

Symposium on Role of civil societies in making of legislations

[Symposium on 'Role of civil societies in making of legislations' held on 28 Sept 2011 at 4.30 PM in Bar Association Hall, Odisha High Court, Cuttack convened by Lawyers' Academy to mark 11th Capacity Building Workshop

President – Sri Biswa Mohan Patnaik, Sr. Advocate and President of Odisha High Court Bar Association

Chief Guest and Synthesizer- Justice Sri R.K.Patra, Chairperson State Human Rights Commission, Odisha

Welcome Address by Sri Santosh Kumar Nanda, Advocate

Introduction of the dignitaries on the dais by Mr. Gurudatta Kar, Advocate

Mr.Nigamanand Das, Advocate introduced Lawyers' Academy and topic of the Symposium

Speakers –Prof Dr. Pradip Kumar Sarkar, Mr.Ram Chandra Ray Advocate, Mr. Basudev Pujari Advocate, Mr.Chitta Ranjan Behera Advocate and Socio-legal Activist]

Talk by Chitta Behera

Mr. Chitta Behera's turn came following the talk delivered by Prof. P.K. Sarkar, and was followed by Justice Sri R.K.Patra who addressed the house as its Chief Guest and Synthesizer. Deviating from the pattern of speaking in English followed by other speakers, Mr.Behera spoke in Oriya, using English only where he felt necessary to use excerpts and quotes from other sources to elucidate his contention. He spoke as follows-

As of today, the question as to whether the civil society has any role in making of the laws, the topic of the evening is only a scholastic one, worth being taken up for the purpose of debates in schools and colleges, where the participating students are more concerned with the academic aspects, rather than practical implications of the given topic. Why I say so? Because, the strident march of events in last six months (April to September 2011) has culminated in conclusively establishing one very simple but profound lesson of history i.e. the civil society or for that matter the members of public are not an ordinary player, but a pioneer in the matter of giving articulation to what kind of legislation the nation requires on the pressing issues of the day. Everyone of this house knows that the Central Government, of course bowing before the Anna-led nation-wide agitation for Jan Lokpal Bill, agreed to constitute an 11-member Joint Drafting Panel on Lokpal Bill taking 5 persons from Team Anna representing the civil society side as its members and brought out a notification to that effect on 8th April 2011. Then we also noticed that not only the Central Government, but also the entire Parliament, yielding to the overwhelming impact of Anna's 2nd fast from 16 to 28 August last declared to treat Jan Lokpal Bill version 2.3 as a crucial document for deliberations by the members of Joint Parliamentary Committee and by Parliamentarians at large. After this let's not dispute as to whether the civil society has any role to play in making of laws or not. The proposition that the civil society has a pre-eminent role to play

in the making of any law that concerns the life of common people is no longer a moral or intellectual precept, but a well acknowledged stark reality of our national life. In this sense, the topic of today's evening is dated and devoid of relevance.

Given the above backdrop, the question that deserves to be debated by this august gathering of legal practitioners and pundits, is the very rationale of Anna phenomenon. To put the question more pointedly, why a person from civil society like Anna Hazare had to tell all of us that the entire corpus of anti-corruption legal-administrative dispensation that is in place across the country as of now is filled with a plethora of loopholes and deserves to be reformed and replaced by a new, fool-proof one? As most of you know, Sri Hazare whose formal education is less than matriculation won't fit into this platform, because unlike you he doesn't know the nitty-gritty of any law nor can he speak in English. How is it that a huge spectrum of people including cross sections from among the political leaders, Government personnel and legal fraternity could feel the resonance in Anna's deadly critical discourse on the faulty system of governance that is in place today? It is simply because, every pillar of our State edifice, be it legislature, executive or judiciary has not only failed to curb corruption, but also directly or indirectly entrained and sheltered it. The common people, squarely fed up as they were with large scale corruption in every sphere of public life, could readily release their deep-seated anguish against graft and mal-governance by way of identifying and solidarising with Anna's Jan Lokpal Bill as the one window beacon for a corruption free India.

But the question arises, is there no Constitutional scheme in place in respect of making or remaking of laws, especially as and when necessary to curb corruption? As you know, an overall Scheme for the purpose is very much laid out there in the Constitution. Needless to say, it is the Parliament and State legislatures which are supposed to make laws in respect of every matter. The administration or bureaucracy is entrusted with making of sub-ordinate legislation in the shape of Rules and Regulations. The laws including sub-ordinate legislations are implemented by the administration. The Ministers who are members of the legislature head different departments and thus serve as leaders of the executive. It is now the Judiciary which is entrusted with the power to review as to whether the laws so made were proper and effective in respect of their construction and whether the implementation of the laws so made was undertaken properly as per their letter and spirit. Thus, it is the judiciary which has been endowed by the Constitution with the supreme power to set aright the faulty construction or faulty implementation of any law.

Article 141 of the Constitution says, "Law declared by Supreme Court to be binding upon all Courts- The law declared by the Supreme Court shall be binding on all Courts within the territory of India." It means that the law declared by Supreme Court is the law of the land. It is a precedent for itself and for all Courts /tribunals and authorities in India [Rupa Ashok Hurra v Ashok Hurra (2002) 4 SCC]. Article 32 of the Constitution confers unfettered powers upon the Supreme Court to issue direction to any public authority so as to remedy infringement of any fundamental right guaranteed to every citizen of India. Similar writ powers have been entrusted to High Courts under Article 226 to redress such cases of infringement within their respective jurisdictions. Thus the higher judiciary is in a position to review any law and suggest amendment to any law. But the moot point arises whether the Supreme Court and High courts have exercised such powers

entrusted to them in respect of plugging the loopholes in the anti-corruption laws of the country. Has the Supreme Court or any High Court, for instance, suggested removal of Section 19 from Prevention of Corruption Act 1988, which requires the previous sanction of the concerned competent authority before investigating or prosecuting any public servant against whom the allegation of corruption has been lodged? In fact, as you might know, Section 19 of PC Act is the crux of the debate between Government and Anna Team, with the former insisting on its retention and the latter its removal. As a matter of fact, Section 19 of PC Act is the villain of the piece owing to which such investigating agencies as CBI at Centre or State Vigilance Wings are not able to arrest, enquire into and prosecute the public servants including the Ministers and bureaucrats, who are in the good book of the ruling party or coalition of parties. So long Section 19 is retained in the PC Act, there is absolutely no hope that CBI or for that matter State Vigilance would ever act as independent and autonomous bodies in the matter of deterrence to corruption. If Supreme Court or any High Court would have reviewed the PC Act and issued a direction for removing its biggest loophole i.e. Section 19, there won't have appeared an Anna Hazare to voice such concern.

It is not a fact at all that the judges of Supreme Court or High Courts are not aware about their powers in respect of review and amendment to laws in general and to laws related to corruption in particular. They are in fact very much aware about the sweeping powers entrusted to them. As you know, the apex Court formulated certain Guidelines on Sexual Harassment at Workplace [Vishaka and others V. State of Rajasthan and others (AIR 1997 SUPREME COURT 3011)], which are till date treated as having the force of law across the whole country. Similarly, Supreme Court had formulated elaborate guidelines on Adoption of Children while disposing of the case L.K.Pandey vs Union of India (WP No 1171 of 1982), which are still adhered to by all concerned agencies and parties involved in the process of in-country or inter-country child adoption. Such guidelines also informed the text of Juvenile Justice Act 1986, 2006 and amendment of 2006. It shows that if the Supreme Court or a High Court would ever wish, they could have directed the suitable amendment of anti-corruption laws.

Rather, it has been found that some High Courts abusing the writ powers entrusted to them by the Constitution have issued such arbitrary directions as have caused substantial detriment to the public interest. For instance, in July 2008 Orissa High Court hearing the plea of Society of Retired Forest Officers Association issued a stay order on the implementation of Forest Rights Act 2006, which was vacated in August 2009. Due to this reason, Orissa lagged behind other States in respect of implementation of FRA 2006, which is a progressive Central law, enacted with a view to issuing of Patta over forest land to STs and other traditional forest dwellers. The retrograde stay clamped by Orissa High Court was a mark of arbitrary exercise of plenary power bestowed on it under Article 226 of the Constitution. The question arises, is there any mechanism to hold any judge of a superior court accountable for his mindless judgments or directions? The answer is an emphatic no. As a matter of fact, the Constitution has unequivocally granted the independence of judiciary, which is a sacrosanct principle under any democracy and it was expected that the judiciary itself shall evolve elaborate norms of transparency and accountability in respect of its own conduct. But during last so many decades, it has conspicuously failed to devise the same despite recommendation issued to that effect by several illustrious bodies including National Commission to Review the Working of the Constitution chaired by Justice M.N.Venkatachaliah.

On the contrary the higher judiciary was found to be involved in exercising the power to punish somebody for contempt of itself as permissible under Articles 129 and 142 of the Constitution with much gusto. Everybody knows the case of E. M. Sankaran Namboodiripad vs T. Narayanan Nambiar 1970 AIR 2015, 1971 SCR (1) 697 in which the apex court upheld the Kerala High Court's verdict against EMS Namboodiripad for his liability for contempt of court. Then again, the apex Court applying its original jurisdiction held on 6th March 2002 the noted writer Mrs. Arundhati Roy [SUO MOTU CONTEMPT PETITION (CRL) NO. 10 OF 2001] guilty of contempt of court for her critical writings and utterances on the role of Supreme Court in the context of Narmada Bachao Andolan. Applying the criteria underlined by Justice Markandeya Katzu for any superior court to exercise their original power to punish for contempt of itself, the above two instances would appear to be unwelcome aberrations committed by Superior Court. According to Justice Katzu, the contempt power of the court is like a Brahmastra, which can only be applied once and that too in an extreme situation, that is, when somebody or a group, by their acts of violence or vandalism make the functioning of court impossible. Otherwise, the court should look upon every piece of criticism however harsh or pinching against a judge or even an entire court as an exercise by the concerned individual of his or her fundamental right to freedom of expression as guaranteed under Article 19(1) of the Constitution.

It is in this context that we would do well to attend to what Justice Katzu says on the attitude of Judges towards the public whom he considers as their true masters. In an article 'Contempt of Court : Need for a Fresh Look' the then Judge of Supreme Court wrote inter alia the following - "The basic principle in a democracy is that the people are supreme. It follows that all authorities, whether Judges, Legislators, Ministers, Bureaucrats, etc. are servants of the people. Thus, the preamble to the Constitution of India states: 'We, The People of India, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION'. These words emphasize the republican and democratic character of our Constitution, and show that all power ultimately stems from the People. Once this concept of popular sovereignty is kept firmly in mind it becomes obvious that the people of India are the masters and all authorities in India (including the Courts) are their servants. Surely the master has the right to criticize the servant if the servant does not act or behave properly. . . . The Constitution has no doubt been created by the people. But this instrument has itself created the Courts."

This long quotation from Justice Katzu also throws light on the topic of the day. If the three organs of our State edifice, legislature, executive and judiciary have failed to discharge their obligations to provide good governance for the country during so many decades post independence, civil society persons like Mr. Anna Hazare representing the vast multitude of this nation and our true masters have an indisputable right to take any of the authorities to task, because the latter being the tax-payers are ultimately our task masters. And all the authorities including the judiciary have a bounden obligation to listen to them with respect and patience and carry out faithfully whatsoever is just and legitimate in their demands.

(Transcript by the speaker himself Mr. Chitta Behera, 4A Jubilee Tower, Choudhury Bazar, Cuttack-9, Mobile 9437577546)