Speech on Decolonisation of the Indian Legal System to be delivered at the 16th National Council Meeting of the Akhil Bharatiya Adhivakta Parishad, Hyderabad

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I. General Remarks

1. I am delighted to have been invited for the 16th National Council Meeting of the Akhil Bharatiya Adhivakta Parishad here in Hyderabad. For me, it is always a pleasure and honour to be invited to speak at such events as it allows me the opportunity of engaging in a more informal manner with members of the Bar.

2. At the very outset, I must congratulate the Akhil Bharatiya Adhivakta Parishad for their work over the last three decades towards the objective of conducting regular educational programs for lawyers across the country. Continuous legal education is an essential pillar of the practice of law and I am happy to note that the Akhil Bharatiya Adhivakta Parishad has conducted workshops and seminars, established legal aid centres and regularly printed its quarterly magazine to aim this process of continuous education of our country's lawyers. The present council meeting is another facet of the efforts of the Akhil Bharatiya Adhivakta Parishad in educating the legal fraternity.

3. I am happy to note that the theme for this year's national council meeting of the Akhil Bharatiya Adhivakta Parishad is 'Decolonisation of the Indian Legal System'. While it may sound like a subject pertaining to legal history, this issue has never been more contemporaneously relevant. Just in the past few months, several of my brother judges at the Supreme Court as well as the Hon'ble Chief

Justice of India have voiced their concern about the need for re-thinking and re-formulation of the Indian legal system so that it reflects India's current realities, which is an amalgamation of our rich and diverse heritage of the centuries past and also the dreams and aspirations for the shining future of the billion plus Indians. I would like to use this opportunity to share some of my own thoughts on this topic, so as to encourage further discussion, debate and deliberation within the legal fraternity in relation to this subject.

II. Ancient Indian legal systems

4. Indian law has traditionally drawn on a number of sources. Our legal system began with the Vedas and contemporary indigenous customs from thousands of years ago. Over time, it evolved through blending and being replaced with other influences, both foreign and domestic. After the Arab invasions of India in the 8th century, Islamic law was introduced in some areas of India. Similarly, during the British occupation of India, the English common law was introduced as the residual law in the earlier high courts of Bombay, Calcutta and Madras to answer all questions of law in respect of which no Indian statute or rule of personal law such as law was prevalent. The Portuguese and French used their own laws in their colonies in India.

5. When the colonisers first invaded India, they made outward remarks stating that India was a land lacking in legal principles or the observance to the rule of law. They used this as the excuse for super-imposition of their foreign ideas and systems upon India. But these misleading remarks and notions are a misrepresentation of Indian Jurisprudence and the legal system of ancient India.

These incorrect statements may have been made due to ignorance, or imperialist self-interest, or a contempt for Indian culture and civilization. The effect of this misrepresentation was to create a false picture of the Indian legal system both in India and outside.

6. We must go back in time, to the ancient Indian scriptures, to get a true and correct picture of the legal system of ancient India. It is then that we discover that ancient Indian jurisprudence was founded on basis of the rule of law and had some of the features that were immensely revolutionary for the ancient world. These included:

   a. the King himself was subject to the law and the King's right to govern was subject to the fulfillment of duties which, if breached, resulted in forfeiture of kingship;

   b. the judges were independent and subject only to the law and ancient India had the highest standard amongst all nations for the ability, learning, integrity, impartiality, and independence of the judiciary;

   c. the Indian judiciary consisted of a hierarchy of judges with the Court of the Chief Justice (*Praadvivaka*) at the top, each higher Court being invested with the power to review the decision of the Courts below;

   d. disputes were decided essentially in accordance with the same principles of natural justice which govern the judicial process in the modern State today:

   e. the rules of procedure and evidence were similar to and just as advanced as those followed today;

f. in criminal trials, the accused could not be punished unless his guilt was proved according to law and in civil cases the trial consisted of four stages like any modern trial – plaint, reply, hearing and decree;

g. doctrines such as *res judicata* (*prang nyaya*) were prevalent in the ancient Indian jurisprudence;

h. all trials, civil or criminal, were heard by a bench of several judges and rarely by a judge sitting singly;

i. decisions of all courts except the King were subject to appeal or review according to established principles; and

j. the fundamental duty of all courts was to do justice "without favour or fear".

i. Rule of Law

7. Other than the broad features I have highlighted, it would be fruitful to examine in-depth some of the more nuanced features of ancient legal systems, so as to fully appreciate the intricacy, justness and aptness of those legal systems for India. Let us start by the most fundamental of these aspects, the 'rule of law'.

8. Naturally, the first question to address would be whether there was a rule of law prevalent in ancient India? Evidence for a resoundingly affirmative answer to this question is bore out by the great epic texts. The Mahabharata, for instance, stated that "a King who, after having sworn that he shall protect his subjects, fails to protect them, should be executed like a mad dog." Similarly, the Mahabharata also stated that "the people should execute a King who does not protect them but instead deprives them of their property and assets and who takes no advice or

guidance from anyone. Such a King is not a King but misfortune." While the words used may have been grim and in keeping with the modern legislative language, the message is clear that the King is not above the law.

9. These provisions indicate that sovereignty was based on an implied social compact and if the King violated this traditional pact, he forfeited his kingship. Coming to the historical times of Mauryan Empire, Kautilya described the duties of a king in the Arth-shastra in the following terms: "In the happiness of his subjects lies the King's happiness; in their welfare his welfare; whatever pleases him he shall not consider as good, but whatever pleases his people, he shall consider as good." I will refer to the wise words of many other such ancient scholars, whose works provide us a window into the ancient legal systems of our nation.

10. Returning to Kautilya, the principle enunciated by him was based on a very ancient tradition which was already established in the age of the Ramayana. Rama, the King of Ayodhya, was compelled to banish his queen, whom he loved and in whose chastity he had complete faith, simply because his subjects disapproved of his action of taking back a wife who had spent a year in the house of her abductor. The King submitted to the will of people even though it broke his heart.

11. In the Mahabharata, it is stated that a common fisherman refused to give his daughter in marriage to the King of Hastinapur unless the King accepted the condition that his daughter's sons, and not the heir apparent from a former queen, would succeed to the throne. The renunciation of the throne and the vow of life-long celibacy (*Bhishma Pratgya*) by Prince Deva Vrata is one of the most moving episodes in the Mahabharata. But its significance for the legal fraternity is that

even the sovereign King was not above the law. The great King of Hastinapur could not compel the humblest of his subjects to give his daughter in marriage to him without accepting his terms. It refutes the view that the kings in ancient India were despots who could do as they pleased without any regard for the law or the rights of their subjects.

ii. Judiciary in ancient India

12. According to the Arthashastra of Kautilya, who is generally recognised as the Prime Minister of the first Mauryan Emperor (322-298 B.C.), the Mauryan realm at the time was divided into administrative units called Sthaniya, Dronamukha, Khrvatika and Sangrahana (the ancient equivalents of the modern districts, tehsils and Parganas). Sthaniya was a fortress established in the center of eight hundred villages, a dronamukha in the midst of 400 villages, a kharvatika in the midst of 200 villages and a sangrahana in the center of ten villages. Law courts were established in each sangrahana and also at the meeting places of the districts (Janapadasandhishu). The Court consisted of three jurists (dhramastha) and three ministers (amatya).

13. The great jurists, Manu, Yajn-valkya, Katyayana, Brihaspati and others, and in later times commentators like Vachaspati Misra and others, described in detail the judicial system and legal procedure which prevailed in India from ancient times till the close of the Middle Ages.

14. According to Brihaspati Smiriti, there was a hierarchy of courts in Ancient India beginning with the family Courts and ending with the King. The lowest was the family arbitrator. The next higher court was that of the judge; the next of the Chief

Justice who was called Praadivivaka, or adhyaksha; and at the top was the King's court.

15. The jurisdiction of each court was determined by the importance of the dispute, the minor disputes being decided by the lowest court and the most important by the king. The decision of each higher Court superseded that of the court below. According to Vachaspati Misra, "The binding effect of the decisions of these tribunals, ending with that of the king, is in the ascending order, and each following decision shall prevail against the preceding one because of the higher degree of learning and knowledge".

16. It is noteworthy that the Indian judiciary today also consists of a hierarchy of courts organized on a similar principle-the village courts, the Munsif, the Civil Judge, the District Judge, the High Court, and finally the Supreme Court which takes the place of the King's Court. We have been unconsciously following an ancient tradition.

17. The fountain source of justice was the sovereign. In Indian jurisprudence dispensing justice and awarding punishment was one of the primary attributes of sovereignty.

18. Being the fountain source of justice, in the beginning the king was expected to administer justice in person, but strictly according to law, and under the guidance of judges learned in law. A very strict code of judicial conduct was prescribed for the king. He was required to decide cases in open trial and in the court-room, and his dress and demeanour were to be such as not to overawe the litigants. He was required to take the oath of impartiality, and decide cases without bias or

attachment. Katyayana says that "the king should enter the court-room modestly dressed, take his seat facing east, and with an attentive mind hear the suits of his litigants. He should act under the guidance of his Chief Justice (Praadvivaka), judges, ministers and the Brahmana members of his council. A king who dispenses justice in this manner and according to law resides in heaven".

19. These statements are significant. The king was required to be modestly dressed (vineeta-vesha) so that the litigants were not intimidated. The code of conduct prescribed for the king when acting as a judge was very strict and he was required to be free from all "attachment or prejudice". As per Narada, "if a king disposes of law suits (vyavaharan) in accordance with law and is self-restrained (in court), in him the seven virtues meet like seven flames in the fire". Narada enjoins that when the king occupies the judgment seat (dharmasanam), he must be impartial to all beings, having taken the oath of the son of Vivasvan, which was the oath of impartiality as the son of Vivasvan was Yama, the god of death, who was impartial to all living beings.

20. The judges and counselors guiding the king during the trial of a case were required to be independent and fearless and prevent him from committing any error or injustice. As per Katyayana, "if the king wants to inflict upon the litigants (vivadinam) an illegal or unrighteous decision, it is the duty of the judge (samya) to warn the king and prevent him. The judge guiding the king must give his opinion which he considers to be according to law, if the king does not listen, the judge at least has done his duty. When the judge realizes that the king has deviated from equity and justice, his duty is not to please the king for this is no occasion

for soft speech (vaktavyam tat priyam natra); if the judge fails in his duty, he is guilty."

21. As civilization advanced, the king's functions became more numerous and he had less and less time to hear suits in person, and was compelled to delegate more and more of his judicial function to professional judges. Katyayana stated that "if due to pressure of work, the king cannot hear suits in person he should appoint as a judge a Brahmin learned in the Vedas." The qualifications prescribed for a judge were very high. According to Katyayana, "a judge should be austere and restrained, impartial in temperament, steadfast, God-fearing, assiduous in his duties, free from anger, leading a righteous life, and of good family."

22. In course of time, a judicial hierarchy was created which relieved the king of much of the judicial work, but leaving untouched his powers as the highest court of appeal. Under the Maurya Empire a regular judicial service existed as described above.

iii. Integrity of the judiciary in ancient India

23. I shall now say a few words about the qualities of the judiciary and the code of conduct prescribed for ancient judges. The foremost duty of a judge was integrity which included the responsibility of being impartial and a total absence of bias or attachment. The concept of integrity was given a very wide meaning and the judicial code of integrity was very strict. Brihaspati stated that "a judge should decide cases without any consideration of personal gain or any kind of personal bias; and his decision should be in accordance with the procedure prescribed by

the texts. A judge who performs his judicial duties in this manner achieves the same spiritual merit as a person performing a Yajna."

24. The strictest precautions were taken to ensure the impartiality of judges. A trial had to be in open court and judges were forbidden to talk to the parties privately while the suit was pending because it was recognised that a private hearing may lead to partiality (pakshapat). It was stated by Shukra-nitisara that "five causes destroy impartiality and lead to judges taking sides in disputes. These are attachment, greed, fear, enmity and hearing a party in private."

25. Another safeguard of judicial integrity was that suits could not be heard by a single judge, even if he was the king. Our ancestors realized that when two minds confer, there was less chance of corruption or error, and they provided that the King must sit with his counselors when deciding cases, and judges must sit in benches of uneven numbers. Shukra-nitisara noted that "persons entrusted with judicial duties should be learned in the Vedas, wise in wordly experience and should function in groups of three, five, or seven." Similarly, Kautilya had also stated that suits should be heard by three judges (dharmasthstrayah).

26. Unfortunately, our present judicial system, created by the British, does not follow this excellent safeguard. Today every suit is heard by a single Munsif or civil Judge or District Judge for reasons of economy. But the state in ancient India was more interested in the quality of justice than economy.

27. Every Smriti emphasizes the supreme importance of judicial integrity. Shukra-nitisara said that "the judges appointed by the king should be well versed in procedure, wise, of good character and temperament, soft in speech, impartial to

friend or foe, truthful, learned in law, active (not lazy), free from anger, greed, or desire (for personal gain), and truthful." Corruption was regarded as a heinous offence and all the authorities are unanimous in prescribing the severest punishment on a dishonest judge. Brihaspati said that "a judge should be banished from the realm if he takes bribes and thereby perpetrates injustice and betrays the confidence reposed in him by a trusting public." A corrupt judge, a false witness, and the murderer of a Brahmin were considered to be in the same class of criminals. Vishnu had said that "the state should confiscate the entire property of a judge who is corrupt." Judicial misconduct included conversing with litigants in private during the pendency of a trial. As per Brihaspati, "a judge or chief justice (Praadvivaka) who privately converses with a party before the case has been decided (anirnite), is to be punished like a corrupt judge."

iv. Rules for interpretation of the text of the law in ancient India

28. In ancient India, principles for interpretation of laws were developed to high degree of perfection. Judges were required to decide cases, criminal and civil, according to law (samyak, yath-shastram, shastro ditena vidhina). This involved interpretation of the written text of the law. This task created many problems such as the elucidation of obscure words and phrases in the text, reconciliation of conflicting provisions in the same law, solution of conflict between the letter of the law and principles of equity, justice and good conscience, adjustment between customs and smritis, and so on. This branch of law was highly developed and a number of principles were enunciated for the guidance of the courts. The most

important of them related to the conflict between the dharm-shastra and the artha-shastra.

29. Three systems of substantive law were recognized by the court, the dharma-shastra, the arth-shastra and custom which was called sadachara or charitra. The dharma-shastra consisted of laws which derived their ultimate sanction from the smritis and the arth-shastra of principles of government. The border line between the two often overlapped. In several matters the arthashastra and the dharma-shastra were in conflict. As such, one is naturally driven to wonder how did the law courts resolve this conflict when it arose in particular suits?

30. The first principle was that of avirodha: the court must try to resolve any apparent conflict between the two. Today, this is called the principle of harmonious construction. But if the conflict could not be resolved, the authority of the dharma-shastra was to be preferred. Bhavishya purana provided that "when smriti and artha-shastra are inconsistent, the provision in the artha-shastra is superseded (by smriti); but if two smritis, or two provision in the same smriti are in conflict, whichever is in accordance with equity is to be preferred." Narada smriti lays down a similar rule of interpretation according to reason in case of conflict between two texts of the smritis. But while interpreting the written text of the law, the court was to bear in mind that its fundamental duty was to do justice and not to follow the letter of the law. As per Brihaspati, "the court should not give its decision by merely following the letter of the shastra for if the decision is completely devoid of reasoning, the result is injustice (dharma-hani)." Brihastpati further said that the court should decide according to the customs and usages of

the country even if they are in conflict with the letter of the law; and he even gave several remarkable illustrations which are incidentally capable of guiding contemporary social conditions. He pointed out that "the maternal uncle's daughter is accepted in marriage by brahmanas of the south; in Madhya desha (Central India), brahmanas become hired labourers and craftmen and eat cow's flesh; eastern brahmanas eat fish and their women are addicted to drinking. On account of the acts specified these communities, in their respective countries, should not be liable to undergo any punishment".

v. The importance of customs in law-making in ancient India

31. In view of the vital part played by custom (achara, sadachara, charitra) in society, in ancient times the State was required to maintain an authenticated record of the customs observed in the various parts of the country. Katyayana stated that "whatever custom is proved to be followed in any particular region, it should be duly recorded as established (dharya) in a record stamped with the seal of the Sovereign". But even an established custom could be formally "disestablished" if in course of time it became inequitable. In fact, it was the duty of the Sovereign to remove from time to time the dead or rotten branches of custom. In this respect, Katyanana stated that "when the Sovereign is satisfied that a particular custom is contrary to equity (nyayatah) in the same way-that is in the way it was established-it should be annulled by a formal decision of the Sovereign." This remarkable provision indicates how highly developed the judicial and legal system of ancient India were.

32. Very often the decision in a suit dependeded on proof of the existence of a custom. Narada stated that the basis of a judicial decision (vyavahara) may be: (i) Dharma-shastra, (ii) previous judicial decisions (vyavahara), (iii) custom (charitra), (iv) or the decrees of the Sovereign. The authority of these four is in the reverse order, each preceding one being superseded by the one following it. The artha-shastra contains an identical provision.

33. The significance of these provisions cannot be overemphasized. By gearing law to changing customs, ancient Indian jurisprudence gave the concept of law a secular hue. Moreover, it developed the evolutionary concept of law and rejected the concept of an absolute, eternal, never-changing law. Both Manu and Parashara had said "the laws of kritayuga are different from those of treat and dwapara, and the laws of kali yuga are different from those of all the previous; ages- the laws of each age being according to the distinctive character of each age (yuga roopanusaratah)."

vi. The law of evidence in ancient India

34. The existence and robustness of law of evidence and the modes and standards of proof are an index of the quality of a legal system. In this respect, the Indian legal system was more advanced than any other legal system of the time.

35. In ancient societies, proof by supernatural devices, such as trial by ordeal, was quite common. In England it prevailed till the very close of the Middle Ages. But our judicial system prohibited resort to supernatural devices, if oral or documentary evidence was available.

36. The real test of any judicial system is that it should enable the law courts to discover the truth, and that of ancient India stands high under this test. Schol Gautam stated that "in disputes the Court has to ascertain what is true and what is false from the witnesses". All available evidence indicates that in ancient India, bearing false witness was viewed with great abhorrence. All the foreign travellers from Megasthenes in the 3rd century B. C. to Huan Tsiang in the 7th century A.D. testified that truthfulness was practiced by Indians in their worldly relations. "Truth they hold in high esteem", wrote Megasthenes. Fa Hien and Huan Tsiang (who visited India during the reign of Harsha) recorded similar observations. A virtue practiced for a thousand year became a legal tradition.

37. The procedure and atmosphere of the Courts discouraged falsehood. The oath was administered by the judge himself, and not by a peon as today. While giving the oath, the judges were required to address the witness extolling truthfulness as a virtue and condemning perjury as a horrible sin. Brihaspati stated that "judges who are well-versed in the dharmashastra should address the witness in words praising truth and driving away falsehood (from his mind)". The judges' address to the witness did not consist of set words but a moral exhortation intended to put the fear of God in him. All the ancient texts are unanimous on this point. According to Narada, "the judges should inspire awe in the witness by citing moral precepts which should uphold the majesty of truth and condemn falsehood". Further, all the Smirtis were unanimous in holding that perjury before a law court was a heinous sin as well as a serious crime. There were other provisions, calculated to reduce the chances of false evidence being given. It was the prerogative of the King to

ensure that here should be no delay in examining witnesses by courts since delay dims the memory and stimulates imagination. Katyayana stated that "the Sovereign should not grant any delay in the deposition of witnesses; for delay leads to great evil and results in witnesses turning away from the law."

vii. Prevalence of an administrative code in ancient India

38. The State in ancient India had a public sector of huge dimensions which was engaged in commerce and industry. The modern western and capitalist notion that there should be no industries run by the State would have appeared non-sensical to ancient Indians. Under the Mauryan Empire, there was a State mercantile industry, a state textile industry, a state mining industry and a state trading department which were taken charge of respectively by a Superintendent-General of Shipping (navadhyaksha), textiles (Sootradhyaksha), mining (akaradhyaksha), and commerce. The regulation of each state industry was under its own rules and all the rules were compiled and classified in the artha-shastra which may be regarded as an Administrative Code. I shall give a few illustrations.

39. The artha-shastra provides a complete Administrative Code prescribing rules of maritime and river navigation. It provided that the State should have a Superintendent-General of Navigation whose duties were defined as follows: "the Superintendent of ships shall examine the accounts relating to navigation not only on the oceans and mouths of the rivers, but also on lakes, natural or artificial, and in the vicinity of Sthaniya and other fortified cities." The artha-shastra contains strict regulations to ensure the safety of vessels. It states: "for navigation on large rivers which cannot be forded (atarya) even during winter and summer season,

there shall be a service of large boats (mahanavo), with a captain (shasaka), pilot (niyamaka), a crew to hold the sickle and the ropes, and to clear the boat of water."

40. The artha-shastra also contains regulations indicating that the state mercantile marine operated on the high seas and it provided that "passengers arriving in port on the royal ships shall pay their passage money (yatra-vetanam)." The rates were to be fixed by the Superintendent-General. Incidentally, the existence of this code proves beyond doubt that the people of India were a sea-faring people with extensive trade relations with foreign countries.

41. Similarly, the manufacture of textiles and cotton yarn, which was a huge industry exporting textiles to foreign countries had a public as well as a private sector. The public sector was under the supervision of a Superintendent-General of Textiles (Sootradhyaksha). He had a large organization under him. The artha-shastra prescribed the duties of the Sootradhyaksha and the other officials working under him. It required him to "employ qualified persons to manufacture treads (sutra), coats (varma), clothes (vastra), and ropes." His other duties included giving employment to women in their own homes. Cotton was distributed among them and spun into thread and either collected by the department or delivered by the women themselves. But the artha-shastra contains strict regulation against the taking of liberties with such women or withholding their wages. It prescribed that "if the official of the Superintendent stares at the face of such woman or tries to engage her in conversation about matters other than her work, he will be punished as if he is guilty of a first assault". It also provided that delay in payment of wages would be likewise punishable. Another regulation made it a punishable offence to

show any undue favour to any women worker. It provided that "if an official pays wages to a woman for no work done, he will be punished."

III. Casting of ancient Indian legal system into oblivion by colonisers as well as present-day Indian legal system

42. Despite such a rich tradition of highly sophisticated pre-existing legal system which was prevalent in India, foreign and laien legal systems were imposed upon us with every invasion and occupation. Unfortunately, despite Indian returning to independence ever since 1947, many of the fundamental aspects of the Indian legal system have remained unchanged since the same were introduced and imposed upon us during the period of British occupation of India. This is despite the fact that India has the oldest judiciary in the world and no other judicial system in the world has a more ancient or exalted pedigree. As such, the colonial takeover of India's legal system, under the garb of absence of any pre-existing legal systems, was lamentable and it is tragic that the same colonial legal system is being continued in a largely unchanged manner even today in 2021.

43. Yet, some of the facets of the exhalted ancient Indian legal system can be observed in modern day India's West-dominated legal system as well. Let us take the example of the essential characteristic of judicial independence. The principle of judicial independence did not originate with British rule. As I have said earlier, it was fully understood and enforced in ancient India. Katyayana and all other scholarly law-givers emphasized the Supreme importance of judges being independent and fearless even of the king.

44. After attainment of freedom in 1947, the Indian judiciary has maintained the ancient Indian tradition of judicial independence and integrity. The Supreme Court has set the pace and its record of independence is second to none in the world. The High Courts, too, on the whole, have maintained a high degree of independence, and cases of judges carrying favour with the executive are rare. The highest praise must go to our subordinate judiciary-the Munsifs, Civil Judges, and District Judges who have dispensed impartial justice between citizens of different communities and castes, and whose record compares very favourably with that of British judges who were not always impartial between Indian and British litigants. As such, Indian Judges have lived up to the mandate of the ancient scholar Brihaspati who stated that a Judge should decide cases without any motive of personal gain or prejudice or bias and his decisions should be in accordance with the law prescribed by the text.

IV. The weakness of the present legal system and need for its de-colonisation

i. Absence of a theoretical heritage for modern Indian legal system due to shunning of the ancient Indian legal system

45. The great weakness of our legal system today is that due to its divorcing from Indian legal heritage, it lacks theoretical nourishment. The impact of theories of jurists, including ancient scholars, on the legal system of a country is profound even though it may seem unseen and subconscious. A great American Judge, Oliver Wendell Homes, wrote that "the felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen have a great deal

more to do than the syllogism in determining the rules by which men are governed." Another great American Judge, Benjamin Cordozo, had observed that "logic, and history and custom, and utility, and the accepted standard of right conduct, are the forces which singly or in combination shape the progress of the law". Roscoe Pound was also of the view that "current moral ideas and ethical customs are drawn upon continually by courts although seldom consciously."

46. The Supreme Court of India has also maintained that in determining whether any restriction on a fundamental right is reasonable. There is no abstract test of reasonableness and it is inevitable that the prevailing conditions at the time and the social philosophy and the scale of values of the judges should play an important part in determination of reasonableness. In ancient India, the judges were required to be well versed in all branches of knowledge (vidya) as well as jurisprudence and the science of government (dharma-shastrartha kushalai rartha shastra visharadai). But what about today? What is the legal and social philosophy on which the Indian judges are brought up today?

47. In England, Western Europe, and the U.S., the judges and lawyers have received constant inspiration and education from the jurisprudence of their civilization which has been developoing for centuries. Similarly, the judicial process in Russia derives nourishment from Marxian jurisprudence which is constantly evolving. But where does the Indian judge or lawyer receive his inspiration from? Not from the jurisprudence of his own civilization. He knows something of Roman Law and of the theories of western jurists but very little about the evolution of the law and jurisprudence of his own civilization. The syllabus for the law degree in an Indian

University does not include Indian Jurisprudence or the theory of the State in ancient India or the History of Indian Law. Consequently, our judicial process is an edifice constructed without theoretical foundations, or rather on foundations supporting other structures in other lands.

48. To give an illustration, Manu prescribes public censure as one of the punishments for crime. This provision was even adopted by the Soviet Criminal Code but the Indian Penal Code, drafted by Macaulay, ignores it altogether, though it can be an effective form of punishment in many cases. Evidently the Russian jurists had more regard of Indian jurisprudence than Indians themselves.

49. The low standard of legal and juristic studies in India today creates an urgent problem. On the one hand, our High Courts and the Supreme Court are invested with the power to interpret the constitution and declare any law or act of the State invalid on the ground that it is unconstitutional or illegal or restrictive of the fundamental rights of a citizen. The law declared by the Supreme Court has a binding supremacy throughout the territory of India, and its appellate powers are wider than those of any other federal court in the world. The interpretation of the Constitution and the adjustment of the rule of law with economic progress require of our judges a profound knowledge of jurisprudence and the social science and a capacity for applying the law of social evolution to judicial process. On the other hand, the standard of legal education in our universities and law colleges is very low. A poor legal education makes poor jurists and judges. The present disparity between the power and intellectual equipment of those who will be our future judges creates a problem which can be ignored only at our peril.

50. I am all in favour of our universities teaching the best that Western thought and science can tell us. But the almost complete neglect of Indian jurisprudence and political philosophy leaves the education of every Indian lawyer and judge incomplete. I have come to the conclusion that the foundation of legal studies must be the study of Indian jurisprudence and every Indian university should include it as a compulsory subject for the Bachelor of Law Degree.

51. I concede that there is much in Indian jurisprudence which is out of date today. But this is true of every system of jurisprudence. The Greek and Roman civilizations were based on slavery. The divine right of kings prevailed in Europe till the end of the 17th century. The law of reason was often identified with the law of a Christian God. There was no freedom of belief or worship in Europe, and many were burnt alive for the offence of heresy. Women were tried and burnt for the offence of being witches and men for having communion with the devil. Some of the peculiar absurdities which disgraced law and justice in Western Europe are absent in Indian jurisprudence.

52. As an example of the absurdities of Western legal systems, which were absent from ancient Indian legal system, I shall mention the peculiar practice of holding trials of animals for criminal offences which were taking place in Europe till the 17th century! As per the treatise Keeton's Elements of Jurisprudence, in Germany, once a cock was solemnly placed in the prisoner's box, and was accused of insubordinately making noise. Counsel for the defendant failed to establish the innocence of his feathered client, and the unfortunate bird was accordingly ordered to be slaughtered. Similarly, in 1508, the caterpillars of Contes, in Provence, were

tried and condemned for ravaging the fields, and in 1545, the beetles of St. Jean de-Maurienne were similarly punished. These absurdities find no place in the judicial system of ancient India.

ii. *The completely disparate conceptions of 'Rights' and 'Duties' under ancient Indian legal system and the colonial legal system*

53. An important difference between Indian and Western jurisprudence is their respective attitudes to rights and duties. They are correlated in both systems, but the emphasis is different. In Indian jurisprudence the emphasis is on obligations. In fact, the word right (adhikar) does not occur even once in the whole of the Anushasan Parva or the Arthasastra. Indian jurisprudence is founded on theories which emphasise that rights are corollaries of duties. Even freedom of speech is recognised as a duty to speak without fear. In Western jurisprudence, on the other hand, rights, natural or legal, are primary, though every right must have a corresponding duty. This emphasis on rights in one case and obligations in the other has had important effect on social institutions like marriage. Under Indian jurisprudence, marriage was a duty, a job to be performed as one of the many social obligations, which everyone had to perform. But the pre-occupation of Western jurisprudence with rights has resulted in marriage being looked upon as an alliance from which each partner tries to get much as he or she can. The high rate of divorce is the result of neglecting the 'duty' aspect of marriage.

V. The way forward for the Indian legal system

54. In light of everything that we have spoken of so far, one must question what the future model of our legal system ought to be. The legal system does not operate in a vacuum. The administration of justice has a social function and the judicial and legal process is only a part of the larger social process. Therefore, the courts of law cannot function in defiance or ignorance of the social objectives or "the felt necessities of times" as Mr. Justice Homes called them. The Latin maxim "fiat fiat iusticia et peret mundes" i.e. justice must be done though the beams may fall, emphasizes the impartiality of the judges but does not permit the judiciary to be indifferent to social needs.

55. The role of the Indian judiciary cannot be isolated from the social objectives of the nation. Our Constitution has set before the Indian people the ambitious goal of achieving a synthesis of the Western and the Socialist way of life, individual liberty and social control, abolition of anarchy in production and preservation of democracy and of political and economic freedom. I must not be understood to mean that there is absolutely no political freedom in the Western democracies. The difference is one of emphasis. Our Constitution attempts to achieve a balance between role of the State and rights and freedoms of the individuals. It reflects the spirit of non-alignment in the field of constitutional law. Social control of industry is in accord with the Indian tradition. I have already indicated that the state in ancient India had a huge public sector, and the Arthashastra prohibits such trade practices as cornering the market to raise prices. The Indian Constitution has set before our people a very ambitious and difficult goal. A Constitution is not a collection of abstract theories, nor does it operate in a vacuum. It reflects a way of

life which enables a particular people to realize its objectives and ambitions. If it fails to do this, it will be amended or discarded by agreement or otherwise. To be able to achieve the objectives of the Constitution of India, due regard must be had to the principles and practices of law which prevailed in India for centuries before the advent of colonialism.

56. It is no exaggeration to say that the ability, wisdom and patriotism of our future lawyers and judges depends to a great extent the future of the rule of the law and parliamentary democracy in India. Such lawyers and judges will only grow from the social soil of India and will be nurtured by its social atmosphere. Great lawyers and judges are not born but are made by proper education and great legal traditions, as were Manu, Kautilya, Katyayana, Brihasparti, Narada, Parashara, Yajnavalkya, and other legal giants of ancient India. The continued neglect of their great knowledge and adherence to alien colonial legal system is detrimental to the goals of our Constitution and against our national interests.

57. A colonial psyche persists in the administration of justice in the present day Indian legal System. The British colonialists protected their subjects only on the surrender of their rights to their rulers. In other words, justice could not be demanded, but rather it was allowed by the state as a matter of concession. This is in contrast to ancient Indian legal systems, where justice could be demanded, being a concept that was inbuilt. As I have narrated earlier, ancient India legal systems required even Kings to bend before the rule of law and justice could be demanded against the kin or even the King himself. Instead of this approach, the colonial mindset left behind by British colonialists is apparent from the manner in

which pleadings are drafted in courts today, the way in which the courts are addressed and, most importantly, by accessibility to courts itself.

58. Today, justice is not demanded but prayed for in the humblest terms. Judges continue to be addressed as Lordships and Ladyships. The ordinary litigant is often unable to bear the expenses of pursuing litigation in distant higher courts, a practice which was introduced by the Britisher colonials with the Privy Council.

59. Further, the mounting backlog of cases means that judges are rendered helpless, even if they want to help the ordinary litigant. The huge case pendency means that it is the degree of injustice rather than the injustice itself which determines whether relief is granted by Courts. That the law disregards trivial cases is also a part of the persisting colonial mindset.

60. There can be no doubt that this colonial legal system is not suitable for the Indian population. The need of the hour is the Indianisation of the legal system. The eradication of such a colonial mindset may take time but I hope that my words will evoke some of you to think deeply about this issue and steps that need to be taken to decolonize the Indian legal system. Even though it may be an enormous and time-consuming effort, I firmly believe that it would be a worthy endevour which could revitalise the Indian legal system and align it with the cultural, social and heritage aspects of our great nation and ensure much more robust delivery of justice.

61. I thank the Akhil Bharatiya Adhivakta Parishad for inviting me to this seminal event and I am confident that the discussions here will contribute to a greater

understanding of the ancient Indian legal systems and the need for decolonisation of our legal system.

Thank you. Jai Hind!