

Speech of Dr. Justice Syed Refaat Ahmed as a Keynote Speaker on Conference Titled “Achieving Just Societies: Inclusive Justice Pathways for People and Planet in Asia and the Pacific”

Good Morning participants, ladies and gentlemen.

As we convene here under the aegis of this conference on “*Achieving Just Societies: Inclusive Justice Pathways for People and Planet in Asia and the Pacific*” the notion of *sanctity of justice* comes foremost to mind given the recent student-led revolution in Bangladesh. The people’s will has been expressed through a collective voice demanding accountability in governance and thereby, underscoring the crucial role of an independent judiciary in achieving just societies. As Sir Thomas Bingham, former Lord Chief Justice of England and Wales, perceptively observed, the "enthronement of the law" places the independent judicial function of interpreting and applying the law at the forefront of any constitutional scheme.

Historical Context of Justice in Asia and the Pacific

The quest for justice in Asia and the Pacific is a story woven through millennia, a narrative marked by both progress and pain. From the ancient codes of empires to the modern legal systems of today, the pursuit of fairness has always been intertwined with the complexities of human experience. Understanding this rich and diverse history is essential to navigating the current landscape of justice in the region.

The historical narrative of justice in Asia and the Pacific is not one of unmitigated progress. The legacy of colonialism has cast a long shadow, imposing foreign legal frameworks that often disregarded indigenous

practices and customs. This resulted in the alienation of many communities from their own systems of justice and fostered a legacy of inequality that continues to impact the present day.

The historical injustices of the past continue to resonate in the present. We see a growing demand for a reimagined justice system respecting diversity, prioritizing inclusivity and empowering individuals to participate in the pursuit of justice as active agents of change.

The journey begins with recognizing the individual's agency in shaping justice. The Vienna Declaration and Programme of Action, adopted in the 1993 World Conference on Human Rights, for example, expressly provides for the “universality and interdependence” of all human rights. In explaining the universal character of all human rights, the Declaration states:

While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political economic and cultural systems to promote and protect all human rights and fundamental freedoms.

Vis-à-vis this universal approach to human rights it has been said that the Asian perspective of regional particularism ought also to be taken into account as the major determinant of the nature and scope of human rights. Also subsumed under this approach is the view that human rights must be relative to the socio-economic realities in a given state. Western liberal-individualist ideology is seen by many in Asia as informing the Universal Declaration of Human Rights and the two International Covenants as representing an individualist ideology that should be rejected in the Asian context. An alternate ideological base is found in the propagation of ‘Asian values’ that have emerged from the Asian experience in state-building and economic development. The Asian perception of human rights is accordingly

said to be inextricably linked with “economic development, harmony, national unity and autonomy”. This accommodates Confucian tenets on the prevalence of the family and society over the individual, and that of authority and discipline over unfettered license. My view is that a pragmatic approach should be taken of a gradual accommodation of universal democratic and human rights principles within the Asian socio-political culture with the objective of evolving a system as “won’t necessarily exactly replicate Western democracy, but it will approximate democracy none the less.” The Asian experience indeed shows that the achievement of such harmony and stability appears to hinge on the empowerment of the individual to a greater extent than previously deemed feasible. However, this reassessed significance of the individual is projected to be achieved in compliance with traditional Asian standards rather than with borrowed Western precepts. The empowerment of the individual becomes key too towards strengthening community bonds and spearheading advancements at the community level.

The Call for Inclusive Justice

Bangladesh provides an instructive case study of the pursuit of inclusive justice within the Asia-Pacific region. The country’s diverse socio-economic circumstances, political landscape, and cultural contexts underscore the imperative for tailored approaches to guarantee justice for all. In Bangladesh, village courts have revitalized the historical tradition of community-based justice, significantly enhancing access to legal remedies at the grassroots level. By providing an accessible and culturally resonant alternative to formal judicial systems, these courts have made justice more inclusive, empowering local communities to resolve disputes effectively and fairly.

We have also made significant progress in improving access to legal aid. The provision of legal aid represents a vital instrument for empowering those who are unable to pursue justice due to an array of constraints. In that sense, the scope of access to legal aid in Bangladesh has expanded beyond its initial focus on addressing financial limitations. In order to address the broader spectrum of barriers to justice, the Supreme Court has introduced a scheme similar to the capability approach. This innovative framework extends beyond the mere financial incapacity of individuals in order to encompass other obstacles that impede their ability to secure legal representation. By acknowledging the diverse limitations that individuals may face, this approach facilitates the establishment of a more equitable legal framework. The holistic approach to legal aid, which combines a means-based and a capability-based perspective, shifts the focus from generic requirements to a nuanced understanding of access to justice.

One promising approach to reform is the establishment of community-based legal aid programmes. I cite here the efforts of one of our subordinate court judges who was a dedicated District Legal Aid Officer worked tirelessly to bring justice to the doorstep of those often overlooked by traditional legal systems. With a deep commitment to the community, he began each day by reviewing applications for Alternative Dispute Resolution submitted by local litigants. Understanding the pressing needs of the people, he prioritized these disputes into categories, focusing first on those that were complex and required urgent attention. Recognizing the importance of addressing issues at their source, he personally visited the sites of the disputes. For land-related conflicts, he collaborated with an expert surveyor from the Assistant Commissioner's office, ensuring that mediation meetings were held on-site. As he organized these mediation sessions, he understood that true justice extended beyond mere resolution; it required community involvement.

Therefore, he arranged awareness programs alongside the mediation meetings, engaging local residents and elites to foster understanding of their rights and the legal processes available to them. After each mediation meeting, he took the initiative to hold follow-up awareness sessions. These sessions were designed to ensure that the knowledge of legal rights and services permeated every level of society. Furthermore, he reached out to local NGOs, journalists, panel lawyers, and educational institutions, conducting awareness programs that informed community members about their legal entitlements. He recognized the importance of educating not just adults but also students, ensuring that the next generation understood the significance of justice and legal access. With the support of the District Legal Aid Committee, he extended these awareness programs to prisons and various government offices, bringing legal aid facilities directly to those who needed them most. Through his unwavering dedication and innovative approach, he transformed the landscape of legal aid in that District, creating an informal justice delivery system that was effective, cost-free, and free from harassment. In his mission to dispense justice at the grassroots level, the legal aid officer became a beacon of hope for his community, demonstrating that access to justice is not merely a privilege for the few but a fundamental right for all.

Navigating Challenges in Asia and the Pacific

It cannot be gainsaid that systemic inequities, which are deeply embedded within the social structure, serve to perpetuate cycles of disadvantage. The disparities faced by marginalized communities, defined by factors such as economic status, ethnicity or gender, require immediate attention.

In Bangladesh, Public Interest Litigation (PIL) has emerged as a powerful tool for addressing social, ecological, health and other connecting concerns and holding authorities accountable. Notably, my two PIL judgments exemplify the effectiveness of collaborative efforts between petitioners, state entities, and the judiciary in safeguarding public rights and interests. In *Syed Saifuddin Kamal vs. Bangladesh, Ministry of Health*, reported in 38 BLD (2018), 453, the court's intervention led to the creation of the "Emergency Medical Services for Road Accident Victims and Protection of Good Samaritans Policy, 2018," showcasing the potential for legal frameworks to enhance public health and safety. Similarly, in *Human Rights and Peace for Bangladesh vs. Bangladesh (Writ Petition No. 14258 of 2012)*, the Bangladesh Telecommunication Regulatory Commission, under judicial direction, developed the "Guidelines for Limiting Exposure to Radiation of Electromagnetic Fields," reflecting a commitment to protecting citizens from harmful environmental impacts. A landmark case in this context is *Mohiuddin Farooque vs. Government of Bangladesh (WP 998 of 1994)*, also known as the *Flood Action Plan* case, where the court recognized that the right to life extends to the right to a healthy environment. This pivotal decision emphasized that environmental degradation directly threatens the fundamental right to life, reinforcing the judiciary's role in advocating for sustainable development and environmental justice. Collectively, these cases illustrate how PIL can serve as a catalyst for progressive policy-making, underscoring the judiciary's commitment to championing both health and environmental rights. Indeed a spate of such cases emerged eventually as a precursor to a constitutional provision dealing specifically with protection and improvement of the environment and bio-diversity. Incorporating the principle of intergenerational equity in environmental law, Article 18A of the Bangladesh Constitution that makes

the present generation the trustees for future generations has informed judicial thinking and pronouncements significantly.

Thus, for example, in a ruling involving the ship-breaking industry, this is what a court had to say:

“A concerted effort by all, including the judiciary, at a closer alignment of Bangladeshi practices in the field of ship-breaking with ever-tightening and restrictive international standards is the only way out for an industry as this to sustainably operate within these borders. Viewed from a point of constitutional law, it is our view that any regulatory and enforcement system falling short of applicable standards will make the inter-generational promise under article 18A of the Constitution to a protected and improved environment hollow and the guarantees to the citizenry under articles 31 and 32 to lives lived under the protection of rule of law illusory.” (Bangladesh Environmental Lawyers Association (BELA) vs. Bangladesh and others reported in 2020 ALR (HCD) online, 38)”

The Crying Need for Justice Sector Reform

Reform is not merely a social requirement; rather, it is a moral imperative that demands immediate action. My office has proposed a roadmap for reforming the justice sector in Bangladesh comprising three distinct phases: short-term, mid-term, and long-term.

At the core of these proposed reforms is the necessity to safeguard the independence of the judiciary from external influences in order to uphold the rule of law. The objective is to guarantee the autonomy of the relevant institutions, thereby ensuring that the courts are able to function unhindered. It cannot be gainsaid that the establishment of an autonomous and impartial judiciary is essential for the advancement of constitutionalism, the protection of the rule of law, and the sustenance of democratic governance. The concept of constitutionalism, when broken down into its core components of democratic governance, human rights and the rule of law,

presupposes the existence of an independent judiciary. The UN Basic Principles on the Independence of the Judiciary employs terminologies such as “*influences*”, “*pressures*”, and “*interference*” as anti theses to the independence of judiciary. Indeed, these factors determine the extent to which the judiciary may act impartially, free of bias, prejudice, fear and extra-judicial compulsions and constraints.

The independence of the judiciary is also a crucial element in the articulation of a limited form of government, whereby the government itself is constrained by the Constitution. In the annals of the liberal tradition of political thought, this is most closely aligned with John Locke’s narrative of the relationship between the ‘*Sovereign State*’ and the ‘*Sovereign People*’ in the context of people being recognized as the legitimate source of the State’s powers. In this sense, a constitution can be considered as a compact between the people and their government, establishing the latter as a limited authority, subject to specific conditions. The Constitution serves to safeguard individual liberties, thereby protecting individuals from encroachments by the government or other parties. The core assumption here is that of the existence of a limited government duly supplemented and reinforced by a legislative, executive and judicial apparatus that remain distinct in their functions and autonomy, and an autonomous justice delivery system that is genuinely accessible to the citizenry and capable of performing its functions effectively to limit the government. This ideal constitutional structuring of the state is imagined to operate as a system of checks and balances on each other, with an overarching aim of ‘*separation of power*’. This perspective necessitates that each branch or organ fulfills its functions in a responsible and constrained manner.

The judiciary, as a crucial component of the state apparatus, serves as a

counter-majoritarian institution, thereby maintaining the separation of powers and ensuring the accountability of the executive and legislative branches. One of the principal objectives of this counter-majoritarian strategy is to afford substantial protection to minorities and to resist the influence of majoritarian impulses that are frequently directed against them.

In the aftermath of the July revolution, the Supreme Court of Bangladesh has taken significant steps to safeguard the independence of the judiciary. The Supreme Court has submitted a proposal to the government to establish a separate secretariat aimed at ensuring interference-free judicial administration. Another notable achievement has been the validation of a ruling that nullified the 16th Constitutional Amendment to the Constitution of Bangladesh. This Amendment sought to vest the authority to remove Supreme Court judges in parliamentarians, a move that was deemed unconstitutional. Consequently, the authority has been reconferred upon the Supreme Judicial Council, an independent body comprising the Chief Justice and the next most senior judges. This initiative will serve to prevent the '*abusive constitutionalism*', whilst simultaneously reinforcing the independence of the judiciary as a counter-majoritarian institution, thereby enabling it to articulate a limited government.

It is similarly of great importance to establish transparent and well-defined procedures for the appointment of judges. As part of the reform scheme, the objective is to establish transparent and merit-based criteria that ensure the selection of judges thereby, reinforcing public confidence in the judiciary.

Furthermore, as part of the reform scheme, there is an intention to digitize the judiciary in order to meet the evolving needs of a technology-oriented,

globalized world and to enhance both accessibility and efficiency. This will facilitate greater engagement with the legal system of citizens and ensure the timely resolution of cases. In this regard, the objective is to prioritize the modernization of court facilities in order to create an environment conducive to the dispensation of justice.

It is equally our objective to ensure the training and education of lawyers and Judges engage in comparative studies of judicial systems thereby bringing about necessary reforms based on best practices and innovative solutions that have proven to be effective in other comparable contexts.

Strategies for Change across Borders

In contemplating our prospective trajectory, it is imperative that we remain tenacious in our pursuit of transformative changes, which according to Lon Fuller the American Legal philosopher cumulatively constitute the inner morality of law. His thesis has got its starting point the identification of *precepts* or *desiderata* that must inform any law-making process in order to produce good law. Legal systems operating under the rule of law must be founded on clearly declared, prospective rules that are well-established and conducive to compliance and execution in alignment with stated objectives.

Furthermore, there is a case to be made for adopting a “*dialogical approach*” in the delivery of judgments pertaining to socio-economic rights, as exemplified by the practices of numerous Latin American countries. Such rulings would allow government agencies to engage in “*democratic deliberation*” by seeking input from civil society and the general public on the implementation of socio- economic rights. Furthermore, they would facilitate dialogue between such agencies and the courts, thereby enabling the identification and gradual resolution of inconsistencies between the

aspiration of a “*social rights constitution*” and neoliberal economic policies adopted by the state. This approach entails the incorporation of the general public as a constituent element of the judicial process, thereby facilitating the establishment of a justice system that is centered on the interests of the people.

In addition, the role of regional cooperation in advancing justice should be given due consideration. By establishing collaborative relationships between nations in Asia and the Pacific, it is possible to facilitate cross-border dialogue and collaboration. Regional legal forums can function as a conduit for the exchange of experiences, the identification of shared challenges, and the formulation of collective strategies to enhance access to justice. In this connection, I want to recall the South Asia Judicial Conference on Environment and Climate Change, held in Dhaka in 2016 jointly organized by the Supreme Court of Bangladesh and Asian Development Bank (ADB), which emphasized the importance of regional cooperation in addressing environmental justice issues. This conference exemplified how regional legal forums can serve as vital platforms for sharing experiences and formulating collective strategies.

Conclusion

In conclusion, I extend my most profound and heartfelt gratitude to each of you for your steadfast dedication to the exalted pursuit of justice. Together, let us embark upon this noble journey, guided by the firm principles of conviction and compassion, as we strive to cultivate a society that is, in every respect, just one in which the harmonious interests of humanity and the natural world are entwined in a most beneficial accord. Thus, we shall bequeath a legacy of equity to generations yet unborn, crafting a realm wherein individuals from all stations in life irrespective of social, political, economic, religious, or gender

identities are assured equal access to the venerable institutions of law and justice.

It is incumbent upon us to adopt a people-centered approach to the rule of law, thereby ensuring that our policies, laws, and institutions are thoroughly equipped to uphold the sacred principles of equality and non-discrimination. Our collective duty demands that we leave no soul behind, exemplifying the fundamental tenets of the social contract. As Lord Bingham most sagaciously observed, “*The rule of law requires that the law be accessible, intelligible, clear, and predictable.*” Let us, therefore, resolutely commit ourselves to these ideals as we labor in unison to build a more just and equitable society for all.

Thank you.