan Khimalal Totame AIR 1990 SC 630).
(e) Right of residents of hilly areas to access to roads (State of H.P. Vs, Umed Ram Sharma, AIR 1986 SC 847).

A corollary of this development is that while so long the negative language of Art. 21 and use of the word ‘deprived’ was supposed to impose upon the State the negative duty not to interfere with the life or liberty of an individual without the sanction of law, the width and amplitude of this provision has now
imposed a positive obligation (Vincent Panikurlangara Vs. UOI AIR 1987 SC 990) upon the State to take steps for ensuring to the individual a better enjoyment of his life and dignity, e.g.-

(i) Maintenance and improvement of public health (Vincent Panikurlangara Vs. UOI AIR 1987 SC 990).
(ii) Elimination of water and air pollution (Mehta M.C. Vs. UOI (1987) 4 SCC 463).
(iii) Improvement of means of communication (State of H.P. Vs. Umed Ram Sharma AIR 1986 SC 847).
(iv) Rehabilitation of bonded labourers (Bandhuva Mukti Morcha Vs. UOI, AIR 1984 SC 802).
(v) Providing human conditions if prisons (Sher Sing Vs. State of Punjab AIR 1983 SC 465) and protective homes (Sheela Barse Vs. UOI (1986) 3 SCC 596).

The common golden thread which passes through all these pronouncements is that Art. 21 guarantees enjoyment of life by all citizens of this country with dignity, viewing this human rights in terms of human development.

The concepts of justice social, economic and political, equality of status and of opportunity and of assuring dignity of the individual incorporated in the Preamble, clearly recognize the right of one another amongst the citizens of these basic essentials designed to flower the citizen’s personality to its fullest. The concept of equality helps the citizens in reaching their highest potential.

Thus, the emphasis is on the development of an individual in all respect. The basic principle of the dignity and freedom of all individual is common to all nations, particularly those having democratic set up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard of the people and to give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and cooperative living. If democracy is based on the recognition of the individuality and dignity of man as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral his/her personality and is one of the most basic aspect of self determination dignity and freedom. In fact, there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity.

Access to justice to the marginalized and vulnerable section of the society:

What are these Vulnerable Groups? In general terms, vulnerability is the susceptibility to physical or emotional injury or attack. It is typically associated with victimhood, deprivation, dependency or pathology. ‘Vulnerable Groups’ are defined as those who are likely to have additional needs and experience poorer outcomes if these needs are not met. From human rights perspective, Vulnerable Groups are disadvantaged people who are unable to acquire and use their rights.

Human right applies universally to all. It is a hard reality on the ground that there are certain groups who are vulnerable and marginalized lacking full enjoyment of a wide range of human rights, including rights to political participation, health and education. Certain groups in the society often encounter discriminatory treatment and need special attention to avoid potential exploitation. This population constitutes what is referred to as Vulnerable Groups.

In Indian, there are multiple socio-economic disadvantages that members of particular groups experience, which limits their access to health and healthcare. The task of identifying the vulnerable groups is not an easy one. Besides, there are multiple and complex factor of vulnerability with different
layers and more often than once it cannot be analyzed in isolation. The present document is based on some of the prominent factors on the basis of which individuals or members of groups are discriminated in India, i.e. structural factors, age, disability, mobility, stigma and discrimination that act as barriers to health and healthcare. The Vulnerable Groups that face discrimination are:-

- Women
- Scheduled Castes (SC)
- Scheduled Tribes (SC)
- Children
- Aged
- Disabled
- Poor Migrants
- People living with HIV/AIDS, and
- Sexual Minorities
- Transgender

There are enumerable decisions under the aforesaid head advancing justice to such persons belonging to the vulnerable groups which are the outcomes of liberal interpretation of constitutional values, using PIL as a tool for enforcement of rights of such people, adopting purposive interpretation coupled with innovative method welfare legislation, plugging statutory lacunae while ensuring justice to such persons. For the sake of brevity, those judgments are not discussed herein.

MANDATING GOOD GOVERNANCE:

In a recent judgment pronounced on January 18, 2010 in the case of State of Uttaranchal v. Balwant Singh Chaufal & Ors., JT 2010 (1) SC 329, the Supreme Court has revisited the entire law on PIL, including its origin, extent and evolution. Speaking for the Court, Hon’ble Mr. Justice Dalveer Bhandari, scanned through the position relating to PILs prevailing in various countries, including Australia, USA, England, Sri Lanka and even Nepal. Tracing its origin and evolution in India, the Supreme Court has divided the PIL in three phases:-

- **Phase-I:** It deals with cases of this Court where directions and orders were passed primarily to protect fundamental rights under Article 21 of the marginalized groups and sections of the society who because of extreme poverty, illiteracy and ignorance cannot approach this court of the High Courts.
- **Phase-II:** It deals with the cases relating to protection, preservation of ecology, environment, forests, marine life, wildlife, mountains, rivers, historical monuments, etc.
- **Phase-III:** It deals with the directions issued by the Courts in maintaining the probity, transparency and integrity in governance.

As is clear from the above, Phase-III that is the present phase focuses on good governance. In fact, the democratic and representative character of governance has been treated to be a basic feature of the Constitution (Keshavanandan Bharti vs. State of Kerala (1973) 4 SCC 225). Governance is a concept of wide import. Every feature of the Constitution which imposes a limitation or which sets out principle and measures for the exercise of power can be said to be a spoke of the wheel, of convulsing towards fulcrum of good governance. It applies to accountability and record to constitutional limitations and prescriptions (See: Vineet Narain vs. U.O.I. (1998) 1 SCC 226."

“It can be seen that besides the enforceability of Fundamental Rights or other guarantee and basic features of the Constitution as a principle of good governance, certain provisions of the Constitution can also be linked with or related to accountability in governance. The power conferred on the President of
India to take decisions in relation to suspension of the government of a State in certain circumstances is one such provision calling for accountable exercise of power (State of Rajasthan vs. UOI (1978) 2 SCR 1 to S.R. Bommai vs. UOI (1994) 3 SSC 1). Similarly, the power conferred on the Election Commission to be in-charge of the superintendence, direction and control of the preparation of electoral rolls and the conduct of all elections in the country, is also a matter of power couple with duty (Mohinder Singh Gill v. Chief Election Commissioner (1978) 1 SCC 405. Since free and fair elections is said to be the backbone of, and vital to democracy, the Election Commission is entrusted with a duty to ensure free and fair elections.”

Again, in last few years, landmarks judgments are given by the Supreme Court for cleansing the elections system as also given heavily on the issues of corruption which are plaguing this country, as can be discerned from the following judgments:

(3) Centre for PIL v. UOI (2011) 4 SCC 1.
(4) Ram Jethmalani v. UOI (2011) 8 SCC 1.
(5) Dr. Subramanian Swamy v. Dr. Manmohan Sing (2012) 3 SSC 64.
(6) Shahid Balwa v. UOI 2013 (11) SCALE 75.
(8) Resurgence India v. Election Commission of India 2013 (11) SCALE 348.
(9) People’s Union for Civil Liberties v. UOI (2013) 10 SCC 1.

Role of Subordinate Judiciary

At this juncture, I would like to briefly touch upon the role of subordinate judiciary as well. What has been discussed up till now may give an impression that upholding the rule of law and in the process protecting the Constitution and democracy is the function of higher judiciary, namely the Supreme Court and the High Courts. If needs to be clarified that subordinate courts also play equally important role in enforcing rule of law and thereby taking care of the different aspects democracy and constitution which are covered above. Professor N.R. Madhawa Menon has neatly summed up the prominent role which is played by the trial courts, in such cases, in the following words:

“There is a wide perception on the part of the public and even amongst a section of lawyers and judges that matters of human rights are to be raised only in constitutional courts and the C.P.C., Cr. P.C. and Evidence Act are the governing law for justice administration at the subordinate level. This is a travesty of justice and the notion of rule of law. After all, Constitution is the fundamental law and nothing contrary to its provisions can claim legality in any court or authority. The interpretation of fundamental rights in the Constitution by the Supreme Court is binding on all courts under Art. 141 of the Constitution itself. In this view of the matter there is no substance in the argument that human rights issues have to be agitated before constitutional courts only.”

He is also strong supporter of “social justice adjudication” or “social context adjudication” in contras distinction to adversarial system, in order to achieve social justice.

Prof Madhava Menon describes it eloquently:-
“It is therefore, respectfully submitted that “social context judging” is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication.”

Let me emphasize here that a Judge is supposed to decide the case in accordance with the law. If a dispute between husband and wife comes before the Court, the Court has to find out who is at fault. It has to return such findings on the basis of evidence laid before it. Law is to be applied on the facts that are established on record. Therefore, it is not at all suggested that every case has to be decided in favour of the wife in a dispute between husband and wife or in favour of the women if it is a dispute relating to property between her and other family members. The judicial system still remains adversarial and, therefore, a Judge is supposed to work within the system. In the process, while undertaking social context, a Judge is supposed to impart equal in an unequal society. This can be achieved at two levels, viz.:

a) Ensuring level Playing field; and
b) By innovative and purposive interpretation of statutory provisions in deciding “hard cases”.
c) Other measures.

a) Level Playing Field:

Let me start with key points. The harsh reality is that most people find an appearance before the Courts to be daunting experience, particularly people who have difficulty in coping with the language or those who are socio-economically disadvantage in society. Those at a particular disadvantage may include people from ethnic minority communities, individual with disabilities (physical or mental), woman, children and those who are through poverty or in other reasons are socio-economically excluded. Many of them may simply feel to be intimidated to inadequacy or to articulate to speak up. This justifies special or different treatment to be provided to such people ensuring fairness or equality of opportunity. Identifying situations in which an individual may be at a disadvantage because of some personal attribute of no direct relevance to the proceedings and taking the appropriate steps to ensure that there is no consequent obstacle to achieving justice is an important skill. This is all part of the art of judge craft that may be performed during case management. Part of that skill lies in identifying situations of disadvantage at an early stage, and discreetly dealing with them without prejudicing other parties. They can arise at any time and in any type of case. The equality of judicial decision making is crucial.

Neutral application of legal rules is fundamental to high-quality judicial decision making. Decision based on erroneous perceptions, interpretation or understanding may lead to faulty decisions and this to substantive unfairness. It is important to emphasize that we are not concerned about equal treatment but about fair treatment. It is not sufficient to treat everyone in the same way- equal treatment may itself amount to discrimination.

Fair treatment means affording equal opportunity for the parties to achieve justice. How to achieve this? Some of the steps, which are to be borne in mind, are listed below:-

i) Special Needs:

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1 Delivered a key note address on “Legal Education in Social Context.”
Some people, for a variety of reasons, find it difficult or impossible to:

- Attend at a court,
- Function in a court room,
- Understand what is going on, or
- Be understood by others

As judicial office-holders, we should demonstrate an awareness of the feelings and difficulties experienced by those appearing before us. Every effort should be made to help in an effective way whilst maintaining a balance between assisting and adjudicating to enable people to participate fully in the proceedings.

ii) Avoid Delays:

It is not only the final decision, but the entire process in judicial decision making is relevant. If application under Section 125 Cr. P.C. filed by destitute woman is decided after five years and this undue delay in disposing of request for interim maintenance, even if the ultimate decision is in her favour, it may be of no worth to her.

iii) Sensitization while Analyzing the Needs:

A judge is supposed to analyze the facts and evidence appearing before him/her in an impartial and objective manner. While doing so in the case of gender issues, a Judge is supposed to be sensitive regarding key points:

- Though women and girls comprise more than half the population, they remain disadvantaged in many areas of life.
- Stereotypes and assumptions about women’s lives can unfairly impede them and might frequently undermine equality.
- Care must be taken to ensure that our experiences and aspirations as women or of other women, are not taken as representative of the experiences of all women.
- Factors such as ethnicity, social class, disability status and age affect women’s experience and the types of disadvantage to which they might be subject.
- Women may have particular difficulties participating in the justice system, for example, because of child care issues.
- Women’s experiences as victims, witness and offenders are in many respects different to those of men.

b) Purposive Interpretation and Judicial Discretion:

No doubt the Legislature makes the law, however, while enforcing that law by applying the same in a given case; it is the Judge who states, by interpretative process, what actually the law is. It is, therefore, a myth that a Judge merely states the law and does not create it. Hard reality is that, while interpreting a
statute and declaring what the Legislature meant thereby, Judge is the final arbiter in deciding as to what law is. While performing this function in social justice adjudication, the Judge is supposed to bridge the gap between law and society. The law regulates relationships between people. It prescribes patterns of behaviour. It reflects the value of society. The role of the judge is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society’s changing needs. In both constitutional and statutory interpretation, a judge must sometimes exercise discretion in determining the proper relationship between the subjective and objective purpose of the law. Indeed, a theory of interpretation cannot be constructed without interpretive discretion as its foundation. Interpretation without judicial discretion is a myth. Any theory of interpretation—internationalism, originalism, purposivism and so on—must be based on an inherent internal element of interpretive discretion. Discretion exists because there are laws with more than one possible interpretation.

In the process of interpreting the statutory law, the judge attempts to find out the intention of the legislature and in this pretence, it is his final word as to what the legislature intended and thus, what the law is. After all, legal practice is pervasively interpretation. It is, therefore, now widely accepted that in this whole process, the judge or the judiciary makes the law as well.

c) Other Measures:

We have seen that various rights of the accused persons are acknowledged as a part of fair trial which may pertinent to grant of bail, rule against any governing, providing suitable defence lawyer/legal aid etc. It becomes the duty of the subordinate judiciary to implement those judgments while dealing with the cases and any enumerable examples ac be given.

Further, we have to keep in mind recent amendments in CPC as well as Cr.P.C. enabling settlement through ADR methods in civil cases and through plea bargaining in criminal cases. The success of these methods entirely depend on the pro-active approach of the subordinate judiciary. Other measures which can be taken are succinctly explained by Prof. Menon in the following words:

“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 fairly 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.

They need, therefore, to adopt a proactive stance to overcome technical biases and manipulative layering 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 culture 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.”

I may end by referring to “virtue jurisprudence” which is being debated for deciding social context issues. It highlights a virtue centered theory of judging. “Virtue jurisprudence” is a normative and explanatory theory of law that utilizes the resources of virtue epistemology, virtue ethics and virtue politics to answer the central question of legal theory². In a sense, virtue jurisprudence is a new theory, drawing on the resources provided by recent developments in moral philosophy, but virtue jurisprudence is also a very old theory, rooted in Aristotle’s conception of ethics, politics, and the nature of law. This theory demonstrates that apart from well known judicial virtues, namely, (i) judicial temperance; (ii) judicial courage; (iii) judicial temperament; (iv) judicial intelligence and (v) judicial wisdom.

There is another crucial and central virtue, namely, “virtue of justice”. Lawrence B. Solum has beautifully summed up this virtue in the following words:

“We can high judges, “justices”, we call the building they occupy the “halls of justice”, and we call what they do, “the administration of justice”. If we know anything about judges, it is that they ought to be just. If judges should possess the virtue, then surely they should possess the virtue of justice.”³

He highlights at least three ingredients in the virtue of justice as it applies to judges; “Judicial impartiality”, “judicial integrity” and “legal vision”. I emphasize this legal vision while deciding “hard cases”.

If this ‘Legal Vision’ is kept in mind, it will bring about just results and that should be the approach of a Judge in ‘Social context adjudication’.

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² Virtue Jurisprudence (A Virtue Centered Theory of Judging) BY LAWRENCE B. SOLUM
³ Virtue Jurisprudence (A Virtue –Centered Theory of Judging) BY LAWRENCE B. SOLUM