

# CONVOCATION ADDRESS

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Hon'ble Mr. Justice Altamas Kabir, members of the General Council of the University, Vice-Chancellor Professor Dr. P. Ishwara Bhat, members of the faculty, distinguished guests and, last but by no means the least, the graduating students of the University:

The Chancellor and members of the General Council have done me a great honour by inviting me to be the Chief Guest at the Seventh Convocation of The West Bengal National University of Juridical Sciences. As a lifelong resident of Kolkata, and a member of the academic community of the city, I have watched with some pride the nation-wide reputation that NUJS has achieved in the last decade or so as a premier institution of training in law. It is, therefore, particularly gratifying for me that I have been given the opportunity to address the graduating students at this convocation. I am also delighted to be sharing the dais with the Chief Justice of the Supreme Court who was my fellow student at the Presidency College, Calcutta, in the mid-1960s and whom I am meeting after forty-five years. I have many fond memories of those years, not all of which can be shared in this august gathering. Allow me only to make the remark that even though they say that morning shows the day, Altamas Kabir at the age of twenty did not display any of the gravitas of a future Chief Justice of India. He was jovial, fun-loving, sometimes mischievous and always a very loyal friend. The lesson that I will draw for you, the graduating class of this university, is that the youthful frivolities and indiscretions that all of us have indulged in as college students are no impediment to achieving the highest levels of excellence and distinction in professional life.

I know I am expected to speak today on matters concerning the relation between law and politics. However, it is impossible to do so without taking note of the remarkable outburst of public emotions over the brutal rape of a young student in Delhi and her subsequent death. I cannot recall another incident where the procedures of law and justice have come under such intense public scrutiny, leading to the beginning of the trial of the accused and the submission by the Committee headed by Justice J.S. Verma of an entire report recommending comprehensive amendments to the criminal laws on sexual violence, all within the extraordinarily short time of around a month. During that period of public outpouring of grief, frustration and anger, one heard many unrestrained expressions of opinion on what people thought should be the proper punishment for such acts and which are the most effective procedures for achieving justice. I do not wish to review all of these opinions. But I do

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want to focus on what I think is a persistent underlying sentiment in the popular mind that was reflected in these varied and often extreme views. This is the deep popular preference – one might even say prejudice – for arbitrary judicial power in order to achieve the good. This sentiment looks upon the established procedures of law as impediments to achieving true justice and yearns for summary justice that is achieved quickly and effectively. Given the growing spread and death of a democratic political culture, I do not think it is wise simply to dismiss this sentiment as the product of popular ignorance. Rather, I believe it is necessary to take it seriously in order for us to reflect on the ineffectiveness and shortcomings of our current judicial procedures. This will be the subject of my address today.

## I. ENGLISH RULE OF LAW

We all know that the concept of rule of law in its present day form was first brought to this country in the settlements of the East India Company in Madras and Calcutta. By the early eighteenth century, well before it made any territorial acquisitions in India, the Company had set up judicial institutions in Fort St. George and Fort William for the administration of English law within their fortified settlements. From the very beginning, Company officials regarded the Mughal forms of law and government as constitutionally corrupt and despotic, and unlike the Arab, Iranian, Jewish or Armenian merchants who came to India before them, refused to accept the legitimacy of local commercial rules and practices. They turned their fortified settlements into virtually sovereign enclaves, with governmental and judicial systems organized on English principles, autonomous systems of revenue collection and a permanent armed force. The Company exercised sovereign powers over all British subjects in India, including the power to try and punish under English civil and criminal law. British subjects could reside in India only by permission of the Company. In all its settlements, the Company exercised its own legal jurisdiction over Indian residents. From the second half of the eighteenth century, with the acquisition by the Company of a territorial empire in Bengal and the South, the Presidency towns of Madras, Calcutta and, later Bombay became the epicenters from which English institutions and practices of the rule of law gradually radiated outwards into the rest of India.

It is worth noting that even the most well-informed and sympathetic Indian observers in the late eighteenth century were critical of the English legal system. Ghulam Husain Tabataba, the most perceptive Indian historian of the eighteenth century, and Mirza Abu Taleb who travelled to Britain at the turn of the nineteenth century, both wrote extensively and critically on what they thought was an expensive, slow, distant and unconscionably inflexible judicial system introduced by the British in Bengal. Both thought that direct access to an impartial judge who was knowledgeable about and sensitive to the specific circumstances of a case was far more likely to serve the cause of

justice. After seeing at first hand the administration of justice in Britain, Abu Taleb was “disgusted to observe that, in these Courts, law very often overruled equity, and that a well-meaning honest man was frequently made the dupe of an artful knave; nor could the most righteous judge alter the decision, without transgressing the law.” Considering the effects of transporting this legal system to the British courts of India, Abu Taleb spoke of the miserable plight of those Indians who had the misfortune of getting involved with these courts, whether as plaintiffs, defendants or witnesses. “In Calcutta, few months elapse that some respectable and wealthy man is not attacked by the harpies who swarm round the courts of judicature.” They do this “by frightening people with the terrors of the English law... These circumstances are all very distressing to a native of India, unacquainted with the English laws and customs, and many of them, rather than have the trouble and run the risk, willingly pay a sum of money...The hardships and inconveniences that witnesses also suffer, when summoned to Calcutta, are so great, that no man in India will now give voluntary evidence in any case.”

I think many here will agree that some of this feeling of dread at the prospect of becoming caught in the tentacles of the courts of law still exists, two hundred years later, among ordinary people in this country. It is true, of course that the institutions of English law spread wide and deepened during the period of British rule in India. Not only that, essentially the same structure of institutions, including the main body of civil and criminal laws, was carried over from the colonial period into the Indian republic, with the important addition, of course, of a written Constitution and a Supreme Court. In the course of this time, a certain class of Indians has not only familiarized itself with the nitty-gritty of legal procedures but has become expert in using it to further both public and private interests. The reminiscences of British colonial officials are full of anecdotes about the litigiousness of propertied Indians. When I was young, I often heard stories about the people of a certain district of Eastern Bengal (now Bangladesh) who were allegedly so fond of litigation that a rural gentleman visiting the district town on business, finding himself with a couple of hours to kill before he could take the bus back home, walked into the court and slapped a few cases against his neighbours. I later discovered that similar stories are told in about virtually every district in every part of the country, usually by people of the neighbouring district. I do not think that anything is gained by repeating as an accusation the colonial provenance or alien character of the legal system in India. By the sheer fact of its longevity, it has been domesticated as the dominant legal and judicial structure of this country. All discussion about its inappropriateness or shortcomings must begin with the recognition that the system has come to stay.

So why is there still this sense of fear about this strange and allegedly malevolent nature of the legal system? Part of the reason undoubtedly has to do with the inefficiencies of the actual judicial institutions rather than the

normative value of the principles on which it is based. That the system is slow and overburdened has been known for a long time. Despite periodic attempts to expedite parts of the system, the overall results have not been encouraging. More troubling is the fact that the very institutional rules created to ensure fairness of procedure are often used with complete cynicism to delay and, if possible, subvert justice. The system then becomes open to the charge that the mechanics of ensuring a fair procedure have come to assume greater importance than achieving a good result. Much of the recent debate about sexual violence has voiced precisely this concern: it is not so much the absence of laws as the repeated failure to implement them that has created this sense of impunity among actual and potential sexual offenders and, correspondingly, the utter defenselessness of their victims.

But although the scale and importance of this problem cannot be minimized, it is not something that touches upon the constitutive principles of the Indian judicial principles. I wish to turn your attention to some other aspects where the inherent arbitrariness and unpredictability of the political enters the core of the system of administration of justice. This has to do with the essentially political judgment that seeks to declare, in specific cases, an exception to the law.

## II. THE POLITICAL NATURE OF EXCEPTIONS TO THE LAW

Let me begin by mentioning a couple of instances where the discretionary political power to declare an exception to the law is inscribed in the very body of our Constitution. The power of the President of the republic to grant pardons or to suspend, remit or commute a sentence of death is explicitly defined in Article 72(c) of the Constitution of India. Recently, this matter has come under a lot of public discussion in connection with the execution of Afzal Guru. The charge is that this power has been used selectively because of political motives. If one raises the historical genealogy of this power, it goes back to the time of the absolute monarchies in Europe when the power to punish, especially the sovereign power to take life, resided in the person of the monarch. Even after absolutism was progressively limited by representative forms of constitutional governments, not to speak of its abolition and replacement by republican governments, a residue of that sovereign power residing in the person of the head of state continues to exist in modern constitutional governments. Today, every state I know that still retains the death penalty also gives to the constitutional head of state discretionary power to commute or remit the death sentence. Whether exercised personally by the head of state or on the advice of a council of ministers, this power, by the very fact that it grants discretionary power to declare an exception to the law, is irreducibly political in its character. Every such decision will necessarily be open to a political examination and its

fairness or legitimacy judged by political criteria, not by legal ones: there is no getting away from it.

Let me give you another example where political compulsions have led to the introduction of exceptions into the constitutional definition of equal citizenship. We all know that the rights of equality and equal opportunity in public employment given by Articles 15 and 16 of the Constitution are qualified by the power of the government to take necessary steps for the advancement of socially and educationally backward classes, scheduled castes and scheduled tribes. These provisions were initially contemplated to operate until the inter-caste and inter-class divide was considerably bridged, and all citizens had an equality of opportunity in a substantive sense. Subsequently, in light of compelling justifications for the continuation of affirmative action, the Parliament has periodically extended this provision such that today the entire polity and judicial system assumes that this is a permanent qualification to the concept of equal citizenship. One knows the pressing, and in my view entirely justified, political and ethical reasons for the special provisions for scheduled castes and tribes. But in the context of our present discussion, it is significant that they continue to exist as exceptions to the fundamental laws of the land.

But these are examples that occur here and there in the body of constitutional law. Let me now point out an area of the daily administration of law where the intervention of politics has created a veritable mountain of exceptions. I am speaking here about the various demands made by different population groups in society and the process by which governmental authorities respond to those demands. Built into this process of everyday democratic politics is the repeated declaration of exceptions to the law.

Take the case of squatter settlements of the poor in numerous cities of India. These urban populations occupy land that does not belong to them and often use water, electricity, public transport and other services without paying for them. But governmental authorities do not necessarily drive these people out of the city or try to punish or put a stop to such illegalities, because of the political recognition that these populations serve certain necessary functions in the urban economy and that to forcibly remove them would involve huge political costs. On the other hand, they cannot also be treated as legitimate members of civil society who abide by the law. As a result, municipal authorities or the police deal with these people not as rights-bearing citizens but as urban populations who have specific characteristics and needs and who must be appropriately governed. On their side, these groups of urban poor negotiate with the authorities through political mobilization and alliances with other groups.

As the targets of a practical policy of governance, these populations do not carry the ethical significance of citizenship. They are heterogeneous

groups, each of which is defined and classified by its empirically observed characteristics and constituted as a rationally manipulable target population for governmental policies. Consequently, if despite their illegal occupation of land, they are given electricity connections or allowed to use municipal services, it is not because they have a right to them but because the authorities make a political calculation of costs and benefits and agree, for the time being, to give them those benefits. However, this can only be done in a way that does not jeopardize the legal order of property and the rights of proper citizens. The usual method is to construct a case such that the particular illegality associated with a specific population group may be treated as an exception that does not disturb the fundamental rule of law. Governmental decisions aimed at regulating the vast populations of the urban poor usually add up to a series of exceptions to the normal application of the law.

These populations in turn respond to the policies by seeking to constitute themselves as groups that deserve the attention of the government. If as squatters they have violated the law, they do not necessarily deny that fact, nor do they claim that their illegal occupation of land is right. But they insist that they have a right to housing and livelihood in the city, and, if they are required to move elsewhere, they must be provided with rehabilitation. They form associations to negotiate with governmental authorities and seek public support for their cause. This becomes a major form of political participation for these groups, invoking their status as formal citizens but acting in ways that often contravene the approved practices of civic life. Their political mobilisation involves an effort to turn an empirically formed population group into a moral community. The force of this moral appeal usually hinges on the generally recognized obligation of government to provide for the poor and the underprivileged.

The field of negotiation between governmental authorities and population groups is necessarily uncertain, laying down no firm principles, recognizing no definite rights, but leaving everything to the repeated and always temporary negotiation of claims. The affected groups of the urban poor have to pick their way through this uncertain terrain by making a large array of connections outside the group - with other groups in similar situations, with more privileged and influential groups, with government functionaries, with political parties and leaders. An increasingly important part of their strategy is to use the media to draw attention to their demands. They do this very often by spectacular demonstrations, including the temporary blocking of road or rail traffic and even the calculated use of violence, such as the destruction of public property, to show their outrage and frustration. They often make instrumental use of the fact that they can vote in elections. But this is possible only within a field of strategic politics. This is the stuff of democratic politics as it takes place on the ground in India. It involves what appears to be a constantly shifting

compromise between the normative values of constitutional propriety and the moral assertion of popular demands.

Governmental authorities, on the other hand, when conceding a demand by making an exception to the law in a particular case, have to be careful that the interests of proper law-abiding citizens are not thereby threatened. Thus, squatters may be allowed water and electricity connections at specific negotiated rates and an exception to the usual structure of rates paid by regular customers. Street vendors may be allowed to set up temporary stalls on the pavement without threatening the regular shops that have licenses and pay taxes. Small industries and services in the informal sector constitute a massive zone of exception because most of them survive in the market place by ignoring labour laws, pollution regulations, license fees and taxes that apply to the formal sector. Government authorities cannot treat them on the same plane as the formally organized domain of the economy and have to make exceptions. Declaring exceptions of this kind is always a balancing act and creates an unstable arrangement that may be disturbed either because the courts decide that the exception is unjustified or the political balance shifts against the population group concerned.

Given the huge number of demands that arise in an immensely heterogeneous society such as India where the vast majority of the population lives and works in the informal sector outside the properly regulated zones of civil society, the administrative response to these demands ends up in an array of temporary and often inconsistent exceptions. Population groups too do not seek to fundamentally change the existing structure of rules and regulations but claim that an exception be made in their case. Frequently, they argue that the rich and the propertied are allowed to get away by breaking the law because they can employ expensive lawyers to exploit the loopholes in the law or because the government chooses to turn a blind eye; why should similar exceptions not be made in the case of the poor? Thus, auto-rickshaw operators violating pollution rules will point out that similar violations made by taxis or public buses are condoned; why shouldn't their violations be condoned as well? I even know a case in Delhi in which a group of slum dwellers accused of possessing illegal arms publicly demonstrated in front of the police station announcing the names of the prominent citizens of the area who, they alleged, had stocks of illegal arms in their houses; if those wealthy and propertied people could keep their arms, why shouldn't the poor be allowed to defend themselves?

Clearly, anyone concerned with the rule of law will find this situation hugely problematic. However there is no easy solution in sight. As far as I can see, two kinds of responses have been made, one opposed to the other. One is to use legislation as well as legal interpretation to progressively include these differential responses to the demands of population groups within the recognized domain of rights. This is in some sense a demand for legal pluralism,

allowing for the coexistence within the same domain a multiplicity of legal regimes with specific fields of application. But the demand, on ground of equality, for recognition of yet another exceptional right by citing one that is already recognized (as exemplified by the case of auto-rickshaws as against taxis and buses) can always be countered, also on grounds of equality, by pointing to those who must abide by the universal norm while others enjoy an illegitimate exception. Thus, owners of private automobiles who abide by all the pollution norms could complain that they are being discriminated against because other vehicle owners are being allowed to violate those norms. In other words, the legal instrument is equally open to both tendencies. On one side, forces from political society try to use the legal institutions to extend the field of exceptions on the moral ground of securing greater equality. On the other side, those upholding the norms of civil society as the space of equal citizenship resist, also on the ground of equality, the proliferation of exceptions. Given the extraordinary powers, unknown in any other liberal constitutional system in the world, of judicial intervention that the Indian courts have come to assume, this has indeed become a major field of contest between the two tendencies.

### III. JUDICIAL ACTIVISM AND EXCEPTIONAL POWER

A great deal has been said about judicial activism in India in recent years. I do not have the expertise to make any original contribution to that discussion. But in the context of my present argument, I wish to point out a few relevant aspects of the subject.

*First*, the expansion of the concept of *locus standi* to include individuals, groups or organisations who are not parties to a litigation and the recognition of collective rights have meant that the traditional adversarial process of English Law has been radically modified in India in the last thirty years. *Second*, in dealing with public interest litigation, the courts have not only taken up the responsibility of actively monitoring the performance of the executive but have even gone to the extent of laying down policy that the government would be required to follow, especially in matters concerning gender justice, child labour and preservation of the environment. Not surprisingly, critics have called this kind of judicial legislation that goes beyond the traditional concept of separation of powers between the legislature, the executive and the judiciary. Further, and more pertinent to our earlier discussion, these expanded acts of law-making by the judiciary have lacked consistency and have appeared to be arbitrary, depending very much upon the personal preferences of individual judges.

But despite all the criticisms it cannot be denied that the activist role of the judiciary has on the whole enjoyed considerable popular legitimacy.

This, it seems to me, is a fact that needs to be understood within the context of our democratic politics, not so much in its normative principles as imagined by political philosophers, but as it is actually practiced in everyday public life. Why do judges feel compelled or emboldened to step beyond the traditional lines separating their powers from those of the other branches of government? Why do politicians and bureaucrats defer to the court when it gives them such directives? Are judges responding to what they sense is a popular demand for quick and effective justice? I think so.

Consider the most frequently cited argument in defence of the activist role of judges. The courts have to step in, the argument goes, because of the lapses of the political class. If the legislative and the executive do not do their jobs properly, who else can step in except the judiciary? Underlying this argument is the widespread perception that people do not trust politicians to be impartial precisely because they are seen to uphold this or that particular interest. In comparison, the courts hold far greater popular trust as an impartial institution. Paradoxically, therefore, the very deepening of the democratic process that has compelled politicians to respond to sectional demands that would not have been heard three or four decades ago has also contributed to their loss of credibility, along with that of the police and the bureaucracy, as upholders of the general interest of society. Unlike Hegel's identification in nineteenth-century Europe of the bureaucracy as the universal class and society, Indian democracy appears to have produced the judiciary as the upholder of the universal social interest. In particular, those powerless and marginal interests which are unable to mobilize sufficient numbers in the field of electoral democracy are the ones who have found in the activist judiciary a protector of their rights. Even though this role is often one of standing against the majoritarian sway of electoral politics, the judiciary's activism in this respect must be appreciated in the context of an evolving democratic system such as India's.

I began this talk by citing some instances of the early skepticism of Indian observers of the English judicial system. I have argued that a desire for arbitrary but impartial judicial power to achieve the good continues to resonate in the popular consciousness in this country. My suspicion is that when judges today relinquish the traditional process of adversarial litigation or transgress the line of separation of powers, they are indeed taking on powers that are undefined, uncodified, internally inconsistent and hence necessarily arbitrary. But they must justify their actions by taking recourse to the inherently political argument of responding to the need of the hour of the demands of society. Anyone familiar with the basics of modern jurisprudence knows of the dangers of arbitrary power and the overwhelming need to ensure fair judicial procedures. Yet, as I have shown today, the political compulsions of democracy have compelled both the bureaucracy and the courts to seek exceptional and arbitrary powers to achieve results that promote a social good.

Let me conclude by pointing out to this year's graduating class that the subject of law has wide ramifications that go far beyond the professional practices of the legal discipline. These ramifications raise questions about the role of law in society that are difficult to answer. But precisely for that reason, they are questions of immense intellectual excitement. In my long years of teaching and research, I have come across a few young scholars who were once graduates like you from law universities but who chose to become black sheep and take to academic careers in history, political science, sociology, anthropology, even cinema studies. Their academic work has been outstanding. I am not going to subvert this happy occasion by inviting you to desert *en masse* the legal profession to which you have just earned admission. But I do wish to underline for you the tremendous intellectual potential that the subject of law holds for anyone who cares to look into it. If I have succeeded in giving you an inkling of this intellectual world, I will consider my effort today a success.

I thank you once more for listening to me.