17TH COMMONWEALTH LAW CONFERENCE

KEYNOTE ADDRESS

ON

"EXPANDING FRONTIERS OF PUBLIC LAW"

BY

JUSTICE B. SUDERSHAN REDDY

JUDGE

SUPREME COURT OF INDIA

ON

7TH FEBRUARY, 2011

AT

HYDERABAD

Lord Neuberger, Ladies and Gentlemen,

At the very outset let me thank the organizers for inviting me to deliver a Key-note address in this conference organized by Commonwealth Lawyers Association on "Emerging Economies and Rule of Law". It is with utmost sense of humility I have accepted this responsibility, because an opportunity to address an august gathering such as this is indeed a privilege.

Over the past three decades or so there have been many instances of popular uprisings against existing socio-economic and political orders. The visuals in the media as those instances unfold, and the consequences thereafter, confirm the most deep rooted assumptions of constitutionalism, and of modern public law: people can, and sometimes do, turn into mobs when rule is not informed by law, and law in turn is not informed by justice. Rare though the occurrences of formation of people as a mob may be, they nevertheless reconfirm the fact that people can be an elemental force.

While the immediate, and understandable, concern of the rest of the world is about a return to "order", the emergence, on occasion, of even more repressive orders should warn us against the banal certitude of the desire for "Le Roi est mort; vive le Roi" – "The King is Dead; Long Live the King." We should have an equally strong concern, in the least, about the conditions, and the deep sense of loss of self-respect and dignity, that impel the people to turn into a mob. Indeed, the absence of "order" for a significant

length of time would raise major concerns about whether, and when, it would return, and what kind of forces are arraigned in favour of, under-girding and benefiting from the new order, and the forces arraigned against it. The fundamental premise of any morally acceptable quest for order ought to be the self-respect and dignity of the people, so that they need no longer be the mob. Unless the conditions of the previous order, and the loss of self-respect and dignity, which impels the people to turn into a mob, are understood, accepted and honestly sought to be changed, one could not be certain that a new order that comes into existence would also not become popularly discredited, passionately despised, and possibly again violently hounded out. The construction of legitimacy of the new order, in the form of a just law, has to necessarily precede the possibility of the political sphere. As pointed out by Julius Stone, " the essence of revolution…. is a sudden breach as opposed to a gradual smooth one, however far-reaching be the effects of the latter."[i] Professor Stone uses another expression to describe the gradual and smooth change of regime within a constitutional order: "social death." The social death of a particular regime within the constraints of an accepted constitutional process, howsoever far reaching the resultant changes, is substantially different from the change wrought by violence of the people as a mob. The revolutionary moment may indeed be the ultimate political choice; nevertheless, for the revolution to stop, so that the ordinary, and hopefully the just, political process may be instantiated afresh, the normative expectations of the people have to be transcribed into a legal order.

Such events, and their consequences, and more particularly the demand for just constitutional democracies by people, who do not have it, carry lessons for the rest of us that the broader understanding of both the necessity and the feasibility of a progressive constitutionalism is correct. It should also make us more inclined to protect, nurture and sustain those progressive constitutional projects that have already commenced. Many civil society initiatives, involving people from all walks of life and from across the globe, have issued statements which stand as testimony to that claim. The key elements are that achievement of democracy and respect for human rights is fundamental to welfare of the people, and that real and effective political reforms would imply rule of law, and institutional integrity based on separation of powers. The wish list in such calls include demands for independent judiciary, respect for human rights, both socio-economic and political, rule of law, end to political trials and repression, allowing advocacy roles for civil society organizations, freedom of expression, neutrality of state institutions to curb politics of patronage, good governance and elimination of corruption, and private sector to be concerned with political reforms and social justice.[ii]

I am sure that anyone with even a rudimentary understanding of public law would immediately recognize the above to be amongst the core aspects of constitutionalism. Cicero was right when he said "salus populi suprema lex esto" – the welfare of the people is the highest law. I do not believe that it is necessary to get into a

lengthy debate about the validity of that proposition. While one might quibble about a particular wording, or about the putative political and ideological origins of a particular conception or relationship, one certainly cannot deny that at least at the textual level, such articulations have been the essence of public law.[iii] The very fact that people as a mob is an infrequent occurrence in the context of reasonably well functioning constitutional democracies that achieve some measure of "salus populi", lends support to the claim that civilized debates about public law, and constitutionalism, are worth pursuing. That those who do not have such an order demand it, should justify our own obsession with it, and a desire to make it more likely to realize its espoused values.

Nevertheless, it should be acknowledged that the need for public law has been a matter of some debate, particularly within the legal tradition that we as members of the Commonwealth share. So, it did not come as a surprise to me that the topics suggested to me, initially about judicial activism and the current one about "Expanding Frontiers of Public Law" were framed in terms of uncertainty of the status of public law. Both the topics reflect a continued unease about the status of public law as a demarcation of legal boundaries within which the political branches are to act. I believe that at least a part of the unease could be explained by an inadequate appreciation of the legitimating functions of public law, in facilitating the orderly change of wielders of political power, and the maintenance of the socio-ethical conviction, or even hope, of the people that the State and its institutions are indeed functioning

in a manner conducive to achievement of the purposes of the original compact. The continued trust of the people is sine-qua-non for the maintenance of constituted political power, and that in turn depends upon the degree of achievement of "salus populi" – welfare of the people. In that sense, the idea of public law may be exemplified not merely by the vesting of power, and of its limitations, but also the purpose to which the power is to be used for, and the consequences of its use. Purpose, in the sense of the goal of achievement of the welfare of the people, itself ought to be treated as a limitation of power.

Part of the problem lies in the deep hold of legal positivism on our modes of legal thought. The core of its conception is that law and the state are to be clearly distinguished, in order to facilitate a scientific study of law. Based on such a distinction, law could then be conceived as a system of primary and secondary rules, with the rule of recognition as the only content of public law. At the very point of inflection, when the how and why of legitimacy of a political order are to be specified, those questions are read out of the equation, as it were. However, hidden from such a perspective, is the fact that it is the very functioning of public law that enables the establishment of private law, and the plausibility of acceptance by the people that law possesses an inner coherence as well as a moral dimension that they may give their consent to. The legitimating function that public law serves of a particular political order has been grossly underappreciated.[iv]

The continued insistence, especially in England, that public law does not exist, or that it need not exist, or that it came into existence only very recently,[v] or that it need exist in specifying only a night watchman role for the state, are both surprising, and also a partial cause for the continued confusion about the status of public law. A more refined historical analysis of England's political history points to continuing debate, battles and entrenchment of the idea of limitation of powers vested in the organs of the State, with law as the community's response to prevent abuse of power.[vi] The more robust entrenchment of human rights, in recent times in England, and the more self-assured claims of judicial independence and powers, maybe indicative of maturing of thought with regard to public law within the fortresses of classical legal positivism.[vii]

If public law is to serve a legitimating function, in order to ensure the stability of the state, then it ought to specify the purposes, and the vision, that would inform the nature of power, its extent, and modalities of use. Based on a study of historical political debates, Michael Oakeshott discerned, at a conceptual level, two dichotomous positions: a politics of faith and a politics of scepticism. The first one is based on the ontology that a perfect order can be devised to achieve a clearly definable "good life", and that all rational individuals would be able to discover the content of that single good life and hence consent to direction of state power towards that goal. The danger lies in its tyrannical impulses. On the other side would be the politics of scepticism that posits the view that because of variegated human experiences, no single conception

of the good can be conceived, and attempts at achievement of some claimed "good life" valid for all would be "to pursue perfection as the crow flies". Politics of scepticism would require that state power only be vested for protection of individuals' freedoms, and the realm, so that they are free to pursue an individualistic understanding of their relationship with the external, and to explore the immense opportunities that open up to them by responding to the world in accordance with only their self-interests. The danger obviously lies in complete breakdown of social ties, and pursuit of any collective purpose becomes difficult to conceive. The two political visions would translate into two political orders: one of overweening state control, and the other of laissez faire free markets. At the present moment we would probably have to say the neither extreme has proved to be a normatively viable category to provide the purposes of the state, and instead what we find as appropriate would be an Aristotelian mean, "not merely in the sense of compromise between the two positions, but a balance between the two tendencies". It is of course a recorded part of history that Oakeshott himself believed that the politics of faith had begun to overly dominate, and he undertook the task of bringing back into view the virtues of politics of skepticism.[viii]

I would suggest that an unease about expanding frontiers of public law, if animated by a sense that politics of faith, and consequently of overweening and dictatorial tendencies, are entrenching themselves, then it is understandable. However, my unease with the unease about public law, as expressed over the

past twenty years or so, is that it arises out of an argument for an extreme form of capitalism, informed by Spencerian Social Darwinism, in which the power of the state is used primarily to uphold an extremely inequitable order. If the politics of faith squelches human beings by imposing a singular modus vivendi, then the politics of scepticism squelches human beings by legitimizing an order that exploits the individual, but hides the fact of exploitation under the rhetoric of individuality. If the cry for liberty and political freedoms in the Casablanca Call is a human understanding that they need protection from extreme forms of politics of faith, then the cry for human rights, dignity, and protection from corruption, in the same Casablanca Call, is reflective of the other human understanding that they need protection from politics of scepticism.

In 1947, the framers of Indian constitution, convened to frame a constitution for a country that was riven by social, linguistic, geographic and religious categorizations and differences. The country itself had been devastated by partition, and most of its populace lived in abject poverty, and shackled by ignorance. Disease, pestilence and death stalked the country side. Social and economic inequalities were endemic. The relationships between the people were mediated through the pernicious categories of the caste system, and of a feudal order. It was for such a country that a remarkable group of people, representing a multitude of social backgrounds, though predominantly from the legal fraternity and trained in the common law, sat down to constitute a nation-state,

and provide a framework for its tryst with destiny. In choosing a political order, for such a country, they did not go with either politics of faith or politics of skepticism. They chose politics of hope. Hope as the Aristotelian mean, between the politics of faith, and politics of skepticism. They debated for long, sought for and brought to the table the varied constitutional experiences of other countries, combined it with their individual and collective intellect and experience, and produced a detailed constitution, that incorporated: division of powers both horizontally and vertically, independent judiciary tasked with the role of constitutional interpretation and protection of constitutional values, flexibility of constitutional amendment within the context of basic unyielding constitutional values, which subsequently came to be identified as the basic structure so that no temporary majority could hijack the constitutional purpose itself. The purpose of the state was to achieve the pre-ambular aspirations for all the people, and this was to be done by protection of fundamental rights of persons and citizens, and state action being informed by directive principles of state policies. While the directive principles of state policy were specified as judicially unenforceable, they were nonetheless conceived as fundamental to governance, and a source of constitutional values.

As I read through the Casablanca Call, I was struck by the remarkable convergence of ideas, aspirations and hopes with those that the founding fathers of India grappled with, and indeed we continue to do so today. It would appear that there is indeed scope

for identification of universal human aspirations, across time and geographic space. I wish to use this convergence of ideas, across a gulf of sixty years and the chasms of different cultural experiences, to offer Indian constitutionalism as proof indeed that a deliberate creation of a constitutional order can be successful, notwithstanding the insurmountable odds that may confront the people. Let me hasten to add that I am not doing this with some jingoistic fervor, or claim to exceptionalism, but in the spirit that identification of the causes and fault lines of Indian experience, would aid better understanding of what the frontiers of public law ought to be.

It is now a confirmed verity, notwithstanding the doubting Thomases, India has survived, and indeed flourished as a democracy. Except for a brief interlude, our political processes have been peaceful, and transfer of power accomplished within the constitutional order. We have had our share of problems, and notwithstanding the vast geographic spaces, of immense populace, unimaginable cultural diversity, and the problems with which we started off, we have survived as a nation state.

Recent empirical research seems to suggest that the Indian constitution shares with the more successful ones, certain design features that may have aided in its endurance. The research reveals that, much like what Thomas Jefferson had figured out two hundred and twenty years ago, few constitutions have had a lifespan of over 19 years! While environmental factors, such as internal or external shocks to the constitutional order, have accounted for a great deal of that mortality, according to this research, with the American

constitution being an outlier, most of the constitutions that have endured for 50 years or more are marked by great detail in constitutional provisions, drafted and maintained by people of diverse backgrounds, and the flexibility to change constitutional meaning, within an overarching and a firm matrix of constitutional values.[ix] The prolixity of the Indian constitution, derided often, may have indeed been a blessing; and the inclusiveness of people from different backgrounds into the constituent assembly, I believe, has indeed given the constitutional text the language around which people of different backgrounds have been able to articulate their political aspirations, and participate in the political processes. The ability to amend the constitution would appear to be commendable in the Indian context; fortunately, the Indian supreme court by discerning the basic structure doctrine, has been able to protect the underlying core constitutional values from reckless abandonment, and change, by transient majorities, thereby protecting the possibilities of democratic participation itself.

However, other factors that are not so easily amenable to statistical and empirical research would also need to be pointed out. India's stability was on account of both the wise men who framed the Constitution, and also the wise and moral leadership that was provided in its formative years. One cannot underestimate those blessings. Indeed, as Dr. Ambedkar, pointed out, whether India would progress or tear itself apart would depend upon the moral fibre. We were indeed fortunate that in our early years, we were blessed with statesmen of great integrity, who believed in the

constitutional vision, and sought to institutionalize the politics of hope. They did not choose to go the route of a communist model or a pure capitalist model of the economy; instead they chose a mixed economy model, because the communist model could have unleashed violence of a massive order, and a pure capitalist order would have prevented the attainment of goals of social justice, and continued unconscionable inequalities, sans even the rhetorical hope that the state might provide a helping hand.[x]

Notwithstanding the above, given the "measurable underachievement", on the socio-economic front, as characterized by Amartya Sen, we have to acknowledge that the greatest blessing of India has been its people. The forbearance of the people, notwithstanding the abysmal lot of a majority of them, and their continued vesting of trust in the state, which is at least evidenced by the fact that it is the poor and the deprived who continue to vote in overwhelming numbers, and also vote to change governments, has been the greatest blessing for India. Let there be no doubt amongst anyone, and as we witness the turmoil in other nations, as indeed we have repeatedly done so in the past, that in the absence of such forbearance, we probably would not have an India today. The poor, the deprived, the unlettered, the malnourished and the disdained people of my country are the ones who have held this country together. I would suggest that the forbearance was on account of a trust that the constitutional values were able to promote, nurture, and sustain. Whether it be the specific constitutional mandate for affirmative action, to provide the

historically socially deprived with an unequal opportunity for some measure of social success, or the detailed provisions with regard to operation of the state's institutions, constitutional text provided the normative categories for articulation in the political, economic and social spaces. Given the extreme inequalities, and inequities, that most of my countrymen suffered from, when this country emerged for its tryst with destiny, and indeed continue to suffer from, the constitution itself recognized the need for mini revolts on a continuous basis, against the established socio-economic order, so that the revolution on the street is prevented. By incorporating the concept of social revolution as a part of itself, and placing an affirmative obligation on the state to forever be mindful of the deprived, the Constitution provided the articulation for far reaching changes within the constitutional order itself. Notwithstanding the "measurable under-achievement" on this front, the articulation of the ideas of social revolution were vital to keep this vast, and diverse nation together, and the nation-state intact.

Unfortunately, and I believe in contravention of broader social values, and recognized social realities, that inform the normative foundations of Indian constitution, for the past two decades, an incessant drum beat of demands for "laissez faire free markets" has dominated the discourse in India, as indeed it has in most of the world. As Jospeh Stiglitz points out, the consequences of the relentless march towards increasing privatization, and unregulated markets, has increasingly eviscerated the State of stature and power, bringing vast benefits to the few, modest benefits for some,

while leaving everybody else, the majority, behind. Such "global imbalances are morally unacceptable and politically unsustainable."[xi]

The neo-liberal ideology that has informed the political and public law discourse has two analytically separable, but related set of implications for stability of the state. Both of them are located in the two hidden sets of assumptions that relate to the relationship between the state, law and the economy.

The first set of assumptions is that "laissez faire free markets" can exist without the undergirding of the law, and the coercive power of the state; that the capacity of the market to process information and arrive at efficient solutions is far superior to that of governmental organizations; and that efficient markets have self-healing capacity, hence the state ought not to be regulating the markets. The first one is an obvious myth that any common law lawyer should clearly recognize. An entire edifice of laws exists that support the functioning of the markets. There never were and never will be "laissez faire free markets," there will always be more or less regulated markets that have more or less impact on various groups. Moreover, the recent global financial crisis has categorically demonstrated, again, the much vaunted self-healing powers of the efficient markets to also be very limited. History of modern economies has repeatedly demonstrated that unregulated markets, coupled with the greed of a rational individual in the market, can and often does lead to disaster. It is a moral failure of power wielders as they blindly allowed such unregulated markets to function, knowing fully that a crisis could wreck the lives of

hundreds of millions, because it blindly allowed ideology to over-ride knowledge – that without regulation markets can be expected to collapse, and could cause grave damage to the people, because they have collapsed previously, and have caused great damage to the welfare of the people.

Worse still, the same neo-liberal ideology of unregulated markets and private enterprise, has in many places given rise to predatory forms of capitalism. The agents of the state become willing co-partners in the private enterprise, to allow the plunder of natural resources, and devastation of the environment. Dissent by the people is suppressed, even by use of great force and by suspension of civil liberties, thereby undermining the moral stature of the state, and the trust in public law amongst the people even more. Eruption of scams about vast corruption further reinforces in the minds of the people that the state is inimical to them.

The second set of assumptions is that nature is unlimited and ever increasing exploitation by private enterprise would enlarge the pie so much, that everyone will get a share in it. The potential environmental crisis, global in scale and likely to have the greatest impact on those with little, implies that such propositions are scarcely believable. If global environmental crisis is likely, and many or even most reasonable experts believe it to be so, then the fundamental premise of how we order our economic sphere is patently unsustainable. Most people are recognizing it to be so, and most are recognizing that the underlying economic philosophy is but a thin cover for Spencerian Social Darwinism. It strikes at the very

root of modern constitutionalism – that the state has an obligation to protect the people. Law would need to address how the economy would be organized, and how the nature is exploited and to what extent. If production levels are not allowed to rise, then the only prospects for a modicum of human dignity for the malnourished, poor and suffering masses, would be redistribution. Indeed as Karl Polanyi wrote many years ago, when the economic sphere far outstrips the social norms, the social sphere would engage in a counter movement to bring the economy back within its fold. The question I suppose would be whether we can conceive public law in a manner that allows the pull to be peaceful and not violent.

I have highlighted two potential challenges, amongst the many that one could conceive, to the stability of state, and hence raising questions about feasibility of public law, and its contents. The issue, I submit ought not to be conceived of in terms of expanding or contracting frontiers of public law. The frontiers of public law have been expanding in as much as the conception of what constitutes "salus populi" has been an expanding domain. Obviously one could conceive of zones in which it could be argued that public law has expanded, thereby suggesting that in certain zones it has come to represent an extreme form of politics of faith. And equally obviously one could conceive of zones in which the public law has contracted, and has begun to look like an extreme form of politics of scepticism. Probably what are needed are more detailed, fact sensitive investigations into the nature of public law. Maybe Martin Loughlin is right when he says that describing what

public law does ought to be the method to figuring out how it does.[xii] I wonder if even a search for an Aristotelian mean, between the two tendencies, discredited at least in their extreme form, – of overweening statism, on one side, and uncontrolled markets on the other, - as some over-arching compromise would suffice. The devil it would seem lies in the details, and in which zones public law has expanded and in which zones it has contracted. Of course, the consequences of such variegated responses of the state, and who benefit from those consequences and who bears the burdens are all legitimate questions when it is the matter of stability of the state.

Over the past three decades or so we have heard an increasing chatter about the self-evident decline of the importance of the nation state. The rapid march of the neo-liberal variant of the globalisation project, emergence of new technologies and collapse of the Soviet Union, were claimed to signify the end of history of political struggles over form and content of our collective organizations. Triumph of the rational man and of markets based on pure self-interest was to dissolve all debate about form and content of justice. Law was to exist only to smooth out inefficient outcomes on account of information asymmetries. On the other side we saw the emergence of nationalist, sub-nationalist and local movements of protest, sometimes violent, seeking greater autonomy from centralized bureaucracies, of the state and of corporatized forms of economy, and a global concern for human rights, equity, and roles for the poor and disempowered to make their own choices at the local level. Law was to play a minimalist role, even in this second

movement, because of claimed ability to better tailor policies to the smaller collective aspirations. However, given the pre-existing power and ideational imbalances that posited disabilities for various social groups, such as caste, gender, language, class and culture, the normative arguments for purely local forms of law have not really succeeded on account of their inherent antipathies for universal categories and conception of justice.

In neither of the two visions could there be clarity as to the role, if any, of public law. The global financial crisis, and national level policy interventions into freshly posited semi-efficient markets without strong healing powers, implying greater variety of regulatory structures with national level accountabilities, may indicate a tempering of impersonal and one shoe fits all modes of conception. To what extent the elite power structures within nations allow the local, sub-national levels to exercise control over decision making, would determine the nature and intensity of democratic experience by the people. The extent that the elite power structures demonstrate credible fealty to welfare of the all the people, including the poor and the disempowered, would determine whether we have more or less revolutionary moments, and also for our ability to instantiate justice informed by universal human values and concerns. The degree to which there is stability in the acceptance of such multiple layers of decision making would have a bearing on the specificity with which public law can maintain boundaries of decision making. The conception that we approach public law with, as to its content and role, would determine whether law can interdict the

debate and conflict about where those boundaries are to be. Whether we like it or not, the battle lines are being drawn on various conceptions of justice and public law. Any which way we look at, I would suppose we can only envision expanding frontiers of public law. The question is: are we prepared to face those challenges?

What about judicial review one might ask? Having taken up so much of your time, I do not want to tax you any further. Nevertheless, I would leave you with a question. Invariably, in India, issues unresolved in the political sphere, arise before the judiciary as legal questions, and even constitutional questions. Many of them involve unimaginable human tragedies, where the positing of constitutional silence would implicate questions about the judge's own humanity. With a constitutional obligation to guard the Constitution, and that Constitution entrenching the necessity of politics of hope, could a judge morally remain silent? If having remained silent, how would we allow public law to serve its function of legitimating a stable political order? And with lowered notions of one's own humanity, how would that judge continue to be a guardian of the Constitution, and of politics of hope?

Ladies and Gentlemen, thank you for your forbearance.

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[iv] Martin Loughlin, "The Idea of Public Law" (OUP, 2003).
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[xi] Quote from Joseph Stiglitz, "Making Globalization Work: The Next Steps to Global Justice", p. 8, (Allen Lane, 2006).
[xii] Supra note 5.